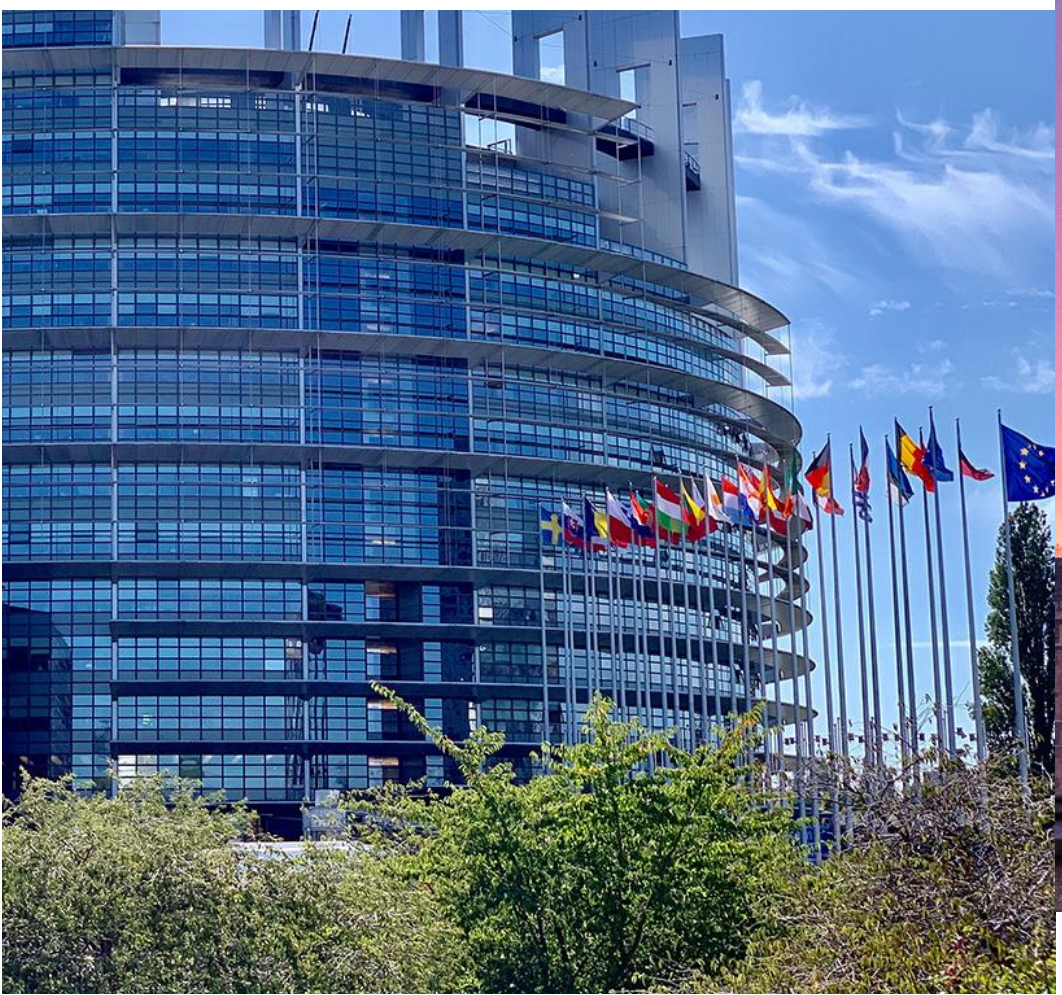
British Institute of International and Comparative Law

International Conference: "A Rules-Based International Law: Benefits and Challenges"

Iris Anastasiadou | Dr. Julinda Beqiraj



British Institute of International and Comparative Law

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

Table of Contents

Foreword

The public international conference took place on Monday 18 March in a hybrid format, combining in-person attendance at the BIICL London Office with online participation, to accommodate attendance of speakers and participants from abroad.[1] The event aimed to present the preliminary findings of a discussion paper and allow the panels to engage with and investigate the challenges and opportunities posed by RBIO in relation to public international law (PIL), with thematic perspectives on trade law, investment law, cultural rights and indigenous peoples' rights, law of the sea, etc. The event was attended by 18 individuals in person and about 50 online attendees, from around the world.

Dr Julinda Beqiraj and Iris Anastasiadou at BIICL, opened the event by presenting preliminary research findings on the topic of the Rules-Based International Order (RBIO) and its relationship with Public International Law (PIL), with a special focus on the Global South and specifically on the African views and perspectives. Their presentations laid the foundation for further discussions during the conference. Panel 1, chaired by Prof. Roger O'Keefe, Professor of Public International Law, Bocconi University, concentrated on the RBIO and its relationship to Public International Law. The participants in the discussion included Dr Kenneth Chan, Dr Kathryn Nash, Dr Yurika Ishii, and Dr Debra Long.

