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EDITORIAL

The Rule of Law Between National and International Contexts: Introduction to the Special Issue on International Economic Law and the Rule of Law

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This special issue is based on papers presented at a conference organised by Nicolas de Sadeleer and Ivana Damjanovic at Maastricht University in January 2022. Supported by the Erasmus+ EUChMIS Jean Monnet project of the Maastricht University's Institute for Transnational Legal Research (METRO), the conference addressed the evolving nature of the rule of law in international economic law. It explored the dynamics between the rule of law and the governance of international economic relations, with a particular focus on interaction and integration of broader policies into international trade and investment. In the modern globalised world, the rule of law has gained a new dimension, as it is increasingly focusing on the impact of the international rule of law on individuals. As the rule of law permeates transnational activities, international economic law faces the challenge of playing a more proactive role in achieving global justice beyond economic interests.

The rule of law is the buzzword of the day. Although no one knows exactly what the concept encompasses, everyone seems to be in favour of it. In its essence, the rule of law entails that no one is above the law. However, the rule of law is anything but an unequivocal concept – there are different conceptions of what constitutes the rule of law, several of which overlap.[1] Basic distinctions can be made between the meaning of this concept in common law vs. civil law legal traditions, which in many aspects mirror the difference between formal or narrower rule of law, and its substantive or broader concept.

In common law countries, the rule of law occupies a pre-eminent position, having evolved to curb, or control the discretionary power of the executive. The creation of the concept of the rule of law is generally attributed to AV Dicey. In his classic 1885 book *Introduction to the Study of the Law of the Constitution*, this Professor of English Law at Oxford gave three meanings to the rule of law. First, he considered that the concept implies the supremacy of legislation, as opposed to the arbitrariness that arises "whenever there is discretion."[2] Arbitrariness in this sense has formal rather than substantive connotation, requiring that laws must be passed in the correct legal manner (through the parliament) and must not be vague and unclear, regardless of the actual content of the laws, that is, regardless of whether they are considered "good" or "bad."[3] Secondly, the rule of law in

[1] B Tamanaha, *On the rule of law: history, politics, theory* (Cambridge University Press 2004)

[2] A V Dicey, *Introduction to the study of the law of the Constitution*, at p 111.

[3] P Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) *Public Law* 467, at p 471.

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this sense excludes the idea of any exemption for officials or others from the duty of obedience to the law that governs other citizens or from the jurisdiction of the ordinary courts.[4] As "no man is above the law",[5] including the government, the concept implies equality before the law and access to the ordinary courts. Thirdly, in the United Kingdom the constitution is not a source of law but rather the result of the ordinary law of the land. Since the constitution does not differ in terms of its status from ordinary laws, fundamental rights have no supremacy over ordinary laws, thus preserving parliamentary supremacy. As a result, in Dicey's conception, the rule of law does not incorporate fundamental rights in their substantive aspects, as they are incorporated in the continental European constitutional tradition and in the United States. Instead, individual rights are the result of numerous judicial decisions determining rights of private individuals in particular cases brought before the courts, but the rule of law does not demand adherence to specific substantive rights.[6] Dicey's three aspects of the rule of law – regulating government power, equality before the law and access to courts – are frequently cited as basic requirements of a *formal* understanding of the rule of law.

This vigorous assertion of supremacy of law and the protection of traditional private rights must be understood as a reaction to a "dislike or distrust of the role adopted by the state" which throughout the 19th century was producing a plethora of administrative institutions and agencies.[7] The rule of law was thus routinely invoked in England by judges in their judgments.[8] Most scholars are still of the view that the essential meaning of the rule of law is to authorise and control the exercise of coercive power by State authorities against individuals according to the settled principles of law.[9] Although Dicey's work has had a profound influence in common law countries, his analysis has increasingly been the object of academic criticism. Various modern commentators do not share Dicey's hostility towards discretion required to exercise executive powers and argue that the concept of the rule of law should be substantive in nature and therefore encompass human rights.[10] That being said, neither British lawmakers nor commentators in the literature have been able to formulate a concise definition of the concept, leaving this task to the courts.

