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ARTICLE

International Investment Law, Rule of Law, and Democracy: When the Solution Is Part of the Problem

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Abstract

It has become fashionable to attack the international investment system, even for former advocates such as the United States Trade Representative. This Article demonstrates a way forward of how the system may be saved—but not the way its proponents propagate. Because of the uncertainty of an economic justification, a rule of law legitimation is mostly advanced in defense of the international investment system. However, in an investment context, even the rule of law can be too much of a good thing, namely when in conflict with democracy. The Article elaborates how best to reconcile investment protection, rule of law, and democratic government, and concludes that only a thin understanding of the rule of law is acceptable on the international plane from the vantage point of democratic theory. Following from this, the Article advocates for a re-calibration of the standard of review and identifies proportionality testing as the setting screw of choice.

Keywords: Proportionality; rule of law; legitimate expectations; international investment

A. Introduction

International investment law is different from other areas of law in that its very existence is called into question.[1] This is true of both its substantive and procedural aspects. Some examples from 2024 demonstrate the legitimacy crisis that has engulfed international investment law: The European Union withdrew from the Energy Treaty Charter;[2] Honduras denounced the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention);[3] and Ecuadorians confirmed their opposition to investor-state dispute settlement (ISDS) in a referendum.[4] Under an ISDS mechanism, covered foreign

[1]On the legitimacy of international investment law, *see* David Schneiderman, *Global Constitutionalism and Its Legitimacy Problems: Human Rights, Proportionality, and International Investment Law*, 12 LAW & ETHICS. HUM. RTS. 251, 251–57, 261–62 (2018); Barnali Choudhury, *International Investment Law as a Global Public Good*, 17 LEWIS & CLARK L. REV. 481, 497–98, 505–8 (2013).

[2]Council of the European Union Press Release, Energy Charter Treaty: EU Notifies Its Withdrawal (June 27, 2024), https://www.consilium.europa.eu/en/press/press-releases/2024/06/27/energy-charter-treaty-eu-notifies-its-withdrawal/. *See also* Energy Charter Treaty art. 47(3), Dec. 17, 1994, 2080 U.N.T.S. 36116 (establishing a sunset period for the treaty as twenty years).

[3]Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; Press Release, Int'l Centre for Settlement of Inv. Disps. [ICSID], Honduras Denounces the ICSID Convention (Feb. 29, 2024), https://icsid.worldbank.org/news-and-events/communiques/honduras-denounces-icsid-convention.

[4]Press Release, Int'l Inst. for Sustainable Dev., Ecuador Referendum Rules Out ISDS Return, Underlining Public Support for a Sustainable Path (Apr. 22, 2024), https://www.iisd.org/articles/statement/ecuador-referendum-rules-out-isds-return-underlining-public-support-sustainable.

investors are entitled to bring legal action against host state measures before an international tribunal.[5] Even the United States is moving away from ISDS.[6] Historically, the United States, as well as European states, have been architects of the international investment system.

Several strategies, economic and legal, have been put forward in defense of the international law protection of foreign investments.[7] The economic rationale in a nutshell goes as follows: The greater legal certainty that ensues from international investment protection, the greater a host state's inflow of foreign capital, which, in turn, contributes to greater economic development, broadly understood—that is, including technology transfer, higher tax income, and increased competitiveness.[8] Although there may be countries that attract foreign capital regardless of international investment protection,[9] there are others in which it would be ill-advised to invest without the added protection of international investment law. So, for those countries, the first prong of the above equation seems plausible.[10] The empirical evidence concerning the second prong, however, that is, whether foreign capital also leads to greater economic development, is inconclusive.[11] Still, the Preamble to the ICSID Convention reaffirms "the need for international cooperation for economic development, and the role of private international investment therein."[12]

Because of the shaky empirical grounding, proponents of the status quo strive to detach the justification of international investment protection from econometric analysis and instead turn to the concept of rule of law—not just in the sense that international investment protection may be conducive to the *domestic* rule of law,[13] but in the sense that it would further the *international* rule

[5]Agreement on Economic Cooperation, Indon.–Neth., art. 11, July 7, 1968, 799 U.N.T.S. 13 (first employed here but terminated July 1, 1995).

[6]*Cf.* Simon Lester, *Senator Whitehouse and Ambassador Tai Talk About Getting Rid of ISDS*, Int. Econ. L. & Pol'y Blog (Apr. 17, 2024), https://ielp.worldtradelaw.net/2024/04/senator-whitehouse-and-ambassador-tai-talk-about-getting-rid-of-isds.html; Simon Lester, *The Biden Administration's Position on ISDS Removal*, Int. Econ. L. & Pol'y Blog (June 5, 2024), https://ielp.worldtradelaw.net/2024/06/the-biden-administrations-position-on-isds-removal.html. *See also* United States-Mexico-Canada Agreement art. 14.D.3(1), Nov. 30, 2018 [hereinafter USMCA] (failing to establish an ISDS mechanism between the United States and Canada, and the scope of ISDS vis-à-vis Mexico neither includes fair and equitable treatment nor indirect expropriation).

[7]*See generally* Alessandra Arcuri & Federica Violi, *Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives*, *in* Handbook of International Investment Law and Policy 2185 (Julien Chaisse, Leïla Choukroune & Sufian Jusoh eds., 2021).

[8]U.N. Conference on Trade and Development, *World Investment Report 2014 – Investing in the SDGs: An Action Plan*, 110–11, U.N. Doc. UNCTAD/WIR/2014, https://unctad.org/publication/world-investment-report-2014; Gebhard Bücheler, Proportionality in Investor-State Arbitration 304–5 (2015); August Reinisch, *The Rule of Law in International Investment Arbitration*, *in* Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade 291, 294 (Photini Pazartzis & Maria Gavouneli eds., 2016). *See also* Mohammad Anamul Haque, Zhang Biqiong, Muhammad Usman Arshad & Nazia Yasmin, *Role of Uncertainty for FDI Inflow: Panel Econometric Analysis of Selected High-Income Nations*, 10 Cogent Econ. & Fin. 1, 13–14 (2022) (providing a recent econometric analysis).

[9]Velimir Živković, *Fair and Equitable Treatment Between the International and National Rule of Law*, 20 J. World Inv. & Trade 513, 537–39 (2019).

[10]*Cf.* Kenneth Vandevelde, *The Liberal Vision of the International Law on Foreign Investment*, *in* Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornara 43, 62 (Chin Leng Lim ed., 2016).

[11]Živković, *supra* note 9, at 519–20; Arcuri & Violi, *supra* note 7, at 2191–96; Choudhury, *supra* note 1, at 495–96, 508–13. *See* Thi-Nham Le & Thanh-Tuan Dang, *An Integrated Approach for Evaluating the Efficiency of FDI Attractiveness: Evidence from Vietnamese Provincial Data from 2012 to 2022*, 14 Sustainability 1, 1–2, 21 (2022) (providing a recent study on Vietnam).

[12]*See* ICSID Convention, *supra* note 3, pmbl. para. 1. *See also* Živković, *supra* note 9, at 545.

[13]*See* Benjamin Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, 45 N.Y.U. J. Int'l L. & Pol. 1151, 1153, 1200 (2013); Alessandra Arcuri, *The Great Asymmetry and the Rule of Law in International Investment Arbitration*, Y.B. on Int'l Inv. Law & Pol'y 394, 396–98 (2018); Prabhash Ranjan, *National Contestation of International Investment Law and the International Rule of Law*, *in* The Rule of Law at the National and International Levels: Contestations and Deference 115, 129–30 (Machiko Kanetake & André Nollkaemper eds., 2016). *Pro* Živković, *supra* note 9, at 544–46, 551. *Contra* Mavluda Sattorva, The Impact of

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of law.[14] Economic development as the ultimate objective of international investment law is, in other words, supplanted by a new objective, namely the realization of the international rule of law. Against this backdrop, the International Law Association had dedicated a committee to the "Rule of Law and International Investment Law," which completed its work at the Athens conference in June 2024.[15] Whether this legitimation strategy to draw upon the international rule of law holds water is the subject of the present article.

The author is sanguine that the international investment system can be salvaged, but not in the way its proponents propagate. The current level of international investment protection hinges upon three core principles—the two substantive investment protection standards of fair and equitable treatment (FET) and indirect expropriation, found in many international investment agreements,[16] plus ISDS. Although certainly one of the most controversial aspects of international investment law, it is not ISDS that is at the root of the legitimacy crisis. In the author's view, it is rather a broad, substantive understanding of the international rule of law, combining the doctrine of legitimate expectations with strict proportionality testing. Instead of doing away with ISDS—and with it the effective control of misuse of public power[17]—this author proposes a re-calibration of the standard of review applied by investment tribunals, and following from this, the level of scrutiny of domestic regulatory changes.[18] At first blush, the question of standard of review seems rather technical, but as will be elaborated, it is of huge practical importance.

The analysis proceeds as follows: Section B seeks to reify the international rule of law as a theoretical framework. In particular, the distinction between "thin" and "thick" understandings of the rule of law will be explored. Section C expounds upon the ramifications for democratic decision-making of adopting a thick rule of law understanding and the consequent broad reading of substantive investment protection standards. The doctrine of legitimate expectations, as read into the FET standard as well as indirect expropriation, facilitates the scrutiny of domestic regulatory changes. This being the case, it is only in combination with strict proportionality testing that that scrutiny threatens to undermine democratic decision-making processes at the domestic

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Investment Treaty Law on Host States: Enabling Good Governance? 101–2 (2018); Bartosz Soloch, *International Investment Law: A Self-Proclaimed Ally in Commission's Rule of Law Endeavors*, *in* Handbook of International Investment Law and Policy 1653–55, 1657–58, 1668, 1670–71, 1676, 1683–84 (Julien Chaisse, Leïla Choukroune & Sufian Jusoh eds., 2021) (explaining the (non-)impact of international investment law on the rule of law in the European Union, and drawing on the fact that there are still investment rulings not available to the public, despite legislative efforts to the contrary: G.A. Res. 68/109, U.N. Comm'n on Int'l Trade Law [UNCITRAL] Rules on Transparency in Treaty-Based Investor-State Arbitration art. 3(1) (Dec. 16, 2013); ICSID Convention, *supra* note 3, art. 48(5), in conjunction with ICSID Arbitration Rules, rule 62(3) (2022)). *See* Dan Cake (Portugal) S.A. v. Hungary, ICSID Case No. ARB/12/9, Award (Nov. 1, 2017) (providing an example of an award of importance to the rule of law that has not been made publicly available).

[14]*See, e.g.*, Philip Morris Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶¶ 42, 51, 57, 61–62, 133 (July 8, 2016) (Gary Born, Concurring and Dissenting Opinion); Steffen Hindelang, Patricia Sarah Stöbener de Mora & Niels Lachmann, *Risking the Rule of Law? The Relationship Between Substantive Investment Protection Standards, Human Rights, and Sustainable Development*, *in* Investment Protection Standards and the Rule of Law 279, 300 (August Reinisch & Stephan Schill eds., 2023); Ursula Kriebaum, *Rule of Law Notions in Human Rights Law*, 22 Zeitschrift für Europarechtliche Studien 369, 381 (2019); Stephan Schill & Vladislav Djanic, *Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law*, 33 ICSID Rev. 29, 31–32, 36–38, 55 (2018); Živković, *supra* note 9, at 519–22, 525, 551; Vandevelde, *supra* note 10, at 43, 61–2, 68; Ranjan, *supra* note 13, at 116, 121–28, 133, 142; Hege Elisabeth Kjos, *Domestic Courts Under Scrutiny: The Rule of Law as a Standard (of Deference) in Investor-State Arbitration*, *in* The Rule of Law at the National and International Levels: Contestations and Deference 353–54, 357, 380 (Machiko Kanetake & André Nollkaemper eds., 2016).

