UiO : Faculty of Law
University of Oslo

Reassessment of national treatment standard in investment treaty arbitration: barriers and potential

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List of Abbreviations and Acronyms

NT	National Treatment
IIa	International Investment Agreement
BIT	Bilateral Investment Treaty
UNCTAD	United Nations Conference on Trade and Development
FET	Fair And Equitable Treatment
MFN	Most Favored Nation
FTA	Free Trade Agreement
NAFTA	North American Free Trade Agreement
ICSID	International Centre for Settlement of Investment Disputes
OECD	Organisation for Economic Co-Operation and Development
TBT	Technical Barriers to Trade
GATT	General Agreement on Tariffs and Trade
TRIPS	Trade-Related aspects of Intellectual Property Rights
NIEO	New International Economic Order
ILC	International Law Commission
ECtHR	European Court of Human Rights
ISDS	Investor–State Dispute Settlement

1. INTRODUCTION

International investment law aims to ensure adequate protection of foreign investments. A need of foreign investments dictates to create conditions to stimulate foreign investors to use their financial resources in other countries. That is why the need to protect foreign investors' investments has existed for an extended period. There are different points of view regarding the specific period, but the starting point in the 17th century in Europe is generally accepted. From this point on, the importance of developing international protection grew with greater force, leading to the emergence of so-called investor treatment standards. The national treatment standard (NT standard) occupies an integral position among these standards. Although no single and generally accepted definition of an NT standard exists, numerous international investment agreements (IIAs), including bilateral investment treaties (BITs), have developed a definition that can be considered the most frequently encountered and reflects the essence. IIAs are a general category of agreements between countries concerning foreign investments aimed at their protection. Whereas a BIT is an agreement between two countries regarding the promotion and protection of investments made by investors from respective countries in each other's territory[1]. According to them, the NT standard is "the commitment of a country to accord to foreign investors and to foreign controlled enterprises in its territory treatment no less favorable than that accorded in similar situations to domestic enterprises"[2]. This standard is relative, meaning its interpretation, application, and scope depend on specific circumstances because one needs to compare a treatment accorded to a foreign investor with a treatment accorded to nationals.

The relevance of this topic is due to the clarification of why the NT standard is needed in investment legal relations. It is essential to determine whether a given standard is sufficiently independent from other security standards to be developed in its own right. In particular, the interest is in what obstacles or shortcomings exist in its application and interpretation and whether it has potential for development.

The preliminary analysis suggests:

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[1] Investment Policy Hub, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements#:~:text=A%20bilateral%20investment%20treaty%20(BIT,countries%20in%20each%20other's%20territory.&text=In%20addition%20to%20IIAs%2C%20there,%2Drelated%20instruments%20(IRIs), accessed 28 Sept. 2023

[2] CEFTA ISSUES PAPER 2 *National Treatment Restrictions and Review of Bilateral Investment Treaties* (2010) 12, https://www.oecd.org/global-relations/CEFTA%20WP2_National%20Treatment_NEW_Nov%202010.pdf, accessed 26 Sept. 2023

- Proof of violation by host states of the NT standard is a rare phenomenon according to existing arbitral practice, which leads to the conclusion that this standard does not fully protect the interests of foreign investors;
- The criteria for assessing the presence or absence of a violation of the NT standard are not unified and, therefore, depend on the specific IIA and the approach of the tribunal considering the case;
- The NT standard is directly related to other standards, such as fair and equitable treatment (FET) and most-favored-nation treatment (MFN), which gives the impression that it is not self-sufficient and, therefore, can be replaced.

In the following, I will try to find empirical (factual) confirmation of some of these observations and explain the reasons or consequences in detail.

The problems mentioned above are the subject of consideration in this thesis since they can help determine what place the NT standard occupies, among other instruments for protecting foreign investors. The NT standard, compared to other investment protection standards, gets the same level of attention[3].

It is precisely taking into account the existing problems, as well as the relevance of this topic, that it is necessary to formulate and, to a certain extent, narrow the subject of study of the thesis, moving on to posing questions, the answers to which are the main task of this work.

1.1. Research Questions

There are different views as to the operation of NT standard and a need to clarify this standard. Some believe that clarifying the principle of its operation is not required since the NT standard is a guiding principle and, therefore, does not need to be specified[4]. The guiding

[3] Gâlea, I. and Biris, B., *National treatment in international trade and investment law* (Hungarian journal of legal studies, 2014), https://heinonline-org.ezproxy.uio.no/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/ajur55&men_hide=false&men_tab=toc&kind=&page=174, accessed 26 Sept. 2023, Brar, M., *The National Treatment Obligation: Law and Practice of Investment Treaties* (Handbook of International Investment Law and Policy , 2021), https://link-springer-com.ezproxy.uio.no/referenceworkentry/10.1007/978-981-13-3615-7_5, accessed 26 Sept. 2023, Bjorklund, A.K. and Vanhonnaeker, L., *National Treatment, in Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA) (*Springer International Publishing, 2019), https://link-springer-com.ezproxy.uio.no/chapter/10.1007/978-3-319-98361-5_3, accessed 26 Sept. 2023, Tudor, I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press, 2008), https://academic-oup-com.ezproxy.uio.no/book/10604, accessed 26 Sept. 2023

