



## SINGAPORE ACADEMY OF LAW

The Singapore Academy of Law (the “Academy”) is a body created by statute. It is the umbrella body of the legal profession in Singapore and its members include all legal practitioners, the Judiciary, the Legal Service, in-house legal counsel and faculty members of law schools. The work of the Academy is focused on three key areas: supporting the growth and development of the Legal Industry; building up the intellectual capital of the legal profession by enhancing Legal Knowledge; and improving the efficiency of legal practice through Legal Technology.

# RULE OF LAW SYMPOSIUM 2014

## THE IMPORTANCE OF THE RULE OF LAW IN PROMOTING DEVELOPMENT

*Editors*

Jeffrey Jowell, J Christopher Thomas, Jan van Zyl Smit

**BINGHAM  
CENTRE FOR  
THE  
RULE  
OF  
LAW**



SINGAPORE  
ACADEMY OF LAW



SINGAPORE  
ACADEMY OF LAW

## Rule of Law Symposium 2014



# RULE OF LAW SYMPOSIUM 2014

The Importance of the Rule of Law in Promoting  
Development

Editors

Professor Sir Jeffrey Jowell QC

Mr J Christopher Thomas QC

Dr Jan van Zyl Smit

BINGHAM  
CENTRE FOR  
**THE  
RULE  
OF  
LAW**



SINGAPORE  
ACADEMY OF LAW

2015

**Academy Publishing** is a division of the Singapore Academy of Law.

The Singapore Academy of Law is the promotion and development agency for Singapore's legal industry. Its vision is to make Singapore the legal hub of Asia. It aims to drive legal excellence through developing thought leadership, world-class infrastructure and legal solutions. It does this by building up the intellectual capital of the legal profession by enhancing legal knowledge, raising the international profile of Singapore law, promoting Singapore as a centre for dispute resolution and improving the efficiency of legal practice through the use of technology. More information can be found at [www.sal.org.sg](http://www.sal.org.sg).

#### DISCLAIMER

Views expressed by the authors are not necessarily those of Academy Publishing nor the Academy. Whilst every effort has been made to ensure that the information contained in this work is correct, the authors, Academy Publishing and the Academy disclaim all liability and responsibility for any error or omission in this publication, and in respect of anything, or the consequences of anything, done or omitted to be done by any person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.

#### COPYRIGHT

© Singapore Academy of Law and Bingham Centre for the Rule of Law.  
Published by Academy Publishing.

All rights reserved. No part of this publication may be reproduced, stored in any retrieval system, or transmitted, in any form or by any means, whether electronic or mechanical, including photocopying and recording, without the written permission of the copyright holder. All enquiries seeking such permission should be addressed to:

Director, Academy Publishing  
Singapore Academy of Law  
1 Supreme Court Lane, Level 6  
Singapore 178879  
Tel No: (+65) 6332 4388 Fax No: (+65) 6334 4940  
E-mail: [publications@sal.org.sg](mailto:publications@sal.org.sg)

ISBN 978-981-09-1674-9



9 789810 916749

## CONTENTS

	Page
<i>About the Contributors</i>	vii
<i>Introduction</i>	xiii
<i>Acknowledgments</i>	xxiii

### THE RULE OF LAW AND DEVELOPMENT

<b>The Rule of Law: A Practical and Universal Concept</b>	<b>3</b>
<i>by Professor Sir Jeffrey Jowell QC</i>	
<b>The Force That Turns the Virtuous Circle: Rule of Law, Socio-Economic Development and the Post-2015 Agenda</b>	<b>11</b>
<i>by Nick Booth</i>	
<b>The Rule of Law in Development</b>	<b>29</b>
<i>by Christopher Stephens</i>	

### THE RULE OF LAW IN BUSINESS AND FINANCE

<b>Rule of Law in Business and Finance: Development and Human Rights Issues</b>	<b>45</b>
<i>by Professor Robert McCorquodale</i>	
<b>Development, the Rule of Law and Business</b>	<b>60</b>
<i>by Professor David Kinley</i>	
<b>Challenges Facing Business and Finance Institutions: The Rule of Law Seen Through the Eyes of Business</b>	<b>70</b>
<i>by Lee Ming Chua</i>	

### THE RULE OF LAW AND FOREIGN INVESTMENT

<b>International Investment Law and the Rule of Law</b>	<b>81</b>
<i>by Professor Stephan W Schill</i>	

	Page
<b>The Rule of Law, Investment Treaties, and Economic Growth: Mapping Normative and Empirical Questions</b>	103
<i>by N Jansen Calamita</i>	
<b>The Rule of Law and Foreign Investment: Treaty Contexts and the Rule of Law</b>	129
<i>by Professor Locknie Hsu</i>	
JUDICIAL PERSPECTIVES ON THE RULE OF LAW AND DEVELOPMENT	
<b>Lord Phillips of Worth Matravers</b>	153
<i>Former President of the United Kingdom Supreme Court</i>	
<b>Chief Justice Geoffrey Ma</b>	159
<i>Chief Justice of Hong Kong</i>	
<b>Chief Justice Sundaresh Menon</b>	165
<i>Chief Justice of Singapore</i>	
KEYNOTE ADDRESS	
<b>The Importance of the Rule of Law in Current Global Challenges</b>	177
<i>by Ambassador Patricia O'Brien</i>	
IN CONVERSATION WITH THE MINISTER	
<b>Mr K Shanmugam</b>	191
<i>Minister for Foreign Affairs and Minister for Law, Singapore</i>	
CLOSING ADDRESS	
<b>The Rule of Law – “Killer App” or Open Source Software?</b>	203
<i>by Lionel Yee SC</i>	

## ABOUT THE CONTRIBUTORS

**Mr Nick Booth** is Programme Advisor for Governance, Conflict Prevention, Access to Justice and Human Rights at UNDP's Bangkok Regional Hub. He was previously advisor on rule of law issues in UNDP Vietnam (2008–2012) and the UN peacekeeping mission in Kosovo (2001–2007). His most recent publication is “The UN and Governance in Middle-Income Countries: a Vietnam Case Study” in Randall Peerenboom and Tom Ginsburg (eds), *Law and Development of Middle-Income Countries* (Cambridge University Press 2014). A barrister by profession, with law degrees from Cambridge and Oxford Universities, he practised law for 12 years in the UK and US before joining the UN.

**Mr N Jansen Calamita** is Director of the Investment Treaty Forum at the British Institute of International and Comparative Law. He concurrently holds the position of lecturer in the University of Birmingham Law School. Mr Calamita has served in the Office of the Legal Adviser in the US Department of State and as a Legal Officer in the UNCITRAL Secretariat. He continues to counsel governments on matters relating to the law of foreign investment and international dispute resolution issues. His research is in general public international law and the international law of investment.

**Mr Chua Lee Ming** is a Judicial Commissioner of the Supreme Court of Singapore. He was the General Counsel of GIC Pte Ltd (formerly known as Government of Singapore Investment Corporation Pte Ltd) from 1998 to August 2014. He was admitted as an advocate and solicitor of the Supreme Court of Singapore in 1984 and served in Singapore's judicial and legal service from 1984 to 1990. He then practised as a litigator with Lee & Lee before joining GIC Pte Ltd in 1998. Mr Chua served as one of two Vice-Presidents of the Singapore Corporate Counsel Association until February 2015. He also serves on the LawNet Management Committee, Singapore Academy of Law, and the Singapore Management University's School of Law Advisory Board.

**Professor Locknie Hsu** is a Professor and former Associate Dean at the School of Law, Singapore Management University. She received her legal training from the National University of Singapore and Harvard University, and is a member of the Singapore Bar. Locknie specialises in international

trade and investment law and dispute settlement, and has published widely in these areas. She is also Chairperson of the Trade and Investment Group of the ASEAN Law Association and co-rapporteur of the Committee on Sustainable Development and the Green Economy in International Trade Law of the International Law Association. Professor Hsu teaches Trade and Investment Law and Contract Law, and has received five teaching awards at SMU.

**Professor Sir Jeffrey Jowell KCMG QC** is the Director of the Bingham Centre for the Rule of Law, an independent research centre within the British Institute of International and Comparative Law in London. A leading authority on public law, he has successfully combined a distinguished academic career with a legal practice at the Bar. Previously Dean of the Faculty of Law and a Vice Provost of University College London, he has assisted in drafting many national constitutions and served on a number of public bodies including as the UK's member on The Council of Europe's Commission for Democracy Through Law ("The Venice Commission"). He was knighted in 2011 "for services to human rights, democracy and the rule of law".

**Professor David Kinley** holds the Chair in Human Rights Law at University of Sydney and an Academic Panel member of Doughty Street Chambers in London. His particular expertise is in human rights and the global economy, having worked for more than 20 years with governments, international agencies, law firms, corporations and NGOs in the field. He is the author of a number of books and is currently working on a new book entitled *An Awkward Intimacy: Why Human Rights and Finance must Learn to Love Each Other*, and a new research project proposing the establishment of a new human right to freedom from corruption.

**Chief Justice Geoffrey Ma Tao-li GBM** was appointed Chief Justice of the Hong Kong Court of Final Appeal on 1 September 2010. Chief Justice Ma joined the Hong Kong Judiciary as Judge of the Court of First Instance of the High Court in 2001. He was appointed Justice of Appeal of the Court of Appeal of the High Court in 2002, and Chief Judge of the High Court in 2003. Chief Justice Ma graduated with a Bachelor of Laws degree from Birmingham University in 1977. He completed his Bar Finals in 1978. He was called to the English Bar (Gray's Inn) in 1978, the Hong Kong Bar in 1980, the Bar of the State of Victoria in Australia in 1983 and the Bar of Singapore in 1990. He was appointed Queen's Counsel in 1993

and made an Honorary Bencher of Gray's Inn in 2004. He was admitted to the degree of Doctor of Laws (*honoris causa*) by the University of Birmingham in 2011. He was awarded the Grand Bauhinia Medal by the Hong Kong Government in June 2012 and was conferred an Honorary Fellowship by Harris Manchester College of the University of Oxford in November 2012.

**Professor Robert McCorquodale** is the Director of the British Institute of International and Comparative Law in London. He is also Professor of International Law and Human Rights at the University of Nottingham, and a barrister at Brick Court Chambers in London. Previously he was a Fellow and Lecturer in Law at St. John's College, University of Cambridge and at the Australian National University in Canberra. Before embarking on an academic career, he worked as a solicitor in commercial litigation with King & Wood Mallesons in Sydney and Herbert Smith Freehills in London. Professor McCorquodale's research and teaching interests are in the areas of public international law and human rights law, including the role of non-state actors and business and human rights issues. He has published widely on these areas, and has provided advice and training to governments, corporations, international organisations, non-governmental organisations and peoples concerning international law and human rights issues.

**Chief Justice Sundaresh Menon** is Chief Justice of the Supreme Court of Singapore. Chief Justice Menon graduated with a Bachelor of Laws (First Class Honours) from the National University of Singapore in 1986 and later obtained a Master of Laws degree from Harvard Law School in 1991. He was admitted as an advocate and solicitor of the Supreme Court of Singapore in 1987 and as an Attorney and Counsellor-at-law of the Bar of the State of New York in 1992. He was appointed Senior Counsel in January 2008. As a private practitioner, Mr Menon was recognised as one of the leading lawyers in the fields of commercial litigation and arbitration, insolvency and construction law, in Singapore and abroad. He advised and represented numerous local and overseas clients in complex and technical disputes and appeared before as well as in arbitration tribunals in various jurisdictions.

**Ambassador Patricia O'Brien** is currently the Ambassador and Permanent Representative of Ireland to the Office of the United Nations and other International Organisations in Geneva. From August 2008 to September

2013, she was Legal Counsel of the United Nations and Under-Secretary-General for Legal Affairs. She served as Legal Adviser to the Department of Foreign Affairs of Ireland, Senior Legal Adviser to the Attorney General of Ireland and Legal Counsellor in Brussels. Earlier in her career, Ms O'Brien practiced law at the Irish Bar and at the Bar of British Columbia, Canada. She held academic positions at the University of British Columbia, Canada. Ms O'Brien earned her law degrees in Trinity College, Dublin, the Kings Inns, Dublin, and the University of Ottawa, Canada. She is a member of the Irish Bar and of the Bar of England and Wales. She is a Fellow of the Society for Advanced Legal Studies, London and a Fellow of the Foreign Policy Association (US). She is Vice-President of the Dublin University Law Society, a Master of the Bench of the Middle Temple, London and an Honorary Bencher of the Kings Inns, Dublin.

**Lord Phillips of Worth Matravers KG PC** was called to the Bar in 1962, was appointed a Judge of the Queen's Bench Division in 1987 and a Lord Justice of Appeal in 1995. Elevated to the House of Lords in 1999, he was appointed Master of the Rolls in 2000, Lord Chief Justice in 2005, and Senior Law Lord in 2008. He was the founding President of the UK Supreme Court from 2009 until 2012. A Knight Companion of the Order of the Garter, Lord Phillips is a Visiting Professor at King's College London and at the University of Oxford, the President of the Qatar International Court and Dispute Resolution Centre, and a non-resident Judge on the Court of Final Appeal of Hong Kong. He sits as an arbitrator in international arbitrations.

**Professor Stephan W Schill** is Professor of International and Economic Law and Governance at the University of Amsterdam and Principal Investigator of an ERC-project on "Transnational Public-Private Arbitration as Global Regulatory Governance". He is admitted to the bar in Germany and New York, is a Member of the ICSID List of Conciliators, and has acted as counsel before the European Court of Human Rights. He is Editor-in-Chief of the Journal of World Investment and Trade and has published several books and articles on international investment law and arbitration.

**Mr K Shanmugam**, Minister for Foreign Affairs and Minister for Law, Singapore, was formerly head of Litigation and Dispute Resolution at Allen & Gledhill LLP, which was the largest law firm in Singapore. He was consistently recognised, in various international publications, as one of the

top litigation, arbitration and insolvency Counsel in Asia and Singapore. In 1998, he was appointed a Senior Counsel by the Supreme Court of Singapore, one of the youngest lawyers to have been so appointed. Prior to accepting public office, Mr Shanmugam served in various committees and Boards, including the Government Parliamentary Committee for Health; Advisory Board of the NUS Faculty of Law; the Raffles Institution Board of Governors; the Media Development Authority, and Sembawang Corporation Industries Ltd. Mr Shanmugam was also President of the Singapore Indian Development Association (SINDA) from 2002 to 2009. In 2008 Mr Shanmugam was appointed a Cabinet Minister. He is now the Minister for Foreign Affairs and the Minister for Law. He has also served as the Minister for Home Affairs.

**Mr Christopher Stephens** is the General Counsel of the Asian Development Bank (ADB). ADB is a partnership of 67 member countries established to facilitate economic development and alleviate poverty in Asia and the Pacific. ADB invests more than \$20 billion per year in 42 developing countries by providing loans, investment capital, grants and technical assistance. ADB also manages \$35 billion in 38 funds in 24 currencies. ADB's legal department also runs the Law, Justice and Development program, through which ADB provides technical assistance to member countries in relation to the rule of law in sustainable development. Prior to joining ADB, Mr Stephens spent 28 years in private law practice focusing on finance and development, and was a managing partner at the law firms Coudert Brothers and Orrick, Herrington & Sutcliffe.

**Professor Thio Li-ann** teaches and researches constitutional and administrative law, public international law and human rights in Asia at the Faculty of Law, National University of Singapore. She is co-author of the leading casebook *Constitutional Law in Malaysia and Singapore* (Lexis-Nexis, 2010, with Kevin YL Tan) and author of *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012).

**Mr J Christopher Thomas QC** is Senior Principal Research Fellow at the Centre for International Law at the National University of Singapore. He has advised a number of States on the negotiation of international trade and investment agreements. He has also appeared as counsel in many international trade disputes, investor-state disputes, and judicial review applications involving investor-state arbitration awards, and more latterly

has acted as an arbitrator in investment treaty, trade, and commercial disputes.

**Dr Jan van Zyl Smit** is an Associate Senior Research Fellow at the Bingham Centre for the Rule of Law, where his research since 2013 has focused on judicial independence and constitutional transitions. A South African law graduate, he holds masters and doctoral degrees from the University of Oxford and previously taught public law and international human rights law at Oxford Brookes University. Jan has been involved in the Kenyan constitutional transition since 2009, and has served as a researcher with the Kenyan Committee of Experts on Constitutional Review and as a consultant to the Judges and Magistrates Vetting Board.

**Mr Lionel Yee SC** took office as Singapore's Solicitor-General on 1 February 2014. Prior to that, he was a Judicial Commissioner of the Singapore Supreme Court from 1 February 2013 to 31 January 2014 and Singapore's Second Solicitor-General from 1 January 2011 to 31 January 2013. He was appointed a Senior Counsel in 2013. Between July 2008 to May 2012, Mr Yee was Director-General of the International Affairs Division in the Attorney-General's Chambers of Singapore. Mr Yee graduated with a Bachelor of Arts degree in Law from the University of Cambridge and with a Master of Laws (International Legal Studies) degree from New York University School of Law.

---

## INTRODUCTION

The principle of the rule of law plays a central part in much contemporary debate or discussion about development. This is no accident or passing fashion. The rule of law speaks to the demand, in both developing and developed societies, for all institutions, public and private, to be accountable for the stability and fairness of their decision-making structures and for the impact of their actions on individual rights. As awareness of its wider implications grows, the rule of law is now firmly entrenched in the international discourse on development, not least in relation to the post-2015 Sustainable Development Agenda of the United Nations, which is currently under discussion with a view to articulating new global norms to replace the Millennium Development Goals.

This book is the result of a Symposium convened in Singapore in May 2014 to consider the implications of the rule of law for development both in the South-East Asia region and globally. Made possible by the generous support of the global law firm Linklaters, the Symposium was co-organised by the Bingham Centre for the Rule of Law, an independent research centre within the British Institute of International and Comparative Law in London, and the Singapore Academy of Law. It follows the Academy's inaugural Rule of Law Symposium held in 2012.

The chapters in this volume represent a conversation between senior judges, scholars and lawyers from the worlds of business and private practice. There are four thematic sections, which address the rule of law and development from a legal and policy perspective; the implications of the rule of law for business and finance; the rule of law in international investment disputes; and judicial reflections from the past or present heads of the judiciary in England and Wales, Hong Kong and Singapore. The thematic sections are followed by individual contributions from former UN Legal Counsel, Ambassador Patricia O'Brien, the Singapore Minister for Law and Foreign Affairs, Hon K Shanmugam and the Solicitor-General, Hon Lionel Yee SC.

In the first thematic section, **The Rule of Law and Development**, the opening essay is by Professor Sir Jeffrey Jowell QC, who is Director of the Bingham Centre. Sir Jeffrey considers the definition of the rule of law

propounded by the late Lord Bingham in *The Rule of Law*.<sup>1</sup> The early notion of the rule of law in Magna Carta was an important restriction on the arbitrary rule of kings, but the modern conception of the rule of law, as exemplified by Lord Bingham's writing on the subject, is a fundamentally practical concept. In summary, the rule of law consists of four main ingredients – legality, legal certainty, equality and access to justice and legal rights – each of which is needed to protect society from tyranny and corruption. Together, these ingredients serve to attract long-term investment by assuring firms that they will not be subject to discrimination or official intimidation without recourse to law. The universal appeal of the rule of law is illustrated by recent efforts to secure it in countries as diverse as South Africa and Burma/Myanmar.

Nicholas Booth, UNDP Programme Advisor in the Asia-Pacific region, goes on to examine the linkages of cause and effect between the rule of law and development in the context of the UN approach to development, which embraces a broad notion of economic and social advancement, including human rights, with a particular focus on the poor and the marginalised. The question should not be whether the rule of law gives rise to development or *vice versa*, he argues, since the two phenomena are mutually reinforcing and operate as a virtuous circle. Moreover, the rule of law is vital to ensuring that economic growth is sustainable and that the benefits of prosperity are not monopolised by dominant groups in society. It is of critical importance that these longer-term advantages of the rule of law are not overlooked by governments and other international actors when they negotiate new Sustainable Development Goals to replace the UN Millennium Goals in 2015.

Multilateral development banks (MDBs) have an important part to play in fostering the rule of law at the country level. Christopher Stephens, General Counsel of the Asian Development Bank, explains that MDBs work in tandem with global actors such as the UN which are responsible for articulating rule of law norms internationally. MDBs can assist the adoption of such norms in the developing countries where they work, either independently or in collaboration with private sector investors. Technical assistance projects offer the opportunity to transfer know-how to local institutions and officials. The Asian Development Bank works in 42

---

1 Allen Lane, Penguin Press, 2010.

developing countries and seeks to enhance the rule of law through its support for domestic regulatory regimes, promotion of gender equity and programmes to strengthen judicial capacity and enable regional judicial exchanges.

The second thematic section, **The Rule of Law in Business and Finance**, draws out both how corporations can benefit from the rule of law and what it requires of them. Professor Robert McCorquodale, Director of the British Institute of International and Comparative Law, argues that while corporations have long been attracted to the stability and certainty offered by the rule of law, there is now much greater recognition that they also have human rights responsibilities. The leading global instrument in this regard is the UN Guiding Principles on Business and Human Rights.<sup>2</sup> This area of international law and practice is undergoing rapid expansion while debates rage about the respective extent of state and private sector responsibilities. The three pillars of the Ruggie scheme require, first, that states protect against human rights abuses (arguably also those associated with the extraterritorial activities of its corporate nationals); second, that businesses respect human rights, not only by ensuring that their corporation does not breach rights but also by leveraging their influence with other entities (for example in their supply chain); and thirdly, that effective remedies be provided. This last pillar is of great importance to the individuals affected but its effective implementation requires greater clarity about the content of the first two pillars and more effective enforcement mechanisms for what are often complex transnational disputes.

Professor David Kinley of the University of Sydney considers the challenges and opportunities presented by foreign investment in developing countries. His chapter is informed by observation and experience of the legal system in Myanmar, where weak institutions are faced with rapidly increasing levels of investment activity. Traditionally, businesses and human rights advocates may have been motivated by different aspects of the rule of law – roughly its procedural and substantive elements, respectively – but in recent years there has been considerable convergence between these two camps. A range of legal mechanisms, in both host and investor states, offer the prospect of

---

2 *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, endorsed by the UN Human Rights Council in its resolution 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

both legal liability, for example under the US Alien Tort Claims Act, and regulatory remedies. However, the scale of global corruption and its prevalence in many countries continues to exact a heavy human cost and underscores the urgency of establishing and strengthening the rule of law worldwide.

Lee Ming Chua, General Counsel of Singapore's Government Investment Corporation, provides a perspective on the rule of law "through the eyes of business". He observes that, given the right circumstances, businesses may have incentives to pursue not only certainty and stability but also substantive human rights concerns. This is certainly the case when profit and human rights concerns are aligned. But human rights arguments carry a wider relevance, and have been successfully articulated even by minority shareholders, as recently occurred when the directors of fast food giant McDonald's were persuaded to review and expand their human rights policy. This case study demonstrates that the potential for shareholder activism to bolster the rule of law is not to be underestimated.

**The Rule of Law and Foreign Investment**, the third thematic section of this book, examines the state of the rule of law in international investment law, as assessed by three leading scholars. While undoubtedly vital to the global economy, this body of law is also highly decentralised, with a proliferation of investment treaties negotiated between individual states and jurisdiction exercised by a variety of judicial and arbitral bodies. Professor Stephan W Schill of the University of Amsterdam considers how investment law can answer its critics, who question whether the present system serves the rule of law or only the interests of powerful investors. Professor Schill argues that there are beneficial effects both for the domestic rule of law in developing countries and also at an international level, where rule of law concepts are playing an increasingly important part in arbitration decisions and other forms of dispute resolution. In the developing country context, a functioning investment treaty not only provides a direct example of procedural and substantive aspects of the rule of law, and access to justice, but also brings indirect economic benefits by supporting a wider range of economic activity by domestic as well as foreign business entities. In addition to the contribution that treaties may make to the rule of law, Professor Schill adds that the rule of law should not only guide governments in treaty-making, but it must inform arbitrators themselves as to how they conduct arbitral proceedings, exercise their procedural powers, and interpret investment treaties. In sum, the potential

for using rule of law concepts in international treaty-making and dispute resolution has not yet been exhausted, and despite the decentralised nature of these activities, rule of law principles developed in domestic constitutional settings are proving increasingly influential.

N Jansen Calamita, Director of the Investment Treaty Forum at the British Institute of International and Comparative Law examines three aspects of the global foreign investment dynamic which implicate rule of law concerns. With respect to the current structure of the legal regime he argues that there are deep disagreements between competing visions of the rule of law, which go back as far as the origins of the subject in 19th century doctrines about the protection of aliens. The disagreement encompasses the debate between a purely procedural view of the rule of law and one that encompasses substantive notions such as minimum standards for the treatment of investors. The modern practice of including “fair and equitable treatment” clauses in investment treaties has not resolved this dispute, and indeed renders the task of interpreters more fraught as they have to decide between rival assertions about the rule of law in the absence of clear textual guidance. On the development side, Mr Calamita cautions against assumptions about the impact of investment treaties on the development of domestic rule of law institutions. Social science research in the area remains nascent and it seems premature to conclude that investment treaties push host states to improve adherence to the rule of law for local populations. Indeed, some have suggested just the opposite. Finally, Mr Calamita also notes open questions about the role of the rule of law in the decision-making of foreign direct investors. While the importance of legal environment to investors seems established, a more nuanced understanding of what particular aspects of the rule of law most directly support investment has not yet been developed. This question is the subject of a current empirical investigation by the Investment Treaty Forum in conjunction with the Bingham Centre.<sup>3</sup>

Professor Locknie Hsu of the Singapore Management University considers whether, in spite of the existence of multiple conceptions of the rule of law, there is nonetheless evidence that investment law is contributing to the rule of law enhancement. She postulates that the rule of law may be viewed on a

---

3 See the Corporate Decision-Making in Foreign Direct Investment project <<http://www.biicl.org/ingham-centre/projects/corporatedecision>>.

spectrum, ranging from a “thin”, largely procedural notion to a “thicker” rule of law which incorporates more substantive protections. In this sense, she argues that the sheer level of treaty-making and adjudicatory activity in investment law, and parallel developments in trade law under the auspices of the World Trade Organisation (WTO), have contributed to countries moving from the thin to the thicker end of the spectrum. It is precisely the flexibility and openness of treaty terms such as “fair and equitable treatment” that has allowed arbitrators and tribunals to require scrutinise the actions and legal frameworks of host states on grounds such as stability, transparency, clarity, non-arbitrariness and fair procedures, which are integral to the rule of law. The Association of Southeast Asian Nations (ASEAN) has given prominent place to such rule of law protections in the ASEAN Comprehensive Investment Agreement which came into force in 2012,<sup>4</sup> and the full results of implementing this agreement are awaited with interest.

The fourth section of this volume contains **Judicial Perspectives on the Rule of Law and Development** in the United Kingdom, Hong Kong and Singapore, as presented at the Rule of Law Symposium. We were fortunate indeed to be addressed three distinguished jurists who had attained the highest judicial office in their respective jurisdictions. The speech of Lord Phillips of Worth Matravers, who retired as President of the UK Supreme Court in 2012, focuses on the close connection between the rule of law and economic development. Lord Phillips observes that “underpinning the entire rule of law ... is an impartial and incorruptible judiciary” and that corruption in other public institutions will likewise deter foreign investment. A legal system can positively attract commercial business if it provides appropriately skilled and specialised courts, such as the Commercial Court which was created in London in the latter part of the 19th century and continues to attract litigants whose business interests lie in many different parts of the globe. The modern phenomenon of the rise of international arbitration, Lord Phillips suggests, is driven by the same demand for impartial, expert and expeditious adjudication by the business sector whose activities are essential to economic development.

Chief Justice Geoffrey Ma, Chief Justice of Hong Kong, also argued that the rule of law is fundamental to economic development, particularly in the

---

4 Opened for signature 26 February 2009, entered into force 29 March 2012.

longer term. His speech observes that while commercial courts and arbitration processes are undoubtedly of great value in securing the confidence of the business community, the relevance of the rule of law is wider than this. Legal frameworks and judicial decisions that affirm the dignity and rights of individuals help to ensure a sound foundation for long-term investment, and speaking shortly after the 60th anniversary of the famous US Supreme Court decision that outlawed segregation in Southern schools, Chief Justice Ma noted that, “cases like *Brown v Board of Education* do matter in the grand scheme of things”. Investors, like private individuals, have an undoubted interest in equality before the law and in an independent judiciary which maintains public confidence through its impartiality and reasoned judgments.

Chief Justice Sundaresh Menon, Chief Justice of Singapore, agreed with his judicial colleagues that the rule of law was crucial to attracting economic development. His speech goes on to argue that there is a phenomenon of “bi-directionality”, in which advances in economic development in turn strengthen the rule of law. Globalisation not only challenges lawyers to offer services that meet the needs of clients who operate in multiple jurisdictions, but also provides both the need and the opportunity to bring about convergence and harmonisation of both legal standards and institutions. International arbitration has taken important steps in that direction through initiatives such as the New York Convention<sup>5</sup> and the Model Law on International Commercial Arbitration.<sup>6</sup> Harmonisation of domestic commercial law has thus far presented a greater challenge, but increased contact between international dispute resolution systems and domestic jurisdictions may help to address that. Chief Justice Menon outlined the concrete steps taken recently to establish the Singapore International Commercial Court and Singapore International Mediation Centre. These are to be located within the High Court in Singapore and are envisaged as continuing the process of internationalisation which has already seen the

---

5 United Nations Commission on International Trade Law (UNCITRAL), Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (1958) 330 UNTS 38, 7 ILM 1046 (entered into force 7 June 1959).

6 UNCITRAL, Model Law on International Commercial Arbitration, UN Doc A/40/17 (1985), 24 ILM 1302.

Singapore International Arbitration Centre, founded in 1991, become one of the world's leading centres for arbitration.

The keynote speech of the Rule of Law Symposium was given by Ambassador Patricia O'Brien, formerly Legal Counsel of the United Nations and Under-Secretary-General for Legal Affairs. Ambassador O'Brien is presently the Ambassador and Permanent Representative of Ireland to the Office of the UN and other international organisations in Geneva. Her address, **The Importance of the Rule of Law in Current Global Challenges**, sets out her own reflections on the most urgent challenges faced by the United Nations in its rule of law work, both at the domestic and the international level. The rule of law programmes which the UN and its agencies design for domestic settings are highly sensitive to the political and social context of each country, particularly in conflicts or post-conflict situations where the achievement of peace cannot be taken for granted. At the international level, respect for the UN Charter and international law are of fundamental importance, as is the recognition that "peace and security, development, human rights, the rule of law and democracy, are interlinked and mutually reinforcing". Important developments of the past two decades have included the establishment of the International Criminal Court and the recognition of a "responsibility to protect" (R2P) on the part of the international community when populations are threatened by genocide, war crimes, ethnic cleansing and crimes against humanity. The R2P concept does not entail an enlargement of the right of individual states to use force, but is a powerful statement of the purposes for which the measures provided under the UN Charter may be used.

The Minister for Law and Foreign Affairs, Mr K Shanmugam, also addressed the Rule of Law Symposium in a session, **In Conversation with the Minister**, which was moderated by Professor Thio Li-ann of the National University of Singapore. Prior to joining the government of Singapore, Mr Shanmugam was a distinguished legal practitioner. He shared the view of most conference speakers that the rule of law was essential to development and indeed "fundamental for any society". Singapore had benefited from "a unique set of circumstances that allowed us to progress in the way we did" and was not readily replicable. The Minister argued that Singapore's small size meant that it had a greater need for stability than larger and more established democracies such as the United States, which also benefits from being the issuer of the world's

reserve currency. He also observed that political speech was regulated differently between these jurisdictions, and defended the Singapore model which shields public officials from allegations of impropriety unless these can be proven to be true. However, within this framework, he expressed the firm view that “Civil participation and societal participation are essential for a society, particularly a complex economy, a complex economy, to move ahead.”

In closing the conference, the Solicitor-General of Singapore, Lionel Yee SC, reviewed the breadth of discussions at the Symposium reflected on how the rule of law has been characterised by historians and economists who see it as contributing to development. Niall Ferguson’s description of the rule of law as a “killer app” conveys some of the benefits and advantages it brings to countries, but does not quite do justice to the enduring appeal of the rule of law in so many different parts of the world.<sup>7</sup> Unlike a manufactured “app” which modern computer users simply “plug and play”, the rule of law is an open and accessible concept and one which people are constantly drawn to reconstruct in their own social and political circumstances. The conference discussions had certainly demonstrated this by highlighting the centrality of the rule of law both domestically and internationally and on issues as wide-ranging as public accountability, the human rights responsibilities of business, and the economic and legal impact of investment law frameworks.

---

7 Niall Ferguson, *Civilization: The West and the Rest* (Allen Lane, 2011).



## ACKNOWLEDGEMENTS

This book is the product of the Rule of Law Symposium 2014, the second conference of its kind in Singapore. This conference was a joint initiative by the Bingham Centre for the Rule of Law, an independent, London-based international body and part of the British Institute of International and Comparative Law, and the Singapore Academy of Law. The impetus for this collaboration came from the global law firm, Linklaters, who had the vision to propose a full-day conference in Singapore that would bring together leading members of the judiciary, academia and lawyers in business and in practice to reflect on the significance of the rule of law for development, both in the South-East Asia region and globally.

As principal sponsors of the Symposium and long-term supporters of the Bingham Centre, Linklaters deserve all the credit for their generosity and endurance in supporting an event that was nearly two years in the making and for enabling us to invite a cross-section of speakers from the region and around the world. We are grateful to Simon Davies (global managing partner), who came from London to lead the firm's delegation at the conference, and to Kathryn Ludlow and Rory Conway in London, and Kevin Wong (managing partner) and Charles Thornhill in Singapore, for all their work over this period.

The conference was co-sponsored by two leading Singapore firms, Stamford Law Corporation and Rodyk & Davidson LLP, whose support ensured that the conference could take place on the scale that it did, with 400 delegates attending in the auditorium of the Supreme Court of Singapore.

The Singapore Academy of Law were the co-organisers and hosts of the Symposium. Aurill Kam of the Attorney-General's Chambers chaired the local organising committee on which the head of the Academy, Serene Wee, Karin Lai of the Attorney-General's Chambers and Thian Yee Sze and Diane Tan of the Ministry of Law also served. Their farsighted planning secured the participation of a most distinguished line-up of Singapore speakers and an event which, on the day, ran impeccably from the staging of the speeches and panel discussions to the banqueting meals for all the delegates which in true Singaporean style were on offer throughout the day. The Academy's management and conference team under Sharon Lee

deserve especial thanks for their enormous dedication and hard work which produced such spectacular results.

Distinguished members of the Singapore legal community agreed to serve as panel chairs for the conference, and we thank V K Rajah SC, now Attorney-General of Singapore and then of the Court of Appeal and Professor Simon Chesterman, Dean of Law at the National University of Singapore, for agreeing to do so. Chief Justice Sundaresh Menon both spoke at the conference and, as head of the Academy, was the official host.

The Bingham Centre is part of the British Institute of International and Comparative Law and this enabled it to draw on the Institute's links with experts around the world when it came to assembling the thematic panels. The Institute Director, Robert McCorquodale, and N Jansen Calamita, Director of the Institute's Investment Treaty Forum, played a key part in the academic planning of the Symposium in addition to their role as speakers. Bingham Centre Research Fellow Lucy Moxham led the initial planning phase of the conference in 2013 and Centre administrator Sandra Homewood was instrumental in co-ordinating the involvement of the international speakers.

For the preparation of this book, we express our appreciation to the team at Academy Publishing for their tireless and efficient work and for their patience with editors! The Bingham Centre editors were assisted by interns Natalia Spyridaki, Charlotte Bellamy and Nick Ognibene who provided excellent research assistance.

Finally, we are immensely grateful to all our Symposium speakers, who are the contributors to this volume, for the distances many of them travelled and for their engagement with the many and diverse rule of law questions presented at this conference. They have ensured that the rule of law issues that are so essential to development receive the attention they deserve.

**Jeffrey Jowell**  
**Christopher Thomas**  
**Jan van Zyl Smit**

January 2015

---

# THE RULE OF LAW AND DEVELOPMENT





## THE RULE OF LAW: A PRACTICAL AND UNIVERSAL CONCEPT

**Professor Sir Jeffrey Jowell QC**

*Director, Bingham Centre for the Rule of Law*

This Symposium is a result of a request by Linklaters to the Bingham Centre for the Rule of Law to organise this event and join with the Singapore Academy of Law (who had held an excellent Symposium on this subject in 2012). That we all worked well together is demonstrated by the outstanding participants from all parts of the world who have kindly produced their papers for this volume. It is so fitting too to discuss the links between the rule of law and development in Singapore, which has achieved such spectacular development in so short a time.

The Bingham Centre is named after Lord Bingham who is generally regarded as the most outstanding judge of his generation (which itself produced many outstanding judges) and successively held the posts of Lord Chief Justice of England and Wales, Master of the Rolls and then Senior Law Lord. Towards the end of his life he wrote a book, *The Rule of Law*, which is so accessible to lawyers and non-lawyers alike. Bingham's enduring contribution was to show first that the rule of law is not, as is often supposed, a vague concept, or a mere work in progress. He defines the rule of law pithily:

All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.<sup>1</sup>

This definition is supplemented by eight “ingredients” of the rule of law which are practically understandable and highly specific. The ingredients are: that law be accessible, clear and predictable; that matters are decided by law and not normally by discretion; that there is equality before the law; that power be exercised lawfully fairly and reasonably; that human rights are protected; that disputes are resolved without undue cost or delay; that trials be fair and, finally that the state complies with its obligations in international law as well as national law.

These specific aspects of the rule of law amount to principles of good governance. They are also indispensable features of any true democracy and

---

1 *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p 8.

indeed any society that seeks to accord equal respect and concern for every person's human dignity, as the former Attorney General of India, Soli Sorabjee has said:

It needs to be emphasised that there is nothing Western or Eastern or Northern or Southern about the underlying principle of the rule of law. It has a global reach and dimension. The rule of law symbolizes the quest ... to combine that degree of liberty without which the law is tyranny with that degree of law without which liberty becomes licence. In the words of the great Justice Vivien Bose of [the Indian] Supreme Court, the rule of law "is the heritage of all mankind because its underlying rationale is belief in ... the human dignity of all individuals anywhere in the world".<sup>2</sup>

I increasingly find that one of the key problems in explaining the rule of law is that it consists of four really rather separate aspects which are contained within the Bingham definition and the eight ingredients, but not specifically articulated. (I exclude for these purposes the international aspects of the rule of law.) And I have come to realise that it is the lack of appreciation of the fact that the sum of the rule of law requires attention to all four parts, which are somewhat distinct, but nevertheless cohere and indeed overlap, that accounts for some of the lack of understanding of the rule of law's high significance.

The first is the notion of *legality*. Legality requires that we live under a system of law and not anarchy. We should all be under an obligation to obey a system of legal rules and principles. This obligation, crucially, applies also to public officials, who must act within their given legal powers.

Because any system of law is rarely self-applying, legality requires that institutions must exist to secure the enforcement of laws, civil and criminal. So here we have the notion of a government of laws and not man; and of settlement of disputes by law and not by the arbitrariness associated with anarchy, despotism or tyranny.

Next year, in the United Kingdom, we shall be celebrating the 800th anniversary of Magna Carta. In 1215, in a field at Runnymede, a document was sealed by King John which, for the first time in our history, replaced the divine rule of kings by a written charter proclaiming that

---

2 "The Rule of Law: A Moral Imperative for South Asia and the World", lecture delivered at Brandeis University, 14 April 2010.

absolute power should be no more. King John had maintained, in words William Shakespeare put into the mouth of a later king, that:

Not all the water in the rough rude sea  
Can wash the balm from the anointed King.  
The breath of worldly men cannot depose  
The deputy elected by the Lord.<sup>3</sup>

However, the Magna Carta struck a blow against that claim and insisted that:

39: No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by lawful judgment of his peers or by the law of the land.

The second feature of the rule of law is the notion of *legal certainty*. The application of law must be predictable. Laws must not generally be retrospective. Fair warning should be given about any change in the law. Writing in the late nineteenth century, the great English jurist Dicey emphasised this aspect of the rule of law. However, he went too far in insisting that there be no administrative discretion at all, believing that discretion would inevitably lead to arbitrariness. We now know, however, that in all societies some degree of discretion is necessary in order for the state to perform a number of welfare and regulatory tasks. However, the discretion must itself be controlled by principles of good governance which themselves draw their authority from the rule of law (namely, its requirement that power, as Tom Bingham noted, be exercised legally, rationally and fairly).

The third aspect of the rule of law is *equality*. Equal application of the law ensures that when law is enforced, it is enforced equally against all: rich and poor, the powerful and the marginalised. Thus corruption offends this sense of the rule of law, by preferring those who can afford to purchase justice; by selling justice to the highest bidder. As Magna Carta also said:

40: To no one will we sell, to no one deny or delay right or justice.

Those three features – legality, certainty and equality – consist of the formal or procedural features of the rule of law. However, there is more to it than that. Those are necessary features of the rule of law but, on their own, can

---

3 *Richard II*, Act III, scene ii.

amount to rule *by* law rather than rule *of* law. It is sometimes said that the apartheid system in South Africa fulfilled the qualities of the rule of law because the laws, albeit unjust, were themselves clear and prospective and applied to all without distinction. That view confuses legalism and legality; it was rule by law (any law, however outrageously unjust) rather than rule of law.

The necessary quality that brings rule by law into rule of law – that provides a thick rather than thin account of the rule of law – is the fourth element, namely, *access to justice and rights*. This aspect of the rule of law is in a very different category from the first three. It insists that people have the ability to challenge decisions made about them, to assert their rights (private and public). This is fundamental: whatever degree of legality and legal certainty there may be, if an individual is not able to challenge the government and to assert his or her rights, including human rights, the rule of law cannot be said to pertain. In fact, it could be said that perhaps the most important defining feature of a state based upon the rule of law is that a person in a rule of law state has the opportunity of challenging the government of the day with a reasonable prospect of success in an appropriate case.

Access to justice first requires a system of courts or their equivalent to which a person with sufficient interest in the matter may make a legitimate claim. Obviously in some areas not everyone will have the resources to pursue all potential claims, but the lack of infinite resources is a fact of life. However, once access to a court is gained, the rule of law requires a fair trial or due process, and that the trial be before an independent judiciary. The result must not be predetermined by a judge who is not impartial or independent in fact, or indeed in appearance. As is said, “Justice must not only be done but seen to be done” – in order to give the litigants, and the public, confidence in the impartiality of the judicial system.

The independence of the judiciary is routinely considered to be an essential element of the rule of law, but we are also finding that access to justice cannot be achieved without other actors also being independent, such as the public prosecutor and indeed the legal profession so that they may advocate for their clients without fear or favour.

Under this fourth aspect, the rule of law is not simply a formal or procedural concept, but one that contains within it substantive rights, such as the right to a fair hearing, to administrative justice, not to be tortured, and so on. It may not include all human rights within its purview (for

example, the right to privacy) but in general it is a vital instrument of justice and institutional morality.

For those who insist, contrary to Soli Sorabjee, that the rule of law is a purely Western concept, let me provide this example by way of rebuttal. In about 2005 the Council of Europe's Venice Commission (the Commission for Democracy Through Law – formed in 1990 to assist the countries of the former Soviet Union with constitutional advice) was approached by its Ukrainian member to produce a document on the rule of law. This was because, he said, Ukrainian judges were at that time confusing rule by law with rule of law and endorsing any actions that were technically authorised by law. Initially there was no consensus in the 47 countries with very different traditions, from common law to codified systems and from the German "*Rechtsstaat*" to the French "*Etat de droit*" and onwards. However, after almost 5 years of discussion it was the Bingham definition and ingredients which were agreed upon in the document which is now frequently cited and has formed the basis for a new document on the rule of law endorsed also recently by the Commission of the European Union.<sup>4</sup>

Having argued thus far for the universality of the rule of law let me now qualify it in only two respects. First, even in parts of the world which fully subscribe to the rule of law, it is not fully achieved and is often under threat. Governments, whatever their hue, inevitably want to get things done without too many impediments, delays or challenges, least of all through the law when administered by "unelected judges". In the UK recently judicial review has been criticised as a device which sometimes delays the achievement of public goals, and there has been a difficult discussion about the necessity of secret proceedings in civil cases involving threats to national security. In Europe, the Secretary General of the Council of Europe recently categorised as "very worrying" challenges to the rule of law across Europe's 47 states.<sup>5</sup> These included discrimination against ethnic and national

---

4 *Report on The Rule of Law*, CDL-AD(2011)003rev-e, adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011) and *Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM (2014) 158, adopted by the Commission of the EU on 11 March 2014.