[15]Int'l Law Ass'n [ILA], Committee on the Rule of Law and International Investment Law, Resolution 04/2024 [hereinafter ILA Resol. 04/2024].

[16]Kjos, *supra* note 14, at 367.

[17]*Cf.* Vandevelde, *supra* note 10, at 66–67. *See also* Wojciech Sadowski, *The Rule of Law and the Roll of the Dice: The Uncertain Future of Investor-State Arbitration in the EU*, *in* Defending Checks and Balances in EU Member States 333, 354–55 (Armin von Bogdandy ed., 2021) (explaining further advantages of ISDS).

[18]A reform process concerning ISDS is ongoing under the aegis of UNCITRAL. *See* UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform (2024), https://uncitral.un.org/en/working_groups/3/investor-state.

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level. Section D explains that what really matters from a democratic vantage point is the standard of review employed and rejects strict proportionality testing by investment tribunals. Under a strict proportionality test, it is examined whether the protection of the stated public welfare objective(s) is excessive or not in light of investor rights. In other words, the level of protection pursued by the host state is challenged, with the consequence that arbitrators make prioritization decisions in lieu of legislatures. Not only does this compromise legal certainty and the predictability of the dispute resolution system—themselves bedrock elements of the rule of law[19]—but also results in a systematic re-prioritization of policy objectives, with proprietary interests favored over other interests.[20] Section E finally concludes.

That the rule of law is key to a functioning legal system and to a democratic state order has become axiomatic.[21] History teaches us that "the rule of law can exist without democracy," but not the other way around.[22] As this Article explicates, in an investment context, rule of law principles can be in conflict with democracy. Doubtless it is not a bad thing *per se* to curb the tyranny of the majority, but a question of calibration. The Article, therefore, submits that only a thin understanding of the international rule of law is acceptable from the vantage point of democratic theory. For some investment lawyers, this might be perceived as bordering on heresy. However, an investment system thus curtailed is defensible in light of both principles—democracy as well as the rule of law.

B. Concepts of Rule of Law

Let us start at the beginning, with the concept of "rule of law" as a guiding principle of international lawmaking, and the "rule *by* law" as the first step towards its actualization.[23] The

[19]*Cf.* U.N. Secretary-General, *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels*, ¶ 2, U.N. Doc. A/66/749 (Mar. 16, 2012) [hereinafter *Delivering Justice*]; European Commission for Democracy Through Law, *Report on the Rule of Law*, ¶¶ 41, 44–51, Study No. 512/2009 (Apr. 4, 2011) [hereinafter Venice Commission Report], https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e. *See also* Del Río Prada v. Spain, App. No. 42750/09, ¶ 125 (Oct. 21, 2013), https://hudoc.echr.coe.int/eng?i=001-127697; Machiko Kanetake, *The Interfaces Between the National and International Rule of Law: A Framework Paper*, *in* THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE 11, 19 (Machiko Kanetake & André Nollkaemper eds., 2016); Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, *in* INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE 251, 256 (Armin von Bogdandy & Ingo Venzke eds., 2012).

[20]Arcuri & Violi, *supra* note 7, at 2203. *Cf.* Josef Ostřanský, *Fair and Equitable Treatment*, *in* RETHINKING INVESTMENT LAW 126, 128 (David Schneiderman & Gus Van Harten eds., 2023) (describing the phenomenon without linking it to strict proportionality testing).

[21]G.A. Res. 67/1, ¶ 5 (Nov. 30, 2012) [hereinafter U.N. Declaration on the Rule of Law]; Venice Commission Report, *supra* note 19, ¶ 16; Thomas Cottier, *The Rule of Law in International Economic Relations*, ZEITSCHRIFT FÜR EUROPARECHTLCHE STUDIEN 3, 3, 12 (2022). *See also* Statute of the Council of Europe, pmbl. para. 2, May 5, 1949, C.E.T.S. No. 1; Ngangjoh Hodu Yenkong, *Reflecting on the Rule of Law Contestations Narratives in the World Trading System*, 15 J. INT'L DISP. SETTLEMENT 238, 250 (2024); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 454 (1996). *Contra* James Crawford, *International Law and the Rule of Law*, 24 ADEL. L. REV. 3, 4–5 (2003), *but see* 10–12 (affirming "the need for the rule of law as a virtue at the international level").

[22]BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 37 (2004); Charles Sampford, *"Thin Theories" of the Domestic and International Rule of Law*, *in* INTERNATIONAL RULE OF LAW AND PROFESSIONAL ETHICS 49, 55–56, 59–60, 72 (Vesselin Popovski ed., 2014). Unless one incorporates democracy into the definition of the rule of law concept as done by the United Nations, *see infra* n. 43.

[23]Jørgen Møller, *The Advantages of a Thin View*, *in* HANDBOOK ON THE RULE OF LAW 21, 27, 29 (Christopher May & Adam Winchester eds., 2018); Adriaan Bedner, *The Promise of a Thick View*, *in* HANDBOOK ON THE RULE OF LAW 34, 36–37 (Christopher May & Adam Winchester eds., 2018). *Cf.* Vienna Convention on the Law of Treaties arts. 26–27, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; Int'l Law Comm'n Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 32, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA]. *See also* Machiko Kanetake & André Nollkaemper, *The International Rule of Law in the Cycle of Contestations and Deference*, *in* THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE 445 (Machiko Kanetake & André Nollkaemper

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existence of an *international* rule of law concept must be considered as settled now,[24] although "there are varying degrees of adherence" thereto.[25] The international rule of law can be distinguished from the domestic concept:[26] "the rule of law primarily regulates the relations between the national government and individuals under its jurisdiction,"[27] while "the international rule of law concerns three levels of relations: [A] horizontal state-to-state relations, [B] authority exercised by the government against individuals and non-state entities, and [C] authority exercised by international institutions . . . ."[28] International human rights law and international investment law come under situation [B] of the above categorization.[29] It is here, with the overlap of domestic and international rule of law, that the conflict arises which this article seeks to resolve.

The rule of law generally has many facets, ranging from simply having access to legal texts to demands for the organization of the state. Whereas some commentators consider the elements that make up the international rule of law to be consubstantial with their domestic counterparts,[30] this author has his doubts. The International Court of Justice (ICJ) famously underlined in *ELSI* that:

> [T]he fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law . . . . Nor does it follow from a finding by a municipal court that an act was . . . arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[31]

Another example where the international rule of law falls short of its domestic permutations is the right to a fair trial. As to the question of whether an international court needs, under Article 14(1) of the International Covenant on Civil and Political Rights,[32] to be "established by law" in the same way as a domestic court would, the International Criminal Tribunal for the Former Yugoslavia stated that "the principle that a tribunal must be established by law . . . is a general principle of law imposing an international obligation which *only* applies to the administration of criminal justice *in a municipal setting*."[33] By the same token, the European Court of Justice in *Kadi I* justified its review of the lawfulness of domestic acts implementing international law—United Nations Security resolutions—on the basis that it "must be considered to be the expression, in a community *based on the rule of law*, of a constitutional guarantee stemming

eds., 2016); Robert McCorquodale, *Defining the International Rule of Law: Defying Gravity?*, 65 Int'l & Compar. L.Q. 277, 296–98 (2016) (linking the international rule of law to *pacta sunt servanda*).

[24]U.N. Declaration on the Rule of Law, *supra* note 21, ¶¶ 1–2; McCorquodale, *supra* note 23, at 284–87, 289–91, 296.

[25]McCorquodale, *supra* note 23, at 291.

[26]*Delivering Justice*, *supra* note 19, ¶ ¶ 3–4; Cottier, *supra* note 21, at 3–4; Kriebaum, *supra* note 14, at 370; Živković, *supra* note 9, at 528–29; Sampford, *supra* note 22, at 66–67. *See also* Werner Schroeder, *The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?*, *in* Defending Checks and Balances in EU Member States 105, 109–10, 123 (Armin von Bogdandy ed., 2021) (arguing that the rule of law is not even homogenous among the Member States of the European Union).

[27]Kanetake, *supra* note 19, at 15.

[28]*Id.* at 16.

[29]Kanetake, *supra* note 19, at 17.

[30]Kjos, *supra* note 14, at 374, 378. *See also* ILA, Study Group on Principles on the Engagement of Domestic Courts with International Law, *Final Report: Mapping the Engagement of Domestic Courts with International Law*, ¶ 30 (2016), https://www.ila-hq.org/en_GB/documents/conference-study-group-report-johannesburg-2016 (defining consubstantial norms).

[31]Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 ICJ Rep. 15, ¶ 124 (July 20).

[32]International Covenant on Civil and Political Rights art. 14(1), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

[33]Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 42 (Int'l Crim. Trib. Former Yugo., Oct. 2, 1995) (emphasis added).

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from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement."[34]

The inference that can be drawn from those rulings is that between the international rule of law, on the one hand, and its domestic counterparts, on the other hand, there is not just a relational difference but also one in substance.[35] This is not surprising considering the diversity of political systems that operate under an international rule of law. We can further ascertain that the two levels cross-fertilize each other, but not to the extent of assimilation.[36]

Although a universally accepted definition of the rule of law does not exist,[37] its rationale seems clear, namely the exclusion of arbitrary power exercise.[38] This can be understood in a formal and substantive sense.[39] The former is captured in the principle of legality, that is, government respecting the law and governing through law.[40] According to Rawls, "the conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system."[41] On that basis, the international rule of law is tantamount to the rule of international law.[42]

Former United Nations Secretary-Generals Annan and Ban Ki-moon advocated a substantive understanding: 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.[43]

[34]Case C-402/05 P, Kadi and Al Barakaat Int'l Found. v. Council, ¶ 316 (Sept. 3, 2008), http://curia.europa.eu/juris/liste.jsf?num= C-402/05 (emphasis added). *See also* Case C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, ¶ 31 (Feb. 27, 2018), http://curia.europa.eu/juris/liste.jsf?num= C-64/16.

[35]Kanetake, *supra* note 19, at 20.

[36]*Id.* at 12–14, 22, 26–30, 35–36, 39. *See also* Kanetake & Nollkaemper, *supra* note 23, at 455, 459.

[37]Esmé Shirlow, *The Rule of Law, Standards of Review, and the Separation of Powers*, *in* Investment Protection Standards and the Rule of Law 259, 261 (August Reinisch & Stephan Schill eds., 2023); Yenkong, *supra* note 21, at 240, 242–44; Cottier, *supra* note 21, at 3. *See also* McCorquodale, *supra* note 23, at 288–96 (on attempts to define the rule of law).

[38]*Rule of Law*, Black's Law Dictionary (11th ed. 2019); European Commission, *A New EU Framework to Strengthen the Rule of Law*, Communication to the European Parliament and the Council, 3–4, COM(2014) 158 final (Mar. 11, 2014) [hereinafter European Commission Report]; Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, *in* Relocating the Rule of Law 45, 57 (Gianluigi Palombella & Neil Walker eds., 2008); Arcuri, *supra* note 13, at 405.

[39]Caroline Henckels, *Legitimate Expectations and the Rule of Law in International Investment Law*, *in* Investment Protection Standards and the Rule of Law 43, 44 (August Reinisch & Stephan Schill eds., 2023); Shirlow, *supra* note 37, at 261–63; Jørgen Møller & Svend-Erik Skaaning, The Rule of Law: Definitions, Measures, Patterns and Causes 16–17, 19–20, 22–24, 26–27 (2014). *See also* McCorquodale, *supra* note 23, at 281–82; Jeremy Waldron, The Stanford Encyclopedia of Philosophy (Edward Zalta & Uri Nodelman eds., 2023), https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/ (separating a procedural understanding from the formal understanding).

