AMERICAN UNIVERSITY OF ARMENIA

ՀԱՅԱՍՏԱՆԻ ԱՄԵՐԻԿՅԱՆ ՀԱՄԱԼՍԱՐԱՆ

LL.M. Program

ԻՐԱՎԱԳԻՏՈՒԹՅԱՆ ՄԱԳԻՍՏՐՈՍԻ ԾՐԱԳԻՐ

Can the FET standard in Armenia - United States of America BIT (1992) be applied in case of denial of Justice?

by

ARAM AGHABABYAN

SUPERVISOR

PROF. MESROP MANUKYAN

Contents

Introduction

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 regime, 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]

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

[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].
[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].

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 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. In recent years there was a rise in the amount of FDI from the United States. See the chart[10] below.

[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]Trading Economics, Section on Armenia Foreign Direct Investment - Net Inflows, *available at* https://tradingeconomics.com/armenia/foreign-direct-investment (last visited, May 17,2018)

Though it is highly contested[11], 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 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. Another important factor is the rise of the amount of FDI from the United States to Armenia. Nearly all FDIs from other countries have sharply decreased in 2017[12].

[11] 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].

[12] Armenian Statistical Service, Section-Foreign Direct Investments for 2017, *available at* http://www.armstat.am/file/article/sv_04_17a_420.pdf (last visited, May 17,2018)

CHAPTER 1: Fair and Equitable Treatment standard and Armania-USA BIT

Fair and equitable treatment standard is the most referred standard in investment treaties[13]. 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.[14] 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[15] case the ICSID tribunal defined that "In their ordinary meaning, the terms *"fair' and 'equitable' used in Article 3(1) of the BIT*[16] *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."*[17]

The Mondev tribunal specified that "Article 1105(1)[18] *does not confer an unfettered discretion to decide for itself on a subjective basis what is "fair" or "equitable" treatment in the circumstances*

13 Dolzer, R. and Stevens, M. (1995). *Bilateral investment treaties*. The Hague; Boston: Norwell, MA, U.S.A: Kluwer Academic Publishers, p.58.
14 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
15 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Case No. ARB/01/7 (May 25, 2004)
16 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
17 *See footnote 15*, Para 113
18 North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105(1), Dec. 17, 1992, 32 I.L.M. 289 (1993)

of each particular case.[19] 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.[20]

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[21] adding that the terms fair and equitable need to be interpreted in conjunction with an introductory phrase which refers to international law.[22] 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.[23]

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 arbitrate the 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.[24] In light of nonunified approach[25] 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[26] of the latter, the fair and equitable treatment is breached by the state in the below-mentioned circumstances.

(a) denial of justice;

(b) fundamental breach of due process

(c) manifest arbitrariness

---

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

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

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

[22] *Ibid*, Para. 262

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

[24] 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].

[25] 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].

[26] 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

(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.[27]

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."*[28]

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[29]. The clause of the latter stated that "*each Member shall accord to the trade of the other Members fair and equitable treatment."*[30] Another example of pre-investment treaty occurrence of the standard is the Economic Agreement of Bogota (1948). Article 22 of the latter establishes that "*foreign capital shall receive equitable treatment*."[31] However these were not the only appearances of the FET provisions in non-investment treaties.

[27]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.

[28] 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

[29] *Ibid*

[30] 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

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

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[32]. Almost identical provisions were put in the treaties concluded with Israel, Nicaragua, France, Pakistan, Belgium, and Luxembourg. Nowadays the reference to FET could be found in many other FCN treaties[33].

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 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."[34]

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.[35] This kind of FET standards are also referred as FET unqualified.[36] 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 and security."[37]

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

---

[32] 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

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

[34] 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

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

[36] 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

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

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.[38]

Even though this formulation does not exclude the denial of justice 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.[39]

The third category of FET standards appearing in BITs is FET standards formulated without reference to the international law[40]. 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[41]. 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 specifically important in terms of our research since Article 2(II)b[42] 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****,(…).*"[43]

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*

[38] *Ibid*, art. 5(2)(a)
[39] *See footnote* 2, p.44.
[40] Change Kläger, R. (2011). *Fair and Equitable Treatment' in International Investment Law.* 1st ed. New York, United States: Cambridge University Press, p.17.
[41] Treaty between Cambodia and Cuba concerning the Encouragement and Reciprocal Protection of Investment, art. II (2), 2001
[42] *See footnote 18*

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

the minimum standard under the customary international law."[44] 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).[45]

Since the formulation of the FET clause might result in different interpretations, it is highly important to 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) of Armenia-USA BIT[46]. 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 the similar to provisions which were interpreted by various arbitral tribunals:

Identical formulations of FET standards are stipulated in BITs between USA and Ecuador[47], USA and Ukraine[48] 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.*" [49]

The similarity in formulation provides an opportunity to draw a remarkable comparison with Armenia-USA BIT. The interpretation of the FET standard in Argentina-USA BIT is of particular importance since the FET provision in it has been interpreted by many tribunals.

