INTERNATIONAL LAW ASSOCIATION

RULE OF LAW AND INTERNATIONAL INVESTMENT LAW

Resolution 04/2024

1. The 81st Conference of the International Law Association, held in Athens, Greece, from 25 to 28 June 2024:
2. ACKNOWLEDGING the sometimes divergent approaches to the rule of law in different national legal systems and different institutions;
3. RECALLING in particular the rule of law definition of the 2004 UN Secretary-General Report on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies (S/2004/616) and the Sydney Report (2018) of the Committee on Rule of Law and International Investment Law, outlining relevant rule of law definitions;
4. ACKNOWLEDGING the work of UNCITRAL Working Group III on Investor-State Dispute Settlement Reform and in particular the Draft Code of Conduct for arbitrators in international investment dispute resolution and the Draft Code of Conduct for judges in international investment dispute resolution;
5. RECOGNISING the need to ensure the respect for the rule of law through and in investor-State dispute settlement;
6. APPRECIATING in particular the importance and benefits of providing access to justice, due process, legal certainty, legal security, consistency and predictability in and through investor-State dispute settlement;
7. MINDFUL of concerns about the compatibility of international investment law and investment arbitration with the rule of law;
8. CONVINCED that certain substantive standards of treatment in investment law can be seen as expressions of the rule of law;
9. HAVING CONSIDERED the interim reports of the Committee on Rule of Law and International Investment Law;
10. HAVING CONSIDERED ALSO the Final Report of the Committee on Rule of Law and Investment Law;
11. ADOPTS the Athens Recommendations Concerning the Rule of Law and International Investment Law and Investor-State Dispute Settlement annexed to this Resolution;
12. COMMENDS the Recommendations in particular to adjudicators involved in investor-State dispute settlement, but also organizations, States, and interested groups working on investment law and investor-State dispute settlement;
13. RECOMMENDS to the Executive Council that the Committee, having completed its mandate, be dissolved.

ANNEX:

Athens Practices and Recommendations Concerning the Rule of Law and Investment Law and Investor-State Dispute Settlement

The Recommendations concerning the Rule of Law and Investment Law and Investor-State Dispute Settlement include relevant practices identified on the basis of investment arbitration practice and recommendations adopted against the backdrop of this arbitration practice. The recommendations are primarily addressed to adjudicators of investment disputes, who should take into account these recommendations on rule of law demands when deciding investment disputes.

Based on an analysis of investment arbitration practice, the rule of law standard against which the recommendations are formulated include, in particular, access to dispute settlement, as expressed in ‘the right of equal access to justice for all’, including judicial review of legislative and administrative acts; adjudicatory (judicial and arbitral) independence and impartiality; due process and absence of denial of justice; legal certainty, including the accessibility and predictability of legal norms; consistency and predictability of dispute settlement outcomes; legality, including a transparent, accountable, and rules-based/democratic process for enacting legislation; prohibition of arbitrariness; proportionality; transparency; respect for human rights; non-discrimination and equality before the law.

A) Relevant Practices and Recommendations Concerning the Rule of Law and Investment Law

1. Expropriation and the Rule of Law

1.1 Relevant Practices

1.1. a) “The standard of expropriation is meant to further certain aspects of the rule of law. It imposes demands on host states.”

1.1. b) “In particular, the requirements of due process and of non-discrimination are expressions of core rule of law demands and contribute to the prevention of arbitrary and discriminatory governmental measures.”

1.1. c) “The requirements of a public purpose or public interest and payment of compensation for expropriations further rule of law demands, ensuring that expropriatory measures serve the public at large and do not unilaterally disadvantage individual investors. When assessing public purpose or public interest in relation to the effect of a measure on an investment, tribunals give particular weight to considerations of proportionality.”

1.1. d) “Investment jurisprudence on the regulatory space of host states (police powers), carving out non-discriminatory, good faith measures in the public interest from the notion of compensable expropriation, enhances the regulatory freedom of states to act in the public interest. In distinguishing between regulatory measures and compensable expropriation, tribunals give particular weight to considerations of proportionality and to the existence of specific commitments to investors/investments.”

1.2 Recommendations

1.2. a) “When deciding upon expropriation claims, adjudicators should take into account the rule of law demands of the expropriation standard."

1.2. b) "Adjudicators should assess whether the rule of law-requirements of due process and non-discrimination as well as public purpose and compensation have been complied with when called upon to determine whether an expropriation was lawful."