[40]ILA, *Rule of Law and International Investment Law: Sydney Conference Report*, 13 (2018), https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-14; Alan Greene, *States of Emergency and the Rule of Law*, *in* Routledge Handbook of the Rule of Law 211, 214–15 (Michael Sevel ed., 2025); Kriebaum, *supra* note 14, at 370; Møller, *supra* note 23, at 33.

[41]John Rawls, A Theory of Justice 235 (1971).

[42]*Cf.* Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 Va. J. Int'l L. 19, 22 (2003).

[43]U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004); *Delivering Justice*, *supra* note 19, ¶ 2. *See generally* Hannah Birkenkötter, *The United Nations and the Rule of Law*, *in* Routledge Handbook of the Rule of Law 372, 373, 380–81 (Michael Sevel ed., 2024).

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The primary difference between the two approaches, which is of interest to our analysis, is that a formal or thin understanding of the rule of law would not put demands on the content of laws,[44] whereas a substantive or thick understanding would screen their substantive content.[45] That screening would need to be carried out against certain benchmarks, such as human rights and principles of justice, which entails value judgments.[46] As per Dworkin, the rule of law "requires . . . that the rules in the rule book capture and enforce moral rights."[47] This is at the same time the main merit and the main point of contention of the substantive understanding, encapsulated in Raz's metaphor of the law being a knife: "[T]he fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives."[48] On the plus side, screening provides a mechanism to filter out oppressive laws.[49] The other side of the coin is the key question: Whose values, whose morals are imposed? For there is a distinct risk that the applied law will be imbued with the screeners' values if the rule of law concept is converted into the "rule of the *good* law."[50] Chesterman, consequently, warns against expanding the international rule of law, as this risks reducing the concept "to a rhetorical device at best, a disingenuous ideological tool at worst."[51]

From a substantive understanding, the proportionality principle and the protection of legitimate expectations can be inferred.[52] In which guise, however, is disputed. It is conceivable, for instance, to recognize the doctrine of legitimate expectations in principle while at the same time leaving sufficient policy space for host states to regulate in the public interest. As we will see later, the distinction between general law changes and the host state reneging on a specific promise made to a foreign investor becomes relevant in this connection.[53]

The main conclusion from Section B is that the international rule of law does not prescribe a thick understanding.[54] Crawford provides an explanation: "[T]he application of the basic value of the rule of law at the international level is conditioned by certain facts of life, notably the absence of legislative power such as exists in internal legal systems."[55] This may account for the thickening

[44]Greene, *supra* note 40, at 218; Joseph Raz, The Authority of Law: Essays on Law and Morality 211, 221 (1979); Tamanaha, *supra* note 22, at 92.

[45]Shirlow, *supra* note 37, at 261–62. *See also* Møller, *supra* note 23, at 21, and Bedner, *supra* note 23, at 34 (comparing a "thick" and "thin" understanding of the rule of law).

[46]Greene, *supra* note 40, at 219; Bedner, *supra* note 23, at 38–39.

[47]Ronald Dworkin, Political Judges and the Rule of Law 262 (1980). *See also* Philip Selznick, *The Rule of Law: Legal Cultures and the Rule of Law*, *in* The Rule of Law After Communism: Problems and Prospects in East-Central Europe 21, 25–26 (Martin Krygier & Adam Czarnota eds., 1999).

[48]Raz, *supra* note 44, at 225.

[49]*Cf.* Møller, *supra* note 23, at 30–31, 33; Tamanaha, *supra* note 22, at 37.

[50]Raz, *supra* note 44, at 211 (emphasis added).

[51]Simon Chesterman, *An International Rule of Law?*, 56 Am. J. Compar. L. 331, 360 (2008).

[52]For the European understanding of the rule of law, *see* Venice Commission Report, *supra* note 19, ¶ 48; European Commission Report, *supra* note 38, annex I; Nagy v. Hungary, App. No. 53080/13, ¶ 78 (Dec. 13, 2016), https://hudoc.echr.coe.int/eng?i=001-169663; Case C-547/14, Philip Morris Brands Sàrl v. Sec'y of State for Health, ¶ 165 (May 4, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-547/14; Case C-477/14, Pillbox 38 (U.K.) Ltd. v. Sec'y of State for Health, ¶ 48 (May 4, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-477/14; Case C-46/87, Hoechst v. Comm'n, ¶ 19 (Sept. 21, 1989), https://curia.europa.eu/juris/liste.jsf?num=C-46/87; Case C-205/82, Deutsche Milchkontor GmbH v. Germany, ¶¶ 27–28 (Sept. 21, 1983), https://curia.europa.eu/juris/liste.jsf?num=C-205/82. *See also* Bundesministerium der Justiz [Federal Ministry of Justice], *Das Rechtsstaatsprinzip im Grundgesetz* (Apr. 10, 2023), https://www.bmj.de/DE/rechtsstaat_kompakt/grundgesetz/rechtsstaatsprinzip/rechtsstaatsprinzip_node.html (giving the German perspective); Philip Joseph, *Law of Legitimate Expectation in New Zealand*, *in* Legitimate Expectations in the Common Law World 189, 190 (Matthew Groves & Greg Weeks eds., 2017) (giving the New Zealand perspective); Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 Duke J. Compar. & Int'l L. 291, 302 (2011) (giving the United States perspective).

[53]Lucian Ilie, *Revisiting the Concept of Legitimate Expectations in Renewable Energy Treaty Cases*, 6 Eur. Inv. L. & Arb. Rev. 169, 172–84, 187–88 (2021).

[54]Kanetake, *supra* note 19, at 20, 22, 36. *See also* Gianluigi Palombella, *Legality, the Rule of Law, and the Path to Inter-Legality in the Extra-State Setting*, *in* Routledge Handbook of the Rule of Law 292, 296 (Michael Sevel ed., 2024).

[55]Crawford, *supra* note 21, at 10.

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of the rule of law within the European Union as the European integration process progressed.[56] In international investment law, the two main setting screws in a substantive sense are legitimate expectations and proportionality. In the next Section, we will canvass the doctrine of legitimate expectations, as embodied in the FET standard and as a factor to determine indirect expropriation, before addressing the principle of proportionality in Section D.

C. Protection of Legitimate Expectations

I. Legitimate Expectations in International Investment Law

1 . Legal Nature and Function

The significance of the doctrine of legitimate expectations for international investment law can hardly be overstated. This is because of its relevance to the two most invoked causes of action in investment disputes, FET and indirect expropriation,[57] resulting in an overlap between those investment protection standards.[58] Given its support in domestic law,[59] some commentators rank the doctrine of legitimate expectations among the general principles of law in terms of Article 38(1)(c) of the Statute of the International Court of Justice.[60] In addition, because the doctrine is concerned with protecting trust in public authority,[61] it is considered a rule of law requirement. In consequence, the FET standard, since it protects foreign investors' expectations, has been dubbed an "expression of the rule of law."[62]

One of the leading cases on FET is *Saluka v. Czech Republic*. In that case, FET was in issue because the host state had initiated a forced administration on the investor's banking business.

[56]Schroeder, *supra* note 26, at 118, 120–23.

[57]Krista Nadakavukaren Schefer, International Investment Law: Text, Cases and Materials 401 (2020); Rudolf Dolzer, Ursula Kriebaum & Christoph Schreuer, Principles of International Investment Law 153 (2022).

[58]*See* August Reinisch & Christoph Schreuer, International Protection of Investments: The Substantive Standards 156, 164, 350 (2020) (outlining the overlap between different substantive investment protection standards). *See also* El Paso Int'l Energy Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 226 (Oct. 31, 2011); Mobil Expl. & Dev. Arg. Inc. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, ¶ 811 (Apr. 10, 2013); Brit. Caribbean Bank Ltd. v. Belize, PCA Case Repository No. 2010-18, Award, ¶ 280 (Dec. 19, 2014).

[59]For the European Union, *see* CFI, Case T-115/94, Opel Austria GmbH v. Council, ¶ 93 (Jan. 22, 1997), https://curia.europa.eu/juris/liste.jsf?num=T-115/94. For Spain, *see* Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público art. 3(1)(e), https://www.boe.es/buscar/act.php?id=BOE-A-2015-10566. For the United Kingdom, *see* Finucane, Re Application for Judicial Review (Northern Ireland), [2019] UKSC 7, ¶¶ 56, 62. For Canada, *see* Agraira v. Canada, [2013] 2 S.C.R. 559, ¶ 94. For Singapore, *see* Chiu Teng @ Kallang Pte v. Singapore Land Authority, [2013] SGHC 262, ¶¶ 113, 119 (Nov. 27, 2013). For South Africa, *see* Promotion of Administrative Justice Act 3 of 2000 § 3; MEC for Education in Gauteng Province v. Governing Body of Rivonia Primary School, 2013 (6) SA 582 (CC), ¶¶ 60, 68. For Hong Kong, *see* Ng Siu Tung v. Dir. of Immigr., Court of Final Appeal, [2002] 1 HKLRD 561. For New Zealand, *see* Comptroller of Customs v. Terminals, [2012] NZCA 598, ¶¶ 125–27. For India, *see* Confederation of Ex Servicemen v. Union of India, AIR 2006 SC 2945, ¶ 33. *See also* Henckels, *supra* note 39, at 48–51. *Contra* Ostřanský, *supra* note 20, at 132–37.

[60]Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 1 U.N.T.S. 993. *Cf.* Thomas Cottier, Roberto Echandi, Rachel Liechti-McKee, Tetyana Payosova & Charlotte Sieber, *The Principle of Proportionality in International Law: Foundations and Variations*, 18 J. World Inv. & Trade 628, 630 (2017). *Contra* Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. Rep. 507, ¶ 162 (Oct. 1); Henckels, *supra* note 39, at 46–47.

[61]Marc Jacob & Stephan Schill, *Fair and Equitable Treatment: Content, Practice, Method*, *in* International Investment Law: A Handbook 700, 723–24 (Marc Bungenberg, Jörn Griebel, Stephan Hobe & August Reinisch eds., 2015).

[62]Martins Paparinskis, *The Rule of Law and Fair and Equitable Treatment*, *in* Investment Protection Standards and the Rule of Law 23, 25, 40 (August Reinisch & Stephan Schill eds., 2023); Hindelang, Stöbener de Mora & Lachmann, *supra* note 14, at 281–82; Reinisch, *supra* note 8, at 292. *See also* Casinos Austria Int'l GmbH v. Argentine Republic, ICSID Case No. ARB/14/32, Decision on Jurisdiction, ¶¶ 242–43 (June 29, 2018); Horthel Systems B.V. v. Republic of Pol., PCA Case Repository No. 2014-31, Award, ¶ 296 (Feb. 16, 2017). *See generally* Velimir Živković, Fair and Equitable Treatment and the Rule of Law (2023).