In *Enron Company vs. Argentina*[50] case, while referring to the Article II(2)(a) of the Argentina-

[44] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) (Jun. 22, 2010) Para 263
[45] *Ibid*, Para 268
[46] *See footnote 18*
[47] 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
[48] 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
[49] 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
[50] *Enron Corporation Ponderosa Assets, L.p v. Argentine Republic* Icsid Case No. Arb/01/3, (May 12, 2005)

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.[51]

Article II.2(a) of Argentina-USA BIT was interpreted by *Azurix vs. Argentina*[52] 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. [53] 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.[54]

According to *Sempra Energy vs. Argentina*[55] 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 the international minimum standard.[56]

From the analysis of the FET provision in Armenia-USA BIT, it is possible to conclude that the protection from denial of justice would be considered as an element of the standard. The comparative interpretation with other FET provisions allows us to suggest that the denial of justice **is not limited to the minimum standard offered by customary international law and the treatment afforded might be above that which is required by international law**. Now let us turn to the important element of the FET standard: Denial of justice.

[51] *Ibid*, Para. 253-259
[52] *Azurix Corp. v. The Argentine Republic* Icsid Case No. Arb/01/12, (Jul. 14, 2006)
[53] Miles, K. (2013). *The Origins of International Investment Law*. New York: Cambridge University Press, p.157.
[54] *See footnote 49*, Para 361
[55] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, (Sep 28, 2007)
[56] *Ibid*, Para 302

CHAPTER 2: Denial of Justice: Fair and Equitable Treatment

After specifying the FET standard and observing it in light of different interpretation approaches, let us focus on the important element of FET: denial of justice. To understand what can amount to a denial of justice under Armenia-USA BIT we need to examine the relevant awards rendered by arbitral tribunals. But before understanding what can constitute a denial of justice in the context of International investment law one needs to consider it in a broader framework.

Denial of justice as a principle of general international law has emerged before the embodiment of the latter in IIL. Respecting due process of law is seen to be attributive to denial of justice in the sense of fairness of administrative proceedings.[57] Thus, a failure to provide due process of law would amount to a denial of justice. The procedural fairness and respect of due process of law are typical to both common law and civil law countries[58]. One of the first appearances of procedural fairness and due process of law could be found in the 5th and 14th amendments of the US constitution[59] as well as in Swiss Federal Constitution of 1874[60]. Apart from that, under international law diplomatic protection claims always entailed the application of denial of justice. [61] A reference to denial of justice is also present in Honduran Constitution of 1982 concerning the diplomatic protection issues[62].

At first sight denial of justice might seem an ambiguous notion, since it is hard to imagine the courts to deny justice. Although there have been violations of denial of justice in its most obvious meaning[63], the latter is a way broader concept than restricting ones access to court.[64]While defining the denial of justice in international law Harvard Research Draft articles on the Law of State Responsibility stated:

"*Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment."*[65]

[57]Maria Palombino, F. (2012). *Fair and Equitable Treatment and the Fabric of General Principles*. 1st ed. Berlin, Germany: Springer Nature, p.58.
[58] Paulsson, J. (2005). *Denial of Justice in International Law.* New York: Cambridge University Press, p.11. Denial of Justice in
[59] *See footnote 55*, p.75.
[60] Swiss Const. (1874), art. 4(1)
[61] *See footnote 55*, p.17
[62] Honduras Const. (1982), art. 33
[63] *See footnote 55*, p. 132.
[64] *Greece v. United Kingdom*, award, 23 ILR 306 (Mar. 6, 1956), p. 325
[65] John P. Grant and J. Craig Barker, The Harvard Research in International Law: Contemporary Analysis and Appraisal, p. 97

Albeit in the early era arbitral tribunals and many authors admitted that governments could not be held responsible for the conduct of its judiciary[66], the situation has changed over time. Nowadays the state responsibility is widely recognized. Even though the judiciary is independent from the government, it will be absurd to infer that it can be independent of the state under international law and the local legislation can be invoked as a justification for that.[67]

The same is stated in The ILC Articles on the Responsibility of States for Internationally Wrongful Acts. Article 4(1) of the latter states:

"*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever (…) and whatever its character as an organ of the central government or of a territorial unit of the State."*[68]

The denial of justice is a commonly invoked element by European Court of Human Rights (ECHR). Article 6(1) of the European Convention on Human Rights defines:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

In around half of the cases adjudicated by ECHR, the court found violations under article 6 concerning fairness and the length of the proceedings.[69] The components of article 6 include a) denial of justice in civil and criminal proceedings, b) a violation of the right to fair hearing, c) justice conducted in an untimely manner, d) Impartiality of the tribunals from the governmental branches[70]. The ECHR judgments could be reviewed in analogy with International investment law in two important aspects[71]. First, ECHR judgments could be viewed in light of interpretation under Vienna Convention on Law of Treaties. Second, a state owes obligations to its citizens under ECHR article 6(1) the same way as the host state owes obligations towards the investors in case of denial of justice under FET standard. In addition to that, some tribunals had considered ECtHR judgments in the analogy are addressing the issue of denial of justice[72].

