E-ISSN: 2997-9420
American Journal of Political Science and Leadership Studies
https://semantjournals.org/index.php/AJPSLS

| Research Article

Check for updates

The Role of Foreign Investments in the International Integration of the Economy and the Regulation of their International Movement

Nozimov Eldor Anvarovich
Assistant of the Samarkand Institute of Economy and Service

Abstract: This article is written about the legal framework and guarantees of international investment activities. The influence of international organizations on investment activity was also studied. Local state authorities within the limits of their powers and together with territorial divisions of the authorized state body in the field of state regulation of investments and investment activities carry out: implementation of investment policy at the local level, including attraction of investments, aimed at stimulating the expansion of investment volumes in the relevant territory of the country, further improvement of the investment climate in the territory, support for the development of enterprises in the relevant territory; study and identification of promising projects that require investment, as well as empty state property and land plots based on the needs and potential (resource, natural-climatic, labor, etc.) territories; dealing with issues directly related to the activities of investors, as well as, if necessary, proposals for the implementation of promising business initiatives and projects by attracting direct investment; identification of factors impeding the timely and effective implementation of investment projects, including those involving foreign investment in the relevant territory, with the adoption of operational measures to address them; improving the efficiency of the use of investments attracted to the economy of the corresponding territory on the basis of the analysis of the activities of foreign capital enterprises, as well as the implementation of investment obligations by investors.

Keywords: WTO, FCN, FDI, OECD, EFTA, NAFTA.

This is an open-access article under the CC-BY 4.0 license

Introduction. Why are capital flows among nations intended to secure the establishment of a business enterprise widely considered the principal engine of ecomomic globalization ? There are two reasons: quantitative and qualitative. Althoug the WORLD TRADE ORGANIZAtion (WTO) regime govering the sale of goods has received the bulk of scholarly attention, the amount of trade in goods (export and import) not connected to FDI as such. Foreign investors around the

The first reference to "equitable" treatment is found in the 1948 Havana Charter for an International Trade Organisation. Its contemplated that foreign investments should be assured "just and equitable treatment". The Article provided that the International Trade Organisation (ITO) could: 1. make recommendations for and promote bilateral or multilateral agreements on measures designed… 2. … to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one member country to another. 3. "Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention", OECD (1967), pp. 13-15. 4. "Intergovernmental Agreements Relating to Investment in Developing Countries" OECD, 1984. 5. In 1967 and 1984, the OECD countries based their work essentially on state practice and literature.

The organisation was to be authorised, inter alia, to promote arrangements which would facilitate "an equitable distribution" of skills, arts, technology, materials and equipment, with due regard to the needs of all member States. Also, the member States were to recognise the right of each State to determine the terms of admission of foreign investors on its territory, to give effect to "just terms" on ownership of investment, and to apply "other reasonable requirements" with respect to existing and future investments. Because of a number of unresolved issues, some major developed countries did not ratify the Charter, bringing the first post-war multilateral effort on trade and investment to an unsuccessful conclusion. At the regional level, in 1948, the Ninth International Conference of American States adopted the Economic Agreement of Bogotá, 7 an agreement covering among other things, the provision of adequate safeguards for foreign investors. of the agreement included the following language: "Foreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied."8 Like the Havana Charter, the Bogotá Agreement failed to come into force due to lack of support. At the bilateral level, the US treaties on Friendship, Commerce and Navigation (FCN), developed after the First World War, contained a standard reference to international law in connection with protection of the persons and property of aliens. In the period following the preparation of the Havana Charter, the terms "equitable" and "fair and equitable treatment" started to appear in certain of the US FCN treaties. The proponents of the standard considered it as a safeguard against state action that violated internationally accepted norms.10 In 1959, the Draft Convention on Investments Abroad, developed under the leadership of Herman Abs, the Director-General of the Deutsche Bank and Lord Shawcross, the UK Attorney General, in its Article 1 stipulated that "each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties".11 This effort led to the German proposal to the OECD that it develop a convention on the international protection of private property. Intensive discussions started in the OECD in the early 60's and culminated in the adoption of the Draft Convention on the Protection of Foreign Property by the OECD Council on 12 October 1967.12 Under the Article 1(a) "Treatment of Foreign Property: "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties…" The Draft Convention, although never opened for signature, represented the collective view and dominant trend of OECD countries on investment issues and influenced the pattern of deliberations on foreign investment in that period. The requirement to "ensure fair and equitable treatment" in the Draft Convention placed greater emphasis on the standard than earlier instruments.