Panel 2 was chaired by Prof. Bankole Sodipo, School of Law and Security Studies, Babcock University, Nigeria. Panel members included Dr Oke Ejims, Prof. Aya Iino, Prof. Federico Lenzerini, and Prof. Alexandra Xanthaki, who provided thematic perspectives on RBIO and PIL, focusing on cultural and indigenous rights, trade and investment.

The panels sparked a lively debate, both between the speakers and the attendees.

[1] A Rules-Based International Order: Benefits and Challenges (Hybrid) Programme

Paper Presentation: Rules Based International Law: Challenges and Opportunities

Dr. Julinda Beqiraj, *Maurice Wohl Senior Fellow in European Law, Bingham Centre of the Rule of Law*

Iris Anastasiadou, *Researcher in Public International Law, BIICL*

Julinda Beqiraj and Iris Anastasiadou commenced the event by presenting preliminary research findings on the topic of the Rules-Based International Order (RBIO) and its relationship with Public International Law (PIL), with a special focus on the Global South and specifically on the African views and perspectives. Their presentations laid the foundation for further discussions during the event.

Dr Beqiraj presented the preliminary findings of the paper on the meaning and content of the RBIO concept. While this concept is often mentioned in political statements and declarations, questions arise regarding its definition and scope. The discussion underscored differing interpretations of RBIO and the extent to which this means upholding international law. While some view the RBIO as synonymous to public international law, it can also be strategically invoked by governments to selectively adhere to international commitments based on political circumstances. In literature, the concept is defined as one that seeks to establish a fair, just, open, and predictable system of global governance, reflecting the interests and values of the states involved. However, there may not be a single rules-based order, but rather multiple orders operating simultaneously. Defining and clarifying the substantive meaning of the rules-based order is essential, to avoid ambiguity and potential weakening of public international law.

The utility of a rules-based international order grounded in public international law boils down to three elements. Firstly, rules are essential for guiding behaviour and setting expectations, thereby reducing the risks of conflict or misinterpretation. Secondly, RBIO provides predictable mechanisms for updating or amending existing rule sets when necessary. Thirdly, despite its limitations, a rules-based international order based on public international law offers mechanisms for addressing violations of these rules. Dr Beqiraj highlighted the efforts of Global South nations to strengthen institutions, enhance legal frameworks, and promote accountability. This involves addressing historical legacies of colonialism and economic disparities, while also considering partial changes to existing rules through available mechanisms. Incorporating diverse voices and perspectives from the Global South into discussions is essential in upholding a rules-based international order, which is grounded in public international law.

Iris Anastasiadou focused on the African views and perspectives to the rules-based international order, highlighting their diverse nature shaped by historical experiences, cultural diversity, and geopolitical realities. Despite diversities among African nations as to their approaches and commitment to PIL, there are certain commonalities and

overarching themes which the paper seeks to identify. Firstly, sovereignty and non-interference are fundamental principles in the African approach, rooted in responses to historical colonialism and struggles for self-determination. Regional bodies like the African Union prioritise respecting member state sovereignty and non-interference in internal affairs, codified in key documents such as the African Charter of Human and People's Rights. Secondly, multilateralism is strongly advocated among African countries, and is seen as a tool for amplifying their influence in global affairs while facilitating cooperation, resource-sharing, and mutual assistance in addressing common challenges. Regional organisations like ECOWAS and SADC, AU play vital roles in promoting unity and solidarity among states, alongside active participation in global institutions such as the UN, WTO, and IMF. Thirdly, Collective security and conflict resolution are also key aspects of the African approach, with initiatives like the African Peace and Security Architecture demonstrating a commitment to resolving conflicts through African-led mechanisms supported by the international community. Fourthly, African states call for reforming international institutions to better reflect contemporary global realities and provide African states with a more prominent role. Proposed reforms include increasing representation in bodies like the UN Security Council and addressing systemic inequalities in the global governance architecture. Regarding trade and the WTO, African countries prioritise issues related to development, poverty alleviation, and economic justice within the rules-based international order. They advocate for fair trade practices, increased development aid, debt relief, and technology transfer to support sustainable development efforts, aligned with the UN Sustainable Development Goals and the AU Agenda 2063. Last but not least, the Global South and African States are taking the lead in ongoing discussions at the UN level on the Draft Covenant on the Right to Development. Interestingly the drafting and negotiation process had limited engagement and cooperation with financial institutions (IMF, World Bank), as well as the global North.