5 *Report by the Secretary General of the Council of Europe: State of Democracy, Human Rights and the Rule of Law in Europe*, presented to the 124th Session of the Committee of Ministers in Vienna, 5–6 May 2014 at p 7.

minorities (in 39 member states); prison overcrowding (30 states); corruption (26 states) – including judicial corruption, and restrictions on free expression (8 states). The European Court of Human Rights, which is operated by the Council of Europe, constantly finds violations of the right to fair trial within a reasonable period of time and has found unlawful the fact that in some states prosecutors sit alongside judges, exercising powers that are too broad, and which lack transparency.

The second qualification to the universality of the rule of law speaks less to its substance than to its forms. There is some room for national approaches to rule of law to differ. Any system has to grow naturally in its own soil and in harmony with its own traditions. We have found this in the work we are doing in the Bingham Centre on constitutional reform in Burma/Myanmar where, incidentally, Daw Aung Sang Suu Kyi now heads the rule of law committee of their Parliament. We have also seen it in work we are doing in the Palestine Authority on the balance between judicial and executive authority and in an exercise with which we have been engaged in Bahrain on freedom of expression. When seeking international standards on the latter, you find that the United States brooks little interference with freedom of speech whereas in Continental Europe, with a different history, tolerates restrictions on hate speech, or Holocaust-denial. The UK falls somewhat in between. Previously, criticism of government officials in the UK could be chilled by defamation laws, but recently our courts have held that officials acting on behalf of the public and in their interest should not be shielded from legitimate criticism, however robust, at least where there is no malicious intent.

Acknowledgment that there may be different ways of achieving the rule of law does not, however, lead to the conclusion that the rule of law is an entirely relative and shifting concept and therefore may be readily excused by the standard of national convenience. As we have seen, the rule of law has a core meaning and a profound purpose in a world where the value of human dignity is too often compromised by oppression and a desire to rule not by law but by ideology – by raw power and by extreme dogma. In fact it is patronising to say that the rule of law is for some parts of the world only. Turn the Bingham definition and ingredients of the rule of law on its head and, as each of its core features fall to the ground, the core features of tyranny come ominously into view: laws which are uncertain and retrospective; corruption and favouritism in the implementation of law; no access to courts; unfair trials before judges who routinely decide in favour of

the government of the day or other powerful elites. Can we really say that any of those are suitable only for some countries and not for others?

There are also instrumental benefits of the rule of law. It clearly has a part to play in attracting investment and therefore promoting development, growth and stability. Investment will shirk countries which do not honour contracts or property rights, or which tax retrospectively or discriminate or intimidate selected firms or individuals without any hope of recourse.

However it should be remembered too that the rule of law is not only for the investor or the entrepreneur. It is an instrument of empowerment. I said earlier that the ability to challenge public decisions is a key feature of the rule of law. An example from South Africa illustrates this starkly. The rule of law was incorporated as a founding principle of the post-apartheid South African constitution and South Africa was the first constitution in the world to establish a constitutional right to just administrative action – the right to challenge public officials for breach of legal, fair or unreasonable acts. The President of South Africa at the time refused to make anti-retroviral drugs, donated by the manufacturer, available to pregnant women despite these drugs having been found to be effective in reducing the risk of mother-to-child transmission of HIV-AIDS. His decision was challenged by an NGO and the Constitutional Court held against the country's President.<sup>6</sup> The application of administrative review principles to this case, coupled with a constitutional duty to take reasonable measures to implement the right of access to health care, and the provision of a fair trial before an independent judiciary led to a decisive shift in government policy and eventually the establishment of the world's largest public sector HIV-AIDS treatment programme.

Landmark developments such as these make it all the more surprising that there is such reticence in accepting the rule of law as a key feature of the post-2015 Development Agenda which the United Nations is formulating at the moment. Almost unbelievably, the last UN Development Agenda, the Millennium Development Goals, said nothing about the rule of law. Ban Ki-moon, the UN Secretary General, has now asked for a debate about the extent to which the replacement, post-2015 goals, should contain (as he recommends) rule of law requirements, and an international debate is now

---

6 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC).

taking place as to whether it should be a stand-alone goal, be integrated into the goals, or not feature at all. You might think that the rule of law is a clear condition of development as it imports the kind of certainty and stability that I have outlined. But at present it seems that the rule of law sceptics might be winning this battle, and diluting the rule of law to a too great extent. If they succeed, there is a fair chance that the fruits of the next stage of international development will, once again, fall into the hands of the powerful to the exclusion of the poor and the marginalised.

A Symposium such as this allows the benefits and limits of the rule of law to be considered through papers and discussion that engage different aspects of the rule of law in different settings and in its different manifestations in different parts of the world. This is important so that we may seek ways practically to achieve the rule of law's benefits in the interest, as Tom Bingham said, of "good government and peace, at home and in the world at large".<sup>7</sup>

---

7 *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p 174.

## THE FORCE THAT TURNS THE VIRTUOUS CIRCLE: RULE OF LAW, SOCIO-ECONOMIC DEVELOPMENT AND THE POST-2015 AGENDA

**Nick Booth**<sup>1</sup>

*Programme Advisor – Governance, Conflict Prevention, Access to Justice and Human Rights, UNDP Bangkok Regional Hub, Thailand*

In this chapter I will argue that rule of law<sup>2</sup> is necessary for sustainable socio-economic development, and put forward a hypothesis to support that argument, developed from classical social contract theory and the recent work of Daron Acemoglu and James Robinson. For this reason, rule of law is a core part of the work of the United Nations Development Programme (UNDP) around the world, and the chapter will conclude with an update on the current discussions around the place of rule of law within the framework of the “Sustainable Development Goals” that will replace the Millennium Development Goals after 2015.

- 
- 1 The views in this paper are those of the author and do not necessarily represent those of the UN or UNDP.
  - 2 The definition of rule of law has attracted considerable discussion, including in this volume. For the purposes of this paper it is enough to underline that I am talking about a “thick” rule of law including both substantive protection of human rights as well as procedural issues, as explained further below. In general, UNDP together with other UN agencies adopts the UN Secretary-General’s definition of the rule of law as stated in his Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616): “For the United Nations, 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.”

## The Relationship between Rule of Law and Socio-economic Development

A number of studies have demonstrated the strong correlation between governance (including rule of law) and economic development.<sup>3</sup> Put simply, states with higher levels of GDP score more highly on the various rule of law indices which attempt to measure such factors as the state's ability to uphold contractual and property rights, ensure that officials and citizens alike are bound by publicly-available laws, and guarantee human security. Some studies<sup>4</sup> have also shown that this holds true for the relationship between governance and the wider concept of human development<sup>5</sup> which is a broader socio-economic concept and especially

- 
- 3 The literature is extensive. The role of rule of law specifically is examined in Roberto Rigobon and Dani Rodrik "Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships" <<http://www.nber.org/papers/w10750>> (accessed 24 June 2014). Most of the literature examines correlations between governance more broadly (including rule of law) and economic growth. See, *eg*, the Governance Matters series and especially the summary of 10 years' experience with the Worldwide Governance Indicators provided by Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, "Governance Matters 2009: Learning From Over a Decade of the Worldwide Governance Indicators", The Brookings Institution (2009) <<http://www.brookings.edu/research/opinions/2009/06/29-governance-indicators-kaufmann>> (accessed 24 June 2014). For a challenge to this view, see Markus J Kurtz and Andrew Schrank, "Growth and Governance: Models, Measures, and Mechanisms" (2007) 69 *Journal of Politics* 538.
- 4 See, *eg*, Sharmila Gamrath, "The governance dimension of human development" (2013) 29 *Humanomics* 240 and Andreea-Oana Iacobuta, "Considerations on the Relationship between Institutional Quality and Human Development Across Nations", Alexandru Ioan Cuza University of Iasi (2013) <[http://www.far2real.com/economie/images/anale/lucrari/Lucrari\\_2013/Lucrari\\_vol\\_XIX\\_2013\\_057.pdf](http://www.far2real.com/economie/images/anale/lucrari/Lucrari_2013/Lucrari_vol_XIX_2013_057.pdf)> (accessed 24 June 2014).
- 5 Human development is based on enlarging people's ability to make choices about their lives, and therefore covers many factors such as access to quality education and health care, nutrition and livelihoods, environmental protection and security, in addition to economic wealth. Measured by UNDP's Human Development Index (HDI) in the annual Human Development Reports since 1990, it is a broad concept of socio-economic development in which GDP growth is only one factor. For more on human development, see <<http://hdr.undp.org/en/humandev>> (accessed 24 June 2014).

important for UNDP, since our aim is not just to help countries achieve economic growth, but more importantly to enhance the quality of life of their people.

More controversial, however, is the direction of causality. Does strengthened rule of law improve a state's economic performance and its ability to deliver basic services such as health and education to all its citizens? Or is rule of law, like opera houses, a luxury public good whose emergence is only affordable once societies reach a certain level of affluence?<sup>6</sup> For development agencies such as UNDP this question matters. We have to make the best use of scarce development resources, and should prioritise funding those interventions which are likely to have most impact on human development. Therefore, even if rule of law and access to justice are good things in themselves (which they incontestably are), it is still important to understand the nature of their contribution to other development outcomes.

While economists continue to refine their analysis of the data to see if a convincing case on causality can be made, we can supplement that evidence by turning to other disciplines such as history to test hypotheses that would support the case that rule of law itself contributes to socio-economic development, rather than the reverse.

One hypothesis commonly advanced is that a state which upholds contracts and property rights and is able to maintain security will attract greater foreign investment, hence facilitating growth.<sup>7</sup> But there are at least two

---

6 It may be objected that there are more persuasive ways of stating the case for rule of law as consequence rather than cause of growth – for instance, a claim that increased affluence leads to the emergence of an educated and property-owning middle class which in turn drives demands for greater accountability. On my account, while the latter part of the proposition (educated middle class demands accountability) may well be true, the former (increased affluence leads to emergence of educated and property-owning middle class) is not necessarily true and depends on what happens to that increased affluence.

7 This line of argument originates in the New Institutional Economics created by scholars from Ronald Coase and Harold Demsetz to Douglass North, which then in turn influenced international development through the so-called “Washington Consensus” adopted by World Bank, IMF and other institutions particularly from the end of the 1980s.

problems with this hypothesis. The first serious objection to it is that countries like China and Vietnam have in recent times achieved spectacular socio-economic development results while receiving relatively weak ratings on indices for rule of law,<sup>8</sup> and in particular have done much better than other countries like India whose rule of law ratings are higher. The reason for this may be, as discussed elsewhere in this volume,<sup>9</sup> that investors calculate the security of property and contract rights as just some of a series of risk factors to be assessed against expected returns. Countries such as China and Vietnam have offered favourable market opportunities and relatively strong stability which make them attractive destinations, while contract and property right risks can be mitigated through international arbitration and other means.

Another objection, which is particularly important for agencies such as UNDP which concentrate on the poorest and most disadvantaged groups, is that greater foreign investment need not translate into better schools and hospitals for the poor. For instance, the growing literature on “resource curses” demonstrates that countries with rich natural resources have often failed to achieve sustainable improvements in human development, with the income from resources channeled to a small elite which just gets richer while the poor stay poor.<sup>10</sup> Relying on foreign investment to improve human development generally and reduce inequalities would require us to adopt a “trickle-down theory” of the kind fashionable in the days of Reaganomics, which however has since been thoroughly discredited.<sup>11</sup>

---

8 See, *eg*, Frank Upham, “From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory” (2009) *International Law and Politics* 41. On the basis of this restricted notion of rule of law (he terms it “formalistic” and “apolitical” notion) Upham rejects the thesis that rule of law contributes to growth – see Frank Upham, “Mythmaking in the Rule of Law Orthodoxy”, Carnegie Endowment Democracy and Rule of Law Project, Rule of Law Series Working Papers No. 30 (Sep 2002), <<http://carnegieendowment.org/2002/09/10/mythmaking-in-rule-of-law-orthodoxy/8g6>> (accessed 24 June 2014).

9 See chapter 6 by Mr Chua Lee Ming in this volume.

10 The seminal work is Richard M Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge, 1993).

11 See, *eg*, Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (Allen Lane, 2012).

If I am to convince my readers, then, I need to rely on a different hypothesis which would explain why we should expect rule of law to be a necessary condition for sustainable human development, and in so doing would also provide clarity on what kind of rule of law this would need to be. To do so, I should like to take as my starting point the recent work of Daron Acemoglu and James Robinson, and in particular their celebrated book “Why Nations Fail”,<sup>12</sup> which aims precisely to answer the question why some countries have become prosperous while others remain mired in poverty.

Their main argument is that what all prosperous societies have in common is neither geography, nor superior natural resources, nor race, religion or culture, but something quite different – the quality of the institutions by which they are governed. Prosperous societies, they argue, are governed by inclusive institutions in which citizens are able to hold those with power to account. In other societies, by contrast, an elite group has managed to hold on to power and to keep the lion’s share of the country’s riches for themselves, and for so long as this elite can continue to do so, they see no need to share the power and access to benefits and resources more broadly with citizens, even if doing so would increase the aggregate welfare of their country. These countries have “extractive institutions”, which force the majority of society to suffer in the interests of the power-holding elite.

Acemoglu and Robinson argue that both political and economic institutions can be extractive or inclusive, and that the two are related.<sup>13</sup> Extractive political institutions include those in which only certain sectors of society, such as landed gentry or men or business leaders, have access to political power and the opportunity to influence it. Extractive economic institutions enable the economic potential of assets to be exploited by limited sectors of society while excluding others. Such institutions depend upon extractive political institutions, because the excluded groups in society will use political power to gain access to assets if they can; and the economic institutions help in turn to sustain the political institutions, because they lock the excluded groups into continued dependence on the elite for their

---

12 Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishers, 2012).

13 Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishers, 2012), chapter 3.

survival and livelihoods, blocking off the potential for the excluded to take their destinies into their own hands.

Extractive economic institutions, and their relationship to extractive political institutions, are crucial to their thesis, because the argument rests on the intuition (which Acemoglu and Robinson illustrate by extensive historical discussion) that the key to sustainable prosperity is “creative destruction”, by which they mean the kind of technological innovations which characterized the Industrial Revolution in England and which were a key driver of growth. Feudal land tenure and monopolies are the classic examples of extractive economic institutions, and the authors show how the technological innovations of the Industrial Revolution were only possible when entrepreneurs were able to defeat the resistance of the various groups who stood to lose through industrialization.

It is beyond the scope of this paper to elaborate here the detailed case that Acemoglu and Robinson make for their thesis, carefully constructed as it is from an extensive basis of historical and economic research. I will limit myself to a few observations about their argument, before turning to the implications of their thesis for rule of law and its role in promoting “inclusive” rather than “extractive” institutions.

First, it needs to be emphasized at the outset that – as the authors themselves acknowledge – economic growth is quite possible within extractive societies.<sup>14</sup> The Soviet Union’s economic growth persuaded many, for a while, of the success of communism as an economic model. And China’s introduction of market reforms under authoritarian direction has realized historically unprecedented levels of both economic growth and poverty reduction. Even in extractive societies, elites have both economic and political reasons to encourage growth, through which they themselves benefit economically and which also secure the basis of their rule. However, the potential for technological innovation through “creative destruction” will always be limited in those societies because it will always threaten the economic monopolies which those elites enjoy and the basis on which their political stability rests. By limiting the potential for such “creative destruction”, those societies limit their own development. Ultimately, therefore, Acemoglu and Robinson predict that countries like China will

---

14 Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishers, 2012), chapter 3.

either develop towards more inclusive societies, or their growth model will fail.

Secondly, it is important to understand extractive and inclusive institutions as ideal types at opposite ends of a spectrum, as opposed to clear categories into one of which any society can neatly be classified. The authors chart the progress of England towards more inclusive institutions, starting from Magna Carta through the conflicts between Parliament and the Stuart kings, the English civil war and the Glorious Revolution, but they are careful to note the very gradual nature of democratization in England, with the franchise extended stage by stage until universal suffrage in the 20th century. The transformations of the Industrial Revolution which for Acemoglu and Robinson typify “creative destruction” initially led to concentrations of capital never before witnessed, during which time workers’ wages failed to increase in real terms for many decades until the end of the 19th century. The authors argue, however, that moves towards more inclusive institutions at critical junctures set in motion a “virtuous circle” which led, in time, to organized labour, universal suffrage and the welfare state, accompanied by a cultural transformation in the discourse of politics and rights themselves. I will come back to this point below.

Thirdly, they do not claim that there is any inevitable historical force that will cause extractive institutions to give way to inclusive ones. On the contrary, they are careful to note the path-dependency of the historical transformations they describe. For sure, certain factors favour the move towards inclusive institutions, in particularly where rulers are forced to make concessions in order to get the cooperation they need from the ruled, as in the case of the internal governance of colonial settlements in Jamestown, Virginia in the 17th century and in Sydney Bay, New South Wales in the late 18th century.<sup>15</sup> But extractive institutions have proved both durable and persistent in many other countries.

Fourthly, the process is reversible. If circumstances allow a particular group in society to strengthen their hold on power and assets, that society’s

---

15 See Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishers, 2012), chapter 1 and chapter 10 respectively. By contrast, colonial governance towards aboriginal populations in the United States, Canada and Australia was extractive in the extreme and remained so at least until the late 20th century.

institutions may well move away from inclusion back towards extraction. We may well think that the alarming and continuing increase in inequality around the world over the last 40 years, which is at the heart of the important recent work of Stiglitz<sup>16</sup> and Piketty,<sup>17</sup> and which reversed the trend that followed two world wars in the first half of the 20th century, is itself a move towards a more extractive world, and both these authors remind us that there is no inevitable reason to expect a corrective return to a more equal world.<sup>18</sup> Politics is driving the change towards a more unequal world which will also be a less prosperous world, and only determined political action can save us from that destiny.

So far I have used the term “prosperity” without differentiating clearly between pure economic development (measured by GDP, for instance), and broader socio-economic development, but it is clear from the authors’ argument that “prosperity” refers to the latter. For instance, the innovation which drives creative destruction requires an educated workforce. And it is important to realize that the notion of inclusive institutions has implications for more equitable redistribution of public goods, an issue which lies at the heart of socio-economic development, as opposed to models which focus on economic growth alone.

Indeed, although Acemoglu and Robinson do not themselves refer to it, for me there are clear parallels between their notion of inclusive institutions and classical social contract theory as developed by Rousseau,<sup>19</sup> and which underpins the work of John Rawls.<sup>20</sup> The very term “extractive”, with its sense of exploitation rooted in force, economic compulsion or social prejudice and discrimination, implies that its opposite “inclusion” treats all members of society as equal and offers terms for political and economic collaboration which are sustained not through compulsion, but through

---

16 Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (Allen Lane, 2012).

17 Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press, 2014).

18 As Piketty puts it: “The history of the distribution of wealth has always been deeply political ... there is no natural, spontaneous process to prevent destabilizing, inegalitarian forces from prevailing permanently” (*Capital in the Twenty-First Century* (Harvard University Press, 2014) at p 20).

19 Jean-Jacques Rousseau, *On the Social Contract* (1762).

20 John Rawls, *A Theory of Justice* (Belknap Press, 1971).

their intrinsic fairness as terms which all can reasonably accept. In that sense, perfectly inclusive institutions are those which would be chosen under Rawls' "veil of ignorance"<sup>21</sup> by a society of rational actors who know all about the world but do not know their station in it – neither their race, their age, their gender, religion nor other circumstances.

I stress this point because I believe it is crucial for understanding the intrinsic role of rule of law in supporting and sustaining inclusive economic and political institutions. At the heart of social contract theory is the notion that, in an inclusive society, political and economic power is sustained through the fairness (universal acceptability) of the rules governing it, rather than through the physical force of elites with militaries and police at their command, the economic power of landlords and capitalists who can force workers and peasants to work on their own terms, or the social and cultural power that favours higher castes, dominant ethnic groups and heterosexual men rather than women, dalit, indigenous peoples and LGBT. As Rawls' own works reflect, such a set of rules, in order to command this rational acceptance across society, would need to be equally applied, with mechanisms to ensure that all are accountable to those rules and required to respect the rights they protect. What else is this but a society based on rule of law? How could inclusive institutions function without it? The title of Rawls' masterpiece – *A Theory of Justice* – itself underscores the role of law and justice at the heart of a politically and economically inclusive society.

Acemoglu and Robinson acknowledge the importance of the rule of law in the emergence of inclusive institutions, and they specifically discuss an extremely important feature of the rule of law, which is the way that it constrains those whom it empowers. Acemoglu and Robinson demonstrate this, once again, by turning to English history. Notions of the rule of law and equality were an essential part of the political rhetoric which accompanied the rise of the Whigs in late 17th century England, but when in the early 18th century the Whigs' own power and property came under challenge from commoners, they sought to use the law as a tool of

---

21 See John Rawls, *A Theory of Justice* (Belknap Press, 1971), chapter 24.

repression to safeguard their gains<sup>22</sup>. As Acemoglu and Robinson demonstrate, these attempts ultimately failed, because the discourse of rule of law which brought them to power also, in the end, constrained their ability to act outside it. In this way, even though the rule of law and democracy were at first far stronger in rhetoric than in reality, that rhetoric itself played a role in slowly transforming Britain's institutions towards rule of law and democracy.

Thus the ideal of the rule of law helps create the “virtuous circle” which – however partial and imperfect the first steps towards it – can transform societal understandings about power, rights and justice which themselves help societies to become more inclusive. Rule of law and its ideology are a force which keeps the virtuous circle turning. This helps us understand better the notion of causality, and explains how we can still regard rule of law as a cause of (and necessary for) socio-economic development even while acknowledging that higher levels of development produce changes (such as educated middle-classes who have gained wealth independent of feudal structures) which themselves play a role in strengthening rule of law.<sup>23</sup> The process is circular (and hence cause and effect are inseparable, like chickens and eggs), but rule of law – and its ideals – is one of the forces which drives the circle, and is therefore a cause and not a consequence.

To summarise this discussion, then, I argue that rule of law is intrinsic to the notion of inclusive political and economic institutions. Only the rule of law's ability to constrain the social, cultural, economic and military power of elites can counter the strong incentive towards extractive behavior which will always tempt those with power, and check or even reverse the move towards an inclusive society which can alone secure socio-economic development.

Considerable attention has been paid – including in this conference – to the question of whether we understand rule of law in a “thick” sense to include substantive values such as human rights, or as a “thin” procedural rule of law which rests on the predictability and enforceability of publicly

---

22 Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishers 2012) chapter 11, drawing on EP Thompson, *Whigs and Hunters: the Origin of the Black Act* (Allen Lane 1975).

23 This point is examined at text accompanying n6 above.

promulgated rules but implies nothing about their content.<sup>24</sup> For the purposes of this chapter I can be brief on this point. The very nature of my argument for rule of law in socio-economic development presupposes the “thicker” conception of rule of law. For the very terms of the social contract which underpin inclusive societies themselves have strong implications as to the substance of the rules of a fair society. It is a society (in its ideal form) in which inequalities are only tolerable so long as they also benefit the worst-off; it is a society of equal political participation and equal opportunity and equal access to public goods and services with no distinctions as to race, religion, gender or caste.<sup>25</sup> In short, it is a society in which human rights – socio-economic, cultural, civil and political, as well as environmental – are foundational and logically prior to the legal system which is required to protect and enforce them. There is no reason to suppose that the procedural protections of the rule of law alone – unless they are supporting these substantive rights – will contribute to inclusive societies. To return to the role of property rights, discussed above,<sup>26</sup> the mere protection of property rights will not support an inclusive society if the structure of those property rights is itself extractive (for instance, because it explicitly excludes some groups from property rights, or because it protects property rights which are in fact very unequally distributed as a result of historical, socio-cultural or other factors).

Of course, “thick” and “thin” rule of law are themselves only the ends of a spectrum with infinite variations between, and no society has a perfectly “thick” rule of law with ideal accountability and protection of human rights. The point, however, is that the value of rule of law in driving socio-economic development comes only from the substantive values of equality and justice which it promotes. The thicker the rule of law, the stronger its contribution to transformation towards an inclusive society.

---

24 See, *eg*, Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press 2010), chapter 7, and Simon Chesterman, “An International Rule of Law?” (2008) 56 *American Journal of Comparative Law* 331 at 340.

25 See John Rawls, *A Theory of Justice* (Belknap Press, 1971).

26 This point is examined at text accompanying nn 7–8 above.

## **The Role of Rule of Law in UNDP's Work**

As an essential driver of socio-economic development, it is clear why rule of law matters to UNDP. Our vision, as most recently expressed in our 2014–2017 Strategic Plan,<sup>27</sup> is to help countries achieve the simultaneous eradication of poverty and significant reduction of inequalities and exclusion.<sup>28</sup> As mentioned at the beginning of the paper, we focus not only on economic growth, but human development, which expands people's choices by increasing their access to public goods like health and education and their ability to participate in political processes, on equal and non-discriminatory terms. Supporting the transformation from extractive to inclusive societies is therefore at the very core of what we do. And that means, for the reasons I have explained above, promoting rule of law is an essential part of our work.

We view rule of law, access to justice and human rights as inseparable and indivisible from one another. Laws, law-making processes and justice systems must embody and protect human rights if they are to play their role in upholding the inclusive social contract; access to justice requires ensuring that people know their rights and are able to enforce them. On the ground in more than 170 countries and territories, our engagement is as diverse as the countries we serve, and this short paper cannot and should not attempt to do it justice.<sup>29</sup> Here I will simply refer briefly to some of the main ways in which we support a wide range of national actors to strengthen the rule of law, access to justice and human rights:

- (a) Supporting reform of constitutional and legal frameworks to reflect human rights and to ensure that everyone, including

---

27 UNDP, "UNDP Strategic Plan: 2014–17" <[http://www.undp.org/content/undp/en/home/librarypage/corporate/Changing\\_with\\_the\\_World\\_UNDP\\_Strategic\\_Plan\\_2014\\_17/](http://www.undp.org/content/undp/en/home/librarypage/corporate/Changing_with_the_World_UNDP_Strategic_Plan_2014_17/)> (accessed 24 June 2014).

28 UNDP, "UNDP Strategic Plan: 2014–17" at II.7.

29 Interested readers can learn more from our website at <[http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/)> (accessed 24 June 2014). Details of our country programmes can be found under the country-specific pages of our main website, <<http://www.undp.org/content/undp/en/home.html>> (accessed 24 June 2014).

excluded groups, can have their voice heard in law and constitutional reform processes;<sup>30</sup>

- (b) Making laws work for women, poor and excluded groups – legal aid<sup>31</sup> and legal empowerment<sup>32</sup> to protect the right to identity and to ensure access to land, resources and livelihoods; human security (including security from gender-based violence) and access to justice;
- (c) Addressing discrimination based on race, caste or religion, gender, disability, sexual orientation and gender identity or other status;

---

30 For more on UNDP's work – as well as that of other UN agencies – in supporting constitution-making and constitutional reform processes, see the UN Constitutional Newsletter <<http://peacemaker.un.org/Constitutions/Newsletter>> (accessed 24 June 2014).

31 UN General Assembly, “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems” (28 September 2013) UN Doc A/RES/67/187 <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/67/187](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/187)> (accessed 24 June 2014). UNDP – together with the United Nations Office on Drugs and Crime (UNODC) – played a major role in the development of these principles and guidelines which now provide a strong normative framework for our work around the world. However, we also strongly support non-criminal legal aid, as well as legal empowerment initiatives, to strengthen access to justice across the whole legal system.

32 For more on legal empowerment, see UNDP, “Making the Law Work for Everyone: Reports of the Commission on Legal Empowerment of the Poor” (2008) <<http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/Lep/making-the-law-work-for-everyone---vol-i---english/>> (accessed 24 June 2014). UNDP has recently launched a new study of how legal empowerment initiatives can make a difference to socio-economic development for poor and excluded groups in practice, see UNDP, “Legal Empowerment Strategies at Work: Lessons in Inclusion from Country Experiences” (2014) <[http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access\\_to\\_justiceandruleoflaw/legal-empowerment-strategies-at-work/](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/legal-empowerment-strategies-at-work/)> (accessed 24 June 2014).

- (d) Strengthening the governance of the legal and justice system and judicial reform, including survey-based indices for governance, rule of law and access to justice.<sup>33</sup>

This short description highlights the main point I wish to make here: that, in keeping with our vision to support the reduction of inequalities and exclusion as well as poverty, our work focuses on the poorest and on those groups most subject to exclusion in society, strengthening their voice, protecting their rights and making the legal system work for them. In extractive societies, these groups are by definition those for whom laws can be a tool of oppression rather than a weapon for social justice. In supporting rule of law and access to justice for the poor and vulnerable groups, we seek to help countries transform their institutions away from extraction and towards inclusion.

### **Rule of Law in the Post-2015 Agenda**

Important as we believe it is for development, progress on the rule of law across the world appears disappointingly slow. A glance at the World Governance Indicators for Rule of Law between 1996 and 2012<sup>34</sup> shows no significant overall improvement in any region or for countries at any income level.<sup>35</sup> Although there have been important achievements in other areas, such as poverty reduction, these gains may be fragile and reversible without a strengthened environment for governance and rule of law – at least if the thesis of this paper is correct.

What can we do to bring rule of law into the spotlight? For more than a decade the Millennium Development Goals have played a remarkable role in drawing the world's attention to a set of key indicators of human

---

33 See, *eg*, Chi so cong ly Justice Index, "Assessment of Distributive Justice and Equality from a Citizen-based Survey in 2012" (2012) <<http://chisocongly.vn/en/>> (accessed 2 June 2014).

34 Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, "Worldwide Governance Indicators" (2013) Worldwide Governance Indicators Project <<http://info.worldbank.org/governance/wgi/index.aspx#home>> (accessed 24 June 2014).

35 Arguably, the figures even show regression in some regions, *eg* South Asia, although margins of error in the data probably do not allow such conclusions to be drawn at a high level of confidence.

development. But although the importance of governance and rule of law was highlighted in the Millennium Declaration itself,<sup>36</sup> the detailed goals and targets which have set the world's human development agenda since 2000 contained no goals, no targets, and no indicators to measure progress in those areas.

This has been widely acknowledged as a shortcoming, and the process to draw up the next set of Sustainable Development Goals (SDGs) which will be at the heart of the post-2015 agenda has, at least throughout the process so far, more clearly recognized the role of rule of law and governance. To cite some examples:

- (a) The Outcome Document from the Rio+20 summit in 2012, which formally launched the process for agreeing the post-2015 agenda, emphasised democracy, good governance and rule of law as essential for sustainable socio-economic development and poverty reduction;<sup>37</sup>
- (b) Subsequently, the 2013 report<sup>38</sup> of the UN Secretary-General's High-Level Panel of Eminent Persons on the Post-2015 Development Agenda outlined five "transformative shifts" for

---

36 UN General Assembly, "United Nations Millennium Declaration" (18 September 2000) UN Doc A/RES/55/2 <<http://www.un.org/millennium/declaration/ares552e.htm>> (accessed 24 June 2014). Clause 24 of the Millennium Declaration states: "We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development."

37 UN General Assembly, "The Future We Want" (11 September 2013) UN Doc A/RES/66/288 <<http://imuna.org/sites/default/files/ARES66288.pdf>> (accessed 24 June 2014) at I.10: "We acknowledge that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth" and VI.252: "We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained, inclusive and equitable economic growth, sustainable development and the eradication of poverty and hunger".

38 High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, "A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development" <<http://www.post2015hlp.org/wp-content/uploads/2013/05/UN-Report.pdf>> (accessed 24 June 2014).

- the post-2015 agenda including building effective and accountable institutions that support the rule of law as a means to an end, and an end in themselves, proposing an “illustrative goal” to ensure good governance and effective institutions;
- (c) In September 2013 the General Assembly held a Special Event on MDGs whose Outcome Document<sup>39</sup> reaffirmed the importance of promoting rule of law<sup>40</sup> as part of a coherent approach for the post-2015 agenda;<sup>41</sup>
  - (d) In the UN’s own “The World We Want” survey, which gives people everywhere a chance to express their own voice on the issues that matter most to them, “Honest and responsive governments” consistently ranks near the top of the list – usually third after education and healthcare – see [www.myworld2015.org](http://www.myworld2015.org).

But the key question is whether and how this will translate into concrete commitments related to rule of law in the final post-2015 agenda, SDGs, targets and indicators which are to be adopted by the General Assembly in September 2015.

During 2013 and 2014, the UN’s member states discussed the future SDGs through the Open Working Group on Sustainable Development Goals (OWG) which was created following the Rio+20 summit. Co-chaired by Kenya and Hungary, it included 70 countries represented through 30 groups. The final report proposed no fewer than 17 SDGs comprising 169 targets.<sup>42</sup>

---

39 UN General Assembly, “Outcome document of the special event to follow up efforts made towards achieving the Millennium Development Goals” (28 January 2014) UN Doc A/RES/68/6 <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/6](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/6)> (accessed 24 June 2014).

40 UN General Assembly, “Outcome document of the special event to follow up efforts made towards achieving the Millennium Development Goals” (28 January 2014) UN Doc A/RES/68/6 at para 13.

41 UN General Assembly, “Outcome document of the special event to follow up efforts made towards achieving the Millennium Development Goals” (28 January 2014) UN Doc A/RES/68/6 at para 19.

42 Report of the Open Working Group of the General Assembly on Sustainable Development Goals (12 August 2014) UN Doc A/68/970 <<https://sustainabledevelopment.un.org/sdgsproposal>>.

Proposed Goal 16 is to “[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. Specifically in relation to rule of law it contains a target to “promote the rule of law at the national and international levels, and ensure equal access to justice for all”.

So far so good, but it is unlikely that the OWG’s proposed set of SDGs and targets could be adopted by the GA in their current form. It is generally recognised that 17 goals and 169 targets is simply too many for a global agenda which needs to be adopted and measured by every country. In the process of trying to reach consensus on a more focused post-2015 agenda, this goal and target may well be vulnerable, because it faces strong opposition from countries such as China, India and Russia, even if it also enjoys equally strong support from Western countries and from the UN Secretary-General who, in his recent Synthesis Report on the post-2015 agenda, categorised “justice, safe and peaceful societies and strong institutions” as one of “six essential elements” for delivering on the sustainable development goals.<sup>43</sup>

---

43 See “The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet” Synthesis report of the Secretary-General on the post-2015 sustainable development agenda (4 December 2014) UN Doc A/69/700, especially at paras 77–78:

“77. Effective governance for sustainable development demands that public institutions in all countries and at all levels be inclusive, participatory and accountable to the people. Laws and institutions must protect human rights and fundamental freedoms. All must be free from fear and violence, without discrimination. We also know that participatory democracy and free, safe and peaceful societies are both enablers and outcomes of development.

“78. Access to fair justice systems, accountable institutions of democratic governance, measures to combat corruption and curb illicit financial flows and safeguards to protect personal security are integral to sustainable development. An enabling environment under the rule of law must be secured for the free, active and meaningful engagement of civil society and of advocates, reflecting the voices of women, minorities, lesbian, gay, bisexual and transgender groups, indigenous peoples, youth, adolescents and older persons. Press freedom and access to information, freedom of expression, assembly and association are enablers of sustainable development. The practice of child, early and forced marriage must be

*(continued on next page)*

Furthermore, even if this goal and target were to be retained in the final agenda, there would remain the question how a target phrased in this way could be measured. Considerable work has been done, by UN agencies and others, on devising practicable and meaningful indicators by which to measure the rule of law,<sup>44</sup> and earlier proposals of the Open Working Group contained more concrete proposals for targets related to rule of law. But the targets now proposed for Goal 16 – including that proposed for rule of law – are now so general that it will be challenging to reach consensus on indicators which can be objectively measured and tracked. And if progress against the goal and its targets cannot be clearly measured, the value of its inclusion within the post-2015 agenda will be substantially compromised.

If clear, measurable and unambiguous commitments to rule of law are not included within the post-2015 agenda, the greatest risk is that the world continues along its current path, in which greater wealth is accompanied with greater inequality, deepening rather than addressing exclusion, and exacerbating rather than addressing conflict, in a series of vicious circles which stronger rule of law could have reversed. At any rate we in UNDP – and throughout the UN – will continue to strive to generate better evidence and data to support our message that sustainable human development can only come about through strengthened rule of law.

---

ended everywhere. The rule of law must be strengthened at the national and international level to secure justice for all.”

44 See for instance the measurement framework for rule of law, justice and security set out in UNODC, “Post-2015 Development Agenda” <<https://www.unodc.org/unodc/en/about-unodc/post-2015-development-agenda.html>> (accessed 27 January 2015).

## THE RULE OF LAW IN DEVELOPMENT

**Christopher Stephens<sup>1</sup>**

*General Counsel, Asian Development Bank*

The benefits to developing countries and their citizens of a culturally, legally, socially and economically embedded acceptance of rule of law principles have been widely accepted for generations. The signing of the Magna Carta in June 1215 institutionalised specific limits on monarchical power in England, enshrined individuals' access to courts, and provided for due process in criminal cases. And even 1800 years before that – after the establishment of the Athenian assembly or *Ecclesia* – the rule of law was recognised as a worthy value, at least for land-owning, native-born men.

Although variously defined in different contexts, this chapter refers to “rule of law” as a set of fundamental principles within which a society recognizes and upholds certain relationships and transactions. These principles include (1) good governance, by which officials at all levels of society are accountable under the law for their personal and professional conduct, and conduct the affairs of government fairly, openly, and ethically; (2) laws that protect fundamental rights securing persons, their rights and their property are properly enacted, and justly, fairly, and consistently applied and implemented; and (3) justice is delivered pursuant to due process by competent and ethical judges and officials acting consistently with law.

Over the course of the 800 years since the Magna Carta, organisations including the United Nations, the United Nations Development Programme (UNDP), the Bingham Centre for the Rule of Law, the Singapore Academy of Law, and various other institutes, universities, think tanks, NGOs, and law societies, have, through a relentless focus on the rule of law, raised the concept to a normative principle that is almost universally recognised as an aspirational premise of civil society. Yet after all that time and effort, rule of law topics ranging from human rights to governance continue to be examined and debated. A Google search for conferences on

---

1 This chapter was prepared by the author in his personal capacity and not as representative of Asian Development Bank. Any views contained in this chapter are the personal views of the author, and do not necessarily reflect the views of Asian Development Bank, its Board of Governors or the governments they represent.

the rule of law in 2014 alone yields nearly 20 million hits. Even after 2600 years, there is no shortage of discussion.

### **Connecting Theory to Practice: The Last Mile**

The gap between the recognition of rule of law principles and societal inculcation is often vast, and institutionalising a national acceptance of rule of law principles is an evolutionary process that can only be approached in a holistic manner, involving a society's culture, government, law enforcement authorities, judges, and citizenry.

At the "high level" of this effort – culture and government – inculcating rule of law principles as a normative value can best be done under the leadership of global institutions, like the United Nations and its development arm, the United Nations Development Programme (UNDP), the latter having spent many years convening meetings and conferences, publishing articles that articulate theories on the morality and social and economic benefits of the rule of law, and studies that demonstrate empirically the validity of those theories. Ultimately, protocols, agreements, treaties and conventions are agreed and signed by nation states in which governments undertake commitments to adopt specific component principles of the rule of law.

At the next level – legislatures, regulators, law enforcement authorities, judges, and the citizenry – realising and applying rule of law principles in the everyday personal and economic affairs of people, multilateral development banks (MDBs)<sup>2</sup> and similar institutions can play a more effective role. MDBs do this by mobilising financing and investment to facilitate economic development, and by attaching rule of law oriented technical assistance and consultancy services to such financing and investment. That technical assistance often supports countries in the enactment of laws and regulations that further economic development, the enhancement of governance and/or the effective and consistent

---

2 A multilateral development bank is an institution established by treaty signed by several states that provides financing and technical assistance to developing countries. These include Asian Development Bank (ADB), the World Bank, European Investment Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, African Development Bank, and Islamic Development Bank, among others.

implementation and enforcement of laws. In this respect, MDBs provide the “last mile”, connecting globally recognised norms to the granular level of specific projects in specific locales, affecting specific communities and businesses in their daily affairs.

In this sense, the two processes work in tandem, with (1) global institutions working from Geneva and New York, inculcating normative values on the highest plane, and carrying those values down to the multinational and national level in the form of international treaties and domestic laws; and (2) MDBs working in regions and communities, leveraging the prospect of financing to apply rule of law principles at the shovels-in-the-dirt level of project implementation (*eg*, making financing available with strings attached in the nature of required compliance with standards on the environment, treatment of affected people, open and fair procurement, anti-corruption, and good governance).

### **Breadth of Rule of Law Principles**

Although such a tandem-application of rule of law appears workable in theory, the concept of rule of law is broad, and means different things in different contexts. NGOs and global institutions typically touch upon a wider array of rule of law issues than MDBs. Few institutions have taken a broader approach to rule of law than UNDP. This broader focus includes human rights and moral principles involving individuals’ dignity, freedoms and “natural” rights, and these in turn often contain elements of political rights and freedoms.

The benefits of this broad and high-level approach are several. First and foremost, recognition of the societal and economic benefits of rule of law principles – at least insofar as relates to the need for clear laws that are fairly implemented on a consistent and predictable basis – has become almost universal. To that extent, the rule of law has become a globally recognised normative value among nations.

Unfortunately, full implementation of rule of law principles at the most granular level of human affairs is less universal, especially in much of the developing world.

Fortunately, this is the level at which MDBs can – and do – play an important and effective role in furthering the application of rule of law

principles, albeit with an emphasis that is more tightly focused on development.

### **Rule of Law in ADB's Development Efforts**

At Asian Development Bank (ADB), a regional development bank, the mission is to facilitate economic development and to alleviate poverty in Asia and the Pacific. To do this, ADB engages in financing and investment activities in its 42 developing member countries (DMCs) that will foster sustainable economic growth and enhance further investment, business and trade, ultimately leading to higher incomes and the alleviation of poverty. Infrastructure – particularly large-scale infrastructure that provides a public service, like roads, rail, water treatment, and power generation and transmission – has traditionally been a government responsibility, and much of ADB's financing activity is comprised of sovereign loans to developing member countries to finance specific public service oriented infrastructure projects.

A fast-growing part of ADB's business, however, is lending to, and making equity investments in, private companies, as part of the effort to engage privately-owned enterprise and private capital, technology, know-how and management expertise in the economic development of DMCs. ADB has also identified public-private partnerships (PPPs) as a hybrid sovereign-private sector approach that can effectively engage private sector resources in the efficient provision of public services.

Apart from financing and investing in projects and companies, ADB also provides technical assistance, typically in the nature of advisory or consulting services. Technical assistance projects (TAs) are engagements by which ADB helps developing member countries develop more effective and efficient institutions, legal or regulatory policy frameworks, and systems and capacities to promote sustainable and inclusive economic growth and development.

In the context of rule of law, ADB takes a holistic approach encompassing legislation, regulation, regulators, judges and judicial capacity, and enforcement. For example, ADB TAs include technical assistance aimed at creating legislation and a legal regime that will accommodate private investment in PPP projects. To establish an effective PPP regime, a country needs laws relating to concessions, the establishment and operations of

private companies, financing and collateral security, the recognition and protection of property and contract rights, currency convertibility and remittance, procurement, insolvency, tax and other matters. This is not only a broad array of different laws, but many of these have to take account of – and have to be tailored for – specific sectors, such as telecommunications, water, transport, energy, education and health, where PPP might provide an appropriate developmental framework. And PPP-related TAs are just one example. A similarly broad approach applies, with different laws in mind, to TAs aimed at building other sectors, such as the financial sector, capital markets, and corporate governance.

The theory common to all rule of law oriented TAs is the idea that economic development requires rules of the game that provide a level playing field in which participants in the economy can be confident that their contracts are valid, their property and contract rights are enforceable, the laws apply equally to all players, and the outcomes to disputes are consistent with those laws untainted by corruption and are therefore predictable.

As such, an effective and efficient legal system, anchored in the rule of law, is a precondition to maximising the effectiveness and efficiency of economic and financial activity, and, ultimately, to sustainable and inclusive economic development.