Although most of the above issues had not reached consensus in the last version of the text (1986), the negotiating States agreed that the Code should provide for "equitable" treatment of transnational corporations. The 1985 Convention establishing the Multilateral Investment Guarantee Agency (MIGA) specifies in Article 12(d) that in order to guarantee an investment, MIGA must satisfy itself that fair and equitable treatment and legal protection for the investment exist in the host country concerned.25 This would appear to be not only a prudent standard for

lowering the risk for guaranteed investments, but also one of the means by which MIGA carries out its mission under Articles 2 and 23 to promote investment flows to and among developing countries, which include promotion of investment protection. The 1992 World Bank Guidelines on Treatment of Foreign Direct Investment26 stipulate in their article III(2) that: "each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in the Guidelines." It then in II(3) indicates the standards of treatment which are to be accorded to foreign investors in matters such as security of person and property rights, the granting of permits and licenses, the transfer of incomes and profits, the repatriation of capital. The approach suggested is that fair and equitable treatment is an over-arching requirement. The standard can also be found in 1990 Lomé IV, 27 the Fourth Convention of the African, Caribbean and Pacific Group of States and the European Economic Community (EEC) and in the 1987 ASEAN Treaty for the Promotion and Protection of Investments.

The Colonia Protocol on Reciprocal Promotion and Protection of Investments signed by MERCOSUR member States29 in January 1994, expressly grants to investors from each MERCOSUR country "at any moment, fair and equitable treatment". An additional Protocol on the Promotion and Protection of Investments from non-member States extends the same treatment to these investments.30 Article 159 of the 1994 Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) also requires COMESA member States to "accord fair and equitable treatment to private investors". Article 1105(1) of the NAFTA, which entered into force on 1 January 1994, stipulates under the rubric "Minimum Standard of Treatment" that: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The Draft OECD Multilateral Agreement on Investment (1998) in its preamble indicated that "fair, transparent and predictable investment regimes complement and benefit the world trading system", while under the "General Treatment" Article it stipulated that: "Each contracting Party shall accord fair and equitable treatment and full and constant protection and security to foreign investments in their territories. In no case shall a contracting Party accord treatment less favourable than that required by international law." The Energy Charter Treaty (1995) provides also that fair and equitable treatment shall be accorded at "all times". Although the Treaty is limited to one sector, it is significant in this context because it includes among its Parties several economies in transition31 which embrace the standard. Finally, the June 2002 Agreement between Singapore and EFTA establishing a free-trade area among the Parties stipulates in its Article 39 that each Party shall "accord at all times to investments of investors of another Party "fair and equitable treatment". Schemes for the coverage of such risks may be national, bilateral, regional or multilateral in concept and scope. While the bilateral schemes have become well-established since the 1950s, and a regional insurance agency was established in the 1970s, 3 only in 1988 did we witness an operational multilateral insurance agency. Early initiatives to create such an international investment guarantee entity emerged in the 1950s, and the idea was discussed in the early 1960s in various international forums including the World Bank, the Organization for Economic Cooperation and Development, the Inter-American Development Bank, the United Nations Conference on Trade and Development, and the European Economic Community. However, none of these earlier initiatives materialized. In the 1980s, the concept was reintroduced in the form of the Convention Establishing the Multilateral Investment Guarantee Agency ("MIGA"), which became effective in April 1988.14 Since MIGA has just become operational, the main emphasis in this article will be with the bilateral schemes,15 even though in the appropriate areas of the discussion, comparisons with and references to the MIGA scheme as represented in its Convention are made. Yet, historically, access to justice has remained problematic for aliens. Even before the formation of the modern nation state, the need for a minimum degree of protection of the life, security, and property of aliens established in or visiting

a foreign land had emerged in the late Middle Ages, especially in the context of the flourishing trade between the Italian maritime Republics – such as Venice and Genoa – and the Mediterranean areas under Muslim dominion. In these areas, foreign merchants coming from the Christian world could not expect the protection of the universal system of Roman law which had guaranteed the political and legal unity of the ancient Mediterranean world. On the contrary, they encountered diffidence and marginalization by local authorities and, more fundamentally, they had to deal with the difficulty of reconciling their need for personal and economic security with the rigid system of the personality of the law in the Islamic world. This system, informed by the close interpenetration of Islamic law and religion, was a powerful obstacle to the application of legal guarantees of contractual and property rights of non-Muslims under the. The pragmatic response to this normative and jurisdictional mismatch was the development of special extraterritorial legal regimes for commercial establishments, trade centres, and warehouses maintained in Muslim lands (FONDACI) by foreign merchants and the gradual recognition of a system of IN SITU protection of foreign merchants by agents of the foreign power of which they were nationals. This practice constitutes a predecessor to the modern idea of 'free zones' and, more importantly, formed the basis of the early development of consular relations and of the later emergence of that special branch of customary international law that goes under the name of 'minimum standard of treatment of aliens'. History tells us also that this early model of international protection of foreign economic interests later degenerated into forms of sheer economic dominance and of colonialism by the European Powers. The most radical manifestation of this development was the system of 'capitulations', an extreme form of extraterritorial imposition of foreign law and jurisdiction in the receiving state, which served to exempt their citizens from the sovereignty of the host state.