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The tribunal held that the FET standard is "closely tied to the notion of legitimate expectations which is the dominant element of that standard."[63] That is to say, if the notion of legitimate expectations is not ruled out, but even then it would be a factor to be taken into account.[64] The same holds true for the determination of indirect expropriation. The United States-Mexico-Canada Agreement, for instance, provides that:

> The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: . . . the extent to which the government action interferes with distinct, reasonable investment-backed expectations . . . .[65]

The Agreement goes on to clarify that the reasonableness of expectations "depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector."[66] In the context of the doctrine of legitimate expectations, the terms "reasonable" and "legitimate" are used interchangeably.[67]

A formulation of that doctrine can be found in Article 8.10(4) of the Canada-European Union Comprehensive Economic and Trade Agreement:

> [T]he Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.[68]

The scope of the doctrine largely hinges upon the concept of "legitimate expectations," that is, the kind of expectations deemed legitimate in a particular case. It bears emphasizing that only regulatory *changes* can be challenged; a foreign investor must accept the law of the host state as found when making the investment.[69] This is part of the investor's due diligence obligation.[70]

[63]Saluka Investments B.V. v. Czech Republic, PCA Case Repository No. 2001-04, Partial Award, ¶ 302 (Mar. 17, 2006) (citations omitted). *See also* Novenergia II - Energy & Env't (SCA) v. Kingdom of Spain, SCC Case No. 2015/063, Final Award, ¶ 648 (Feb. 15, 2018); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.75 (Nov. 30, 2012).

[64]*See, e.g.*, Comprehensive Economic and Trade Agreement, Can.–E.U., art. 8.10(4), Oct. 30, 2016, 2017 O.J. (L 11) [hereinafter CETA] (art. 8.10 is not provisionally applied); Investment Protection Agreement, E.U.–Sing., art. 2.4(3), Oct. 19, 2018 (not in force) [hereinafter E.U.-Sing. IPA]; Trans-Pacific Partnership Agreement [hereinafter TPP] art. 9.6(4), as incorporated into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership by virtue of art. 1(1), Mar. 8, 2018, 56101 U.N.T.S. 3337 [hereinafter CPTPP]; USMCA, *supra* note 6, art. 14.6(4); Mesa Power Group LLC v. Canada, PCA Case Repository No. 2012-17, Award, ¶ 502 (Mar. 24, 2016). *See generally* Steven Ratner, *Fair and Equitable Treatment and Human Rights: A Moral and Legal Reconciliation*, 25 J. Int'l Econ. L. 568, 572–73 (2022).

[65]USMCA, *supra* note 6, annex 14-B, para. 3(a)(ii). *See also* TPP, *supra* note 64, annex 9-B, para. 3(a)(ii), as incorporated into the CPTPP; CETA, *supra* note 64, annex 8-A, para. 2(c); Regional Comprehensive Economic Partnership Agreement, annex 10B, para. 3(b), Nov. 15, 2020 [hereinafter RCEP].

[66]USMCA, *supra* note 6, annex 14-B, n. 19.

[67]Att'y Gen. of Hong Kong v. Ng Yuen Shiu, Privy Council, [1983] UKPC 7; Henckels, *supra* note 39, at 51.

[68]CETA, *supra* note 64, art. 8.10(4).

[69]Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 622, 624 (Dec. 8, 2016); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 287 (Nov. 12, 2010).

[70]Markus Burgstaller & Giorgio Risso, *Due Diligence in International Investment Law*, 38 J. Int'l ARB. 697, 706–8, 712–17 (2021); Yulia Levashova, *Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law*, 67 Neth. Int'l L. Rev., 233, 238–41 (2020).

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2. Legitimacy of Expectations

According to the prevailing view, representations made by the host state to the foreign investor need to be "specific" enough in order to generate *legitimate* expectations.[71] If this is given too expansive a reading, the investment protection standards that incorporate legitimate expectations become problematic from the vantage point of national sovereignty. This brings us to the crux of the matter: When is a representation "specific" in that requisite sense? In particular, would the host state's regulatory framework meet this criterion?

Some tribunals answer this in the affirmative, thus subjecting changes to the regulatory framework to international scrutiny.[72] The ruling in *Suez and Vivendi v. Argentina (II)*, which was about a concession in Argentina "for water distribution and waste water treatment services," is exemplary in that respect:

> When an investor undertakes an investment, a host government through its laws, regulations . . . creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State. The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed.[73]

Importantly, the democratic legitimation of the rule change, as the case may be, is secondary: As per Article 27 of the Vienna Convention on the Law of Treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[74] Democratic credentials of the internal law do not detract from this obligation.[75]

On the other end of the spectrum, several investment tribunals were called to assess whether modifications to solar energy regimes which harmed foreign investments in that sector—for example, a reduction in subsidies, an increase in taxation—were consistent with the Energy Charter Treaty, notably the FET standard in Article 10(1). One such case was *Blusun v. Italy*. Italy had decided to decrease the level of feed-in-tariffs to be paid in the future. The key question was whether the host state's renewable energy regime was capable of generating legitimate expectations in the continuance of the feed-in-tariffs as before the modification. In this regard, the tribunal stressed that "there is still a clear distinction between a law, i.e. a norm of greater or lesser generality creating rights and obligations while it remains in force, and a promise or contractual commitment."[76] Against that background, the tribunal in *Masdar v. Spain*—a case concerning Spain's withdrawal of support measures for renewable energy producers—concluded that there are two schools of thought:

> [O]ne school of thought considers that such commitments can result from general statements in general laws or regulations . . . . The second school of thought considers that a specific commitment giving rise to legitimate expectations cannot result from general regulations and that something more is needed.[77]

[71] *See, e.g.*, CETA, *supra* note 64, art. 8.10(4).

[72] *See, e.g.*, ESPF Beteiligungs GmbH v. Italian Republic, ICSID Case No. ARB/16/5, Award, ¶ 512 (Sept. 14, 2020); 9REN Holding S.À.R.L. v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award, ¶ 295 (May 31, 2019) (regarding Energy Charter Treaty, *supra* note 2, art. 10(1)).

[73] Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 1, 222 (July 30, 2010).

[74] Vienna Convention, *supra* note 23, art. 27.

[75] *See* Gelman v. Uruguay, Merits and Reparations, Judgement, Inter-Am. Ct. H.R., (ser. C) No. 221, ¶ 239 (Feb. 24, 2011). *See also* Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 Int'l J. Const. L. 1023, 1027 (2012).

[76] Blusun S.A. v. Italian Republic, ICSID Case No. ARB/14/3, Award, ¶ 371 (Dec. 27, 2016).

[77] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶¶ 490, 504 (May 16, 2018). *See also* Ratner, *supra* note 64, at 573, 582–83.

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A corollary of the first-mentioned school is that states face a liability risk whenever they alter the regulatory framework in a way that may negatively affect foreign proprietary interests. Legislatures and regulators, being aware of this, might under-regulate in an attempt to assuage that risk.[78] The delayed introduction of plain packaging legislation is probably the best-known example of this phenomenon, often couched as "regulatory chill."[79]

As the following section will demonstrate, the protection guaranteed under the doctrine of legitimate expectations in domestic law as well as other international contexts stays well below its application in international investment law. Investment case law has derogated from certain important limitations, thereby expanding the doctrine's scope. Those limitations have been put in place because, without them, the doctrine would unjustifiably restrict, even paralyze, decision-makers.

II. Legitimate Expectations in Other Forums

Global administrative law distinguishes between acquired rights and promises made, and attaches different legal consequences to these categories. A comparative study has revealed that only the former remain unaffected by regulatory changes.[80] In addition, "a clear and effective promise" is required.[81] What the first school of thought from the above *Masdar* ruling has done is ascribe to legitimate expectations the status of rights, thereby conflating those two categories. Moreover, in domestic systems, the protection of legitimate expectations is weighed up against the public interest.[82] That is, even when assuming legitimate expectations, a certain outcome is not guaranteed in light of a conflicting public interest.

In international investment law, it is not clear whether a frustration of legitimate expectations amounts to a violation of the FET standard *eo ipso*,[83] or whether the frustration, for example the reversal by the host state of undertakings made,[84] must have been caused by *arbitrary* government conduct—in other words, whether arbitrariness is an additional requirement under that element of FET.[85] By the same token, some domestic jurisdictions only infer procedural, not substantive, guarantees from the doctrine of legitimate expectations.[86]

[78]Lukasz Gruszczynski, *Saving Regulatory Space for States Through the Standard of Review: A Case Study of Tobacco Control-Related International Disputes*, *in* Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence, and Standards of Review in the Practice of International Courts and Tribunals 65, 68 (Gábor Kajtár, Basak Çali & Marko Milanovic eds., 2022); Hindelang, Stöbener de Mora & Lachmann, *supra* note 14, at 282; Schill & Djanic, *supra* note 14, at 42. *Contra* Vandevelde, *supra* note 10, at 63–64.

[79]*See, e.g.*, Press Release, New Zealand Government, Government Moves Forward with Plain Packaging of Tobacco Products (Feb. 20, 2013), https://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products.

[80]Louise Otis & Jérémy Boulanger-Bonnelly, *The Protection of Legitimate Expectations in Global Administrative Law*, *in* Law for Social Justice 395, 433–35 (George Politakis, Tomi Kohiyama & Thomas Lieby eds., 2019).

[81]*Id.* at 412.

[82]For the European Union, *see* Case C-349/17, Eesti Pagar AS v. Ettevõtluse Arendamise Sihtasutus, ¶ 97 (Mar. 5, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-349/17. For Germany, *see* Verwaltungsverfahrensgesetz (Administrative Procedure Act), May 25, 1976, BGBl I at 1253, § 48(2)–(3) [hereinafter VwVfG]; Bundesverfassungsgericht [BverfG] (Federal Constitutional Court), 2 BvR 2365/09, May 4, 2011, ¶ 135, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504_2bvr236509en.html; BverfG, 1 BvF 1/94, Nov. 23, 1999, ¶ 107, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1999/11/fs19991123_1bvf000194en.html. For the United Kingdom, *see* Finucane, [2019] UKSC 7, ¶ 56. For Singapore, *see* Chiu Teng @ Kallang Pte v. Singapore Land Authority, [2013] SGHC 262, ¶ 119.

[83]No automatism: USMCA, *supra* note 6, art. 14.6(4); TPP, *supra* note 64, art. 9.6(4); E.U.-Sing. IPA, *supra* note 64, art. 2.4(3), n. 2.

[84]Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 285 (Nov. 12, 2010).

[85]*See* Henckels, *supra* note 39, at 55–60.

[86]For Canada, *see* Agraira v. Canada, [2013] 2 S.C.R. 559, ¶ 97. For Australia, *see* Re Minister for Immigr. & Multicultural and Indigenous Affs., ex parte Lam, (2003) 214 CLR 1, ¶¶ 105, 148; Att'y Gen. for New South Wales v. Quin, (1990) 170 CLR 1, ¶ 37; Minister for Immigr. & Border Prot. v. WZARH, [2015] HCA 40, ¶¶ 30, 61 (further limiting the doctrine of legitimate expectations in Australian public law).

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Domestic law further clearly distinguishes between claims directed against the executive, the legislative, and the judiciary, with the consequence that protection against law changes and new interpretations of existing law, in other words claims against the legislature and the judiciary as opposed to the executive, is more restricted. Under international law, the conduct of all branches of government is treated as acts of state.[87] In German law, for instance, protection against prospective law changes is foreclosed, barring the requirement of transitional provisions, as the case may be.[88] The same holds true for changes in the case law.[89] Likewise, under European Union law, a beneficiary—in our context an investor—"cannot rely on there being no legislative amendment, but can only call into question the arrangements for the implementation of such an amendment."[90] On that basis, a claim as brought by Eli Lilly against Canada—challenging new case law relating to Canadian patent law that had tightened the patentability requirement that an invention must be "useful"—would have been precluded *a priori*.[91] Finally, the doctrine of legitimate expectations is subject to a legality requirement in some jurisdictions.[92]

In summary, we find ourselves in the uneasy situation whereby the application of the doctrine in its investment guise seems excessive as compared to its domestic provenance as well as its equivalent in other international fields, for example employment with an international organization, where changes of the regulatory framework would not be considered to frustrate legitimate expectations.

