

## Variety of Formulations of Fair and Equitable Treatment in International Investment Agreements

*Inamdjanova Elnora Elbekovna*

*Lecturer of the Department of International Private Law Tashkent State University of Law*

**Abstract:** In the context of globalization of the world economy, attracting foreign investment is one of the key factors of growth and development for countries seeking to strengthen their economic positions. Uzbekistan, which is on the path to building a socially-oriented market economy, is also interested in creating a favorable investment climate and an influx of capital investment from abroad. The Government of Uzbekistan is pursuing a targeted policy to improve the conditions for doing business and create the most comfortable environment for foreign investors. Laws and programs are adopted aimed at liberalizing the economy, improving tax and customs administration, protecting property rights and ensuring the rule of law. However, further development of investment legislation remains an urgent task. Compliance with the standard of fair and equitable treatment means that the state is obliged to provide a foreign investor with a certain level of protection and a favorable regime for his investments. This includes procedural impeccability, stability and predictability of legal regulation, compliance with the legitimate expectations of the investor and other requirements. Failure to comply with these principles may serve as grounds for filing a claim against the host state.

**Keywords:** legal guarantees, investment activities, dispute resolution, subjects of investment relations, obligations under the agreement, stable regulatory framework, foreign investors, clause, capital inflow, regional agreements.

The diversity of formulations of fair and equitable treatment in international investment agreements is becoming increasingly important in the modern world, where international investment plays a key role in the economic development of states. In light of the growing competition to attract foreign investment, there is a need to improve the regulatory and legal framework to ensure fair and equitable conditions for all parties. It is important to note that there are many approaches to the formulation of legal norms in international investment agreements, including various mechanisms for protecting investors, regulating disputes and determining the conditions for foreign investors to participate in the market. However, the diversity of these formulations can lead to differences in the interpretation and application of agreements, which can create uncertainty and conflicts between the parties. In this regard, it is necessary to analyze the diversity of formulations of fair and equitable treatment in international investment agreements in order to develop uniform and transparent norms that will ensure stability and sustainability of the investment climate. Only in this way can favorable conditions be created for attracting investment and stimulating economic growth at the international level.

The object in this case is international investment agreements, i.e. documents concluded between different states to protect investments and ensure equal conditions for all investors. The study includes an analysis of various aspects of the formulations of fair and equitable treatment, such as definitions and specifications of these concepts, dispute resolution mechanisms, investor protection mechanisms, and much more. The study can also examine examples of successful and unsuccessful cases of applying these formulations, as well as compare the approaches of different states and international organizations to this issue [1].

The purpose of the study is to identify the most effective and fair approaches to the formulations of fair and equitable treatment in international investment agreements and offer recommendations for

improving existing practices in this area. However, such a topic can also be a subject of discussion for researchers and experts in the field of international law, economics and politics.

International investment agreements play a key role in the modern economy, since they regulate the relationship between investors and recipient states. Within the framework of such agreements, an important aspect is ensuring fair and equitable treatment for all parties. The study of this issue will allow us to identify trends in the development of international investment law and develop recommendations for improving mechanisms for ensuring fair and equitable treatment in investment relations. Given the growing importance of foreign investment for economic development, such research is becoming relevant and important for the world community [2].

The purpose of this study is to analyze and study the principle of fair and equitable treatment, which is a standard in international investment law, taking into account the specifics of its application in the context of the Republic of Uzbekistan. This study aims to identify and analyze various aspects of the principle of fair and equitable treatment, such as its historical roots, evolution in international practice, interpretation and application in modern investment law. The study involves a thorough analysis of the doctrine and practice of international investment law, as well as a study of relevant regulations, decisions of international courts and arbitrations, as well as international treaties, including bilateral and multilateral agreements ratified by Uzbekistan [3]. Particular attention is paid to the adaptation and interpretation of the principle of fair and equitable treatment in the context of the national legislation and practice of Uzbekistan.

Study and analysis of international norms and treaties governing the standard of fair and equitable treatment in international investment law.