Panel 1: The RBIO and PIL

Chair: Prof. Roger O'Keefe, *Professor of Public International Law, Bocconi University*

Dr. Kenneth Chan, *Research Associate, Walther Schücking Institute of International Law, University of Kiel*

Dr. Yurika Ishii, *Associate Professor, National Defence Academy of Japan*

Dr. Kathryn Nash, *Chancellor's Fellow, Edinburgh Law School*

Dr. Debra Long, *International Policy Manager, The Law Society*

Chair: **Professor Roger O'Keefe** introduced the topic of the first panel: the rules-based international order and public international law. While confirming strong commitment and advocacy for PIL prevalence, he addressed the question to the panellists on the possible added value in the rules-based international order, alongside non-binding norms.

1. Presentations

Dr Kenneth Chan started by posing fundamental questions about the nature and purpose of the rules-based order, emphasising the ambiguity surrounding its definition, membership criteria, and underlying principles. There is a lack of clarity regarding what exactly constitutes the rules-based order and who its members are. He questioned whether the rules-based order aligns with existing international legal frameworks or if it introduces new norms and principles. Additionally, he explored the relationship between the rules-based order and public international law, noting that while proponents often imply alignment with international law, there is a deliberate avoidance of explicit commitment to it.

In a historical context, the term's emergence can be found in the US foreign policy discourse during the early 21st century and its association with Western liberal democracies and their allies. He discussed how the rules-based order evolved from a parallel normative framework to a central narrative in US foreign policy, influencing the practices and perceptions of member states. Dr Chan examined RBIO potential implications for international law and global governance. Quite rightly, according to Dr Chan, critics argue that this attempt to disrupt continuity of public international law is more about control and power within the multilateral order. It should be underlined that the rules-based order initially gained importance in contemporary international relations at a time where Western legal and political authority had diminished and great power rivalry similar to the geopolitics of the Cold War, is on the rise again. Thus, in no uncertain terms, when other powers like China and Russia criticised, the rules based order, we should understand this because they want their own rules based order which they have autonomy control over. The ability of hegemonic powers like us to cast influence over other states is changing. So the RBIO could be understood not as an attempt to address gaps of international law, but also as the administration empire. There is a fraught relationship between the Global North and Global South.

For example, Africa's engagement in the International Criminal Court, pinpoints the hegemonic character to the rules-based order.

In conclusion, Dr Chan stressed the importance of further examination of the rules-based order to gain a comprehensive understanding of its nature, purpose, and implications for international law. The fragmented understanding of the rules-based order, with information disseminated in a piecemeal fashion through government statements, creates an incoherent picture. He highlighted the need for transparency and clarity in defining the rules-based order and its relationship with existing legal frameworks. Additionally, Dr Chan called for a nuanced approach to analysing recent developments and their potential impact on global governance and the rules-based international order.

Dr Ishii proceeded to discuss the concept of the comprehensiveness of the United Nations Convention on the Law of the Sea (UNCLOS), customary international law and recent case law from the International Court of Justice (ICJ). Dr Ishii explained that she takes a broad view of UNCLOS, comprising maritime zones and the recognition of states' claims within those zones. She discussed the Nicaragua v Colombia case, where the ICJ addressed the extension of a state's continental shelf beyond 200 nautical miles. In this case, Nicaragua claimed the extension of the continental shelf into Colombia's 200 nautical miles continental shelf. Since Colombia is not a party to the UNCLOS, the Court judgement was based on customary international law. Looking at the practices of the member states of UNCLOS, it held that there is a rule that Nicaragua cannot extend its entitlement into the 200 nautical miles. Dr Ishii highlighted the Court's role in preventing excessive maritime claims and preserving the freedom of the seas. She further emphasised RBIO's significance in shaping international maritime law and resolving jurisdictional disputes. Analysing the Nicaragua v Colombia case in depth, Dr Ishii discusses the ICJ's interpretation of UNCLOS provisions regarding continental shelf entitlements and the interrelationship between exclusive economic zones (EEZs) and continental shelves. She suggests that further examination of the judgement is needed to understand its implications for the comprehensiveness of UNCLOS and the rules-based order at sea.

Before delving into the contributions of regional systems to the rules-based international order and public international law, **Dr Kathryn Nash** defined her perspective on the concept of RBIO. She takes a broad view of the rules-based international order, encompassing norms, treaties, and agreements that set expectations which contribute to the development of public international law. Her presentation focused on two specific regions, Latin America and Africa. Dr Nash discussed the significant contributions of regional systems to various aspects of international law. In Latin America, she highlights the Inter-American human rights system, comprising both the Inter-American Commission and Court of Human Rights. Dr Nash emphasised the historical influence of Latin American jurists on the development of economic, social, and cultural rights, which later found expression in the UN's Universal Declaration of Human Rights. Furthermore, she discussed the Inter-American Court's role in shaping legal precedents, particularly regarding indigenous rights and the prohibition of amnesties, which have had a substantial impact on land ownership issues and post-conflict reconciliation efforts. Regarding Africa, Dr Nash focused on the contributions of the African Union (AU) to peace and security, for instance the ECOWAS's intervention in Liberia in 1990, which predated Western notions of the Responsibility to Protect and helped shape subsequent international discussions