In the civil law family, the rule of law has been conceived more broadly with the enunciation of formal and *substantive* requirements of legality, an approach that places less emphasis on judicial process. The rule of law is known in the Council of Europe and in the EU legal order[11] as the *Rechtstaat*, and in the French-speaking world as *l'Etat de droit*[12] which is the literal translation of the German concept. It is also known as the *Rätt Staat* (Norwegian, Danish and Swedish), *Estado de derecho* (Spain) and *Stato di diritto* (Italy). The combination of the terms (*State, Staat, Etat, Estado, Stato*) with the terms (*Law, Recht, Rätt, Droit, Derecho, diritto*) implies that the State is subject to a gamut of principles that mutually reinforce one another. The literal

[4] See *National Corn Growers Assn. v Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324

[5] Dicey, supra, n 2, at p 114.

[6] Craig, supra, n 3, at pp 473–74.

[7] P Craig, "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 *L.Q.R.* 105, at pp 118–19. See also R Cass, *The rule of law in America* (Johns Hopkins University Press, 2001), at p 4.

[8] T Bingham, "The Rule of Law," (2007) 66(1) Cambridge Law Journal 67.

[9] T W Merrill, "The Essential Meaning of the Rule of Law," (2022) 17 The Journal of Law, Economics & Policy 675.

[10] However, several authors do not accept that the rule of law is capable of addressing the full range or rights and freedoms protected under human rights international instruments. See J Jowell, "The Rule of Law Today," in J Jowell and D Oliver (eds), *The Changing Constitution*, 5th ed. (Oxford University Press 2004), at p 23.

[11] See Art 2(1) of the German version of the Treaty on European Union (TEU).

[12] The terminology can indeed be confusing. By way of illustration, the preamble to the Statute of the Council of Europe refers in French to the principle of "prééminence du droit" and in English to the term "rule of law." In the French version of the dissenting Opinion of 8 July 1996 of Judge Weeramantry the "rule of law" is translated as "primauté du droit'." See *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep. 1996, 226.

translation of the rule of law in French (*la règle de droit*) or in German (*Herrschaft des Rechts*) therefore does not capture the essence of the broader notions of *Rechtstaat/Etat de droit.*[13]

As in the common law tradition, the concepts of *Rechtstaat/Etat de droit* aim to constrain the actions of the public authorities within a legal framework in order to ward off the risk of arbitrariness. However, the concepts of *Rechtstaat/ l'Etat de droit* ascribe greater importance to substantive rights. This can be explained by the enshrinement of fundamental rights in national constitutions, in contrast to common law countries (with the exception of the United States). Neither the administration nor the legislature can escape judicial or constitutional review.[14]

In Europe, a body of principles (or constituent elements) structuring the rule of law have gradually emerged. The list of these principles varies from one author to another,[15] and from one legal order to another.[16] The European Commission for Democracy through Law of the Council of Europe (Venice Commission) has identified several sub-principles, which are not subordinate to one another: legality, legal certainty, equality and non-discrimination, separation of powers, etc. They are mostly formal and procedural in nature, given that they require control over executive bodies. Although the precise content of these principles is likely to vary from one State to another, depending on their constitutional traditions,[17] their substance has been identified through the case law of the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR).[18] The general nature of these constituent elements does not negate their binding effect in EU law. As their scope has been extensively developed in the case law of the CJEU, they are not a source of legal uncertainty.[19]

Accordingly, it is important to distinguish between those components that are formal and those that are substantive in their nature. The formal conception refers to the characteristics of the legal order and the judicial system, without regard to the content of the law, the pre-eminence of which must be ensured. However, the purely formal conception is subject to limits, as a State cannot be governed by rules that are formally valid but that do not reflect values of society. Indeed, it would be difficult to consider a State that tolerated religious persecution or muzzled freedom of expression as being genuinely compliant with the rule of law, even if it was compliant on a formal level.[20] According to a substantive conception, a rule must satisfy moral requirements in order to be valid. From this perspective, the rule of law only makes sense in relation to the liberal democratic regime characterised by respect for human rights, to which it is consubstantial.[21] In the EU and in the Council of Europe, the rule of law requires that laws afford adequate protection of fundamental human rights. The substantive "rights"

[13] K Bosselman, "Grounding the Rule of Law," in C Voigt (ed.) *Rule of Law for Nature* (Cambridge University Press 2012), at p 80.