---

[66] 21 October 1861, A. de Lapradelle and N. Politis, Recueil des arbitrages internationaux, vol. I, 78, at p. 103, para. 30

[67] de Are´chaga, J. (1978). *International Law in the Past Third of a Century.* 1st ed. p.278.

[68] International Law Commission, Draft articles on Responsibility of States for internationally wrongful acts, 2001, Article 4(1) http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

[69] The ECHR in 50 questions, *available at* https://www.echr.coe.int/Documents/50Questions_ENG.pdf , (last visited, May 17,2018)

[70] Council of Europe/European Court of Human Rights (2017). *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb)*. New York And Geneva, p.44.

[71] Gonzalez Garcia, L. (2013). The Role of Human Rights in International Investment Law. [online] p.40. Available at: https://www.matrixlaw.co.uk/wp-content/uploads/2016/05/The-role-of-human-rights-in-international-investment-law.pdf [Accessed 7 May 2018]

[72] *See footnote 19*, at para. 142.

While Article 6(1) did not establish a right of access to the court when it was signed by UK Golder v. the UK[73], ECtHR while interpreting the provision defined that the right of access constitutes an element which is inherent. It is worth paying attention to this decision. Taking into account the similarities available in ECHR, the protection offered by investment instruments and the practice of arbitral tribunals making analogies with ECHR it might be possible to observe access to the court under International Investment law as well as under Armenia-USA BIT.

While shifting our objective to the international investment law, a remarkable judgment was given on denial of justice by the Azinian[74] tribunal. The case originated because of the cancellation of the contract without giving any reasons by the Mexican authorities. After failing at domestic courts applicants initiated proceeding under International Centre for Settlement of Investment Disputes (ICSID) rules, claiming that there has been a violation of Article 1110 and 1105[75] of NAFTA. Although the claimant did not claim denial of justice tribunal in its final award has addressed the offense.[76] According to the tribunal ,"*a denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way."* In addition, the court noted that there is a 4th type of denial of justice as well and that kind of wrong surely overlaps with the notion of "pretense of the form" to mask a violation of international law[77].

The excessive verdict by the local court could amount to a denial of justice. In the Loewen vs. Mexican United States case, the jury's decision amounted to punitive damages in the amount of 400 million dollars. It did not take into account the law that punitive damages trials should be procedurally bifurcated. Additionally, the judge did not give instructions to the jury members that it is prohibited to discriminate on the grounds of nationality, race, and class.[78] According to the Loewen tribunal, all these violations would amount to a denial of justice under NAFTA article 1105(1).[79]

Although it highly depends on the arbiters who are going to arbitrate the dispute it is possible to make a useful analogy with NAFTA agreement disputes. With some level of certainty, it is possible to infer from the decision of Loewen award that the acts performed by a state authority would amount to the violation of the FET standard under Armenia USA BIT as well.

The prohibition of the investor to pursue its remedies before the arbitral tribunals can amount to a

[73] *Case Of Golder V. The United Kingdom,* EctHR, App. no. 4451/70,(Jan 20, (1956)
[74] *Robert Azinian, Kenneth Davitian, v. Ellen Baca And The United Mexican States,* Case No. Arb(Af)/97/2 Icsid, (Nov. 1, 1999)
[75] *See footnote 18*
[76] See footnote 72, Para. 99-103
[77] *Ibid*, Para. 102
[78] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* Case No. ARB(AF)/98/3, Para 74 (Jun. 26, 2003)
[79] Up page 4

denial of justice. In Himpara vs Indonesia[80] the Indonesian authorities restricted parties to participate in arbitral proceedings by securing an order from the local court[81] as well as preventing the arbitrator from appearing in the final hearings. The arbitral tribunal held Indonesia responsible for the denial of justice. It stated *'to prevent an arbitral tribunal from fulfilling its mandate in accordance with procedures formally agreed to by the Republic of Indonesia is a denial of justice"*. Similarly, in Waste Management, Inc. II vs. the United Mexican States, the claimant argued that making the use of arbitral mechanism burdensome can amount to a denial of justice, but the tribunal did not find any violation of FET in that regards.[82]

Any interference with the right to pursue the available remedies could be contested under FET in terms of denial of justice. While in some cases the threshold of the interference could be not high enough to constitute a denial of justice in case of grave breaches the interference could amount to a denial of justice under Armenia-USA BIT.