on humanitarian intervention. Nash also highlighted the AU's advocacy for a cooperative relationship between the UN Security Council and regional bodies, advocating for a shift from UNSC primacy in this field to enhanced cooperation. AU's diplomatic efforts and advocacy have led to tangible outcomes such as the establishment of an office to the African Union by the United Nations and the passing of a framework for funding African peace missions by the UN Security Council. In conclusion, Dr Nash stressed the importance of recognising the diverse contributions of regional instruments, NGOs, and individuals to shaping the rules-based international order and public international law beyond Western actors.

Dr Debra Long's contribution focused on two recent research projects looking at the implementation of decisions of the African Commission on Human and People's Rights and the African Court on Human and People's Right. Dr Long outlined the diverse range of outputs from African human rights bodies, including both binding and non-binding instruments, such as judgments, decisions, provisional measures, resolutions, and recommendations. She reported that the first research project examined the factors influencing the implementation of so-called "soft law" instruments, using the Robben Island Guidelines as a case study. Long challenged the notion that non-binding instruments are inherently weaker or less effective, revealing that stakeholders often strategically choose whether to implement instruments or not, based on their perceived utility rather than their legal status. There have been attempts to assign non-binding instruments with a binding character, yet the African Commission's failure to systematically reference and use its own findings, contributes to a lack of confidence among stakeholders. In the second research project, Long had explored the implementation of decisions and judgments from the African Commission and Court in three African jurisdictions. Despite perceptions of limited implementation, Dr Long's research uncovered evidence of greater implementation than publicly visible. There are several factors influencing implementation, including visibility, political context, specificity of decisions, and pressure from international actors. Dr Long challenged the conventional view that legally binding judgments are more likely to be complied with, revealing instances where states comply with non-binding decisions due to various factors beyond legal obligations. She argued that discussions on enforcement mechanisms can distract from practical implementation efforts and advocated for greater dialogue, dissemination of findings, and cooperation to induce implementation. In conclusion, Long emphasised the importance of understanding the role of implementation and the role of both states and supranational bodies in promoting compliance with human rights standards. She underscored the need for strategic institutional and domestic cooperation to facilitate implementation and mobilise stakeholders effectively.

2. Discussion

The Chair posed a question to all the panellists, to kick off the discussion: Does speaking of the rules based international order rather than international law add any positive value to the discourse or is it only going to weaken international law?

Dr Chan suggested that the rules-based order represents a community of states built on desirable global public goods like the rule of law. However, there is concern that it may serve as a rhetorical device to legitimise certain behaviours or even replace the

existing international law regime entirely. For instance, the US advocating for liberalising the right to use force in self-defence against non-state actors could have different implications within the rules-based order than international law. This needs to be carefully balanced. While the aspirations of the rules-based order may seem noble, a cautious approach was recommended given its implications for global stability, particularly its resistance to a more inclusive conceptual structure of international law.

From the Law of the Sea perspective, **Dr Ishii** made a positive assessment and viewed the RBIO as adding significant value to the regime. Its development has been shaped in a political context, including resistance against customary norms and efforts by states to claim maritime entitlements beyond established rules. The rules-based international order provides guiding principles for states and facilitates peaceful dispute resolution in international conflicts, whether in maritime domains like territorial waters or in global arenas like cyberspace. By upholding international law, we ensure that all states, regardless of their power, receive equitable treatment and fair benefits, promoting stability and cooperation within the international community.

According to **Dr Nash**, the rules-based international order adds value to public international law in several ways. It aids in the development of new legal norms over time and provides clarity in understanding existing laws. For instance, examining the ambiguity within the UN Charter regarding peace and security, and the collaboration between regional organisations like the AU and global bodies like the UN Security Council, helps clear up ambiguity in the application of international law. Additionally, the de facto division of labour between these entities and the frameworks for funding African peace missions under the UN umbrella can be seen as integral components of the rules-based order. Thus, these two concepts can be seen as mutually reinforcing, providing a comprehensive understanding of global governance and legal frameworks.

The concept of a rules-based international order could be useful if it is understood as encompassing a wide range of instruments aimed at promoting respect for human rights, regardless of their legal status, according to **Dr Long**. However, there is a concern that the focus on this concept might distract from discussing the broader human rights system, which seems to have diminished in recent discourse. It is essential to recognise and acknowledge various documents and mechanisms established to enhance human rights and address ongoing challenges. There is a worry that the rhetoric surrounding the rules-based order could be used to circumvent, undermine, or ignore human rights law, as seen in certain legislative initiatives like the UK's Safety of Rwanda Bill, which has been criticised for jeopardising the rule of law and human rights protections. Therefore, while the concept could be beneficial if it encompasses diverse instruments aimed at improving state behaviour concerning human rights, its current usage and rhetoric raise concerns about its potential negative implications for human rights and the rule of law.