ADB, working in tandem with internationally recognized rule of law norms, ensures their application to specific projects in a specific country by tethering its work to rule of law principles in at least two respects:

- (a) First, the project will require that the implementing government agency or private sector borrower or investee (i) adhere to standards on the environment, including rigorous assessments of the project's impact on air, water, soil and people, and of alternatives to mitigate adverse effects; (ii) assess and properly handle the impact of the project on affected people and their livelihoods; (iii) implement relevant project contracting through open and fair procurement processes, free of corruption; and (iv) adhere to other standards of good governance.
- (b) Second, ADB often provides technical assistance to a government agency or ADB borrower that is aimed at (i) assisting the country in the adoption of relevant laws or regulations; (ii) developing more efficient or effective systems for

managing or administering critical operations; or (iii) providing training for regulators, law enforcement authorities, administrators or judges to enhance their capacity for managing their tasks of governing or adjudicating.

It is important to remember that ADB's priorities, projects and investments in DMCs are not "imposed" or even selected unilaterally by ADB. For each DMC, ADB engages the government, civil society and a range of stakeholders in developing a country partnership strategy (CPS) with the country. The CPS defines the strategic approach and priorities of ADB's investments in the country for a specific period, and is aligned with the country's own development strategy, and ADB's own strategy and capacities, taking into account complementary efforts by other development institutions. Accordingly, a particular TA covering rule of law principles or initiatives is mutually identified and defined by ADB and its client country through such collaboration.

### **Rule of Law and Political Affairs**

Although many of the rule of law principles encouraged and supported by ADB align with international norms, they are not as broad as those pursued by the UN. The breadth of ADB's ability to impose rule of law principles is limited by its charter. The Agreement Establishing the Asian Development Bank<sup>3</sup> provides that the Bank "shall not interfere in the political affairs of any member [country]."<sup>4</sup>

The "political affairs" prohibition creates some interesting dilemmas. The majority of ADB's financing and TA activities are undertaken in collaboration with member countries' governments, and pursuing projects

---

3 Agreement Establishing the Asian Development Bank (4 December 1965) 571 UNTS 8303 (entered into force 22 August 1966) is the treaty that established ADB and is signed by the ADB's 67 member countries. It defines ADB's capitalization, shareholdings, operations and governance.

4 ADB Charter, Article 36.2. Nearly identical provisions appear in the articles of agreement of the World Bank, International Bank for Reconstruction and Development, Inter-American Development Bank and African Development Bank. The articles of the European Investment Bank and European Bank for Reconstruction and Development do not contain the political affairs prohibition.

that interfere with a country's political affairs would not further that collaborative spirit. Yet many ADB projects are aimed at supporting governmental functions, like enhancing the rule-making capacity of agencies or the efficiency of public management functions. While the "political affairs" prohibition would clearly prevent ADB from undertaking certain types of politically oriented TAs, where the lines are drawn is not entirely clear, and MDBs and their client countries can have different views. Certain human rights initiatives advanced by the United Nations, think tanks, NGOs and other institutions would seem to touch on political affairs. These might include certain individual freedoms, like freedom of the press, political speech, the nature of elections, and the right to vote. Other human rights would not fit easily into categories of political and non-political. In the case of ADB, its mission is economic development and poverty alleviation, and, to the extent its policies touch on rule of law principles that embody human rights, they do so in the context of its development mission, rather than from a political perspective.

### **Gender Equity**

Gender equity is a good example of a human rights issue that is also a developmental imperative. Gender equality and women's empowerment are essential for meeting Asia's aspirations of inclusive and sustainable development, and gender equality must be pursued in its own right for a just society. Beyond the moral imperative, however, women represent at least half the society in all ADB member countries, and half the nations' human capital and resources. In many cultures, traditions assign them critical operational and management roles in essential family and business functions of society. Raising living standards in an entire country – any country – is a Herculean task that requires tapping all available resources in a thoughtful and efficient way. To seek to attain a country's development potential without the full engagement of women is akin to undertaking the task with one arm, one leg and half the brain tied behind one's back – clearly not the most effective approach.

In order for women to be fully engaged in these critical endeavours, they need education, training, experience and access to capital and health care, and other resources. And, for these initiatives to be sustainable, they have to be programmatically ingrained in society and accepted culturally. These principles also have to translate into specific laws and regulations that are

correctly, fairly and consistently interpreted and applied, and have to be accompanied by a broad public awareness of the law and the availability of resources. Such a holistic approach might involve a sequencing of initiatives:

- (a) public awareness and acceptance of the moral and economic imperatives;
- (b) government and legislative commitment through appropriate laws;
- (c) implementation of laws by informed, effective, ethical and resourced ministries and agencies;
- (d) interpretation and enforcement of laws and regulations by administrators, law enforcement authorities, and judiciaries, supported by resources, and acting ethically and through due process; and
- (e) community awareness of the availability of programmes and resources, and citizens' rights under the law.

Technical assistance projects aimed at furthering these initiatives are among the most important priorities for ADB, and are enshrined in ADB's core strategy.<sup>5</sup> To that end, ADB finances, invests in, and supports projects that cover support of gender equity laws, enhance the education of women and girls, provide vocational training for women, provide microfinancing of women-owned businesses, and support women's health programs and projects that benefit mainly or substantially women's economic, educational or health issues. Specific projects include:

(i) Gender Tool Kit

In 2013, ADB launched a tool kit consisting of a menu of gender equality outcomes, results, and indicators that may be selected or adapted by users.<sup>6</sup> The tool kit is designed for a wide audience of development policy makers, planners, implementers, and evaluators in governments across Asia and the Pacific. The tool kit will assist

---

5 Asian Development Bank, *Strategy 2020: The Long-Term Strategic Framework of the Asian Development Bank 2008–2020*, (April 2008) <<http://www.adb.org/documents/strategy-2020-working-asia-and-pacific-free-poverty>> (accessed 13 January 2015). See also ADB, "Gender and Development" <<http://www.adb.org/themes/gender/main>> (accessed 13 January 2015).

6 ADB, "Gender and Development – Sector Checklists and Toolkits" <[www.adb.org/themes/gender/checklists-toolkits](http://www.adb.org/themes/gender/checklists-toolkits)> (accessed 13 January 2015).

specialists in particular sectors to identify gender equality results and indicators in designing policies and projects.

(ii) Cambodia

In 2013, the legal team completed a \$15 million finance sector program in Cambodia that will provide access to credit for over 15% of the country's people by 2017, with at least 60% of the beneficiaries being women.

(iii) Maldives Gender Equality Law

This TA provides advice and support to the Government of the Maldives on the development of a new Gender Equality Law, a diagnostic assessment of gender in several sectors of the economy, and an advocacy plan for the new law.

(iv) Gender in Islamic Societies

TAs in Pakistan and Malaysia seek to raise awareness of gender issues in Islamic societies and the critical role women can play in society and economic development.

## **Other Rule of Law Related Initiatives**

Other ADB initiatives that tie rule of law principles to economic development include the following:

(a) *Public management and investment*

(i) In Myanmar, an ADB TA provides basic public management training on leadership, governance and public management, and seeks to build capacity to formulate policy, and prepare and implement programs in key sectors, such as energy, water and sanitation, and transport and IT. This project will also support relevant ministries in Myanmar and related domestic higher education institutions to build in-house skills to develop and deliver systematic capacity development of civil servants in the country.

(ii) Another ADB TA in Myanmar aims to improve the general investment climate. The TA supports the drafting of a new company law and the establishment of an electronic registry to facilitate an investment environment conducive to private sector development and inclusive economic growth. ADB carried out a diagnostic of Myanmar's 1914 company law and

the company registry, and funded support for training senior officials from Myanmar's registry at the New Zealand Company Registry Office (to assess operations of a first-class company registry). The TA also focuses on the urgency of reforming the company law for private sector development and for attracting quality foreign investors.

(iii) ADB, in partnership with the ASEAN Capital Markets Forum, jointly developed the ASEAN Corporate Scorecard<sup>7</sup> – an ASEAN-focused methodology of corporate governance assessment, using a scorecard system that is based on international best practices. The Scorecard encourages publicly listed companies in the six participating ASEAN countries to go beyond national legislation requirements and follow internationally recognized best practices in corporate governance. Corporate governance principles are the essence of the application of rule of law principles to corporate organization and conduct, and can encourage and attract domestic and foreign investment, and build liquidity by encouraging confidence in capital markets. The ASEAN Corporate Scorecard furthers these objectives in the six ASEAN countries that use it to assess publicly listed companies. The assessment has also proven to be useful to brand ASEAN as an asset class to compete with other regional jurisdictions as an attractive investment destination.

*(b) Judiciary and building judicial capacity*

Most countries in Asia have promulgated domestic laws and have signed most international treaties on environmental protection in relation to sustainable development and modernisation. In most of these same countries, however, effective and efficient implementation is lacking, due in large degree to shortcomings in interpretation and application by the courts. To address this, ADB has undertaken numerous projects aimed at enhancing judicial capacity in environmental adjudication. In each of these, participating justices from

---

7 ASEAN Economic Community Scorecard (2012) <[http://www.theacmf.org/ACMF/upload/asean\\_cg\\_scorecard.pdf](http://www.theacmf.org/ACMF/upload/asean_cg_scorecard.pdf)> (accessed 13 January 2015).

different countries collaborate to identify common challenges and needed recourses, and to commit to knowledge-sharing and mutual support. These projects include, for example, the following:

(i) Judicial capacity – ASEAN and the environment

The ASEAN Chief Justices' Roundtable on the Environment was organised under a TA by ADB's legal department, and convened in Bangkok in November 2013 and in Hanoi in 2014. For the first time, chief justices and high court judges from all 10 ASEAN countries participated.

(ii) Judicial capacity – South Asia and the environment

Under another TA, the South Asia Chief Justices Roundtable was organized by ADB's legal department in Bhutan in 2013 and in Colombo in 2014 for the chief justices and senior judges of South Asia (Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka) to discuss strengthening of environmental adjudication and enforcement by their judiciaries in their respective countries.

(iii) A critical objective of these Roundtables is to develop and implement specific action items that further common objectives, clearing demonstrating that these are far more than mere talk-fests. As a result of these Judicial Environmental Roundtables, several countries have implemented specific programs and other action items in furtherance of important rule of law principles:

(A) Several – including Malaysia, Cambodia, Lao PDR, Vietnam, Indonesia, Myanmar and Pakistan – have established “green benches” comprised of judges with specific and specialised training in the complexities of environmental issues who would sit on cases involving the interpretation of environmental laws, compensation issues and other issues specific to this sector. These judiciaries recognize that effective environmental adjudication is a complex area requiring a specialised focus in the same way that tax courts specialise in tax cases and bankruptcy courts specialize in insolvency cases.

(B) Several have developed environmental law training modules and curriculum for training of the judges,

improvements to capacity, knowledge-sharing among judiciaries across the region, and access to justice for citizens.

(C) Some are collaborating on the development of “bench books” comprising relevant environmental policies, laws, regulations, and case law to assist judges in deciding environmental cases by providing them access to the reasoning and resources of other jurisdictions.

(D) Participating judiciaries are working on an MOU setting out further commitments on collaboration and knowledge-sharing on environmental cases, based on these countries’ similar common law principles and other legal traditions and approaches to the conservation of natural resources.

(iv) South Asian Association for Regional Cooperation (SAARC)<sup>8</sup>

ADB has supported SAARC with several TAs to actively pursue regional cooperation across the legal sector (judges and lawyers in private practice) through a number of joint regional projects, meetings, and conferences. However, despite common regional issues, similar legal systems and laws, SAARC member countries have not been able to develop a common jurisprudence due to lack of legal and judicial exchanges, knowledge-sharing and sharing of experiences with each other. SAARCLAW, a subdivision of SAARC consisting of senior members from judiciary and legal community, has been established for the purposes of disseminating information, promoting cooperation and understanding of the legal developments in the region, and developing law as an instrument of social change.

ADB entered into a Memorandum of Understanding with SAARCLAW in November 2013 to collaborate on legal and judicial initiatives with the objective of assisting the broader

---

8 The South Asian Association for Regional Cooperation (SAARC) is an economic and geopolitical organisation of eight countries located primarily in South Asia: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.

development of rule of law principles and judicial capacity-building in South Asia.

(c) *Financial institutions and financial markets*

ADB regularly undertakes TAs to support the development of financial systems, capital markets and financial institutions as a critically important component of DMCs' sustainable development, including assistance with strategies for Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT). Over the last year, under ADB's Law, Justice and Development program, TAs have focused on several important areas:

(i) Tajikistan

Tajikistan became a member of the WTO in 2013, and ADB has undertaken several projects to assist the country in its transition to open markets and financial sector reform. The international Financial Action Task Force (FATF) has identified Tajikistan as having strategic AML/CFT deficiencies. ADB was engaged to assist Tajikistan to develop an action plan with FATF to enable Tajikistan to integrate into the international financial community, thereby facilitating its participation in international financial transactions and encouraging foreign investment and the development of capital markets.

(ii) Cambodia

ADB has undertaken a TA for the Government of Cambodia to support certain key government agencies to implement the key policy milestones and to provide the government with timely policy advice to formulate a national AML/CFT strategy, enhance compliance by reporting banks and financial institutions and raise public awareness among casinos and non-supervised entities on AML/CFT.

(iii) Mongolia

ADB has undertaken a TA for the Government of Mongolia to strengthen its anti-money laundering regime. The TA supports capacity development for about 40 officers from the participating government authorities in Mongolia over a 2-year period. They will be trained through workshops in money laundering and terrorism financing trends and typologies,

investigation techniques, legal and evidentiary issues, and case preparation for investigation and prosecution, which will be applied in their operational work. There will also be post-workshop mentoring and secondments to agencies in other ADB client countries.

(iv) Lao PDR

ADB engaged in a TA for Lao People's Democratic Republic (Lao PDR) aimed at strengthening supervision of commercial banks; capacity development for the microfinance supervision unit of the central bank of Lao PDR; and capacity development for the Financial Intelligence Unit (FIU) of Lao PDR.

These initiatives are but a few of the hundreds of TAs undertaken by ADB each year across Asia and the Pacific, all of which seek to enhance development and contribute to the ultimate eradication of extreme poverty. The vision of sustainable economic development is almost certainly unattainable without furthering the broadest and deepest possible acceptance and application of rule of law principles.

---

**THE RULE OF LAW IN BUSINESS  
AND FINANCE**





## RULE OF LAW IN BUSINESS AND FINANCE: DEVELOPMENT AND HUMAN RIGHTS ISSUES

**Professor Robert McCorquodale<sup>1</sup>**

*Director, British Institute of International and Comparative Law*

John Ruggie, the Special Representative of the Secretary-General of the United Nations (UN) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG),<sup>2</sup> began his ground-breaking work for the UN with this statement:

Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights ... [H]istory teaches us that markets pose the greatest risks – to society and business itself – when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability. This is such a time and escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well.<sup>3</sup>

His comment encapsulates some of the key issues for business and finance today: generating economic development and growth while being alert to rule of law and social development issues.

---

1 The Bingham Centre for the Rule of Law, which co-organised the Symposium at which this paper was delivered, is a part of the British Institute of International and Comparative Law. Much of this paper reproduces parts of Robert McCorquodale, “International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights” in Lara Blecher, Nancy Stafford and Gretchen Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (American Bar Association, 2014) at pp 51–78.

2 Reports of the SRSG are available at <<http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.asp>>.

3 *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General of the United Nations on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc A/HRC/8/5 (7 April 2008) at para 2.

Indeed, business and finance are crucial for development. They are involved in investment and trade, as well as being employers and purchasers. At the same time, ensuring the rule of law, with its stability, transparency and accountability, creates an environment where development of all kinds is possible. There is economic research showing that entrenchment of the rule of law will have beneficial economic results, and is critical to developing the trust and certainty needed for entrepreneurship activity.<sup>4</sup> This also shows that a functioning judiciary applying credible rules in the absence of corruption enhances the investment environment.<sup>5</sup> Indeed, the World Bank now regularly produces indicators that show correlations between real Gross Domestic Product (GDP) per capita and the rule of law, such that GDP per capita increases as the rule of law becomes more firmly entrenched in a state.<sup>6</sup> Indeed, *The Economist* has described the rule of law as the “motherhood and apple pie of development economics”.<sup>7</sup>

The rule of law has been deftly defined by Tom Bingham, who was President of the British Institute of International and Comparative Law at his (untimely) death.<sup>8</sup> This is discussed elsewhere. What is relevant for this paper is that he did not see the rule of law as merely procedural (or “thin”) but as being substantive (or “thick”) and so it affects people’s daily lives.<sup>9</sup> Thus he made clear that the rule of law includes that states must comply with their international legal obligations and that the law afford adequate protection of human rights. In this way, the rule of law includes justice in a substantive sense as part of its elements, and that part of modern justice requires respect for human rights, including, for example, the right to a fair

---

4 See Jason Higbee and Frank A Schmid, “Rule of Law and Economic Growth” *International Economic Trends* (August 2004) <<http://research.stlouisfed.org/publications/iet/20040801/cover.pdf>> (accessed 14 January 2015).

5 See Robert Lensink and Gerard Kuper, “Recent Advances in Economic Growth: A Policy Perspective” in Maaike Oosterbaan *et al* (eds), *The Determinants of Economic Growth* (Kluwer 2000) and Kenneth W Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press 2006).

6 World Bank Governance Indicators are available at <<http://info.worldbank.org/governance/wgi/index.aspx#home>> (accessed 14 January 2015).

7 “Economics and the Rule of Law”, *The Economist* (London) (13 March 2008).

8 *The Rule of Law* (Allen Lane, Penguin Press, 2010).

9 He thus disagreed with Simon Chesterman, “An International Rule of Law” (2008) 56 *American Journal of Comparative Law* 331 at 340.

trial, freedom from discrimination, rights to participation in public life, labour rights and cultural rights.

## **Business and Human Rights**

The SRSG created a Framework and then Guiding Principles to put this framework into operation. This Framework has three elements (or “pillars”): the state’s duty to protect against human rights abuses by corporations; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The justification for this Framework is stated to be:

[There is] the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse ... The three principles form a complementary whole in that each supports the others in achieving sustainable progress.<sup>10</sup>

He clarified that all corporations (which he calls “business enterprises”) of all sizes, configurations and locations can abuse all human rights and that simply making profits was no longer the social expectation of a business enterprise. The Guiding Principles were adopted by the UN Human Rights Council,<sup>11</sup> and are now included in large number of global and regional documents, including those that affect finance (such as the Equator Principles).<sup>12</sup> They are the current parameter for discussion in this area.

---

10 *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General of the United Nations on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc A/HRC/8/5 (7 April 2008), para 9.

11 *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, endorsed by the UN Human Rights Council in its resolution 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

12 The Equator Principles, which concern project finance, are available at <<http://equator-principles.com/>> (accessed 14 January 2015).

**(a) State's duty to protect human rights**

Under international human rights law, each state has a duty, or legal obligation, to protect against human rights abuses. The obligation on a state to protect human rights includes an obligation to protect against abuses by state officials. This also includes an obligation to protect against actions by non-state actors (such as business enterprises) within its territory that violate human rights, including in conflict zones.

These customary international law obligations (being obligations on all states) are essentially restated in the first Guiding Principle:

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

The human rights that are expressly included as being a legal obligation on all states under the Guiding Principles are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Labour Organisation core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

Therefore, in relation to the first pillar of the Framework and the Guiding Principles, each state has extensive legal obligations to protect all those within its territory from violations of human rights by both state officials and by business enterprises in relation to those human rights for which the state has accepted legal obligations (under both treaty and customary international law). It is my view that this obligation extends to activities by a business enterprise outside the territory of the state and requires a state to enact laws and establish practices to protect against human rights violations, which may include regulation of both corporate nationals and their subsidiaries wherever occurring.

The extent of the regulation required by states is indicated in the Guiding Principles 3 to 7, which clarify the state's regulatory and policy functions, from oversight of commercial transactions to control of state-owned business enterprises, and Guiding Principles 8 to 10, which concern policy coherence by states both domestically and in relation to their roles internationally. This policy coherence is not limited to a state's implementation of its own international human rights obligations but extends horizontally as well, as the Commentary notes:

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments’ human rights obligations.<sup>13</sup>

Thus states should ensure that they meet their international human rights obligations, including not allowing investment treaties to restrict their human rights protection activities while also ensuring that their own engagement with business enterprises, such as in export credit guarantees and public procurement processes, do respect human rights, and states should ensure that business enterprise acting in conflict zones, fragile states and emerging markets are appropriately regulated. If states take these obligations and these approaches seriously then significant steps forward would be made in the protection of the human rights affected by corporate activity.

One abiding message of the SRSG’s approach in relation to the state’s duty to respect human rights is that inaction by a state in this area is in breach of its international human rights legal obligations. Indeed, he goes further to warn that “States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights”.<sup>14</sup>

### ***(b) Corporate responsibility to respect***

The Framework, as elaborated in the Guiding Principles, has made clear that business enterprises have a responsibility to respect human rights. This responsibility is defined as follows:

[The corporate] responsibility to respect is defined by social expectations – as part of what is sometimes called a company’s social licence to operate ... [and] ‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps. ... To discharge the responsibility to respect requires

---

13 Commentary to Guiding Principle 8.

14 Commentary to Guiding Principle 3.

due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.<sup>15</sup>

This is a strong and important statement that is then set out in the Guiding Principles in five “foundational” principles, being Guiding Principles 11 to 15. In addition, the Guiding Principles make clear that the corporate responsibility to respect human rights “exists independently of states’ abilities and/or willingness to fulfil their own human rights obligations [and]... over and above compliance with national laws and regulations”.<sup>16</sup>

The Framework does not alter the position that, under the current international human rights law structure, business enterprises do not have any direct international legal obligations. Accordingly, business enterprises cannot be directly responsible for violations of international law.<sup>17</sup> Yet, the SRSG acknowledged that this responsibility is not a “law-free zone”, and will be affected by developments in law, especially national law.<sup>18</sup>

Many business enterprises and business organisations have supported this pillar of the Framework.<sup>19</sup> Much of this support comes because many of these business enterprises see their Corporate Social Responsibility (CSR) policies as being the equivalent to a human rights policy and/or as making

---

15 *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General of the United Nations on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc A/HRC/8/5 (7 April 2008) at para 54-56.

16 Commentary to Guiding Principle 11.

17 This is due to the fact that international human rights law imposes the legal obligations to protect human rights on states alone, and has not yet developed so as to regulate directly the activities of business enterprises, or other non-state actors. For a discussion of this, see Rorbert McCorquodale and Rebecca La Forgia, “Taking off the Blindfolds: Torture by Non-State Actors” (2001) 1 *Human Rights Law Review* 189.

18 See SRSG Report 2010 at para 66.

19 See, for example, the International Chamber of Commerce, Joint Views of the International Chamber of Commerce and the International Organisation of Employers to the 8th session of the Human Rights Council on the [SRSG Report], March 2009, available at <<http://www.ioe-emp.org/other-international-organizations/ohchr/>> (accessed 27 January 2015).

them compliant with human rights norms.<sup>20</sup> However, having a CSR policy is not the same as providing protection for all human rights. While there are a variety of definitions of CSR, one that is frequently used is:

CSR can be defined as a concept whereby companies voluntarily decide to respect and protect the interests of a broad range of stakeholders and to contribute to a cleaner environment and a better society through active interaction with all. CSR is a voluntary commitment by business to manage its role in society in a responsible way.<sup>21</sup>

What is important about all the definitions is essentially that CSR efforts are management-driven and corporate-determined policies that are designed to assist the business enterprise, including in terms of its reputation, even if genuinely aimed for a positive social end.

In contrast, human rights protections are person-centred and have legitimate compliance mechanisms (even if these are not always very strong). Human rights are not voluntary. Human rights are an expression of human dignity and the right to be protected in that human dignity.<sup>22</sup> In addition, most CSR policies tend to refer to, or focus on, a limited range of human rights, such as the right to privacy or freedom from torture. While there is now a growing acceptance by many of the major transnational business enterprises that CSR policies need to align with human rights, it is still vital that this distinction between CSR policies and human rights protections is made clearly and unequivocally.

The Framework, as reflected in the Guiding Principles, draws a deliberate distinction between the state's "duty" to protect and the corporate "responsibility" to respect. This is perhaps trying to sharpen the difference

---

20 See, for example, the survey evidence of business enterprises in relation to human rights in Adam McBeth and Sarah Joseph, "Same Words, Different Language: Corporate Perceptions of Human Rights Responsibilities" (2005) 11 *Australian Journal of Human Rights* 95.

21 Ramon Mullerat, "Corporate Social Responsibility (A Human Face to the Global Economy)" (2004) 5 *Oil Gas and Energy Law*; and Ramon Mullerat (ed) *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law, 2005).

22 The literature on human rights is vast. For a useful summary see James Nickel and David Reidy, "Philosophy" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010).

between legal and moral obligations, as well as in the scope of the obligation. This corporate “responsibility” is called a “social expectation” in the SRSG Report 2008, as quoted above.<sup>23</sup> In the SRSG Report 2009, it is called a “social norm” on which a corporation’s “social licence to operate is based”<sup>24</sup> and in the SRSG Report 2010 it is seen as a “standard of expected conduct”.<sup>25</sup> So there has been a degree of movement and lack of coherence in the definition. Yet the concept of corporate responsibility, as Ruggie himself noted in an earlier report, is that it is “the legal, social or moral *obligations* imposed on companies [emphasis added]”.<sup>26</sup> That earlier view is consistent with the general understanding that:

[T]he concept of corporate responsibility is based on the expectation that private companies should no longer base their actions on the needs of their shareholders alone, but rather have obligations towards the society in which the company operates.<sup>27</sup>

General Principle 13 sets out the key issues of the corporate responsibility to respect human rights. It provides:

The responsibility to respect human rights requires that business enterprises:

- (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

---

23 Quotation at n15 above.

24 See SRSG Report 2009 at para 46.

25 See SRSG Report 2010 at para 55.

26 *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General of the United Nations on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie UN Doc A/HRC/4/35 (19 February 2007) at para 6.

27 Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press, 2009) at p 18. She prefers the use of the term “corporate accountability”, as it implies that they are answerable to others for their actions.

There is thus a clear distinction made here between the responsibility on a business enterprise to “avoid” causing or contributing to its own human rights impacts (13(a)) and the responsibility to “seek to prevent or mitigate” impacts by third parties (13(b)). This distinction is also seen in the use of the term “leverage” to describe how a business enterprise should respond to actions by third parties. For example, General Principle 19(b)(ii) provides that appropriate action by a business enterprise will depend on the “extent of its [the business enterprise’s] leverage in addressing the adverse impact”. In the Commentary to General Principle 19, it is stated:

Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm. Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.<sup>28</sup>

Therefore, it can be seen that there are two different standards operating in the application of General Principle 13 to a business enterprise: a strict standard of avoiding its own impacts, and a leveraged standard for seeking to prevent others’ impacts. The former is consistent with the human rights legal obligations on states, which is objective and for which compliance can be determined, and the latter is more consistent with the business practices, which are more voluntary and based on the business enterprise’s own risks.

The concept of “due diligence” is used throughout this pillar, with Guiding Principle 15, being one of the “foundational” principles, providing:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) a policy commitment to meet their responsibility to respect human rights;
- (b) a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

---

28 Commentary to Guiding Principle 19.

- (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Guiding Principles 17 to 21, which discuss the practical steps that business enterprises should take to discharge this responsibility, appear under the heading “[h]uman rights due diligence”.<sup>29</sup> These steps include having a human rights policy; assessing human rights impacts of company activities; integrating those values and findings into corporate cultures and management systems; and tracking as well as reporting performance. A key matter is the need for free and fair consultation and consent, which should be done as early as possible in any development.

In any event, the lack of clearer legal obligations on business enterprises in the Framework and Guiding Principles in relation to their activities that violate human rights makes it very difficult to access or enforce any remedies against them.<sup>30</sup> This is of particular importance as Guiding Principle 22 provides that “Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”. This leaves the issue as to how to access a remedy, which is the third pillar of the Framework.

### **(c) Access to remedy**

The third pillar of the framework is the need for access to a remedy. This is expressed in terms that there should be “effective grievance mechanisms” for the actions of both states and business enterprises, “where there is a

---

29 For a fuller discussion of the issue of due diligence in the Guiding Principles, see Jonathan Bonnitcha and Robert McCorquodale, “Is the Concept of ‘Due Diligence’ in the Guiding Principles Coherent?” (29 January 2013) <<http://ssrn.com/abstract=2208588>> (accessed 14 January 2015).

30 See, for example, the cases against Coca-Cola in Colombia where the company was accused of complicity in the murder of trade union members working at a Coca-Cola bottler but it was not held liable because the company’s involvement was not deemed sufficiently proximate to find legal liability. *Sinaltrainal v Coca-Cola* (2009) 578 F 3d 1252; Mark Thomas, “Colombia: To Die For” *The Guardian* (20 September, 2008); Alison Frankel, “11th Circuit Invokes ‘Iqbal’ in Affirming Dismissal of Alien Tort Claim Against Coca-Cola and Bottlers” *The American Lawyer* (August 13, 2009).

perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, explicit or implicit promises, customary practice, or general notions of fairness".<sup>31</sup> The remedies can be judicial and non-judicial.<sup>32</sup>

A state has an obligation under international human rights law to provide a remedy where there is a violation of human rights.<sup>33</sup> While a state has some discretion as to how to provide a remedy, it must be "accessible and effective ... [with] appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law".<sup>34</sup> As shown above, a state's obligation to protect human rights includes an obligation to regulate, through law and practice, the actions of business enterprises which violate human rights. This obligation requires states to regulate their corporate nationals as part of the state's responsibilities under international human rights law. This obligation is confirmed in Guiding Principle 25, which is the "foundational" principle of the third pillar. It provides:

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

States have been poor in their action in this area, with many obstacles to its achievement.<sup>35</sup>

An appropriate and effective way that states can comply with their obligation to enable access to remedies, would be to amend their corporate/company law, including in areas such as directors' duties, to regulate the responsibility of a business enterprise in relation to any of the business enterprise's activities (including extraterritorially and for its

---

31 SRSG Report 2010 at para 90.

32 SRSG Report 2008 at paras 82–103. See also Guiding Principle 25 on effective remedies.

33 Guiding Principle 1 reiterates this position.

34 UN HRC General Comment 31 at para 15. Guiding Principle 25 reiterates this standard but also refers to *any* appropriate means.

35 See Gwynne Skinner, Robert McCorquodale, Olivier De Schutter and Andie Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (ICAR, 2013).

subsidiaries) that could adversely impact on the protection of human rights. Many states are now doing this,<sup>36</sup> and some states are also extending their criminal law to include corporate activity.<sup>37</sup> This principle could extend beyond corporation/company law to other areas of law as well.<sup>38</sup> As discussed above, laws should also be developed so that parent corporations are clearly legally responsible in their home state for the actions of their subsidiaries in other states that occurred due to the subsidiary operating the policies of the parent corporation (for example, on human resource policies, marketing and finances).<sup>39</sup> This may also be a means to enable appropriate capacity building support to occur in some economically weaker states.

In relation to business enterprises' obligations concerning access to remedies, the Guiding Principles provide:

29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

While many business enterprises have committed themselves to global, sectoral or other statements about CSR, some of which include reference to

---

36 See, for example, the UK Companies Act 2006 that requires directors to “have regard” to such matters as “the impact of the company’s operations on the community and the environment” as part of their duties (section 172(1)(d)), and the South African Companies Act 2008 allows the Government to prescribe social and ethics commitments for companies (section 72 (4)).

37 See, for example, Italian statute Decreto Legislativo 231#, 2001, and Australian Commonwealth Criminal Code 1995.

38 For example, the UK Agency Worker Regulations (in effect from October 2011) require UK employers to ensure that short-term contract workers (many of whom are non-nationals) have comparable employment protections to permanent workers.

39 An example is the California Supply Chain Transparency Act 2010, under which companies worth more than a stated amount are required to report on whether they are engaged in ethical supply chain management and the extent of this engagement. By setting a volume threshold in capturing companies under the law, foreign companies operating in California are subject to its extraterritorial effect, as foreign companies must report on foreign suppliers linked to California.

human rights,<sup>40</sup> these are all voluntary commitments and none of them have any compliance mechanisms with independent dispute settlement bodies. This prevents access to legally effective remedies.<sup>41</sup>

Guiding Principle 31 sets out the effectiveness criteria for business enterprises in relation to access to a remedy (all of which are non-judicial). It provides that these mechanisms should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue. While these are very useful and laudable aims, it can be argued that the due diligence responsibility of business enterprises, especially when related to impacts caused by the business enterprise itself, should, as discussed above, be directly linked to effective, legitimate monitoring and compliance mechanisms regulated by law and not left to regulation by a self-reviewing system.<sup>42</sup> Of course, such independent judicial mechanisms do not exist in

---

40 For example, the UN Global Compact, available at <<http://www.unglobalcompact.org>>. The Global Compact includes the following principles that business enterprises should adopt: “World Business *Principle 1*: support and respect the protection of human rights within their sphere of influence; *Principle 2*: make sure that their own corporations are not complicit in human rights abuses”. See also the promotion of CSR by the International Council on Mining and Metals, available at <<http://www.icmm.com/our-work/sustainable-development-framework>>. The Equator Principles <<http://equator-principles.com/>> and the Extractives Industry Transparency Initiative <<http://eiti.org/>> are two additional examples (all pages accessed 14 January 2015).

41 See, for example, the chemical industry activities: James Colopy, “Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States” (1994/1995) 13 *UCLA Journal of Environmental Law and Policy* 167; Robert Gottlieb *et al*, “Greening or Greenwashing?: The Evolution of Industry Decision Making”, in Robert Gottlieb (ed), *Reducing Toxics: A New Approach to Policy and Industrial Decision Making* (Island Press 1995). In relation to the oil and gas industry, see Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitcha, Antony Crockett and Audley Sheppard, “Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles” (2013) 6 *Journal of World Energy Law and Business* 2 at section 4.

42 There is also likely to be more consistency if international human rights standards are applied than if they are either nationally based or deal with cultural issues in a different way to international human rights law.

some states, especially in conflict zones and fragile states, and so there is also a requirement for the rule of law to be supported.<sup>43</sup>

Indeed, it might be argued that most business enterprises respond better to preventative regulation by a state than to reactive litigation, not least because it reduces uncertainty and risk for the business enterprise. Business enterprises, as legal entities, have been held to be legally responsible around the world for actions that violate aspects of human rights, such as in consumer protection areas and environmental damage. There is also the possibility of joint liability at the international level for a state and one or more business enterprises, in the same way as can occur within many states' national laws.

Hence, the last pillar of the Framework is essential but, as it is built on the other two pillars, it has flaws, not least in whether there can be an effective access to a remedy against a business enterprise when there is no legal obligation on that business enterprise to have a legally enforceable grievance mechanism. There will also be issues of costs, standing and access to justice which will require effective cooperation between and within states.<sup>44</sup>

## Ways Forward

The SRS's Guiding Principles have made a significant change in the debate about the responsibility of business enterprises for violations of human rights, as has his method of active consultation. There is still a great amount of work to be done to ensure that the obligations and standards recommended are not the very minimum but are a platform for dynamic

---

43 For a fuller discussion of the importance of the rule of law in this area, see Robert McCorquodale, "Business, the International Rule of Law and Human Rights", in Robert McCorquodale (ed), *The Rule of Law in International and Comparative Legal Context* (BIICL, 2010). Also Guiding Principle 7 stresses conflict zones as a major concern for corporate complicity in human rights abuses.

44 This is also seen in the debate in the UK over contingency fees, which human rights advocates fear could be amended to prevent business and human rights cases from being viable due to cost implications for victims and plaintiffs' lawyers. Roger James, "Global Justice Under Threat from Legal Aid Plan" *Bristol 24/7* (28 March 2012); Daniel Brennan, "The Legal Aid Bill Will Enable Multinationals to Exploit the Poor" *The Guardian* (26 March 2012).

change, and that, as a consequence, there is support for capacity building initiatives to assist governments and business enterprises around the world towards upholding their responsibilities.

A major step towards this would be the increase of the rule of law worldwide. If states uphold the rule of law then they will not only protect human rights but attract and sustain business enterprises. If business enterprises, through their practices, codes of conduct, increased transparency and accountability, act to protect human rights then their management risks are reduced. Indeed, it is important that rule of law risks are expressly included in business decision-making.

Legal regulation consistent with international human rights law is needed in the application of the Guiding Principles. Indeed, much of the activity of business enterprises is assisted substantially by the operation of a rule of law. A rule of law, as Tom Bingham stated, requires good governance consistent with justice and human rights, that all actors are accountable to the law (including governments and those with power), that all actors can have disputes settled in an independent and accessible way, and that there are compliance checking mechanisms. Where there is an effective rule of law, business enterprises can conduct their business aware that there is likely to be a large degree of stability, certainty and recourse, and hence reduce their risks.<sup>45</sup> Therefore, as noted in the opening quotation, it is essential for both the protection of human rights and the integrity of markets to find the best solutions in law and practice.

---

45 See the report from the World Bank on the link between the Rule of Law and GDP: Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, "Governance Matters IV: Governance Indicators for 1996-2004" (May 2005) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=718081](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=718081)> (accessed 14 January 2015).

## DEVELOPMENT, THE RULE OF LAW AND BUSINESS

**Professor David Kinley**

*University of Sydney*

### **How Hard it Can be?**

Some 18 months ago I found myself sitting in a room in the middle of Yangon filled with Western diplomats, aid agencies, human rights NGOs, and local bureaucrats and business representatives.

It was six months after the country had begun its reforms in earnest: Aung San Suu Kyi had been released (together with many other political prisoners); a mini election, including National League of Democracy candidates, had just been held and Parliament was sitting; and press restrictions had been removed. The Generals had swapped light green combat uniforms for dark grey lounge suits, and Myanmar had declared itself “open for business”.

Of all the matters that were raised and discussed in the room on that afternoon, the most compelling was how to handle the tsunami of international funding and finance that was now heading the way of a state that had been, just a year earlier, an international pariah. I vividly recall a short statement made by an official from the Myanmar Chamber of Commerce that stunned everyone. He told us that during 2011–2012 more than US\$20 billion in foreign investment has been promised (a 20-fold increase on the year before), and that nearly 500 foreign companies had registered to do business in the country in the past year alone (from a prior base of a mere handful), mostly in the mining, energy and construction sectors. On top of what everyone in the room knew was the eagerness of donor agencies to pour money into the country as soon as possible, the implications of such exponential increases in investment were truly staggering – both in terms of the opportunities and the challenges they would offer.

And so it has proven to be. Foreign corporations, trade commissions, diplomatic delegations, aid agencies, civil society organisations, and a welter of experts and consultants of every kind are now tripping over themselves doing work in the country. Yangon has now some of the most expensive

hotel rooms in the world, such is the enormous demand on their limited supply!

The capacity of much else in Myanmar is also being tested to its limits, including, and perhaps especially, its capacity for institutional and regulatory reform. The rule of law – to the extent that it existed at all in recent decades – has had to be reinvented and reconstructed. The sclerotic court system (which had been thoroughly subjugated under the previous regimes) and an independent Bar worthy of the title (led by a few truly heroic individuals who had raged against its systematic destruction over the past decades) are in the process of being revived; the Executive and Legislature are learning to live with each other and, crucially, sometimes in opposition to each other; and new laws and institutions of governance are sprouting up everywhere. The currency has been floated; a new and comprehensive tax regime established; new corporate codes and investments rules enacted; and new regulatory bodies created including an anti-corruption commission, a powerful committee reviewing foreign investment and ownership proposals, and a less powerful (but symbolically important) Human Rights Commission.

To pursue economic development and the establishment of the rule of law together (as must be the case), is no easy task as Myanmar, and indeed all developing states (and many developed ones!), bear testimony. But in Myanmar, businesses, financiers, development economists, human rights advocates and government officials alike are all agreed at least on these twin objectives. The two go hand in hand, simultaneously feeding off, and promoting, one another. Still, while this is all very well and easy to say, putting the theory into practice in any state is a hugely difficult task, and one, what is more, that is never-ending.

## **Globalisation and the Rule of Law**

Though vast and important, the opportunities and challenges for economic development in our current era of globalisation, are mostly expected and mostly known. For the rule of law on the other hand, globalisation has thrown up issues that are less predictable and often less well known. At best, we might classify such issues as “known unknowns”. At worst, we are floundering in a world of lawlessness – that is, at least, its absence in terms of our modern perceptions of law and its critical role in governance. This “worst case scenario” is no idle threat. According to the UN Commission

on Legal Empowerment, most of the world's population (some 4 billion people, or approximately 60%) live from day to day without any access to, or interaction with, a formalized legal system of any kind.<sup>1</sup> The most significant consequences of such exclusion, as made clear to the Commission through data collected from those who are excluded, were a revealing mix of basic human rights and the practical conditions of doing business – namely, the need for:

- (a) access to justice (a fair and independent system of dispute resolution);
- (b) the securing of rights to property (for reasons of security of residence, business and finance);
- (c) the protection of labour rights (freedom from discrimination and exploitation); and
- (d) what were loosely called, “business rights” (that is, contractual certainty, financial fairness, and freedom from corruption and extortion).

As to the “best case scenario”, what I mean by the “known unknowns” is based on what we understand to be the differences between rule of law theory and its practice – or rather, to be more precise, what we understand to be the differences between competing conceptions of the rule of law and, thereby, the resultant differences in their practical implementation. At its most basic, the schism in rule of law thinking traces the line between those who see its characteristics and qualities being essentially (though not necessarily exclusively) formal and procedural, and those who see them as necessarily substantive and outcome dependent, as well as formal and procedural. To put this divide in the form of a pair of questions, we might ask: (1) to what extent must we invest standards of fairness and equity of result in the notion of the rule of law, in addition to the fairness and equity of the process by which the result is obtained; and (2) if we are to accept (to whatever degree) that the rule of law comprises substantive and outcome concerns, what might be their composition? The most persuasive answers to these questions are: to Question 1, that substantive outcomes such as

---

1 United Nations Development Programme (UNDP), *Making the Law Work For Everyone*, Report of the Commission on Legal Empowerment of the Poor (2008) <[http://www.unrol.org/files/Making\\_the\\_Law\\_Work\\_for\\_Everyone.pdf](http://www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf)> (accessed 15 January 2015).

fairness, equity and accountability (through transparency) are inherent to the procedural rule of law (as Simon Chesterman and Robert McCorquodale, among others, have argued); and to Question 2, that the precise composition of such substantive outcomes must reflect the standards set by universal human rights laws, as, notably, both Lord Bingham and Lord Phillips of Worth Matravers have suggested.

In the context of globalization and the pursuit of economic development for all countries – but especially for the poorest – the answers to these questions are of fundamental importance. In effect, they determine the extent to which notions of individual freedom and societal equity are going to be the companions to economic development, rather than its victim. Business – and especially, cross-border business – is by far the most important driver of economic development today. Once upon a time (in the 30 years following the Second World War), aid (or Official Development Assistance (ODA)) was the greatest source of transnational capital investment, but in the last 30 years ODA has been eclipsed by the overwhelming (if erratic) rise of flow of Foreign Direct Investment (FDI). The basic statistics are conclusive on this point, with global FDI flows to developing and transition economies (in 2010 figures) being around four times greater than global ODA – that is, ODA of roughly \$140bn versus an FDI inflow of roughly \$600bn.<sup>2</sup> Furthermore, a significant proportion of official aid is now directed towards stimulating private enterprise, by way of “public-private partnerships” as long-term investment vehicles, and through “aid for trade” initiatives driven by, for example, alliances between the World Trade Organisation (WTO) and the World Bank, and between the trade and aid branches of many national governments (practised by China as avidly as by the US).

The rule of law has always been critical to the establishment and sustainability of private commercial enterprise. But now that the private sector plays such a predominant role in the propagation of economic development on a global scale, its relationship with the rule of law becomes

---

2 United Nations Development Programme (UNDP), *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty* (September 2011) <[http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Towards\\_SustainingMDG\\_Web1005.pdf](http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Towards_SustainingMDG_Web1005.pdf)> (accessed 26 January 2012) at pp 147–148 and 161.

a matter of vital importance to the nature as well as success of economic development.

### **Perceptions of the Rule of Law**

A dozen years or so ago, when the most recent incarnation of the business and human rights debate was in its infancy, I suggested that when it comes to the rule of law, the two sides of the debate look for, or stress, different components in the makeup of the rule of law.<sup>3</sup> Put simply, the argument was that business favours order, predictability and enforceability – in other words, the procedural or formal features of rule of law. Human rights activists, in contrast, are more concerned with substantive outcomes – improvements in individual liberty and equality, through wider/fairer access to social goods.

