The Rule of Law in International Investment Law and Arbitration as Reflected in the Work of the ILA

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Contents

Abstract

The relationship between the rule of law and international investment law and arbitration was the focus of the International Law Association (ILA) Committee on "Rule of Law and International Investment Law". From 2016 to 2024, this committee focused on analysing the rule of law aspects contained in substantive investment protection standards as well as the rule of law issues arising from investor-state dispute settlement (ISDS). Accepting that the rule of law has no clearly defined and universally accepted meaning, the Committee chose to use the rule of law notion adopted at the UN level as a yardstick to assess both substantive and procedural international investment law. It has done so in two extensive reports adopted in 2022 and 2024 and a final resolution containing a brief version of Relevant Practices and Recommendations, mostly directed at adjudicators to ensure adherence to rule of law principles when interpreting investment standards and when conducting ISDS proceedings. This contribution is intended to provide an overview of the Committee's work and to situate it in the broader context of the discussion about the rule of law and investment law and arbitration.

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A. Introduction and Background

In 2015, the International Law Association (ILA) established a Committee on Rule of Law and International Investment Law[1] with the mandate "to study rule-of-law implications of international investment law on both substantive and procedural matters."[2] Thus, the Committee focused both on the way how "substantive protections found in treaties attempt to ensure government decision-making based on the rule of law"[3], and on the extent to which "investment arbitration itself operates in a manner that is consistent with the rule of law."[4]

This work is situated in the broader debate about the legitimacy of the current system of ISDS mostly in the form of investor-state arbitration (ISA). What has been partly described as a backlash against investment law[5] is a criticism that this method of dispute settlement would lead to unclear outcomes as a result of divergent interpretations of identical or similar standards, deprive states of their sovereign policy choices, and operate with an inherent pro-investor bias.[6] In rule of law terms, such criticism particularly translates as lack of predictability/consistency and lack of equality of the parties. Regardless of whether the criticism was justified or not, it served as an important reminder that any dispute settlement system needs to retain the confidence of its users in order to continue being used.

At the same time, the criticism led to various efforts of reforming the system, ranging from attempts to modernize existing investment treaties, mostly aimed at substantive standards,[7] but also partly addressing procedural issues,[8] to comprehensive reform proposals of ISDS within the framework of UNCITRAL. This led to the establishment of Working Group III, expressly tasked with a broad mandate to "(a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission."[9]

1 The *ILA Committee on Rule of Law and International Investment Law* was established by the ILA Executive Council in 2015.
2 See the *ILA Committee on Rule of Law and International Investment Law* mandate in its committee description, available at https://www.ila-hq.org/en_GB/documents/rule-of-law-international-investment-law-committee-description (28/10/2024).
3 *Ibid.*
4 *Ibid.*
5 See, e.g., *Waibel/Kaushal/Chung/Balchin* (eds.).
6 See, e.g., *Van Harten*, pp. 152 ff.; *Schneiderman*; *Van Harten*, in: Schill (ed.), pp. 627 ff.
7 See, e.g., *Titi*, EJIL 2015/3, pp. 639 ff.; *Monti/Fermeglia*, J. Int. Arb. 2024/2, pp. 155 ff. See generally *De Mestral/Lévesque* (eds.).
8 See, e.g., Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions, JWIT 2020/2-3; *Kinnear*, U. St. Thomas L.J., 2021/2, pp. 209 ff.
9 Report of the United Nations Commission on International Trade Law (3–21 July 2017), UN Doc. A/72/17, para. 264.

It was against this background that the ILA Committee on Rule of Law and International Investment Law with a membership of roughly 50 experts in the field, serving in their individual capacity after having been nominated by over 25 national branches of the ILA, addressed its twofold mandate.