III. Scope vs. Standard of Review

As seen, to what extent regulatory changes can frustrate legitimate expectations of foreign investors—advanced as either an FET claim and/or indirect expropriation—remains contested. Be that as it may, international scrutiny of domestic regulatory changes is not problematic *per se* from the point of view of democratic theory.[93] At the end of the day, it all depends upon how deferential the scrutiny is towards regulatory autonomy, in other words, the standard of review.[94]

[87]ARSIWA, *supra* note 23, art. 4(1).

[88]VwVfG § 38(3) (Ger.); BVerfG, 1 BvR 706/08, June 10, 2009, ¶ 212 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/rs20090610_1bvr070608en.html.

[89]Klaus Rennert, Former President of the Federal Administrative Court, Vortrag anlässlich des Seminars zum Vertrauensschutz der Association of Councils of State and Supreme Administrative Jurisdictions of the European Union [Presentation at the Seminar on the Protection of Legitimate Expectations of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union]: Vertrauensschutz im deutschen Verwaltungsrecht [Protection of Legitimate Expectations in German Administrative Law] 9–10 (Apr. 21, 2016) (transcript available at https://www.bverwg.de/user/data/media/rede_20160421_vilnius_rennert.pdf).

[90]Case C-487/01, Gemeente Leusden v. Staatssecretaris van Financiën, ¶ 81 (Apr. 29, 2004), https://curia.europa.eu/juris/liste.jsf?num=C-487/01.

[91]*See* Global Affairs Canada, *Eli Lilly and Company v. Government of Canada* (Dec. 19, 2017), https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng (summarizing the case).

[92]Case C-349/17, Eesti Pagar AS v. Ettevõtluse Arendamise Sihtasutus, ¶ 104 (Mar. 5, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-349/17 (describing the European Union approach); Dr. Luchkiw v. Coll. of Physicians & Surgeons of Ontario (2022), 2022 ONSC 5738, ¶ 72 (Can. Ont. Sup. Ct. J.) (describing the Canadian approach).

[93]von Staden, *supra* note 75, at 1030–33, 1048–49. *See generally* Armin von Bogdandy & Ingo Venzke, In Whose Name? A Public Law Theory of International Adjudication 156–206 (2014). For democratic theory, *see* Tom Christiano & Sameer Bajaj, *Democracy*, *in* The Stanford Encyclopedia of Philosophy (Edward Zalta & Uri Nodelman eds., 2022), https://plato.stanford.edu/archives/spr2024/entries/democracy/.

[94]Eyal Benvenisti, *Explaining Variations in Standards of Review in International Adjudication*, *in* Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence, and Standards of Review in the Practice of International Courts and Tribunals 21–22 (Gábor Kajtár, Basak Çali & Marko Milanovic eds., 2022); Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. Int'l Econ. L. 223, 238–41 (2012).

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Standards range from non-justiciability to *de novo* review,[95] and investment tribunals have taken varied approaches.[96] The most intrusive standard of review is a strict proportionality test, which will be the topic of Section D.

Shirlow explains that "[d]eference assists international adjudicators to determine whether to assert their own authority over that of domestic decision-makers or, instead, to recognise the authority of domestic actors."[97] On that score, Fahner attaches a lot of importance to the distinction between how narrowly an investment protection standard is interpreted, on the one hand, and the standard of review, on the other hand.[98] However, the intensity of scrutiny adopted by arbitral tribunals perforce corresponds to the level of investment protection, which, in turn, calls for more or less legitimation: The stricter the scrutiny of domestic law the higher the level of investment protection, and the greater the legitimacy concerns raised.[99]

D. Proportionality

I. Proportionality as Standards of Review

When subscribing to the first school of thought from *Masdar*,[100] the issue of the indeterminacy of the substantive investment protection standards, most notably the FET standard, is exacerbated because of the wide discretion that investment tribunals enjoy.[101] It is an important premise for our analysis to acknowledge that investment tribunals make law in defining vague concepts such as what is "fair and equitable"[102] and in balancing competing societal values and interests,[103] prompting in turn the need for legitimization from a democratic theory point of view.[104]

With a view to rationalizing the legal analysis, that is, the scrutiny of the domestic regulatory change, tribunals employ the principle of proportionality as a yardstick.[105] It bears recalling that

[95]Gruszczynski, *supra* note 78, at 66; Stephan Schill, *Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review*, 3 J. Int'l Disp. Settlement 577, 579, 582 (2012). *See also* Esmé Shirlow, Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication 107–12 (2021) (providing a more detailed taxonomy).

[96]Vladyslav Lanovoy, *Standards of Review in the Practice of International Courts and Tribunals*, *in* Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence, and Standards of Review in the Practice of International Courts and Tribunals 42, 56–7 (Gábor Kajtár, Basak Çali & Marko Milanovic eds., 2022); Gruszczynski, *supra* note 78, at 72.

[97]Shirlow, *supra* note 95, at 269.

[98]Johanes Hendrik Fahner, Judicial Deference in International Adjudication: A Comparative Analysis 223–24 (2020).

[99]*See* Benvenisti, *supra* note 94, at 40–41. *See also* Michael Ioannidis, *A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, 12 German L.J. 1175, 1175–76 (2011) (linking the legitimacy of adjudicating bodies and standard of review).

[100]*See supra* Section C.I.2.

[101]*Cf.* Ostřanský, *supra* note 20, at 150–52.

[102]*Cf.* Alec Stone Sweet & Giacinto Della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez*, 46 N.Y.U. J. Int'l L. & Pol. 911, 942 (2014); Ioannidis, *supra* note 99, at 1178, 1192.

[103]Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L. 72, 87 (2008).

[104]Habermas, *supra* note 21, at 457–58; von Staden, *supra* note 75, at 1024–25; Schill, *supra* note 95, at 580, 591; Christiano & Bajaj, *supra* note 93. *See also* Friedrich Rosenfeld, *Abstract Interpretations in International Investment Law*, *in* Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade 331–32, 337–43 (Photini Pazartzis & Maria Gavouneli eds., 2016).

[105]*See, e.g.*, Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003); Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 123, 309 (Dec. 27, 2010); RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 465 (Nov. 30, 2018); Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Award, ¶ 179 (Nov. 25, 2015); Marfin Investment Group Holdings S.A., Alexandros Bakatselos v. Republic of Cyprus, ICSID Case No. ARB/13/27, Award, ¶ 826 (July 26, 2018). *See also* Xu Qian, *Revisiting Proportionality in Investment Arbitration: Theory, Methodology, and Interpretation*, 21 Chinese J. Int'l L. 547,

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the principle is germane to both the FET standard and indirect expropriation.[106] As to its elements, the ruling in *RWE Innogy v. Spain* is paradigmatic:

> [T]he question of disproportionality in the current context entails a consideration as to whether the changes were suitable and necessary to achieve the legislative intent, *and* whether an excessive financial burden was shifted to the Claimants who had committed very substantial resources . . . .[107]

The context referred to concerned an appraisal of the legitimacy of investors' expectations as to the stability of Spain's renewable energy regime. In the same vein, the tribunal in *PL Holdings v. Poland*, which had to assess whether the forced sale of the investor's shareholding in a bank in the host state was proportionate, found that:

> To satisfy the principle, a measure must (a) be one that is suitable by nature for achieving a legitimate public purpose, (b) be necessary for achieving that purpose in that no less burdensome measure would suffice, *and* (c) not be excessive in that its advantages are outweighed by its disadvantages.[108]

What the tribunals set out here is the most stringent version of the proportionality test. This so-called strict proportionality test includes an examination of whether the government acted excessively.[109]

Its components can be broken down and exist as separate tests in the guise of a suitability and a necessity test.[110] Put differently, there are various versions of proportionality testing. A suitability test is confined to step (a); all that needs to be shown is that the government measure at issue is capable of furthering a legitimate public welfare objective. A necessity test combines steps (a) and (b) and involves a least-restrictive-means test: If there is an alternative measure that achieves the same level of protection of the stated public welfare objective but is less restrictive on, in the present context, foreign proprietary interests, the government must adopt that alternative.

In terms of scrutiny, a hierarchy of tests can be ascertained, with strict proportionality being the most exacting one and suitability testing being most deferential towards host states.[111] The difference between those levels of scrutiny is significant, and indeed may be dispositive of a case.[112] The next section expounds upon the democratic concerns raised when a tribunal ventures into strict proportionality testing.

554–55, 558–59, 581–82 (2022); Kleinlein, *supra* note 19, at 268; Valentina Vadi, Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration 198, 200 (2018); Cottier, Echandi, Liechti-McKee, Payosova & Sieber, *supra* note 60, at 660, 654 (describing the similar function in World Trade Organization [WTO] law); Janina Boughey, *Proportionality and Legitimate Expectations*, *in* Legitimate Expectations in the Common Law World 121, 139–46 (Matthew Groves & Greg Weeks eds., 2017) (linking legitimate expectations and proportionality). *But see* Daria Davitti, *Proportionality and Human Rights Protection in International Investment Arbitration: What's Left Hanging in the Balance?*, 89 Nordic J. Int'l L. 343, 361–63 (2020); Schneiderman, *supra* note 1, at 275–80.

[106]Bücheler, *supra* note 8, at 179–81, 208–20, 302; Kleinlein, *supra* note 19, at 268.

[107]RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34, Award, ¶ 551 (Dec. 18, 2020) (emphasis added). *See also* Philip Morris Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 139 (July 8, 2016) (Gary Born, Concurring and Dissenting Opinion).

[108]PL Holdings v. Poland, SCC Case No. 2014/163, Partial Award, ¶ 355 (June 28, 2017) (emphasis added).

[109]*See also* Muszynianka v. Slovakia, PCA Case Repository, No. 2017-08, Award, ¶¶ 573–4 (Oct. 7, 2020); Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Award, ¶ 351 (Nov. 5, 2021).

[110]Qian, *supra* note 105, at 554; Cottier, Echandi, Liechti-McKee, Payosova & Sieber, *supra* note 60, at 629; Arcuri & Violi, *supra* note 7, at 2200; Vadi, *supra* note 105, at 196.

[111]Henckels, *supra* note 94, at 227–28.

[112]Vadi, *supra* note 105, at 187, 193; Gruszczynski, *supra* note 78, at 81.

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II. Democratic Concerns

Von Staden identifies "self-government" as the core democratic principle.[113] It is undisputed that a state may domestically regulate the use of property in the public interest.[114] That national bargain struck between property rights and other competing societal values is conditioned by the state's international obligations vis-à-vis foreign investors. For some countries, the domestic law protection of property rights of nationals will, commensurate with the tenet of equality before the law, be brought into line with those international obligations.[115] For other countries, foreign property interests will enjoy stronger protection than like domestic ones, resulting in the discrimination of nationals.[116]

In light of scarce resources, legislatures have to make prioritization decisions. Political parties, be they from the left or the right of the political spectrum, generally agree what legitimate public welfare objectives include—public order, raising living standards, environmental protection, public health, etcetera. Where they differ is how to achieve those objectives and how to prioritize—in general and specific terms. In democracies, voters express their prioritization preference in general elections.

The regulation of tobacco products is a good example to illustrate this point.[117] Some countries might require plain packaging in addition to health warnings;[118] some might feel that health warnings suffice; others might pass smoking bans and/or restrict tobacco sales.[119] Wherever a country sits on that spectrum between commercial interests and public health will represent a societal compromise, reflecting that country's preference as to tobacco control measures.

