The Fair and Equitable Treatment Standard in Armenia – USA BIT (1992)

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Keywords: *International investment law, Investments, Public International law, Fair and Equitable Treatment, Biliteral Investment treaty, the Republic of Armenia, United States*

Currently, the Republic of Armenia is a party to 42 bilateral investment treaties (BITs). Most of these BITs were signed during the first decade of independence[1] coinciding with the sharp rise in the amount of bilateral investment treaties worldwide[2]. While there were 700[3] BITs in force, at the beginning of the 1990s the amount reached to almost 3000 by 2018. Trying to identify the international investment network, Julie A. Maupin once notably stated:

"*Textually, the regime is a 'spaghetti bowl' of around 3000 overlapping bilateral and regional treaties, tens of thousands of transnational contracts, and an unknown number of domestic statutes, whose purported aim is to stimulate economic development by attracting and protecting foreign investments within the sovereign territories of host states*"[4]

The whole idea behind the BITs and International investment agreements (IIAs) is to encourage the movement of capital from one country to another which will lead to prosperity for all countries concerned. There are many factors besides BITs that can influence the investment decision. Those factors are the quality of the workforce, whether there is peace and tranquility in the country, the size of the market available, and many other commercial and economic factors that can influence the investment decision. Despite all this, the existence of a BIT or several BITs is of significant importance to the investor. First of all, it is a signal to the investors that the investments are welcomed, and second, it is an indication that the investments will be treated fairly and equitably.[5]

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[1] Investment Policy Hub, Section on Armenian Bilateral Investment treaties, *available at*http://investmentpolicyhub.unctad.org/IIA/CountryBits/9, (last visited, May 17,2018)

[2] United Nations Conference On Trade and Development (2007). *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking. Trends in Investment Rulemaking*. New York And Geneva, p. 31.

[3] Peters, P. (1996). R. Dolzer, M. Stevens, Bilateral Investment Treatie, Kluwer Law International, The Hague 1995, Dfl. 175/$124/£ 75. *Netherlands International Law Review*, 43(01), p.1.

[4] Julie A. Maupin, Transparency in International Law, United Kingdom, Cambridge, Cambridge University Press, 16 April 2003, p. 2. Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5840&context=faculty_scholarship ttps://doi.org/10.1017/S0922156514000594 [Accessed 24 June 2018]

[5]Yackee, J. (2010). Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence. SSRN *Electronic Journal*, [online] (No. 1114), p.397. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887 [Accessed 16 May 2018].

An important factor is the effectiveness of investment treaties. Enforcement mechanisms provided in the treaties make the promises made in such treaties credible. Nearly all of the BITs refer to arbitration institutions to which the investors can submit investment disputes against states. Although the investors do not always win (only around 30 percent[6] of investment disputes are being decided in favor of the investor) the amount of compensation can sometimes amount to hundreds and millions of dollars which is enough for states to recognize that they need to fulfill their obligations under the BITs and to be afraid to find themselves in investment arbitration. Not doing so might result in paying huge damages.

Armenia - United States of America BIT (Armenia-USA BIT) was signed in 1992. Its purpose also is to encourage and protect the foreign investments of one party in the territory of the other[7]. Although Armenia is a party to numerous BITs, there were only four, under which, investment arbitration proceedings were initiated. Armenia-USA BIT is the only BIT under which claims were brought against the Republic of Armenia.[8] The most recent one was brought before the International Center for Settlement of Investment Disputes (ICSID) tribunal in August 2018 and is still pending.[9]

Armenia-USA BIT is a powerful instrument offering extensive protection to persons and entities conducting business in the territories of contracting parties. Around 6 percent of foreign direct investments in Armenia is being made by US citizens and companies, in average amounting to 44 Million dollars per quarter.

Though it is highly contested[10], bilateral investment treaties are designed to promote the flow of foreign direct investments (FDIs). BITs offer a wide range of protection standards to the nationals and companies investing in the contracting states. Standards of protection vary from BIT to BIT. The most commonly appearing standards in BITs are the national treatment standard (NT), full protection and security standard (FPS), most favored nation standard (MFN) and more importantly fair and equitable (FET) standard. Our main objective in this paper will be focused on the fair and equitable treatment standard.

One of the reasons why this research is specifically important is because the Armenia-USA BIT has never been publicly interpreted by any arbitral tribunal. This

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[6] Icsid.worldbank.org. (2018). *The ICSID Caseload - Statistics*. [online] Available at: https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx [Accessed 17 May 2018].