B. Rule of Law Concept Used

At the beginning of its work, the ILA Committee devoted considerable time to agree on a shared notion of the concept of the rule of law which has, of course, developed in particular legal cultures and with particular features.[10] Committee members were careful not to rely on common and/or civil law concepts of the rule of law/*état de droit*/*Rechtsstaat* alone but to ensure that a globally accepted rule of law notion served as an analytical framework for its deliberations.[11] The Committee was also aware of the controversial debate whether something akin to an international rule of law existed.[12]

At the end of this initial process the Committee agreed to use the rule of law notion used by the UN,[13] less as a concept of an international rule of law than a rule of law notion that focuses on the rule of law within states. For this purpose, a rather precise definition of the rule of law was found in the UN Secretary-General's 2004 "Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies".[14] This report refers, inter alia, to "(…) the demands of equal enforcement and independent adjudication of legal rules and principles as well as fairness in the application of the law, legal certainty, the avoidance of arbitrariness and procedural and legal transparency."[15] All these procedural rule of law demands are clearly addressed to the judiciary and appeared particularly relevant for ISDS as well. Similarly, the 2012 "UN General Assembly High-Level Declaration on the Rule of Law"[16] was regarded as useful because it was consented to by the most

10 See *Bingham*; *Tamanaha*.

11 *ILA Committee on the Rule of Law and International Investment Law*, Report 2016 (2016) 77 ILA Rep Johannesburg Conference, p. 331.

12 *Brownlie*; *Chesterman*, AJCL 2008/2, pp. 331–361; *Koskenniemi*; *Allott*; *Wood*, in: M. Pogačnik et al (eds.), pp. 431 ff.

13 *Reinisch*, ZEuS 2019/3, pp. 337–348.

14 See *United Nations Security Council*, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, 23 August 2004.

15 *Ibid*., para. 6 ("The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.").

16 *UNGA*, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1, 30 November 2012.

representative international body. This declaration emphasizes various due process elements of the rule of law, such as "(…) an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice (…)."[17] Furthermore, it stresses the need for judicial independence and impartiality as "an essential prerequisite for upholding the rule of law"[18] as well as effective "access to justice."[19] In addition, it also endorses a more substantive concept of the rule of law when it refers to "just, fair and equitable laws" as well as to "equal protection of the law" "without any discrimination".[20]

The Committee agreed to use this UN concept of the rule of law as a yardstick for the purposes of its analysis. It permits an assessment whether and to what extent the "substantive protections found in treaties attempt to ensure government decision-making based on the rule of law"[21] and whether and to what extent "investment arbitration itself operates in a manner that is consistent with the rule of law."[22]

C. The Specific Outcome of the Committee's Work: Reports as well as Relevant Practices and Recommendations

After having identified the rule of law concept to be applied to its analysis, the Committee decided on the outcome of its work which was, on the one hand, influenced by the ILA tradition to have not only reports, but also resolutions with normative content and, on the other hand, required by the nature of the topic which seemed to necessitate a combination of a descriptive assessment of the actual practice and separate normative sections of recommendations in light of rule of law concerns.

17 *Ibid.*, para. 12 ("We reaffirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid.").

18 *Ibid*., para. 13 ("We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.").

19 *Ibid*., para. 14 ("We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.").

20 *Ibid*., para. 2 ("We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.").

21 See *supra* text at note 2.

22 *Ibid*.

On this basis, the Committee decided to draft a resolution, containing both descriptive "relevant practices" as well as normative "recommendations." Following the Committee's twofold mandate, the recommendations or guidelines should cover both substantive and procedural issues, i.e. both the rule of law criteria found in investment standards as well as the rule of law requirements to be followed in investment arbitration.