1. Defining the role of the standard of fair and equitable treatment in international investment law and its importance for ensuring the protection of investors' rights in the Republic of Uzbekistan.
2. Analysis of the practice of applying the standard of fair and equitable treatment in international disputes and proceedings in the Republic of Uzbekistan.
3. Developing recommendations for improving national legislation and judicial practice in the Republic of Uzbekistan in order to ensure fair and equitable treatment in international
4. Forming a final conclusion and recommendations for the application of the standard of fair and equitable treatment in international investment law in the Republic of Uzbekistan

Today, the relevance of the standard of fair and equitable treatment (standards of fair and equitable treatment) does not fade and, in turn, is one of the key principles in international investment law. This standard serves as the basis for protecting the rights and interests of foreign investors and is an important element in ensuring a stable and predictable investment climate. The concept of fair and equitable treatment is that the "host state" must provide investors with equal rights and protection in accordance with international standards. This includes fair, unfettered and non-discriminatory treatment of foreign investment, as well as protection against arbitrary or discriminatory government action. The importance of the fair and equitable treatment standard derives from its role in providing legal protection to foreign investors [4]. This standard ensures that investors are treated fairly and without advantage or discrimination, which in turn creates a favorable environment for investment and promotes economic development. The fair and equitable treatment standard also plays an important role in investment dispute resolution. It serves as a basis for assessing the host government's actions and possible breach of its obligations to the investor. Arbitration tribunals and international dispute resolution bodies often base their decisions on this standard.

The presence of two descriptive words in the standard, "fair" and "equitable", have a close similarity to each other, which is due to their common focus on ensuring a favorable regime for foreign

investment, but their content is different, which is confirmed not only by their interpretations at the level of theoretical discussion, but also by the practice of their application in international judicial and arbitration proceedings [5]. For example, the following structural elements are implied and included in the part of the "fair regime" standard:

- elements that form the investment regime: the duty to respect the investor's legitimate expectations, the duty to ensure stability and transparency of the legal regulation of foreign investments, the duty to fulfill contractual obligations, the duty to act in good faith;
- elements related to unlawful actions: the duty to refrain from unjustified and illegal treatment (duty to refrain from "arbitrary and abusive treatment"), discrimination, coercion, duress and harassment;
- Elements related to procedural issues: the duty to ensure due process and not to allow denial of justice.

"The reference to fair and equitable treatment is contained in various formulations in virtually all investment treaties and is often used as a fallback argument after the expropriation argument has failed. In the case of *Servin and Rone v. Costa Rica*, the plaintiffs alleged that the defendant State had violated the fair and equitable treatment provision of the bilateral investment treaty (BIT) between Costa Rica and Switzerland (2000) by setting reduced tariffs on liquefied petroleum gas (LPG) without taking into account the financial stability of market participants. According to the arbitral tribunal, the provisions of the BIT on fair and equitable treatment of foreign investors by the state receiving foreign investment set forth a special standard. Its content does not coincide with the content that customary international law attaches to this concept, namely fair and equitable treatment. The elements of this standard of treatment for foreign investors are similar to those determined by another arbitration in *MTD v. Chile*: fairness, reasonableness and equality; they apply in the present case as well." "There are several variations in the wording of the fair and equitable treatment standard, although arbitral tribunals have tended to interpret fair and equitable treatment as an autonomous and independent treaty standard." The fair and equitable treatment standard requires that investors be treated equally and fairly by host states and not subjected to unlawful or discriminatory government practices. This standard is based on the inherent principles of legal protection and the protection of private property.