Requirement of overly burdensome documentation and denial of hearing by the domestic courts can amount to unfair and inequitable treatment and constitute a denial of justice. According to the *Dan Cake vs. Hungary*[83] tribunal, the denial of hearing due to missing documentation and a request for additional supplementary documentation is a form of denial of justice. The tribunal specified that regardless of the possible success the debtor had a right to be granted a hearing. In the mentioned case the demand for supplementary documentation made it impossible to hold a hearing within the specified time. Despite the fact that the court could have demanded the documents, the tribunal did not find justifiable the request for the documentation in advance. Besides that, the tribunal noted that the required documents were not necessary at the moment of the request.[84]

The grant to stay of execution of the judgment might constitute a denial of justice. In *Petrobart v. the Kyrgyz Republic*[85] case the tribunal concluded that the grant to stay from the execution of the award by the local court can amount to a violation of Article 10(1) of ECT since the accorded treatment by the Kyrgyz Republic was less favorable than that required by international law. The tribunal also added that the interference by the executive branch of the government with the domestic court's affairs is a clear breach of FET and is considered as denial of justice under international law.[86]

---

[80] *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara*, UNCITRAL Ad Hoc-Award of, YCA XXV (2000), 13 et seq. (May 4, 1999)

[81] Sattorova, M. (2012). Denial Of Justice Disguised? Investment Arbitration And The Protection Of Foreign Investors From Judicial Misconduct. *The International and Comparative Law Quarterly*, [online] 61(no. 1), p.233. Available at: http://www.jstor.org/stable/41350141 [Accessed 7 May 2018

[82] *Waste Management, Inc. (Claimant) Versus United Mexican States*, Icsid D.c. Case N° Arb(Af)/00/3, Para 21, (Apr. 30, 2004)

[83] *Dan Cake S.A. v. Hungary*, Icsid Case No. ARB/12/9, P146-149 (Aug. 24, 2015)

[84] *Ibid*, Para. 117

[85] Petrobart Limited v. The Kyrgyz Republic, Arbitral Award in Arbitration No. 126/2003 of the Arbitration Institute of the Stockholm Chamber of Commerce: The Kyrgyz Republic (Mar.29, 2005)

[86] *Ibid*, page 7-8

A delay in issuing a decision by the domestic court may amount to a denial of justice as well. The tribunal in C*asado and Foundation vs. Chile*[87] found that a seven-year delay by the court to provide a decision on merits amounted to unfair and inequitable treatment and therefore to denial of justice.[88]

This is just a partial illustration of the factors that could amount to denial of justice under various BITs. The next chapter will address the issue of the exhaustion of domestic remedies rule in international investment law. The local remedies rule is specially essential in terms of denial of justice claims.

[87] *Victor Pey Casado and Foundation "presidente Allende" Claimants v. The Republic Of Chile,* Icsid, D.c. In The Resubmission Proceeding Between Respondent, Case No. Arb/98/2 (May 8, 2008)
[88] *Ibid,* Para. 650-660

CHAPTER 3: The Exhaustion of Domestic Remedies Rule and Denial of Justice

Upon our analysis, we found that FET standard in Armenia USA BIT provides valid protection in case of denial of justice and that the offered protection is not limited to the minimum treatment standard. We have also examined the possible violations that could amount to a denial of justice the list of which is not exhaustive. The question this chapter intends to answer is whether the denial of justice or violation of conduct of due process by domestic courts is a subject to exhaustion of domestic remedies rule.

The exhaustion of domestic remedies rule under international law requires seeking redress within the local legal system of the state. The aim of the rule is to provide an opportunity for the state to address the wrongful conduct of domestic courts internally, prior to applying to international tribunals. No state has undertaken an obligation to provide judicial conduct free of errors. In other words, states are obliged to provide an effective legal system as a whole. The latter approach was reinstated by James Crawford in the ILC draft articles on state responsibility who emphasized that the decision of the officer in the lower instance cannot be considered as an unlawful act attributed to the state except if, there is a possibility to reconsider it.[89]

Many international human rights treaties incorporate the exhaustion of domestic remedies rule. The most obvious and commonly known example is the European Convention on Human Rights. Article 35 of the latter states explicitly that ECtHR can deal only with cases where all available domestic remedies have been exhausted justifying it by reference to general international law.[90] However, there is a slight difference between international human rights law and general international law in terms of exhaustion of domestic remedies. Unlike customary international law, the relationship concerned in international human rights law is between the state and its own citizens while in diplomatic protection claims it affects two states.[91] In other words, the customary International law ensures peace between states while the International human rights law protects human rights of nationals within the territory of state.[92]

Although many International investment treaties provide an express waiver of the rule still the local remedies rule is not as clear and straightforward as it may sound. There are numerous international investment treaties which are silent on the exhaustion of domestic remedies rule, and this could raise a concern whether the remedies need to be executed or not. To the contrary, there

[89] 2 International Law Commission (Crawford), Second Report on State Responsibility, UN Doc. A/CN.4/498 (1999) at para. 75
[90] European Convention of Human Rights, 1953, Article 35
[91]International Institute for Sustainable Development (2017). *Exhaustion of Local Remedies in International Investment Law*. IISD Best Practices. [online] p.8. Available at: https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf [Accessed 17 May 2018].
[92] Felix Amerasinghe, C. (2004). *Local Remedies in International Law*. 2nd ed. New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo: Cambridge University Press, p.101.