1.2. c) "At the same time, adjudicators should ensure that the regulatory space of host states is sufficiently respected, enabling them to adopt proportionate, non-discriminatory, good faith measures in the public interest without the need for compensation of foreign investors."

1.2. d) "When assessing the public interest of states, as part of determining the existence of an indirect expropriation or whether an expropriation is lawful, adjudicators should give due deference to states and refrain from substituting their own view for that of sovereign decision-makers with respect to the determination of whether their acts fulfilled a public purpose. Still, they should retain their competence to scrutinize state compliance with their obligations towards investors, including the proportionality of host state measures as well as their potentially discriminatory character."

2. Fair and Equitable Treatment and the Rule of Law

2.1 Relevant Practices

2.1. a) "The standard of fair and equitable treatment, regularly contained in IIAs, is meant to further certain aspects of the rule of law and imposes demands on host states."

2.1. b) "Specifically, the requirement to afford due process/fair trial corresponds to a core rule of law demand as well as a fundamental human rights guarantee. The due process/fair trial requirement is generally found to apply to civil, criminal, and administrative adjudicatory proceedings of the host state. Due process is understood to require access to justice before an independent and impartial adjudicator, a fair procedure entailing equal treatment of the parties and the right to be heard, leading to a decision within a reasonable period of time. Sometimes the avoidance of a manifestly unjust outcome, referred to as 'substantive denial of justice', is also regarded as being implied in the obligation to accord due process."

2.1. c) "The good faith-inspired obligation not to act in an arbitrary or discriminatory fashion is also widely considered to form part of the fair and equitable treatment standard. It requires host states to abstain from unjustifiable or unreasonable distinctions. More far-reaching obligations to act with reasonableness and in a proportionate way have also been deduced from the prohibition of arbitrariness and discrimination."

2.1. d) "Whether and to what degree transparency forms an inherent element of FET has remained more controversial. In general, however, 'a complete lack of transparency' has been considered to fall short of fair and equitable treatment in investment arbitration."

2.1. e) "Similarly, the degree of predictability/stability/legal certainty owed by host states, and particular its relationship with the right to regulate, has remained open to debate. While legal certainty/predictability are recognized as core rule of law demands, the sovereign right to regulate is acknowledged as permitting adaptations or changes to the legal framework of host states and a balancing of interests. However, legal certainty, as a rule and subject to limited exceptions, precludes retroactive application of legislation or regulation."

2.1. f) “Related to the concept of predictability/stability/legal certainty, the protection of the investors’ legitimate expectations, though often regarded as a central and crucial element of FET, remains controversial, in particular in cases based on the international minimum standard of treatment. In investment arbitration, the role of host states in creating investor expectations, as well as of investors in acting reasonably and with due diligence when relying on host state behaviour, have been important aspects in assessing the legitimacy of such expectations. In this context, the more direct and specific the commitments made to investors are, the more likely they are to create legitimate expectations. In some instances, the need to balance the investor’s legitimate and reasonable expectations, on the one hand, and the host State’s legitimate regulatory interests, on the other hand, has also been recognized.”

2.2 Recommendations

2.2. a) “Adjudicators should take into account the rule of law demands of the FET standard.”

2.2. b) “When assessing whether host states have complied with the due process/fair trial element of FET, adjudicators should ensure that it is interpreted in accordance with traditional rule of law requirements. Specifically, due process should be interpreted as requiring access to justice before an independent and impartial adjudicator, a fair procedure entailing equal treatment of the parties and safeguarding their right to be heard as well as receiving a decision within a reasonable time. In addition, manifestly unjust outcomes, often referred to as ‘substantive denial of justice’, should be regarded as being in violation of the obligation to accord due process.”

2.2. c) “When assessing whether host states have complied with the good faith-inspired obligation not to act in an arbitrary or discriminatory fashion, adjudicators should assess whether host states have applied unjustifiable or unreasonable distinctions to the detriment of investors.

2.2. d) “In addition, adjudicators should take into account whether host states have acted reasonably and in a proportionate way.”

2.2. e) “When assessing whether host states have complied with FET, adjudicators should also take into account the level of transparency in the legal and regulatory framework adopted by host states.”

2.2. f) “When assessing whether host states have complied with FET, adjudicators should also take into account the predictability/stability of host state behaviour as well as its proportionality. When assessing legal certainty and predictability, adjudicators should also take into account the sovereign right to regulate and engage in a balancing of interests.”

