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INTERNATIONAL STANDARDS OF INVESTMENT IN INTERNATIONAL ARBITRATION PROCEDURE AND INVESTMENT TREATIES

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RESUMEN

Debido a la importancia significativa de la inversión extranjera en el crecimiento económico de los países, especialmente los países en desarrollo, el propósito de esta investigación es revisar las normas internacionales de inversión en el procedimiento de arbitraje internacional y los tratados de inversión que han sido muy eficaces para eliminar las barreras de inversión así como para proteger y atraer a más inversionistas extranjeros a los Estados anfitriones. El método descriptivo-analítico fue aplicado en esta investigación utilizando recursos bibliográficos. El presente estudio, al describir y analizar los conceptos, ejemplos y métodos de aplicación de las normas internacionales de inversión en los tratados bilaterales y multilaterales de inversión, así como el procedimiento de arbitraje internacional, ha llegado a la conclusión de que estas normas son muy flexibles y dinámicas, y evolucionan en el tiempo.

PALABRAS CLAVE: normas internacionales, inversión extranjera, procedimiento de arbitraje internacional, tratados de inversión.

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ABSTRACT

Due to the significant importance of foreign investment in the economic growth of countries, especially developing countries, the purpose of this research is to review the international standards of investment in international arbitration procedures and investment treaties which have been very effective in removing investment barriers, as well as protecting and attracting more foreign investors in host states. The research method used in this research is descriptive-analytical using library resources. The present study, by describing and analyzing concepts and examples and methods of enforcement of international standards of investment in bilateral and multilateral investment treaties as well as the international arbitration procedure, has concluded that these standards are very flexible and dynamic, and they evolve over time.

KEY WORDS: international standards, foreign investment, international arbitration procedure, investment treaties.

INTRODUCTION

Foreign investment plays an important and crucial role in economic development so that foreign investment attraction has become one of the main directions of economic policymaking in developing countries. Importance of foreign investment in economic development urged many developing countries to create the favorable circumstances for foreign investors in their territory that it causes to flow investments towards them.

Capital importer states concerned about looting of national wealth and resources and also capital exporter states and their investors concerned about the violation of investment in the host state, so, in order to eliminate these concerns and to regulate the relations between these states in the field of investment and also to make stability, security, protection and guarantee of investments, many Bilateral Agreements on Promotion and Protection of Foreign Investment were concluded between these states that had a significant impact on the growth of foreign investment and nowadays, bilateral investment treaties are most widely used in developing countries such as Brazil.

One of the most fundamental provisions that exist in these agreements is international treatment standards that the host states are required to follow them in dealing with foreign investment. These standards include fair and equitable treatment (FET), full protection and security (FPS), national treatment (NT) and most-favored-nations treatment (MFN). Standards of fair and equitable treatment and full protection and security are independent and absolute in nature because there are no special conditions for their implementation by the host state. National treatment and most-favored-nations treatment standards are contingent or relative because their application depends on the conduct taken by the host state with respect to other investors (Salacuse, 2015 ; Brabandere, 2016, p. 2).

Now the question is whether international standards of investment have been evolved since the emergence so far? In a short answer may be said although these standards have fluctuated but certainly have evolved. Therefore, the main purpose of this study is to examine evolution of these standards by international arbitration procedure and investment treaties since the emergence so far. Accordingly, in the first part, the concept of foreign investment will be discussed. In the second part, the evolution of standards of fair and equitable treatment, full protection and security, national treatment and most-favored-nations treatment will be examined.

CONCEPT OF INVESTMENT

Discussion of investment and investment-related issues without understanding its concept would not be effective. Among jurists there is no consensus on the definition of foreign investment and they have provided various definitions of investment and despite numerous bilateral and multilateral treaties concerning foreign investment, general and uniform definition is not mentioned in them. Accordingly, the concept of investment has not been determined precisely because of fragmentation and lack of coherence.

Although a comprehensive discussion about the concept of investment is not the subject of this article but in this section, I will try to reach a unit definition with reviewing bilateral and multilateral treaties and state practice and international arbitral awards.

Investment's origin is in economic and in the past, there were definitions with economic aspects and its legal aspects were not considered but when the term was first used in investment agreements it was necessary to be defined as a legal concept.

In practice, to provide legal means of investment, two conceptual approaches have been developed. One, bilateral and multilateral treaties and the other, practice of states and tribunals. In the first approach, bilateral and multilateral treaties usually at the beginning of agreement provide typically their own definition of investment in detail. The second approach is based on the usage of the term in regular economic parlance and providing the interpretation and application to the practice of states and tribunals (Dolzer & Schreuer, 2012, p. 61).