While I think there is still some value in this relative distinction, it is neither as stark nor as straightforward as perhaps I had originally thought. In fact – and perhaps especially over the past ten to 15 years – the significance and utility of individual protections is now more apparent in, and to, businesses. On the other hand, the benefit, and indeed necessity, of procedural propriety to the promotion and protection of human rights is more apparent to rights advocates, especially in countries in which the rule of law has been compromised or is absent – as is the case in many states struggling with economic development. So, in other words, in terms of the rule of law, the two sides of the debate have crossed, or are crossing, the divide.

Certainly, there are positive signs. Here I note just some of the most notable:

- (a) The business community's widespread endorsement of the UN Human Rights Council's 2011 Guiding Principles on Business and Human Rights<sup>4</sup> that seek to demark (or obscure?)

---

3 David Kinley, "Human Rights, Globalization and the Rule of Law: Friends, Foes or Family?" (2002–2003) 7 *University of California, Los Angeles, Journal of International Law and Foreign Affairs* 239.

4 *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, endorsed by the UN Human Rights Council in its resolution 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

- the difference between the human rights obligations of states and the human rights responsibilities of corporations;
- (b) The broadening of concerns that financial institutions ought now consider under the Equator Principles (Mark III)<sup>5</sup> when scrutinizing project finance proposals to include more social as well as environmental standards;
  - (c) Various initiatives that encourage or mandate greater transparency in cross-border business transactions, such as the US Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 focusing on the financial sector, and the Extractive Industries Transparency Initiative focusing on the mining sector;<sup>6</sup>
  - (d) The WTO-brokered 2013 Bali Agreement on the facilitation of international trade,<sup>7</sup> which not only underscores the legal right of developing states to employ trade protectionist measures when the necessity of food security so demands, it may also have rescued the whole multi-lateral trade regime from sinking beneath the waves of alternative bilateral trade negotiations;
  - (e) The growing recognition throughout the jurisprudence of international human rights courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, as well as in the opinions of UN human rights treaty bodies, that states not only have extra-territorial human rights obligations, but that those obligations could encompass vicarious liability for the overseas rights abuses by corporations domiciled in their jurisdiction;<sup>8</sup>
  - (f) That – despite reports to the contrary – the US’s Alien Torts Claims Act 1789 (ATCA) remains a force for holding US

---

5 The Equator Principles Association, *The Equator Principles III* (June 2013) <[www.equator-principles.com](http://www.equator-principles.com)> (accessed 15 January 2015).

6 See <<https://eiti.org/>>.

7 Agreement on Trade Facilitation (Dec 2013), WT/MIN(13)/36 <<http://docsonline.wto.org>> (accessed 15 January 2015).

8 See Daniel Augenstein and David Kinley, “Beyond the 100 Acre Wood: In which International Human Rights Law Finds New Ways to Tame Corporate Power Overseas” (2015) 18 *International Journal of Human Rights* (forthcoming); see <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2501876](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501876)> (accessed 26 January 2015).

corporations (and foreign corporations with “substantial and systemic” operations in the US) to account for human rights abuses committed overseas. And, in any case, the jurisdictional reach of “ordinary” tort law continues to extend abroad, as demonstrated not only by case law in the various US federal circuit appeals courts (especially California and New York), and the UK, but also in European Civil Code systems as well;<sup>9</sup>

- (g) The express recognition – if not yet clear enforcement – in international investment dispute settlement fora, of the precedence of obligations in international human rights law over investment treaty guarantees, in the sense that the latter cannot provide protection to an investor where their actions contravene local human rights laws that implement a state’s obligations under international law;<sup>10</sup>
- (h) Global supply chains – especially in clothing and footwear manufacture – are being better managed, as the corporations (with reputations to lose) sitting at the head of these supply chains, are pressured into taking some degree of responsibility for the actions of their suppliers; as well as host-state governments shamed into improving their regulation and control of local industries – as illustrated by some of the positive (albeit modestly so) outcomes following the outrage of the Rana Plaza building collapse in Bangladesh in 2013;<sup>11</sup>
- (i) And finally, the prospect (or “possibility”) of the institution of a financial transactions tax (FTT) in the European Union (EU) by mid-2016, which has the potential to raise enough possibly to double (present figures are inconclusive) the EU’s aid budget – that is, despite the fact that it will almost certainly not include the country that hosts the site of Europe’s heaviest concentration

---

9 See Cees van Dam, “Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights” (2011) 2 JETL 211.

10 See Ursula Kriebaum, “Foreign Investments & Human Rights: The Actors and Their Different Roles” (2013) 10 *Transnational Dispute Management* 1.

11 See David Kinley and Jahan Navidi, “The Long Arm of Human Rights Risk: Supply Chain Management and Legal Responsibility” (2013–14) 3 *The Business and Human Rights Review* 10 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2340821](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340821)> (accessed 26 January 2015).

of “high frequency trading” (at which the FTT is principally aimed), namely, the United Kingdom.

But there are negative signs too, as evident in various flaws and compromises associated with all of the above listed positives. For example:

- (a) There is an inherent weakness in the voluntarism that underpins the UN’s Guiding Principles on Business and Human Rights, the financial sector’s Equator Principles, and the supply chain management agreements established by industry bodies and individual corporations alike.
- (b) The regulatory capacity of a great many developing countries is often pitifully inadequate or wholly compromised by corruption (or both), such that the prospects for the establishment of anything like a robust system of the rule of law in some countries remain dim.
- (c) There is, among states, a conspicuous lack of translation of (or even the will to translate) their extraterritorial obligations under international human rights laws into domestic laws. The US Alien Tort Claims Act and ordinary torts in Western states are, in fact, exceptional, and very restricted, remedies, rather than the rule.
- (d) Any inflation of aid funds by way of the proceeds of an FTT, provides no guarantee that the aid reaches those that need it most. Though we might all fervently wish it otherwise, the “leaky bucket” metaphor of aid’s continuing failure in this respect remains all too apt.

### **Anti-corruption: An Essential Way Forward**

If, however, we are to choose one matter upon which to focus our attention that traverses all three spheres of development, business and the rule of law, for me that would have to be the combatting of corruption. The misuse of public power for private gain has the potential to so thoroughly undercut the combined means and goals of sustainable commercial enterprise, economic development and the rule of law, that it may render a state effectively ungovernable. The extent of the problem globally is truly staggering. It has been calculated, for example, that in the ten years to 2009,

some US\$8.44 trillion has flowed illicitly out of the developing world. And this, necessarily, is a conservative estimate.<sup>12</sup> This figure represents about the same as all the FDI inflows into developing countries in the same period! Soberingly, it also represents the scale of money laundering that financial institutions in developed nations are engaged in – including in many large OECD states and not just the usual suspects of small secrecy jurisdictions such as the British Virgin Islands, the Caymans and Liechtenstein – for the main reason for movement of these illicit funds off-shore is to clean them of their tainted origins.

For those who suffer directly and most from bribery and corruption – and they are mainly the poorest and/or those in developing states – the impact on their lives is nothing less than profound. Corruption – whether petty, coercive, everyday, bribery and extortion, or grand, co-ordinated and consensual theft and patronage – assaults the dignity as much as the pockets of those it affects. It enfeebles them as individuals, it destroys the trust they have invested in their public institutions, and it grossly distorts the economy to benefit the few at the expense of the many.

So it was in Myanmar – as in other dysfunctional or autocratic developing states. During my years working there in the early 2000s, and even given the many other degradations of the polity, it was the emasculation of the legal system and thereby the withering of the rule of law that I found most shocking. I don't think this was just because we are lawyers that we mourn such a circumstance. For individuals and for society as a whole in such countries, it is an indication of the desperation of their situation that the law – the first (and last) bastion against illegitimate, unaccountable and capricious government – is useless, or even worse, that it has been hijacked and conscripted to serve its new masters, giving them the veneer of respectability.

Let me conclude, therefore, by saying that behind the undoubted benefits that flow from a thriving private sector that propagates the spread of economic development and does so in a way that both conforms to and promotes the rule of law, there lie many dark forces, the darkest of which is

---

12 Global Financial Integrity, *Illicit Financial Flows from Developing Countries Over the Decade Ending 2009* (December 2011) <<http://www.gfintegrity.org/report/illicit-financial-flows-from-the-developing-world-over-the-decade-ending-2009/>> (accessed 17 January 2015).

corruption, and all that spurs it on. It has to be on these dark forces, and on corruption in particular, that we focus our collective attentions. By seriously promoting the implementation and enforcement in domestic legal systems of the UN's Convention Against Corruption<sup>13</sup> (now ratified by 171 states), as well as the complementary regional treaties in Africa (the African Union's Convention on Preventing and Combatting Corruption<sup>14</sup>) and the Americas (the Organization of American States' Convention Against Corruption<sup>15</sup>), as well as the OECD's Anti-Bribery Convention<sup>16</sup>, we would take an essential step towards establishing and maintaining the rule of law in the many places where it is currently lacking.

---

---

13 United Nations Convention Against Corruption (9 December 2003), GA Res 58/4, 2349 UNTS 41, UN Doc A/Res/58/4 (entered into force on 14 December 2005).

14 African Union Convention on Preventing and Combating Corruption (11 July 2003) 43 ILM 5 (entered into force 5 August 2006).

15 Inter-American Convention Against Corruption (29 March 1996) 35 ILM 724 (entered into force 6 March 1997).

16 Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997) 37 ILM 1 (entered into force 15 February 1999).

## CHALLENGES FACING BUSINESS AND FINANCE INSTITUTIONS: THE RULE OF LAW SEEN THROUGH THE EYES OF BUSINESS

Lee Ming Chua<sup>1</sup>

*Judicial Commissioner of the Supreme Court of Singapore,  
former General Counsel of GIC Pte Ltd*

Much has been written about the correlation between economic growth and the rule of law. This paper will not attempt to add to that discussion. Instead, it will examine how business views the rule of law, the challenges that corporations face in connection with certain aspects of the rule of law, and the dilemma that corporations face in connection with social or moral responsibilities.

### Through the Eyes of Business

Lord Bingham's seminal work on the rule of law has done much to explain what the rule of law means in simple and clear language.<sup>2</sup> There is general consensus that the rule of law is an important concept and that having a strong rule of law is a good thing. What does this mean for business? How does business view the existence or strength of the rule of law in any country?

Corporations will approach rule of law issues in a country from the perspective of risk management and "pricing" the risks. The existence of the rule of law is a matter of degree, with all legal systems being on a spectrum.<sup>3</sup> Corporations will assess the risks posed by weaknesses in the rule of law in a country, and price these risks into the overall assessment. The weaker the rule of law, the higher the risk for investments in that country.

This approach towards the rule of law as a risk factor in the risk-reward equation means that a weaker rule of law does not necessarily deter investors

---

1 The author served as General Counsel of GIC Pte Ltd (formerly known as Government of Singapore Investment Corporation Pte Ltd) from 1998 until 2014.

2 Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010).

3 Robert McCorquodale, "Business, the International Rule of Law and Human Rights" in Robert McCorquodale (ed), *The Rule of Law in International and Comparative Context* (BIICL, 2010) at p 29.

from investing. The opportunities may be just too good. Myanmar is a good example. Concerns about the rule of law spring to mind when one thinks of Myanmar. Yet, it was reported in March 2014 that Myanmar's foreign direct investment for the current financial year is set to more than double that of the previous year to US\$3.5 billion, and that the momentum is unlikely to slow with the country projecting US\$4 billion in foreign direct investment in the next financial year.<sup>4</sup>

However, in some circumstances, uncertainty about the rule of law may just tip the scales and keep investors away. South African-born billionaire businessman Nathan Kirsh of Kirsh Industries has been reported to be "concerned about the 'erosion' of the rule of law in South Africa" and to have said that "he would consider coming back to South Africa if this were restored".<sup>5</sup>

## **Challenges Faced by Business**

The closer the rule of law moves towards the positive end of the spectrum, the lower the risk and the more attractive that country will be for inbound investments. Most of the challenges faced by business in connection with the rule of law relate to weaknesses in meeting the standards found in Lord Bingham's principles.

The first of Lord Bingham's principles states that the law must be accessible and, so far as possible, be intelligible, clear and predictable. One challenge frequently faced by corporations is that laws are not clear. Sometimes, the laws are clear but impractical, or they are applied inconsistently. In such cases, compliance is at best uncertain, and at worst impossible.

Multi-national corporations may also face different – or worse, contradictory – laws, in different countries. Compliance in such cases can increase costs significantly for the corporations. Where compliance in all the

---

4 Channel NewsAsia, "Myanmar: FDI set to double" (3 March 2014), available via <<http://www.adbi.org/e-newsline/140305.html#4>> (accessed 19 January 2015).

5 Phakamisa Ndzamela, "Shaky rule of law keeps Kirsh out of SA" *Business Day* (4 April 2014) <<http://www.bdlive.co.za/business/2014/04/04/shaky-rule-of-law-keeps-kirsh-out-of-sa>> (accessed 14 January 2015).

countries is not possible, corporations may be forced to decide which countries to stay away from.

We now live in a world of complex regulations and there is no reason to believe that this complexity will reduce significantly any time soon. Regulators have to recognise that they have an increasing role to play in providing guidance to corporations that are seeking to comply with their regulations. It is understandable that regulations may need to be drafted broadly; however, that has to be balanced against certainty and practicality. Regulators can do much in this respect by providing guidance.

Having clear laws is only the beginning. Where protection of rights under these laws depend on enforcement agencies, these agencies must be effective. One of Lord Bingham's principles requires public officers at all levels to exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers. Unfortunately, corruption remains a major challenge to business in some countries.

Even when enforcement agencies are not corrupt, it does not help if they are otherwise still ineffective. An example is where a foreign investor has prima facie evidence that his joint venture partner is cooking the books and depriving him of his just share of profits. Yet the police refuse to act on a complaint and instead require the foreign investor to investigate further and produce evidence of the wrongdoing!

Another challenge that corporations often face in countries with a weak rule of law relates to dispute resolution. Lord Bingham's principles include the provision of means for resolving civil disputes without prohibitive cost or inordinate delay, and fair and independent judicial and other adjudicative procedures. However, where the rule of law is weak, it is not uncommon to find corruption and lack of independence in the judicial system. Often, seeking redress through the courts in these countries also takes so many years that it seems like forever from the perspective of business.

### **Corporations' Dilemma**

Proponents of free-market economics often argue that the social responsibility of business is to use its resources and engage in activities designed to increase its profits. Corporations owe a duty of profitability to

their shareholders. Actions taken by corporations should be consistent with this duty.

A social or moral responsibility to respect human rights, absent regulations, can be consistent with the duty to be profitable. This would be the case where the failure to respect human rights could result in damage to reputation and harm to the business, for example, a boycott by customers or the loss of investors. As Professor McCorquodale has pointed out, it is in the interests of business to uphold human rights and to work within the law.<sup>6</sup>

However, if there is no immediate risk of consequential harm to the business, expectations of a social or moral responsibility to respect human rights can sometimes place corporations in a dilemma. How do they rationalise meeting such expectations with their duty to be profitable? Is this fair to business? Should the focus not be on the State's duty to protect human rights?

### **The Story of McDonald's Corporation**

McDonald's operates in more than 100 countries, and there are over 35,000 McDonald's restaurants worldwide.<sup>7</sup> McDonald's Standards of Business Conduct state:

At McDonald's, we conduct our activities in a manner that respects human rights as set out in The United Nations Universal Declaration of Human Rights. We do not use any form of slave, forced, bonded, indentured or involuntary prison labor. We do not engage in human trafficking or exploitation, or import goods tainted by slavery or human trafficking. We support fundamental human rights for all people. We will not employ underage children or forced laborers. We prohibit physical punishment or abuse. We respect the right of employees to associate or not to associate with any group, as permitted by and in accordance with applicable laws and

---

6 Robert McCorquodale, "Business, the International Rule of Law and Human Rights" in Robert McCorquodale (ed), *The Rule of Law in International and Comparative Context* (BIICL, 2010) at p 27.

7 See McDonald's Corporation, "Company Profile" <[http://www.aboutmcdonalds.com/mcd/investors/company\\_profile.html](http://www.aboutmcdonalds.com/mcd/investors/company_profile.html)> (accessed 14 January 2015).

regulations. McDonald's complies with employment laws in every market where we operate.<sup>8</sup>

In 2013, the American Federation of State, County and Municipal Employees Pension Plan filed a shareholder proposal at the company's Annual General Meeting urging the Board of Directors to report on:<sup>9</sup>

McDonald's process for identifying and analysing potential and actual human rights risks of McDonald's operations (including restaurants owned and operated by franchisees) and supply chain (referred to herein as a "human rights risk assessment") addressing the following:

- human rights principles used to frame the assessment;
- frequency of assessment;
- methodology used to track and measure performance;
- nature and extent of consultation with relevant stakeholders in connection with the assessment; and
- how the results of the assessment are incorporated into company policies and decision making.

The shareholders' supporting statement referred to "increasing recognition that company risks related to human rights violations, such as litigation, reputational damage and project delays and disruptions, can adversely affect shareholder value". The statement also referred to the United Nations Guiding Principles on Business and Human Rights.<sup>10</sup>

The company's Board of Directors recommended voting against the proposal. According to the Board, the report was unnecessary in light of "the Company's demonstrated commitment to human rights, including an expectation that McDonald's independent owner-operators and suppliers

---

8 See <[http://www.aboutmcdonalds.com/mcd/investors/corporate\\_governance/codes\\_of\\_conduct/standards\\_of\\_business\\_conduct/amendments\\_and\\_waivers.html](http://www.aboutmcdonalds.com/mcd/investors/corporate_governance/codes_of_conduct/standards_of_business_conduct/amendments_and_waivers.html)> (accessed 14 January 2015).

9 McDonald's Corporation, "Proposal No 6. Advisory vote on a shareholder proposal requesting a human rights report", Section 14(a) Proxy Statement re 2013 Annual Shareholders Meeting, filed with the Securities and Exchange Commission, <<http://www.sec.gov/Archives/edgar/data/63908/000119312513152413/d472792ddef14a.htm>> (accessed 14 January 2015) at pp 48–49.

10 *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, endorsed by the UN Human Rights Council in its resolution 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

do the same”.<sup>11</sup> In addition, the Board felt that the proposal represented “the potential for a diversion of resources with no corresponding benefit to the Company, [its] customers or [its] shareholders”.

At the 2013 Annual General Meeting, the proposal garnered 28% of shareholders’ votes and so did not pass. Nevertheless, the Board of Directors decided to ask its Sustainability and Corporate Responsibility Committee to review the company’s human rights risks and prepare a report to shareholders. The company explained that it had “concluded that the issue of risk management as relates to human rights matters within McDonald’s operations may be of interest to some shareholders”.<sup>12</sup>

The Committee requested management to prepare a special report addressing its process for identifying and analysing human rights risk. McDonald’s management prepared a report dated 9 January 2014. The Committee reviewed the report and announced itself satisfied that “management has taken reasonable steps to comprehensively identify, analyse and address the human rights impacts of its business”.<sup>13</sup> The Committee also decided to publish the report to inform shareholders of the company’s efforts.

An overall review by the Committee of its role in the oversight of sustainability and corporate responsibility led to the adoption of a new Committee Charter. Under the new Charter, one principal responsibility of the Committee is to “oversee the Company’s policies and strategies related to matters of sustainability and corporate responsibility that are of

---

11 McDonald’s Corporation, “Proposal No 6. Advisory vote on a shareholder proposal requesting a human rights report”, Section 14(a) Proxy Statement re 2013 Annual Shareholders Meeting, filed with the Securities and Exchange Commission, <<http://www.sec.gov/Archives/edgar/data/63908/000119312513152413/d472792ddef14a.htm>> (accessed 14 January 2015) at p 49.

12 Report of the Sustainability and Corporate Responsibility Committee of the Board of Directors of McDonald’s Corporation (9 January 2014) <<http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202014/Human%20Rights.pdf>> (accessed 14 January 2015) at p 1.

13 Report of the Sustainability and Corporate Responsibility Committee of the Board of Directors of McDonald’s Corporation (9 January 2014) <<http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202014/Human%20Rights.pdf>> (accessed 14 January 2015) at p 2.

significance to the Company and its stakeholders ... [including] oversight of matters related to ... human rights ...”<sup>14</sup>

The McDonald’s story is interesting in several respects. First, in proceeding to prepare the report for shareholders, the company gave effect to the wishes of the minority shareholders (28%), overriding the voice of the majority (72%) who voted against the proposal. This raises an interesting question of accountability. Perhaps the majority did not have strong views on this and had merely agreed with the Board’s recommendation to vote against the proposal.

Second, both the company and the shareholders focused not on the moral arguments relating to respecting human rights, but on the economic consequences. The shareholders’ proposal in 2013 was put forward on the basis that human rights violations can adversely affect shareholder value, whereas the company’s opposition to the proposal was based, in part, on considerations of cost versus benefit.<sup>15</sup> This is consistent with the theory that the social responsibility of business is profitability.

Third, the McDonald’s story shows that an effective way to influence corporations to act can be through their shareholders, and that a strong view from a significant minority is sometimes all that is needed.

## **Conclusion**

The rule of law is relevant to business, but often only as a risk factor in the overall risk-reward assessment by business.

The challenges faced by business in countries with a weaker rule of law often relate to fundamental aspects of the rule of law – clear, practical laws; effective enforcement; an effective dispute resolution process; and an

---

14 McDonald’s Corporation, Sustainability and Corporate Responsibility Charter <[http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202013/Sustainabilityandcorporateresponsibilitycharter\\_12\\_5\\_2013.pdf](http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202013/Sustainabilityandcorporateresponsibilitycharter_12_5_2013.pdf)> (accessed 14 January 2015).

15 McDonald’s Corporation, “Proposal No 6. Advisory vote on a shareholder proposal requesting a human rights report”, Section 14(a) Proxy Statement re 2013 Annual Shareholders Meeting, filed with the Securities and Exchange Commission, <<http://www.sec.gov/Archives/edgar/data/63908/000119312513152413/d472792ddef14a.htm>> (accessed 14 January 2015) at pp 49–50.

independent and effective judiciary. Addressing these challenges can clearly reduce the riskiness of the country and improve its attractiveness as an investment destination. Regulators have an important role to play in providing guidance to corporations navigating through increasingly complex regulations.

Corporations will find it easier to meet expectations of a social responsibility to respect human rights if failure to do so has a direct impact on the business and its profitability. One effective route to influencing corporations may be through their shareholders.

---



# **THE RULE OF LAW AND FOREIGN INVESTMENT**





## INTERNATIONAL INVESTMENT LAW AND THE RULE OF LAW

Professor Stephan W Schill<sup>1</sup>

*Amsterdam Centre for International Law, University of Amsterdam*

International investment treaties constitute one of the principal instruments to enhance the rule of law in investor-state relations. Still, for a long time, they have been little-known and little-used instruments under international law by which states, mostly on a bilateral level, but increasingly often also regionally and in some cases even in multilateral instruments,<sup>2</sup> grant foreign investors from the other contracting state(s) certain rights. It was only during the last decade that international investment law became

- 
- 1 The author was supported in writing this chapter by a European Research Council Starting Grant on “Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the *Lex Mercatoria Publica*” (LexMercPub, Grant agreement no: 313355).
  - 2 By June 2013, there were 2,860 bilateral investment treaties and 340 other international investment agreements, such as investment chapters in free trade agreements; see United Nations Conference on Trade and Development (UNCTAD), “International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal”, IIA Issues Note No 4 (June 2013) <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf)> (accessed 9 June 2014) at p 1. Concerning regional investment treaties, the most prominent examples are the North-American Free Trade Agreement (17 December 1992) 32 ILM 289 and 605 (1993) (entered into force 1 January 1994) (NAFTA); the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>> (accessed 9 June 2014); and the ASEAN Comprehensive Investment Agreement (26 February 2009, entered into force 29 March 2012), <<http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20%28ACIA%29%202012.pdf>> (accessed 16 January 2015). See also UNCTAD, *Investment Provisions in Economic Integration Agreements* (2006) <[http://www.unctad.org/en/docs/iteiit200510\\_en.pdf](http://www.unctad.org/en/docs/iteiit200510_en.pdf)> (accessed 9 June 2014). The most prominent multilateral investment treaty is the Energy Charter Treaty (17 December 1994) 34 ILM 360 (entered into force 16 April 1998).

mainstream in the international law community.<sup>3</sup> This was principally due to the growing dispute settlement practice under investment treaties, which grew rapidly, from its first use in the late 1980s in *Asian Agricultural Products v Sri Lanka*<sup>4</sup> to over 560 treaty-based investment disputes in 2013.<sup>5</sup>

Despite their myriad number, investment treaties follow a sufficiently uniform structure, lay down relatively uniform principles for the treatment of foreign investors, and build on a common dispute settlement mechanism, which arguably results in a regime that is largely comparable to a multilateral system.<sup>6</sup> Investment treaties typically grant investors the right not to be expropriated without compensation, to be treated fairly and equitably, to enjoy full protection and security, and to be treated no less favorably than national investors or investors from any third state. In addition, investment treaties typically offer foreign investors access to arbitration against the host state in order to bring claims, usually for damages, for breach of the obligations laid down in the treaty. This allows them to opt out of domestic courts and to bring a claim under international law without the need for the investor's home state to exercise diplomatic protection.<sup>7</sup> This can have a considerable impact on the conduct of all branches of domestic government, including legislation, administration, and the judiciary. International investment law therefore constitutes a

---

3 For a reflection of this development in the literature on investment law, see Stephan W Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law" (2011) 22 EJIL 875.

4 *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka* ICSID Case No ARB/87/3, final award dated 27 June 1990.

5 Cf UNCTAD, "Recent Developments in Investor-State Dispute Settlement (ISDS)", IIA Issues Note No 1 (2014) (recording 568 treaty-based investment arbitrations at the end of 2013) <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf)> (accessed 9 June 2014) at p 1.

6 Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009).

7 Generally on investment treaties see Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press, 2007); Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, 2009); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press, 2012).

special protection regime for foreign investors that combines public law constraints with private-public arbitration as a dispute settlement mechanism.

The growth of investment treaties and investment treaty arbitration has led, within a short space of time, to a lively debate about the benefits, justification, and problems of this special regime for foreign investors. Indeed, this debate has developed into what is often called a “legitimacy crisis” of international investment law.<sup>8</sup> Symptoms of this crisis are the withdrawal of some states from bilateral investment treaties (BITs) and the International Centre for Settlement of Investment Disputes (ICSID);<sup>9</sup> the efforts of many countries to recalibrate their investment treaty obligations

---

8 See Charles N Brower and Stephan W Schill, “Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?” (2009) 9 *Chicago Journal of International Law* 471 at 473 (with further references).

9 ICSID was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 UNTS 159 (entered into force 14 October 1966) (ICSID Convention). For example, Bolivia, Ecuador and Venezuela denounced the ICSID Convention in 2007, 2009 and 2012, respectively; South Africa is currently in the process of terminating several of its BITs, see Robert Hunter, “South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland” (2013) <<http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/>> (accessed 9 June 2014). Indonesia too is planning on terminating most of its BITs see Financial Times, “Indonesia to terminate more than 60 bilateral investment treaties” (26 March 2014) <<http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz34QKVh5iI>> (9 June 2014). See further the Trade Policy Statement of the Australian Gillard Government expressing opposition to the inclusion of investor-state dispute settlement provisions in future trade agreements: Australian Government, Department of Foreign Affairs and Trade, “Gillard Government Trade Policy Statement: Trading Our Way To More Jobs and Prosperity” at p 14 (April 2011), <<http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx>> (accessed 9 June 2014). Criticism is also omnipresent in the current debates on the EU-level about the direction and content of a future EU international investment policy and the future of investment agreements of member states; see, in particular, the European Parliament Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI).

and to reconsider investment treaty arbitration;<sup>10</sup> and by now a more general public debate about the possibly harmful impact of investment treaties on states' right to regulate, *inter alia*, for the protection of the environment, human rights, or other public interests. Critics question the democratic accountability, independence and impartiality of arbitrators, disapprove of the vagueness of treaty standards, condemn the extent to which arbitrators' interpretations of these standards restrict the right of host states to regulate in the public interest, and deprecate the institution of investor-state dispute settlement.<sup>11</sup>

Criticism of international investment law and investment treaty arbitration has also been launched in respect of the rule of law. One of the most vocal critics, Gus Van Harten, says the following:

Investment treaty arbitration is often promoted as a fair, rules-based system and, in this respect, as something that advances the rule of law. This claim is undermined, however, by procedural and institutional aspects of the system that suggest it will tend to favour claimants and, more specifically, those states and other actors that wield power over appointing authorities or the system as a whole. On the other hand, other states and investors (especially those that bring claims against a powerful state) can expect to be disadvantaged.<sup>12</sup>

Van Harten's recommendation, as that of other critics, is to get rid of the whole system and to replace the dispute settlement mechanism either with

---

10 See José E Alvarez, "Why Are We "Re-calibrating" Our Investment Treaties?" (2010) 4 *World Arbitration & Mediation Review* 143. For various reform proposals that aim at restricting investment treaty arbitration, see UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", IIA Issues Note No 2 (2013) <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf)> (accessed 9 June 2014) at pp 4ff.

11 See, especially, Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) at pp 152ff; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, 2008); Kyla Tienhaara, *The Expropriation of Environmental Governance* (Cambridge University Press, 2009).

12 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* (Oxford University Press, 2010) at p 627.

domestic courts<sup>13</sup> or with a to-be-established permanent international investment court.<sup>14</sup>

The supporters of investment law, by contrast, for years have done too little to explain the benefits of system. One of the benefits of investment treaties and investment treaty arbitration is arguably their contribution to creating a rule of law framework for investment relations that is based on international law and that domestic regulation of foreign investment is not necessarily able to provide. In particular in countries with a weak domestic rule of law, investment treaties can help create the legal and institutional infrastructure that is necessary for attracting foreign investment into industries and projects that further host state development, as stated, for example, in the Agenda 21 of the UN Conference on Environment and Development.<sup>15</sup> At the same time, the concept of the rule of law is itself a guiding principle for assessing investment treaties and investment treaty arbitration and in informing treaty and dispute settlement practice. It is therefore two sets of questions this chapter will address: first, how investment treaties can help

---

13 See York University, Osgoode Hall Law School, “Public Statement on the International Investment Regime” (2010) at para 10, reproduced in (2011) 8(1) *Transnational Dispute Management*.

14 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) at pp 152ff; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge University Press, 2008) at pp 180ff.

15 United Nations Conference on Environment and Development (UNCED), *Agenda 21: Programme of Action for Sustainable Development* UN Doc A/Conf.151/6/Rev.1 (1992) at para 2.23: “Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which domestic and external financial resources are needed. Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources.” For further references to documents of international conferences and organizations see also Markus W Gehring and Andrew Newcombe, “An Introduction to Sustainable Development in World Investment Law”, in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) at pp 3, 4–5.

implement the rule of law domestically particularly in developing countries; and secondly, how the concept of the rule of law should inform and help reform the practice of investment law and arbitration.

### **The Rule of Law through Investment Treaties**

Rather than engaging with the criticism of international investment expressed by Gus Van Harten and others in detail, I want to lay out the positive case for understanding international investment law as an instrument for the furtherance of the rule of law. This section of the chapter does so on a conceptual level in discussing how investment treaties and investment treaty arbitration can be understood as an expression of the rule of law. As a definition and benchmark, I want to use a “thick” definition of the rule of law, similar to that developed by Lord Bingham.<sup>16</sup> Given that international investment law is part of international law and hence subjects domestic legal systems to its understanding of the rule of law, but itself also needs to be measured against an international yardstick, the transnational definition contained in the UN Secretary-General’s 2012 report, *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels*, seems particularly appropriate in this context. It defines the rule of law:<sup>17</sup>

... as 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 decisionmaking, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The question that arises then is how this definition is reflected in the investment treaty regime. Three aspects, in my view, are worth discussing. These are, first, the question of how the very existence of treaties that

---

16 Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p 8.

17 *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels, Report of the Secretary General*, UN Doc A/66/749 (2012) at para 2.

provide for special protection to foreign investors can be squared with the concept of the rule of law and the idea of “equality before the law” inherent in it; second, the question to which extent the substantive standards of investment treaties reflect the content of the rule of law as defined above; and finally, how access to investor-state arbitration can be seen as part of the rule of law.

### **Rule of Law Objectives of Investment Treaties**

Turning to the first point, the existence of investment treaties is best considered in relation to the rule of law by looking at the objectives of investment treaties. These are closely related to the functions of the rule of law. According to Jeswald Salacuse, the objectives of investment treaties can be distinguished into primary, secondary, and long-term objectives.<sup>18</sup> Primary objectives are the protection and promotion of foreign investment; secondary objectives encompass market liberalization and the building of closer economic and political relations among contracting states. Yet, all of this is not an end in itself, but geared towards enhancing, on the long run, the economic welfare of contracting states. Investment protection and promotion, in other words, have the objective to lead to economic growth and, ultimately, human development.

The functions of the rule of law can be seen in parallel to these objectives. The goal to protect foreign investment corresponds to the protection that the rule of law is designed to afford against illegitimate government conduct. The promotion of foreign investment runs parallel to the function of the rule of law in decreasing political risk, that is, the risk resulting from cooperation with a state that has sovereignty over the law regulating the investment and which, in the absence of an investment treaty, exercises complete judicial control over any disputes that might arise between the investor and the host state.<sup>19</sup> And finally, just as investment treaties ultimately aim at contributing to the development of host states, the

---

18 Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) at pp 108ff.

19 On the notion of political risk and dispute settlement through arbitration as a means of risk management, see Noah Rubins and N Stephan Kinsella, *International Investment, Political Risk and Dispute Solution* (Oxford University Press, 2005) at pp 261ff.

concept of the rule of law is widely recognized as an important factor for economic growth and development.<sup>20</sup> Richard Posner, for instance, points to the “empirical evidence showing that the rule of law does contribute to a nation’s wealth and its rate of economic growth.”<sup>21</sup> Similarly, the link between the rule of law and economic development has materialized in the World Bank’s legal reform program<sup>22</sup> and has been reiterated in its good governance agenda, which comprises, as one of the core concepts to help developing countries develop, the rule of law.<sup>23</sup>

The critical point from a rule of perspective, however, remains, how a system for the protection of the specific class of foreign investors can be justified, instead of a system creating rule of law institutions for all investors, both domestic and foreign. The main reason for the limited

---

20 Daron Acemoglu, James A Robinson and Simon Johnson, “Institutions as the Fundamental Cause of Long-Run Growth” in Philippe Aghion and Steven N Durlauf (eds), *Handbook of Economic Growth*, Vol 1 A (North Holland, 2005) at pp 385, 389.

21 Richard A Posner, “Creating a Legal Framework for Economic Development” (1998) 13 *The World Bank Research Observer* 1 at 3. See also Hernando De Soto, *The Other Path* (Harper & Row 1989); James Bradford De Long and Andrei Shleifer, “Princes and Merchants: European City Growth Before the Industrial Revolution” (1993) 36 *Journal of Law and Economics* 671; Timothy Besley, “Property Rights and Investment Incentives: Theory and Evidence from Ghana” (1995) 103 *Journal of Political Economy* 903; William Easterly and Ross Levin, “Africa’s Growth Tragedy: Policies and Ethnic Divisions” (1997) 112 *Quarterly Journal of Economics* 1203; William Easterly and Ross Levine, “Tropics, Germs, and Crops: How Endowments Influence Economic Development,” (2002) 50 *Journal of Monetary Economics* 3; Stephen Knack and Philip Keefer, “Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures” (1995) 7 *Economics & Politics* 207; Daron Acemoglu, James A Robinson and Simon Johnson, “The Colonial Origins of Comparative Development: An Empirical Investigation” (2001) 9 *American Economic Review* 1369; Dani Rodrik, Arvind Subramanian and Francesco Trebbi, “Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development” (2004) 9 *Journal of Economic Growth* 131.

22 For a critical account, see Lawrence Tshuma, “The Political Economy of the World Bank’s Legal Framework for Economic Development” (1999) 8 *Social and Legal Studies* 75.

23 See World Bank, *Governance and Development* (World Bank, 1992) at p 28.

personal scope of application of investment treaties lies in their pedigree in the international law of aliens which was based on the idea that conduct that interferes with the rights of a foreigner, including her property rights, was a violation of the rights of the foreigner's home state.<sup>24</sup> Yet, notwithstanding the limited protection *ratione personae*, investment treaties are considered to have an impact on domestic investments as well. This is most obvious in case of investment projects that are implemented through joint ventures between a foreign and a domestic investor, where the latter indirectly benefits from the protection afforded to the former.

But arguably the indirect impact of investment treaties on domestic investors goes further. As pointed out by Salacuse, a secondary objective of investment treaties is the encouragement of domestic investments. As he argues, “[a]n investment treaty ... serves as a ‘signaling device’ to the domestic private sector that the government’s intentions towards private capital, both foreign and domestic, are benign in view of the international commitments it has made in the treaty to protect capital of foreigners.”<sup>25</sup> In addition, improved domestic governance and a strengthened rule of law are another secondary objective given that, as soon as governments internalize the disciplines that investment treaties demand in the treatment of foreign investors, domestic investors are likely to benefit through “trickle-down effects”. As explained by Salacuse:

The theory underlying this rationale is that developing country authorities and institutions that have prevented themselves from acting in arbitrary and abusive fashion towards foreign investors by signing a treaty will also be lead to avoid arbitrary and abusive actions towards their own nationals. Over time those authorities and institutions may demonstrated improved governance and a heightened respect for the rule of law.<sup>26</sup>

Looking at the primary, secondary, and long-term objectives of investment treaties and comparing them to the function of the rule of law therefore makes a case for understanding investment treaties as an instrument geared towards furthering the rule of law. In this perspective, investment treaties

---

24 For the classical expression of this idea see *Chorzow Factory Case (Germany v Poland)* (1928) PCIJ Reports (ser A), No 17, 3, 27-28.

25 Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) at p 113.

26 Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) at p 114.

are serving both as substitutes for domestic institutions and the domestic rule of law and as inducements to governments to improve their domestic legal regimes in order to reduce the prospect of future international claims for damages.<sup>27</sup>

### **Standards of Treatment as Embodiments of the Rule of Law**

Turning from the objectives of investment treaties to the substantive standards of protection, how is the rule of law reflected in them? On a general level, the standards of protection contained in investment treaties reflect a liberal, rights-based approach which seeks to limit government action that interferes with protected investments. In terms of their content, these standards correspond, or at least are analogous in some respects, to the rights and principles governing state-market relations found in the domestic legal orders of many countries, mostly at the constitutional level.

The specific guarantees contained in investment treaties aim at implementing structures that are essential for the functioning of a market economy and cover aspects of the rule of law. National and most-favoured-nation treatment are designed to bring about equality before the law by ensuring, as a prerequisite for fair competition, a level playing field for the economic activity of foreign and domestic economic actors. The protection against expropriation guarantees respect for property rights as an aspect of the rule of law and an essential prerequisite for market transactions; capital transfer guarantees ensure the free flow of capital in and out of the host state and contribute to the efficient allocation of resources in a global market; and umbrella clauses back up private ordering between foreign investors and the host state by ensuring that contractual and other similar promises vis-à-vis foreign investors benefit from a layer of international law protection in addition to the protections that exist under domestic law. All these standards address problems that businesses face and which concern aspects of the rule of law.

But there is one standard that is even more closely related to the rule of law, that is, the standard of fair and equitable treatment. In fact, as I have argued elsewhere, the way arbitral tribunals have interpreted fair and equitable

---

27 Cf Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties" (2005) 25 *Int'l Rev L & Econ* 107.

treatment can be equated with how the rule of law is commonly understood in domestic public law, international law, and in the development efforts of various development organizations as part of the concept of good governance.<sup>28</sup> In close parallel to the definition of the rule of law set out above, and depending upon the context of different cases, arbitral tribunals have variously interpreted the standard of fair and equitable treatment to encompass (1) the requirement of legal security and predictability; (2) the principle of legality; (3) the protection of legitimate expectations; (4) basic due process requirements for administrative and judicial proceedings; (5) protection against arbitrariness and discrimination; (6) legal certainty and transparency; and (7) the concept of proportionality or reasonableness. These concepts reflect elements of the rule of law that one can also find in the administrative and constitutional frameworks of many countries worldwide.

Two examples from arbitral jurisprudence to illustrate the parallels between the rule of law and fair and equitable treatment may suffice for present purposes. The first example is the decision in *Waste Management v Mexico*, an ICSID Additional Facility case under the North American Free Trade Agreement (NAFTA). In its award, the Tribunal understood the fair and equitable treatment to be:

... infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a 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.<sup>29</sup>

The parallels to the concept of the rule of law as set out above are striking. While not identical, and qualified through adjectives such as “gross” or “manifest”, the Tribunal’s interpretation of fair and equitable treatment is structurally analogous to elements of the rule of law, such as the prohibition

---

28 See 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* (Oxford University Press, 2010) at pp 151ff.

29 *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, award dated 30 April 2004, at para 98.

of discrimination and arbitrariness as well as due process and transparency in administrative proceedings.

A second example is the ICSID case *Tecmed v Mexico*<sup>30</sup> under the Spanish-Mexican BIT. In applying the fair and equitable treatment standard to the relations between an investor in a hazardous waste landfill and the supervisory agency, the Tribunal focused on the concept of legitimate expectations as part of fair and equitable treatment and held that the latter standard

... requires ... treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor ... The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments ... The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>31</sup>

Once again, and even though the interpretation of the *Tecmed* tribunal of fair and equitable treatment differed from that of the *Waste Management* tribunal, there are clear structural parallels between fair and equitable treatment and how the rule of law is applied to administrative relations at the domestic level to protect legitimate expectations of private actors. Structural analogies are also notable in that the *Tecmed* tribunal considered fair and equitable treatment to prohibit the inconsistent application of domestic law or its non-application, as well as arbitrary conduct of the administration.

Not only can an understanding of fair and equitable treatment as an embodiment of the rule of law be reconstructed from arbitral jurisprudence; it can also be linked to the development-related object and purpose of investment treaties. This is possible when considering the debate about the

---

30 *Técnicas Medioambientales Tecmed SA v the United Mexican States*, ICSID Case No ARB (AF)/00/2, award dated 29 May 2003.

31 *Técnicas Medioambientales Tecmed SA v the United Mexican States*, ICSID Case No ARB (AF)/00/2, award dated 29 May 2003, at para 154.

relationship between the rule of law and development together with the object and purpose of international investment law to contribute to the host country's development by protecting and promoting foreign investment.<sup>32</sup> Indeed, development as the wider context and objective of investment treaties is also articulated in the ICSID Convention. Reflecting the development goals of the World Bank Group, of which ICSID forms part, and the belief that the creation of facilities for the neutral arbitration and conciliation of disputes between private investors and states could further development,<sup>33</sup> the Preamble of the ICSID Convention explicitly draws a connection between economic development and the protection of foreign investment.<sup>34</sup>

### **Investment Treaty Arbitration as Judicial Review**

Turning finally to dispute settlement, investment treaty arbitration serves as a mechanism to implement the rule of law standards laid down in investment treaties. Furthermore, investment treaty arbitration can be understood as a form of access to justice, as a neutral, independent and impartial dispute settlement mechanism that has the function to control government action. In that respect, investment treaty arbitration assumes the role that is usually fulfilled by courts exercising judicial review at the domestic level. Indeed, this right is often backed by a constitutional right to judicial review of government conduct, which itself is an aspect of the rule of law.<sup>35</sup>

In this context, investment treaty arbitration compensates for a number of limitations that may exist for foreigners concerning access to justice under domestic law. In Germany, to take an example, domestic law, including constitutional law, contains a number of important restrictions for

---

32 See text accompanying nn18–27 above.

33 On this point see Aron Broches, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States” (1972) 136(2) *Recueil des Cours* 331 at 343.

34 ICSID, *ICSID Convention, Regulations and Rules* (International Centre for Settlement of Investment Disputes, April 2006) at p 11.