[14] E Caprano, "La crise de l'État de droit en Europe. De quoi parle-t-on?" *Revue des droits et libertés fondamentaux* (2019) n° 29.

[15] K Sobota lists twenty-four principles. See K Sobota, Das Prinzip Rechtstaat. Verfassungs-und verwaltungereschtliche Aspectke (Mohr Siebeck, 1997). The definition of the rule of law provided by EU Regulation 2020/2022 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ 2020, L 433I, 1) is limited to specifying a number of principles which derive from it and which are relevant to the objective of protecting the Union's financial interests. See Case C-156/21, *Hungary v EP v Council,* C-156/21 [2022] EU:C:2022:97, paras 236–37.

[16] Case C-156/21, *Hungary/European Parliament and Council* [2022] para 228.

[17] Ibid., para 233.

[18] N de Sadeleer, "Overview of the Rule of Law and Recent Developments in the European Case Law" (2024) 56/1 *Revue de droit de l'Union européenne* 193–215.

[19] Case C-156/21, supra, n 17, paras 236–37, p 240.

[20] J Raz, "The Rule of Law and its Virtue", in Raz (ed.) *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) p 221.

[21] Under Art 2(1) TEU, these values are placed on equal footing.

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component of the rule of law must be understood as having regard to the importance afforded by these legal orders to human rights.[22]

To sum up, the rule of law is a *concept à géométrie variable* that has been evolving over time. The lack of a settled definition is both a weakness and a strength. Given the controversies about its status and substance, international courts (except for the ECtHR and the CJEU) appear to be reluctant to rely upon it. At the same time, the rule of law can be adapted to the specificities of various legal branches or specific legal orders such as the EU legal order or public international law.

In international law, given its traditional State-centric nature, the rule of law has for a long time remained relatively unknown, having been conceived more in the context of the control of State powers in the international legal order.[23] Traditional distinction between the "rule of law" and "rule by law" is less applicable to the international legal order, where the primary question is not the vertical relationship between the State and the governed (individuals) but rather horizontal, between subject and subject[24] (primarily States and international organisations). As there is no international lawmaker, it thus comes as no surprise that several components described above, at the outset, are not relevant in the context of the international legal order. For instance, public international law does not reflect the separation of powers through a tripartite state system of checks and balances (the legislature, the executive and the judiciary). Enforcement of rules is subject to consent of States and there are limited mechanisms to ensure compliance. The principles of equality and non-discrimination – general principles of law in domestic law[25] – have a different focus in the international legal order and have been developed primarily to ensure the sovereign equality of States.

However, this has changed with the passage of time and the expansion of international law to individuals and other non-State actors. If we understand the rule of law as the "central principle of constitutional governance,"[26] it could be argued that "constitutionalisation" of international law more generally has contributed to the need to expand the rule of law beyond the State. This concept refers to, on the one hand, the change of public international legal order from an inter-State to a legal order committed to the individual and global community; and on the other, internal constitutionalisation of international organisations, characterised by judicial application of law.[27] For example, a more common invocation of the rule of law by the ECtHR and the CJEU can be understood in this regard.

Accordingly, in modern international law, the application of the rule of law can be examined through a set of different relationships: between States (e.g. rules regarding international peace and security as the core objective of the UN Charter); between international organisations and their Member States (e.g. issues of competence and delineation of powers); between States and individuals/non-State actors within their jurisdiction (e.g. international human rights); direct relationship between the international level and the individual (e.g. international criminal law). This poses additional complexity for transposition of the rule of law from the domestic into the international sphere.

The rule of law was recognised by the United Nations General Assembly within both international and national affairs in 2000.[28] The content of the concept was summarised in a 2004 report by the UN Secretary General as:

[22] Art 6 TEU.