The Committee first embarked on an analysis of the rule of law criteria found in investment standards. This led to an interim report in 2022[23] and the publication of an edited volume with contributions of Committee members.[24] Subsequently, the Committee turned to rule of law criteria which are relevant to the practice of ISDS, and which investment tribunals ought to consider and respect in their practice. Taking into account the current debate of creating a more permanent mechanism for ISDS, possibly in the form of an investment court, the Committee decided to refer generally to "ISDS" and "adjudicators" in order to encompass both arbitration and adjudication. In 2024, it presented its final report as well as a consolidated resolution containing Relevant Practices and Recommendations concerning the rule of law criteria found in investment standards, as well as rule of law requirements to be adhered to in ISDS.[25] This resolution was adopted by the ILA at its 2024 Athens conference as "Athens Practices and Recommendations Concerning the Rule of Law and Investment Law and Investor-State Dispute Settlement".[26]

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

Based on its interim as well as final report, the Committee formulated relevant practices and recommendations which will be briefly explained below. The full text of the "Athens Practices and Recommendations" is provided in an annex to this contribution.

I. Substantive Protection Standards

The interim report presented at the 2022 Lisbon Conference focused on the main protection standards contained in international investment agreements (IIAs), including bilateral investment treaties (BITs) and treaties with investment provisions,

23 *ILA Committee on the Rule of Law and International Investment Law*, Report 2022 (2022) 80 ILA Rep Lisbon Conference, p. 569.

24 *Reinisch/Schill* (eds.).

25 *ILA Committee on the Rule of Law and International Investment Law*, Report 2024 (2024) 81 ILA Rep Athens Conference [forthcoming], also available at <https://www.ila-hq.org/en_GB/committees/rule-of-law-and-international-investment-law> [noch nicht abrufbar].

26 *ILA Committee on the Rule of Law and International Investment Law*, Athens Practices and Recommendations Concerning the Rule of Law and Investment Law and Investor-State Dispute Settlement, available at <https://www.ila-hq.org/en_GB/committees/rule-of-law-and-international-investment-law> [noch nicht abrufbar]. See *infra* Annex at p. 477.

such as the Energy Charter Treaty (ECT), NAFTA/USMCA and others. Its main task was to examine "these protection standards and how they have been interpreted in practice, (…) identify relevant practices that reflect rule of law demands and then formulate recommendations for adjudicators of investment treaty disputes to assist them to uphold rule of law principles in the application of these standards."[27]

The Report as well as the practices and recommendations first addressed the question of expropriation, recognizing that the due process and non-discrimination requirements, regularly contained in expropriation clauses of IIAs "are particularly clear expressions of core rule of law demands", while the "requirement of a public purpose or interest and the need to compensate expropriated investors also reflect rule of law mandates."[28]

Based on an analysis of the relevant cases, addressing the requirements of due process[29] and non-discrimination,[30] as well as public purpose,[31] which also play a crucial role in distinguishing between indirect expropriations and non-expropriatory regulation according to the so-called police powers doctrine,[32] and the obligation to provide compensation, the Committee recommended that "[a]djudicators should assess whether the rule of law-requirements of due process and non-discrimination

27 Lisbon report, *supra* note 23, para. 8.

28 Lisbon report, *supra* note 23, para. 20. See also Relevant Practices 1.1. b) and c).

29 See, e.g., *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 435 ("Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. (…)").

30 See, e.g., *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015; *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*, Southern African Development Community Tribunal (SADC Tribunal), SADC (T) Case No. 2/2007, Judgment, 28 November 2008.

31 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 432 ("(…) a treaty requirement for 'public interest' requires some genuine interest of the public. If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.").

32 See, e.g., *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, IV D, para.7 ("(…) as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.") and *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 255 ("It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.").

as well as public purpose and compensation have been complied with when called upon to determine whether an expropriation was lawful."[33] The Committee specifically recognized the elements of proportionality and respect for the regulatory space of host states,[34] recommending that "[w]hen 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."[35]

Turning to fair and equitable treatment (FET), the Committee acknowledged that this typical and frequently invoked investment protection standard is the most relevant one to rule of law considerations – to the extent that a number of tribunals have recognized it as an "expression of the rule of law".[36] It also noted the debate whether fair and equitable treatment should be regarded as equivalent to the international minimum standard of treatment or as an autonomous standard,[37] and paid regard to the jurisprudential development of the elements of fair and equitable treatment, ranging "(…) from procedural due process or fair trial guarantees, a lack of discrimination and arbitrariness, transparency, predictability/stability, to the protection of investors' legitimate expectations."[38]