35 See, *eg*, the Basic Law for the Federal Republic of Germany, Article 19(4); the Constitution of the Italian Republic, Article 24; the Spanish Constitution, Section 24(1); the Political Constitution of the Republic of Chile, Article 20.

foreigners in this respect. The German Constitution, the “Grundgesetz” (Basic Law), for instance, does not grant fundamental rights to foreign juridical persons. Under Article 19(3) Grundgesetz, foreign corporations cannot rely on fundamental rights granted in the Constitution, and hence have no access to the German Constitutional Court.<sup>36</sup> Similarly, Article 12 Grundgesetz, which contains the freedom of enterprise, a right that, *inter alia*, protects against government interference with business enterprises that fall short of interferences with the right to property, is a fundamental right that is only afforded to German natural and juridical persons, not foreigners.<sup>37</sup>

And finally, even if there is access to justice under domestic law, the recourse provided is not necessarily neutral; the forum not necessarily independent from the respondent government; and the recourse provided not necessarily sufficiently efficient. Corrupt or government-dependent courts are only the tip of the iceberg. Even well-developed domestic systems can face problems with their domestic courts. In respect of Germany, for example, the European Court of Human Rights has rendered multiple judgments deciding that the length of domestic court proceedings in Germany was contrary to Article 6(1) of the European Convention on Human Rights which provides for “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>38</sup> What is more, in a pilot proceeding against Germany, the European Court of Human Rights even determined that overly long court

---

36 There is an exception for juridical persons from other Member States of the European Union (EU) who can invoke their rights of non-discrimination under EU law to claim equal treatment with German juridical persons. See BVerfGE 129, 78, 97ff (German Constitutional Court, 19 July 2011). In the absence of specific treaty commitments, however, juridical persons from outside the EU will not benefit from fundamental rights protection under German constitutional law.

37 However, non-discrimination provisions under EU law must have the effect of extending that right to foreigners who are EU nationals.

38 See, amongst others, *Sürmeli v Germany*, ECtHR (Application No 75529/01), decision of 8 June 2006, at para 134; *Kressin v Germany*, ECtHR (Application No 21061/06), decision of 22 December 2009, at para 26; *Spaeth v Germany*, ECtHR (Application No 854/07), decision of 29 September 2011, at para 42.

proceedings and the inexistence of a remedy under domestic law to address them constituted a “systemic problem”.<sup>39</sup>

In all of these instances, investment treaty arbitration can be a means to provide access to justice for foreign investors that may otherwise face problems in domestic courts. Viewing investment arbitration as a mechanism to provide judicial review can also be backed by the rationale of a decision of the European Court of Human Rights that concerned the question of whether Article 6(1) of the European Convention on Human Rights required access to a permanent court in order to bring claims, including against the government. In *Lithgow and others v United Kingdom*, the applicants argued that an “Arbitration Tribunal was not a ‘lawful tribunal’” in the sense of Article 6(1) of the Convention “in that it was an extraordinary court, namely a tribunal set up for the purpose of adjudicating a limited number of special issues affecting a limited number of companies”.<sup>40</sup> This drew the following response from the Court:

The Court cannot accept this argument. It notes that the Arbitration Tribunal was ‘established by law’, a point which the applicants did not dispute. Again, it recalls that the word ‘tribunal’ in Article 6 para. 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country; thus, it may comprise a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees. The Court also notes that, under the statutory instruments governing the matter, the proceedings before the Arbitration Tribunal were similar to those before a court and that due provision was made for appeals.<sup>41</sup>

Even though the decision did not concern recourse to an investment treaty tribunal, its rationale would seem to apply equally in that context. As a consequence, submitting to investor-state arbitration can be considered as a fulfillment of the obligation of the host state to offer a forum for judicial review and therefore provide a dispute settlement infrastructure that is required by the concept of the rule of law.

---

39 *Rumpf v Germany*, ECtHR (Application No 46344/06), decision of 2 September 2010, at para 64ff.

40 *Lithgow and Others v United Kingdom*, ECtHR (Application No 9006/80, Series A102), decision of 8 July 1986, at para 201.

41 *Lithgow and Others v United Kingdom*, ECtHR (Application No 9006/80, Series A102), decision of 8 July 1986, at para 201.

Taking into consideration all of the above, it is possible to understand investment treaties as a compensatory mechanism for problems that may exist in host states' domestic governance with the domestic rule of law, both as regards substance and procedure. Substantive investment treaty standards reflect rule of law components that are often enshrined in domestic constitutional law, and investment arbitration provides a mechanism through which compliance with these standards can be ensured. Although tribunals cannot repeal measures that are contrary to an investment treaty, or enforce awards ordering specific performance, the preferred remedy under investment treaties, that is damages as a consequence of the host state's international responsibility,<sup>42</sup> arguably creates an incentive for governments to comply with the rule of law standards set out in the treaties.

As additional mechanisms to implement the rule of law standards contained in investment treaties, one could also promote the direct application of investment treaties in domestic courts and by the domestic executive, and consider the introduction of investment treaty impact assessment mechanisms in order to reduce, or even avoid, liability of host states under investment treaties. Finally, it may be worth considering under which conditions investment treaty arbitration can create incentives for domestic court reform. After all, only if domestic courts are as good or better than investment treaty tribunals, are foreign investors likely to consider having recourse to them instead of initiating arbitration. All of this could enhance the rule of law effects of international investment treaties and investment treaty arbitration.

### **The Rule of Law as a Benchmark for Investment Law**

Yet, the rule of law is not only important as an explanation of the structure and content of investment treaties, it is also an important set of standards against which the practice of investment law and in particular investment arbitration has to be measured. Challenges to the rule of law that are caused

---

42 Notably, awards for damages can be enforced widely, depending on the applicable arbitration rules, either under Art 54(1) of the ICSID Convention or under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (entered into force 7 June 1959) (the "New York Convention").

by investment law itself are manifold. First, investment treaties implement an asymmetric rule of law: they protect foreign investors without expressly having regard to competing rights and interests that are protected under national or international law. How investment treaties interact with human rights, public health, environmental law, labour rights or indigenous rights, and more generally the question of how much space they give to host governments to regulate in the public interest is a concern that must be addressed in order to assess what kind of rule of law investment treaties further.<sup>43</sup>

Secondly, inconsistencies in arbitral awards constitute a problem for legal certainty and predictability and hence for the rule of law.<sup>44</sup> Thirdly, there is an issue of accountability of arbitrators in the way they develop the law, because there are no supervisory mechanisms that are comparable to the ones at the domestic level, namely a supreme or constitutional court at the apex of the court system and a legislature that can act against judicial decisions that it considers undesirable by modifying law to be applied by the courts.<sup>45</sup> Fourthly, the issue of independence and impartiality of arbitrators, the question of an alleged pro-investment bias in their jurisprudence, and what is often called a “double-hat problem”, that is, the fact that one and the same person can act as arbitrator in one proceedings and simultaneously as counsel in another case, are questions that need to be

---

43 For a critical account see, *eg*, Kyla Tienhaara, *The Expropriation of Environmental Governance* (Cambridge University Press, 2009).

44 Susan D Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions” (2005) 73 *Fordham L Rev* 1521; Stephan W Schill, “W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law” (2011) 22 *EJIL* 875.

45 For a description of this problem in respect of international courts and tribunals generally, see Armin von Bogdandy and Ingo Venzke, “Beyond Dispute: International Judicial Institutions as Lawmakers” (2011) 12 *German Law Journal* 979.

addressed from the perspective of the rule of law.<sup>46</sup> Finally, transparency and third-party participation are important issues for the rule of law.<sup>47</sup>

All of these issues need to be debated and are currently debated. Yet, the challenges posed for the rule of law in this context should be taken as such: they are challenges that require adaptation of the existing system of international investment law and investor-state dispute resolution, but do not, in my view, militate for abandoning the system of investment law in principle, as some argue. Investment treaties are not *per se* contrary to the rule of law, but can actually further it as argued above. At the same time, and notwithstanding the positive impact investment law can make towards the domestic rule of law, we must use the concept of the rule of law as a yardstick for the investment treaty system itself. After all, only if investment treaties and investor-state arbitration themselves meet the commonly accepted standards embodied in the rule of law will the outcome of arbitral jurisprudence be considered as legitimate. In this sense, the concept of the rule of law can serve as a guidepost in the current debates about the reform of international investment law.

Thus, the concept of the rule of law can be used to demand more transparency and third party participation, a process that is well underway with the coming into effect of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration on 1 April 2014<sup>48</sup> and the adoption by the General Assembly of the United Nations Convention on

---

46 On questions of professional ethics in investment arbitration generally, see Catherine Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014).

47 See Julie Maupin, "Transparency in International Investment Law: The Good, the Bad and the Murky" in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press, 2013) at p 142; Alessandra Asteriti and Christian J Tams, "Transparency and Representation of the Public Interest in Investment Treaty Arbitration" in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) at pp 787ff; UNCTAD, *Transparency*, UNCTAD Series on Issues in International Investment Agreements II (2012).

48 Report of the United Nations Commission on International Trade Law of its Forty-Sixth Session (8-26 July 2013), UN Doc A/68/17 (2013) <[www.un.org/en/ga/search/view\\_doc.asp?symbol=A/68/17](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/17)> (accessed 13 May 2014) at para 128 and Annex I.

Transparency in Treaty-based Investor-State Arbitration on 10 December 2014.<sup>49</sup> Likewise, the concept of the rule of law should also inform debates about the introduction of codes of conduct for arbitrators and counsel, a topic that the EU has introduced, *inter alia*, in its investment treaty negotiations with Canada and the United States.<sup>50</sup> The rule of law could also be a guiding principle in discussing strengthened corporate social responsibility in international investment relations in order to emphasize not only the rights of foreign investors, but also their duties. Similarly, the concept of the rule of law can inform governments' efforts to recalibrate investment treaty obligations in order to achieve a better balance between investment protection and competing concerns and to implement a thick rule of law.

In consequence, in order to implement a thick version of the rule of law in treaty-making that has regard to competing rights and the host states' right to regulate, contracting states are: concretising the substantive standards of treatment in investment treatment, such as the concept of indirect expropriation or fair and equitable treatment;<sup>51</sup> introducing general

---

49 Resolution adopted by the General Assembly on 10 December 2014, UN Doc A/RES/69/116 (2014) <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/69/116&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/69/116&Lang=E)> (accessed 20 January 2015).

50 See Question 8 of the European Commission's online questionnaire issued in the context of its public consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement (TTIP), available via <<http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS>> (accessed 9 June 2014). See also the Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (9 September 2012) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng>> (accessed 17 June 2014), Art 24(2)(c) of which provides that arbitrators must "comply with any additional rules where such rules are agreed to by the Contracting Parties," which would provide an express basis for incorporating ethical rules on arbitrator conduct.

51 See, for example, Annexes on Expropriation and FET in the 2012 US Model BIT <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> (accessed 9 June 2014); see further European Commission, "Public consultation on modalities for investment protection and ISDS in

exceptions in order to allow certain interferences with investor rights for public purposes;<sup>52</sup> clarifying the concept of protected investment;<sup>53</sup> recalibrating access to investor-state arbitration and achieving a better integration of alternative dispute settlement mechanisms;<sup>54</sup> and considering the introduction of control mechanisms for arbitrations, such as appellate mechanisms or joint interpretation commissions that the contracting states can use in order to counter the precedential effect of arbitral decisions the contracting states disapprove of.<sup>55</sup> Finally, governments need to be reminded of their role as enforcers of obligations that serve interests that compete with investment protection: not only do they have to refrain from illegitimate interference with foreign investment, but they also have a duty to regulate investment efficiently in order to protect competing concerns.

Yet, the rule of law should not only guide governments in treaty-making. It also has to inform arbitrators in how they conduct arbitral proceedings, exercise their procedural powers, and interpret investment treaties. Thus, even though the protection of competing rights and interests is usually not expressly mentioned in investment treaties – unlike in human rights treaties that contain provisions stipulating for which purposes and under which conditions states can interfere with protected rights – investment arbitrators are equipped with sufficient interpretative tools to achieve the idea of a

---

TTIP”, <[http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152280.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf)> (accessed 9 June 2014) at Table 3 and Table 4.

52 See, for example, the Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments (9 September 2012) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng>> (accessed 17 June 2014), Art 33.

53 On the exclusion of sovereign debt from the scope of protected investment, see Peru-Korea Free Trade Agreement (21 March 2011, entered into force 1 August 2011) <[http://www.sice.oas.org/TPD/PER\\_KOR/PER\\_KOR\\_Texts\\_E/09\\_KPFTA\\_Investment.pdf](http://www.sice.oas.org/TPD/PER_KOR/PER_KOR_Texts_E/09_KPFTA_Investment.pdf)> (accessed 9 June 2014), Annex 9d.

54 See, *eg*, UNCTAD, “Reform of Investor-State Dispute Settlement: In Search of a Roadmap” IIA Issues Note No 2 (2013) <[http://unctad.org/en/Publications\\_Library/webdiaepcb2013d4\\_en.pdf](http://unctad.org/en/Publications_Library/webdiaepcb2013d4_en.pdf)> (accessed 9 June 2014) at pp 7–8.

55 See, *eg*, 2012 US Model Bilateral Investment Treaty <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> (accessed 9 June 2014) at Art 28(10).

thick rule of law and to ensure sufficient policy space for host states to regulate in the public interest.

Arbitrators can, as I have suggested elsewhere, make more use of comparative law analysis to concretize the interpretation of vague standards of treatment in investment treaties in order to align the application of these standards with commonly accepted legal analysis and outcomes of comparable disputes at the domestic level.<sup>56</sup> One public law concept that can guide the interpretation of investment treaty standards, which is particularly powerful in striking a balance between investment protection and competing rights and interests of host states and their population, is the use of proportionality analysis; notably, such reasoning is an interpretative technique that is increasingly used by arbitrators.<sup>57</sup> Finally, investment tribunals are able to safeguard policy space by considering what the appropriate standard of review is of government conduct, in other words

---

56 See Stephan W Schill, “International Investment Law and Comparative Public Law: An Introduction” in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) at pp 3ff. For examples of such methodology see *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1, decision on liability dated 27 December 2010, at para 111; *Toto Costruzioni Generali SpA v Republic of Lebanon*, ICSID Case No ARB/07/12, award dated 7 July 2012, at para 166; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, award dated 5 October 2012, at para 402-404; *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, award dated 22 September 2014, at para 576.

57 See *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB (AF)/00/2, award dated 29 May 2003, at para 122; *Saluka Investments BV v Czech Republic* [2006] UNCITRAL, partial award dated 17 March 2006, at para 306; Benedict Kingsbury and Stephan W Schill, “Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality” in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) at pp 75ff; Alec Stone Sweet, “Investor–State Arbitration: Proportionality’s New Frontier” (2010) 4 L Ethics Hum Rights 47; Erlend Leonhardsen, “Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration” (2011) 1 J Int Disp Settlement 1; Caroline Henckels, “Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration” (2012) 15 JIEL 223.

the question to which extent certain findings of fact and of law made by the host state prior to taking a measure against a foreign investor can be revisited by an investment tribunal or to which extent deference is appropriate.<sup>58</sup>

Ultimately, the end towards which all of these techniques and approaches should be employed, both in investment treaty-making and investment treaty arbitration, is meeting the goals of the rule of law, as expressed by Joseph Raz: “After all the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.”<sup>59</sup> This should be the guiding vision for the rule of law that investment treaties and investment treaty arbitration help implement for investor-state relations and their contribution to development.

---

58 Stephan W Schill, “Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review” (2012) 3 J Int Disp Settlement 577.

59 Joseph Raz, “The Rule of Law and Its Virtues” (1977) 93 LQR 195 at 211.

**THE RULE OF LAW, INVESTMENT TREATIES,  
AND ECONOMIC GROWTH:  
MAPPING NORMATIVE AND EMPIRICAL QUESTIONS**

**N Jansen Calamita<sup>1</sup>**

*Senior Research Fellow and Director, Investment Treaty Forum,  
British Institute of International and Comparative Law*

Questions about the rule of law are of ongoing concern in discussions about economic development and the international investment treaty regime. As states move forward with negotiations for treaties of ever larger scope, certain salient questions of a normative and empirical character remain outstanding with respect to the relationship between the rule of law, international investment treaties, and foreign direct investment (FDI).

This chapter addresses two areas of inquiry in particular. Following a preliminary discussion on the meaning of the rule of law in legal discourse, the second part of this chapter offers observations about how differing conceptions of the rule of law map onto historical and contemporary debates about the treatment of foreign investors in host states. This discussion suggests that differences in conceptions of the rule of law with respect to the treatment of aliens in customary international law continue to pose challenges for the interpretation of the “fair and equitable treatment” standard in particular, and give rise to determinacy concerns about state treaty obligations which implicate the rule of law.<sup>2</sup> The third part of the

---

1 I am grateful to Nancy Eisenhauer, Geoffrey Gertz, Lauge Poulsen, Mavluda Sattorova, Taylor St John, and Antonios Tzanakopolous for their helpful ideas in a workshop on the rule of law and international investment treaties held at the University of Oxford. I am grateful as well to the Singapore Academy of Law and the organisers of the Rule of Law Symposium 2014. All errors are my own.

2 This chapter does not consider directly whether the mechanism of investment treaty arbitration as such comports with conceptions of the rule of law. The issues raised by investment treaty arbitration with respect to transparency, conflicts of interest, *etc*, have been addressed in a variety of writings and from a variety of perspectives elsewhere. For two differing perspectives, see, *eg*, Yves Fortier, “Investment Protection and the Rule of Law: Change or Decline”, Lecture at the British Institute of International and Comparative Law, London

*(continued on next page)*

chapter changes tack and examines the empirical basis for certain oft-repeated assumptions about the relationship between economic growth, the rule of law and international investment treaties. The discussion in this part observes that while empirical work in the field has increased dramatically over the last several years, research has not yet established a solid basis for mapping this complex relationship, suggesting the need for further (and different) empirical research in the area.

### **Variable Conceptions of the Rule of Law<sup>3</sup>**

At the outset it is useful to offer a working understanding of the rule of law for the purposes of this chapter. The rule of law is a political/legal concept addressed to the operation of government and the structure of law. In its domestic constitutional articulations there is often broad agreement that the rule of law lies at the philosophical, if not legal, centre of the constitution, even while the meaning and manifestation of the rule of law is often highly contested. Thus, for example, debates within domestic constitutional orders often concern the scope of the concept, justifications for its invocation in legal argument, how it should be operationalised into justiciable rules, and whether, indeed, it is being adhered to by the organs of government. Internationally, because the international legal order remains erratically constitutionalised,<sup>4</sup> the rule of law is a legally soft concept, not widely or

---

(17 March 2009); Gus Van Harten, “Five Justifications for Investment Treaties: A Critical Discussion” (2010) 2 *Trade, Law and Development* 19.

3 There is a voluminous literature on the rule of law and on the drivers of international investment and economic development from scholars, governments, civil society organisations, and commentators of almost every conceivable stripe. This chapter makes no pretence at being anything like a complete survey of these differing perspectives. Rather, it attempts to address certain salient questions of a normative and empirical character with respect to the relationship between the rule of law, international investment treaties, and foreign direct investment (FDI).

4 The international legal order remains a decentralised one. Rulemaking on the international level continues to rely upon state consent, as does the adjudication of disputes. In certain specialised areas, states have adopted deliberately constitutional texts, such as the treaties establishing the European Union. In other areas, states have agreed to texts which create institutions capable of establishing authoritative and, indeed, constitutional, interpretations

*(continued on next page)*

consistently idealised. It is, however, a powerful political concept and finds its way into numerous documents of international organisations<sup>5</sup> and the policy statements of national governments.<sup>6</sup>

Conceptions of the rule of law are often differentiated by reference to whether they may be identified as either formal or substantive, that is to say, whether the particular conception is principally addressed to the formal characteristics of law or whether it also seeks to encompass broader normative substance within its definition.<sup>7</sup> Briefly put, formal conceptions of the rule of law tend to identify the rule of law as a unique jurisprudential concept, which is distinct from conceptions of justice, democracy, human rights, and so on. Accordingly, formal conceptions of the rule of law articulate criteria largely aimed at the processes by which legal rules are created and the ability of those persons subject to the law to know what the law is and to plan their lives accordingly. In general terms, then, a formal conception of the rule of law is likely to entail a condition in which laws are created through duly authorised processes and thus conform to established criteria for validity; are open, general and clear; are prospective and not retrospective; are relatively stable; are administered by an independent

---

of constituent treaties, such as in some regional human rights regimes, see, *eg* the European Court of Human Rights in *Loizidou v Turkey* (1995) 20 EHRR 99 at para 75 (describing the European Convention on Human Rights as a “constitutional instrument of European public order”), and in some subject areas, *eg*, trade. See Deborah Cass, “The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade” (2001) 12 EJIL 39. But see Jeffrey Dunoff, “Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law” (2006) 17 EJIL 647.

- 5 Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc A/RES/67/1(30 Nov 2012); *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, endorsed by the UN Human Rights Council in its resolution 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.
- 6 See, *eg*, Dominic Grieve, United Kingdom Attorney General, “The Value of the Rule of Law to International Trade and Finance”, Speech at City of London Guildhall (13 October 2013).
- 7 See Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] PL 467.

judiciary; and place limits on governmental discretion so as not to undermine the foregoing.<sup>8</sup>

Formal conceptions of the rule of law are by design limited and do not seek to encompass wider moral or political values about the content of the law. Formal conceptions of the rule of law do not discount the value of normative concerns like liberty, justice and democracy, but take the view that the debate and discussion of these matters does not belong within the rubric of discussions about the rule of law as such. We may all agree that laws should be just, that their content should be morally sound and that substantive rights should be protected within society. The problem is that if the rule of law is taken to encompass the necessity for “good laws” (in addition to its formal content) then the concept ceases to have any useful independent normative or analytic function. That said, it is of course true that no conception of the rule of law is devoid of normative content. Even the most formal conceptions are informed by values related to limitations on the exercise of governmental power and respect for the individual *vis-à-vis* that exercise.

Substantive conceptions of the rule of law go beyond formal conceptions and seek to articulate a model of the rule of law which includes broader moral and political values. As put by Ronald Dworkin, a substantive conception of the rule of law “does not distinguish, as the [formal] conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the [rule of law] capture and enforce moral rights.”<sup>9</sup> On Dworkin’s view, the very need to preserve a firm distinction between “legal” rules and a more complete political philosophy is rejected by the thesis itself. The rule of law simply captures the theory of law and adjudication whereby we consider what is the best theory of justice as part of an overall decision as to what rights people presently have. As a result, the substantive view of the rule of law requires the articulation not simply of general concepts of liberty, equality, and so on, but demands that the particular conception of these broader concepts

---

8 Joseph Raz, “The Rule of Law and its Virtue” (1977) 93 LQR 195 at 196. For similar approaches, see Robert S Summers, “A Formal Theory of the Rule of Law” (1993) 6 *Ratio Juris* 127; Lon L Fuller, *The Morality of Law* (Yale University Press, rev edn 1969).

9 Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) at pp 11–12.

be administered and developed through courts and constitutional institutions.

It is not the purpose of this chapter to advocate one particular conception of the rule of law over another. It is useful, however, to make two observations about the rule of law in an international setting before moving forward. The first is that in the international setting, due to the absence of an internationally centralised source of legislative power and the limited grants of jurisdiction given to international courts and tribunals, constitutionally authoritative tribunals and constitutional texts remain in short supply such that there is a practical limitation on the effective development of substantive conceptions of the rule of law in any Dworkian sense.<sup>10</sup> Indeed, as I have argued at greater length elsewhere, and note below, there is a legitimacy danger in grafting constitutional conceptions into areas of international law which lack constitutionally validated or empowered institutions, such as in the field of international investment law.<sup>11</sup> The second point is that in the discourse on the rule of law which takes place outside of the law, such as in economics and development studies, formal and substantive conceptions of the rule of law quickly lose their distinctiveness as conceptualisations of the rule of law for the purpose of measurement take on particularly substantive content, such as the protection of property rights and more basic notions about physical security. As discussed in Part 3, this dynamic of translation from law to social science raises questions about the empirical data and how it might be used to inform legal discourse.

### **The Rule of Law and the Treatment of Foreign Investors: Normative Concerns**

In broad terms, the debate in classic customary international law with respect to the treatment of aliens can be seen as reflecting a disagreement

---

10 See Simon Chesterman, “An International Rule of Law?” (2008) 56 *American Journal of Comparative Law* 331 at 333. See also Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) at pp 91–94.

11 See N Jansen Calamita, “The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties” *Yearbook of International Investment Law & Policy* 2013–14 (forthcoming).

between differing conceptions of the rule of law. As is well known, following the break-up of Spain's South American empire in the nineteenth century, Argentine jurist Carlos Calvo set forth a theory of inter-state relations seeking to establish rules as between these newly independent states and other states and their nationals.<sup>12</sup> Under Calvo's doctrine, which was a reaction to regular uses of force against South American states by European powers, there were three key principles: (1) there must be no intervention in the internal affairs of states, diplomatically or otherwise, with respect to the protection of property;<sup>13</sup> (2) aliens are to be treated non-discriminatorily and are entitled to such rights as are accorded nationals;<sup>14</sup> and (3) redress for grievances must be sought exclusively in the domestic courts of the host state in accordance with domestic law.<sup>15</sup> Calvo's conception of the international law regarding the treatment of aliens reflects an essentially formal view of the rule of law. That is, on Calvo's view, as a matter of international obligation on the host state, aliens were entitled to be treated non-discriminatorily in accordance with the provisions of local law and to have access to local courts in order to address complaints about the content or application of that law. International law, Calvo argued, required nothing more substantial with respect to the host state's treatment of an alien.<sup>16</sup> Indeed, for Calvo, to argue for anything further would entail an essential infringement of the host state's sovereignty within its territory.

The absoluteness of Calvo's doctrine was not accepted by European powers or by the United States. In a speech in 1910, Elihu Root, then the US Secretary of State, offered a classic rebuttal to Calvo's approach – the articulation of an international minimum standard of treatment:

---

12 Carlos Calvo, *Le droit international theorique et pratique*, vol 1 (5th edn, 1896) at para 185–205, pp 322–51. The first edition of Calvo's treatise appeared in 1868.

13 Carlos Calvo, *Le droit international theorique et pratique*, vol 1 (5th edn, 1896).

14 Carlos Calvo, *Le droit international theorique et pratique*, vol 1 (5th edn, 1896) at para 1280; vol 6 at para 256.

15 Carlos Calvo, *Le droit international theorique et pratique*, vol 1 (5th edn, 1896) at para 205.

16 Carlos Calvo, *Le droit international theorique et pratique*, vol 1 (5th edn, 1896) at para 205.

There is a standard of justice very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of its citizens.<sup>17</sup>

Root's speech presented a different conception of international justice from Calvo's, and a fundamentally different conception of the rule of law in international law. For while Root's approach to the treatment of aliens generally accepted Calvo's position of non-discriminatory national treatment as an acceptable default rule for most cases, Root posited an international standard of justice to address exceptional cases where the justice offered by the state's legal order failed. Root's objection to Calvo's argument appears not to have been so much a disagreement over Calvo's focus on the importance of formal procedures for administering law, but rather on whether international law itself contained standards for guaranteeing that the formal rule of law be met on the domestic level. As Paparinskis has noted, while Root characterised the international standard he was invoking as "very simple", in truth there was nothing simple about it, even given its relatively formal focus.<sup>18</sup> The challenge faced by the project to establish an international minimum standard was threefold: (1) to develop an articulation of a standard of international treatment phrased with sufficient clarity and determinacy (and one which states of different legal traditions could comfortably meet) so as to (2) permit the principled identification of specific cases in which a host state's non-discriminatory treatment of an alien should be considered to have crossed the line and become characterised as an internationally wrongful act, while (3) building an international consensus supporting and recognising the articulation of this standard, which itself should be

---

17 Elihu Root, "The Basis of Protection to Citizens Residing Abroad" (1910) 4 *Proceedings of the American Society of International Law* 16 at 21.

18 Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013) at p 43.

knowable to states. Ultimately, it was a challenge which Root and his contemporaries were unable to overcome.<sup>19</sup>

The struggle to articulate and agree upon the scope for an international standard persisted as states moved from reliance on customary norms to treaties with respect to the treatment of foreign investors. For although states signed international investment treaties (and treaties containing investment disciplines) in their thousands in the second half of the 20th century, these treaties in the main did a poor job of creating or articulating a political settlement on the underlying debate with respect to the appropriate standard of treatment of foreign investors. In the investment treaties developed following the Second World War, and popularised in dramatic fashion in the 1980s–2000s,<sup>20</sup> states came to replace the opaque and increasingly politically charged phrase “international minimum standard” with the also opaque but not yet politically infused

---

19 The Responsibility of States for Damage Caused in Their Territory to the Person or Property was a main subject of consideration in the 1930 Hague Conference for the Codification of International Law sponsored by the League of Nations. See, *eg*, Green H Hackworth, “Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners” (1930) 24 AJIL 500. No agreement was reached in part because of “the refusal of [newly independent states] to accept the ... minimum standards of treatment insisted upon by the capital-exporting states” (PT Muchlinski, “The Energy Charter Treaty: Towards a New International Order For Trade and Investment or a Case of History Repeating Itself?” in Thomas W Waelde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) at p 209).

20 There is a remarkable similarity among the investment treaties entered into during this period, accounting for the great mass of investment treaties presently in force. To a great degree these treaties follow closely the model established by the 1967 draft Convention on the Protection of Foreign Property of the Organisation for Economic Co-operation and Development (OECD). Generally, they are short agreements, usually about four to six pages long, with twelve to fourteen articles. As a general matter, the agreements pay little attention to such issues as the promotion of foreign investment in the host state economy or the obligations placed upon foreign investors in making an investment in the host state. Rather the focus of these agreements is on investment protection. See, *eg*, United Nations Conference on Trade and Development (UNCTAD), *Trends in International Investment Agreements: An Overview* (1999) UNCTAD/ITE/IIT/13.

phrase “fair and equitable treatment”.<sup>21</sup> The adoption of open-textured standards like “fair and equitable treatment” in these treaties appears to have been a political choice aimed at facilitating agreement and reducing the likelihood of renewed disagreement with respect to the content or existence of protections in customary international law. No effort was made in these treaties to give concrete meaning as to what “fair and equitable” treatment might mean or entail<sup>22</sup> and thus the treaties did little to address the normative challenge of idealising the substantive protections of an internationalised rule of law guarantee which would serve to keep in check deficiencies on the national level.

While some *post hoc* commentators on the development of the investment treaty regime have described the guarantee of “fair and equitable treatment” as ensuring “government according to the rule of law”,<sup>23</sup> given its unique focus on property (“investment”) rights, it is an especially substantive conception of the rule of law. Moreover, because the treaties in which the phrase appears provide few interpretative clues as to its meaning, its

- 
- 21 It is not necessary here to trace the introduction into the international treaty lexicon of the phrase “fair and equitable treatment”. Suffice it to note for present purposes that the phrase appears to have begun its modern life in the Friendship, Commerce and Navigation Treaties negotiated by the United States following the Second World War, see Herman Walker, “Modern Treaties of Friendship, Commerce and Navigation” (1958) 42 *Minnesota Law Review* 805 at 811, before finding its way into the text produced by Herman Abs and Hartley Shawcross in their “Draft Convention on Investments Abroad”, originally published in (1960) 9 *Journal of Public Law* 116 at 119 (Art 1). The Abs-Shawcross draft in turn served as the underlying text for the OECD 1967 Draft Convention which became the basis for the majority of bilateral investment treaties presently in force.
- 22 Neither the Abs-Shawcross draft, nor the accompanying commentary that they prepared, elaborated on the meaning of “fair and equitable” or the rationale for its inclusion. The commentary simply noted that with respect to the accompanying prohibition on “unreasonable” treatment, the draft “merely gives clear expression to a concept inherent in any system of law and which, in the sphere of international law, has been affirmed in general terms” (Herman Abs and Hartley Shawcross, “Draft Convention on Investments Abroad” (1960) 9 *Journal of Public Law* 116 at 120).
- 23 Charles N Brower and Stephan W Schill, “Is Arbitration a Threat or a Boon to International Investment Law?” (2009) 9 *Chicago Journal of International Law* 471 at 488.

open-textured quality gives rise to concerns of indeterminacy and variability of application and the ability of those to whom the standard applies to understand *ex ante* what the law is, not to mention the possibility that the judicial philosophies of arbitrators will play an important role in the standard's articulation and application. The words "fair" and "equitable" of course demand reference to external values in order for them to be given meaning and operation; they are not self-defining concepts. But as investment treaties have historically been drafted, there has been limited evidence of wider agreement on such values by the treaty parties.<sup>24</sup>

In response to the vague standards which frequently must be applied by investor-state tribunals, some arbitrators have sought to give positive grounding to their interpretations of these provisions through the importation of values from other systems of law.<sup>25</sup> These efforts are reflective of the need for socio-political values in order to give meaning to a phrase like "fair and equitable" or, more generally, to any kind of substantive conception of the rule of law. These efforts at cross-pollination or incorporation of values found outside of the investment treaty can be problematic, however, especially where these interpretive methods proceed

---

24 See N Jansen Calamita, "International Human Rights and the Interpretation of Investment Treaties – Constitutional Considerations" in Freya Baetens (ed), *The Interaction of International Investment Law with Other Fields of Public International Law* (Cambridge University Press, 2013).

25 In interpreting a treaty, Article 31(3)(c) of the Vienna Convention on the Law of Treaties (1969) requires "tak[ing] into account ... any relevant rules of international law applicable in the relations between the parties." The provision, however, leaves open a number of questions about its implementation, not least of which is what it means to "take into account" other legal rules for the purposes of interpretation. What I refer to here, however, is the outright grafting of values from other international legal regimes into the interpretation of investment treaties where the external regime is one to which the investment treaty parties do not belong, see, *eg*, *Técnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No ARB (AF)/00/2, award dated 29 May 2003 (application of case law of the European Court of Human Rights, even though respondent state was not a party to the European Convention on Human Rights); *Occidental Petroleum Corp v Ecuador* ICSID Case No ARB/06/11, award dated 5 October 2012 (same; neither claimant state nor respondent state party to European Convention).

without apparent regard to the primary rules of public international law<sup>26</sup> with respect to formal sources of law<sup>27</sup> and the consensual nature of jurisdiction.<sup>28</sup> While the interpretative burden placed on tribunals under these treaties is daunting,<sup>29</sup> the solution to that problem is not found by discarding foundational principles of public international law, but rather

- 
- 26 As Jessup remarked in 1927 at the American Society of International Law, the desirability of clearer rules should not lead to an abandonment of general principles of international law: “I fully agree there is an overwhelming necessity for definite criteria ... but I deny the implication that merely because there is necessity for this definite position that you have a right to inject into international law a criterion merely because it is definite without ascertaining whether that criterion is actually accepted. We cannot dismiss something as a generality in favor of something which is definite merely because one is definite and one is general, unless the definite criterion is actually accepted.” Philip C Jessup, Comments, Round Table Conference on the Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners (1927) 21 *Proceedings of the American Society of International Law* 35 at 35–36.
- 27 See, *eg*, Duncan B Hollis, “Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law” (2005) 23 *Berkeley Journal of International Law* 1; Matthew Lister, “The Legitimizing Role of Consent in International Law” (2011) 11 *Chicago Journal of International Law* 1.
- 28 See *Status of Eastern Carelia* [1923] PCIJ (ser B) No 5, at 19, holding that “no State can, without its consent, be compelled to submit its disputes ... to arbitration, or any other kind of pacific settlement”; see also Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press, 2003) at p 287, describing the principle of consent as part of the “basic constitutional doctrine of the law of nations”.
- 29 Elsewhere I have discussed some of the difficulties faced by tribunals called upon to interpret and apply investment treaties through accepted methods of interpretation in public international law. See N Jansen Calamita, “International Human Rights and the Interpretation of Investment Treaties – Constitutional Considerations” in Freya Baetens (ed), *The Interaction of International Investment Law with Other Fields of Public International Law* (Cambridge University Press, 2013). See also Campbell McLaughlin, “Investment Treaties and General International Law” (2008) 57 ICLQ 361; Martins Paporinskis, “Investment Treaty Interpretation and Customary Law: Preliminary Remarks” in Chester Brown and Karen Mills (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011).

precisely by acknowledging those principles, applying them rigorously, and bringing change to bear through the practice of states themselves.<sup>30</sup>

The problem of indeterminacy and variability in the interpretation and application of investment treaties is compounded by a structural aspect of the investment treaty regime as it presently exists: the delegation of the interpretation and application of these treaties to *ad hoc* arbitral tribunals. While the clarification of vague legal standards through the decisions of dispute resolution institutions is not an unheard of phenomenon, particularly in orders with institutions that are constitutionally competent to adopt authoritative interpretations of constitutional texts, even in domestic or regional constitutional orders where such arrangements are often found, the process of constitutional explication through adjudication raises concerns with respect to legitimacy, consistency, predictability and coherence.<sup>31</sup> These concerns are even more heightened and more critical in the field of international investment law, which exists as a diffuse network

---

30 Moreover, practically and politically it is evident that if investment treaty commitments are to become entrenched and even systematised, it is for states to create that system through the hard process of developing consensus, refining design, and learning from experience. No amount of creative attempts to fashion a *jurisprudence constante* from what remains a relative handful of *ad hoc* arbitral awards interpreting a small minority of 3,200 or more increasingly heterogeneous investment treaties can or will do that. For thoughts on the instrumental role of investor-state arbitral decisions as signals to treaty parties about the meaning and effects of their existing treaty commitments, see generally Tom Ginsburg and Richard H McAdams, “Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution” (2004) 45 *William & Mary Law Review* 1229 at 1263–76, which notes that international tribunals can provide information in the form of “focal points” that clarify textual ambiguities or “signals” that cause parties to update their beliefs about facts. For concerns about the learning of lessons in investment treaty-making practice, see, *eg*, Lauge Poulsen, *Developing Countries, Bounded Rationality, and the Diffusion of Investment Treaties* (unpublished manuscript of forthcoming work on file with author); Mark S Manger and Clint Peinhardt, “Learning and Diffusion in International Investment Agreements”, Presentation at the PEIO Conference at Princeton University (16–18 January 2014).

31 See N Jansen Calamita, “The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties” *Yearbook of International Investment Law & Policy* 2013–14 (forthcoming).

of increasingly heterogeneous agreements entered into against a background of contested customary international law without authoritative (and thereby unifying) interpretive institutions.<sup>32</sup>

As a consequence of this combination of open-textured language and *ad hoc*, decentralised dispute resolution, questions have been raised about the compatibility of the regime with formal imperatives of the rule of law. Not only does the lack of clarity, consistency, and predictability of the content of investment treaty obligations raise concerns about these treaties' ability to provide for a coherent concept of the rule of law applicable to the treatment of foreign investors, but it also raises rule of law concerns as to the ability of host states to know what the law is and be able to act upon that knowledge. As observed in a recent report on fair and equitable treatment by the United Nations Conference on Trade and Development (UNCTAD):

[D]ivergent approaches based on capacious wording may result in a real challenge for States to implement the FET obligation domestically. This is even more challenging when State agencies or subnational entities are the ones interacting with the investor or in charge of taking a regulatory measure or implementing it. If the State and its subnational entities do not know in advance what type of conduct may be considered a breach of a treaty, then it cannot organize its regulatory and administrative decision making processes and delegation in a way that ensures that its conduct will not incur liability under the FET standard.<sup>33</sup>

Investment treaty making is a dynamic process. Over the past ten years the structure and content of investment treaty arrangements has begun to change significantly from the skeletal structures of earlier investment treaties and their vague terminology. The development, as is well known, began in North America with the treaty-policy innovations adopted by Canada and the United States in reaction to their experiences both as respondents and as observers of claims under the investment chapter of the North American

---

32 As discussed below, investment treaty-making practice has undergone significant changes over the past ten years, and what was once a relatively homogeneous landscape has become increasingly and significantly varied.

33 UNCTAD, *Fair and Equitable Treatment: A Sequel*, Series on Issues in International Investment Agreements II, UN Doc UNCTAD/DIAE/IA/2011/5 (2012) <[http://unctad.org/en/Docs/unctaddiaeia2011d5\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf)> (accessed 21 January 2015).

Free Trade Agreement.<sup>34</sup> With the model treaties adopted by Canada and the United States in 2004,<sup>35</sup> and in the texts of the treaties covering investment entered into by those states (and increasingly others) in the years since, there has begun what seems to be a continuing process of crafting treaty language to express with greater clarity, specificity and context the obligations states intend to undertake, the rights they intend to reserve, and to limit the delegation of discretion to arbitral tribunals resolving disputes under these treaties. Thus in these treaties one finds preambulatory and textual statements specifically identifying shared values of the parties which are to serve as context for the interpretation of the agreement;<sup>36</sup> clarifications with respect to the meaning of expropriation;<sup>37</sup> specific provisions addressing “prudential measures” taken by the state to maintain the integrity of financial institutions and capital markets;<sup>38</sup> “temporary safeguards” provisions addressing capital controls and exchange restrictions taken to protect monetary reserves and the national currency;<sup>39</sup> broadly

---

34 North American Free Trade Agreement (17 December 1992) 32 ILM 289 (entered into force 1 January 1994) (NAFTA).

35 See Treaty Between The Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2004) (“US Model BIT (2004)”) <[www.state.gov/documents/organization/117601.pdf](http://www.state.gov/documents/organization/117601.pdf)>; Canada’s Model Foreign Investment Protection Agreement (2004); Treaty Between The Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2012) (“US Model BIT (2012)”) <<http://www.state.gov/documents/organization/188371.pdf>>.

36 See, *eg*, United States-Uruguay Treaty Concerning the Encouragement and Reciprocal Protection of Investments (2005) 44 ILM 268 (recognising the rights of the parties to regulate and specifically with respect to “the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labour rights”).

37 See, *eg*, Central America-Dominican Republic-United States Free Trade Agreement (2004) Annex 10-B <[www.ustr.gov](http://www.ustr.gov)>; Korea-United States Free Trade Agreement (2010) Annex 11-B <[www.ustr.gov](http://www.ustr.gov)>; Canada-Peru Free Trade Agreement (2009) Annex 812.1 <[www.international.gc.ca](http://www.international.gc.ca)>.

38 See, *eg*, US Model BIT (2004) Art 20.1; Canada-Peru Free Trade Agreement (2009) Art 1110 <<http://www.international.gc.ca>>.

39 See, *eg*, Canada-Chile Free Trade Agreement (1997) Annex G-09.1 <<http://www.international.gc.ca>>.

worded general exceptions clauses establishing the state's right to take action in its self-determined "essential security" interests;<sup>40</sup> specialised treatment of investments in the financial services sector;<sup>41</sup> clarification about the meaning of "customary international law" for purposes of treaty interpretation;<sup>42</sup> special exemptions from particular substantive protections, such as non-discrimination;<sup>43</sup> special procedures for claims related to measures of taxation;<sup>44</sup> mechanisms for binding interpretations of the treaty by the parties;<sup>45</sup> and a host of others. As I have argued elsewhere, clearer and more precise specification of the meaning of investment treaties is not simply a North American preoccupation, but is well on its way to becoming an international best practice.<sup>46</sup>

As a matter of text, interpretation and meaning, it seems evident that many of the drafting developments in state treaty practice over the past ten years have served to promote the rule of law in international investment law by clarifying the meaning of the rights and obligations set out under investment treaties, textually restraining arbitral discretion in the interpretation and application of those treaties, and providing greater specificity as to the values context in which those treaties are located in the parties' relations.<sup>47</sup> This development surely improves predictability and the parties' *ex ante* ability to understand what the law is and in that respect advances the adherence of the investment treaty regime to the criteria

---

40 See, *eg*, US Model BIT (2004) Art 18.

41 See, *eg*, NAFTA ch 14.

42 See, *eg*, US Model BIT (2012) Annex A.

43 See, *eg*, NAFTA Art 1108.7(a) (Government Procurement), Art 2106 and Annex 2106 (Cultural Industries).

44 See, *eg*, US Model BIT (2012) Art 21.

45 See, *eg*, US Model BIT (2004) Art 30.

46 See N Jansen Calamita, "The Making of Europe's International Investment Policy: Uncertain First Steps" (2012) 39 *Legal Issues of Economic Integration* 301 at 328.