According to the first approach, international investment agreements usually define investment in very broad terms. They refer to "every kind of asset" followed by an illustrative but usually non-exhaustive list of assets, recognizing that investment forms are constantly evolving (OECD, 2008, p. 9). So, most of the treaties, adopt an asset-based, rather than a process-based, definition of investment (Salacuse, 2015, p. 27).

There are many bilateral and multilateral treaties¹ provided broad definitions of investment and they try to cover any financial rights by the concept of investment and put it under international protection but in the following only two cases will be mentioned.

¹ For reading more see: North American Free Trade Agreement (NAFTA), article 1139. Agreement on Promotion and Protection of Investment in ASEAN, article 3 (1). Germany-Pakistan bit 1959, article 8 (1). Free Trade Agreement between the EFTA States and the United Mexican States, 2000, article 45.

For example, in multilateral treaties, according to article 1(6), The Energy Charter Treaty, “investment” means every kind of asset, owned or controlled directly or indirectly by an investor. In bilateral treaties, the agreement between the United States and Chile stated that “Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”². This agreement in addition to the definition of investment has emphasized on its characteristics.

Now the second approach, the practice of states and tribunals is examined. A significant number of states have foreign investment rules that include a definition of investment. For example, the Albanian Law on Foreign Investments, defines ‘foreign investment’ in Article 1(3) as: every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor, which consists of: (a) real and personal property, loans, monetary obligations, intellectual property) Schlemmer, 2008, p. 54).

States define the investment in their national legislation; also, when they are parties to a bilateral agreement, they can provide a definition of investment with the consent of the other party so that in the case of any dispute could be used in arbitral tribunals.

It needs to say, if some disputes arise in the agreement before arbitral tribunals and states parties did not provide any definition of investment, the task of defining the contents and limits of the term has turned out to be complex for tribunals charged with its interpretation. Even if the parties to the agreement have expressed definition of investment but it is not transparent and comprehensive definition, the tribunal can define and interpret it (Malik, 2009, p. 18). So, In the absence of a definition of investment by the parties and also existence of vague definition, the tribunal has the right to define and interpret investment.

In case law there are four criteria for recognizing the notion of investment: a contribution of money or assets, a contribution to the host state’s economy, certain duration of performance of the contract and a participation in the risks of the transaction³. These criteria are based on three ideas. First, there can be no investment without a contribution; whatever the form of that contribution. Second, there can be no investment within a short period of time: an investment transaction is characterized by a ‘durability’ that can only be satisfied by a mid to long term contribution. Third, there can be no investment without risk, which means that

² Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, Art 10.27, 6 June 2003.

³ *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52.

the deferred compensation of the investor must be dependent upon the loss and profit of the venture. These three criteria are to be applied cumulatively (Gaillard, 2009, p. 404).

Many tribunals have confronted with the Salini criteria over the years, and they came to a variety of results. Many have simply adopted the test as it stands. Some have removed prongs or recharacterized them, while others added more elements on top of the ones that Salini initially had (Grabowski, 2014, p. 289). Although the tribunal's award in this case was a milestone in the evolution of case law in connection with the investment concept and Salini criteria could provide a model for identifying and recommending investment but because ICSID arbitral tribunals, do not follow necessarily their former practices and they attempt to define investment by interpreting the regulation between the parties so it failed to create and establish uniform procedures.

The analysis of different investment treaties and international arbitration procedures reveals that there is no general definition of investment applicable to all investment relations, despite of some common features between the definitions (Harb, 2011, p. 8), so the concept of what constitutes foreign investment has changed over time but finally according to the common points of different definitions, a less comprehensive definition of investment can be expressed as follows:

"Investment" means every kind of asset, owned or controlled by an investor and includes the following:

- Movable and immovable property and any other property rights such as mortgages, liens and pledges;
- Shares, stocks and debentures of companies or interests in the property of such companies;
- Claims to money or to any performance under contract having a financial value;
- Intellectual property rights and goodwill; and
- Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources. (UNCTAD, 2011).

INTERNATIONAL STANDARDS OF INVESTMENT

As mentioned, International standards of investment include fair and equitable treatment, full protection and security, national treatment and most-favored-nations treatment have arisen in order to encourage to investment in safe and stable situation for investor in the territory of the host State. These standards may be found in most investment protection treaties. Some arbitral tribunals have regarded some of these standards as being closely interrelated. In fact, fair and equitable treatment was realized as a comprehensive standard that embraced the other standards (Schreuer, 2013, p. 9).

