

EIGHTEENTH COMMISSION

**Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the
Host State under Inter-State Treaties**

Rapporteur : M. Andrea Giardina

RESOLUTION

The *Institute of International Law*,

Whereas the Institute has adopted, at its Amsterdam Session in 1957, a Resolution on Arbitration in Private International Law, at its Athens Session in 1979, a Resolution on The Proper Law of the Contract in Agreements between a State and a Foreign Private Person, and, at its Santiago de Compostela Session in 1989, a Resolution on Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises;

Emphasizing the importance of international investment for economic and social development, both in periods of expansion and in periods of crisis, and the need to ensure a balanced protection of the interests of the involved parties, guaranteeing due protection of the rights of investors and the rights of States to pursue, in a non-discriminatory way, their public and regulatory purposes;

Recalling the differences which, for a long time, have prevented the negotiation and the adoption of a general multilateral convention on the regulation of foreign investment;

Considering the increasing number of bilateral treaties and regional agreements for the promotion and the protection of investment;

Considering the important evolution permitting investors to initiate directly international arbitration procedures against States on the basis of consent to arbitration expressed by the State in an international treaty or a national law;

Considering the most recent developments relating to international investment in certain regional areas, Free Trade Areas or Preferential Trade Areas regulating both trade and investments or in conventions in specific economic sectors, and the situation resulting from European Union competence in matters of foreign investment;

Considering the large and increasing number of arbitral awards involving disputes between investors and States and the desirability of creating consistent jurisprudence that would promote reasonable predictability, and the confirmation and consolidation of the rights and obligations of both foreign investors and host States;

Considering that certain recurring problems call for the elaboration of principles enjoying wide support, and *reserving* certain more specific matters for further discussion;

Calls upon

States and international organizations parties to bilateral and multilateral treaties on investment promotion and protection,

private parties having recourse to, or participating in, arbitral mechanisms for the resolution of investment disputes as provided for in such treaties,

arbitrators appointed for the resolution of investment disputes and/or authorities in charge of the control and enforcement of arbitral awards,

public and private international institutions with responsibility for the administration of such arbitral proceedings,

to recognize and apply the following principles and rules, and promote compliance with them:

GENERAL ISSUES

Article 1

The interpretation and application of bilateral and multilateral international instruments for the protection of international investments shall be in accordance with the general rules of international law as reflected in the Vienna Convention on the Law of Treaties.

Article 2

Consistency of solutions in investment arbitration contributes to legal certainty for all actors involved. The quest for consistency does not require the mechanical application of prior practice without regard to the particular circumstances of the case or the need for the interpretation and development of the law.

Article 3

The requirements and characteristics of investment arbitral mechanisms chosen by the parties shall be respected and their effects recognized. This applies, *inter alia*, to the existence of the parties' consent (host States and investors) and the existence of an investment in conformity with the applicable international instruments, taking particularly into account the features of different ICSID or non-ICSID arbitral mechanisms.

Article 4

Arbitral tribunals, when referring to notions defined in municipal law, such as that of nationality or legal personality, shall at the same time respect the relevant rules of international law.

Article 5

The development of special foreign investment regulations in certain regional economic entities shall not impair the rights of the investors of third States acquired on the basis of the treaties entered into by these third States and the member States of such regional economic entities.

Article 6

Transparency in investment arbitration and in particular intervention of *amici curiae* shall be accommodated according to the will of the parties and in conformity with applicable arbitration rules, as well as in light of the confidentiality requirements of each particular case.

Article 7

The power of arbitral tribunals to pronounce on mass claims should be addressed by appropriate provisions in the instruments governing investment arbitration.

Article 8

Conflicts of interest shall be avoided in investor-State arbitration. Particular attention shall be given to problems that may arise from third-party funding.

Article 9

Acceptance by individuals of different roles as counsel, arbitrators, members of ICSID *ad hoc* committees must not be allowed to affect the impartiality and independence of arbitrators.

SUBSTANTIVE ISSUES

Article 10

The definition of investment is determined according to the applicable international instruments, in compliance with the rules of interpretation mentioned in Articles 1-2 and 4 above.

Given the fact that investment arbitration can be initiated by investors solely on the basis of a treaty, special weight must be given to the requirement that the investment contribute to the development of the host State, as may appear in the relevant instrument.

Article 11

Treaty clauses requiring compliance with non-treaty obligations of the State (“umbrella clauses”), frequently inserted in bilateral investment treaties, are to be interpreted taking into account the specific wording of the clause and the instrument in which they are included in order to determine whether a breach of an obligation amounts to a breach of the treaty.

Article 12

Most favoured nation treatment requires interpretation of the specific wording of the clause of the treaty in which it is inserted, in order to respect the intentions of the States parties. This is of particular significance when the MFN clause is claimed to encompass dispute settlement provisions.

Exceptions to MFN clauses are allowed for customs unions and other regional economic agreements.

MFN treatment required by an investment treaty which does not contain an umbrella clause does not apply to an umbrella clause included in a treaty concluded by the host State with a third country.

Article 13

Fair and equitable treatment, which is a key standard of investment protection, must accord investors and investments, in particular: (i) due process, (ii) non-discrimination and non-arbitrary treatment, (iii) due diligence, and (iv) respect of legitimate expectations.

The notion of legitimate expectations, as applied to the investor, shall not be construed to include mere expectations of profit, in the absence of specific engagements undertaken towards them by competent State organs.

Compensation due to an investor for violation of the FET standard shall be assessed without regard to compensation that could be allocated in case of an expropriation, in accordance with the damage suffered by the investor.

Article 14

Expropriation of foreign property, whether direct or indirect, including measures tantamount to an expropriation, is subject to the following rules. Foreign property cannot be expropriated except: (i) for public purposes, (ii) on a non-discriminatory basis, (iii) in accordance with due process of law, and (iv) against compensation.

Without prejudice to the particular provisions of the applicable treaty or of the specific agreement on which the investment is based, compensation must be: (i) prompt, (ii) adequate, and (iii) effective. As to the interpretation and application of the notion of “adequate” compensation, an appropriate balance must be assured between the interests of the investor and the public purposes of the State.

In principle, these rules are also applicable to nationalizations in the absence of specific agreed rules.