[7]Treaty Between the United States of America and The Republic of Armenia Concerning the Encouragement and Reciprocal Protection of Investment, preamble, Sep. 23, 1992 http://investmentpolicyhub.unctad.org/Download/TreatyFile/144

[8] Investment Policy Hub, Section on Investment Settlement Dispute Navigator, Armenia - as respondent state, *available at* http://investmentpolicyhub.unctad.org/ISDS/CountryCases/9?partyRole=2 (last visited, May 17,2018)

[9] Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia (ICSID Case No. ARB/17/36) Registration date: 27 September, 2017

[10]Salacuse, Jeswald, W. and Sullivan, Nicholas, P. (2009). Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain. [online] 46., p.78. Available at: https://heinonline.org/HOL/LandingPage [Accessed 17 May 2018].

might create certain ambiguities for the US and Armenian investors who are planning to invest in Armenia. Examination of the BIT and comparative analysis would make it possible to understand what to expect in case of a hypothetical dispute brought under the BIT.

Fair and equitable treatment standard is the most referred standard in investment treaties[11]. But what does 'fair' and 'equitable' actually mean? What kind of protection does it offer to the foreign investor? Because FET is a conventional norm, to answer these questions one should first look into the relevant treaty provision where the FET standard is incorporated. FET provision in Armenia - United States of America BIT states the following:

Article II *2. (a) "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."*

Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) which is a codification of customary international law provides the rules of interpretation of treaties. According to the latter, the treaties need to be interpreted in good faith. It also instructs to consider the ordinary meaning of words and examine the provision considering the context object and the purpose of the treaty. In addition to that, the circumstances of the treaty and preparatory work should be taken into account as well.[12] Thus to be able to interpret the FET provision in Armenia-USA BIT one should start with the ordinary meaning of the words stipulated in the relevant provision.

In the MTD v. Chile[13] case the ICSID tribunal defined that "In their ordinary meaning, the terms *"fair' and 'equitable' used in Article 3(1) of the BIT*[14] *mean 'just', 'even-handed', 'unbiased' and 'legitimate".* The tribunal also referred to the preamble of the treaty to define the object of the latter. There the parties define their willingness to create favorable conditions for investments as well as recognizing the need to protect investments. Hence the tribunal points out that "*in terms of the BIT, the fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."*[15]

The Mondev tribunal specified that "Article 1105(1)[16]*does not confer an unfettered discretion to decide for itself on a subjective basis what is "fair" or "equitable" treatment*

[11]Dolzer, R. and Stevens, M. (1995). *Bilateral investment treaties*. The Hague; Boston: Norwell, MA, U.S.A: Kluwer Academic Publishers, p.58.

[12]Vienna Convention on the Law of Treaties, art. 31-32, 23 May,1969 https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

[13]*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* Case No. ARB/01/7 (May 25, 2004)

[14] Agreement Between The Government Of Malaysia And The Government Of The Republic Of Chile On Promotion And Investment Protection, Nov 11,1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/690

[15]*See footnote 15*, Para 113

[16] North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105(1), Dec. 17, 1992, 32 I.L.M. 289 (1993)

in the circumstances of each particular case.[17] According to the tribunal they do not possess the right to adopt their own idiosyncratic standard while answering the question what is "fair" and what is "equitable" without reference to the established sources of law.[18]

While interpreting the same article from North American Free Trade Agreement (NAFTA) *Myers v. Canada* tribunal declared that they do not have an open-ended mandate to second-guess government decision-making[19] adding that the terms "fair" and "equitable" need to be interpreted in conjunction with an introductory phrase which refers to international law.[20] The CMS vs. Argentina tribunal concluded that the FET provision in the relevant BIT is an objective requirement and is unrelated to the deliberate intention or bad faith.[21]

But still, the meaning and scope of fair and equitable treatment is unclear and remains unanswered. The interpretation of the standard depends on the arbitrator or the panel who is going to arbitratethe dispute. Even though there are thousands of FET provisions incorporated in treaties around the globe, there is no defined system of precedents in international investment law, and the tribunals are free to interpret the standard on their own.[22]In light of nonunified approach[23] towards interpreting the BITs by tribunals, it creates a valid risk that some governments could accidentally violate the standard, or else for the investors who will not-knowingly lose their protection. This originates especially a risk for the countries for which the BITs were never invoked in investment disputes and therefore have never been interpreted. The same concern has led some states for asking clarifications for newly adopted instruments. In 2016 the Comprehensive Economic and Trade Agreement (CETA) signed between Canada and European Union states included an explanation of the FET standard. According to article 8.10[24] of the latter, the fair and equitable treatment is breached by the state in the

[17] *Mondev International Ltd. Claimant v.United States Of America,* Case No. Arb(Af)/99/2 ICSID, (October 11, 2002) Para 119

[18] Orakhelashvili, A. (2008). *The Interpretation of Acts and Rules in Public International Law*. Oxford: Oxford University Press, p.258.