Under a strict proportionality test, the question would be whether the protection of the stated public welfare objective(s)—here public health—is excessive in light of investor rights.[120] This results in a weighing of interests between investor rights and the host state's right to regulate, meaning that the level of protection pursued by the host state is called into question.[121] According to Kleinlein, and this author agrees, this limits "the legitimizing potential of this methodology."[122] The problem is compounded by the fact that the hurdle to react to rogue investment rulings is high: Unless the respective international investment agreement allows for authoritative interpretations by the contracting parties,[123] the treaties would need to be amended, precipitating domestic ratification processes.

[113]von Staden, *supra* note 75, at 1024–25, 1033–34, 1049.

[114]*See, e.g.,* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1(2), Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol to ECHR]; GRUNDGESETZ [BASIC LAW] art. 14(1), 2nd sentence, www.gesetze-im-internet.de/englisch_gg/index.html.

[115]Reinisch, *supra* note 8, at 295 (referring to this as the "positive spill-over effect" of international investment agreements).

[116]Arcuri, *supra* note 13, at 396–98; Sattorova, *supra* note 13, at 101–2.

[117]*Cf. Summaries of the Legal Challenges Against Plain Packaging Laws*, TOBACOO FREE KIDS, https://www.tobaccofreekids.org/plainpackaging/tools-resources/legal/case-summaries.

[118]*Tobacco Plain Packaging Progress Continues Worldwide with 42 Countries and Territories Moving Forward with Regulations,* CANADIAN CANCER SOC'Y (Feb. 6, 2024), https://cancer.ca/en/about-us/media-releases/2024/international-warnings-report.

[119]World Economic Forum, *Smoking Bans: These Countries Are Tackling Tobacco Use* (Nov. 27, 2023), https://www.weforum.org/stories/2023/11/smoking-tobacco-ban-portugal-new-zealand-mexico-uk/; *Mexico's Lower House Passes Constitutional Ban on E-Cigarettes, Vapes*, REUTERS (Dec. 3, 2024), https://www.reuters.com/world/americas/mexicos-lower-house-passes-constitutional-ban-e-cigarettes-vapes-2024-12-03/.

[120]*See supra* Section D.I. Unless there is a carve-out for tobacco control measures as in the CPTPP, *see* TPP, *supra* note 64, art. 29.5.

[121]Arcuri & Violi, *supra* note 7, at 2201; Vadi, *supra* note 105, at 253; Henckels, *supra* note 94, at 250–52. *See also* Vandevelde, *supra* note 10, at 63–64 (being less critical of the international investment regime).

[122]Kleinlein, *supra* note 19, at 254.

[123]*See, e.g.,* TPP, *supra* note 64, art. 9.25(3); USMCA, *supra* note 6, art. 14.D.9(2).

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Even taking account of a general trend to delegate political decisions to the judiciary,[124] it is a fine line that needs to be walked: On the one hand, "[t]he independence of the judiciary is implicit in the function of judicial bodies."[125] That is, the legitimacy of investment tribunals does not hinge upon some form of control, even a democratic one, for this would be at odds with the rule of law *ipso facto*.[126] On the other hand, "[t]he deference to democratic legitimacy is one way to alleviate the democratic deficit in the operation of international judicial bodies themselves."[127] Although heralded by some commentators as the solution to the legitimacy crisis of international investment law,[128] this author submits that it is strict proportionality testing, and the ensuing balancing of interests, that is at the root of the crisis. The reason is the restricted perspective under which international arbitrators labor. This is most acute when weighing up conflicting interests.[129]

To elaborate on this, it is important to recall that investment tribunals "exercise delegated authority."[130] Arbitrators are generally appointed by the disputing parties,[131] leading to unease about personal legitimation.[132] But this is not our primary concern here. Our concern is: Not all relevant interests are equally present before an arbitral tribunal—for example indigenous interests when a foreign-owned mining company operates on indigenous land—but rather are mediated by the host state government, *vel non*,[133] which makes the tribunal a forum less legitimate for the reconciliation of conflicting interests than a parliament where those interests can be aggregated.[134] This problem is heightened in polycentric disputes, such as when investment tribunals review climate change measures,[135] or cases of grand-scale resource re-allocation.[136]

Output legitimacy—here the successful resolution of an investment dispute—cannot remedy the lack of input legitimacy; the two are mutually dependent.[137] To use Benvenisti's taxonomy,[138]

[124]*See generally* Rachel Sieder, *The Juridification of Politics*, *in* THE OXFORD HANDBOOK OF LAW AND ANTHROPOLOGY 701–2, 710 (Marie-Claire Foblets et al. eds., 2022); MARIANO CROCE, THE POLITICS OF JURIDIFICATION 5–7, 10–11 (2018).

[125]Kanetake, *supra* note 19, at 21.

[126]*See* U.N. Declaration on the Rule of Law, *supra* note 21, ¶ 13 (describing the independence of the judiciary as "an essential prerequisite for upholding the rule of law"). *See also* ILA Resol. 04/2024, *supra* note 15, point 8; Reinisch, *supra* note 8, at 291–92, 297–99; Raz, *supra* note 44, at 216–17.

[127]Kanetake & Nollkaemper, *supra* note 23, at 456. *Contra* Fahner, *supra* note 98, at 218, 221-24 (rejecting this "constitutional deference," barring human rights courts, and instead advocates, as appropriate, a restrictive interpretation); *supra* Section C.III.

[128]*See, e.g.,* Schill & Djanic, *supra* note 14, at 45–47.

[129]*Cf.* Henckels, *supra* note 94, at 244–45.

[130]*Cf.* von Staden, *supra* note 75, at 1049.

[131]*See, e.g.*, ICSID Convention, *supra* note 3, art. 37(2); UNCITRAL Arbitration Rules arts. 8–10 (2021).

[132]*Cf.* von Bogdandy & Venzke, *supra* note 93, at 156–70.

[133]For a negative example, *see* Bernhard von Pezold v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No. 2, ¶¶ 38, 59 (June 26, 2012).

[134]*Cf.* Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, *in* INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE 24–25 (Armin von Bogdandy & Ingo Venzke eds., 2012); Shirlow, *supra* note 37, at 272–74. *See also* Nicolás Perrone, *The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime*, 113 AJIL UNBOUND 16, 21 (2019); Arcuri & Violi, *supra* note 7, at 2205–7; Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L. L. 367, 428 (2012) (regarding the WTO); DAVID SCHNEIDERMAN, CONSTITUTIONAL REVIEW AND INTERNATIONAL INVESTMENT LAW: DEFERENCE OR DEFIANCE? 198–99 (2024) (regarding domestic constitutionl courts).

[135]*Cf.* Basil Ugochukwu, *Litigating the Impacts of Climate Change: The Challenge of Legal Polycentricity*, 7 GLOB. J. COMPAR. L. 91, 91–92, 113–14 (2018). *See generally* John W.F. Allison, *Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication*, 52 CAMBRIDGE L.J. 367 (1994).

[136]*Cf.* BÜCHELER, *supra* note 8, at 63–64; von Staden, *supra* note 75, at 1026, 1034–38 (drawing upon the principle of subsidiarity); Loannidis, *supra* note 99, at 1180–82, 1202 (describing WTO law). *Pro* Davitti, *supra* note 105, at 348–49, 360, 362. *Contra* SHIRLOW, *supra* note 37, at 276 (arguing that "the standards of review appropriate to mediating a separation of powers between investment arbitrators and domestic actors cannot be fixed in advance"); SHIRLOW, *supra* note 95, at 258–59, 263–67 (describing it as a question of legitimacy and expertise).

[137]*Cf.* von Bogdandy & Venzke, *supra* note 93, at 157. *See also* Arcuri, *supra* note 13, at 411.

[138]Benvenisti, *supra* note 94, at 24–25, 30, 35, 37–39.

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investment tribunals, when reviewing government measures, tend to attach weight to the externally disregarded—the investor claimant—while being generally indifferent towards the internally disregarded, barring the occasional amicus curiae brief.[139]

It is true that, unlike World Trade Organization (WTO) law, international investment law does not provide any remedies to reverse the regulatory change in question.[140] Modern international investment agreements explicitly restrict remedies to monetary damages.[141] Therefore, legally speaking, an investor claimant could not force the host state to change its policy; a host state can buy its way out of the investment commitments at issue. However, given the sums at stake, the burden on the national purse would be felt even by wealthier nations. Bonnitcha and Brewin have identified "50 known cases in which a tribunal has awarded compensation over USD 100 million, including eight known cases in which a tribunal has awarded more than USD 1 billion."[142] As a result, poorer nations may have no choice but scrap an envisaged regulatory change.

The above has wider implications. The arguments that militate against strict proportionality testing in an investment context hold equally true for other international law contexts. Because of the link between international investment law and international human rights law,[143] it would appear equally incongruous for international human rights bodies to review domestic law under a strict proportionality test. Against this background, we will next draw a comparison between the standards of review in international investment law and the cognate areas of international trade and European human rights law.[144] Both areas have been seen as benchmarks by investment tribunals.[145]

III. Standards of Review in Cognate Areas of Law

The now defunct Appellate Body has long recognized, for purposes of WTO law, that "the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context."[146] In relation to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Appellate Body stressed "the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the

[139]A notable exception is Glamis Gold Ltd. v. United States of America, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation, ¶ 13 (Sept. 16, 2005).

[140]*See* Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 19(1), 22(1), Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter Dispute Settlement Understanding].

[141]*See, e.g.,* TPP, *supra* note 64, art. 9.29(1); CETA, *supra* note 64, art. 8.39(1); USMCA, *supra* note 6, art. 14.D.13(1).

[142]Jonathan Bonnitcha & Sarah Brewin, *Compensation Under Investment Treaties: What Are the Problems and What Can Be Done?*, Int'l Inst. Sustainable Dev. 1 (2020), https://www.iisd.org/system/files/2020-12/compensation-investment-treaties-en.pdf.

[143]*Cf.* Universal Declaration of Human Rights art. 17, G.A. Res. 217 (III) A (Dec. 10, 1948); Protocol to ECHR art. 1; American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights art. 14, June 1, 1981, 1520 U.N.T.S. 217. *But see* Ratner, *supra* note 64, at 585–86; Schneiderman, *supra* note 1, at 263, 267–68. *See also* Anne Peters, Beyond Human Rights: The Legal Status of the Individual in International Law 318–21 (2016) (comparing investor rights and human rights).

[144]Schill, *supra* note 95, at 593 (explaining the relevance of standards of review in other international law regimes).

[145]Gruszczynski, *supra* note 78, at 82 (regarding "the conceptual similarities between trade and investment rules and the general WTO case law"); Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 77–78 (Apr. 15, 2009) (regarding the relevance of WTO law to the interpretation of international investment agreements). For the reception of case law of the European Court of Human Rights, *see infra* n. 155.

[146]Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 210, WTO Doc. WT/DS332/AB/R (2007). *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 168, WTO Doc. WT/DS135/AB/R (Apr. 5, 2001). *See also* Agreement on Technical Barriers to Trade art. 2.2, 2nd sentence, Apr. 15, 1994, 1868 U.N.T.S. 120; Agreement on the Application of Sanitary and Phytosanitary Measures art. 5(6), n. 3, Apr. 15, 1994, 1867 U.N.T.S. 493.