47 At the same time with refinement of text to better reflect state agreement and understanding may come increased heterogeneity, reflecting the fact that on the international level a move towards increased predictability and certainty may also mean a move away from systematisation. See generally N Jansen Calamita and Mavluda Sattorova (eds), *The Regionalization of Investment Treaty Arrangements: Developments and Implications* (British Institute of International and Comparative Law, 2014).

associated with a formal conception of the rule of law. The question left open, however, is the substantive one. That is, as states increasingly move towards making the standards in their investment treaty arrangements more explicit, are the substantive choices being made reflective of more than the norms advanced by a formal conception of the rule of law? Are these new treaties also serving to promote some of the wider values embraced by more substantive conceptions of the rule of the law, such as democracy, human rights, and human development? While a full answer to that question is beyond the scope of this chapter, Part 3 offers some preliminary observations about what we seem to know and do not know about the relationship between the rule of law, development and international investment treaties.

### **Economic Development, the Rule of Law and Investment Treaty Arrangements: Empirical Questions**

While the public international law relating to foreign investment has focused historically on the application of the rule of law to foreign investors, the broader topic of the rule of law and investment treaty arrangements raises a further set of questions which tend to receive limited attention from lawyers but are of increasing interest among political economists and international relations experts: (a) What is the relationship between foreign investment flows, host state rule of law conditions and investment treaty arrangements? (b) What is the relationship between investment treaty arrangements and rule of law conditions in host states? This section provides a brief survey of some of the principal issues raised by this fast-growing area of empirical study and notes a number of key questions which remain outstanding.

#### ***The relationships among host state rule of law conditions, investment treaties, economic development and foreign direct investment***

The rule of law, variously conceived and defined, has become one of the most widely invoked ideas in discussions about international development. Writing in 1998, Carothers observed that: "One cannot get through a foreign policy debate these days without someone proposing the rule of law

as the solution to the world's troubles.”<sup>48</sup> Ten years later *The Economist* magazine described the rule of law as having become “the motherhood and apple pie of development economics ... held to be not only good in itself, because it embodies and encourages a just society, but also a cause of other good things.”<sup>49</sup> In public statements and policy prescriptions, international financial institutions, aid organisations, governments and intergovernmental organisations often emphasise the rule of law as a key component for human welfare, stability, and growth in their reform programs.<sup>50</sup>

As emphasis on the rule of law has grown in policy discussions, the rule of law has concurrently received attention in the social sciences, examining the causes and consequences of the rule of law and its relationship to economic growth. In large measure these studies have taken the form of econometric analyses based on large “rule of law” data sets.<sup>51</sup> A principal difficulty which has emerged in this work, however, concerns the problem of conceptualisation.<sup>52</sup> That is, how does one take the conceptions of the rule of law described in Part 1 by legal theorists and establish measures capable of being captured and subjected to quantitative analysis? As one political economist has observed, “it is hardly surprising that a heated debate on the

---

48 Thomas Carothers, “The Rule of Law Revival” (1998) 77 *Foreign Affairs* 95 at 95.

49 “Economics and the Rule of Law: Order in the Jungle”, *The Economist* (London) (13 May 2008).

50 See, *eg*, UN General Assembly, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc A/RES/67/1 (30 Nov 2012): “The advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law.” See generally Rachel Kleinfeld Belton, “Competing Definitions of the Rule of Law” (2005) Carnegie Papers No 55, Carnegie Endowment for International Peace.

51 See Stephan Haggard, Andrew MacIntyre and Lydia Tiede, “The Rule of Law and Economic Development” (2008) 11 *Annual Review of Political Science* 205.

52 See Tom Ginsburg, “Pitfalls of Measuring the Rule of Law” (2011) 3 *Hague Journal on the Rule of Law* 269 at 270–271.

production, quality, and use of governance indicators has flourished in the recent years.”<sup>53</sup>

As a lawyer approaching the myriad of economic studies addressing the relationship between the rule of law and economic growth, one notes quickly how different the conceptions of the rule of law being used in these studies are from the conceptions addressed in Part 1 above, especially those of a formal character. In these studies, “the rule of law is usually identified with property rights, contract enforcement, low crime rates, minimal corruption, independent judiciaries, legal formalism, and legal limits on government officials, while broader versions include democracy, human rights, and welfare rights.”<sup>54</sup> Such a diverse range of conceptualisations and operational meanings for measurable “rule of law” variables makes general assessment of the literature difficult and attempts to map these social science findings back onto legal theory even more so. A large-scale review study that compared measured rule of law variables across the widely used data sets found a “relatively low level of correlation both within and across categories”, and in some cases found negative correlations between different

---

53 Svend-Erik Skaaning, “Measuring the Rule of Law” (2010) 63 *Political Research Quarterly* 449 at 449.

54 Brian Z Tamanaha, “The Primacy of Society and the Failures of Law and Development” (2011) 44 *Cornell International Law Journal* 209 at 228. The World Bank, for example, in its World Governance Indicators and its Rule of Law Index has defined the rule of law as “the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police and the courts, as well as the likelihood of crime and violence”, World Bank, World Governance Indicators, available at <<http://info.worldbank.org/governance/wgi/pdf/rl.pdf>> (accessed 14 June 2014). As Ginsburg has noted, this definition conflates a variety of ideals, including both crime and contract enforcement in the same framework, and brings procedural elements readily associated with a formal conception with the rule of law together with substantive concepts like security of the person, freedom from crime, and notions of property and contract law. An overly inclusive conceptualisation of the rule of law raises a host of difficulties for the interpretation of data. See Tom Ginsburg, “Pitfalls of Measuring the Rule of Law” (2011) 3 *Hague Journal on the Rule of Law* 269 at 271. See also Svend-Erik Skaaning, “Measuring the Rule of Law” (2010) 63 *Political Research Quarterly* 449 at 452–453.

measured variables.<sup>55</sup> In a more recent analysis of 11 leading cross-country “rule of law” datasets (collected on the basis of different conceptualisations of the rule of law), the authors came to a similar conclusion: “findings with respect to the rule of law and economic growth are likely to be highly sensitive to the use of indicator.”<sup>56</sup>

Given this diversity, there are relatively few strong conclusions that one feels comfortable drawing. Perhaps the strongest correlation which emerges from these studies is the link between conceptions of the rule of law which include measurement of the protection of individual property rights and economic growth.<sup>57</sup> This conceptualisation is sometimes described as focusing on the role of “institutions”.<sup>58</sup> This, of course, is a very broad conception of the rule of law and one which incorporates aspects of liberal economic theory, so it is not especially surprising to find a strong correlation between the recognition and protection of property rights and economic growth. But even here there is reason for caution lest one conflate correlation with causation, or read specific policy prescriptions into general correlations. As Tamanaha has pointed out, even the strong correlation between the protection of property rights and economic growth is open to counter-examples such as the economic growth experienced in China, a state in which collective ownership and little regard for private property rights, particularly in the intellectual property area, has largely been the

---

55 Stephan Haggard, Andrew MacIntyre and Lydia Tiede, “The Rule of Law and Economic Development” (2008) 11 *Annual Review of Political Science* 205 at 222.

56 Stephan Haggard and Lydia Tiede, “The Rule of Law and Economic Growth: Where are We?” (2011) 39 *World Development* 673 at 677.

57 Stephan Haggard and Lydia Tiede, “The Rule of Law and Economic Growth: Where are We?” (2011) 39 *World Development* 673 at 674 (“A broad literature has found that more robust property rights protection is associated with better long-run economic performance.”)

58 See, *eg*, Dani Rodrik, Arvind Subramanian and Francesco Trebbi, “Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development” (2004) 9 *Journal of Economic Growth* 131. In their paper the authors find that an increase in institutional quality of one standard deviation – corresponding roughly to the difference between measured institutional quality in Bolivia and South Korea – produces a two log points rise in per capita incomes, or a 6.4-fold difference, which is also roughly the income difference between the two countries (at 134).

norm.<sup>59</sup> Likewise, as Rodrik, Subramanian and Trebbi note in their study finding correlations between the “institution” of property rights and economic growth:

[T]he operational guidance that our central result on the primacy of institutional quality yields is extremely meagre ...

We illustrate the difficulty of extracting policy-relevant information from our findings using the example of property rights. Obviously, the presence of clear property rights for investors is a key, if not the key, element in the institutional environment that shapes economic performance. Our findings indicate that when investors believe their property rights are protected, the economy ends up richer. But nothing is implied about the actual form that property rights should take. We cannot even necessarily deduce that enacting a private property rights regime would produce superior results compared to alternative forms of property rights ...<sup>60</sup>

These empirical analyses of the relationship between conceptions of the rule of law, property rights and economic development are an instructive background against which to consider the relationship of investment treaties and economic growth. Given the strength of correlation (generally) between economic growth and the recognition of property rights, one might reasonably hypothesise that international investment treaty arrangements, which are principally aimed at the recognition and protection of foreign investments, would correlate with higher levels of international investment. And, indeed, a frequently recited aspect of the international investment law narrative is that a principal purpose of international investment treaties is to serve as an internationalised substitute for the domestic legal systems of host states in which the place of the rule of law (including the recognition of property rights) may be unreliable or uncertain.<sup>61</sup> Such a commitment device, it has been argued, serves to signal to foreign investors that the host

---

59 Brian Z Tamanaha, “The Primacy of Society and the Failures of Law and Development” (2011) 44 *Cornell International Law Journal* 209 at 229.

60 Dani Rodrik, Arvind Subramanian and Francesco Trebbi, “Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development” (2004) 9 *Journal of Economic Growth* 131.

61 See, eg, Christoph Schreuer, Loretta Malintoppi and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) at p 352; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) at p 128.

state is willing to abide by the specific rules of law as articulated in the investment treaty, which may reflect an adherence to the rule of law more generally, which in turn serves as an incentive to investors in their FDI decision-making.<sup>62</sup> As the argument was colourfully put by Hartley Shawcross, one of the originators of the ill-fated Organisation for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Foreign Property:

The *quid pro quo* for the States' undertaking is, in fact, in the English vernacular, the provision of the quids, that the capital importing countries in return for agreeing to abide by the generally recognized procedures of international law, will receive more private investment and with the capital, the benefits of the technical and commercial skills which go with them than would otherwise be the case.<sup>63</sup>

The empirical evidence for this dynamic occurring in practice remains unsettled, owing in significant part to the methodological challenges posed by econometric studies of the subject.<sup>64</sup> Whereas findings of relative correlation between host state conclusion of investment treaties and flows of inward FDI have become predominant,<sup>65</sup> these studies suffer from similar

---

62 See, *eg*, Alan O Sykes, "Public Versus Private Enforcement of International Economic Law: Standing and Remedy" (2005) 34 *Journal of Legal Studies* 631 at 644. Indeed, this was the position taken by the United Nations in the late 1990s/early 2000s, see UNCTAD, "UNCTAD Hosts Bilateral Investment Treaty Negotiations by Groups of Fifteen Countries", Press Release, (7 Jan 1999), advising that by "signing BITs ... developing countries are sending a strong signal of their commitment to provide a predictable, stable and reliable legal environment for foreign direct investors".

63 Quoted in Earl Snyder, "Protection of Private Foreign Investment: Examination and Appraisal" (1961) 10 *ICLQ* 469 at 492.

64 See Lauge Poulsen, "Book Review: Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*" (2009) 20 *EJIL* 935.

65 See, *eg*, Jeswald W Salacuse and Nicholas P Sullivan, "Do BITs Really Work?" (2005) 46 *Harvard International Law Journal* 67; Selen Sarisoy Guerin, "Do the European Union's Bilateral Investment Treaties Matter?" (July 2010) CEPS Working Document No 333; Matthias Busse, Jens Königer and Peter Nunnenkamp, "FDI Promotion through Bilateral Investment Treaties: More Than a Bit?" (2008) Kiel Working Paper No 1403. See generally UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD/DIAE/IA/2009/5 (2009).

methodological limitations which suggest treating their conclusions with some caution: (a) most studies do not account for differences in the structure and content of investment treaty arrangements (for example, whether the treaty provides for pre- or post-establishment protection); (b) none appear adequately to establish causality (as opposed to simple correlation) between investment treaties and levels of FDI; (c) all struggle to isolate the conclusion of investment treaties as a measurement variable from plausible endogenous causes of increased levels of FDI (such as large markets, an emerging middle class with greater purchasing power, broader legislative reforms or the presence of other economic treaties, for example, free trade agreements or double taxation treaties); and (d) all suffer from the poor quality of available FDI data, whether measured as flows of FDI or existing stocks.<sup>66</sup> Given the limitations on econometric study of the impact of investment treaties on levels of FDI, one scholar has suggested that “a useful approach for future studies would perhaps be to ask foreign investors themselves whether they take these treaties into account when deciding where, and how, to invest.”<sup>67</sup> Precisely such a study forms a central part of the research programme of the Investment Treaty Forum and the Bingham Centre for the Rule of Law at the British Institute of International Comparative Law for 2015.<sup>68</sup>

### ***Host state rule of law conditions and the effect of investment treaty arrangements***

Beyond the relationship between flows of FDI and investment treaties, there has been considerable theorising about the effect that international investment treaty arrangements may have on governance and rule of law

---

66 See, eg, Jason Yackee, “Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties” (2008) 33 *Brooklyn Journal of International Law* 405; Emma Aisbett, “Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation” in Karl Sauvant and Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (Oxford University Press, 2009).

67 Lauge Poulsen, “Book Review: Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*” (2009) 20 *EJIL* 935 at 937.

68 See the Corporate Decision-Making in Foreign Direct Investment project <<http://www.biicl.org/bingham-centre/projects/corporatedecision>>.

conditions in host states.<sup>69</sup> For many legal scholars the positive effects of investment treaty commitments are presumed to flow naturally from the host state's desire to avoid liability to foreign investors for breaches of their treaties.<sup>70</sup> The assumption made in these arguments is that investment treaty rules act as “a deterrent mechanism against short-term policy reversals and assist developing countries in promoting greater effectiveness of the rule of law at the domestic level.”<sup>71</sup> Others have claimed similarly that “[d]amages as a remedy sufficiently pressure States into complying with and incorporating the normative guidelines of investment treaties into their domestic legal order.”<sup>72</sup>

These assertions rest on empirically questionable assumptions about state behaviour, especially in the developing world.<sup>73</sup> The underlying premise is that governments are rational (and unitary) decision-makers and can therefore be presumed to act rationally in the face of negative incentives, such as losing an investment treaty arbitration. This dynamic, in turn, is assumed to lead to preventative practices in the form of better decision-making, *ex ante* compliance with investment treaty standards, and post-hoc revision of domestic regimes in light of experience. Emerging scholarship, however, both with respect to developing state decisions to enter into investment treaties and with respect to how host states adapt their investment treaty policies in light of experience, question whether the

---

69 For a recent analysis, see Mavluda Sattorova, “The Impact of Investment Treaty Law on Host State Behavior: Some Doctrinal, Empirical and Interdisciplinary Insights” in Shaheez Lalani and Rodrigo Polanco (eds), *The Role of the State in Investor-State Arbitration* (Brill, 2014).

70 See, *eg*, Rudolf Dolzer, “The Impact Of International Investment Treaties On Domestic Administrative Law” (2005) 37 *New York University Journal of International Law and Policy* 972.

71 Roberto Echandi, “What Do Developing Countries Expect from the International Investment Regime?” in Jose Alvarez (ed), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011) at p 13.

72 Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) at p 377.

73 See generally Lauge Poulsen, *Developing Countries, Bounded Rationality, and the Diffusion of Investment Treaties* (unpublished manuscript of forthcoming work on file with author).

rational-choice model of state behaviour is valid.<sup>74</sup> This, in turn, calls into question the robustness of claims about the effects of international investment treaties on the domestic administration of law which depend upon assumptions about state behaviour without further examination.<sup>75</sup>

Finally, looking at the treaties themselves for provisions addressing host state rule of law development directly, one finds little at present. While some more recent treaties refer to host state governance in preambles and declaratory provisions, few treaties create operational commitments addressed to the development and maintenance of effective legal frameworks in host states.<sup>76</sup> Some recent treaties create concrete frameworks with respect to the transparency of host state laws, establishing rules for making such laws publicly available to foreign investors,<sup>77</sup> but beyond this fairly narrow form of commitment, international investment treaties do not as yet contain provisions to guide (or assist) host states in

---

74 See Lauge Poulsen and Emma Aisbett, “When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning” (2013) 65 *World Politics* 273.

75 Not all theorising has assumed that rational-choice will lead to improvements in the domestic administration of law. Ginsburg, relying upon institutional design theory, has suggested that international investment treaties may lead to a decline in domestic institutional quality. On Ginsburg’s view, “If governments and foreign investors can turn to external sources of dispute resolution, they have little incentive to make marginal investments in improving local judicial quality.” See Tom Ginsburg, “International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance” (2005) 25 *International Review of Law and Economics* 107 at 121. On both views it is fair to say that empirically more work needs to be done.

76 In a similar way, international investment treaties generally do not contain operational commitments with respect to promoting investment into the host state.

77 See, eg, ASEAN Comprehensive Investment Agreement (2009), Art 1 and 21 <<http://agreement.asean.org>>; Panama–United States Free Trade Agreement (2007), Art 18 <[www.ustr.gov](http://www.ustr.gov)>. Compare Azerbaijan–Estonia Bilateral Investment Treaty (2010), Art 2(4) (requiring transparency “to the extent possible”) <<http://investmentpolicyhub.unctad.org>>. See generally, UNCTAD, *Transparency: A Sequel*, Series on Issues in International Investment Agreements II, UNCTAD/DIAE/IA/2011/6 (2012).

building domestic institutions, enacting appropriate domestic legislation and effectively implementing their international obligations.<sup>78</sup>

## Conclusions

Conceptions of the rule of law vary in their content and articulation. For international investment law, conceptions of the rule of law run as a deep current throughout the regime. Largely, however, states have not articulated these conceptions in clear and predictable ways in their investment treaties. While state practice in this regard is improving as states increasingly draft more expressive treaties, issues remain for the interpretation and application of the great mass of investment treaties presently in force which were drafted in an earlier generation. In approaching these treaties it can be tempting to give substance to vague text through the relaxation of fundamental rules of public international law on norm creation and interpretation, but rather than addressing the problem of indeterminacy, such questionably legitimate efforts to import normative systems in the context of *ad hoc* international arbitration raises their own rule of law implications about ascertainment of the law, both its content and sources.

Empirically, important work is being done which addresses questions of fundamental importance to the development of international regulation of FDI. From examinations of the relationship between the rule of law and economic development to the effect of investment treaties on levels of FDI and FDI decision-making, empirical questions remain open which may serve to help policy makers in their formulation and design of the regime going forward. Similarly, the dynamics between investment treaties, investment treaty arbitration and rule of law conditions in host states remain not well understood. From a treaty design perspective, at the present, investment treaties generally do not address host state rule of law development directly. It may be that with further research evidence will

---

78 Compare, for example, the position with respect to the World Trade Organisation (WTO) and the Institute for Training and Technical Cooperation established to coordinate WTO-related technical assistance and training in response to the Doha Development Agenda. See Greg Shaffer, "Can WTO Technical Assistance and Capacity Building Serve Developing Countries?" (2006) 23 *Wisconsin International Law Journal* 643.

emerge which may move states towards including treaty provisions or mechanisms to assist in this regard.

---

## THE RULE OF LAW AND FOREIGN INVESTMENT: TREATY CONTEXTS AND THE RULE OF LAW

Professor Locknie Hsu<sup>1</sup>

*School of Law, Singapore Management University*

[S]omeone claimed that these international investment agreement dispute settlements are an instrument for improved governance in developing countries, which I think is a very pretentious claim. ... If we are going to meddle in countries, I would think this is the area of “transparency”, which would be very valuable ... Whether [an investment agreement] promotes investment or not is questionable but at least it’ll promote due process.

– Don Wallace, Georgetown Law Center<sup>2</sup>

### Contextualizing Investment Treaty Commitments and Rule of Law Notions

There has been no agreement on what forms the precise content of the rule of law.<sup>3</sup> As the late Lord Bingham aptly and candidly summed up the situation, when explaining why he had chosen the rule of law as the subject of the sixth Sir David Williams Lecture at Cambridge:

- 
- 1 The author wishes to thank Mr Christopher Thomas QC for his helpful comments in reviewing this article. Any errors remain my own.
  - 2 Don Wallace, “Promoting and Protecting Investment in the Asia-Pacific Region: What is the Role for Investment Agreements” in Ian A Laird and Todd Weiler (eds), *Investment Treaty Arbitration and International Law* (JurisNet LLC, 2002) at p 75.
  - 3 See Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010), particularly chapter 10; Thom Ringer, “Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the ‘Rule of Law’ and its Place in Development Theory and Practice” (2007) *Yale Human Rights & Dev L J* 178; as well as the pertinent remarks in the speech by Arthur Mitchell, General Counsel, Asian Development Bank, “The Role and Rule of Law in Asia”, reprinted in [2004] *ADBLPRes* 8, <<http://www.asianlii.org/asia/other/ADBLPRes/2004/8.html>> (accessed 5 March 2014).

...the expression was constantly on people's lips, I was not quite sure what it meant, and I was not sure that all those who used the expression knew what they meant either, or meant the same thing.<sup>4</sup>

To add to this situation, the rule of law has taken on a globalised dimension. Put another way, the far-reaching effects of globalisation, normally thought of in the context of trade law and economics,<sup>5</sup> have extended to the rule of law notion. Without attempting to define the rule of law, this article will use a number of hallmarks associated with it and link these to the globalisation phenomenon, particularly in relation to investment law.

The intellectual discourse has produced considerable debate, leading to approaches such as the "thin" and "thick" approaches, and the formal and substantive approaches, to the rule of law notion.<sup>6</sup> While it is not the aim of this chapter to fully address the presently intractable positions of those advocating either a "thin" or "thick" concept of the rule of law (leading to what appears to be an binary, "either-or" choice), a modest idea is suggested here as a small contribution to this debate.

Three points matter here. First, policies that inform the law and legal systems of a state are often fluid and may, as a result, vary over time. Secondly, while there have been various attempts to capture the essential elements of "rule of law", there is no universal consensus as to the criteria for measuring adherence to the "rule of law", or as to its scope. Moreover, a national system that may be seen to be taking a "thin" rule of law approach may be said to be so by certain criteria (for example inclusion of certain types of penalties in its criminal law). Yet, the same system may be

---

4 Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p vii. The lecture took place on 16 November 2006 and is available at <[http://www.cpl.law.cam.ac.uk/past\\_activities/the\\_rt\\_hon\\_lord\\_bingham\\_the\\_rule\\_of\\_law.php](http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php)> (accessed 5 March 2014).

5 See, eg, "Economics and the Rule of Law – Order in the Jungle", *The Economist* (London) (13 March 2008) <<http://www.economist.com/node/10849115>> (accessed 10 June 2014).

6 See Benjamin K Guthrie, "Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law" (2012-13) 45 *NYU J Int'l L & Pol* 1151 at 1160-64, citing Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) at p 91.

seen as having a “thick” rule of law approach in other respects (such as strong anti-corruption laws and enforcement). Finally, systems are generally not at one end or the other and usually fall somewhere in between.

In light of these points, an alternative way could be to view systems as sitting on a continuum, between a purely “thin” approach (formal observance of laws and rules only, with no social justice considerations) and a purely “thick” approach (formal observance of laws and rules which carry a full panoply of social justice notions, not all of which are the subject of universal agreement). The advantage of such a view is that as systems are located along this continuum, they may adjust the “thin-ness” or “thick-ness” as their social and developmental values and needs evolve. As a society matures, this adjustment could move a state toward the “thick” end of the continuum. However, given the absence of agreement on the notions packing the “thick” rule end of the continuum, a state may arguably never reach that extreme end, depending on the criteria adopted. This frame of reference does not attempt to pass judgment over whether the location of a system on the continuum makes it “dysfunctional” or a failure, as an assessment of this would require examination of matters that encompass a broad range of factors (such as history, culture and characteristics of the political system) and not just those couched within the present rule of law concepts (over which there is, as mentioned, no agreement in the first place). While others have raised this notion of a continuum, it has not necessarily been discussed in a non-judgmental manner.<sup>7</sup>

---

7 See, *eg*, Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press 2002) at p 592; suggesting a continuum of the “dysfunctional” to “functional” to “some ideal”. In Randall Peerenboom, “Show me the Money: The Dominance of Wealth Determining Rights Performance in Asia” (2004) 15 *Duke J Comp & Int'l L* 75, note 14 at p 79, the author also suggests a “continuum” in the context of scoring the performance of states with respect to social, economic and other rights. See also John Gillespie, “Towards A Discursive Analysis of Legal Transfers into Developing Asia”, (2008) 40 *Int'l Law & Pol* 657 at p 657, and Suzanne Ogden, *Inklings of Democracy in China* (Harvard University Press, 2002) at pp 4–6; cited by Guo Dingping, “Institutional Accumulation and Gradual Substitution: The Dynamics of Developmental Democracy in China” (2009) *China Papers* No 7, New Zealand Contemporary China Research Centre, (continued on next page)

Where do foreign investment and related treaties such as bilateral investment treaties (BITs) and free trade agreements (FTAs, which often carry investment treaty-type provisions and more) fit in with the above discussion, and how might they advance the promotion of movement along the continuum (toward the “thick” end)?<sup>8</sup> In order to better appreciate this, one must understand the broader multilateral developments occurring from the mid-1990s, when the World Trade Organization was set up. First, let us consider the overall picture: globalisation has led to the breaking down of trade and investment barriers, through a web of international economic agreements. As a result, the rule of law is present in a number of contexts – in domestic legal systems, multilateral systems and bilateral/plurilateral systems. Multilateral systems refer to the agreements such as those that bind WTO members. Bilateral/plurilateral systems refer to those established by trade and investment agreements by a smaller number of participants, such as free trade agreements (FTAs) and bilateral investment treaties (BITs). These systems co-exist and interact increasingly with each other. For example, multilateral rules such as those in WTO agreements affect the trade-related national laws of WTO members, how they are applied, and often even their national structures insofar as they affect cross-border trade. These rules also affect the bilateral or plurilateral agreements that members may enter into. Such agreements can and do, in turn, influence state actions and governance.

Two key observations follow the above points. First, specifically relevant to the present theme, rule of law notions are evident in many of these agreements, even though the agreements may not always say so in express terms.

Secondly, as these agreements often contain their own dispute settlement mechanisms (which may include state-to-state and investor-state mechanisms), they provide non-domestic avenues of scrutiny of *acts of*

---

University of Wellington, Victoria <<http://www.victoria.ac.nz/chinaresearchcentre/publications/papers/7-dingping-guo.pdf>> (accessed 4 March 2014) at p 9.

8 This is not to say that such treaties, when being negotiated, necessarily aim to promote the rule of law, or aim to encourage broad rule-making by investor-state tribunals. On the contrary, parties may be directly targeting encouragement of foreign direct investment and economic growth through signing such treaties; this can often be seen from preambular language of such treaties.

*governance* and *accountability* of states – which are related to the state of the rule of law in those states.

Together, they lead one to conclude that the rule of law as it relates to governance that affects trade and investment matters has been acquiring a new dimension. This is not thought of as revolutionary, since BITs have existed at least since the 1950s. However, the proliferation of such agreements (and FTAs which usually contain investment protection provisions similar to those in BITs), together with their dispute systems which are available to private claimants to enforce the treaty obligations, has greatly magnified the potential to affect national laws and state actions of governance and regulation. In this regard there has been somewhat of a revolution. Some even use the term “globalised governance”.

BITs and FTAs have therefore been instruments of a quiet legal revolution over the last two decades alongside the legal developments at the WTO. When the WTO was established in 1995, its members – comprising states only – committed to a large number of binding treaty obligations in a wide variety of areas, ranging from regulations on trade in goods to intellectual property rights. These have had broad implications and a significant impact on trade-related law reform, transparency and legal institutions in all WTO members.<sup>9</sup> They have laid a foundation for, or in some cases, further strengthened, systems of protection for trade, and to a much lesser extent, investment (through the narrow provisions of the Trade-Related Investment Measures Agreement, or TRIMs) across member states. Several WTO treaty provisions contribute toward promoting the rule of law in member states, such as those governing transparency and publication of members’ laws and regulations (for example under GATT 1994) access to domestic tribunals (for example under TRIPs), decision-making processes by central and sub-central levels of government in relation to trade matters (and investment, to a more limited degree), requirements of express and clear exceptions (such as permitted reservations under GATS) and requirements that changes to the law be clearly notified and that appropriate public consultation should take place (for example under the

---

9 See, *eg*, General Agreement on Tariffs and Trade (15 April 1994) 1867 UNTS 190 (“GATT 1994”), Art X and Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (“WTO Agreement”), Art XVI.

Agreement on Sanitary and Phytosanitary Measures, or SPS Agreement, and the Agreement on Technical Barriers to Trade, or TBT Agreement). To these provisions the WTO case law (which is ample) adds the notion that laws and regulations are scrutinized not only as they stand in the books but how a state *applies* and *enforces* them;<sup>10</sup> this approach makes clear the need for substantive rather than merely formal compliance with the WTO rules. This body of law makes a contribution to the transparency and stability of legal rules for traders and investors and has also had a significant effect on rule-making in many legal systems within WTO states, provoking the implementation of laws and measures that promote the rule of law elements as found in many of these commitments. The fact that many states in the developing world and Asia have already legally subscribed to this system of adherence to *both* formal and substantive (rule of law-related and other) requirements in their WTO obligations (with the possibility of challenge at the WTO, if breached in either manner) is a matter that appears to have been underemphasised, if not overlooked, by commentators in this area. Given that WTO obligations span a wide variety of areas of law-making that affects trade, rule of law requirements embedded in such obligations have led to changes within national legal systems. The WTO dispute settlement system provides a means to scrutinize and promote compliance with these rules. In short, WTO members have made binding legal commitments, some of which affect domestic law-making and governance, which are now subject to WTO dispute settlement scrutiny.

While this has been occurring at the multilateral level, states have also been entering into more BITs and FTAs than ever before. Asian states, in particular, have been increasingly involved in negotiating FTAs.<sup>11</sup> Again,

---

10 Compliance with non-discrimination principles in the WTO is expected on a *de facto* and a *de jure* basis – see, eg, Federico Ortino, “WTO Jurisprudence on De Jure and De Facto Discrimination”, in Federico Ortino and Ernst-Ulrich Petersmann (eds), *WTO Dispute Settlement System: 1995-2003* (Kluwer, 2004). See also General Agreement on Trade in Services (15 April 1994) 1869 UNTS 183 (“GATS”), Art XVII.

11 See generally World Trade Organization (WTO), *World Trade Report, 2011*, <[http://www.wto.org/english/res\\_e/publications\\_e/wtr11\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr11_e.htm)> (accessed 10 June 2014). The WTO system permits members to enter what are termed “regional trade agreements” (RTAs, often popularly known as FTAs) as long as certain criteria are fulfilled.

such agreements, with their various rule of law-related requirements, have had an impact on law reform and law-related institutions within the domestic systems of signatory states. One might venture to say that by entering such agreements, a state is at least signaling that it is open to an increased presence of the rule of law through observance of the relevant treaty provisions that promote it. As most FTAs and BITs carry dispute settlement provisions that allow investors to claim compensation or other remedies in the event of a breach of the treaty which causes damage to them, such treaty states are exposing themselves to challenge for government conduct or measures that may raise rule of law questions. Indeed, there have been a large number of investor challenges to investment host states on the basis of arbitrary, non-transparent or unfair treatment, as will be illustrated below.

In addition, by entering into such treaties, consistent with the rules of customary international law pertaining to the operation of treaties, states also commit to international treaty law norms such as *pacta sunt servanda*,<sup>12</sup> which require them to adhere to their legal commitments – whether directly related to the application of rule of law principles or not.

Apart from possible promotion of domestic rule of law, trade and investment treaties may also promote the *international* rule of law.<sup>13</sup> According to Lord Bingham: “the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large”.<sup>14</sup>

---

12 See Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (entered into force 27 January 1980), Preamble and Art 26.

13 See, *eg*, Chief Justice Sundaresh Menon, “Keynote Address: ASEAN Integration Through Law” (25 August 2013) <<http://cil.nus.edu.sg/wp/wp-content/uploads/2013/09/Keynote-by-CJ-Menon.pdf>> (accessed 20 January 2015); and the Address by James Bacchus, former Chairman of the World Trade Organization Appellate Body, “Groping Towards Grotius: The WTO and the International Rule of Law” (1 October 2002) <<http://www.worldtrade-law.net/articles/bacchusgrotius.pdf>> (accessed 5 March 2014). Tom Bingham, *The Rule of Law*, (Allen Lane, Penguin Press, 2010) at pp 110–11.

14 Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p 111.

## **Trade and Investment Law: Domestic Reforms**

In both the trade and investment contexts, therefore, there is an increasing opportunity for external scrutiny – through treaty dispute settlement mechanisms – of government acts that may be alleged to be at variance with treaty obligations that express one or more aspects of rule of law norms (such as the obligation to refrain from arbitrary or discriminatory treatment) within a state.

In the trade and investment law context, WTO commitments and bilateral/regional treaty activities have provided a certain impetus and incentive for increased observance of the rule of law.<sup>15</sup> The core provisions of investment treaties which address investor concerns often give rise to such potential for rule of law impact, even if the treaty language does not expressly state so. What then are some examples of investment treaty provisions that embrace the rule of law and may play a role in promoting it in the signatory states? Examples include provisions assuring investors access to international arbitration (in which the arbitrators are to act independently and impartially), transparency of laws and regulations affecting foreign investments; sometimes, the right to be consulted on significant changes to laws and regulations; and the very common “fair and equitable treatment” (FET), national treatment and most-favoured nation treatment provisions. For the purpose of this article, it is the treaty dimension arising from BITs and FTAs that is addressed, as opposed to national laws on admitting foreign investment/investors. Such treaties can have a profound effect on governance and law-making in a state.

---

15 Of course, states may embark on legal change that promotes the rule of law due to other reasons, such as compliance with international aid and development programmes and internal political decisions.

The following discussion illustrates some of these investment treaty provisions, which cover a range of obligations.<sup>16</sup> It is suggested that such provisions can have a salutary effect on the promotion of the rule of law in states, by forming enforceable obligations, the breach of which can be (and increasingly are) challenged in investment arbitration brought by disgruntled investors.<sup>17</sup> The effect can be to nudge a state further along the rule of law “continuum”. Although the scope and boundaries of the rule of law are not a subject of universal consensus, as discussed above, a number of concepts have gradually been evolving and become associated with the rule of law, such as accessibility of the law, access to justice, non-arbitrariness, etc, many of which draw from international law and domestic administrative law principles.

The jurisprudence that has sprung from arbitral tribunals interpreting FET and its scope has identified a number of factors that are relevant to these rule of law concepts. In fact in its recent efforts to negotiate clearer investment treaty terms, the European Union (EU) has recently attempted to distill a list of these very factors in order to spell out the ingredients of FET interpretation, as discussed below. These include ensuring due process, preventing denial of justice in proceedings, transparency and non-arbitrariness in decision-making. Recent rules supporting investment

---

16 See generally Benjamin K Guthrie, “Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law” (2012–13) 45 *NYU J Int’l L & Pol* 1151 at 1160–64 and Benedict Kingsbury and Stephan Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law” *NYU School of Law, Public Law Research paper No 09-46* (September 2009), <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1466980](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980)> (accessed 3 March 2014). Guthrie rightly notes that the rule of law concept (in the context of investment law) encompasses more than dispute resolution and the courts (at 1185).

17 On the other hand, however, there are some potential difficulties when considering the rule of law in investment dispute settlement itself. For example, criticisms have been raised in two areas: first, about the independence of certain tribunals (for various types of reasons), and secondly, about the suitability of arbitrators adjudicating on national measures, particularly those relating to domestic health or environmental policy. Systemic fairness and legitimacy of the adjudicatory body – important aspects of the rule of law in a system – are at the heart of these criticisms.

treaty arbitrations can also help to reinforce rule of law notions when investment disputes are resolved, for example in the light of the Rules on Transparency in Treaty-Based Investor-State Arbitration issued by the United Nations Commission on International Trade Law (UNCITRAL) in 2014.<sup>18</sup>

### **Fair and Equitable Treatment**

A key investment treaty obligation is that found in the fair and equitable treatment (FET) provision. Undefined but developed in different and conflicting ways through investment tribunal awards, the meaning of FET has come to embrace a number of notions familiar to the rule of law debate.<sup>19</sup>

FET, in arbitral “case law”, has come to focus on certain factors or benchmarks, discussed below. These factors have been developed in a number of separate investor-state arbitral awards and appear to have gained some degree of recognition. For example, the European Union’s policy on

---

18 United Nations Commission on International Trade Law (UNCITRAL), Rules on Transparency in Treaty-based Investor-State Arbitration (effective date 1 April 2014) <[http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html)> (accessed 10 June 2014). These Rules address transparency in *arbitral proceedings*; it should be noted generally that “transparency” in the investment law context may also relate to government decision-making and transparency in law-making and publication of laws and regulations (the latter being illustrated in Art X of GATT 1994).

19 See also Benjamin K Guthrie, “Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law” (2012–13) 45 NYU J Int’l L & Pol 1151 at 1160–64 and 1186–88. For overview discussions of the FET standard as interpreted by tribunals, see, *eg*, Roland Kläger, “*Fair and Equitable Treatment*” in *International Investment Law* (Cambridge University Press, 2011); United Nations Conference on Trade and Development (UNCTAD), “Fair and Equitable Treatment”, UNCTAD Series on Issues in International Investment Agreements II, UN Doc UNCTAD/DIAE/IA/2011/5 and Organisation for Economic Co-operation and Development (OECD), “Fair and Equitable Treatment Standard in International Investment Law,” (September 2004), <<http://www.oecd.org/investment/internationalinvestmentagreements/33776498.pdf>> (accessed 5 March 2014).

its “new-age” investment treaties,<sup>20</sup> now expressly provides as factors the protection given to investors in the following situations:

- (a) Denial of justice in criminal, civil or administrative proceedings;
- (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
- (c) Manifest arbitrariness;
- (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- (e) Abusive treatment of investors, such as coercion, duress and harassment.<sup>21</sup>

Due to space constraints, the following is a selection of case illustrations relating to the FET obligation; it represents but a small fraction of the arbitral jurisprudence and is intended to provide a brief flavour of approaches to interpretation in these matters.<sup>22</sup>

---

20 The EU reformulated its investment treaty negotiation policy and practice after the coming into force of the Lisbon Treaty; see generally European Commission, Towards a Comprehensive European International Investment Policy, COM(2010)343 (7 July 2010) <[http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc\\_146307.pdf](http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf)> (accessed 15 July 2014) and European Commission, Fact Sheet on Investment Protection and Investor-State Dispute Settlement in EU Agreements (November 2013) <[http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf)> (accessed 7 March 2014)

21 European Commission, Fact Sheet on Investment Protection and Investor-State Dispute Settlement in EU Agreements (November 2013). According to the Fact Sheet, its policy formulation will “avoid too wide interpretations and provide clear guidelines to tribunals”. The EU has been holding consultations on its investment dispute settlement provisions: see European Commission, “Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement”, European Commission Press Release (21 January 2014) <[http://europa.eu/rapid/press-release\\_IP-14-56\\_en.htm](http://europa.eu/rapid/press-release_IP-14-56_en.htm)> (accessed 10 June 2014).

22 For more detailed examinations of the FET obligation, see *eg*, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press, 2012) at Chapter VII: Standards of Protection.

### ***Ensuring a stable legal system***

One of the factors considered in FET interpretation has been whether a host state has ensured a stable legal system within which foreign investors may operate. In *CMS Gas v Argentina*,<sup>23</sup> for example, the International Centre for Settlement of Investment Disputes (ICSID) Tribunal stated as follows:

[F]air and equitable treatment is inseparable from stability and predictability. (para 276)

[A] stable legal and business environment is an essential element of fair and equitable treatment ... [T]he measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. [The measures] resulted in the objective breach of the standard laid down in Article II(2)(a) of the Treaty. (para 281)

In *Impregilo v Argentina*,<sup>24</sup> the tribunal however said as follows:

290. If fair and equitable treatment is indeed linked to the legitimate expectations of the investors, these have to be evaluated considering all circumstances. In the Tribunal's understanding, fair and equitable treatment cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the state has signed investment agreements. The same approach was followed by the ICSID tribunal in *Parkerings-Compagniet AS v. Lithuania*:

It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.

291. The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but

---

23 *CMS Gas Transmission Co v Republic of Argentina*, ICSID Case No ARB/01/8, award dated 12 May 2005. It should be noted generally that interpretations of FET may be influenced by other language of the treaty in question, such as its preamble.

24 *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, award dated 21 June 2011 (original footnote omitted).

certainly investors must be protected from unreasonable modifications of that legal framework.

292. In this context, the Arbitral Tribunal observes that the existence of legitimate expectations and the existence of contractual rights are two separate issues. This has been highlighted by the *Parkerings-Compagniet* tribunal, which made a clear distinction between contractual obligations under national law and legitimate expectations under international law:

It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law.

### ***Protection of legitimate expectations of investors***

The legitimate or basic expectations of investors form part of the calculus in evaluating whether there has been a violation of an FET obligation. This factor was used by tribunals such as those in the *Saluka* and *TecMed* cases.<sup>25</sup>

In a recent award, the tribunal in *Teco Guatemala Holdings LLC v The Republic of Guatemala*<sup>26</sup> explained the “expectation” factor succinctly as follows:

It is clear, in the eyes of the Arbitral Tribunal, that any investor has the expectation that the relevant applicable legal framework will not be disregarded or applied in an arbitrary manner. However, that kind of expectation is irrelevant to the assessment of whether a State should be held liable for the arbitrary conduct of one of its organs. What matters is whether the State’s conduct has objectively been arbitrary, not what the investor expected years before the facts. A willful disregard of the law or an arbitrary application of the same by the regulator constitutes a breach of the minimum standard, with no need to resort to the doctrine of legitimate expectations.

---

25 *Saluka Investments BV v Czech Republic* [2006] IIC 210 (UNCITRAL award); *TecMed v Mexico*, ICSID Case No ARB (AF)/00/2, award dated 29 May 2003.

26 *Teco Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No ARB/10/17, award dated 19 December 2013, at para 621 (original footnote omitted). See also *Micula v Romania*, ICSID Case No ARB/05/20, award dated 11 December 2013, at para 669, 671 and 673.

***Non-arbitrariness and transparency of state action***

In *TecMed v Mexico*,<sup>27</sup> in applying the FET standard, the tribunal considered whether the host state's actions were arbitrary or lacking in transparency. The following excerpt merits full reproduction here as it clearly features various components of the rule of law, with these highlighted in italics:

154. The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to *act in a consistent manner, free from ambiguity and totally transparently* in its relations with the foreign investor, so that it may 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 or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should *relate* not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to *act consistently*, i.e. *without arbitrarily revoking* any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to *use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned* to such instruments, and not to deprive the investor of its investment without the *required compensation*. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, compliance by the host State with such *pattern of conduct* is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized "...by any reasonable and impartial man," or, although not in violation of specific regulations, as being contrary to the law because: ... (it)

---

27 *TecMed v Mexico*, [2003] ICSID Case No ARB (AF)/00/2, award dated 29 May 2003.

shocks, or at least surprises, a sense of juridical propriety. [Original footnote omitted, italic emphases added]

Arbitrary state action is therefore disciplined under the FET obligation.<sup>28</sup>

Again, in *LESI SpA and Astaldi SpA v Algeria*,<sup>29</sup> the FET obligation (“imported” via a Most Favoured Nation (MFN) clause), was explained as follows:

[T]he State must act in a *coherent, unambiguous, transparent* manner, it must maintain an environment *sufficiently stable* to allow a reasonably diligent investor to adopt a strategy and implement it over time, and it must act in a *non-arbitrary* and *non-discriminatory* manner, *without abuse of power* and *in compliance with its commitments*. [emphasis added]

### ***Clarity of laws and application***

A lack of clarity of national laws may also form the subject matter of a claim of violation of FET. In *Occidental Petroleum Corp v Ecuador*, for example, it was noted the investor received “a wholly unsatisfactory and thoroughly vague answer” and that the tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes.<sup>30</sup>

---

28 For a further, interesting discussion on arbitrariness, Jeremy Bentham’s formulation of the notion, judicial decision-making and law-making, see Timothy Endicott, “Arbitrariness” (2014) Can J L & Juris, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2378858](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2378858)> (accessed 29 May 2014). See also Jacob Stone, “Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment” (2012) 25 Leid J Int’l L 77.

29 *LESI SpA and Astaldi SpA v Algeria* [2008] ICSID Case No ARB/05/3, award dated 12 November 2008 (unofficial translation from [www.IAReporter.com](http://www.IAReporter.com)).