A question that arose from a participant attending online, relates to whether the concept of the rules-based international order is evolving to encompass rules originating from the private sector. For instance, agreements between corporations and governments concerning the regulation of artificial intelligence or online hate speech, such as the oversight boards established by companies like Meta. The **Chair, Prof. O'Keefe** posed the question whether there is an indication that the discourse

surrounding the rules-based international order is expanding to incorporate norms from the private sphere, potentially transitioning from an international to a more global framework? If so, should this integration of private sector norms be viewed positively or negatively?

The private sphere is an intriguing aspect to consider, according to **Dr Chan** since even if there is such engagement and borrowing of norms, it would likely undergo a process of filtering through the lens of the rules-based order. However, the process of how norms are integrated within this framework remains unclear. Unlike international law, which has a defined process, the rules-based order appears to operate on a more case-by-case basis, with norms being identified and labelled as part of the order after the fact. This lack of clarity can lead to confusion, as seen in past instances such as the early engagement with the Responsibility to Protect concept. Therefore, while engagement with private sector norms may occur, the rules-based order has yet to establish a clear mechanism for integrating them, unlike the structured process seen in international law.

Dr Ishii added that while traditional international law has been primarily state-centric, there are numerous issues that fall outside the scope of state laws and regulations. Private entities and corporate standards indeed play a significant role in addressing these gaps, particularly in areas such as environmental protection, the development of continental shelf resources, submarine cable production, and fisheries regulations. These examples highlight the need to recognise and incorporate the contributions of private entities into the broader discourse on international norms and governance.

The **Chair** made a follow-up question on the Nicaragua-Colombia case, in the context of the rules-based international order at sea. The judgement indeed appears to prioritise customary international law over UNCLOS, which raises questions about the balance between the two in maritime disputes. This preference for customary international law could be seen as a form of creeping jurisdiction, where customary norms gradually influence and shape legal interpretations, potentially impacting the rules-based international order at sea. However, it is essential to consider the specific details and implications of the judgement within the broader framework of international maritime law and the rules-based order.

Upon close examination of the judgement, it appears that there is no explicit preference given to customary international law or UNCLOS. However, according to **Dr Ishii** the relationship between customary international law and UNCLOS, as asserted in the judgement, should be carefully considered. There are multiple interpretations of the judgement, and the main concern is that some countries may exploit it to justify creeping jurisdiction beyond the rights and obligations outlined in UNCLOS. Nevertheless, there are alternative interpretations of the judgement that suggest the ICJ did not go that far.

The **Chair** then proceeded, stating that the discourse surrounding the rules-based international order can potentially undermine the sovereign equality of states and the principle of state consent to binding rules of international law. It may promote a selective approach where powerful states can pick and choose which rules to adhere to, thereby weakening the universality and effectiveness of international law. If this is the case, the notion that sovereign equality of states is inherent in the requirement of consent. What are the implications for international law?

RBIO seems to pivot more towards states reinforcing their sovereignty, according to **Dr Long.** It presents a different perspective where states leverage this concept to assert their sovereignty, even to the extent of challenging or disregarding human rights obligations. Therefore, it appears to be employed by states to affirm their sovereignty, potentially conflicting with the objectives of human rights law. On the other hand, **Dr Nash** shared a different opinion. She does not perceive the RBIO as inherently more problematic for state sovereignty than public international law. The Inter-American system, for example, where there has been recent criticism of the court's use of conventionality control, aiming for robust implementation of judgments. Despite states opting into this treaty and the court's jurisdiction, concerns arise about a mechanism developed by the court for enforcement, raising questions about state sovereignty and consent. Such concerns exist within international law, indicating an ongoing dialogue between the rules or laws crafted by the international community and states' decision-making autonomy.

Dr Ishii agrees that the rules-based international order does not undermine the state-consent system under public international law. The international community, which comprises not only states but also principles and values, requires a solid foundation. The rules-based international order could serve as one such model. While disagreements may arise among countries, dialogue and opportunities for expressing views exist within the framework of international law. These discussions should be based on established legal orders, such as public international law.