The arbitral tribunal in *Plama Ltd. v. Republic of Bulgaria* believes that while these standards can overlap on certain issues, they can also be defined separately. From the tribunal point of view, the better view is that these standards, though related, are separate and autonomous⁴. So, in the following, the concept and development process of each of these standards will be examined independently and separately since the emergence so far.

I. Fair and equitable treatment

The fair and equitable treatment (FET) standard as an absolute, non-contingent and independent (Yannaca-Small, 2011; Angelet, 2011) standard is deemed the most basic standard of treatment which according to accepted standards of international law provides favorable conditions for protecting foreign investors and his property in the territory of the host state.

The Fair and Equitable Treatment standard establishes one of the most important elements available to a foreign investor to protect his investment in a foreign country, because it provides him with a certain treatment that the host state must grant regardless of the treatment given to its own nationals (Bronfman, 2006, p. 611).

Fair and equitable treatment standard is still a complex legal term although in recent years to be fully brought in most of the documents related to investment and in many international arbitration cases have been invoked but its meaning has not yet been completely clarified. So the concept of fair and equitable treatment does not have the accuracy and objectivity and it cannot be easily noted an accurate and comprehensive definition.

Each of the awards of international arbitration tribunals or international treaties is confronted with the same challenge to extract some kind of meaning from the

⁴ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, para. 184 & 164.

terms ‘fair and equitable treatment’ (Kläger, 2011, p. 3). However, a number of international arbitral tribunals tried to collect and set different ordinary definitions of this standard and with regarding to its dynamics and flexibility to achieve a precise definition. Finally in *Tecmed v Mexico* a definition of this standard mentioned that according to many scholars of international law it can be the most comprehensive definition for understanding the meaning of this standard and even in awards of other tribunals it has been invoked.

Accordingly, in *Tecmed* which concerned the withdrawal of a license for a landfill for hazardous waste, the tribunal defined FET in the following terms: The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation⁵.

Broad definitions or descriptions are not the only way to evaluate the meaning of an elusive concept such as FET. Another method is to identify typical factual situations to which this principle has been applied. In this regard, references arbitration spoken about transparency, stability and the investor’s legitimate expectations, compliance with contractual obligations, procedural propriety and due process, acting in good faith, and freedom from coercion and harassment in a fair and equitable treatment. So, these items can be considered as examples of fair and equitable treatment standard that they can be helpful in new understanding of the standard but discussing each of these items is beyond the scope of this article.

It should be noted, this standard is often used in bilateral investment treaties (BITs) and its main purpose is to fill possible gaps in regulations that protect investors in order to obtain the level of favorable protection of investor.

So, the great majority of BITs have included fair and equitable treatment clauses. There is little difference in the wording of BITs on this point. They express that investments of investors of either contracting party shall be accorded fair and equitable treatment in the territory of the other contracting party, or something very

⁵ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 Award, 29 May 2003, para. 154.

similar (Lowe, 2007, p. 78). Therefore, inserting this standard in bilateral treaties causes to increase desirability of the host state in order to attract foreign investment because the host state indicates other countries that interest of foreign investment owners is safeguarded as fair and equitable.

Now here is the question that if the obligation of fair and equitable treatment is not specified in investment agreements between the parties or even if it exists but not explicitly specified, we can invoke to this standard by virtue of customary international law in international arbitration tribunals?

In response, it can be stated that the FET obligation today remains a treaty-based standard of protection. Therefore, there is no legal basis for an investor to claim the general benefit of FET protection before an arbitral tribunal whenever the standard is not explicitly mentioned in a treaty, the domestic law of the host State or in a State contract (Dumberry, 2016a, p. 23). So it is not available to foreign investors under general international law (Dumberry, 2016b, p. 80).

Fair and equitable treatment may be considered to be at the heart of investment arbitration because of the expanse of factual situations related to host state actions affecting the rights and interests of the investor (Dolzer, 2014, p. 10). Therefore, it can be said that this standard has become an integral and essential element of international arbitration on the issue of investment. Scope, importance, expansion and the increasing development of fair and equitable treatment standard with reviewing some international arbitration tribunal's awards will be observed in the following.

The tribunal in *Genin v. Estonia* stated that under international law, this requirement is generally understood to "provide a basic and general standard which is detached from the host State's domestic law⁶." Therefore, fair and equitable treatment standard is a norm of international law (Tudor, 2008, p. 26) and it should not be analyzed and meant by national law of the host state. In fact, the origin of fair and equitable treatment standard is exclusively in the values of international law and the host state is responsible for obligations arising from it and its application is not dependent on the discretion of the host state. However, the authors, referring to the judgments of the arbitral tribunals in the cases of *Tecmed v. Mexico*⁷, *MTD v. Chile*⁸,

⁶ Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001, para 367.