Although the fair and equitable treatment standard is widely accepted, it remains a controversial and uncertain category of law [6]. A historical review of the development of this standard shows that its original formulation of the obligation of states to "provide fair treatment" left many details unclear. Even today, some bilateral investment treaties do not specify the content of the fair and equitable treatment standard. For example, the Czech Republic's 2016 model bilateral investment treaty does not specify the scope of the fair and equitable treatment standard. This wording leaves a great deal of room for interpretation of the standard, which may give rise to investment disputes between states and investors. The meaning of the "fair and equitable treatment" standard may not necessarily be the same in all countries where it appears. The correct interpretation may be influenced by the specific wording of a particular treaty, its context, the negotiating history, or other indications of the parties' intentions [7]. Attempts to clarify the normative content of the standard itself have been relatively few until recently. It has been argued that the vagueness of the phrase is intended to allow arbitrators to formulate a set of principles necessary to achieve the purpose of the treaty in specific disputes. In modern treaty practice, specific factors are often specified that serve as the basis for assessing whether a state's actions comply with the fair and equitable treatment standard. These factors include reasonable investor expectations, stability, transparency, contractual compliance, good faith, recourse, expropriation rules and compensation for losses. In addition, the standard of fair and equitable treatment also contains some prohibitory principles that indicate violations of this standard. Such prohibitions include unjustified and unlawful treatment by the state, discrimination, coercion, pressure, and denial of access to justice.

These approaches allow for a more specific definition of the host state's obligations and provide stakeholders with a clear understanding of what actions meet the fair and equitable treatment standard. In the work of the author Rudolf Dolzer "Principles of International Investment Law" it is noted that these specific factors and principles of a prohibitive nature help to clarify the content of the fair and equitable treatment standard, removing it from uncertainty and creating a clearer understanding of the rules that must be followed.

This unclear definition of the standard and its vague content lead to different interpretations and disagreements in international arbitration practice. The interpretation of the fair and equitable treatment standard can have an impact on the outcome of investment disputes and the rendering of arbitral awards. In order to overcome the dynamism and uncertainty of fair and equitable treatment in international investment law, it may be useful to conduct an analysis of model investment treaties that are concluded between States and investors to organize investment activities. Such an analysis can be an important tool for identifying potential investment risks and ensuring the necessary level of investment protection, taking into account how States view the principle of fair and equitable treatment.

The products of such an analysis, which examine specific provisions and mechanisms related to the fair and equitable treatment standard, can help investors to better understand the legal and economic environment they face when making investments. This is important for assessing the potential opportunities and risks of an investment project and deciding whether to proceed with it. The fair and equitable treatment standard is therefore an important and widely accepted principle in international investment law. It ensures equal and fair treatment of foreign investments and protects investors' interests from arbitrary or discriminatory actions by host States. Regarding the historical review of the development of the standard of fair and equitable treatment, it is possible to clarify its essence, relevance and significance in modern international law. During the 20th century, there was a gradual development of the legal regime for the protection of foreign investments. However, until the 1960s, the standard of fair and equitable treatment was not explicitly defined in international investment treaties and agreements.

In 1964, the International Centre for Settlement of Investment Disputes (ICSID) introduced the concept of a "standard of fair and equitable treatment" into its provisions. This standard was recognized as an important element for protecting investments and ensuring a level playing field for all investors. The standard evolved in treaties after World War II. The Havana Charter of the International Trade Organization (1948) is considered the first treaty to include "fair and equitable treatment" for investments, although the treaty never entered into force. The organization was to be empowered, among other things, to promote mechanisms that would facilitate the "equitable distribution" of skills, arts, technology, materials and equipment, with due regard to the needs of all member states. In addition, member states were to recognize the right of each state to determine the conditions for admission of foreign investors to its territory, to impose "equitable conditions" on the ownership of investments and to apply "other reasonable requirements" to existing and future investments. Due to a number of unresolved issues, some major developed countries failed to ratify the Charter, leading to a failed conclusion of the first post-war multilateral efforts in the field of trade and investment.

At the regional level, in 1948 the Ninth International Conference of American States adopted the Economic Agreement of Bogotá, an agreement covering, among other things, the provision of adequate safeguards for foreign investors. Article 22 of the agreement included the following wording: "Foreign capital shall receive equal treatment. States therefore agree not to adopt unjustified, unreasonable or discriminatory measures which would prejudice the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skill, art or technology which they have supplied."

Ensuring the effective implementation of the standard of fair and equitable treatment of foreign investors in international investment arbitration practice depends largely on the wording used in the relevant international investment agreements (IIAs). Problems related to the lack of certainty and latitude in the interpretation of the standard can be partly addressed by improving treaty provisions.