2.2. g) “When assessing whether host states have complied with FET, adjudicators should also consider the legitimate expectations of investors. In assessing the legitimacy and reasonableness of such expectations, adjudicators should take into account the role of host states in creating investor expectations as well as the investors’ obligation to act reasonably and with due diligence.”

3. Full Protection and Security and the Rule of Law

3.1 Relevant Practices

3.1. a) “The standard of FPS, requiring host states to exercise due diligence in protecting the physical (and possibly also the legal) security of foreign investments, primarily pursues the peace-securing function of states based on the rule of law.”

3.1. b) “To the extent that FPS requires host states to provide access to legal redress for infringements of investor rights by third parties, this obligation overlaps with the rule of law requirements under FET to provide access to justice and to afford due process.”

3.1. c) “To the extent that FPS requires host states to abide by their own laws in order to provide the required protection to foreign investors it can be seen as an expression of the rule of law requirement that states themselves are bound by the law.”

3.2 Recommendations

3.2. a) “Adjudicators should take into account the rule of law demands of the FPS standard.”

3.2. b) “When assessing whether host states have complied with the FPS standard requiring host states to exercise due diligence in protecting foreign investments, adjudicators should ensure that it is interpreted in accordance with rule of law requirements.”

3.2. c) “When assessing whether host states have complied with the FPS standard, adjudicators should ascertain whether host states have employed due diligence in order to prevent interference with investor rights and properties. They should also take into account the economic and social conditions prevailing in host states when assessing compliance with the due diligence requirement.”

3.2. d) “When assessing whether host states have complied with the FPS requirement to provide access to legal redress for infringements of investor rights by third parties, adjudicators should ensure that this requirement is interpreted in accordance with rule of law requirements. Specifically, compliance with the access to justice/due process demands of obtaining redress before an independent and impartial adjudicator, and a fair procedure entailing equal treatment of the parties and their right to be heard, should be scrutinized.”

4. National Treatment and the Rule of Law

4.1 Relevant Practices

4.1. a) “The national treatment standard, requiring contracting states to provide investors and investments from the other contracting parties with ‘treatment no less favourable’ than that accorded to their own investors and investments, primarily pursues the equality of treatment function of the rule of law.”

4.2. b) “The assessment of compliance with national treatment is based on the identification of a domestic comparator ‘in like circumstances’ against which to measure the allegedly discriminatory behaviour, an assessment whether the treatment accorded to a foreign investor was indeed less favourable than that received by a domestic comparator, and the absence of legitimate reasons justifying different treatment.”

4.2 Recommendations

4.2. a) “Adjudicators should take into account the rule of law demands of the national treatment standard.”

4.2. b) “When determining whether a foreign investor is ‘in like circumstances’ or ‘in like situations’ with a national investor, adjudicators should identify comparators on a reasonable basis. Identifying comparators in the same business or economic sector shall normally be presumed to be a reasonable approach and avoids imposing too high a burden on host states.”

4.2. c) “The determination whether a foreign investor was treated less favourably than national comparators does not require proof of intent to discriminate on the part of the host state.”

4.2. d) “When assessing ‘less favourable treatment’ adjudicators may take into account both de jure and de facto discrimination.”

4.2. e) “When determining whether different treatment may be justified, adjudicators should take into account public interest grounds, including environmental and health reasons for differences in treatment.”

5. Most-Favoured Nation Treatment and the Rule of Law

5.1 Relevant Practices

5.1. a) “The MFN standard, requiring contracting states to provide investors and investments from the other contracting parties ‘treatment no less favourable’ than that accorded to the investors and investments from third states, pursues the equality of treatment function of the rule of law.”

5.1. b) “MFN clauses usually require host states to accord investors and investments no less favourable actual or de facto treatment.”

5.1. c) “In this context, the assessment of compliance with MFN treatment requires the identification of a third party comparator ‘in like circumstances’ against which to measure the allegedly discriminatory behaviour, an assessment whether the treatment accorded to a foreign investor was indeed less favourable than that received by a third party comparator, and the absence of legitimate reasons justifying different treatment.”

5.1. d) “MFN clauses in IIAs have also been interpreted to permit investors and investments to rely on more favourable substantive treatment standards and, pursuant to the controversial *Maffezini* approach, even on procedural and/or jurisdictional advantages contained in third-party IIAs.”

5.1. e) “Reliance on more advantageous jurisdictional and procedural provisions contained in third party IIAs has given rise to inconsistent investment jurisprudence and has led treaty-makers to clarify the issue expressly in more recent IIAs.”

5.2 Recommendations

5.2. a) “Adjudicators should take into account the rule of law demands of the MFN standard, in particular non-discrimination/equal treatment."