⁷ Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, supra note 5, paras.155-56.

⁸ MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, 25 May 2004, paras. 110-112.

Occidental v. Ecuador⁹, Enron v. Argentine¹⁰, Saluka v. The Czech Republic¹¹, as well as the study conducted by the UNCTAD Secretariat on the standard of fair and equitable treatment, maintain that this standard is not a rule of international law and still has a treaty base (UNCTAD, 2012, pp. 23-29).

The tribunal in *Noble v. Romania* has reminded, generally, of the scope of the standard. It stated (FET) to be a more general standard which finds its specific application in inter alia the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor.¹²

The tribunal in *Swisslion v. Macedonia* subscribed “to the view expressed by certain tribunals that the standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors”¹³.

In the case of *Enron v. Argentina* tribunal positioned the fair and equitable standard in the evolutionary context of international law so that in this case it concluded in specific context, fair and equitable treatment may be beyond customary international law¹⁴. It should be noted the FET standard is not a rule of customary international law (Dumberry, 2016a, p. 80).

The Tribunal in *ADF v. United States* in interpreting Article 1105 of the NAFTA, agreed: (...) that the customary international law referred to in Article 1105(1) is not ‘frozen in time’ and that the minimum standard of treatment does evolve. ... [W]hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development¹⁵. Accordingly, fair and equitable treatment standard is constantly evolving and improving.

⁹ Occidental Exploration and Production Company v. Ecuador, UNCITRAL, Award, 1 July 2004, para 173.

¹⁰ Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras 255.

¹¹ Saluka Investments BV (The Netherlands) v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006, paras. 286-295.

¹² Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 Sep. 2005, para. 182.

¹³ Swisslion Doo Skopje v. Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16, Award, 6 July, 2012, para 273..

¹⁴ Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras 256—8.

¹⁵ ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, para 179.

Fair and equitable is a flexible standard, whose normative content is being constantly expanded to include new elements. Because of this flexibility, it is the most often invoked treaty standard in investor-State arbitration (Yannaca-Small, 2011, p. 111). For instance, The Tribunal in *Waste Management v. Mexico* noted that ‘the standard is to some extent a flexible one which must be adapted to the circumstances of each case’¹⁶.

The Tribunal in *PSEG v. Turkey* stated that the standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate... the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable¹⁷. In this case, the tribunal refers to the expansion and flexibility of this standard.

As described above, International arbitration tribunals have applied the fair and equitable treatment standard in many disputes and now considerable legal precedent in this context is developed. So, with the progress of the arbitration procedures, examples inferred from this standard is unlimited and it has the ability to extension and development (Dolzer & Schreuer, 2012, p. 160), and this shows that this standard will be more precise by the judicial procedures and as a result it is not static and is evolving.

However, according to Rudolf Dolzer There are some reasons for evolution of the fair and equitable treatment standard. Firstly, bilateral investment treaties only set forth limited number of substantive absolute standards. Secondly, the FET rule is certainly the broadest of all of them, susceptible to cover a much wider range of activities than other rules (Dolzer, 2014, p. 10).

2. Full protection and security

The second standard is a full protection and security (FPS) standard. It can be a complement to fair and equitable treatment and like fair and equitable treatment standard is general in nature and its flexibility makes it apply to different situations.

Most investment treaties contain provisions granting protection and security for investments. Many of these treaties, including the North American Free Trade Agreement (NAFTA), in article 1105 (1) and Energy Charter Treaty (ECT), in article 10 (1) refer to ‘protection and security’ (Schreuer, 2010, p. 353). The wording of

¹⁶ *Waste Management, Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, para 99.

¹⁷ *PSEG Global Inc. v. Republic of Turk.*, ICSID Case No. ARB/02/5, Award, 19 Jan. 2007, paras 238-239.

these provisions implies the notion that the host state is committed to adopt some measures to protect foreign investors against unfavorable events and harmful acts.

Concerning the scope of this standard in one of arbitral awards is stated: This standard imposes an obligation of vigilance and care by the State under international law comprising a duty of due diligence for the prevention of wrongful injuries inflicted by third parties to property of aliens in its territory¹⁸. Of course, it does not mean that any damage to investment of investors will be included but it means more specifically protection from the physical integrity of investment against the host state intervention.

Also in this regard, the tribunal in *Saluka v The Czech Republic* noted that the standard applies essentially when the foreign investment has been affected by civil strife and physical violence¹⁹.