are also treaties which require exhausting available domestic remedies. Whether there is a waiver of exhaustion of domestic remedies in the treaty or not is a matter of interpretation. ICJ has expressed an opinion that the waiver is an important rule and by default, the rule is that there is no waiver unless it is expressly stated in the treaty. Article 26 of the ICSID convention provides:

"Consent of the parties to arbitration under this Convention shall unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."[93]

From the analysis of article 26 of the convention, it is possible to conclude that if the BIT is referring to ICSID arbitration as the only dispute settlement mechanism, the waiver rule will apply. In any other formulation of the BIT referring to ICSID convention along with other dispute resolution mechanisms, the waiver rule would apply with the consent of the parties to refer the dispute to ICSID arbitration.[94] However, the second part of article 26 allows the contracting parties to modify the waiver rule, and if the parties consented in their agreement, the waiver rule may be excluded.

There are also cases when the BIT refers to *ad hoc* arbitration only and remains silent on the local remedies rule. If the waiver stipulation is not provided at all, the situation would not be defined and crystal clear. The interpretation of the clause will become controversial since there are arguments both for and against the waiver rule. However, the answer will depend on the treaty construction and interpretation. An illustrative example of a provision with no reference to local remedies rule could be found in the article 9 of the Switzerland and Lithuania BIT (1992).[95]

Importantly for our research, there are situations where the exhaustion of local remedies rule is provided as an alternative in the relevant BIT. Article VII of Argentina-USA BIT as well as Article VI of Armenia USA-BIT provide precisely the same formulated provision:

"2. (…) *If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:*

(a) to the courts or administrative tribunals of the Party that in a Party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3".

As we can observe the articles provides three possible ways of dispute resolution. Afterwards, the third paragraph adds:

---

[93] Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, art. 26, Oct. 14, 1966 https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf
[94] *See reference 89,* P. 270.
[95] Agreement between the Swiss Confederation aod the Republic of Lithuania on the Promotion and Reciprocal Protection of Investments, art. 9 Dec. 23, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1925

"*3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:"*

By referring to article VI of the BIT, the *Lanco*[96] tribunal mentioned that the treaty provides an investor a power to choose between several ways of dispute resolution, and if the investor has given its consent to ICSID arbitration it will be the only mean of dispute resolution. The same interpretation will be valid in case of article VI of Armenia-USA BIT. While interpreting Article 26 of the ICSID convention in conjunction with Article VII of Argentina-USA BIT the same tribunal concluded:

"(…)the second sentence is precisely the waiver, by the Contracting State party, of the prior exhaustion requirement, a requirement that the State may reserve to itself, through such second sentence, which operates as a rule of judicial abstention, such that the local courts to which the State submits a dispute with an investor who is a foreign national should refer the Parties to ICSID arbitration."[97]

Felix Amerasinghe in his book "*Local Remedies in International Law"* addressed the interpretation of Article VII of the Argentina-USA BIT as well. According to the author, the exhaustion of local remedies rule will apply if the investor would exercise the option to refer to local courts or administrative tribunals. After that, the failure to exhaust domestic remedies will result in inadmissibility of the case based on diplomatic protection. However, if the investor decides not to exercise the right to refer to local courts or administrative tribunals and would go instead with the option to submit the dispute for binding arbitration the waiver of local remedies rule will apply. [98]

The same goes for Armenia-USA-BIT. As with the Article VII (2) of Argentina USA BIT Article VI (2) of the Armenia-USA BIT provides three possible ways for dispute resolution. First, that the investment disputes might be submitted to domestic courts and administrative tribunals. Second, that the dispute could be filed in accordance with any applicable, previously agreed dispute-settlement procedures. And third and most important one, provided that the national or the company did not submit the dispute in accordance with first two options and the specified six months period has passed from the date on which the dispute arose, the injured party may decide to consent in writing to the submission of the dispute for settlement by binding arbitration:[99]

At first sight article VI provides an express waiver and if the stipulated time period has elapsed from the date on which the dispute had arisen, local remedies rule cannot prevent the national or

[96] *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Para 31, (Dec. 8, 1998)
[97] *Ibid*
[98] *See footnote 89,* p. 271.
[99] *See footnote* 9, art. VI(2) and art. VI (3)

the company concerned to submit the claim to arbitration. However, this is not the case with denial of justice claims. No application will be considered admissible under a denial of justice claim unless all available and effective remedies have been exhausted within the state legal system. The practice of submitting the denial of justice claim, without the exhaustion of local remedies rule, has been contested by Mondev and Loewen tribunals.