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Members for themselves."[147] The Appellate Body concluded that "[t]o adopt a standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that."[148] Early on, the Appellate Body stated that whether or not a panel made an objective assessment of the matter before it commensurate with Article 11 of the Dispute Settlement Understanding "goes to the very core of the integrity of the WTO dispute settlement process itself."[149]

Furthermore, bearing in mind the differences to investment dispute resolution,[150] it is worth noting the pronouncement from the European Court of Human Rights with respect to the limitations of freedom of expression under the European Convention on Human Rights,[151] which propelled the development of the Court's "margin of appreciation" jurisprudence; this is often amalgamated by investment tribunals with the "right to regulate":[152]

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.[153]

Gerards notes that "the scope of the margin of appreciation corresponds with a certain intensity of the Court's proportionality review."[154]

Some investment tribunals have shown sympathy towards this jurisprudence.[155] The tribunal in *Chemtura v. Canada*, for instance, took into account "the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations."[156] The case was about the banning of an agricultural pesticide due to health concerns. Along the same lines, the tribunal in *Philip Morris v. Uruguay*, which dealt with tobacco control measures imposing a single presentation requirement and large graphic health warnings, accepted that "[h]ow a government requires the acknowledged health risks of products, such as tobacco, to be communicated to the

[147]Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 115, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Feb. 13, 1998).

[148]*Id. See also* Aditya Suresh, *Re-Calibrating the Standard of Review of Scientific Evidence in WTO Dispute Settlement*, 15 Trade L. & Dev. 1, 3–8 (2023) (giving a detailed analysis of the standard of review under the SPS Agreement).

[149]Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, ¶ 133, WTO Doc. WT/DS69/AB/R (July 23, 1998). *See also* Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 117, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Feb. 13, 1998).

[150]For those differences, *see* Schill, *supra* note 95, at 590.

[151]Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(2), Nov. 4, 1950, 213 U.N.T.S. 221.

[152]*Cf.* Frontier Petroleum Services Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 527 (Nov. 12, 2010); Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 181 (Sept. 5, 2008).

[153]Handyside v. United Kingdom, ¶ 48 (Dec. 7, 1976), https://hudoc.echr.coe.int/eng?i=001-57499. *See also* Mouvement Raëlien Suisse v. Switzerland, ¶ 64 (July 13, 2012), https://hudoc.echr.coe.int/fre?i=001-112165. *See generally* Vadi, *supra* note 105, at 210–25 (describing the margin of appreciation doctrine).

[154]Janneke Gerards, General Principles of the European Convention on Human Rights 336 (2023). *See also* Tek Gıda İş Sendikası v. Turkey, ¶ 36 (Apr. 4, 2017), https://hudoc.echr.coe.int/eng?i=001-172858.

[155]*See, e.g.*, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶¶ 388, 399 (July 8, 2016); Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3, Award, ¶ 6-26 (June 18, 2010); Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 181 (Sept. 5, 2008); Saluka Investments B.V. v. Czech Republic, PCA Case Repository No. 2001-04, Partial Award, ¶ 221 (Mar. 17, 2006). *Contra* Bernhard von Pezold v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, ¶¶ 465–67 (July 28, 2015); Renta 4 S.V.S.A v. Russia, SCC Case No. 24/2007, Award, ¶ 22 (July 20, 2012); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 354 (Feb. 6, 2007). *See also* Lukasz Gruszczynski & Wouter Werner, *Introduction*, *in* Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation 1, 4 (Lukasz Gruszczynski & Wouter Werner eds., 2014) (describing the relationship between margin of appreciation and standard of review).

[156]Chemtura Corporation v. Canada, UNCITRAL, Award, ¶ 123 (Aug. 2, 2010).

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persons at risk, is a matter of public policy, to be left to the appreciation of the regulatory authority."[157]

The conclusion that can be drawn is that the ultimate question is one of separation of powers.[158] Von Bogdandy and Venzke point out that the "oversight function [by international courts] vis-à-vis the bearers of public authority must be calibrated in light of the democratic principle,"[159] and Lanovoy reminds us that "[t]he determination of what standard of review should be applied . . . often resembles a policy choice between activism and self-restraint."[160] How to make that choice as far as international investment law goes will occupy us in the next section.

IV. Need for Calibration

On the basis of the law as it stands, there are two main calibrating techniques. First, the scope of "legitimate expectations" can be interpreted narrowly. As seen above, even some domestic courts have qualms about interfering with other branches of government and so confine legitimate expectations to procedural fairness.[161] Second, proportionality testing in an investment context can, and should, stop at the necessity step. Such an approach would align two pillars of international economic law, namely international investment law with international trade law, and also bring the application of the proportionality test in international investment law closer to the reasonableness test known.[162] The ICJ, too, explicitly adopted a reasonableness standard in the *Whaling in the Antarctic* case,[163] whereas in *Certain Iranian Assets*, which concerned the lawfulness of United States economic sanctions against Iran under the United States-Iran Treaty of Amity,[164] the Court read the proportionality principle into the reasonableness test while at the same time qualifying that principle: "[A] measure is unreasonable if its adverse impact is *manifestly* excessive in relation to the purpose pursued."[165]

At a minimum, such a test calls for a rational basis for state conduct.[166] In *Glamis Gold*, the tribunal had to assess the legality of regulatory changes to open pit mining operations, including backfilling and grading requirements for operations in the proximity of indigenous sacred sites, which allegedly harmed a proposed gold mine in the host state. The tribunal laid down this yardstick: "The sole inquiry for the Tribunal . . . is whether or not there was a manifest lack of reasons for the legislation."[167] In addition, arbitral tribunals oftentimes require "an appropriate

[157]Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 419 (July 8, 2016). *See also* Gruszczynski, *supra* note 78, at 70–72 (providing a succinct case analysis).

[158]Shirlow, *supra* note 37, at 260, 267, 270–71, 275–77; Fahner, *supra* note 98, at 220–21; Lanovoy, *supra* note 96, at 42; Schill, *supra* note 95, at 580, 586, 588, 592–94, 599–600, 607; von Bogdandy & Venzke, *supra* note 93, at 193–95; von Staden, *supra* note 75, at 1032–33; Vadi, *supra* note 105, at 190–91. *See also* Enkev Beheer B.V. v. Poland, PCA Case Repository No. 2013-01, First Partial Award, ¶ 327 (Apr. 29, 2014).

[159]von Bogdandy & Venzke, *supra* note 93, at 198. *See* von Staden, *supra* note 75, at 1026.

[160]Lanovoy, *supra* note 96, at 44. *See also* Gruszczynski & Werner, *supra* note 155, at 4.

[161]*See supra* Section C.II.

[162]*See* Vadi, *supra* note 105, at 137–38, 144, 183, 256.

[163]Whaling in the Antarctic (Austl. v. Japan), Judgment, 2014 I.C.J. Rep. 226, ¶ 67 (Mar. 31).

[164]Treaty of Amity, Economic Relations, and Consular Rights, U.S.–Iran, Aug. 15, 1995, 8 U.S.T. 899, 284 U.N.T.S. 93.

[165]Certain Iranian Assets (Iran v. U.S.), Judgment, 2023 I.C.J. Rep. 51, ¶¶ 149, 186–87 (Mar. 30) (emphasis added). *See also* Mir-Hossein Abedian & Reza Eftekhar, *Reasonableness: A Guiding Light—A Probe into the World Court's Landmark Judgment on Substantive Standards of Investment Protection and Its Takeaways for Investment Treaty Tribunals*, 40 ARBIT. INT'L 307, 309–18 (2024) (providing a case analysis).

[166]Certain Iranian Assets (Iran v. U.S.), Judgment, 2023 I.C.J. Rep. 51, ¶ 146 (Mar. 30); Saluka Investments B.V. v. Czech Republic, PCA Case Repository No. 2001-04, Partial Award, ¶ 309 (Mar. 17, 2006).

[167]Glamis Gold Ltd. v. United States of America, UNCITRAL, Award, ¶ 805 (June 8, 2009). *See also* Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 399 (July 8, 2016).

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correlation between the state's public policy objective and the measure" at issue.[168] Following this, the tribunal in *RREEF v. Spain*, which presented another legal challenge against Spain's renewable energy regime, conflated the concepts of reasonableness and proportionality, but in a different way from the aforementioned *Certain Iranian Assets* case. Instead of qualifying the strict proportionality step—"manifestly excessive"—the tribunal expunged it: "[R]easonableness in the exercise of regulatory power includes: *Legitimacy of purpose . . . Necessity . . . Suitability . . . .*"[169]

International trade law adopted this development before international investment law when it became apparent that "[t]rade policy limited to liberalization no longer was sustainable and undermined the rule of law."[170] By way of example, in *EC—Asbestos*, the Appellate Body was called to adjudicate whether France's ban on asbestos could be justified on public health grounds. Applying the exception clause in Article XX(b) of the General Agreement on Tariffs and Trade,[171] the Appellate Body held that the—only, one might add—"remaining question . . . is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition."[172]

The outcome of a necessity test is far more predictable and, therefore, manageable for domestic regulators. Not having to worry about strict proportionality allows domestic regulators and lawmakers to experiment with regulations, the cost-benefit ratio of which is not clear (yet).[173] This is particularly important in the area of climate change regulation. Framers know this and choose their words carefully, for example "necessary" instead of "proportionate," with a view to signaling interpreters which level of scrutiny they prefer.

Strict proportionality undermines the very regulatory autonomy that the police powers doctrine[174] and, if codified, the corresponding carve-out relating to the definition of indirect expropriation seek to guarantee in the first place.[175] Reading fully-fledged proportionality tests into substantive investment protection standards disregards, in the author's view, the common intentions of the contracting parties and is thus at variance with the rules of treaty interpretation as set out in Article 31 of the Vienna Convention.[176] Considering its stark consequences, it seems appropriate to rule out strict proportionality testing whenever it is not expressly stipulated. Absent such stipulation, a less intrusive test should be applied by treaty interpreters, which better attests to the mutual respect of the actors involved at different layers of governance.[177]

[168]Ioan Micula, Viorel Micula v. Romania (I), ICSID Case No. ARB/05/20, Award, ¶ 525 (Dec. 11, 2013); AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary (II), ICSID Case No. ARB/07/22, Award,¶ 10 (Sept. 23, 2010). *See also* Certain Iranian Assets (Iran v. U.S.), Judgment, 2023 I.C.J. Rep. 51, ¶ 148 (Mar. 30). *See generally* Vadi, *supra* note 105, at 151–80 (describing the reasonableness test in international investment law).

[169]RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶¶ 463-64 (Nov. 30, 2018) (emphasis in original). *Contra* Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Award, ¶ 179 (Nov. 25, 2015) (reading strict proportionality into the reasonableness test); Vadi, *supra* note 105, at 184 (excising the necessity test from the reasonableness test).

[170]Cottier, *supra* note 21, at 8; Yenkong, *supra* note 21, at 244–54 (giving the rule of law in the world trading system).

[171]General Agreement on Tariffs and Trade art. XX(b), Apr. 15, 1994, 1867 U.N.T.S. 187.

[172]*See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WTO Doc. WT/DS135/AB/R (Apr. 5, 2001).

[173]An example would be Uruguay's tobacco control measure of a single presentation requirement, *see* Gruszczynski, *supra* note 78, at 70.

[174]For the existence of the police powers doctrine, *see* Certain Iranian Assets (Iran v. U.S.), Judgment, 2023 I.C.J. Rep. 51, ¶ 185 (Mar. 30); Saluka Investments B.V. v. Czech Republic, PCA Case Repository No. 2001-04, Partial Award, ¶¶ 255, 262 (Mar. 17, 2006). *See generally* Catharine Titi, *Police Powers Doctrine and International Investment Law*, *in* General Principles of Law and International Investment Arbitration 323 (Andrea Gattini, Attila Tanzi & Filippo Fontanelli eds., 2018).

[175]*See, e.g.,* CETA, supra note 64, annex 8-A, para. 3; TPP, *supra* note 64, annex 9-B, para. 3(b); USMCA, *supra* note 6, annex 14(B), para. 3(b); RCEP, *supra* note 65, annex 10B, para. 4.