In relation to the issue that the host state is only responsible for third parties to avoid violence, in *Biwater Gauff v. The Republic of Tanzania* the arbitral tribunal noted that “full security” standard is not only limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself²⁰. So the task of physical protection and providing security for foreign investors, in addition to violations resulting from acts of private parties it also includes violations of state institutions.

According to this standard the host state responsible for preventing violations on investor and his or her property. The question comes to mind whether in all circumstances the host state responsible for the violations and damage to investors?

In response, it can be referred to the *Tecmed* tribunal which it held that “the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it”²¹. It should be noted, although this standard does not cause to absolute responsibility of the host state but it should exercise due diligence to protect foreign investment.

The ‘due diligence’ approach suggests that the host state must only make its best efforts to protect foreign investors from physical harm that may result from civil unrest or other such disturbances (Collins, 2011, p. 231; Zeitler, 2010, pp. 199-210). For instance, in *(AMT) (USA) v. Republic of Zaire* the tribunal held that the host State “must show that it has taken all measures of precaution to protect the

¹⁸ *Ulysseas, Inc v. Ecuador*, UNCITRAL, Final Award of 12 June 2012, para 272.

¹⁹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 483.

²⁰ *Biwater Gauff v. The Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 730.

²¹ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, supra note 5, para. 177.

investments of [the investor] in its territory”²². As a result, it can be said that the host state to prevent such violations does not have completely explicit and inflexible commitment so the host state’s commitment under this standard will be a kind of obligation to result and not be an obligation to means.

When the host state exercises essential protection of investors and his or her property with reasonable treatment but according to some circumstances the investor or his property damaged, under this standard the host state cannot be blamed.

Although in the past, role of this standard was to protect investor against unrests and physical violence but now this role has been developed and expanded so that some international awards have considered scope of the standard beyond physical security and it includes judicial and legal protection.

Some awards deem the standard of full protection and security to extend beyond the mere physical safety So that the host state is obliged besides its military forces provides the judicial and administrative system to protect the interests of investors (Cordero Moss, 2008, p. 144). For instance, the tribunal in *Wena v Egypt* stated that one of the violations of the obligations connected with full protection and security was that the State had not imposed any sanctions against those who had unlawfully seized the investment²³. In *Tecmed v. Mexico* the tribunal affirmed that the availability of the judicial system was an element of the full protection and security standard²⁴.

In relation to the legal protection some awards have exceeded the state’s commitment to makes available it’s judicial and administrative system so that the investor can protect its interests, and explicitly affirm that the standard of full protection and security extends to the stability of the investment climate and the legal framework (Cordero Moss, 2008, p. 145). For instance, the tribunal in *Siemens v. The Argentina* considered that the obligation to provide full protection and security is wider than “physical” protection and security, so it also includes the legal security of the investment and it means, substantially, the certainty of the legal system²⁵. The tribunal in *Vivendi v. Argentina* affirmed the standard apply to any act or measure which deprive an investor’s investment of protection and full security. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment²⁶.

²² American Manufacturing & Trading, In c. (AMT) (USA) v. Republic of Zaire, ICSID Case No. ARB/93/1, 21 February 1997, para 6.05.

²³ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paras. 82,84,94,95.

²⁴ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, supra note 5, para.171.

²⁵ *Siemens A.G. v. The Argentina Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para 303.

²⁶ *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic II*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para 7.4.15.

As a result, it can be said that the main purpose of this standard was traditionally an investor protection against various types of physical violence including violations of property on investment, but the concept of this standard has evolved now and has extended beyond the physical protection of investments and it includes judicial and legal protection.

3. National treatment

The third standard is national treatment which is considered as one of the important standards in international investment law to ensure optimal performance of the host state with foreign investments so that the host state in the same way which treats domestic investors also deal with foreign investors.

National treatment as a relative or contingent obligation (Bjorklund, 2008, p. 30) causes the host state does not treat foreign investment less favorable than its nationals. Therefore, this standard is based on non-discrimination (Kurtz, 2010, p. 243).

In order to set out the concept of national treatment, Article 1102(1) NAFTA reads: each party shall accord to investors of another party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Accordingly, national treatment generally means that the foreign investor and its investments are 'accorded treatment no less favorable than that which the host state accords to its own investors'. Hence, the purpose of National treatment is to oblige a host state to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals (Dolzer & Schreuer, 2012, p. 198).