Dr Chan suggested that we are at a point in time where sovereignty has been dramatically reframed, with a shift towards the idea of sovereignty as responsibility. This reframing has parallels with the historical narrative of the US positioning itself as a global policeman. The emergence of the rules-based order can be seen as a natural continuation of this narrative. With some states increasingly neglecting their responsibilities, particularly towards their populations, the RBIO gains traction as a means to address these shortcomings. In essence, the rules-based order becomes more relevant as states fail to uphold their "sovereignty as responsibility". However, the consent-based structure inherent in international law is somewhat contradictory to the objectives of the rules-based order. It's essential for international lawyers to engage in critical examination of the claims made by the rules-based order, questioning the rationale behind its rules and their application. Moreover, it is imperative to hold states accountable when they fail to adhere to these rules themselves, as this inconsistency weakens PIL. Discussions such as these are crucial for international lawyers to actively challenge the encroachment of the rules-based order on international law's conceptual framework. By interrogating its claims and holding states accountable, we can ensure a more robust and consistent application of the rules-based order.

Panel 2: Thematic perspectives on the RBIO and PIL

Chair: Prof. Bankole Sodipo, *School of Law and Security Studies, Babcock University, Nigeria*

Dr. Oke Ejims, *Senior Lecturer, University of Bedfordshire*

Prof. Aya Iino, *Professor, College of Commerce, Nihon University, Japan (Tokyo)*

Prof. Federico Lenzerini, *University of Siena*

Prof. Alexandra Xanthaki, *UN Special Rapporteur on Cultural Rights*

Chair Prof. Bankole Sodipo opened the second panel discussion. One of the fundamental aspects of law is its ability to provide certainty. However, it is evident that the concept of the rules-based order is continuously evolving. While some argue that public international law is stagnant, the question arises: if it's working, why change it? Does the rules-based order aim to complement or replace public international law? Following up on Panel 1, where various perspectives were shared, Panel 2 aimed to delve deeper into the RBIO understanding in the context of Investment Law, Trade Law, Indigenous Rights and Human Rights.

1. Presentations

Dr Oke Ejims presented his ongoing research on climate change in African Foreign Investment Law, offering an AU perspective on the RBIO grounded in international law. Dr Ejims aligned with the position discussed in the previous panel, that the concept of the rules-based order, leans towards norms and agreements states agree to abide by. This contribution focused on the intersection of climate change and international law, particularly in the context of African investment law, and more specifically, the AU's contributions.

Investment treaty law serves as a platform to confront the pressing issue of climate change impacts in Africa, such as flooding and drought. The priority of the AU is to attract investments that build resilience and adapt to these climate impacts. However, the existing international law regime governing foreign investment, particularly investment agreements and investor-state dispute settlement mechanisms, presents challenges rather than opportunities for climate-friendly investments. Recent reports highlight the rising Investment Treaty claims against African countries, potentially exposing them to significant financial liabilities. This poses a threat to their ability to pursue climate goals, as these financial commitments could cripple governments financially and hinder their climate action initiatives. Mozambique, for instance, faces substantial claims in the fossil fuel market, jeopardising its climate resilience efforts. Amidst these challenges, the AU has emerged as a leader in promoting climate-conscious policies within its constitutional

framework. The AU's strategic interests and values, including climate change considerations, are reflected in its constitutional act. Consequently, the AU has a legal obligation to integrate climate change into its commercial policies. Key assumptions regarding climate change and investment law include the belief that investment law can enhance climate action and the necessity for reforms aligning investment law with climate change mitigation and adaptation goals. Applying a double benchmark method, AU's approach is analysed within two normative frameworks: international law governing climate change and the AU's self-imposed obligations. The AU's objective to promote climate change integration in its economic policies shows its commitment to sustainable development. Concretely, international law includes the Paris Agreement, aiming to reduce the global temperature to below two degrees. Recent state practice reveals states tried to find ways to integrate climate mitigation and adaptation explicitly or in some indirect way in international investment agreements. On a regional level, the AU's new investment protocol adopted in February 2023 introduces innovative provisions promoting sustainable investments and streamlining investor protections. Notably, it obligates foreign investors to ensure their activities align with climate action goals, marking a significant shift in investment law. The AU is not conservative here, and there are innovative and ambitious provisions regarding climate action in its investment agreements.

Prof. Aya Iino's remarks focused primarily on trade aspects, particularly within the context of WTO law. The term "rules-based" is frequently used in discussions about the WTO, and there is broad acceptance within the international community that the WTO operates within a rules-based trading system. The WTO itself emphasises its commitment to a rules-based approach on its website, highlighting that its rules are negotiated agreements. Furthermore, statements from various groups of states, such as the G7, G20, and African ministers of trade, explicitly position the WTO as central to the rules-based trading system. In examining individual country perspectives, we find that many countries also view the WTO as integral to the rules-based multilateral trading system. For instance, the United States, the European Union, China, Japan, and Brazil all emphasise the WTO's role in upholding a rules-based order in their official statements.