[23] Judge Weeramantry held that "the humanitarian principles of the laws of war are a vital part of the international rule of law" which the International Court of Justice is charged to administer. Dissenting Opinion, 551. *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep. 1996, 226.

[24] S Chesterman, "An international rule of law?" (2008) 56/2 American Journal of Comparative Law, 28.

[25] Case C-195/12 *Industrie du bois de Vielsam* [2013] EU:C:2013:598, para 47.

[26] Craig, supra, n 3, p 487.

[27] T Kleinlein, "Summary" *in Konstitutionalisierung im Völkerrecht. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol. 231 (Springer 2012), at pp 703–15.

[28] UN Millennium Declaration, Resolution 55/2, 8 September 2000, para 9.

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> "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."[29]

This UN definition is a synthesis of the common law understanding of the rule of law and the civil law concepts of *Rechtstaat/Etat de droit*. In its essence, it is an expression of the application of the rule of law within States, rather than in the international legal order itself. Its focus is also on formal rather than substantive elements. For example, the requirement of State laws' *consistency* with international human rights norms and standards does not specify their content, which can be explained by the fact that there is no standard of human rights that is universally agreed among nations.[30] The UN statement also does not amount to a formal and thus binding source of international law that would, at least from a positivist perspective, compel States to comply with the rule of law, either domestically or internationally.

The development of the rule of law in international law is incomplete, insofar as perceptions of the concept are constantly evolving in time and space. Is the rule of law an objective, a principle,[31] a guiding principle,[32] a constitutional principle,[33] a fundamental principle of a democratic society,[34] a meta-principle, a customary principle of international law, a value,[35] or merely a concept deprived of legal effects? In terms of formal sources, international treaties do not define the rule of law, even when their provisions refer to the rule of law or encapsulate its different constituent elements.[36] To have a status of customary international law, the rule of law would need to meet the requirements of State practice *(usus)* and *opinio iuris.*[37] As a minimum, inconsistencies in the implementation of the rule of law by the States pose a difficulty for demonstrating compliance with these conditions. Article 38(1)(c) sets out the third source of international law – "general principles of law", which serve to fil gaps in the interpretation of rules by international courts. However, in order to be induced, the rule of law would have to be found in a wide number of domestic legal systems (horizontal generality), and it would need to be suitable for abstraction from the domestic to the international legal regime (vertical generality). For the reasons already discussed, this could also be a challenge.

[29] Security Council, Report of the Secretary-General. The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, S/2004/616

[30] Bingham, supra, n 8, p 76.

[31] In Art 21 TEU, which is devoted to the objectives of the Union's external action, the rule of law is referred to both as a "principle" (para 1) and as a "value" (para 2).

[32] F Ehm, *The Rule of Law: Concept, Guiding Principle and Framework* (Strasbourg, Council of Europe, 2010).

[33] UK Reform Constitutional Act 2005, Section 1. However, the Act does not define the constitutional principle.

[34] ECtHR, *Ukraine-Tyumen v Ukraine*, 22 November 2007, para 49.

[35] See Art 2 TEU.

[36] See, for example, Art 2 TEU. However, the rule of law has been specified in the jurisprudence of the CJEU, which provides authoritative interpretation of the EU treaties.

[37] Both case-law and doctrinal analyses support this view. *North Sea Continental Shelf case* [1969] ICJ Rep 44; para 77, see also 42, para 71; *Continental Shelf (Libya v. Malta)* [1985] ICJ Rep 29–30, para 27. See further I Brownlie, *Principles of Public International Law,* 5th ed (Oxford University Press 1998), pp 4–11; A D'Amato, *The Concept of Custom in International Law* (Cornell 1971) pp 74–87; H Thirlway, *International Customary Law and Codification* (Sijhoff 1972) pp 145–46; G J H van Hoof, *Rethinking the Sources of International Law* (Kluwer 1983) p 87.