What was said is the new concept of national treatment because the classical concept of national treatment was that the foreign investor should not have a better situation than the nationals of the host state and higher points for foreign investors was not considered at the international level so that if the host state conditions is lower than the minimum international standards. Foreign investor cannot request favorable international rules but on the contrary, according to the modern concept of national treatment standard if protection standards of international law are considered higher level for foreign investors, the host State should provide favorable international rules for foreign investors or host State amend their internal rules in this context in accordance with international law.

Nowadays national treatment standard is included as a minimum treatment in most bilateral and multilateral investment treaties. For example, Article 1102 North American Free Trade Area Agreement (NAFTA) and Article 10 (3) of the Energy Charter refer to national treatment standard in which the parties are obliged to treat with investors of each other that at least are similar to its investors.

The application of the national treatment standard depends not only on how the standard is expressed in a particular treaty but also on the specific facts of the case in question (Salacuse, 2015, p. 277). Thus, it is generally agreed that the application of the national treatment clause is fact-specific and there is no definite approach to interpreting the standard will be found (Dolzer & Schreuer, 2012, p. 198-199). This can represent broad scope and flexibility of national treatment standard.

In past decades, in bilateral investment treaties, the national treatment applied when 'like situations' existed. In recent years there was a change in US practice from the term 'in like situations' to 'in like circumstances'. Already all national treatment clauses applied once a business is established (post-entry national treatment). This covers both regulatory and contractual matters. Recently, some investment treaties, especially those concluded by the United States and Canada, also include provisions concerning a right of access to a national market on the basis of national treatment (pre-entry national treatment) (Dolzer & Schreuer, 2012, p. 199).

In other words, one of developments that created about the national treatment standard is that in the past, the standard was implemented after investment but now it also extended the pre-investment for providing fair access to the market of the host state for foreign investment.

Two elements in order to apply national treatment standard should be existed. First, it must be shown whether foreign investor and national investor are in the situation that they can be compared. Second, whether the treatment accorded to foreign investors was discriminatory or not?

In this regard, the tribunal in *UPS v. Canada*, noted that there are three distinct elements to review of a national treatment claim under Art 1102 of the NAFTA: (a) treatment in the areas listed in Art 1102, (b) like circumstances with local investors and investments, and (c) less favorable treatment²⁷.

The first step in applying this rule for a case requires a comparison between treatment accorded to foreign investors and domestic investors by host states (Collins, 2014, p. 163). It means that when the basis of comparison is the national investor, it should operate the same commercial class that the foreign investor works? Or that

²⁷ *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award, 24 May 2007, para 83.

there is no such requirement and national investor activity is sufficient merely in the same economic sector.

Subject of criteria for measurement and comparison of national investor activities with foreign investors in arbitral tribunals have been debated. For example, the tribunal in *Feldman v. Mexico*²⁸ interpreted “in like circumstances to refer to the same business²⁸, whereas the Tribunal in *Occidental v. Ecuador* referred to local producers in general, “and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken”²⁹.

Some arbitral tribunals believe that phrases as ‘in like situations’ and ‘in like circumstances’ should be interpreted in a broad sense. In *S.D. Myers v. Canada* the tribunal stated that the “assessment of “like circumstances” must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest”³⁰.

The standard requires that foreign investors receive at least as good treatment as domestic investors “in like circumstances” (Aisbett, Karp, & McAusland, 2010, p. 2). A national treatment analysis thus usually requires identifying the appropriate comparator against which to measure the allegedly less favorable treatment. If the claimant is not ‘in like circumstances’ with the more favorably treated entity, the national treatment claim will fail (Bjorklund, 2008, p. 30).

The second step in applying this standard is existence of discrimination. So it must be determined whether discriminatory treatment to foreign investors has taken place or not? Whether at the time of adoption of discriminatory treatment, there must be intended to discrimination by the host state? Whether Investors merely be in unfavorable conditions is sufficient for applying the standard?

In this regard, the tribunal in *Lauder v. Czech Republic* stated a discriminatory measure is one that fails to provide the foreign investment with treatment at least as favorable as the treatment of domestic investment³¹. The tribunal in *Gami v. Mexico* noted that a purely incidental differentiation resulting from misguided policy decisions does not suffice to show differential treatment³². About the importance of discriminatory intent the tribunal in *S.D. Myers v. Canada* stated “Intent is important, but protectionist intent is not necessarily decisive on its own...

²⁸ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para 171.

²⁹ *Occidental Exploration and Production Company v. Ecuador*, UNCITRAL, Award, 1 July 2004, para 173.

³⁰ *S.D. Myers Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000, para 250.

³¹ *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award, 3 September 2001, para 220.

³² *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award. 15 Nov 2004, para 114.

The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11³³. So it seems the tribunal focuses on practical impact instead of on intent.