5.2. b) "When determining whether a foreign investor is *de facto* discriminated against compared to third-party investors, adjudicators should rely on the three-step test developed in national treatment cases."

5.2. c) "When assessing whether MFN treatment should be regarded as allowing reliance on more favourable substantive treatment standards, procedural, and/or jurisdictional provisions contained in third-party IIAs, adjudicators should pay attention to the text of the applicable MFN clause and engage in careful treaty interpretation. They should also pay regard to considerations of predictability, equality and access to justice."

6. Umbrella Clause and the Rule of Law

6.1. Relevant Practice

6.1. a) "Umbrella clauses, which require contracting states to observe obligations towards investors and investments from the other contracting parties, pursue the principle of sanctity of contracts/*pacta sunt servanda*. In this sense, umbrella clauses serve the legal certainty and predictability aspects of the rule of law."

6.1. b) "Depending upon the specific formulation of umbrella clauses, they have been interpreted to extend not only to contractual obligations, but also to unilateral commitments in the form of legislation and regulations of host states."

6.1. c) "In investment jurisprudence, tribunals have attempted to limit the effect of umbrella clauses by holding that they apply only to obligations entered into by states in their sovereign or governmental capacity, as opposed to their 'ordinary' commercial capacity, and only in cases of sovereign or governmental breaches, as opposed to 'ordinary' commercial breaches."

6.1. d) "Depending upon the specific formulation of umbrella clauses, tribunals tend to require that obligations have been entered into by host states themselves or entities whose acts can be attributed to them. Similarly, they require that such obligations have been incurred either to investors directly or to their subsidiaries where they can be regarded as their investments."

6.1. e) "While the existence and extent of a breach of obligations will be determined on the basis of the governing (mostly host state) law, umbrella clauses have the effect of turning such breaches into violations of the applicable investment agreement, thereby usually allowing investors to bring such disputes before a treaty-based arbitral tribunal."

6.2. Recommendations

6.2. a) "Adjudicators should take into account the rule of law demands of the umbrella clauses."

6.2. b) "When applying umbrella clauses, adjudicators should take into account their rule of law aspect of securing the sanctity of contracts/*pacta sunt servanda* and ensuring the binding force of commitments made by the host state."

6.2. c) "When applying umbrella clauses, adjudicators should further take into account the rule of law effect of such clauses in offering access to treaty-based dispute settlement."

6.2. d) “When interpreting umbrella clauses adjudicators should take into account the specific wording of such clauses in order to enhance the rule of law aspect of securing the sanctity of contracts/*pacta sunt servanda* and ensuring the binding force of obligations.

B) Relevant Practices and Recommendations Concerning the Rule of Law and Investor-State Dispute Settlement

7. Access to Justice

7.1. Relevant Practices

7.1. a) “The rule of law- and human rights-inspired demands of access to justice are not considered to imply a right of access to ISDS. Rather, they are policy demands calling for increased third party dispute settlement. Whether access to ISDS exists depends upon the legal instruments conferring such a right.”

7.1. b) “The policy demands for non-discriminatory access to justice have not led to an extension of the right of access to ISDS specifically conferred upon certain persons in various legal instruments. Courts and tribunals have not considered that providing access to ISDS to a predetermined group (of nationals of contracting states parties to investment treaties) would violate international or domestic equal treatment obligations.”

7.1. c) “The increasing costs of ISDS reduce the effective access to ISDS by parties under financial constraints. Interested parties have tried to mitigate this effect in various ways.”

7.2. Recommendations

7.2. a) “Adjudicators should take into account the rule of law-inspired demands of access to justice when determining their jurisdiction on the basis of the legal instruments conferring that power.”

7.2. b) “Adjudicators should be mindful of costs imposed on parties in ISDS – respondents as well as claimants.”

7.2. c) “Adjudicators should conduct proceedings in a cost-efficient manner in order to provide effective access to justice.”

8. Independence and Impartiality

8.1. Relevant Practices

8.1. a) “The independence and impartiality of adjudicators is a core aspect of the rule of law and is essential for maintaining the integrity of arbitration and lending legitimacy to the arbitral process in the eyes of the parties and the general public.”

8.1. b) “Independence has been regarded as a duty to remain structurally or financially remote from the parties and their counsel, whereas impartiality has been considered to refer to an absence of bias or predisposition towards one of the parties and the subject matter of the dispute."

8.1. c) "Proactive and comprehensive disclosure helps to ensure the independence and impartiality of adjudicators."