Capitulations were gradually eliminated in the first part of the 20th century and became incompatible with the principle of de-colonization later implemented within the framework of the UN Charter. But the institution of consular protection remains. Thus there also remains the principle of the 'minimum standard of justice' to be reserved to aliens and their economic interests under customary international law. An integral part of this standard is the principle of 'access to justice'. This principle presupposes that the individual who has suffered an injury in a foreign country at the hands of public authorities or of private entities must be afforded the opportunity to obtain redress before a court of law or appropriate administrative agency. Only when 'justice' is not delivered, either because judicial remedies are not available or the administration of justice is so inadequate, deficient, or deceptively manipulated as to deprive the injured alien of effective remedial process, can the alien invoke 'denial of justice': a wrongful act for which international responsibility may arise and in relation to which an interstate claim and diplomatic protection may be made by the national state of the victim. So, in its historical evolution, access to justice is inseparable from the 'minimum standard of treatment of aliens'. This is confirmed by the customary rule requiring prior exhaustion of local remedies as a precondition of diplomatic protection. This rule presupposes the international obligation of every state to ensure access to courts to aliens and to administer justice in accordance with minimum standards of fairness and due process. However, the principle of access to justice, as an integral part of customary international law on the treatment of aliens, guarantees only access to remedial process within the territory and under the law of the host state. Customary international law does not provide for an individual right of access to justice before international tribunals. Nor, by the same token, does it provide a right of access to the courts of a third state, for which, in principle, the alleged mistreatment of an alien in another state remains RES INTER ALIOS ACTA. The major leap forward in the field of foreign investment law is represented by the recognition and consolidation of an indisputable right of access to international justice by private investors and by the extension of this right to the courts of third states to the extent that their cooperation is necessary in order to enforce international investment awards. Following the phenomenal development in the past 25

ears of bilateral investment treaties, regional trade agreements, such as NAFTA, and, more importantly, investment arbitration, the right of access to justice for the investor has shifted from inter-state claims to the private-to-state arbitration where private actors have direct access to 'international' remedial proceedings without the traditional need for the interposition of their national state in diplomatic protection. This shift of focus has important consequences. First, it undermines the traditional dogma of international law under which only states have international rights and the state intervening to protect its nationals injured abroad asserts its own right rather than the right of the injured person, with the consequence that the claimant state may at its own discretion make use of such right and of the eventual compensation it has been able to obtain. Secondly, and more relevantly for the general theme of this article, the 'internationalization' of the right of access to justice of private actors tends to blur the traditional boundary between aliens' rights and human rights. This is so because the private actors in which this right is recognized free themselves from the traditional guardianship of their national state and become empowered to assert their individual rights and interests before an international dispute settlement body. This focus on the individual as the title holder of rights is the hallmark of the international law of human rights. This potential convergence of traditional aliens' rights with human rights in the field of access to justice is the conceptual point of departure for the following analysis, which will focus on three distinct but inter-linked aspects of the operation of the right of access to justice in the field of foreign investment law. The first aspect concerns the extent to which human rights considerations may influence the assessment of the international legality of the host state's interference with the investor's rights and on his ability to obtain judicial or arbitral protection for his investment. The second aspect relates to the emerging claim of access to justice for the host state's population when the operation of the foreign investment is deemed adversely to affect their environment or other societal goods. The third aspect concerns the way in which access to justice may be reconciled with the traditional rule of sovereign immunity when the state of the investment adopts measures with extra-territorial effect that adversely impacts on property rights of foreign investors especially in the field of financial instruments with worldwide circulation. I will examine these three aspects in light of recent arbitral practice.

Reference

1. On the evolution of International law in the context of the mutual contamination and cultural exchange between the Christian World and Islam see the magisterial analysis by Ago, 'Pluralism and the Origin of the International Community', ITALIAN YBK INT'L L (1977) 3.
2. L. Ferrari Bravo, LEZIONI DI DIRITTO INTERNAZIONALE (1993), at 25.
3. Anvarovich, N. E. (2023). Agricultural Insurance and it's Development Today. *Central Asian Journal of Innovations on Tourism Management and Finance*, *4*(4), 17-22.
4. Eldor, N., & Asal, N. (2024). THE ROLE OF INVESTMENTS IN INNOVATIVE DEVELOPMENT. *EUROPEAN JOURNAL OF INNOVATION IN NONFORMAL EDUCATION*, *4*(3), 479-482.
5. Anvarovich, N. E. (2024). THE DEVELOPMENT OF ELECTRONIC COMMERCE IN THE USA. *Web of Semantics: Journal of Interdisciplinary Science*, *2*(5), 227-229.
6. Anvarovich, N. E. (2024). Property Taxes in the System of Taxes and Fees. *Gospodarka i Innowacje.*, *46*, 302-307.
7. Anvarovich, N. E. (2024). Investments in the Development of the National Economy of the Republic of Uzbekistan. *Web of Semantics: Journal of Interdisciplinary Science*, *2*(4), 198-204.

8. Anvarovich, N. E. (2024). POSSIBILITIES OF USING DIGITAL TECHNOLOGIES IN THE BANKING SYSTEM OF UZBEKISTAN. *Gospodarka i Innowacje.*, *53*, 189-193.
9. See Art. 54 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159. Para. 1 of this Art. provides that 'each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'.
10. North American Free Trade Agreement between Canada, the United States, and Mexico, entered into force on 1 Jan. 1994, 32 ILM (1993) 289. 5. MAVROMMATIS PALESTINE CONCESSIONS, PCIJ Rep Series A No. 2, 30 Aug. 1924, at 12