[4] M. Sornarajah, *The International Law of Foreign Investment* (Cambridge University Press, 2021), https://assets.cambridge.org/97811071/33624/frontmatter/9781107133624_frontmatter.pdf, accessed 26 Sept. 2023; Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Priniciples of International Investment Law* (3rd edn, OUP, 2022), https://opil.ouplaw.com/display/10.1093/law/9780192857804.001.0001/law-9780192857804, accessed 26 Sept. 2023

principle means that the NT standard is one of the pillars of investment legal relations and sets the general vector for developing international investment law. On the contrary, others are convinced that the NT standard needs to be improved and reformed since it is the minimum standard for protecting a foreign investor and, therefore, must function fully[5].

From my point of view, the NT standard should retain its relativity nature but at the same time undergo minor reforms, which is why the main questions for studying in this thesis are:

1.1.1. What is the NT standard's role (actual/empirical and potential) in investment treaty arbitration?

1.1.2. Whether reforms of the content and practice of application of the NT standard are needed, and if so, what kinds of reforms?

The answers to these questions will allow me to establish the role of the NT standard in investment treaty arbitration and determine whether reforms are deribale/necessary. Thus, the second chapter of the thesis will be devoted to the scope and application of the NT standard, the third chapter will address the comparative analysis of arbitral practice in applying NT, and lastly, in the fourth chapter, the competing interests of the investor and the host state will be considered. Competing interests are particularly vital since they clearly show why and what reforms to the NT standard are needed.

1.2. Literature Review

Possible reforms to NT have attracted some attention from scholars and they are not entirely in agreement. For this reason, the existing literature superficially studies the NT standard as independent and deserving of separate consideration. Scholars hold opposing points of view because reform cannot be carried out through proven mechanisms. Some unique approach is required. Rudolf Dolzer, within the framework of a symposium co-organized by ICSID, OECD, and UNCTAD, focuses in his article on the fact that existing case law does not answer numerous questions regarding the correct application of the NT standard[6]. In particular, one of the most challenging issues remains establishing criteria for violating the NT standard. Therefore, encouraging and supporting new developments of this standard is an inevitable step[7].

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[5] United Nations Human Rights Office of the High Commissioner *Reforming International Investment Agreements* (2022), https://www.ohchr.org/sites/default/files/2022-06/Reforming-International-Investment-Agreements.pdf, accessed 27 Sept. 2023

[6] Rudolf Dolzer, *National Treatment: New Developments* (Oxford University Press, 2005), https://www.oecd.org/investment/internationalinvestmentagreements/36055356.pdf, accessed 27 Sept. 2023

[7] Ibid

It is worth noting that the study of the origins of the NT standard, as part of international investment law, shows that it is inextricably linked with international trade law. Namely, it is rooted in trade law and reflects well-established ideas. This trend can be considered positive; however, the development of the NT standard in the current conditions should be guided by the originality and specificity of the legal relationship of a foreign investor with the host state[8]. Rudolf Dolzer illustrates this specificity in a historical and structured context in his work "Principles of International Investment Law"[9].

There are scholars who are critical of preferences that foreign investors have under international investment law, and their criticism is also related to NT standard. This topic is well covered by Ivar Alvik in the article "Justification of privileges in international investment law: preferential treatment of foreign investors as a problem of legitimacy"[10]. This article concludes that while there may be existing justifications for such a privilege in circulation by foreign investors, reforming the legal relationship between the host state and foreign investors is necessary. A similar critical approach is contained in the work of M. Sornarajah, who is generally very critical of investment treaty arbitration[11].

Many writings do not deal with NT standard separately but address non-discrimination provisions in treaties that also include MFN. A reasonably thorough consideration of this issue is given in the work of Giorgio Sacerdoti and Niall Moran, which deeply studies the existing case law. The tribunals appear relatively consistent in their approaches to international investor protection standards. "This chapter looked at the different ends of the spectrum in terms of how tribunals have construed likeness; at how determinations of likeness, be they broad or narrow, impact findings of less favorable treatment, as well as factors such as the characteristics of investments and whether their treatment is discriminatory"[12].

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[8] Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer, *Principles of International Investment Law (3rd Edition)* (Oxforf University Press, 2022), https://opil-ouplaw-com.ezproxy.uio.no/display/10.1093/law/9780192857804.001.0001/law-9780192857804, accessed 27 Sept. 2023

[9] Ibid

[10] Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy* (European Journal of International Law, 2020, https://academic.oup.com/ejil/article/31/1/289/5882074, accessed 28 Sept. 2023

[11] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015), https://www.cambridge.org/core/books/resistance-and-change-in-the-international-law-on-foreign-investment/1BC27E76647AD39E9D163C5A2BB0E09C, accessed 28 Sept. 2023

[12] Giorgio Sacerdoti and Niall Moran, *Non-Discrimination Clauses: Most-Favoured-Nation and National Treatment* (Hart Publishing, 2022), https://www-bloomsburycollections-com.ezproxy.uio.no/monograph-detail?docid=b-9781509929078&pdfid=9781509929078.ch-025.pdf&tocid=b-9781509929078-chapter25, accessed 28 Sept. 2023

Nevertheless, the main focus of this thesis in the context of the literature used is the primary sources, which include numerous BITs, case law, and Free Trade Agreements (FTA). Academic literature does not address all aspects needed to answer my research questions, so assessing primary sources (treaties) was an important part of the thesis. Which ultimately influences, to a large extent, the methodology of this thesis.