[176]*Cf.* Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, ¶ 84, WTO Doc. WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 22, 1998).

[177]*Cf.* Thomas Cottier, *Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review*, 24 J. Int'l Econ. L. 515, 533 (2021) (regarding the standard of reasonableness). *See also* Henckels, *supra* note 94, at 253–54 (advocating retaining "residual review of strict proportionality").

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E. Conclusions

The question of legitimacy goes to the very core of any legal regime. Whether it survives, and in what form, depends thereupon. Because the economic case for the international protection of foreign investments is shaky, its proponents have been looking elsewhere and found as an alternative rationale the concept of the rule of law. This Article has critically appraised that attempt to vindicate investment protection through the invocation of an international rule of law.

Strong rule of law protections may be a contributing factor to economic development and that has not been disputed here, although contrary examples could be cited, and what is more, it remains questionable what is cause and what is effect.[178] It is equally clear that effective investor rights alone cannot guarantee economic development without addressing other obstacles to development such as corruption.[179] Good governance seems more crucial for economic development than a particular rule of law approach; the two are not congruent.[180]

In the author's view, the legitimacy crisis faced by international investment law can be explained by the tension that exists between the rule of law and democracy—*in concreto* the right to regulate in the public interest—when the former is deployed to restrict the latter.[181] The international scrutiny of regulatory changes is not problematic *per se* from the vantage point of democratic theory. In fact, the right to regulate and international (investment) law obligations limit each other. Although "the rule of law, which includes treaty obligations, provides . . . boundaries" upon the host state's right to regulate,[182] those treaty obligations themselves are to be interpreted in the light of the right to regulate.[183] This is most obvious in relation to indeterminate protection standards such as FET.[184]

In order to futureproof the international investment regime, the tension outlined above will need to be addressed. It is, however, not through a thickening of the rule of law, for this would exacerbate that tension and, therefore, the legitimacy crisis. What this Article has sought to show is that there can be an excess of rule of law protection on the international plane. Put plainly, what is the purpose of elections if the newly elected government could not change direction?[185] In other contexts, lawyers draw upon standards of review as a technique to manage the tension between rule of law, on the one hand, and democracy, on the other hand.[186] This is where a solution to the legitimacy crisis of international investment law must also start.

By contrast, getting rid of ISDS, as promoted by some,[187] is the proverbial throwing the baby out with the bathwater. The European Court of Justice stresses that "[t]he very existence of

[178]Bedner, *supra* note 23, at 34; Møller, *supra* note 23, at 24; Christopher Boom, *The Importance of the Thin Conception of the Rule of Law for International Development: A Decision-Theoretic Account*, 8 L. & Dev. Rev. 293, 311–16, 324–28 (2015).

[179]*Cf.* U.N. Declaration on the Rule of Law, *supra* note 21, ¶ 25; *Delivering Justice*, *supra* note 19, at ¶ 28.

[180]Živković, *supra* note 9, at 516–17, 524, 537; Schill & Djanic, *supra* note 14, at 39; Guthrie, *supra* note 13, at 1175.

[181]Møller & Skaaning, *supra* note 39, at 23–24; Ugo Mattei & Laura Nader, Plunder: When the Rule of Law is Illegal 1–5 (2008). *See generally* Lone Wandahl Mouyal, International Investment Law and the Right to Regulate: A Human Rights Perspective (2016).

[182]ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary, ICSID Case No. ARB/03/16, Award, ¶ 423 (Oct. 2, 2006).

[183]Hindelang, Stöbener de Mora & Lachmann, *supra* note 14, at 285. *See, e.g.,* Joint Interpretative Instrument on CETA, Can.–E.U., point 2, 2017 O.J. (L 11).

[184]Saluka Investments B.V. v. Czech Republic, PCA Case Repository No. 2001-04, Partial Award, ¶ 305 (Mar. 17, 2006); Joseph C. Lemire v. Ukraine (II), ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶¶ 273, 285 (Jan. 14, 2010); El Paso Int'l Energy Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 358 (Oct. 31, 2011); Copper Mesa v. Ecuador, PCA Case Repository No. 2012-2, Award, ¶ 6.81 (Mar. 15, 2016).

[185]*See* Schneiderman, *supra* note 134, at 200.

[186]For the similar discussion in WTO law, *see* Suresh, *supra* note 148, at 13–18; Cottier, *supra* note 177, at 515–18, 523–33.

[187]*Cf.* Muthucumaraswamy Sornarajah, *Conclusion: Containing the Pernicious Regime of Investment Arbitration*, *in* Rethinking Investment Law 225 (David Schneiderman & Gus Van Harten eds., 2023); Soloch, *supra* note 13, at 1654–55, 1669, 1677–79. *See also* Arcuri, *supra* note 13, at 405–13 (arguing that the current system is not compatible with the rule of law).

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effective judicial review . . . is of the essence of the rule of law."[188] At a conceptual level, any ISDS mechanism constitutes a form of judicial review, commonplace in administrative law,[189] and embodies the maxim of *ubi jus ibi remedium*.[190] There is not much point in granting investor rights without the corresponding remedies. Additionally, even without ISDS, multi-national corporations will still insert arbitration clauses in the investment contracts they enter into with host states and, consequently, can still sue those states. It is small and medium-sized foreign investors that lack the clout to negotiate contracts with such a clause that would be left without international judicial redress.[191]

That being said, it is of concern when investment tribunals question the level of protection of public welfare objectives pursued by host states. In that case, instead of conducting an arbitrariness control, tribunals presume to know it better. Although it is possible to link the doctrine of legitimate expectations and the principle of proportionality to the concept of rule of law, nothing mandates that level of scrutiny on the international plane—especially when considering the concept's rationale, which is to keep in check arbitrary government conduct.[192] From this it follows that any international scrutiny going beyond an arbitrariness control would need to be justified on a basis other than the international rule of law.

Even when accepting the sweeping scrutiny of domestic regulatory changes by investment tribunals under a broad reading of the doctrine of legitimate expectations, the ultimate standard of review is contingent upon the proportionality test employed. Proportionality is often labelled as a method to structure the legal analysis,[193] but it is more than that. In fact, the proportionality test connotes different standards of review.[194] Cottier and others underscore that "[t]hese standards strongly depend upon the authority of the judicial body and may vary."[195] The crux of the matter is how to know which standard to apply. As a guide, Cottier submits that "[w]hile broadening the scope of review, we need to carefully calibrate standards of review at the same time," and further "[s]tandards of review . . . are essential . . . in avoiding that the rule of law transgresses into the rule of lawyers."[196]

Investment tribunals have broadened the *scope* of review while not adjusting the *standard* of review. To correct this, investment tribunals should dismiss strict proportionality testing. The kind of value judgments required under a strict proportionality test is something reserved for domestic courts that have the legitimacy to second-guess their government's prioritization decisions.[197] Proportionality is thus a double-edged sword: If confined to a necessity test, it is

[188]Case C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, ¶ 36 (Feb. 27, 2018), https://curia.europa.eu/juris/liste.jsf?num=%20C-64/16.

[189]Schill, *supra* note 95, at 580, 586, 592; Gus Van Harten, *The Public–Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 Int'l & Compar. Corp. L. Q. 371, 372–73, 381, 392–93 (2007); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 Eur. J. Int'l L. 121, 121–23, 145–50 (2006). *See also* von Staden, *supra* note 75, at 1028 (regarding the democratic legitimation of judicial review in domestic law).

[190]Reinisch, *supra* note 8, at 300–1; Ranjan, *supra* note 13, at 126. *See also* McCorquodale, *supra* note 23, at 295–96.

[191]*Cf.* Jürgen Kurtz, The WTO and International Investment Law: Converging Systems 281–82 (2016). *See also* ILA, Committee on the Rule of Law and International Investment Law, *Final Report*, ¶¶ 32–39 (2024), https://www.ila-hq.org/en_GB/documents/final-report-rule-of-law-int-investment-law-athens-2024; Reinisch, *supra* note 8, at 301.

[192]*See supra* Section B.

[193]Qian, *supra* note 105, at 561, 586–87; Cottier, Echandi, Liechti-McKee, Payosova & Sieber, *supra* note 60, at 654, 656, 665–66, 670; Henckels, *supra* note 94, at 226, 228–29.

[194]*See* Vadi, *supra* note 105, at 139–40, 243, 253–56, 259 (describing that scrutiny can be more or less stringent under a proportionality test).

[195]Cottier, Echandi, Liechti-McKee, Payosova & Sieber, *supra* note 60, at 634.

[196]Cottier, *supra* note 21, at 10–11.

[197]Qian, *supra* note 105, at 562–63; Arcuri & Violi, *supra* note 7, at 2209; Vadi, *supra* note 105, at 204–6; Kleinlein, *supra* note 19, at 283–87; Caroline Henckels, Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy 172–73 (2015).

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tantamount to a good governance guarantee;[198] if however construed as strict proportionality, it is at odds with the requirements of a democratic society.[199]

It is telling that not even the European Court of Human Rights engages in strict proportionality testing when it comes to, for instance, "economic or social planning policy" or environmental issues.[200] On the contrary, the Court emphasized that it "must . . . take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development;"[201] and when adjudicating "the question of the presence of religious symbols in State schools," it was an important consideration for the Court that "there is no European consensus."[202] Such considerations are even more pressing in an international investment context.

On a final note, dispensing with strict proportionality does not lead to a reduction of other investor rights that do not involve a balancing test, for example regarding the repatriation of profits. Nor does it do away with rights that do involve a balancing test. Rather, it amounts to a requisite re-calibration of investment protection, prompted by democratic theory. With the leitmotif being the recognition of the level of public welfare protection as determined by the host state, the consequence of the proposed re-calibration is that the (adverse) impact of a government measure on foreign investments—key to a finding of a breach of relevant investment standards under a strict proportionality test—is reduced to a criterion for the assessment of alternative measures. *Ex abundanti cautela*, given the conflicting case law, it is advisable for negotiators of international investment agreements to specify in the treaty text the type of proportionality testing they wish to see employed.[203] Whether the ICJ's middle course from *Certain Iranian Assets* of qualifying strict proportionality—manifest excessiveness—will be adopted by investment tribunals without any textual hook remains to be seen.

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[198]Vadi, *supra* note 105, at 196–97 (regarding the link between proportionality and good governance).

[199]*See also* Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (II), ICSID Case No. ARB/03/19, Decision on Liability, Separate Opinion of Arbitrator Pedro Nikken, ¶ 20 (July 30, 2010).

[200]Gerards, *supra* note 154, at 350. *See, e.g.,* Hardy and Maile v. United Kingdom, App. No. 31965/07, ¶¶ 218, 231 (Feb. 14, 2012), https://hudoc.echr.coe.int/eng?i=001-109072; Lautsi v. Italy, App. No. 30814/06, ¶¶ 69–70 (Mar. 18, 2011), https://hudoc.echr.coe.int/eng?i=001-104040; Lithgow v. United Kingdom, App. Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, ¶ 122 (July 8, 1986), https://hudoc.echr.coe.int/eng?i=001-57526.

[201]Lautsi v. Italy, App. No. 30814/06, ¶ 68 (Mar. 18, 2011), https://hudoc.echr.coe.int/eng?i=001-104040.

[202]*Id.* at ¶ 70.

[203]An example of a defined standard of review is Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 17.6, Apr. 15, 1994, 1868 U.N.T.S. 201. *See also* Award of the Arbitrators, *Colombia—Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, ¶ 4.12, WTO Doc. WT/DS591/ARB25 (Dec. 21, 2022) (explaining the contemporary operationalization of art. 17.6).

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