33 Recommendation 1.2. b).
34 Relevant Practices 1.1.c) and d).
35 Recommendation 1.2. d).
36 See, especially, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016–07, Award, 21 December 2020, para. 1715 ("In the case of the FET standard and of investment protection standards in general, the most useful guidance can often be found in general principles of law. (…) This includes core principles such as the rule of law, legal certainty, transparency and predictability, non-arbitrariness and nondiscrimination. Indeed, some commentators have argued that the FET standard reflects general principles of law, while others argue that the FET standard 'should properly be understood as an embodiment of the concept of the rule of law (or Rechtsstaat in the German, état de droit in the French tradition)'." [footnotes omitted]). See also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 243 (referring to certain "rule of law-elements flowing from fair and equitable treatment"); *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012–07, Final Award, 23 December 2019, para. 246 ("FET is an autonomous standard generally guaranteeing the rule of law in the treatment of foreign investors under the legal systems of host states. (…)"); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 1308 ("Absent any further guidance from the Treaty itself, it is generally accepted that the obligation to afford fair and equitable treatment (FET) contained in a treaty is a requirement that host States abide by a certain standard of conduct vis-à-vis protected investors. (…) A host State breaches such minimum standard and incurs international responsibility if its actions (or in certain circumstances omissions) violate certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor.").
37 Lisbon report, *supra* note 23, para. 42.
38 Lisbon report, *supra* note 23, para. 43.

Based on an extensive analysis of the due process element, the Committee found that the "requirement to afford due process/fair trial corresponds to a core rule of law demand as well as a fundamental human rights guarantee" which specifically requires "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."[39] It also highlighted the importance of the other fair and equitable treatment elements, recommending that adjudicators should assess whether host states have applied "unjustifiable or unreasonable distinctions to the detriment of investors,"[40] have acted "reasonably and in a proportionate way,"[41] have acted transparently,[42] with predictability/stability and proportionality,[43] and have taken into account the legitimate expectations of investors.[44]

The same rule of law perspective was used when the Committee analysed the practice of investment tribunals applying the full protection and security (FPS) standard, which partly overlaps with fair and equitable treatment,[45] but additionally provides for the crucial "peace-securing function of states based on the rule of law."[46] Taking up jurisprudential developments in ISDS practice, the Committee recommended that "[w]hen 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."[47]

Both in its interim report as well as in the relevant practices, the Committee identified "the equality of treatment function of the rule of law" as the main purpose of both the national treatment and the MFN treatment standard, regularly contained in IIAs.[48] It noted that it has become established practice of investment tribunals to use a three-step test to assess non-discriminatory treatment, comprising "the identification of a domestic [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 domestic comparator, and the absence of legitimate reasons justifying different

39 Relevant Practice 2.1.b).
40 Recommendation 2.2.c).
41 Recommendation 2.2.d).
42 Recommendation 2.2.e).
43 Recommendation 2.2.f).
44 Recommendation 2.2.g).
45 Relevant Practice 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.").
46 Relevant Practice 3.1. a).
47 Recommendation 3.2. c).
48 *ILA Committee on the Rule of Law and International Investment Law*, Report 2022 (2022) 80 ILA Rep Lisbon Conference, p. 569, para. 83; Relevant Practices 4.1. a) and 5.1. a).

treatment."[49] On this basis and given the particularly divergent jurisprudence on the effect of MFN clauses, the Committee cautiously recommended that "[w]hen 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."[50]

In addition, the Committee addressed umbrella clauses which were recognized as "serv[ing] the legal certainty and predictability aspects of the rule of law."[51] The Committee also acknowledged the main practical effect of such clauses as permitting investors to access ISDS.[52] On this basis, the Committee cautiously urged adjudicators to "(…) take into account the rule of law effect of such clauses in offering access to treaty-based dispute settlement."[53]

II. Investor-State Dispute Settlement

The final report as well as the practices and recommendations derived therefrom focus on the following core aspects: access to justice, independence and impartiality, due process, consistency/predictability, and transparency.