The Tribunal in *Siemens v. Argentina* noted that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor³⁴. But in *Methanex v. United States*³⁵ and *Genin v. Estonia*³⁶ the tribunals seemed to require evidence of intent to discriminate.

In the end, it should be noted that an assessment of the few available arbitral awards provides for some clarification, but these decisions are largely based on the North American Free Trade Agreement (NAFTA) Chapter 11 and are not sufficiently varied, nor recent enough, to make an accurate analysis of the application and possible interpretation of the national treatment standard (Choukroune, 2014, p. 188).

4. Most-favored-nation treatment

The latest protection standard that is discussed in this article will be the most-favored-nation (MFN) treatment standard that it can be a complement to national treatment. According to this standard, the host state must treat third state investors as it treats foreign investors because this standard is used to prevent discrimination against foreign investment.

In relation to concept of most-favored-nation treatment standard, the International Law Commission (ILC) has defined MFN treatment as follows: Most-favored-nation treatment is a treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State or to a third State or to persons or things in the same relationship with that third State³⁷.

Therefore, most-favored-nation treatment clauses commit contracting parties to treating each other's investors no less favorably than investors of any non-party (Titi, 2016, p. 427). So, if the host state does not grant interests and favorable treatment to third state, most-favored-nation treatment will not be applied in practice.

Also, the dynamic nature of the MFN clause is intended to operate only in situations where a treatment occurs in 'like situations' or 'like circumstances'. One can see

³³ S.D. Myers Inc. v. Canada, *supra* note 30, para 254.

³⁴ *Siemens v. Argentina*, *supra* note 25, para.321.

³⁵ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, para 12.

³⁶ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, *supra* note 6, para 369.

³⁷ Article 5 of the Draft articles on most-favored-nation clauses (ILC Draft), in *Yearbook of the international Law Commission, 1978, Vol. II, part two, p. 21*. Retrieved from http://legal.un.org/ilc/publications/yearbooks/english/ilc_1978_v2_p2.pdf.

it as a normal limitation of any non-discrimination rule as it exists in most if not all legal systems. No other rights can be claimed under an MFN clause than those falling within the limits of the subject-matter of the clause (Ziegler, 2008, p. 74).

Accordingly, an MFN clause applies subject to the *ejusdem generis* principle, that is, in relation to all matters that fall within the scope of the treaty containing the MFN rule. The exact scope of an MFN clause will be determined by the wording of the clause, and the precise benefit granted will depend upon the right granted to the third State (Schreuer, 2010, p. 12). So, with regards to the *ejusdem generis* principle, most-favored-nation treatment extends only on topics that with the issues contained in the treaty, has been similarities.

The purpose of MFN clause in a treaty is to guarantee 'treatment' that an investor finds more favorable in the host state. If the *raison d'être* of MFN clause is to guarantee 'treatment' then it is essential to consider the scope and ambit of the word treatment to have a grasp over MFN clause and its applicability in a treaty framework (Thulasidhass, 2015, p. 3). Accordingly, the primary goal of this standard is that the parties treat each other at least as favorable as which they treat with third states and their investors.

Most-favored-nation treatment, on the other hand, has the effect of granting to protected foreign investors any benefit or advantage granted by the host country to investors from any third country. It thus enables such investors to take advantage of the higher standards of investor protection that may be contained in other investment treaties to which the host state is a party (Salacuse, 2015, p. 149).

The application of most-favored-nation treatment standard has an ancient history that in many treaties of friendship, commerce and navigation and Europe trade agreements in the 16th and 17th centuries was used but during the years of World War I most-favored-nation clause stagnated. After World War II, the creation of the multilateral trading system in the framework of the General Agreement on Tariffs and Trade led to this standard be revived and widely applied.

After that, in the World Trade Organization (WTO) that most-favored-nation treatment to be considered as a fundamental principle of the multilateral trading system, this standard has been applied to both trade in services and trade-related aspects of intellectual property³⁸. Accordingly, the establishment of the aforementioned agreements which led to the liberalization of trade in goods and services increased re-use of this standard.

³⁸ The report of the International Law Commission on the work of its sixty-seventh session (Official Records of the General Assembly, *seventieth session*, Supplement No. 10 (A/70/10), pp. 152-157. Retrieved from http://legal.un.org/ilc/sessions/67/a_70_10_advance_unedited.pdf.

In addition to, the growth of Development and Protection of Bilateral Investment Agreements from the 1990s onwards and continuous insertion of most-favored-nation treatment in those agreements that guaranteed international minimum standards for treating foreign investment, it led to development and prosperity of this standard.