30 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v the Republic of Ecuador* ICSID Case No ARB/06/11, award dated 5 October 2012, at para 184.

### ***Denial of justice and due process***

In the tribunal decision in *Mondev v United States*,<sup>31</sup> four situations relating to denial of justice were identified. These were: refusal of courts to entertain a suit, undue delay, administration of justice in an inadequate way, and clear and malicious misapplication of the law. The tribunal quoted the following from a prior award (which interpreted provisions of the North American Free Trade Agreement (NAFTA)) in *Azinian et al v. United Mexican States*:<sup>32</sup>

A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way... There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of “pretence of form” to mask a violation of international law.

In *Loewen v USA*,<sup>33</sup> the tribunal referred to the lack of due process as being relevant:

Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough ... .

### ***Access to justice for investors***

Treaties may, in addition to FET provisions, also contain certain additional guarantees regarding access to domestic courts or mechanisms of dispute resolution for the foreign investor. These can lead to scrutiny of the domestic mechanisms if challenges are raised as to their availability or effectiveness. As a result, in some investment disputes, even national judicial

---

31 *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, award dated 11 October 2002, at para 126.

32 *Azinian et al v United Mexican States* ICSID Case No ARB (AF)/97/2, award dated 1 November 1999.

33 *The Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, award dated 26 June 2003, at para 132. For a more recent view on denial of justice in the FET context, see *Franck Charles Arif v Republic of Moldova*, ICSID Case No ARB/11/2, award dated 8 April 2013, at para 427–445.

systems have come under scrutiny in whether a host state has provided proper access to justice.<sup>34</sup>

In *Chevron Corp (USA) & Texaco Petroleum Company (USA) v Ecuador*,<sup>35</sup> the following provision (known as an “effective means” clause, for short) in the relevant treaty came under examination by the tribunal:

Art. II(7): Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

The Permanent Court of Arbitration ruled that such a clause was *lex specialis*, distinct from the denial of justice obligation and that it poses a lower threshold than denial of justice. It can be violated by undue delay and unwillingness of the domestic courts for a case to proceed.<sup>36</sup> It further decided as follows:

While Article II(7) clearly requires that a proper system of laws and institutions be put in place, the system’s effects on individual cases may also be reviewed. The Tribunal thus finds that it may directly examine individual cases under Article II(7), while keeping in mind that the threshold of “effectiveness” stipulated by the provision requires that a measure of deference be afforded to the domestic justice system ...

The Tribunal finds that court congestion must be temporary and must be promptly and effectively addressed by the host state if it is to act as a defense to an otherwise valid claim for breach of Article II(7). That is to say, the State must have previously been in compliance with and must return to

---

34 See, for example, *The Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, award dated 26 June 2003 and *White Industries Australia Ltd v the Republic of India* (UNCITRAL), award dated 30 November 2011, where the clause in question was an “effective means” clause. For a general discussion of such clauses, see Benjamin K Guthrie, “Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law” (2012–13) 45 *NYU J Int’l L & Pol* 1151 at 1189–92.

35 PCA Case No 2009-23.

36 *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador* PCA Case No 2009-23, partial award on the merits dated 30 March 2010, at para 250.

compliance with the international standard within a short amount of time from when the backlogs arise.<sup>37</sup>

In *White Industries Australia Ltd v Republic of India*,<sup>38</sup> the long delays in proceedings brought by a foreign investor in the Indian judicial system came under scrutiny in an arbitration complaint by the investor. Among the provisions relied upon by the investor were an FET clause and an “effective means” clause. While the tribunal was sympathetic to India’s status as a developing country when considering whether the long judicial system delays were a violation of the FET clause, it found that these delays were however a violation of the “effective means” clause.

### **ASEAN Economic Integration and the Rule of Law**

The rule of law in the context of enhanced integration efforts in ASEAN has been of increasing interest in recent years.<sup>39</sup> However, there has been relatively little analysis of the rule of law in the context of ASEAN’s investment treaty provisions.

The ASEAN Community comprises three “pillars”, including the economic “pillar” in the form of the ASEAN Economic Community (AEC), with the

---

37 *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador* PCA Case No 2009-23, partial award on the merits dated 30 March 2010, at para 243–247.

38 *White Industries Australia Ltd v the Republic of India* (UNCITRAL), award dated 30 November 2011, see especially 91–118.

39 See, *eg*, Chief Justice Sundaresh Menon, “Keynote Address: ASEAN Integration Through Law” (25 August 2013) <<http://cil.nus.edu.sg/wp/wp-content/uploads/2013/09/Keynote-by-CJ-Menon.pdf>> (accessed 20 January 2015). See also Joel Ng, “Rule of Law as a Framework with the ASEAN Community”, (2012) *Journal of East Asia and International Law* 2, 327; Paul Davidson, “The ASEAN Way and the Role of Law in ASEAN Economic Integration” (2004) 8 *Singapore Yearbook of International Law* 165; and Kitsuron Sangsuvan, “The Rule of Law in ASEAN” (2011) 40 *International Law News*. Other academic activity has increased in this regard too: see, *eg*, the Singapore Management University’s Asian Business and Rule of Law Initiative, <[http://ink.library.smu.edu.sg/sol\\_april/](http://ink.library.smu.edu.sg/sol_april/)> (accessed 5 March 2014) and the National University of Singapore’s ASEAN Integration through Law Project, <<http://cil.nus.edu.sg/research-projects/cil-research-projects/asean/>> (accessed 5 March 2014).

emphasis of this article being on this “pillar”.<sup>40</sup> In the ASEAN context, the rule of law has been receiving increasing treaty prominence over the last two decades or so. ASEAN is mentioned in particular in view of the ambitious 2015 ASEAN Economic Community (AEC) target. The AEC spells greater economic linkage and integration among the ten members but in the present context, it has also spurred the clarification of the role of law in ASEAN. It is well known that ASEAN has conducted its business through consensus-building processes which has come to be known as the “ASEAN Way”, rather than legalistic formulations and procedures. In recent years, however, a distinctly more rules-based approach has come to the fore.<sup>41</sup>

Seeing that the ASEAN Way was no longer adequate for some areas, ASEAN members embarked on a more rules-based approach, in its integration commitments and in the resolution of trade disputes between members. A key development in 1996 was the establishment of a rules-based dispute settlement system. ASEAN members drew confidence from having entered into a larger “model” of such a system at the WTO (through its Dispute Settlement Understanding).<sup>42</sup> A number of important ASEAN treaties have made express reference to commitments to the rule of law.<sup>43</sup> The landmark ASEAN Charter, for example, which was signed in 2007, sets out objectives and principles which explicitly refer to, *inter alia*, the rule of law, good governance, principles of democracy, fundamental

---

40 The other two are the ASEAN Political-Security and ASEAN Socio-Cultural pillars.

41 See Rodolfo Severino, former ASEAN Secretary-General, “The ASEAN Way and the Rule of Law”, address at University of Malaya, Kuala Lumpur (3 September 2001) <<http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item/the-asean-way-and-the-rule-of-law>> and Termsak Chalermpanupap, ASEAN Secretariat, “The ASEAN Way towards Community Building” (4 July 2005), <[http://www.seaca.net/\\_articleFiles/692/Microsoft%20Word%20-%20ASEAN%20Way%20Towards%20Community%20Building.pdf](http://www.seaca.net/_articleFiles/692/Microsoft%20Word%20-%20ASEAN%20Way%20Towards%20Community%20Building.pdf)> (both links accessed 5 March 2014).

42 Note that as at 1996, Cambodia, Lao PDR and Vietnam were as not yet WTO members.

43 See, *eg*, the preamble and Articles 2(h), (i), (j) and (n) of the ASEAN Charter (20 November 2007, entered into force 15 December 2008), the ASEAN Economic Blueprint, and the ASEAN Comprehensive Investment Agreement (26 February 2009, entered into force March 29, 2012).

freedoms, and the promotion of human rights and of social justice.<sup>44</sup> Express references to the rule of law have also been made in other recent ASEAN agreements, such as the ASEAN Comprehensive Investment Agreement (ACIA).<sup>45</sup> The legal, political and economic diversity in ASEAN makes it important to unify ASEAN with this underpinning notion of rule of law.

The ACIA, in particular, which of immediate interest to this article, is not only a strong signal of commitment by ASEAN members to strengthen investment protection for foreign investors. It is also a signal of commitment by each member to observe its provisions – including FET<sup>46</sup> – in subjecting itself to the potential of investor-state dispute settlement. The rule of law, as with economic integration and development in ASEAN, is a work in progress, just as it is in many countries outside of ASEAN, and legally speaking, this is both a challenging and an interesting time for the region. The ACIA came into force in March 2012, and supersedes two earlier ASEAN investment agreements.<sup>47</sup> It contains a number of important legal commitments mirroring those discussed above, such as those on FET,<sup>48</sup> MFN,<sup>49</sup> national treatment (NT),<sup>50</sup> expropriation and compensation<sup>51</sup> and transparency.<sup>52</sup> The ACIA also contains a number of explicit exceptions and permitted derogations.<sup>53</sup> Its FET provision explicitly refers in an explanatory fashion to denial of justice in legal and administrative proceedings, and to due process. Notably, the objectives of the ACIA, as stated in Article 1, include the following:<sup>54</sup>

---

44 See ASEAN Charter, especially the preamble and Articles 1(7), 2(2)(h)–(j).

45 ASEAN Comprehensive Investment Agreement (26 February 2009, entered into force March 29, 2012).

46 Cf the specific language of ACIA Art 11.

47 The text of the ACIA and members' Reservations Lists are available at <<http://www.asean.org/communities/asean-economic-community/category/agreements-declarations-7>> (accessed 10 June 2014).

48 ACIA Art 11.

49 ACIA Art 6.

50 ACIA Art 5.

51 ACIA Art 14.

52 ACIA Arts 21 and 39.

53 See, *eg*, ACIA Arts 9, 17 and 18.

54 ACIA Art 1(c).

... improvement of *transparency and predictability of investment rules, regulations and procedures* conducive to increased investment among Member states ... [emphasis added]

ASEAN members have therefore embarked on a mission to enhance transparency of their investment laws and rules, as well as committing to upholding the rule of law both explicitly, and via the various investment treaty provisions in the ACIA.

## **Conclusion**

The rapid evolution of international trade and investment treaties has contributed much to law-making and governance at the national and international levels. Such treaties have often encapsulated aspects of norms and rules associated with the rule of law notion. By creating binding legal commitments containing such norms and rules, such treaties have had the potential of promoting the rule of law and good governance within national systems affected by them. ASEAN, with its ambitious integration plan that is expected to bring about the AEC in 2015, has chosen to expressly embody such norms in some of its recent treaties and other documents.

The globalisation phenomenon has affected not only purely economic spheres but has also been leaving its mark on the rule of law. As economically and politically diverse nations such as those in ASEAN – some of which are undergoing a sea change in their economic and investment policies – work to integrate further, the rule of law can be an important underpinning and unifying concept in international and regional economic agreements. As economic treaty-making efforts continue around the world in the midst of economic and non-economic tensions and vicissitudes, it is apt to conclude with the following rather inspiring and timeless language, drawn from the preamble of the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels:

We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the

foundation of friendly and equitable relations between States and the basis on which just and fair societies are built.<sup>55</sup>

---

---

55 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, Un Doc A/RES/67/1 (30 November 2012) <<http://www.unrol.org/files/A-RES-67-1.pdf>> (accessed 29 May 2014).

# **JUDICIAL PERSPECTIVES ON THE RULE OF LAW AND DEVELOPMENT**





## JUDICIAL PERSPECTIVES ON THE RULE OF LAW AND DEVELOPMENT

Speech delivered by

**Lord Phillips of Worth Matravers**

*former President of the United Kingdom Supreme Court*

When I first learned of the topic of this conference I envisaged that it would essentially focus on economic development, but much of the discussion to date has embraced the interrelationship of economic development and social development. My comments are going to be directed to economic development. As so often when considering aspects of the rule of law I turned in the first instance to Tom Bingham's marvellous book on the topic.<sup>1</sup> He identified two different types of rule of law, what he described as the thin type and the thick type. The thin type simply requires that a state should be subject to laws publicly made and publicly administered in the courts, which laws apply equally to all persons and authorities within the state. The thin type of rule of law says nothing about the nature of those laws. Tom Bingham cited Professor Raz's statement that "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".<sup>2</sup> The thick rule of law adds the important element that the laws of the state must guarantee fundamental human rights. This thick rule of law is not necessarily essential for economic, as opposed to social, development. Obviously if a regime tramples on human rights the result may be civil unrest and disorder, which is inimical to any form of development. But vigorous physical and economic development can take place provided only that the narrow rule of law is observed. Our industrial revolution took place at a time of gross inequality and gender discrimination. Today it is a rare state that has within its borders both the resources and the expertise to expand physically and economically without external assistance – indeed I doubt if there is such a state. Some states require external investment to

---

1 Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010).

2 Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p 66.

grow. Some states have the wealth, but must look abroad for the expertise to put that wealth to constructive use, or for vital raw materials. So if development is to take place, commercial relations with international partners must be established.

What aspects of the rule of law have been critical to attracting and retaining international partners? Sadly, I suggest, not a good human rights record. International investors have been primarily concerned with economic risk. In particular they have been concerned with the integrity of their contracts. Their concerns are that the law that governs their contractual rights and obligations is clear, that those rights and obligations will be fairly enforced, that any dispute that may arise will be fairly and reliably resolved and that any judgment or award will be enforceable.

Underpinning all of this, and indeed underpinning the entire rule of law, whether thick or thin, is an impartial and incorruptible judiciary. Let me deal first of all with corruption. Happily I am in a position to address this topic without inhibition, because the three of us have the good fortune to come from jurisdictions where there is a tradition of judicial integrity. I imagine that there must have been a time when some English judges were venal, but if so this was a very long time ago. In 1701 the Act of Settlement entrenched the independence of the judiciary. It provided that no judge could be removed from office unless the removal was approved by resolution of both Houses of Parliament. Since that date no High Court judge has been removed from office for misconduct. It seems to me that if even some judges had been corrupt there would have been at least one case where this was brought to the notice of Parliament and the judge removed.

Certainly over the last half century, during which I have been practising law, it would have been inconceivable that anyone would attempt to bribe an English judge. Hong Kong has inherited this tradition of judicial integrity. As for Singapore, Prime Minister Lee Kuan Yew made it quite plain that corruption would not be tolerated and, in 1994, had the vision to link the salaries of Ministers, judges and top civil servants to those of the top professionals in the private sector. He appreciated that public servants who were underpaid were inevitably more prone to temptation. But the sad fact is that in many parts of the world it is not merely not inconceivable that anyone would try to bribe a judge, it is inconceivable that anybody would not try to bribe a judge.

Jurisdictions where justice can be bought tend to be unattractive to men and women of commerce. How about jurisdictions where *business* can be bought? Fifty years ago it was generally accepted that if you wanted to do business in many parts of the world it was essential to resort to bribery – to pay so called “agency fees” to corrupt officials in order to obtain lucrative contracts. Corruption is a hideous evil. It undermines the rule of law. It also inhibits development, when contracts are bought rather than awarded on merit, and funds that should be boosting the prosperity of a country are instead diverted to off-shore bank accounts of the corrupt.

I hope and believe that a change is taking place. The evils of corruption are becoming more widely appreciated. In 2010 the United Kingdom, following the example of the United States, passed the Bribery Act, which makes it an offence to be party to bribery anywhere in the world. And around the world citizens, who in the past have accepted the need to bribe as a fact of life, are increasingly inveighing against it.

Returning to judges, not only must they be free from corruption, they must be impartial. In many cases the government of the country in which the dispute is taking place is party to the dispute. In the United Kingdom there has been an exponential growth of public law actions against the government, and government, in one form or another, is increasingly party to commercial disputes. If foreign companies are to contract with governments or government entities, they need to be reassured that, in the event of a dispute, they will not find themselves in front of a tribunal that is biased in favour of the home team. If judges are to be free of political bias, and to be seen to be free of such bias, there must be no question of their political affiliation influencing their appointment. And they must have security of tenure, so that there is no question of their being removed if they do not please the government.

Before our recent constitutional changes our judges used to be appointed on the recommendation of the Lord Chancellor, who was a Government Minister. In my time in the law there was never any question of judges being appointed for political reasons – appointments were always made on merit, after wide consultation that included the judiciary. Nonetheless, appointments are now made in the United Kingdom by independent commissions that have no political representatives. In Hong Kong judges are appointed on the recommendation of the Judicial Officers Recommendation Commission on the basis of judicial and professional

qualities. In Singapore there is more political involvement in the appointment of judges inasmuch as this is done by the President on the recommendation of the Prime Minister in consultation with the Chief Justice. I note, however, that Hong Kong and Singapore are recognised by the Political and Economic Risk Consultancy as having the best judicial systems in Asia.

However independent the judiciary may be, litigants will often suspect that a national court will favour the national government, or a company or individual within the national territory, in preference to a foreign litigant. I remember two cases when I was at the Bar, one involving Spanish clients and one involving Japanese clients, where I had great difficulty in persuading my clients that, although they had lost to English companies in the Court of Appeal they had a good prospect of success in the House of Lords. On each occasion I am happy to say they were successful.

But for an international business it is not enough to have judges that are free from corruption and bias. They must also have the competence to resolve complex commercial disputes. Furthermore the judicial system must ensure that disputes are resolved with reasonable expedition. All of this is asking a lot. In England, about 130 years ago, a judge who had heard a general average dispute delayed so long and then produced such an appallingly incompetent judgment that there was a scandal. This led to the creation of a specialist commercial court which has survived to this day and which has the highest reputation. Litigants who use that court know that the judges will not only be uncorrupt and unbiased, but that they will be experts in commercial law of the highest standing.

To what extent the strength of that court has contributed to the growth of London as an international commercial and financial centre, and to what extent it is the product of this is not clear. What is clear is that the majority of the litigants in that court have always been foreign companies and it is frequently adopted as the forum of choice in disputes that have no connection with the United Kingdom.

Common law is very often the law chosen by those engaged in commerce to govern their contractual relations. Much of that law has been judge made by judges who started out in the Commercial Court before rising to the Court of Appeal or the House of Lords. Law made by commercial judges for commercial people – perhaps that is why it is so attractive.

Some countries, for understandable reasons, do not have domestic courts that are well equipped to resolve international commercial disputes, particularly disputes that are governed by common law. Two of these – the United Arab Emirates and Qatar – have set out to meet this problem by setting up international courts staffed for the most part by expatriate common law judges of high repute, and there is talk of Djibouti doing the same. Singapore has plans to set up an international commercial court employing expatriate judges, although no one would question the competence of the Singapore Court itself to handle common law commercial disputes. And, most surprisingly of all, the Court of Final Appeal of Hong Kong includes non-permanent judges appointed from the Commonwealth, of which I am happy to be one. These are all examples of countries setting out to cater for the judicial requirements of the rule of law in order to encourage international economic development.

I now turn to what seems to me to be the most significant development in relation to the fair, competent and effective dispute resolution that is such an essential element in the rule of law. That is the growth of arbitration and other forms of alternative dispute resolution. Arbitrators did not always satisfy the requirement of impartiality. When I started at the bar it was commonplace for each party to appoint an arbitrator who would be expected to urge the case of the party by whom he had been appointed, with the presider having the decisive word. Now all arbitrators are expected to be impartial and to draw attention to anything that might appear to detract from that impartiality. Awards are expected to deal with every point argued and many rival in length and content the lengthy judgments that are the hallmark of the English Commercial Court. I am not quite sure why international arbitration has become so popular. First I suspect this is because it is international. The nationality of the arbitrators can be neutral. Secondly because arbitrations are usually finite. Litigation can take years to resolve as a result of the possibility of one or more appeals. Thirdly because the parties can select their tribunal, so are not at risk of the maverick judge. Fourthly because of the relative ease of enforcement of arbitration awards. For whatever reason, arbitration is booming, as reflected by the remarkable success of the Singapore International Arbitration Centre.

This conference is concerned with the impact of the rule of law on commercial development. Interestingly, I have recently become involved in an initiative that in fact complements this notion, focusing on both the positive and negative impacts that commerce and the rule of law (or rather

the absence of one or the other) have on each other. Chief Justice Menon has spoken on this topic. I would like, in closing, to say a little about this important initiative. In September 2013 the UN Secretary-General launched a global movement entitled 'Business for the Rule of Law'. I have agreed to join a steering group that will develop a Framework which will provide guidance and promote dialogue on how companies can support the rule of law in the regions in which they operate – particularly where the rule of law is not well established.<sup>3</sup>

And if I may end on a personal note, it has been a great pleasure that the rule of law has brought me to Singapore on two occasions this year, the first to sit as an arbitrator and the second to take part in this important Conference.

---

3 The Business for the Rule of Law Steering Group has been assembled to develop, in consultation with the UN Secretary-General's Rule of Law Unit and the UN Global Compact, a Framework which will complement and reinforce UN goals, in particular the Post-2015 Agenda, within the global business community. The Steering Group comprises members with varied and complementary expertise, and a strong track record of supporting and strengthening the rule of law, from business, the legal profession, academia and civil society.

The Framework will include suggested action for business, practical examples of such action, and an interactive technology hub to promote the ways in which companies from diverse regions and sectors are taking action to actively support the rule of law in their business operations and relationships as a complement to, rather than as a substitution for, government action. By way of example, business may support the rule of law through core business activities, strategic social investment and philanthropy, public policy engagement and advocacy, and/or partnerships and collective action.

## JUDICIAL PERSPECTIVES ON THE RULE OF LAW AND DEVELOPMENT

Speech delivered by

**Chief Justice Geoffrey Ma**  
*Chief Justice of Hong Kong*

As I began to prepare for today's Conference and its important theme, three thoughts immediately came to mind. Last Saturday, 17 May 2014, marked an important day in the United States and it was celebrated by the presence of the First Lady (FLOTUS) giving a speech – a commencement address – to public high schools in Topeka, Kansas. Topeka, Kansas was the location of the high school which was the subject matter of *Brown v Board of Education*,<sup>1</sup> the landmark decision of the Supreme Court of the US handed down 60 years earlier to the day, rejecting for all time the “separate but equal” school of thought. As I mentioned at the ceremony for the admission of Senior Counsel in Hong Kong, also last Saturday, that decision changed the attitudes of a nation, marking as it did one of the biggest milestones in human rights history.

It is inevitable when discussing the rule of law to refer, as many have in this Conference, to Lord Bingham's book *The Rule of Law*.<sup>2</sup> My reference is to a well-known passage, in which Lord Bingham remembers the famous answer given by Mr Alan Greenspan, the former Chairman of the Federal Bank of the US.<sup>3</sup> Mr Greenspan was asked what was the single most important contribution to economic growth. His reply was simple and concise: the rule of law.

During the majority of my years in the law, especially during my practice years, the connection between business and economic growth on the one hand and the rule of law on the other, was not one that was readily apparent to me. And it is this aspect that forms the subject matter of my brief address today.

---

1 [1954] 347 US 483.

2 Allen Lane, Penguin Books, 2010.

3 Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Books, 2010) at p 38.

Like Lord Phillips before me, I shall concentrate on the aspect of economic progress and development, though I realise in the Conference Overview, the theme is the relationship between facets of the rule of law, and social development and political stability as well. I am of course limited in my area of expertise and my remarks come from my experiences peculiar to Hong Kong. I am not in a position to make any comments about other jurisdictions, although, inevitably given the closeness of all common law jurisdictions, there will be similarities.

References have been made to the two different types of the rule of law, the thin type and the thick type – in other words, a narrow view or a broader, societal view of the concept. My own working definition of the rule of law encompasses two connected facets: for me, the rule of law presupposes first, the existence of laws that respect the dignity, rights (including economic rights) and liberties of the individual and secondly, the existence of an institution (we of course mean here an independent judiciary) to enforce these rights and liberties. The references to dignity and liberties in the context of rights are important; they underline the point that laws must themselves be just and respect what we term “human rights”.

But what is this link, if there is one, between the rule of law as I have defined it, and economic development and business? One of the objects of the Bingham Centre for the Rule of Law is to “demonstrate how the rule of law upholds respect for human dignity and enhances economic development and political stability”,<sup>4</sup> and this is also the theme of this conference. In Hong Kong, it has frequently been said particularly by the business community and the Hong Kong Government that the rule of law in Hong Kong is critical for business and economic sustainability and development. On a light note, every year at the event near Easter known as the Hong Kong Rugby Sevens Tournament, there is an advertisement splashed across the TV screens in the stadium, a Government promotion encouraging investment in Hong Kong with banner lines such as “low tax rates” and “the rule of law”!

This link between the rule of law and economic development is a common theme among common law jurisdictions. As a further example of this, I am grateful here to the First Deemster of the Isle of Man (Deemster David

---

4 Bingham Centre for the Rule of Law website <<http://www.biicl.org/binham-centre/about-us>> (accessed 12 June 2014).

Doyle) referring me to a decision of the courts there (*Re Oxleys of Douglas Ltd*<sup>5</sup>) in which the First Deemster stressed that one of the reasons investors chose to invest in the Isle of Man and conduct business there was that the rule of law was respected.

On one level, the link between the rule of law and economic development can be said to consist of no more than an effective and sound system of commercial law and practice. In Singapore and the United Kingdom, there certainly exist advanced and sophisticated systems of commercial law and practice. I mention just a few aspects:

- (a) The laws governing commercial matters and the decisions of the courts in this area really need no further elaboration. They are sophisticated and have proven over the years to the commercial community (both nationally and internationally) not only that disputes are justly resolved but also that considerable guidance is given to the way commercial people can and should conduct their affairs. Notwithstanding the welcome development of mediation to encourage the resolution of disputes, the courts continue to give important guidance in commercial matters.
- (b) There are also in place in these two jurisdictions courts or lists which provide a specialist tribunal to deal with commercial disputes. The Commercial Court in London, a part of the Queen's Bench Division, is of world renown. It was established, to put it in the words of Lord Devlin, "so that it might solve the disputes of commercial men in a way which they understood and appreciated".<sup>6</sup> In a report published in January 1892 by a joint committee of the English Bar and the Law Society, it was stated that if the courts as a whole were to maintain the confidence of the business community, it was essential for a separate and specialist list to be established within the court structure to deal with disputes of a commercial nature. In Singapore, Chief Justice Menon has talked about the setting up of an international commercial court.

Not only is the court structure in the United Kingdom and Singapore amply geared towards the proper and effective resolution of commercial

---

5 2003–2005 MLR 57.

6 *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 at 289.

disputes; they are also well-known centres of commercial arbitration. No elaboration is needed here either. There are experienced and extremely able arbitrators in London and here in Singapore, and the courts (and laws) support arbitration.

These indicators of what I have called an effective and sound system of commercial law and practice I hope also apply to Hong Kong. But is this the sum total of the expectations of the business community and international investors – for they are relevant players when one is talking about economic development – as far as the rule of law is concerned?

My own view is that it cannot be. I believe that when one talks about long term economic development and success, and long term investment, having a sound legal foundation in a place is crucial. And such a legal foundation means clearly the existence of the rule of law in that place. The rule of law in this context means primarily the existence of those facets I have earlier identified – the existence of laws that respect the dignity, rights and liberties of the individual (and this includes in particular human rights and fundamental freedoms) and an independent judiciary which will effectively enforce them. Cases like *Brown v Board of Education* do matter in the grand scheme of things.

The respect for human rights and fundamental freedoms, and their enforcement, are important to the international investor and to economic development for the following reasons:

- (a) Economic development in today's world requires international participation and that means, as an important part of this, international investment. International investment requires a sound legal foundation in the relevant place where the investment is to be made.
- (b) The legal system of that place then assumes immense importance. In a jurisdiction like the United Kingdom or Singapore where the principle of equality before the law is a key concept, due recognition of this in real terms will promote economic development and investment. The reason for this is easy to grasp. A foreign investor, just like the citizens of a place, will be subject to the laws of that place. It is therefore only natural for that investor to compare himself or herself with other people who are subject to the law. If others who, like the investor, also have rights and liberties find themselves being

treated arbitrarily, or their rights and liberties are not in reality enforced, then the same fate might one day be suffered by the investor. Where there is arbitrariness or a lack of respect for rights, this breeds inequality. A person treated advantageously one day can quite easily be treated in the opposite way the next. This is the exact reversal of what the rule of law seeks to achieve.

- (c) The enforcement of rights lies with the courts. The litigants before the courts include a multitude of people, corporations and entities, each with different backgrounds and issues, each with a different problem to be solved. And yet each is – or at least should be – treated in exactly the same way by the courts. In the same way as the law applies equally to all, it is the same courts which deal with the disputes before them, whatever the nature of the dispute and whatever the identity of the parties. There may be minor differences in the procedures of different tribunals (some are more informal than others such as in Hong Kong the Labour Tribunal or the Small Claims Tribunal where lawyers are not present) or in the monetary jurisdiction of different levels of courts, but fundamentally the courts will apply the same rules to everyone before them, both the law and the spirit of the law. No litigant or class of litigant has any preferential treatment.
- (d) The enforcement of rights and respect for them also lie with those who wield the most power and influence. In all jurisdictions, this means in particular the government. To everyone subject to the law, and this includes of course our international investor, it is important that the government respects rights and fundamental freedoms, the law and its spirit. It is also of importance that the government is itself subject to the law, and is treated equally with other litigants in the courts.

I have already made reference to the importance of an independent judiciary. This is crucial to the rule of law. Apart from enforcing the rights of persons and resolving the very many disputes that come before them, courts in discharging the constitutional duty on them also ensure that those in power do not abuse their position and at all times act in accordance with the law. Here again, this is a reference in particular to the government. In addition, in the discharge of their constitutional duty, judges must act with transparency. Court procedures and court proceedings must be open to the

public (save in exceptional circumstances). Judgments must be properly reasoned in order to demonstrate clearly that the court has applied the law and its spirit – and only these matters – and has not been influenced by anything else.

These features – the proper discharge of the constitutional duty on the courts and a transparent demonstration of this – ensure that there is credibility on the part of the judiciary as far as those persons they serve, be they the people or the international investor, are concerned. As Justice Thurgood Marshall (who was counsel for the successful parties in *Brown v Board of Education*) said in a speech in May 1981: “We must never forget that the only real source of power that we, as judges, can tap is the respect of the people. We will command that respect only as long as we strive for neutrality.”<sup>7</sup>

Like Nicholas Phillips before me, I wish to record my pleasure in returning to Singapore. It is a special place for me, with many good memories both personal and professional. I end with another quote attributed to Mr Greenspan: “I guess I should warn you, if I turn out to be particularly clear, you’ve probably misunderstood what I have said.”



---

7 Thurgood Marshall, Speech at Second Circuit Conference (8 May 1981).

## JUDICIAL PERSPECTIVES ON THE RULE OF LAW AND DEVELOPMENT

Speech delivered by

**Chief Justice Sundaresh Menon**

*Chief Justice of Singapore*

On behalf of the Singapore Academy of Law and the Supreme Court of Singapore, even though we are approaching the end of this day of fruitful exchanges of thoughts and ideas, let me personally welcome and thank each of you for taking the time and making the effort to be here.

It is of course a tremendous honour to be contributing my thoughts alongside Chief Justice Ma and Lord Phillips, and I am grateful to Sir Jeffrey Jowell for the introduction.

Occasions like this epitomise the exchange and discourse which I believe will be indispensable as the world becomes even more globalised. Indeed the main focus of my thesis today is that a discourse such as this amongst lawyers – whether we occupy the space as corporate counsel, as litigators, as judges or as academics – will become almost inevitable as we move towards a world that is hyper-integrated. Already we can see how development on an international scale is changing the daily realities of how we practise the law within our own jurisdictions. But the topic of our discussion this afternoon engages perhaps an even deeper question – which is, whether development affects not only the *practice* of law, but also the rule of law.

My argument may be stated this way: the traditional perspective when considering the relationship between law and development has been a uni-directional one. We ask ourselves how the rule of law will contribute to the social and economic development of a nation. These contributions are well recognised. They include the protection of property rights; the enforcement of contracts, which are foundational to a market economy; and, at the macro-economic level, the presence of functioning legal institutions improves order, reduces and hopefully eliminates corruption, legitimises enterprise and in so doing promotes a conducive trading environment.

But I suggest this is only one half of the equation. The first limb of my thesis is that the relationship between the rule of law and development is

not merely uni-directional but in fact it is bi-directional. What this means is that we must not only ask how the rule of law impacts upon development, but also how development impacts upon the rule of law. In particular, I suggest it might be instructive to examine how development over the past half-century has changed the realities of legal practice and what implications this will bear for the future. In short, what can be expected out of the inevitable fact of globalisation?

This brings me to the second part of my thesis, which is the globalisation of law. We must anticipate that as the world becomes more interconnected and economic activity less localised, there will be a tremendous impetus for the convergence of legal systems. As lawyers we increasingly have to look beyond our jurisdictional silos, to adopt a more internationalist perspective and to conceive of new ways to facilitate the flow of international commerce.

The third limb of my thesis is that in turn, and in accordance with the notion of bi-directionality, this process of convergence will over time strengthen core rule of law values in each jurisdiction.

### **The First Limb**

So let me begin with globalisation, which has been the principal narrative of the post-Cold War world. Trade, of course, is nothing new. But it is the scale, scope and the speed of the growth of trade which have defined the era of globalisation. Today it is driven not just by the cross-border flow of physical goods but also by the massive increase in the international flow of services, not to mention the near-instantaneous exchange of stocks, bonds, funds and currencies. This economic revolution has been accompanied by social transformation as well. Within what has been described as the “global village”, the exchange of ideas, information and people across state boundaries has been unprecedented in all ways by any other point in human history.

These changes have been so profound that no public institution can remain unaffected. Even issues of governance and public policy are becoming increasingly globalised in that decisions which have a bearing on such matters are increasingly taken by international or geo-political actors rather than exclusively by national governments.

In keeping with all this, the legal profession too has changed dramatically. For practitioners, judges and academics alike, focusing exclusively on domestic law must now be regarded as an act of wilful blindness. There are few areas of legal practice in which one can avoid foreign law, foreign lawyers or foreign clients – and those that remain are fast shrinking. For the vast majority of us, the economics of the field have shifted towards high-value commercial and corporate work. In most instances such work will have an international dimension. Commercial clients vote with their feet, and so there is every incentive for their legal advisors to start offering a suite of cross-jurisdictional services. Lawyers and law firms now have to be more mobile and more cosmopolitan in order to remain commercially relevant.

These market forces are not just operative upon the private sector. At the institutional level there will also be stronger demands for a public justice infrastructure which well accommodates international users. National courts will therefore need to foster closer links with one another. We will have to collaborate on such matters as the exchange of information and the mutual enforcement of judgments. It is no longer the case that judges can focus exclusively on domestic considerations when coming to their decisions. The modern reality is that we must now be comfortable with the awareness that national judiciaries participate in the polycentric resolution of cross-border, transnational disputes.

Closer economic integration is a driver for closer legal integration not only because of market forces but also because of the law's intrinsic nature. Legal systems perform a crucial mediating function between the general conditions of a political order and how these are translated at the ground level where relational rights and obligations are recognised and upheld. And so, as these general conditions are altered by the pervasive influence of globalisation, our legal systems will have to adapt to a new paradigm.

Indeed we can observe such adaptations throughout the long history of the English legal system. The emergence of the Court of Chancery in the 14th century, for example, was in part a response to social conditions which generated novel claims that had no correspondence to the formal writs of the common law courts. And by the 19th century the conditions of the Industrial Revolution gave rise to developments that have culminated in modern tort and company law, and eventually led to the creation of the Commercial Court specialising in commercial and mercantile disputes.

Even today, we can observe how the UK's membership in the European Union is affecting the development of English law in a variety of areas as English judges now have to consider and apply EU directives, and are increasingly open to the influence of continental jurisprudence.

I suggest the same adaptive changes to our legal systems will happen with globalisation.

## **The Second Limb**

The collateral effect of these changes is that as the pace of globalisation intensifies, our legal systems will begin I think to gravitate towards one another. And this is the second limb of my thesis.

What might such a convergence look like? I have already mentioned that there will be closer connections between judiciaries, and to that I would add that convergence will also result in the heightened exchange of ideas and a gradual flattening of divergences between different systems of law. There is evidence of this in the field of arbitration. The International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration is a good example.<sup>1</sup> Having been drafted in consultation with both common and civil lawyers, it brokers a compromise on the procedure of discovery which has long been a point of departure between those two great legal traditions.

Apart from these developments, however, the key outcome of legal convergence is likely to be the creation of a common international legal framework. Staying with commercial arbitration as a case study, an illustrative framework is provided by the New York Convention<sup>2</sup> and the Model Law.<sup>3</sup> These two instruments set out uniform rules for the practice

---

1 International Bar Association, Rules on the Taking of Evidence in International Arbitration (1999, revised 2010) available from <[www.ibanet.org](http://www.ibanet.org)>.

2 United Nations Commission on International Trade Law (UNCITRAL), Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (1958) 330 UNTS 38, 7 ILM 1046 (entered into force 7 June 1959).

3 UNCITRAL, Model Law on International Commercial Arbitration, UN Doc A/40/17 (1985), 24 ILM 1302.

of commercial arbitration. While there remains room for national variations – and indeed one view which I agree with is that it is inherent in the design of these instruments that national courts continue to play a vital role as gate-keepers – the key point nonetheless is that all Member States take their bearings from a common point of reference. Across national judicial institutions, however, there is no equivalent framework. Particularly in the field of commercial law, the pressure for progressive reform will be difficult, I think, to resist. I do not know what form this framework will eventually take, but several iterations could be imagined.

In its most robust form it might constitute a network of courts staffed by global judges exercising universal jurisdiction and applying international law. But on a less ambitious scale it could be a global community of lawyers and judges who can speak with a unified voice on issues of professional standards and policy reform. Some organised international movements already inhabit this space, such as the International Bar Association and the World Justice Project. In its thinnest sense, the framework could simply be the prevalence of uniform norms for cooperation and exchange between jurisdictions. There are any number of possible configurations and variations but I suggest we will gravitate towards some sort of an international architecture in the coming decades.

Most human activity remains governed exclusively by municipal law, even where the ramifications of such activity in a globalised world will frequently spill across national boundaries. This does give rise to a disconnect, which took on a visceral significance for Singapore in 2013 when we endured what remains our worst experience with trans-boundary haze. It is also evident in the regular calls for the international regulation of financial markets, as the shockwaves of the Lehman Brothers collapse in 2008 continue to cause disquiet across the world. As legal problems become globalised, so too must the ability of legal systems to provide legal solutions that are effective across jurisdictional boundaries.

This is an enterprise which we must start to prepare for sooner rather than later. It is therefore incumbent on us to initiate an inclusive discourse which encompasses the views, interests and suggestions of diverse stakeholders. Such a conversation can and should take place at all levels of the legal profession, and if we can meaningfully engage with one another I believe it will make us all better lawyers.

### **The Third Limb**

Let me then move to the third limb of my thesis and return to the notion of bi-directionality.

The changes to the legal profession which have been introduced by globalisation and the process of international convergence which I have described represent a watershed opportunity to strengthen the rule of law within our jurisdictions.

Let me take what is generally regarded to be the “thinnest” and most formal conception of the rule of law, which traces its lineage from Bentham and Austin to Hart, and is associated with such distinguished modern scholars as Joseph Raz. It conceives of the rule of law as the adherence to certain value-neutral procedural attributes.

Professor Raz developed eight principles of the rule of law<sup>4</sup>, the first of which is the most well known: that the law should be prospective, open and clear.

And just taking the first principle as an example, it is not difficult to see how a more outward-looking legal system would be more open and accessible to its citizens as well as to its international users. The commitment to being a member of the international legal community necessarily requires one to have legal institutions whose directives are transparent and available for external scrutiny. Further, the more a system has to measure and perhaps even justify its norms and principles against those of other jurisdictions, the clearer its own laws and jurisprudence will be. The same ethos impels law-makers to draw upon the precedents and experiences of other jurisdictions in the formation of new laws. This reduces the likelihood that retrospective rules and regulations would later have to be introduced to correct unanticipated flaws in legislation.

If we look again at that first principle of Professor Raz, there is a strong claim to be made that adopting a more comparative and internationalist attitude will enable municipal law to be more prospective, open and clear. The same advantages would be magnified if a concrete commitment were made to engage with other jurisdictions and to work with them towards developing a common international framework.

---

4 Joseph Raz, “The Rule of Law and its Virtue” (1997) 93 LQR 195.

Other aspects of the rule of law will be enhanced as well, one of which is judicial independence – incidentally, Professor Raz’s fourth principle. It is critically important that the judiciary be regarded not only as separate from the other arms of government, but also as part of an international fraternity with certain common standards which are divorced from local political conditions. Such standards already exist; they include the UN’s Basic Principles on the Independence of the Judiciary adopted in 1985<sup>5</sup> and the Burgh House Principles developed by the International Law Association on the Practice and Procedure of International Courts and Tribunals.<sup>6</sup> Many judiciaries have developed their own internal judicial codes of conduct which would undoubtedly benefit from the aggregative insights of what standards have been set in other jurisdictions. One could go further to argue that as national legal systems converge, litigants will have a stronger guarantee that principles of natural justice – which apply more or less equally across all jurisdictions – will be upheld.

Ultimately these benefits arise from the presence of common international standards against which each jurisdiction can be measured, to which they can aspire, and with which they will improve. This is not just a theoretical argument. It has in fact been the Singapore experience. Indeed the evolution of Singapore’s legal system to some degree validates this thesis.

## **Conclusion**

One of the pillars of Singapore’s economic success has been its legal integrity. This stems from the efficiency of our courts, the good reputation we’ve been fortunate to enjoy, and our zero-tolerance approach towards corruption. There is no doubt that the rule of law has contributed to this nation’s prosperity. At the same time the converse is also true. Our legal system has mirrored our economy, which is open, transparent, and market driven. As our economy became more open to foreign investment, we have increasingly liberalised our legal sector to permit foreign law practices in various forms, so much so that today, about one fifth of legal practitioners

---

5 United Nations, Basic Principles on the Independence of the Judiciary (1985) UN Doc A/CONF 121/22/Rev 1.

6 International Law Association, Study Group on the Practice and Procedure of International Courts and Tribunals, “The Burgh House Principles on the Independence of the Judiciary” (2005) 4 LPICT 247.

in Singapore are registered as foreign lawyers. Even our law schools have changed significantly in recent times – our undergraduates today are taught by more foreign faculty, and have more opportunities for international exchange, than would have been conceivable even just five years ago. Here we can observe in tangible terms the bi-directional relationship between the rule of law and development.

The trajectory of our development in arbitration is another example. In 1985 we adopted the Model Law.<sup>7</sup> At the time we were a relative backwater in arbitration circles. In 1991 the Singapore International Arbitration Centre was founded and today, 23 years later, we are one of the leading arbitration centres in the world. This is the product of a conscious commitment to an internationalist legal philosophy, and it has paid dividends both intrinsically and extrinsically. It has fostered a generation of lawyers with cross-jurisdictional experience, it has made our firms more outward looking, and it has raised standards across the entire Singapore Bar. We have seen the same sort of phenomenon occurring throughout the world.

Three decades ago arbitration was looked upon as a premium product, and we wanted our courts to have the same standing. As time passed arbitration set the standards and it drove us to improve our judicial institutions. Some would find it ironic, but I take it as a sign of how far we have come, that today at least part of the agenda for reform within arbitration is to make it more competitive when held against the best commercial courts in terms of speed, efficiency and cost-effectiveness.

We are now preparing to play a larger role in international dispute resolution with the creation of the Singapore International Commercial Court (SICC) and the Singapore International Mediation Centre. We believe these institutions will address a crucial need in the regional legal order, and will provide a valuable alternative alongside commercial arbitration, for consumers of dispute resolution services in the commercial sector. We believe we have a contribution to make in this space, but these are major undertakings. They would have been beyond our contemplation were it not for the existing infrastructure we have in place and the

---

7 UNCITRAL, Model Law on International Commercial Arbitration, UN Doc A/40/17 (1985), 24 ILM 1302.

commitment to make the investment necessary to convert these ideas into reality.

We envisage that the SICC will be a division of the High Court of Singapore. It is therefore a major signal of our commitment to playing an active role in the convergence of legal systems, even as we continue to work towards enhancing the rule of law in Singapore. The same philosophy led us to organise the inaugural Rule of Law Symposium two years ago and I am extremely gratified and grateful that we're all here today to support this effort.

In all these examples, I suggest, we can see bi-directionality at work.