Two key agreements, namely the Sanitary and Phytosanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement, explicitly establish rules as their basis. The dispute settlement system of the WTO, consisting of panels and the Appellate Body, has interpreted these agreements, setting important precedents. This raises two important questions: First, how does the concept of being "member-driven" in the WTO relate to the notion of being "rules-based"? Are they contradictory, complementary, or irrelevant? Second, what role does the negotiation process play in shaping the rules-based order within the WTO context? One example is the TRIPS Agreement, which protects intellectual property rights and came into force in 1995 with the establishment of the WTO. However, developing countries faced challenges in implementing this agreement because at the time the negotiations were mainly led by so-called "Quad" (Canada, EU, Japan, US) and the developing countries signed this agreement as a part of the whole package without fully understanding the content agreement. Moreover, contemporary trade issues extend beyond traditional trade matters to encompass non-trade issues such as trade and environment, trade and human rights, and digital trade. This broadening scope raises questions about stakeholder inclusion in the negotiation process and the formulation of rules. Additionally, while the WTO's dispute settlement system functioned effectively for two

decades, its Appellate Body has ceased functioning since 2019. This demonstrates the need to strike a balance between ensuring enforcement and reducing member discretion. Furthermore, the evolution of trade rules illustrates how the rules-based order adapts and evolves over time. For instance, the TRIPS Agreement and the SPS Agreement, which came into force in 1995, paved the way for subsequent agreements that address new areas such as intellectual property and sanitary measures. Similarly, FTAs serve for developing new rules, as seen in provisions addressing trade and environment or digital trade. Lastly, concepts such as sustainable development play a significant role in shaping trade rules. The SDGs refer to the WTO, and the WTO commits itself to the SDGs. Further FTA articles are now explicitly referring to the SDGs, such as the CPTPP countries.

Prof. Federico Lenzerini addressed the topic of the RBIO from the perspective of indigenous rights. The recognition and development of indigenous peoples' rights represent a relatively recent phenomenon in international law. These rights possess a unique character, introducing collective rights that initially were not embraced by the majority of states. The legal landscape governing indigenous rights encompasses an amalgamation of international legal instruments, customary laws, and indigenous traditions. There is significant influence of indigenous customs and traditions on the reinterpretation and application of rules derived from public international law. This influence has led to the transformation and recognition of various rights enshrined in international law, including but not limited to the right to self-determination, in the context of internal self-governance, emphasising indigenous autonomy within the framework of the state; the right to cultural identity, emphasising the preservation and protection of indigenous cultures and traditions; and the right to reparations and redress for historical injustices, such as land rights violations. These rights have been shaped by indigenous customs and traditions, and customary international law. The contents of these rules have been shaped by treaty law, soft law, but also are strongly influenced by something which was exogenous to public international law, the customary international law and customs and traditions of indigenous peoples. The intersection of indigenous rights with public international law raises questions regarding the nature of the rules-based international order. Specifically, the extent to which the rules-based order aligns with public international law. The more rules based international order is based on public international law, the more there is stability, the more certainty there will be in the application of laws, and especially, there are methods to which it is possible to enforce the relevant international rules. The tendency to political manipulation and double standards is an inherent risk in public international law, particularly concerning indigenous rights. States often seek to circumvent their obligations under international law to advance their political interests, therefore highlighting the need for values such as fairness and justice to guide the application of international rules.

Prof. Alexandra Xanthaki scrutinised RBIO from the angle of cultural rights, indigenous peoples' rights, and human rights at large, with a particular focus on Africa. Professor Xanthaki strongly stated that she missed the rationale behind embracing a vague, non-specific concept that offers states an escape route from their binding obligations. Contrary to the sentiments expressed in the previous panel, she opposed adopting a rhetoric that lacks grounding in any international law instrument, as it risks diluting the standards of international human rights law. This was examined on two fronts, namely, specificity and generality. On the one hand, RBIO refers to the notion of "rules". Which rules are being referenced? Who sets these rules, and what criteria define them?

International human rights law operates beyond treaty provisions and incorporates the interpretations of soft law. Adopting the rules-based international order, we risk nullifying all these nuances and discussions and ways of interpreting the binding provisions that states have undertaken. Moreover, there is a lot of discussion on whether international law includes soft law in its scope, with extensive literature exploring its status. In Professor Xanthaki's view, international law, particularly international human rights law, inherently includes soft law, which is not evident in this somewhat novel conceptual framework, the RBIO. Furthermore, the insertion of the RBIO in the WTO and the World Bank, grants these institutions the ability to selectively adhere to elements of international law while disregarding others. Nonetheless, we must keep in mind that the World Bank and WTO are not standalone entities; rather, they are comprised of member states, each of which bears the responsibility of upholding the binding international legal commitments recognised in international human rights law, which they willingly entered into. In her report last year to the UN General Assembly as the UN Special Rapporteur in the field of cultural rights, Professor Xanthaki emphasised that the international governance has to take into account cultural rights and by international governance, including the states that are in the World Bank and in the WTO. That this is particularly important for indigenous peoples rights. While the Declaration on the Rights of Indigenous Peoples (UNDRIP) is not legally binding, certain provisions may even be considered customary international law, however there persists resistance from some states. It is essential to recognise that international human rights law, including the recognition of collective rights, has evolved significantly. In the case of the UK or Japan, which initially dismissed collective rights, such a stance is no longer viable, given the clear recognition of such rights within international human rights law. Within the African context, the recognition of indigenous peoples has been met with reluctance, particularly in comparison to regions like the Americas. However, across Africa, numerous marginalised groups share deep ancestral ties to their lands, possess distinct cultures, and have a strong collective identity. African countries exhibit a clear hierarchy among indigenous groups, with certain communities facing exclusion and marginalisation. International human rights law emphasises that addressing their marginalisation of indigenous peoples should be prioritised and soft law offers such tools.