In the Mondev case, the applicant lodged an unsuccessful appeal before the Massachusetts domestic courts. The invoked grounds for appeal were the breach of contract by Boston Redevelopment Authority (BRA) and the tortious interference by the latter. The appeal eventually was dismissed by Supreme Judicial Court first of all because the BRA enjoyed immunity and secondly because the actual breach of contract was not established since the SLA did not manifest the willingness and ability to perform the contract.[100] The applicant claimed a violation of Article 1105(1) under the NAFTA agreement. In terms of denial of justice the tribunal making a reference to the ECHR article 6(1)[101] not only found no violation of access to justice but also stated that article 1105 does not anyhow entail a right to sue BRA for tortious interference with contractual relations. The Mondev claim was dismissed.

The same approach was restated in the Loewen tribunal[102]. The applicant lodged proceedings under the same NAFTA Article 1105(1) claiming a violation of FET standard. The tribunal admitted that there was a grossly excessive verdict against the applicant by the national court amounting to a manifest injustice as that expression is understood in international law.[103] However, the court dismissed the claim due to not exhausting domestic remedies rule.[104] The tribunal expressly stated that even though there was a waiver stipulated in the treaty to acquire the consent of the state to claim the denial of justice the claimant should exhaust available domestic remedies[105].

According to the Loewen tribunal, the state should have an opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision. The requirement to exhaust domestic remedies was based on the idea that the legal system as a whole ought to be tried and failed before a judicial act becomes amenable to review by an international tribunal. The same is confirmed in the Second Report on State Responsibility to the International Law Commission which states that "*systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act."*[106] Article 21 of the report confirms that if there is an obligation of result (protect against denial of justice), then the obligation will be

[100] *See footnote 19* , Para 48
[101] See *footnote* 8
[102] *See footnote 73*
[103] *Ibid*, para. 54
[104] *See footnote 55*, p 81
[105] *Ibid*
[106] Mr. James Crawford, Special Rapporteur , State Responsibility, Document A/CN.4/498 and Add.1–4 Second report on State responsibility, by, Para. 78, (Jul. 17, 1999)

breached in case if the state will fail by its subsequent conduct to achieve the result required by that obligation[107].

Moreover, the Lowen tribunal had specified that there was no precedent known to them when the state was held responsible for its lower court decision given the fact the other adequate and effective remedies existed.[108] The reasons specified in the award are still valid and are reiterated in many subsequent awards.

Thus, the Loewen judgment and the following arbitral practice infers that in case of a possible dispute that could arise under FET standard of Armenia-USA BIT to invoke a denial of justice claim the investor must exhaust locally available domestic remedies. The exhaustion of domestic remedies rule does not apply to other cases of violation of FET standard under Armenia-USA BIT.

Denial of Justice: Post-Loewen Practice

The judicial finality rule is proven to be a problematic one. Because of that denial of justice claim not only stands alone from other invoked claims, but also it makes the invocation of the latter inefficient. In order to claim denial of justice, the investor needs to go through the long process of exhaustion of domestic remedies. And with some countries, it may last for years. This forces the investors to invoke other investment treaty guarantees than the denial of justice.

The *Saipem v Bangladesh*[109] award is the first illustration of the practice of avoidance to claim denial of justice by claiming judicial expropriation instead. The dispute arose from the interference of Bangladeshi authorities with the domestic court's affairs connected with the arbitral proceeding the claimant initiated under ICC. Contesting the jurisdiction of the tribunal the award was declared a nullity in the eye of the law by the domestic court. The claimant initiated ICSID proceedings under Italy and Bangladesh BIT claiming judicial expropriation. Bangladesh contested to the claim by invoking the requirement of exhaustion of local remedies. However, the tribunal in deciding whether the local remedies must be exhausted in case of judicial expropriation claim came to the conclusion that the **judicial expropriation does not necessarily itself amount to denial of justice**. The tribunal was also of the opinion that local remedies rule is not a requirement for the court to consider an expropriation claim.[110]

To claim a failure to provide effective means of asserting claims is another possible alternative to claiming denial of justice and going through the long path of exhausting domestic remedies. In the recent award, the Chevron v Ecuador[111] tribunal has addressed the relationship between effective

[107] Ibid, Para 56, art. 21
[108] *See footnote 55*, para. 154
[109] *Saipem S.p.A. v. The People's Republic of Bangladesh*, (Award) Icsid Case No ARB/05/7, Para 181 (Jun. 20, 2009).
[110] *Ibid,*
[111] *C*hevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador *(Partial Award on Merits)* UNCITRAL, PCA Case No. 2009-23, (Mar.12, 2010)

means standard and the denial of justice.[112] The dispute arose under Article II(7) USA-Ecuador BIT[113]. The claimant was unsuccessful in finding redress for breach of contract cases in the domestic courts.[114] In addition to that; there was an unreasonable delay and a wrongful dismissal of claims by the local courts. All this constituted a violation of obligations by the government under the BIT.