With the growth of bilateral investment treaties, this standard was included in most bilateral investment treaties like Article 3 of Albania-United Kingdom BIT, and Article 15.4 of United States-Singapore Free Trade Agreement (FTA). It is also inserted in several multilateral treaties such as Article 10 (3) and 7 of Energy Charter Treaty, and Article 1103 of NAFTA. So, this clause is a treaty regulation and it is not the requirements of customary international law. Therefore, if it fails to stipulate in the treaty, the host state will have no obligation to enforce this standard on foreign investment.

The scope of most-favored-nation treatment clauses in investment treaties is quite various. Some of these clauses are limited and others are more comprehensive. In addition, the meaning of these clauses is different as the object and purpose of treaties which contained clauses, are different³⁹. So this standard has both expansion and flexibility.

Among numerous cases brought to ICSID⁴⁰ in recent years, *Maffezini v. Kingdom of Spain* stand out as raising issues concerning the MFN clause that the award issued in the case of *Maffezini* by The ICSID tribunal in 2000, a new era was opened on the MFN clause because with application of the MFN clause, the requirement to seek redress in the host state's courts for 18 months has been abolished but already complying with this requirement was mandatory.

The tribunal in *Maffezini v. Kingdom of Spain* concluded that "...if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle..."⁴¹ Accordingly, the foreign investor could raise an action directly before the ICSID tribunals without compliance of recourse to the host state's courts.

³⁹ For example, Article 3 (1) and (2) of the German Model Treaty, Article 3 of Netherlands Model BIT, Article 3 of the Albania/United Kingdom BIT, Article 10.3 of the US-Chile FTA, Article 15.4 of the US-Singapore FTA.

⁴⁰ For example, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 Feb 2005. *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 Sep 2006.

⁴¹ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 56.

With regard to the evolution and development The MFN treatment since the emergence so far it is considered the following main legal features: 1. It is a treaty-based obligation that must be contained in a specific treaty. 2. It requires a comparison between the treatments afforded to two foreign investors in like circumstances. It is therefore, a relative standard and must be applied to similar objective situations. 3. An MFN clause is governed by the *ejusdem generis* principle, in that it may only apply to issues belonging to the same subject matter or the same category of subjects to which the clause relates. 4. The MFN treatment operates without prejudice to the freedom of contract and thus, States have no obligation under the MFN treatment clause to grant special privileges or incentives granted through a contract to an individual investor to other foreign investors. 5. In order to establish a violation of MFN treatment, a less favorable treatment must be found, based on or originating from the nationality of the foreign investor (UNCTAD, 2010, p. xiv).

Finally should be noted, although there are some developments about the most-favored-nation clause that had taken place since 1978, including the expansion of the application of MFN in the context of the WTO, the pervasive inclusion of MFN provisions in bilateral investment treaties and investment provisions in regional economic integration arrangements, and the specific difficulties that had arisen in the interpretation and application of MFN provisions in investment treaties but MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today⁴² that it has always been used as a guide for the interpretation of this clause by the international dispute settlement authorities.

CONCLUSION

In today's world foreign investment is one important component of international economy so that it plays an important role in the economic development of countries, especially developing countries. Therefore, foreign investment attraction has become one of the main directions of economic policymaking in developing countries. In this regard, the aforesaid countries compete with each other by making different conditions for foreign investors in their territory in order to attract more foreign investments.

However, foreign investment attraction in any country needs proper conditions. So, a set of standards arose in order to attract foreign investment and to encourage to investment in safe and stable situation for investor in the territory of the host state.

⁴² See: The report of the International Law Commission on the work of its sixty-seventh session, *supra* note 38, pp. 152-157 and p.182.

These standards are treaty-based and are not a rule of customary international law. These standards include fair and equitable treatment, full protection and security, national treatment and most-favored-nations treatment.

These standards cause that the host state acts in good-faith with foreign investors without violating its sovereignty. Therefore, the main purpose of the standards is that they consider legitimate expectations of the parties and cause to increase the host State favorableness to attract foreign investment. Accordingly, the common point of these standards is that non-compliance with obligations arising from them leads to loss of the host state favorableness for foreign investment.

Importance, expansion, flexibility and scope of aforesaid standards were evolved because of the increasing development of foreign investment. A significant increase of Bilateral Agreements on Promotion and Protection of Foreign Investment and application of protection standards in these agreements and in addition, remarkable development of judicial procedures in relation to disputes arising from the application of these standards indicates that these standards will be more precise and as a result they are not static and are evolving. Accordingly, today these standards can be applied as a protection system of foreign investment.

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