In their 2012 UN General Assembly Declaration on the Rule of Law,[38] States expressed their "commitment to the rule of law and its fundamental importance for political dialogue and cooperation among States."[39] They recognised the application of the rule of law to "all States equally," as well as to international organisations,[40] reaffirming it as a core value and principle of the UN.[41] Rather than defining the rule of law, States have referred to a number of elements, which they associate with this concept, both formal – such as, the resolution of disputes by peaceful means;[42] importance of fair, stable and predictable legal frameworks;[43] good governance;[44] independence, impartiality and integrity of the judicial system;[45] equal access to justice;[46] the role of international institutions, including courts;[47] but also substantive – e.g., observance and protection of human rights and fundamental freedoms for all.[48] In its essence, understanding the rule of law in the context of international law requires an understanding of the international legal order as an order that functions on its own terms, different to the national rule of law. The following table summarises our discussion by comparing the core (formal) features of the domestic and international rule of law.

Domestic rule of law	**International rule of law**
Principle of constitutional governance	Undetermined formal status – the UN defines it as a "principle of governance"
Based on the system of checks and balances through the separation of powers	Supremacy of international law and respect for international obligations (consistency of national laws with international obligations) – *pacta sunt servanda*
Avoidance of arbitrariness – laws properly enacted and reviewed by independent and impartial judiciary	Avoidance of arbitrariness – fair, stable and predictable legal frameworks in international relations
Equality before the law – constraints on the government vis-à-vis an individual	Equality of subjects before international law (e.g. non-discrimination in trade and in investment) – constraints on State sovereignty vis-à-vis other subjects of international law
Enforcement of individual rights before independent and impartial courts	Peaceful settlement of disputes before independent judicial or non-judicial bodies
Procedural fairness	Procedural fairness

The international rule of law, therefore, may be understood as the application of the rule of law *principles* to relations between States and other subjects of international law.[49] The 2012 UNGA Resolution emphasised the link between "fair, stable and predictable legal

[38] UN General Assembly Resolution 67/1 "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels" (30 November 2012) UN Doc A/RES/67/1.
[39] Ibid, Preamble.
[40] Ibid, para 2.
[41] Ibid, para 5.
[42] Ibid, para 4.
[43] Ibid, para 8.
[44] Ibid, para 13.
[45] Ibid, para 13.
[46] Ibid, para 14.
[47] Ibid, paras 23, 27–36.
[48] Ibid, para 6.
[49] Chesterman, supra, n 36.

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frameworks" and "inclusive economic growth, sustainable development and eradication of poverty."[50] The contributors to this special issue have explored ways in which the rule of law has been implemented and could be further enhanced in the field of international economic law to achieve these objectives. We have not offered a "working definition" of the rule of law. Instead, the contributors have expressed views on the status and implications of the rule of law as a multifaceted meta-principle, developing their analyses around several of its components in international economic law. Indeed, the focus has been placed on the international trade and investment regime, and their intersections with human rights and the environment.

Complementary to our introductory reflections on the rule of law in international law, Henri Culot offers an overview of the different legal sources of the rule of law specifically in international economic law, considers its place in the European context (EU Common Commercial Policy) and its "relative importance" in international trade and investment law. This overview is thus helpful in understanding the ways in which the rule of law can influence this body of law, and provides a basis for more specific analyses in the remaining contributions to the Special Issue.

While international trade involves many actors, its legal regime is based on State-to-State cooperation and resolution of trade disputes in the World Trade Organisation (WTO). Iveta Alexovičová assesses whether the launch of private actions before national courts or through international dispute settlement mechanisms could increase the effectiveness of WTO law and, as a result, enhance the rule of law. While she is sceptical that domestic courts would acknowledge the direct effect of WTO agreements, she argues that the development of private actions could foster the rule of law in international trade.

Protection of human health is one of concerns recognised in international economic law through the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). However, the misuse of SPS measures for protectionist purposes undermines the rule of law. The SPS Agreement thus strikes a balance between the right of WTO members to protect human and animal health and the free movement of goods across international borders. In her analysis, Denise Prévost explores the implementation of SPS measures in light of the rule of law requirements. She highlights that SPS Agreement recognises the right of WTO members to adopt legitimate measures to protect food safety and animal and plant health while ensuring that the procedures are transparent, non-discriminatory and science-based. These requirements stemming from the rule of law imply that SPS domestic measures must not be applied in an unnecessary manner for protectionist purposes.