The tribunal articulated on the so-called "effective means" standard which requires parties to provide effective means of asserting the claims. The tribunal specified that the effective means standard is a *lex specialis* provision, distinct from denial of justice and is easier to be violated. The practice of Chevron tribunal was quickly absorbed by subsequent arbitral tribunals. Some tribunals even widened the application of the effective means standard to be imported from other BIT through MFN clause.[115]

Effective means standard is provided in many United States BITs and international investment agreements. Armenia USA BIT is not an exception as well. Article II(6) of the treaty provides:

"*6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations." [116]*

The effective means standard in Armenia-USA BIT is identical to the provision in Ecuador-USA BIT. Although the FET standard completely covers the acts amounting to a denial of justice, recent arbitral practice showed that it is possible to bypass the exhaustion of local remedies rule by submitting a claim under effective means standard instead.

[112] Sattorova, M. (2013). 'Effective Means' Means? The Legacy of Chevron v. Ecuador. *Columbia Journal of Transnational Law*, [online] 52(no. 1), p.2. Available at: http://www.jstor.org/stable/41350141 [Accessed 7 May 2018].
[113] *See footnote* 48
[114] *See footnote 111, para. 206-207*
[115] *White Industries Australia Limited v. The Republic of India*, Final Award, (Nov. 30, 2011)
[116] *See footnote* 8, Article 2(6)

Conclusion

After examination of the article II (2) b of Armenia-USA BIT and comparison of latter with FET provisions in other BITs, it was possible to conclude that respecting due process of law and prohibition of denial of justice are inherent elements of the FET provision of Armenia-USA BIT. Further observations of identical FET provisions 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. To put it in another way, the protection offered by Article II (2) b is not limited to the customary international law. Arbitral tribunals were of the opinion that the FET standard as formulated in Armenia-USA BIT offers a protection that could be beyond that offered by customary international law. The contracting states should be scrupulous in their actions not to violate the FET standard since the treatment accorded to the investors should be not only in conformity with customary international law but should correspond to the meaning of the words "fair" and "equitable" stipulated in article II (2) b.

Denial of justice in international investment law is not limited to its most obvious meaning, which is only as refusal of the courts to entertain a claim. The examination of the relevant arbitral decisions has revealed other forms of denial of justice by the host states. Interference with the right to pursue domestic remedies or overly burdensome requirements to provide unnecessary documentation could be considered as violation of prohibition of denial of justice as well. The grant to stay of execution by domestic courts of an arbitrated judgment might constitute a denial of justice. Another form of the violation could occur if the dispute is subjected to undue delay by the domestic courts. Although, this is not intended to be an exhaustive list of all possible violation of the prohibition of denial of justice under Article II (2) b, but these findings could serve as valuable guidelines for states and investors to avoid possible breaches of the FET standard in Armenia-USA BIT.

While bringing a denial of justice claim under Armenia-USA BIT the investors should be aware of the exhaustion of local remedies' precondition, first introduced by Loewen tribunal. According to the tribunal an investor should exhaust all available and effective domestic remedies to be able to claim denial of justice against a host state. This could become a serious obstacle for the investor of the contracting party from bringing a claim before investment arbitral tribunal. Not only the process of exhausting all available and effective remedies would be excessively time consuming, but it might also question the very effectiveness of the protection offered by Armenia-USA BIT in its entirety.

Luckily for the investors protected by Armenia-USA BIT, there is an alternative to bringing a denial of justice claim under FET standard. Article II (6) introduces the effective means standard which guarantees that the investors should be provided effective means of asserting claims with regards to their investments. The analysis in chapter three allow the author to recommend the injured investors to bring a claim under Article II (6) instead of basing such claim on FET standard.

List of Sources

Publications

1. United Nations Conference On Trade and Development (2007). *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking. Trends in Investment Rulemaking*
2. 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
3. R. Dolzer, M. Stevens, Bilateral Investment Treatie, Kluwer Law International, The Hague 1995, Dfl. *Netherlands International Law Review*
4. Andrea Bianchi and Anne Peters (eds.), Transparency in International Law, United Kingdom, Cambridge, Cambridge University Press, 2013
5. Yackee, J. (2010). Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence
6. Salacuse, Jeswald, W. and Sullivan, Nicholas, P. (2009). Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain
7. Dolzer, R. and Stevens, M. *Bilateral investment treaties*. (1995)
8. Orakhelashvili, A. *The Interpretation of Acts and Rules in Public International Law.* Oxford: Oxford University Press, (2008).
9. Kill, T. 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* (2008)
10. Radi, Y. Fundamental Concepts for International Law: The Construction of a Discipline, (2017).
11. Choudhury, B. (2005). Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law. *The Journal of World Investment & Trade*
12. OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03
13. Agreement Between the Government of the Kingdom of Cambodia and The Government of the Republic of Cuba Concerning The Promotion and Protection of Investments, (2001)
14. Change Kläger, R., *Fair and Equitable Treatment' in International Investment Law*. 1st ed. New York, United States: Cambridge University Press, (2011).
15. Miles, K. *The Origins of International Investment Law.* New York: Cambridge University Press, (2013).