In regard to access to justice, the Committee took a careful stance, recognizing that demands for access to justice have not developed into a right of access to ISDS. Rather, the principle of consent to international adjudication implies that such access to ISDS depends upon the legal instruments conferring such a right. However, the Committee recognized that if access is provided for, practical issues such as high costs may negatively affect access to ISDS. Thus, it recommended that "[a]djudicators should be mindful of costs imposed on parties in ISDS – respondents as well as claimants" and "should conduct proceedings in a cost-efficient manner in order to provide effective access to justice."[54]

Independence and impartiality of adjudicators is recognized as a core aspect of the procedural rule of law concept,[55] also frequently contained in human rights instruments.[56] The Committee found that "[i]ndependence has been regarded as

49 Relevant Practices 4.1. b) and 5.1.c).
50 Recommendation 5.2. c).
51 Relevant Practice 6.1. a).
52 Relevant Practice 6.1. e).
53 Recommendation 6.2. c).
54 Recommendation 7.2. b) and c).
55 *Bingham*, pp. 90 ff.; *Tamahana*, p. 124.
56 Article 10 Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), 71 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."); Article 14(1) International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, 999 UNTS 171 (1976) ("All persons are equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"); Article 6(1) European Convention on Human

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."[57] It also highlighted the importance of disclosure rules and challenge procedures as well as set-aside and non-recognition/non-enforcement proceedings as important procedural tools to guarantee the independence and impartiality of adjudicators.[58] On this basis, the Committee recommended that "[a]djudicators should maintain both structural independence and the appearance of independence from the parties and their counsel, and should remain free from actual and/or perceived bias," and that they "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."[59]

In its report, the Committee noted that the concept of due process or fair trial has its roots in the customary international law notion of denial of justice[60] and has been further refined in various human rights treaties.[61] In this regard, the equality of arms or equal treatment of the disputing parties has been identified by the International Court of Justice as a core element of a fair trial or "the requirements

Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 221 ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"); Article 8(1) American Convention on Human Rights: "Pact of San José, Costa Rica" (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."); Article 7(1)(d) African Charter on Human and Peoples' Rights (adopted 1 June 1981, entered into force 21 October 1986) 1520 UNTS 217 ("The right to be tried within a reasonable time by an impartial court or tribunal.").

57 Relevant Practice 8.1. b).

58 *ILA Committee on the Rule of Law and International Investment Law*, Report 2024 (2024) 81 ILA Rep Athens Conference [forthcoming], para. 51.

59 Recommendation 8.2 b) and (c).

60 *ILA Committee on the Rule of Law and International Investment Law*, Report 2024 (2024) 81 ILA Rep Athens Conference [forthcoming], para. 61; *Paulsson*.

61 See the human rights provisions cited in footnote 56.

of good administration of justice."[62] That "the parties [be] treated with equality"[63] is a core principle of most arbitration rules. Thus, the "equality of the parties" and the right to be heard equally ("equality of arms") have long been considered to be the cornerstone of arbitral due process[64] and a central element of the rule of law.[65]

The Committee's report finds that while arbitral tribunals are typically considered to afford equal treatment to the parties and respect their right to be heard as well as due process more generally, there is some criticism with regard to the length of ISDS proceedings.[66] It also highlighted the importance of procedural mechanisms ensuring respect for due process by investment tribunals, either through the ICSID annulment procedure[67] or set-aside grounds in national courts.[68] On this basis, the Athens Resolution stated, among others, that "[a]djudicators are under the obligation to afford the parties the right to be heard and to be treated with equality" and that "[r]espect 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."[69]

Turning to consistency and predictability, the Committee noted that, while investment arbitration like other forms of international dispute settlement is not subject to a system of binding precedent,[70] the rule of law demand of legal certainty also extends to expectations of generally predictable legal outcomes in case of dispute settlement.[71] Thus, like other adjudicatory bodies investment tribunals have

62 ICJ, *Judgments of the Administrative Tribunal of the ILO upon complaints made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77, 86 ("The principle of equality of the parties follows from the requirements of good administration of justice."). See also *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, ICJ Reports 2012, 10, para. 47.