Complementing these analyses on the application of the rule of law in international trade law, Ivana Damjanovic considers the rule of law with respect to international investment law and its ongoing reform(s). She particularly explores the difficulty of applying this meta-principle given the divergent perspectives of different actors on what the rule of law in international investment law is. With a focus on systemic issues, her analysis considers the interaction between substantive and formal elements of the rule of law, tensions between law and politics, and issues around arbitration as a private dispute settlement mechanism vs. the court, as proposed by the European Union. Given fragmentation and flexibility of the reforms discussed in international fora, she questions whether the changes will lead to more substantial enhancement of the rule of law in international investment law.

In light of increasing trade tensions, Jun Xiao's analysis provides a very instructive insight into China's perspectives on the rule of law in international economic law. He explains China's position as reflecting the developing countries' approaches to international law, favouring treaties over customary international law, as the later does

[50] See UN General Assembly Resolution 67/1, supra, n 43, paras 7–9.

not reflect the practice and *opinio juris* of developing States. Given that China is in many aspects a latecomer in shaping international economic law, treaties offer an opportunity to develop new rules. Nevertheless, Xiao argues that China's approach has been flexible and pragmatic, even when trade and investment norms have placed constraints on its regulatory sovereignty. While China has overall had a good record of compliance with the WTO rulings and ISDS awards, recent tensions confirm the added value of the rule of law for the operation of international trade.

The remaining articles of the Special Issue explore intersections between trade, labour rights and the environment. Ivana Damjanovic and Nicolas de Sadeleer examine different approaches to the implementation and enforcement of labour standards in international trade agreements. Their analysis thus considers the effectiveness of international trade instruments for enforcing international labour standards as a contribution to the international and domestic rule of law.

Taking a different approach, Nicolas de Sadeleer's analysis focuses more specifically on the enforcement of international environmental agreements through domestic measures. Since these treaties are not self-executing and do not have direct effect, their effectiveness depends on their implementation in clear, precise and binding domestic instruments. The rule of law in the international environmental context thus must take into consideration how international environmental agreements impose obligations on States to regulate the behaviour of non-state entities. Although no multilateral environmental agreements impose any obligation to respect the rule of law, Nicolas de Sadeleer argues that a number of principles that give structure to the rule of law (legality, legal certainty, avoidance of arbitrariness) are relevant in the field of international environmental law. Effective judicial protection (*Ubi jus idi remedium*) and access to justice in environmental matters are the logical culmination of the emphasis placed by recent multilateral environmental agreements on environmental rights. As stressed by de Sadeleer, the rule of law is considered to require the courts to adopt a stance of the strictest political neutrality. Furthermore, first generation human rights compel the State to establish regulatory frameworks and means of enforcement in order to prevent the occurrence of risks to human health.

Taking advantage of the weaknesses and loopholes in environmental law, whether in international, European or national law, unscrupulous companies market hydrocarbon residues as products or by-products. However, these residues should be classified as hazardous waste. Given the cost of recycling hazardous waste, these companies make huge profits. Giulia Giardi highlights, from a criminologist's perspective, that international trade in hydrocarbons can facilitate corporate environmental crime. She defends the view that the rule of law could promote sustainability in international trade.

The complementarity of perspectives presented within this Special Issue demonstrates that there is no one-size-fits-all approach to the rule of law in international economic law. However, they all demonstrate that the rule of law serves to supplant the rule of the jungle,[51] whether as a principle of governance in horizontal relations between States, or as a normative yardstick in vertical relations between States and individuals. As a minimum, it implies the subordination of States to international law. While in many aspects the rule of law remains an ideal, its implementation into practice of international economic law remains as ever important at times of growing challenges for the overall stability of the international legal order.

[51] T Bingham, supra, n 8, p 82.

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