8.1. d) "Mechanisms such as challenge procedures as well as set-aside and non-recognition/non-enforcement proceedings represent important procedural tools to guarantee the independence and impartiality of adjudicators at various stages of the arbitral process."

8.2. Recommendations

8.2. a) "Adjudicators should respect the rule of law demands of the requirements of independence and impartiality to uphold the fairness and integrity of arbitral proceedings."

8.2. b) "Adjudicators should maintain both structural independence and the appearance of independence from the parties and their counsel, and should be free from actual and/or perceived bias."

8.2. c) "Adjudicators should proactively and comprehensively disclose any circumstances that could reasonably be perceived as impacting their independence and impartiality. Disclosure should be made as early as possible and updated continuously throughout the arbitration process. It should be detailed, providing sufficient context and clarity to allow parties to make informed decisions about the adjudicators' suitability."

9. Due Process, Fair Trial and Absence of Denial of Justice

9.1. Relevant Practices

9.1. a) "Investment tribunals have generally considered that they are duty bound to respect due process/fair trial obligations as a result of the procedural rules under which they are operating."

9.1. b) "Investment tribunals have recognised that the rule of law requirement of avoiding undue delay forms part of the obligation to provide a fair trial/due process."

9.1. c) "The principle that each party to an investment dispute be given the right to be heard and treated with equality by the tribunal, as laid down in most applicable arbitration rules, is a core element of the rule of law."

9.1. d) "Investment proceedings that fall short of these fair trial/due process guarantees may be set aside or annulled according to the applicable procedural rules."

9.2 Recommendations

9.2. a) "Adjudicators should respect the rule of law demands of due process/fair trial."

9.2. b) "Adjudicators should conduct ISDS proceedings in an efficient manner so as to avoid any undue delay."

9.2. c) "Adjudicators are under the obligation to afford the parties the right to be heard and to be treated with equality.”

9.2. d) “Adjudicators should balance the due process-based right to be heard against speed and efficiency.”

9.2. e) “Respect for these rule of law-inspired due process requirements should be guaranteed by supervisory bodies, ensuring that fundamental rules of procedures are complied with in ISDS.”

10. Consistency and Predictability of Dispute Settlement Outcomes

10.1. Relevant Practices

10.1. a) “Consistency of outcomes in ISDS and the legal certainty and predictability resulting from consistent case law are core aspects of the rule of law.”

10.1. b) “Investment tribunals have emphasized that there is no binding system of precedent in the current *ad hoc* arbitration system and tribunals are not required to follow the interpretations adopted by other tribunals. However, consistent case law on many questions has led to a *jurisprudence constante*.”

10.1. c) “Investment tribunals have noted that, subject to the specific facts of each case and the specifics of the applicable treaties, tribunals should generally follow existing case law to the extent that has given rise to a *jurisprudence constante* in order to foster predictability and legal certainty.”

10.1. d) “Joint interpretative statements of the parties to an international investment agreement may provide helpful guidance to ensure consistent interpretation of investment standards.”

10.2. Recommendations

10.2. a) “When deciding a particular case, adjudicators should take into account the requirements of the rule of law for consistency and predictability of dispute settlement outcomes.”

10.2. b) “Adjudicators should determine the extent to which a consistent jurisprudence has developed on a particular legal issue and can be regarded as persuasive. Taking into account the specific wording of the investment treaties on which the jurisdiction is based and the factual context of the particular case, adjudicators should avoid departing from consistent jurisprudence absent cogent reasons for so doing.”

11. Transparency

11.1. Relevant Practices

11.1. a) “Investment tribunals have noted the importance of transparency in investment arbitration in relation to the publication of awards and decisions, accessibility of information about proceedings, as well as the participation of *amici curiae*.”

11.1. b) “Investment tribunals and treaty-makers have increasingly provided for more transparency in ISDS.”

11.1. c) “Investment tribunals have increasingly permitted submissions from *amici curiae*.”

11.2 Recommendations

11.2. a) “Adjudicators should take into account the interplay between transparency and the rule of law-demands of consistency, predictability, efficiency and equality of parties.”

11.2. b) “Adjudicators should take into account the nature of the dispute and the extent of the public interest implicated in considering whether or not to encourage the parties to agree to transparency measures, such as the publication of awards and decisions as well as the accessibility of information about proceedings.”

11.2. c) “Adjudicators should take into account the nature of the dispute and the extent of the public interest as well as the interests of non-disputing parties in considering whether or not to admit *amici curiae*.”