[19] *IS.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award (Oct. 21 2000), Para 261

[20] *Ibid*, Para. 262

[21] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8,(May 12, 2005) Para 280

[22] Kill, T. (2008). Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations. *Michigan Law Review*, [online] vol. 106(no. 5), p.856. Available at: http://www.jstor.org/stable/40041641. [Accessed 17 May 2018].

[23] Radi, Y. (2017). Fundamental Concepts for International Law: The Construction of a Discipline (E Elgar Forthcoming). [online] pp.1-2. Available at: http://dx.doi.org/10.2139/ssrn.3058250 [Accessed 7 May 2018].

[24] Comprehensive Economic and Trade Agreement (Ceta) Between Canada, Of The One Part, And The European Union and Its Member States, art. 8.10, Oct. 28, 2016, http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32017D0037

below-mentioned circumstances.

(a) denial of justice;

(b) fundamental breach of due process

(c) manifest arbitrariness

(d) targeted discrimination on manifestly wrongful grounds

(e) abusive treatment of investors, or

(f) a breach of any further elements of the fair and equitable treatment obligation adopted.

While there are some FET provisions with explanations, most of the previously concluded treaties, including Armenia-USA BIT lack any explanation or definition of the FET standard. The logical question that might arise is how to interpret the FET standard then? The answer could be found in the practice of interpretation of the standard. In fact, the CETA agreement has codified already existing arbitration practice. Besides being differently interpreted there are certain similarities in all FET provisions which allows us to generalize those. While interpreting the FET provisions, tribunals have defined the so-called FET sub-standards or FET elements which are almost the same as the CETA agreement. According to the tribunals and their interpretative similarities in the rendered awards, the following elements could be generalized. The host states are obliged to a)provide stability and transparency, b)restrain from arbitrary or discriminatory treatment, c) act in good faith, d) respect the due process and do not commit any denial of justice.[25]

Besides being differently interpreted by arbitral tribunals, FET clauses significantly differ in their formulations, and the formulation of the standard could mean a lot. Addressing the question of FET interpretation OECD in its observations concluded:

"*Because of the differences in its formulation, the proper interpretation of the "fair and equitable treatment" standard depends on the specific wording of the particular treaty, its context, the object, and purpose of the treaty, as well as on negotiating history or other indications of the parties' intent."*[26]

To begin with, we will examine where the FET standard originated from. Prior to becoming widespread in Investment treaties, FET provisions were formulated much differently than what we can witness in nowadays treaty practice. The first FET provision, appeared in Havana Charter for an International Trade Organization[27]. The clause of the latter stated that "*each Member shall accord to the trade of the other Members fair and equitable treatment."*[28]Another example of pre-investment treaty

[25]Choudhury, B. (2005). Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law. *The Journal of World Investment & Trade*, 6(2), p.301.

[26] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD retrieved 13 February 2018 http://dx.doi.org/10.1787/675702255435

[27] *Ibid*

[28] Havana Charter for an International Trade Organization art. 2 (a), Nov. 27, 1948, https://www.wto.org/english/docs_e/legal_e/havana_e.pdf

occurrence of the standard is the Economic Agreement of Bogota (1948). Article 22 of the latter establishes that "*foreign capital shall receive equitable treatment.*"[29] However these were not the only appearances of the FET provisionsin non-investment treaties.

Approximately at the same time,embryonic provisions of fair and equitable treatment started to appear in Friendship, Commerce, and Navigation treaties concluded with the US. A treaty between US and Greece in 1951 provided that each Party shall accord to the nationals, companies, and commerce of the other Party fair and equitable treatment[30]. Almost identical provisions were put inthe treaties concluded with Israel, Nicaragua, France, Pakistan, Belgium, and Luxembourg. Nowadays the reference to FET could be found in many other FCN treaties[31].