Improving the wording of the fair and equitable treatment (FET) standard in international investment agreements (IIAs) is an important task to ensure greater certainty and predictability in its application. The main recommendations can be summarized as follows:

1. Clarifying the content of the standard.

The IIA should clearly define the elements that constitute the content. For example, it is possible to explicitly refer to the duty to respect the legitimate expectations of the investor, the requirement of due process, the prohibition of manifest arbitrariness and discrimination against the investor, etc.

2. Balance with the right to regulate

It is important to enshrine in treaty provisions the principle according to which non-discriminatory regulatory measures pursuing legitimate public policy objectives (protection of health, the environment, etc.) will not be considered a violation of the, even if they have a negative impact on investors.

3. Raising the threshold for violating the standard. Additional criteria for recognizing a violation could be introduced, such as the requirement that the treatment must be "manifestly arbitrary", "manifestly unfair" or violate "the basic rules of a fair trial".
4. Procedural requirements. It is advisable to provide for procedural rules aimed at respecting domestic regulatory and legal processes, for example, a requirement to exhaust domestic remedies before resorting to international arbitration.
5. Exceptions and reservations. IAS may include exceptions and reservations allowing for derogations from the FDR in certain circumstances, for example, when it is necessary to protect essential security interests, public order, etc.
6. Clarity and consistency of wording. The wording of the FDR standard should be as clear and consistent as possible and should not allow for ambiguous interpretation in order to reduce the risks of divergence in arbitration practice. One of the key problems is the vagueness of the very concept of "fair and equitable treatment", which gives rise to significant differences in interpretation by arbitral tribunals. To enhance certainty, new IIAs could include more specific elements of this standard, for example by explicitly referring to the consideration of the investor's legitimate expectations, the duty to comply with due process, the prohibition of manifest arbitrariness and discrimination, etc. An important aspect is the relationship between the standard of fair and equitable treatment and the state's right to regulate in the public interest. To better balance these interests, it is recommended that treaty provisions explicitly stipulate the permissibility of non-discriminatory regulatory measures that pursue legitimate public policy objectives, even if they have a negative impact on investors.

Another area of improvement could be the introduction of additional criteria for recognizing a violation of the standard, such as the requirement that the treatment must be "manifestly arbitrary", "manifestly unfair" or violate "the basic rules of a fair trial". Such wording would raise the threshold for satisfying investor claims.

In addition, IIAs could include additional procedural rules aimed at ensuring due respect for domestic regulatory processes and legal systems. For example, establish a requirement to exhaust domestic remedies before resorting to international arbitration [8].



Also, in the Republic of Uzbekistan, the standard of fair and equal treatment for investors is enshrined in a number of regulations. One of the main ones is ZRU-598 "On Investments and Investment Activities" dated October 27, 2020, replacing the old law of 1998, which defines the legal regime of investors, their rights and obligations, as well as the procedure for resolving disputes between investors and the state. It regulates relations in the field of investment activities in the territory of Uzbekistan. The main provisions of this law are that it defines the basic concepts - investments, investment activities, investors and their types, etc. It also establishes the principles of state investment policy, such as equal protection of the rights of all investors, transparency, freedom of movement of income. Guarantees of investors' rights are enshrined, including guarantees against expropriation, unhindered transfer of income and property abroad upon termination of activities. In addition, the most favorable treatment for foreign investors is also provided. The law also regulates the conclusion of investment agreements between the state and investors. The fundamental aspect of this law is that it regulates the procedure for resolving investment disputes, including in international arbitration [9].

In general, it can be said that this decree introduces a set of systemic measures to significantly improve the investment climate and increase the level of protection of foreign investments in Uzbekistan. Such special laws include, for example, laws on free economic zones, laws on concession agreements, laws on public-private partnerships, etc. These legislative acts provide for a set of benefits, preferences and guarantees for investors implementing projects in relevant areas or in certain territories. Special laws on investment issues play an important role in creating a favorable investment climate, stimulating the inflow of capital into priority sectors of the economy or promoting the development of regions [10]. At the same time, the provisions of these laws must comply with the principles of non-discrimination and ensuring fair and equal treatment of foreign investors, enshrined in the fundamental acts. Thus, the set of constitutional norms, provisions of the basic law on investments and special legislative acts forms a comprehensive legal basis for the implementation of the standard of fair and equal treatment of foreign investors in the country.