---



# KEYNOTE ADDRESS





# THE IMPORTANCE OF THE RULE OF LAW IN CURRENT GLOBAL CHALLENGES

Speech delivered by

**Ambassador Patricia O'Brien**

*Ambassador and Permanent Representative of Ireland to the Office of the United Nations and other international organisations in Geneva  
Former Legal Counsel of the United Nations and Under-Secretary-General for Legal Affairs*

It is a great pleasure to deliver this keynote address at the 2014 Rule of Law Symposium. I would congratulate the organisers of this event, the Singapore Academy of Law and the Bingham Centre for the Rule of Law, for bringing together an exceptional group of experts to assess the importance of the rule of law in promoting development, a timely discussion as we move ever closer to a new development framework for post-2015.

The concept of the rule of law has long been at the heart of the United Nations mission. Though seemingly omnipresent, the meaning and application of the rule of law continues to be the subject of substantial debate. In my remarks, based on my experiences as former Legal Counsel of the United Nations, I will examine how the global mandate of the UN makes it uniquely central to the promotion of the rule of law and to addressing the challenges it faces.

Having listened to the fascinating discussions today, I wish to acknowledge at the outset how my perspective is influenced by my day to day practice as the Legal Counsel, where focus was less on the rule of law in the context of economic progress and development and more on the immediate issues of the maintenance of international peace and security.

## **Rule of Law and the Great Charter(s)**

The origins of the rule of law are multifaceted, and are certainly not limited to the Anglo-American legal tradition. One of the concept's very earliest historical antecedents is the Code of Hammurabi for Babylon, one of the first known legal codes and one of the earliest examples of a codified law applying to the ruled as well as to the ruler, an idea which has an enduring

and lasting significance. Only a few weeks ago, a replica of this code was unveiled at the seat of the International Court of Justice in The Hague, a symbolic acknowledgement of the Code and of its significance for the work of the ICJ, the UN's principal judicial organ.

Early in his seminal book, Lord Bingham traces the history of the rule of law as he saw it. He starts with the Magna Carta, literally meaning "Great Charter", as his "point of embarkation" in 1215.<sup>1</sup>

However, as former Legal Counsel of the UN, perhaps unsurprisingly, my starting point is more recent. It is another great charter, the Charter of the United Nations, which constitutes my starting point today, and from which the United Nations organisation derives the rule of law concept. In 1945, the Peoples of the United Nations expressed their determination "to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained".<sup>2</sup> It is in this perspective that the purposes and principles proclaimed in the Charter are to be understood.

Also present in the UN Charter were principles such as the sovereign equality of states, the fulfilment in good faith of international obligations, the peaceful settlement of disputes and the prohibition of the threat or use of force in international relations. We find, in the very constitutive instrument of the organisation, the foundations of an international society based on the rule of law.

In the words of Secretary General Dag Hammarskjöld, "the demand of the Charter for a rule of law ... aims at the substitution of right for might and makes of the Organisation the natural protector of rights which countries, without it, might find it more difficult to assert and to get respected."<sup>3</sup> The work of the UN has, since its establishment, sought to give practical meaning to this resolve. And in my remarks today, I will reflect on the contemporary meaning of the rule of law concept in light of some of the challenges it faces in today's world.

---

1 *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p 10.

2 UN Charter (1945), Preamble.

3 Secretary-General's sixteenth annual report to the General Assembly on the work of the Organization from June 16, 1960 to June 15, 1961, at p 137.

## Definition of the Concept

Though the concept of the rule of law is very familiar to most of us in this room, there are widely varying schools of thought on the meaning of “*l'état de droit*” and it is therefore important at the outset to be clear about what I mean by the term which has been described as an “exceedingly elusive notion” giving rise to a “rampant divergence of understandings”.<sup>4</sup>

From the perspective of UN, the description of the concept which I favour (for its comprehensiveness more than for its brevity), comes from a 2004 report of the Secretary General which described the rule of law as:

... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publically 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.<sup>5</sup>

Lord Bingham too found this persuasive and reproduced this exact quotation in full in his chapter on the “international legal order”.<sup>6</sup>

This understanding of the rule of law has inspired the UN's actions in this area, and relies on norms and standards found in the full range of legal systems. But that it has not yet been fully endorsed by the GA or the Security Council indicates that the concept of the rule of law continues to be a matter of debate. While member states may well differ on what the rule of law entails and how the UN should work to strengthen it and, as we have heard, where and how it should feature in the post-2015 agenda, they are generally united in viewing the concept as critical to address current global challenges.

In its approach to strengthening the rule of law, conscious of the universality of the principles which inspire the organisation's action in this

---

4 Brian Tamahana, *On the Rule of Law* (Cambridge University Press, 2004) at p 3.

5 Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616.

6 *The Rule of Law* (Allen Lane, Penguin Press, 2010) at pp 110–111.

area, the UN has recognised the dual dimensions of the concept, one national and the other international. The interdependence of these twin tracks was explicitly recognised in the Millennium Declaration. States that proclaim the rule of law at home must respect it abroad and every nation that insists on it abroad must enforce it at home.

### **Rule of Law at the National Level**

The UN work on promoting the rule of law nationally is aimed at providing technical assistance and capacity building to member states at their request or when mandated by the Security Council to do so. In the provision of this assistance, the UN seeks to (i) base assistance on international norms and standards; (ii) take into account the political context; (iii) base assistance on the unique country context; (iv) advance human rights and gender justice; (v) ensure national ownership; (vi) support national reform constituencies; (vii) ensure a coherent and comprehensive approach; and (viii) engage in effective coordination and partnerships.

As the Legal Counsel, my task was to support the Secretary General's, and the Secretariat's, commitment to the strengthening of the rule of law, the pursuit of justice and the determination to end impunity for war crimes, crimes against humanity, genocide and other serious violations of international human rights law. This topic, in one way or another, permeated my activities on a daily basis.

The office which I led plays a key role in promoting the rule of law at the national and international levels, and this is at the heart of the UN's mission. Establishing respect for the rule of law is fundamental and essential for a number of reasons, including, firstly, prevention of conflict; secondly, achievement of a durable peace in the aftermath of a conflict; thirdly, the effective protection of human rights; and also, of course, sustainable economic progress and development.

I would underline that strengthening the rule of law at the national level is a difficult, complex and long-term task. The concept of the rule of law does not mean a one-size-fits-all approach. A failure to take into account national institutions and priorities can lead to a lack of national ownership and a failure to institutionalise long-term reform.

Of course, rule of law activities need to be tailored to specific circumstances, but the UN does utilise a general framework for strengthening the rule of law at the national level, including (i) the necessity of a constitution or equivalent that incorporates internationally recognised human rights, (ii) the creation and implementation of a legal framework; (iii) an electoral system that guarantees that the will of the people shall be the basis of the authority of governments; (iv) institutions of justice, governance, security and human rights; (v) transitional justice processes and mechanisms that respond to the national context while anchored in international norms and standards; and, importantly, (vi) a public and civil society that strengthens the rule of law and holds public officials and institutions accountable, including organised non-governmental organisations. This framework implements the underlying principles of a comprehensive rule of law approach that is not limited to either the security sector or justice sector and ensures that national participation and country context underlie all United Nations rule of law activities.

Ireland has taken a leading role in seeking to ensure that civil society operates in a safe and enabling environment. To this end, in my present role as the Irish Ambassador in Geneva, I led the negotiations of the first Human Rights Council Resolution on the subject of Civil Society Space in September last year<sup>7</sup> and organised an important panel discussion on the subject during the March session of the Council. Just as the rule of law requires civil society, so too does civil society need the rule of law.

### **Rule of Law at the International Level**

How does the UN contribute to the establishment of an *international* rule of law? Under Article 1 of the Charter, the UN is expected to be a “centre for harmonising the actions of nations” in the attainment of common ends including: the maintenance of international peace and security; the development of friendly relations among nations; international cooperation on economic, social, cultural or humanitarian matters; and the promotion of human rights and fundamental freedoms.

---

7 UN Doc A/HRC/27/L.24 (23 September 2014).

The UN approach in this respect is rooted in a number of principles which I would highlight as follows:

- (a) Respect for the UN Charter and international law, which are indispensable foundations for a more peaceful, prosperous and just world;
- (b) An appreciation that peace and security, development, human rights, the rule of law and democracy, are interlinked and mutually reinforcing, and that they form part of the universal and indivisible core values and principles of the UN;
- (c) Recognition that an effective multilateral system in accordance with international law is essential to address the multifaceted and interconnected challenges and threats confronting our world, and that to achieve progress in the areas of peace and security, development and human rights requires a strong and effective UN playing a central role through the implementation of its decisions and resolutions;
- (d) Respect for the sovereign equality of states and the need to promote the non-use or threat of use of force against the territorial integrity or political independence of any State in a manner inconsistent with the Charter;
- (e) The need to resolve disputes by peaceful means in conformity with international law;
- (f) Respect for and protection of human rights and fundamental freedoms;
- (g) Recognition that protection from genocide, crimes against humanity, ethnic cleansing and war crimes is not only a responsibility owed by a state to its population, but also a responsibility of the international community.

All this said, I now turn to look at three thematic areas through the prism of the rule of law, and, in so doing, I will highlight some of the challenges faced by the concept and how I think these might best be overcome.

### **Managing the Post-conflict Situation by Reconciling Peace and Justice**

The first area I turn to is the relationship between peace and justice, which is a delicate and difficult relationship. As Legal Counsel, a central part of my task was to help the UN in its approach to these issues and to assist the

pursuit of justice and the ending of impunity. In doing so, I found myself at the core of the tension engendered by the need to uphold the international rule of law in a complex political environment. This tension includes the need to bring about and sustain peace in post-conflict environments and the concomitant need to pursue justice and to end impunity for gross violations of human rights, international humanitarian law and refugee law.

While many accept that there can be no sustainable peace without justice, it is nevertheless also clear that the relationship between peace and justice is complex. It is easy to understand the temptation to forgo justice in an effort to end armed conflict. But any decision to ignore atrocities and to reinforce impunity may carry a high price. Undervaluing the impact of justice *can*, and in my view, *will* have long- and short-term negative consequences, when weighing objectives in resolving a conflict. As I see it, we are currently witnessing a growing consensus that peace and justice go hand in hand and that elements of justice *must* be factored into every post-conflict strategy in order for peace to be sustainable. Challenges to justice and the rule of law are significant and the threats are constant and multifaceted. The issues should not be framed as a debate between peace and justice, but rather between peace and what kind of justice. The issue is how to articulate the various possible elements of justice in a comprehensive conflict settlement. Just yesterday, the Secretary-General called on the Security Council for accountability for the perpetrators of grave human rights violations, crimes against humanity and war crimes in the context of Syria, stating that “the Security Council has an inescapable responsibility in this regard”.<sup>8</sup>

The problem now relates to the best way to interlink peace and justice, in the light of specific circumstances, without ever sacrificing one for the other. If we ignore the demand for justice simply in order to reach a peace agreement, the foundations of that agreement will be fragile and possibly unsustainable. But, if we insist at all times on a relentless pursuit of justice, a delicate peace may not survive. This pragmatic assessment should not be misinterpreted. Freedom from fear is, first and foremost, what all people in post-conflict societies around the world long for. But they also want justice, and they deserve accountability. We know that accountability matters for

---

8 Deputy Secretary-General’s remarks, on behalf of the Secretary-General, to the Security Council on Syria (22 May 2014) <<http://www.un.org/sg/dsg/statements/index.asp?nid=528>> (accessed on 19 January 2015).

peace. Therefore, it is an important duty to fight impunity. This is my considered view, in light of having seen these issues cross my desk on a daily basis during my term as Legal Counsel.

### **Protection of Civilians in Armed Conflict and the Responsibility to Protect**

The second challenge which I wish to address is the protection of civilians in armed conflict. In the past few years, the UN has faced dramatic challenges in the field of the protection of civilians in armed conflict as humanitarian crises have wreaked local havoc. While the political and operational dimensions of these crises are quite obvious, one should not forget that they also call for an answer to a crucial legal question: should and, if so, how should international humanitarian law and human rights law be strengthened to secure the protection of civilians in armed conflict? International law does contain a well-established set of rules in this field, and the first priority should always be to focus on the implementation and enforcement of the rules already in existence. Most of the efforts of the UN go in this direction. However, many of the relevant instruments in the field of the protection of civilians in armed conflict have not yet obtained universal participation or their rules are still insufficiently known by those who are called to apply them. The UN has therefore encouraged states to ratify those instruments, to take steps for their implementation and to ensure their dissemination.

The core idea that appears to have inspired the UN action in the field of human rights and humanitarian law is that compliance with the relevant rules is a matter of concern to the international community as a whole. International law powerfully mirrors this idea, for instance, in Common Article 1 of the 1949 Geneva Conventions, which provides that the parties “undertake to respect and ensure respect” for their provisions in all circumstances. In the interpretation given by the ICJ, this article entails that “every state ... whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”.<sup>9</sup> In other words, international law embodies the idea that, while the primary responsibility for complying with international

---

9 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (9 July 2004) at para 158.

humanitarian and human rights law falls upon the state directly involved, the international community also has a role to play to ensure respect for the law.

This is the same conviction that brought states at the 2005 World Summit to proclaim the concept of the “responsibility to protect”, which implies both that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and that “[t]he international community through the United Nations, also has the responsibility... to help to protect populations” from those crimes.<sup>10</sup> The concept of R2P was reaffirmed by the Security Council a year later.

This is a powerful notion that has attracted the attention both of Governments and the international legal community. In a 2009 report, the Secretary General developed a tripartite UN strategy to implement the agenda of the World Summit: Pillar One on the responsibility of states to protect their own populations; Pillar Two on international assistance and capacity-building to assist states to protect their populations; and Pillar Three on a timely and decisive response where states are not able or willing to protect their population.<sup>11</sup>

The concept of the rule of law can prove useful in understanding the action needed under each of these three pillars of the responsibility to protect. The rule of law weaves its way through each of the three pillars. Under the first pillar, there is a need for states to become parties to relevant international instruments on human rights, international humanitarian law and refugee law, and to the Rome Statute; and the core international standards need to be faithfully embodied in national legislation. The presence of a strong culture of the rule of law in a society may prevent or minimise the risk of deterioration into a situation of perpetration of atrocity crimes. Under the second pillar, there is a need for assistance programmes to build specific capacities within societies that would make them less likely to travel the path to crimes relating to R2P. Under the third pillar, emphasis is needed on all the available tools provided under the UN Charter, notably in

---

10 2005 World Summit Outcome, resolution adopted by the General Assembly (24 October 2005) UN Doc A/RES/60/1 at para 138–139.

11 Implementing the Responsibility to Protect, Report of the Secretary-General (12 January 2009) UN Doc A/63/677.

Chapters VI, VII and VIII. It is important to underline that R2P does not provide a third exception to the Charter prohibition on the threat or use of force against the territorial integrity or political independence of any state, the only two exceptions being self-defence and actions authorised by the Security Council. R2P does not create a new legal basis for the use of force and is not – as popularly misconstrued – another way of talking about “humanitarian intervention”.

As I see it, R2P is an important political acknowledgement that sovereignty entails responsibility, and that the international community has a responsibility to act to assist states to protect their populations. Too often, R2P is misunderstood as a licence for intervention when in fact, in the words of the Secretary General, “human protection begins with prevention”.<sup>12</sup> Early engagement is preferable to late intervention. Helping states to succeed is preferable to responding when they fail. The challenge is to help societies to build the foundation they need to ensure that gains achieved are irreversible, and that peace is sustainable. The foundation of this lies in the rule of law.

### **The Rule of Law and an Age of Accountability**

It is my belief that we have entered an Age of Accountability in which impunity for international crimes is no longer an option, as shown by the developments which followed conflicts in Rwanda, the former Yugoslavia, Sierra Leone, Cambodia and elsewhere. International criminal mechanisms have already achieved a great deal. A number of those who, from high positions, planned and directed the most serious crimes in the conflicts I have just mentioned have been brought to justice. Heads of states have *not* been exempted. Before the establishment of these mechanisms, impunity was viewed by some perpetrators of terrible crimes as a very likely outcome. This is no longer the case. At the same time, the international community cannot be complacent. Unfortunately, to date, only a relatively small number of those responsible for genocide, crimes against humanity or war crimes find themselves before a court of law. Their victims have rarely been granted redress for the unimaginable suffering they have endured.

---

12 UN Secretary-General Ban Ki-moon, Otto L. Walter Lecture delivered at New York Law School (3 October 2011) <[http://www.nyls.edu/center\\_for\\_international\\_law/cil-events/otto\\_l\\_walter\\_lecture/](http://www.nyls.edu/center_for_international_law/cil-events/otto_l_walter_lecture/)> (accessed 19 January 2015).

While not an uncontroversial topic, the ICC is now the centrepiece of our system of international criminal justice. If we want to be serious about combating impunity and nurturing and developing a culture of accountability, we must support its work. Despite the understandable challenges which the ICC is facing in consolidating itself as a vital and indispensable part of the community of international organisations, I firmly believe that the ICC is our main hope in the quest to end impunity for international crimes. It is a fact that the ad hoc international mechanisms are winding down and their life spans are limited. The ICC is the *only* permanent international court to address atrocity crimes. This Court provides the opportunity and the vehicle for our generation to significantly advance the cause of justice and, in so doing, to reduce and prevent unspeakable suffering. If we fail to support the ICC, we fail humanity.

It is clear that the UN has a responsibility to support the ICC and to spearhead the international effort to bring justice for these crimes. However, I also take every opportunity to emphasise the role of states. The principle of complementarity is essentially the duty of states first and foremost to prosecute international crimes. Only where national judicial systems are unable or unwilling to investigate or prosecute should international courts be involved. This principle is of crucial importance for the future of international criminal justice and the quest to end impunity for grave violations of international humanitarian law and human rights law.

## **Conclusion**

Allow me to conclude with the dramatic words with which the Genevan writer Jean-Jacques Rousseau opened his famous treatise *The Social Contract*: “Man is born free, and yet we see him everywhere in chains”.<sup>13</sup>

It is a sentiment which is easy to understand when we cast our eyes at the current crises engulfing parts of the world – unspeakable atrocities in the Syrian Arab Republic, alarming conflict in South Sudan, ethnic and inter-communal violence in the Central African Republic, violations of the territorial integrity of Ukraine – these are but a few current examples. Too often, it remains a painful truth that in the places where the rule of law is needed most, it is respected least.

---

13 *The Social Contract* (1762).

Without the rule of law, the line between justice and tyranny can too easily blur or disappear altogether. We witness the results of its absence on a daily basis in so many places. But nonetheless, we all see real value in the principle. In the words of Lord Bingham, “to the extent that ... rules have led anyone ... being spared the full horror of unrestrained warfare, they must be accounted a victory for the rule of law.”<sup>14</sup> I would add that, in spite of these considerable high-profile challenges, I generally remain convinced that international law, and the rule of law, are *not* more honoured in the breach than in the observance.

As we all know, the rule of law is an idea with deep roots in times past. But in this contemporary age of accountability, it is incumbent upon those who believe in the concept to seek to show that, despite the significant challenges it faces, it is an idea whose time has come.

---

<sup>14</sup> *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p 32.

**IN CONVERSATION WITH  
THE MINISTER**





## **“IN CONVERSATION WITH THE MINISTER”**

**Mr K Shanmugam**

*Minister for Foreign Affairs and Minister for Law,  
Government of Singapore*

**in conversation with**

**Professor Thio Li-ann**

*Faculty of Law, National University of Singapore*

**at the Singapore Rule of Law Symposium, 23 May 2014**

**Thio Li-ann:**

This conference is essentially about the Rule of Law in relation to development. What is Singapore’s conception of development? Is it just an increase in economic growth or is it GDP plus-plus?

**Minister:**

Thank you for that question. You know, I was struck by one of the gentlemen in the audience who stood up right at the end to say, “Look, we here are all lawyers, judges, academics in the field of law, what does all this mean for the person outside?”

At the end of the day, we accept that the rule of law is fundamental for any society. It cannot, however, just be linked to economic development. Even more basic than economic development is really a framework within which human beings can exist in a free environment – with the right balance between the rights of the individual and the obligations to society. That is the framework that the law seeks to achieve. And within that, to also promote economic development, social justice, and social development. If the law does not achieve any of that, or it does not achieve it fully, then I think it has failed.

So the concept for us is very simple. If we do not have the rule of law, you are not worth much as a society. And if you do not have the rule of law, you are not going to develop economically either, for the variety of reasons that have been explained many times.

**Thio Li-ann:**

One of the interesting things about Singapore, at least as a case study, is that its fiercest critics always direct criticism at our political system rather than the economic development Singapore has experienced since independence. The question I would like to press you on is this – one function of the rule of law is obviously to create markets and to enable market access. But one facet of development is to promote equitable distribution of the benefits of economic growth. How does Singapore manage this tension, as it were, between economic opportunity and economic equity?

**Minister:**

Your questions have focused very much on rule of law and economics. I tried to say that, actually, more fundamental than that is the framework of justice and social justice. How does Singapore manage that?

Let me start with this reference to an interesting commentary by David Brooks, who is from the *International New York Times*, which is one of the fiercest critics of Singapore for over 40 years. The *New York Times*, as well as many others like you, have said, “Look, we credit Singapore for economic development, but when it comes to concepts like democracy, well, you fail or you are not quite there”. But let us look at what he says in the context of what is happening around the world right now.

David Brooks, who is quite a sharp commentator, says this, “Democracies tend to have a tough time with long-term planning. Voters tend to want more government services than they are willing to pay for. The system of checks and balances can slide into paralysis, as more interest groups acquire veto power over legislation.”<sup>1</sup> So he did a good analysis and said basically that it is not working in most countries because of politicians lacking the guts to do the right thing, and because people in power have a very short term outlook. Then he says, “The answer is to use Lee Kuan Yew means to achieve *Jeffersonian* ends – to become less democratic at the national level in order to become more democratic at the local level. At the national level, American politics has become neurotically democratic. Politicians are

---

1 “The Big Debate”, *New York Times* (19 May 2014) <[http://www.nytimes.com/2014/05/20/opinion/brooks-the-big-debate.html?\\_r=1](http://www.nytimes.com/2014/05/20/opinion/brooks-the-big-debate.html?_r=1)> (accessed 21 January 2015).

campaigning all the time and can scarcely think beyond the news cycle. Legislators are terrified of offending this or that industry lobby, activist group or donor faction. Unrepresentative groups have disproportionate power in primary elections.”

I do not see that there is a necessary trade-off between the rule of law, economic development, social justice and freedom. The question every society must ask itself is, “what is the balance between individual rights and the obligations the person has to society”? We strike it somewhat in saying that, “Look, your obligations are these and the framework of law will enforce your obligations, more than perhaps in America or the UK”. So I would say, we strike the balance quite differently but I do not think fundamentally we have a different approach to what the rule of law ought to be.

**Thio Li-ann:**

May I be nostalgic and take you back to a former discourse which was very popular, at least in international circles in the 1990s – the famous Asian values debate. There was an interesting quote by the then Foreign Minister at the 1993 World Vienna Conference and he said this, “in the early phase of a country’s development, too much stress on individual rights, over the rights of the community, will retard progress but as it develops, new interests emerge and a new way to accommodate them must be found.”<sup>2</sup>

Now, ostensibly, Singapore is in a more advanced stage of economic development. The basic idea, in the early stages of economic development, was that there may be a need to curtail civil and political rights in the interest of political stability as a precursor to foreign investment and growth. Now that we are at this stage in Singapore’s development, do you think that the balance has shifted in Singapore? I highlight this because one of the two pillars of the human right to development is “effective participation”. I would be interested to hear your thoughts on how the

---

2 Ministry of Information and the Arts, Singapore Government Press Release, 20/JUN, 09-1/93/06/16, “Statement by Mr Wong Kan Seng, Minister for Foreign Affairs of the Republic of Singapore, The Real World of Human Rights” (16 June 1993), as quoted in Thio Li-ann, “Between Apology and Apogee, Autochthony: The ‘Rule of Law’ beyond the Rules of Law in Singapore” [2012] Sing JLS 269 at 283.

Singapore political system has evolved within the context of human development.

**Minister:**

I think when a country goes through different stages of development, when your per capita income is at say US\$10,000, and your literacy rate is at 60–70%, you will have certain types of accounts, certain types of desired participation. When your per capita is second highest in the world, at US\$65,000, and your literacy rate is at 98% and where nearly 40% of every cohort goes onto, university, and if you include others who go on to other forms of tertiary education, about 85%–90%, then obviously the sense of participation, the wanting to participate, the desire to get involved, and the need for plurality and multiple representation will be much greater. It is the nature of societies and we must accept that change and go with it.

But none of that is to say that political stability is unimportant. Political instability, I think at least for most countries, and certainly for us, would lead to economic paralysis simply because decision making in Government would become difficult. For example, the United States can afford not to pass a budget on time for certain years. I do not think many other countries are in that position. The United States is the reserve currency of the world, they have all the resources, and so they can afford to take a slightly longer time to make decisions. The smaller you are, the nimbler you have to be. The system has got to be stable, which is not the same as saying, therefore it has to be unrepresentative. It can be representative, but the key is, it has to be stable.

Let me show you a slide, on how Hong Kong and Singapore have fared since 1999, in GDP terms.<sup>3</sup> If you look at this, in 1999, we were half the GDP of Hong Kong. In 2012, we overtook Hong Kong with a much smaller population. How do you account for that? There are many theories, and I am not going to offer you a suggestion. But I think very focused policies within the framework of the rule of law, which accepts the dignity of the human being and long term planning, certainly can help. Hong Kong has those advantages as well because it does not face the same pressures as some of the other democracies in the West. But nevertheless I

---

3 GDP figures from the slide (in US dollars): Singapore \$85.86bn (1999), \$274.7bn (2012); Hong Kong \$165.8bn (1999), \$263.3bn (2012).

think, given the benefits of being next to China, which is a huge benefit, and servicing the Chinese economy, I would say by comparison, they have not done too badly over the same period of time – over the 13 years or so.

So my point to you is, “It is possible to strike the right balance between freedoms, obligations to society, the framework of rule of law, and active, focused, good governance”. Lawyers tend to talk in ivory towers about frameworks, and that is why I like the question by that gentleman earlier on what it means for the people outside? The figure in blue there [referring to slide], in 2012, means unemployment is low and people have jobs, people have housing, which not what many countries provide. People can wake up to lead meaningful lives in Singapore. They can in Hong Kong as well, but that is not my point. They can lead meaningful lives and that is the whole purpose of being in Government and having a framework of law.

**Thio Li-ann:**

Well, most of the points that you raised certainly points to Singapore’s realisation of social economic rights or at least social economic welfare. I still want to ask you a question whether or not there had been distinctive or calibrated policy changes towards something like political criticism in Singapore, which is a perennial issue, particularly among foreign observers.

**Minister:**

I do not think so. Going back to our laws, there is nothing to prevent people from criticising Government policies. You can be as hard as you like, and that has always been the case. You see that happening on a regular basis, whether it is on policies on education, immigration, or anything. The law allows you to fully criticise and it does not have to be fair or reasonable, nor does it have to be true. You can say anything you like, you can criticise, and we do get criticised on a regular basis. What you cannot do under our framework of law is to make a personal allegation of fact against anyone, including a politician.

So if you say the Prime Minister steals from pension funds, then you better be prepared to prove it. There are alternate approaches to this. There are some countries which say that in the interest of fair debate, you must allow everything to be said and the politicians can just defend themselves. The Prime Minister can just come out and say that he did not steal from the CPF or pension funds. That is one approach. It is not an illogical or

unreasonable approach. The alternate approach is to say, “Let us keep debate honest and so let us keep it to policies”. Say what you like, be as critical as you like, but when you make allegations which are personal, then prove it. That keeps integrity as a factor in politics. And is it important that the public knows that if a politician is personally impugned, he will seek to clear his name? We think it is important, and that is the approach we have chosen. Is it unreasonable? I think often in systems where politicians are fair game, where you can say this guy is a crook, he has taken money and he is corrupt, politicians in terms of public opinion rank somewhere above lawyers and below used car salesmen, so take your pick.

**Thio Li-ann:**

So am I correct in hearing that the minister acknowledges the importance of civil society in promoting the rule of law and development? And if so, what does he see the role of civil society being?

**Minister:**

I feel like I am being cross-examined. I used to do this to people, now I have this done to me! Civil society is part of society, and society is absolutely essential. Civil participation and societal participation are essential for a society, particularly a complex economy, a complex society, to move ahead. It is axiomatic.

**Thio Li-ann:**

Given that the internet is now a forum for both information exchange as well as misinformation exchange and given that popular participation, a lot of discussion happens on the internet, what do you think is the role of the rule of law is in terms of regulating cyberspace? Should it be a no-man’s, no-law land, a lawless zone or should there be a special regime for it? Is it entirely *sui generis*? What is the Singapore attitude towards cyberspace?

**Minister:**

I think we are all finding our way in this regime but my own philosophical approach is that it is no different from the physical space. For example, when we passed the Protection from Harassment Act, we did a survey through a third party, and 80–85% of the population supported us moving in. Because if you make it a no-man’s land and everyone is fair game, you will get people lynched. Their photographs are put out there, their addresses

are put out, and people are asked to stalk them. People commit suicide as a result of the attacks. Somebody had a baby which was born premature and people said, “Why don’t you kill the baby?” The worst instincts of people come out sometimes when they have anonymity and they feel that they can say and do everything without the controlling framework of social norms. I do not think the concept of freedom justifies that. So there has to be something, a line beyond which it becomes criminal conduct, when it seeks to impact on other people. And we passed that law and likewise other laws of the land apply online as much as they do in the physical space.

**Thio Li-ann:**

Yes, in that sense the civil society can become uncivil. But do you think this kind of law, which really deals horizontally between two private parties, is in effect having the government basically legislating manners?

**Minister:**

I think we have to be very careful. The same philosophical difficulties arise whether you are talking about conduct between parties physically or online. There is a line between bad manners and conduct which is harmful. We have got to find that line and I think we have attempted to. Where it amounts to harassment, it is circular – you got to define harassment, but we take guidance from existing precedents: when it amounts to harassment, when it is stalking, when you are invading the privacy of somebody else, I think society can say that is criminal. That is what we are seeking to do – how you find that definition.

**Thio Li-ann:**

One last question from me before I throw it to the floor. Minister, you have spoken about how Singapore has had to find its balance between rights and competing interests. In a sense, the Singaporean political philosophy could be described as communitarian rather than a form of western liberalism.

**Minister:**

I would disagree with that. I do not think that it is “communitarianism”, as opposed to “western liberal”. I do not like the term “western liberal philosophy” either. These labels do not explain. I do not think our laws and framework will mirror the United States or UK, albeit we took much of it from the UK. So, just with that caveat, please carry on with the question.

**Thio Li-ann:**

Minister, you cut me off at my knees because all I am left with is asking whether you think the Singapore experience is unique or whether there are transferable lessons, either to Asia or beyond? I only ask this because I was at a conference once in Kenya where I had a conversation with an Ethiopian, who basically said, "Singapore and Ethiopia became independent at around the same time, in the 1960s, but why is it that we in Ethiopia are here, but Singapore is in Mars?" This was a, in a sense, a recognition of Singapore's economic growth. He then asked me how Singapore did it. Since I do not know the answer, I am asking you instead.

**Minister:**

You take the post-colonial societies, after the Second World War. Africa, Asia, most of them were British colonies. Some were French, some were Dutch colonies, and at least one American colony, the Philippines. Almost every one of them have not been as successful as they could have been. There is a 1957 or 1958 World Bank report which identified two countries in South East Asia as having the best potential to succeed. One was, what was then called Burma, and the other was the Philippines. The World Bank headquarters was in Manila.

Singapore, when it started out, Mr Lee Kuan Yew said that we hope we could be like Colombo and Phnom Penh, because both were centres of culture and excellence. Many were ahead of us. I think we are probably the only British colony to have taken British institutions, used them, adapted them, and have actually today made our institutions better than when we first had them. For example, our judiciary or our framework of laws and other institutions, and we had used that framework well, provided the governance, for us to go from US\$500 per capita in 1965 to US\$65,000 today and with 1.8 or 2.0 per cent unemployment. Almost every other country, better endowed, with more resources, bigger populations, bigger size has, I think, performed well below potential, often to the detriment of their populations.

Even if you take other countries beyond British colonies, which are the countries that have actually improved the lives of their people? Taiwan, Hong Kong, South Korea, Singapore. Countries like Malaysia have also done well, they could have done better, and we should not forget Japan. And China now is doing that on a massive scale, on a scale that has not

been seen in human history. My own view is that not enough credit has been given to the Chinese leadership. Between 1980 and 2010, in those 30 years, 400 million people have been lifted out of poverty. An achievement that has never been seen in human history before. The fact is, all things considered, you are dealing with a society of 1.3 billion people. And look at where they were in 1980. With every criticism you can mount against them, are their people's lives better today? Much better today? The answer must be yes. Overall, has human dignity and human progress been better? The answer is yes. I am not an apologist for China nor do I say I want their system, but we have got to face facts.

Is what has happened in Singapore replicable? I do not think so, simply because we are too small and we had a unique set of circumstances that allowed us to progress in the way we did. If anybody is interested, I can go into those unique circumstances but I think our unique circumstances are such that it is not likely to be easily replicable. But the pity is, most countries, whether you take Kenya or Tanzania, India or Pakistan, most countries inherited their institutions, and then, unfortunately, have not achieved their full potential.

**Thio Li-ann:**

Thank you, Minister.

---



## **CLOSING ADDRESS**





## THE RULE OF LAW – “KILLER APP” OR OPEN SOURCE SOFTWARE?

Speech delivered by

Lionel Yee SC

*Solicitor-General of Singapore*

In 2011, the historian Niall Ferguson wrote about what he called the six “killer apps” of civilisation: competition, modern science, modern medicine, the consumer society, the work ethic, and finally the rule of law based on private property rights.<sup>1</sup> It was the development of these institutions that, according to Ferguson, accounts for what he describes as “The Great Divergence” between developed and developing nations.

That part of Ferguson’s thesis which relates to the rule of law and property rights is nothing new. Law and development practitioners have long been familiar with the research of another economic historian, Douglass North, which examined long-term differences in economic performance among nations and concluded that countries that protect property rights and establish predictable rules for resolving contractual disputes provide a better environment for economic growth than those that do not.<sup>2</sup>

Where Ferguson differed from the economic historians who came before him was in packaging this argument for a 21st century audience. By labelling laws and institutions as “killer apps”, he was able to claim that institutions and concepts like the rule of law are:

... kind of like the apps on your phone, in the sense that they look quite simple. They’re just icons; you click on them. But behind the icon, there’s complex code. It’s the same with institutions.<sup>3</sup>

How appropriate, though, is this comparison of the experience of the rule of law to the experience of using an application on one’s smartphone or

---

1 *Civilization: The West and the Rest* (Allen Lane, 2011).

2 See, eg, *Institutions, Institutional Change, and Economic Performance* (Cambridge University Press, 1990).

3 Niall Ferguson, “The 6 killer apps of Prosperity”, speech to TED Global (September 2011) <[http://www.ted.com/talks/niall\\_ferguson\\_the\\_6\\_killer\\_apps\\_of\\_prosperity/transcript](http://www.ted.com/talks/niall_ferguson_the_6_killer_apps_of_prosperity/transcript)> (accessed 4 July 2014).

computer? And what does it tell us about where the rule of law's "killer" advantage comes from?

Before we consider the analogy, it is useful to consider what our typical experience of an "app" is. Most of us know that an application or "app" is a piece of software that causes a computer to perform a task or tasks beyond the simple act of running the computer itself. These days, "apps" that we are familiar with can be said to share several characteristics.

The first is ease of use. "Apps" come pre-packaged to work straight out of the box. An application that claims to turn the flash function on your smartphone into a torchlight can be installed in a few seconds and put to use with just a tap (or two) of the finger on the screen. Few of us have ever thought about how to get an "app" working on our phones – they just work;

The second is "universality". Most "apps" are universal in the sense that they are adapted to function on multiple computing platforms (Apple and Android, Mac and Windows). Functionally, however, they provide the user with exactly the same experience no matter what the platform. A game of Angry Birds will seem no different whether you are playing it on an iPhone and an Android phone;

Third and finally, as consumers and/or users of "apps", we have very little say in their content and functions. We can give feedback and suggestions, but ultimately control of development and change to the application software lies in the hands of an invisible developer – often halfway across the world. If we don't like the way an "app" functions, our only real recourse is to uninstall or delete it.

How consistent are these characteristics with those of the rule of law? Having listened to the presentations made during this Symposium, it seems to me that there are several points that have emerged from today's discussions.

First, the rule of law does not come in a neat, easily defined and ready-to-use package. Lord Bingham in what was described by Sir Jeffrey Jowell as his "first major contribution" this morning defined the core principle of the rule of law by stating that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect in the future and publicly administered in the courts. But he immediately added that his statement

was not comprehensive, nor capable of being universally applied without exception or qualification.<sup>4</sup>

Lord Bingham was on surer ground when he listed the hallmarks of a regime that flouts the rule of law as:

... the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war.<sup>5</sup>

Most of us would agree that such acts are obvious failures of the rule of law. But is the position really so unambiguous? Take the midnight knock on the door as an example. I do not know of any legal system where law enforcement authorities are absolutely prohibited from effecting arrests or carrying out searches of premises after the stroke of midnight. What is pertinent instead are the bases upon which and the manner in which these acts are carried out.

I also do not think that the real dichotomy is entirely or even mainly between procedural and substantive conceptions of the rule of law. There is probably general consensus that the rule of law does entail the achievement of certain outcomes such as fairness and equity and the elimination of corruption not only among judges but across all branches of government. The problem lies instead in what other specific outcomes should be incorporated; and, for those which are agreed, what it takes to achieve them and how countries make complicated policy choices about which elements of their legal systems they should try to improve in order to secure certain political and economic ends. Such decisions engage competing priorities that a country may face in its economic development. This tension manifests itself, as has been pointed out in one of our panels, in the ongoing debate in the UN Open Working Group on Sustainable Development Goals over whether there is more value in “merging” or “clustering” rule of law principles under other focus areas than adopting the rule of law as a standalone goal for sustainable development;

The second point to note is that unlike the users of “apps” who have very little say in their content and functions, developing countries, businesses

---

4 Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p 8.

5 Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010) at p 9.

and even individuals are increasingly taking on the role of co-authors of the content of the rule of law.

The need to shape rule of law programmes to fit the local environment has been generally accepted in law and development studies.<sup>6</sup> Since some weight must be given to differing cultures, circumstances and priorities, institutions such as the World Bank, the Asian Development Bank and the United Nations Development Programme (UNDP) that support rule of law reform programmes strive today to include local stakeholders in a bottom-up approach in order to ensure the success of their reform programmes.

Some of the most striking examples of co-authorship emerge from the internationalisation of the rule of law. In our third Panel on “The Rule of Law and Foreign Investment”, we saw how functions essential to upholding the rule of law within a state, such as the accessibility of the law and access to justice, the prevention of arbitrariness, equality before the law, due process and fair dispute settlement, are articulated in the rules underpinning multilateral trade systems and bilateral treaties. These multilateral systems and bilateral treaties, though, reflect values and institutions that have been shaped by states.

You have also heard references to the UN Guiding Principles on Business and Human Rights in the second Panel on “The Rule of Law in Business and Finance”.<sup>7</sup> The Guiding Principles were formulated in consultation with international businesses and business associations. Indeed, companies such as Unilever and Shell actually helped to pilot the idea of “human rights due diligence” processes – according to UN Special Rapporteur John Ruggie, when approached by him, they “spent a year examining whether

---

6 See David Trubeck and Marc Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States” (1974) 4 *Wisc L Rev* 1062.

7 *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, endorsed by the UN Human Rights Council in its resolution 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

they could make sense of this concept, and what it would take to make it work”.<sup>8</sup>

The examples I have cited illustrate the co-authorship of states and businesses in the discourse. You will also have heard in the course of the day how other players such as courts and individuals are as much part of this process.

If it is true that the rule of law does not come in a neat and easily used package, then the analogy between the rule of law and a mobile or electronic “app” begins to fray at the seams. The reality is that the rule of law is not some pre-packaged software which can be plugged-in and played on any platform (or in any developing country) with few simple taps of the finger. While there are some generic features of what constitutes the rule of law, and some examples of what does not, one will very quickly come face-to-face with the need to grapple with conflicting domestic priorities once we move from generalities to specifics, and from high-level principles to implementation. Careful adaptation, and not easy plug-and-play, is the true face of rule of law reform.

One of the keys to careful adaptation is co-authorship. And as co-authorship of rule of law norms and reforms by developing countries, governments, and individuals becomes more common, such parties no longer occupy positions akin to that of mere consumers and end-users of the rule of law. As developing countries increasingly find themselves stepping into the role of co-developers, they will end up with a greater say in the shape of rule of law institutions and reforms that they would like to see implemented, drawing upon their own experiences of what works and what does not. Given these circumstances, it can hardly be asserted that rule of law reform agendas can be set by an invisible “developer” located halfway across the world.

Having made the observations above, it strikes me that in many ways, the rule of law is perhaps more akin to a piece of open source software than it is to an “app”. Like most open source software, it contains a small core of computer code setting out the basic parameters of the program that may be

---

8 Michael Connor, “Interview with John Ruggie”, *Business Ethics* (30 October 2011) <<http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>> (accessed 4 June 2014).

further tinkered with. It is something that can, beyond those basic parameters, be universally accessed, universally modified and improved upon and then universally redistributed for others to access, learn and benefit from. The analogy with open source software is of course not perfect because in the case of the rule of law discourse, there will be some inevitable fuzziness as to the exact extent of basic parameters. But we should not allow ourselves to be overly pre-occupied with the fuzzy edges and fail as a result to appreciate that much of the strength of the rule of law as a concept lies in the varied forms of actualisation that it permits. That strength can only be maintained by constant open dialogue and an exchange of ideas and experiences between all the stakeholders involved: developed and developing countries, states and private parties alike.

---



## BINGHAM CENTRE FOR THE RULE OF LAW

The Bingham Centre is an independent, London-based international body, part of the British Institute of International and Comparative Law. It is devoted to the study and promotion of the rule of law worldwide. Named after Lord Bingham of Cornhill KG, the UK's leading judge of his generation, the Centre is focused on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework in which it can operate, and fashioning practical tools to support it. It is engaged in projects both in the UK and abroad, providing assistance in jurisdictions such as Libya, Bahrain, Burma/Myanmar, Nepal and the Palestine Authority, and to institutions such as the Commonwealth Secretariat and the Council of Europe. The Centre has also participated in the discussion about the place of the Rule of Law in the UN Post-2015 Sustainable Development Agenda.

BINGHAM  
CENTRE FOR  
THE  
RULE  
OF  
LAW



British Institute of  
International and  
Comparative Law

## The Importance of the Rule of Law in Promoting Development

It is increasingly understood that the rule of law can deliver a powerful and lasting boost to the human and economic development of society. What is the nature of this relationship, and what are its consequences for individuals, governments, corporations and transnational actors, ranging from the United Nations to multilateral development banks? This book examines these issues as they apply to the legal systems of Singapore, the South-East Asia region and beyond. It addresses not only the impact of the rule of law domestically but also the burgeoning practice of international investment law and arbitration, and the emergence of a framework of rule of law and human rights responsibilities that apply to business and finance institutions in their operations worldwide.

The year 2015 is expected to see the finalisation of the UN Post-2015 Sustainable Development Agenda. This volume includes contributions from authors who serve or have served in senior positions in the UN, the Government of Singapore and Asian Development Bank. They are joined by the past and present Chief Justices of Singapore, Hong Kong and the United Kingdom and distinguished academics in the fields of public law, business and human rights and investment law. The volume is the result of the second Rule of Law Symposium hosted by the Singapore Academy of Law, in conjunction with the Bingham Centre for the Rule of Law, which was made possible by the principal sponsorship of the global law firm, Linklaters.

### About the editors

**Professor Sir Jeffrey Jowell KCMG QC** is the Director of the Bingham Centre for the Rule of Law, part of the British Institute of International and Comparative Law in London. **Mr J Christopher Thomas QC** is Senior Principal Research Fellow at the Centre for International Law at the National University of Singapore and an arbitrator and counsel. **Dr Jan van Zyl Smit** is an Associate Senior Research Fellow at the Bingham Centre for the Rule of Law.

Publication supported by

Linklaters

ISBN 978-981-09-1674-9



9 789810 916749