Subsequently, a lot has passed since the FET standard first appeared in BITs but still there is no generally agreed formulation for the latter. FET standards can vary from treaty to treaty. Examination of FET standards allows us to separate those into several general categories. The first type of FET standard is that formulated as a freestanding clause. An example can be found in the BIT between Cambodia and Cuba (2001) which provides:

"Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party."[32]

Some FET provisions are stipulated with reference to the customary international law. The aim of this approach is to step over the debate of whether the FET is a separate standard or it should be interpreted as a part of the minimum standard of treatment.[33]This kind of FET standards are also referred as FET unqualified. [34] In order to get an understanding how the unqualified FET provisions are formulated let's examine the US Model BIT which was issued in 2004. The first part of article 5 states:

"1.Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection

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[29]Organization of American States (OAS) Economic Agreement of Bogota art. 22, May 2, 1948, http://www.oas.org/juridico/english/treaties/a-43.html

[30] Commerce, and Navigation Treaty between the United States Of America and Greece, art. XIV (4) Aug. 3, 1951,
https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005345.asp

[31]Change Kläger, R. (2011). *Fair and Equitable Treatment' in International Investment Law*. 1st ed. New York, United States: Cambridge University Press, p.56.

[32] Agreement Between The Government of the Kingdom of Cambodia and The Government of the Republic of Cuba Concerning The Promotion and Protection of Investments, art, II(2) May 28, 2001 http://investmentpolicyhub.unctad.org/Download/TreatyFile/573

[33] Martins Paparinskis, (2013) *The International Minimum Standard and Fair and Equitable Treatment*. 1st ed. Oxford, Great Britain, Oxford University Press, p.39

[34]United Nations Conference On Trade and Development (2012) ,*Fair And Equitable Treatment, UNCAD Series on Issues In International Investment Agreements II,* New York and Geneva, p.104

and security."[35]

Then the second paragraph of Article 5 elaborates on the meaning of fair and equitable treatment standard expressly stating that the concept of the standard does not require additional treatment or beyond that which is required by the standard. The second part of the same paragraph defines that FET contains only obligations not to deny justice and respect due process of law.[36]

Even though this formulation does not exclude the unlawful act of the state as a violation of investors right, it elevates the threshold of the violation to be considered as a breach. While in case of plain meaning approach the standard of proof will be a subjective one, in case of converging approach the violation at stake will be measured against the customary international law.[37]

The third category of FET standards appearing in BITs is FET standards formulated without reference to the international law[38]. Usually, The FETs with such formulations need further clarification since the specific content of the obligation remains unaddressed. An example could be article II(2) in Cambodia and Cuba BIT[39]. According to the latter:

"Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party."

Another variation of FET standard referring to international law is the clause which limits the treatment of the standard to a bar not less favorable than that required by international law. This type of FET provision is specificallyimportant in terms of our research since Article 2(II)b[40]Armenia-USA BIT is formulated in that way. By formulating the standard in this manner and tying up the standard with international law, the drafters aimed to make it clear that the FET standard could be interpreted as granting more guarantees in contrast to, the standard of treatment under the customary international law. A prominent example could be the arbitral tribunal's interpretation of Article 10(1) of the Energy Charter Treaty. It has a similar formulation to Armenia-USA BIT Article II(2)(b). It provides:

"*Each party must(…) accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.(...)In no case shall such Investments be accorded* ***treatment less favourable than that required by international law****,(...).*"[41]

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[35] U.S. Model Bilateral Investment Treaty (BIT), art. 5(1), 2004, https://www.state.gov/documents/organization/117601.pdf

[36] *Ibid*, art. 5(2)(a)

[37] *See footnote* 2, p.44.

[38] Change Kläger, R. (2011). *Fair and Equitable Treatment' in International Investment Law*. 1st ed. New York, United States: Cambridge University Press, p.17.

[39] Treaty between Cambodia and Cuba concerning the Encouragement and Reciprocal Protection of Investment, art. II (2), 2001

[40] *See footnote 18*

[41] The Energy Charter Treaty, art. 10(1) Dec., 1994, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/energy_charter_/energy_c

The Liman Caspian Oil v. Kazakhstan tribunal while interpreting the aforementioned provision noted that FET standard formulated in this way under ECT "*went beyond and was not limited to the minimum standard under the customary international law."*[42]The tribunal also pointed out that the FET provision in ECT differs from NAFTA article 1105(1) which refers to international law. In addition to that, the same tribunal narrowed the FET standard and specified that denial of justice is a part of FET standard stipulated in article 10(1).[43]