Beyond these specific issues lies a more generic concern regarding the liberal order, which underpins the rules-based international order. Historically, liberals have been reluctant to acknowledge collective rights and have largely overlooked social, economic, and cultural factors that continue to oppress indigenous populations. Moreover, the liberal approach often disregards critical aspects like the right to development, contributing to further marginalisation. Vagueness surrounding the concept of a rules-based international order allows states, both liberators and oppressors, to cherry-pick which rules to adhere to. This undermines the broader goal of decolonising international law and would lead to adopting outdated liberal approaches which risks undoing decades of advancement in international human rights law.

2. Discussion

The **Chair** addressed a question to Professor Xanthaki, whether she could share her views on the reluctance of the British Museum to return the artefacts looted across

Africa during the colonial era, due to the British Museum statutes forbidding such return.

Professor Xanthaki replied that she could not share her views on this, since as a UN Special Rapporteur, she should be in touch with a state before sharing any criticism. However, she reported that in her recent report on Germany for the UN Human Rights Council, she congratulated Germany for taking the position to ensure that objects that were gained through colonialism are returned. This is part of the legal obligations that states have undertaken by signing and ratifying the International Covenant on Economic, Social and Cultural Rights, and specifically, Article 15.

Professor Lenzerini adopted the same view and agreed with Professor Xanthaki. When it comes to return of these properties, on one hand, there is the fundamental right of cultural owners to reclaim what rightfully belongs to them—an inherent human right. On the contrary, states often claim that these artefacts are part of their national heritage, and there is also the matter of public enjoyment, which is a parameter in safeguarding cultural heritage. However, in many cases, while these arguments may find legal ground, particularly on a national level, they often serve as excuses to evade international obligations. In Professor Lenzerini's view, these obligations still hold weight today, rooted in human rights standards when applied and interpreted correctly. Although not explicitly outlined in treaties, there is an indirect obligation to ensure the effective enjoyment of these rights by the relevant communities. This responsibility lies with governments, especially concerning indigenous peoples, whose current generations continue to suffer the tangible consequences of cultural heritage deprivation, even if it occurred generations ago. This is an ongoing violation of human rights which demands justice.

The **Chair** followed up Prof. Iino on the importance of involving additional stakeholders in both the formulation and enforcement of rules.

Trade today extends beyond mere economic transactions and encompasses broader issues such as environmental protection, human rights, and digital matters. According to **Prof Iino**, in some Free Trade Agreements (FTAs), we observe a trend towards involving a wider range of stakeholders, not necessarily in the negotiation phase but often in the implementation process. However, it is worth noting that in negotiations conducted within the World Trade Organization (WTO), participation is typically limited to member nations alone. Given the significant impact of trade agreements on various stakeholders beyond just member states, especially in areas like trade and the environment, it raises questions about the adequacy of restricting WTO negotiations solely to nations. Perhaps there is merit in considering broader stakeholder involvement both in the negotiation and implementation stages of WTO agreements, considering their far-reaching implications.

The **Chair** followed up on a point made by Dr Ejims, that AU law now incorporates provisions related to climate change. Do BITs explicitly address or permit climate change considerations to be used as a defence or shield for African nations? And if they do not, what potential conflicts might arise between the AU's stance on climate change and the provisions of these BITs?

With the implementation of the AU Investment Protocol, **Dr Ejims** finds significant development regarding BITs among African states. The Protocol mandates the automatic termination of all intra-bilateral investment treaties between African nations. Consequently, any potential conflicts arising from the absence of enforceable climate change rights in these BITs are effectively mitigated. However, a

potential grey area arises concerning African states entering into investment treaties with countries outside the AU. For instance, recent developments, such as Tanzania's treaty with Canada, pose challenges if these treaties conflict with the African investment protocol. The protocol includes a most favoured nation clause that foreign investors from countries like Canada may invoke if they prefer not to fall under the jurisdiction of the African investment protocol. In such cases, they may opt out of its protections.

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