16. Maria Palombino, F. *Fair and Equitable Treatment and the Fabric of General Principles*. 1st ed. Berlin, Germany: Springer Nature, (2012).
17. Paulsson, J. *Denial of Justice in International Law*. New York: Cambridge University Press, p.11. Denial of Justice in, (2005).
18. Sattorova, M. (2012). Denial of Justice Disguised? Investment Arbitration and The Protection of Foreign Investors from Judicial Misconduct. *The International and Comparative Law Quarterly*
19. Council of Europe/European Court of Human Rights (2017). *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb)*
20. Gonzalez Garcia, L. The Role of Human Rights in International Investment Law. (2013)
21. International Law Commission (Crawford), Second Report on State Responsibility, UN Doc. A/CN.4/498 (1999)
22. International Institute for Sustainable Development (2017). *Exhaustion of Local Remedies in International Investment Law*. IISD Best Practices.
23. Felix Amerasinghe, C. (2004). *Local Remedies in International Law*. 2nd ed. New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo: Cambridge University Press
24. Sattorova, M. (2013). 'Effective Means' Means? The Legacy of Chevron v. Ecuador. *Columbia Journal of Transnational Law*
25. Martins Paparinskis, (2013) *The International Minimum Standard and Fair and Equitable Treatment*. 1st ed. Oxford, Great Britain, Oxford University Press

Legal Documents

1. Treaty Between the United States of America and The Republic of Armenia Concerning the Encouragement and Reciprocal Protection of Investment, 1992
2. Vienna Convention on the Law of Treaties, 1969
3. Organization of American States (OAS) Economic Agreement of Bogota (1948)
4. Agreement Between the Government of Malaysia and The Government of the Republic of Chile On Promotion And Investment Protection, Nov (1992)
5. North American Free Trade Agreement (1992)
6. Comprehensive Economic and Trade Agreement (Ceta) Between Canada, Of The One Part, And The European Union and Its Member States (2016)
7. Havana Charter for an International Trade Organization (1948)
8. Commerce, and Navigation Treaty between the United States of America and Greece, (1951)

9. Change Kläger, R. *Fair and Equitable Treatment' in International Investment Law.* 1st ed. New York, United States: Cambridge University Press, (2011).
10. U.S. Model Bilateral Investment Treaty (BIT), (2004)
11. The Energy Charter Treaty, (1994)
12. European Convention of Human Rights, (1953)
13. Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, (1993)
14. Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, (1994)
15. Treaty Between United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, (1991)
16. International Law Commission, Draft articles on Responsibility of States for internationally wrongful acts, (2001)

Arbitral Awards

1. *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* Case No. ARB/01/7 (May 25, 2004)
2. *Mondev International Ltd. Claimant v.United States Of America,* Case No. Arb(Af)/99/2 ICSID, (October 11, 2002)
3. *IS.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Second Partial Award (Oct. 21 2000)
4. *CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, (May 12, 2005)
5. *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) (2010)
6. *Enron Corporation Ponderosa Assets, L.p v. Argentine Republic* Icsid Case No. Arb/01/3, (May 12, 2005)
7. *Azurix Corp. v. The Argentine Republic* Icsid Case No. Arb/01/12, (Jul. 14, 2006)
8. *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, (Sep 28, 2007)
9. *Greece v. United Kingdom,* award, 23 ILR 306 (Mar. 6, 1956)
10. *Case Of Golder V. The United Kingdom,* EctHR, App. no. 4451/70, (Jan 20, (1956)
11. *Robert Azinian, Kenneth Davitian, v. Ellen Baca and The United Mexican States,* Case No. Arb(Af)/97/2 Icsid, (Nov. 1, 1999)
12. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* Case No. ARB(AF)/98/3, Para 74 (Jun. 26, 2003)
13. *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara*, UNCITRAL Ad Hoc-Award of, YCA XXV (2000)

14. *Waste Management, Inc. (Claimant) Versus United Mexican States*, ICSID Case N° Arb(Af)/00/3, Para 21, (Apr. 30, 2004)
15. *Dan Cake S.A. v. Hungary*, Icsid Case No. ARB/12/9, (Aug. 24, 2015)
16. *White Industries Australia Limited v. The Republic of India*, Final Award, (Nov. 30, 2011)
17. Petrobart Limited v. The Kyrgyz Republic, Arbitral Award in Arbitration No. 126/2003 of the Arbitration Institute of the Stockholm Chamber of Commerce: The Kyrgyz Republic (Mar.29, 2005)
18. *Victor Pey Casado and Foundation "presidente Allende" Claimants v. The Republic of Chile,* Icsid, D.c. In The Resubmission Proceeding Between Respondent, Case No. Arb/98/2 (May 8, 2008)
19. *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Para 31, (Dec. 8, 1998)
20. *Saipem S.p.A. v. The People's Republic of Bangladesh*, (Award) Icsid Case No ARB/05/7, Para 181 (Jun. 20, 2009).
21. *C*hevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, (Mar.12, 2012)