Since the formulation of the FET clause might result in different interpretations, it is highly importantto understand how the standard will be interpreted in case of a hypothetical dispute claiming the violation of the FET clause under Armenia-USA BIT. For that reason, one needs to examine the formulation of Article II (2)(b) ofArmenia-USA BIT[44]. In our case, Article II(2)(b) refers to the international law but **specifically** provides that the treatment "*shall not be accorded less than that required by international law."* This subtle difference is a significant factor as pointed out by various tribunals. Unlike the FET standard provided in Article 1105(1) of NAFTA agreement, by expressly stating that the treatment shall be accorded not less than provided by international law, drafters included a possibility to treat the standard beyond what is required by customary international law. To reaffirm the above mentioned, we will examine similar provisions which were interpreted by various arbitral tribunals:

Identical formulations of FET standards are stipulated in BITs between USA and Ecuador[45], USA and Ukraine[46] and USA and Argentina. The BIT between USA and Argentina (Argentina-USA BIT) signed in 1991 has precisely the same formulation of FET standard as Article II(2)(a) of Armenia-USA BIT. It states "2. *a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law*." [47]

The similarity in formulation provides an opportunity to draw a remarkable comparison with Armenia-USA BIT. The interpretation of the FET standard in

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[42] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) (Jun. 22, 2010) Para 263

[43] *Ibid*, Para 268

[44] *See footnote 18*

[45] Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, art. II 3(a), Aug. 27, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1065

[46] Treaty Between The United States Of America And Ukraine Concerning The Encouragement And Reciprocal Protection Of Investment, art. II 3(a), Mar. 4, 1994 http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=244794

[47] Treaty Between United States Of America And The Argentine Republic Concerning The Reciprocal Encouragement And Protection Of Investment, art. II (2)(a), Nov. 14, 1991 https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Treaty-Concerning-the-Reciprocal-Encouragement-and-Protection-of-Investment-Argentina-United-States-of-America.pdf

Argentina-USA BIT is of particular importance since the FET provision in it has been interpreted by many tribunals.

In *Enron Company vs. Argentina*[48]case, while referring to the Article II(2)(a) of the Argentina-USA BIT, the respondent argued that the FET standard is equated to minimum treatment standard and that tribunals are not authorized to legislate the standard. To substantiate its claim, the respondent referred to several NAFTA and ICSID decisions. However, the tribunal held that the FET standard in this clause requires additional treatment or beyond that provided by customary international law.[49]

Article II. 2(a) of Argentina-USA BIT was interpreted by *Azurix vs. Argentina*[50] tribunal as well. The tribunal observed that statement "treatment no less than required by international law" refers to both FET and FPS standards whichever content is attributed to it. Last sentence of the article allows interpreting the FET standard above what is required by the international law. According to the tribunal the sentence "*treatment no less than required by international law*" sets **not a ceiling but a floor** aiming to limit the interpretation of the standards not below to what is required by international law.[51] The tribunal also notes that FET standard has evolved and the ordinary meaning of the standard nowadays is substantially similar to the international customary one.[52]

According to *Sempra Energy vs. Argentina*[53] tribunal. There are some circumstances when the FET standard is precise and clear enough to be equated with the customary international law. However, the opposite can happen as well. The FET standard might be more demanding than international minimum standard. The tribunal affirmed that the FET standard under Argentina-USA BIT might eventually require a treatment additional or beyond that what is required by theinternational minimum standard.[54]

Examination of the article II (2) b of Armenia-USA BIT, comparison of latter with FET provisions in other BITs and acquaintance with the relevant arbitral awards allowed the author to presume, with a high level of precision, that FET standard of concern is considered as qualified. Therefore, the protection offered by Article II (2) b **is not limited to the minimum standard offered by customary international law and the treatment afforded by the provision might be above that which is required by international law**.

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[48] *Enron Corporation Ponderosa Assets, L.p v. Argentine Republic*Icsid Case No. Arb/01/3, (May 12, 2005)

[49] *Ibid*, Para. 253-259

[50] *Azurix Corp. v. The Argentine Republic*Icsid Case No. Arb/01/12, (Jul. 14, 2006)

[51] Miles, K. (2013). *The Origins of International Investment Law.* New York: Cambridge University Press, p.157.