63 Article 17 (1) first sentence UNCITRAL Arbitration Rules 2021 ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.").

64 *Blackaby/Partasides/Redfern/Hunter*, 6.11 *et seq.*

65 *Institut de Droit International*, Resolution: Equality of Parties before International Investment Tribunals, 80-I AnnIDI (2019), p. 1 et seq. (referring in its preamble to "the principle of equality of the parties [as] a fundamental element of the rule of law that ensures a fair system of adjudication (…).").

66 *ILA Committee on the Rule of Law and International Investment Law*, Report 2024 (2024) 81 ILA Rep Athens Conference [forthcoming], para. 67.

67 Article 52(1)(d) ICSID Convention ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (…) (d) that there has been a serious departure from a fundamental rule of procedure (…)").

68 See, e.g., Article 34(2)(a)(ii) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, UN Doc. A/Res 40/72 (1985) and UN Doc. A/Res 61/33 (2006); see also *Blackaby/Partasides/Redfern/Hunter*, 10.50 *et seq*.

69 Recommendation 9.2 d) and e).

70 See, e.g., Article 53(1) ICSID Convention ("The award shall be binding on the parties").

71 *ILA Committee on the Rule of Law and International Investment Law*, Report 2024 (2024) 81 ILA Rep Athens Conference [forthcoming], para. 80. See also *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL)* v. *Republic of India*, PCA Case No.

tended to follow persuasive reasoning adopted by tribunals in previous cases and developed a "*jurisprudence constante*."[72] The Committee thus recommended that "[a]djudicators 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 their jurisdiction is based and the factual context of the particular case, adjudicators should avoid departing from consistent jurisprudence absent cogent reasons for so doing."[73]

The Committee noted that transparency may be a crucial tool to enhance a consistent jurisprudence, to foster equality of the parties and for taking into account public interests.[74] It focused, in particular, on transparency of proceedings in the form of publication of awards and other documents in the course of ISDS as well as public hearings, on the one hand, and on the issue of third party/*amicus curiae* participation, on the other hand. Based on these considerations the Committee recommended that "adjudicators should take into account the interplay between transparency and the rule of law-demands of consistency, predictability, efficiency and equality of parties."[75]

E. Conclusions

The work of the ILA Committee on Rule of Law and International Investment Law specifically addressed rule of law questions. It has been able to consent to two substantive reports addressing both how substantive investment protection standards may foster the rule of law and the question whether investment arbitration operates in accordance with the rule of law. On this basis, it formulated recommendations to adjudicators to respect and strengthen rule of law aspects when applying investment protection standards and to ensure that their own proceedings are in conformity with rule of law demands. It is to be hoped that the Committee's 2024 "Athens Practices and Recommendations Concerning the Rule of Law and Investment Law and Investor-State Dispute Settlement" will assist them in this pursuit.

2016–07, Award, 21 December 2020, para. 1741 ("The principle of legal certainty is widely recognised as a fundamental component of the rule of law which, in turn, has long been recognised by international law. (...) The use of 'rule of law' as a foundational concept in these judgments has in turn been reflected in investment treaty jurisprudence.").

72 *Bjorklund*, in: Picker/Bunn/Arner (eds.).

73 Recommendation 10.2 b).

74 Athens Report, para. 92.

75 Recommendation 11.2 a).

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ANNEX

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

1.1Relevant 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/ 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/ 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*."