Among the main principles enshrined in this law, it is necessary to highlight the principle of ensuring equal treatment for foreign investors, guarantees of legal protection of their investments, the inadmissibility of illegal interference in the activities of foreign investors, as well as the principle of compliance with the terms of concluded agreements. In addition, the law provides for a number of specific guarantees for foreign investors, such as a guarantee of transfer of income and other payments abroad, a guarantee of compensation in the event of nationalization or requisition of property, as well as guarantees in the event of changes in legislation.

For the Republic of Uzbekistan, in order to improve the wording of the fair and equitable treatment standard (FET) in international investment agreements (IIAs), the following effective measures can be proposed:

1. Revision of the FET wording in bilateral investment treaties (BITs) of Uzbekistan. When concluding new or revising existing BITs, it is recommended to use clearer and more restrictive wording of the FET standard. For example, the Agreement between Uzbekistan and Singapore on the Promotion and Reciprocal Protection of Investments (2003) uses the following wording: "Each Contracting Party shall ensure fair and equitable treatment of investments and investors of the other Contracting Party, which shall not be less favorable than the treatment accorded to investments and investors of any third state, taking into account the principle of non-discrimination."
2. Clarification of the elements of the RRR in the legislation of Uzbekistan

In the national investment legislation (Laws "On Investments and Investment Activities", "On Investments of Foreign Investors", etc.), it is possible to directly establish the elements that

constitute the content of the RRR, such as the legitimate expectations of the investor, due process, prohibition of arbitrariness and discrimination.

### 3. Balance with the right to regulate

In the IIA and national legislation, it is important to establish the principle according to which non-discriminatory regulatory measures in legitimate public interests (protection of the environment, public health, etc.) will not be considered a violation. For example, in the Free Trade Agreement between the EAEU and Vietnam (2015) there is the following clause: "The Parties have the right to regulate in areas in order to implement legitimate political goals, such as protecting public morality, maintaining public order, ensuring social protection of citizens, and protecting the environment." 4. Raising the threshold for recognizing a violation

Additional criteria can be introduced in the wording of IIAs and national legislation that raise the threshold for recognizing a violation such as the requirement of "manifest arbitrariness", "clear denial of justice", etc. It is advisable to provide for requirements for the exhaustion of domestic remedies before applying to international investment arbitration, for example, in the new model BIT of Uzbekistan. The use of such measures will allow Uzbekistan to increase the certainty of legal regulation in the field of protecting foreign investments, balance the interests of investors and the right of the state to regulate in the public interest, and reduce the risks of investment disputes.

### REFERENCES:

1. Decree of the President of the Republic of Uzbekistan "On approval of the Strategy "Digital Uzbekistan-2030" and measures for its effective implementation" // National database of legislation, 24.07.2021, No. 06/21/6268/0700
2. List of international treaties of the Republic of Uzbekistan in the field of promotion and mutual protection of investments <https://invest.gov.uz/investor/russkij-dvustoronnie-dogovora/>
3. Pavlova Yu.V. The practice of using new tools for financing investment activities in a digital economy // Bulletin of the Russian University of Cooperation. - 2019. - No. 3. - P. 79.
4. Netherlands Model Investment Agreement - 2019. Article 9.
5. <https://lex.uz/docs/4664144?ONDATE=07.06.2022>
6. MIGA - Convention establishing the multilateral investment guarantee agency – 12.04.1988
7. International Centre for Settlement of Investment Disputes (далее — ICSID). MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile. Case No.ARB/01/7. Award of 25 May 2004. §113
8. Knyazev O.A. International investment activity in the context of globalization: theory and practical experience. - M.: MAX Press, 2019.
9. Shevchenko I.L. The Impact of Globalization on Some Aspects of Corporate Governance in Russian Companies. // Russian Entrepreneurship. — 2014. — No. 7 (253).
10. Polyakrv V.V., Shchenin R.K. (eds.) World Economy and International Business: textbook. - M.: KNORUS, 2018