[52] *See footnote 49*, Para 361

[53] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, (Sep 28, 2007)

[54] *Ibid*, Para 302

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Արդարացի և հավասար պայմանակարգի ստանդարտը ՀՀ և ԱՄՆ միջև ներդրումների փոխադարձաբար խրախուսման և պաշտպանության մասին պայմանագրում (1992 թ.)

Աղաբաբյան Արամ

Ամփոփում

Հանգուցային բառեր. *միջազգային ներդրումային իրավունք, ներդրումներ, հանրային միջազգային իրավունք, արդարացի և հավասար պայմանակարգ, երկկողմանի ներդրումային համաձայնագիր, Հայաստանի Հարնապետություն, ԱՄՆ*

Սույն հոդվածի նպատակն է անդրադառնալ Հայաստանի Հանրապետության և Ամերիկայի Միացյալ Նահանգների միջև ներդրումների Փոխադարձաբար Խրախուսման և պաշտպանության մասին պայմանագրի (այսուհետ՝ ՀՀ և ԱՄՆ ՆԵՀ) արդարացի և հավասար պայմանակարգի ստանդարտին: ՀՀ և ԱՄՆ ՆԵՀ-ը ստորագրվել է 1992 թվականին: Համաձայնագրի նպատակն է խրախուսել եւ պաշտպանել մեկ կողմի օտարերկրյա ներդրումները մյուսի տարածքում: Չնայած որ Հայաստանի Հանրապետությունը կողմ է հադիսանում 42 երկկողմանի ներդրումային համաձայնագրերի, միայն չորս ներդրումային արբիտրաժային գործ էսկսվել Հայաստանի Հանրապետության դեմ այդ համաձայնագրերի համաձայն: ՀՀ և ԱՄՆ ՆԵՀ-ը միակ ներդրումային երկկողմանի համաձայնագիրն է, որի համաձայն հայցեր են ներկայացվել Հայաստանի Հանրապետության դեմ:

Փորձելով սահմանել արդարացի և հավասար պայմանակարգի ստանդարտի շրջանակը՝ համեմատական վերլուծություն է արվում ՀՀ և ԱՄՆ ՆԵՀ-ի և այլ երկրների միջև կնքված ներդրումային երկկողմանի համաձայնագրերի ու միջազգային ներդրումային համաձայնագրերի արդարացի և հավասար պայմանակարգի ստանդարտների միջև: Հեղինակը նաև անդրադառնում է նեդրումային արբիտրաժային տրիբունալների մի շարք վճիռների, որոնք մեկնաբանում են ՀՀ և ԱՄՆ ՆԵՀ-ում ամրագրված արդարացի և հավասար պայմանակարգի ստանդարտին համանման հոդվածներ: Այս երկու համեմատական մեթոդներից ելնելով՝ հեղինակը փորձում է սահմանել ՀՀ և ԱՄՆ ՆԵՀ-ի արդարացի և հավասար պայմանակարգի ստանդարտի պաշտպանության շրջանակը:

Стандарт справедливого и равноправного режима в договоре между Республикой Армения и Соединенными Штатами Америки о поощрении и взаимной защите капиталовложений (1992 г.)

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Резюме

***Ключевые слова**: международное инвестиционное право, инвестиции, международное публичное право, справедливый и равноправный режим, двустороннее инвестиционное соглашение, Армения*

Цель статьи – рассмотреть стандартсправедливого и равноправного режима в договоре между Республикой Армения и Соединенными Штатами Америки о поощрении и взаимной защите капиталовложений (далее именуемыми ДИС РА и США). ДИС РА и США было подписано в 1992 году. Цель договора заключается в поощрении и защите иностранных инвестиций одной стороны на территории другой. Хотя Армения является участником многочисленных двусторонних инвестиционных договоров, было всего четыре арбитражных разбирательств, начатых против Республики Армения. ДИС РА и США является единственным двусторонним инвестиционным договором, в соответствии с которым были предъявлены претензии к Республике Армения. Последний из них был представлен в Трибунал Международного центра по урегулированию инвестиционных споров (МЦУИС) в августе 2018 года и по-прежнему находится на рассмотрении.

Стремясь определить сферу применения стандарта справедливого и равноправного режима, проводится анализ между инвестиционными двусторонними соглашениями, заключенными между другими странами. Автор также рассматривает ряд решений арбитражных трибуналов, которые интерпретируют аналогичные стандарты справедливого и равноправного режима со стандартом ДИС РА и США. На основе этих двух сравнительных методов автор старается определить рамки справедливого и равноправного режима ДИС РА и США.