1.3. Methodology

The correctness of the conclusions of legal research is based on the methodology used. According to McConville and Chewie's conclusion, legal research could be either doctrinal or non-doctrinal[13]. Doctrinal legal research is that which prioritizes the letter of the law rather than its spirit, that is, emphasizing the importance of reference to primary sources, without necessarily addressing the area surrounding the core of such rules[14]. According to Richard Posner: "The task of the legal scholar was seen as being to extract a doctrine from a line of cases or from statutory text and history, restate it, perhaps criticize it or seek to extend it, all the while striving for "sensible" results in light of legal principles and common sense"[15].

For this reason, given the subject of this thesis, the doctrinal approach is the main one. Namely, re-evaluating the NT standard requires the use of many primary public international law sources to avoid distortion of the underlying true meaning. The mechanism for protecting the rights of foreign investors is presented in international investment agreements, which, as previously noted, can be either bilateral or multilateral. Both types of agreements are the subject of study of this thesis, as they can most comprehensively represent the general understanding of the NT standard in different legal systems.

However, the study of arbitral practice is central to this work. In order to understand how the NT standard works, I needed to consider all cases. My goal was to look at integrity; I used the United Nations Conference on Trade and Development (UNCTAD) database for this purpose. I realized that cases where NT was granted constitute 9[16]. Cases where NT was argued

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[13] M McConville and W Hong Chui, *Research Methods in Law* (Edinburg, Edinburg University Press 2007), 1, https://edinburghuniversitypress.com/pub/media/resources/9781474404259_Research_Methods_for_Law_-_Introduction_and_Overview.pdf, accessed 29 Sept. 2023

[14] Ibid

[15] Richard A. Posner, *Legal Scholarship Today* (Harvard Law Review, 2001), 1316, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2833&context=journal_articles, accessed 29 Sept. 2023

[16] Investment Policy Hub, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement, accessed 30 Novemb. 2023 at 18:00

but was not applied constitute 158[17]. Given the potential relevance of more than a hundred cases, I had to make a choice, and I chose to concentrate on all cases where NT was granted. It seems reasonable because it is essential to look at the wording of NT in treaties and application that NT received in investment treaty arbitration to understand an actual situation about the application and the role that this standard has. Nevertheless, despite the seemingly unipolar approach to the study of one category of cases, it cannot be considered erroneous because:

- to obtain complete information about the operation of the NT standard and the criteria for the presence of its violation, cases in which such a violation has been proven and addressed are of primary importance;

- cases in which only a violation of the NT standard was alleged have general specifics that can be studied using the available legal literature without examining each case separately.

- in cases with an unproven violation of the NT standard, other standards (FET and MFN) are almost always declared, meaning foreign investors often resort to all available remedies. In other words, the NT standard in these cases is not a primary means of protecting interests. Consequently, the significance of this study category as a whole is neutralized. Moreover, in these cases, an actual violation of other treatment standards is revealed, as a result of which we can talk about the presence of a direct relationship between the NT standard and FET and MFN[18].

Thus, the methodology of this thesis consists of doctrinal study combined with empirical research.

[17] Ibid

[18] GRAMERCY FUNDS MANAGEMENT LLC, AND GRAMERCY PERU HOLDINGS LLC v. THE REPUBLIC OF PERU[2016] ICSID 18/2 (2022) UNCT 64, https://www.italaw.com/sites/default/files/case-documents/italaw170945.pdf, accessed 6 September 2023

2. SCOPE AND APPLICABILITY OF NT STANDARD

Before diving deeply into the discussion of what is included in the concept of the NT standard in modern international investment law, it is necessary to turn to the origins of this provision. Obviously, the historical overview is a clear explanation of what prompted the emergence of this standard. In particular, what were the ideas and motivations behind forming the NT standard? In addition to examining the historical development of the NT standard, this chapter will consider the scope of NT using the example of model BITs and the possibility of excluding the operation of the standard.

2.1. Origins of the NT provision in international treaties

First of all, the main impetus for developing the NT standard in investment law in the form in which it has survived to this day occurred at the beginning of the twentieth century. The basis of this was the processes of globalization, particularly the importance of developing a balanced and equal mechanism for regulating international trade for the parties. That is why international trade law and international investment law are inextricably linked.

The very first historical documents that attempted to formulate NT were the Abs-Shawcross Draft Convention (1958-1959) and/or OECD draft convention. The main novelty of the Absa-Shawcross draft convention was the introduction of the rule that the host state must ensure compliance with any undertakings regarding investments by foreign citizens. That is, the responsibility for equal treatment of foreign investment was established. Also, some ideas of the national regime in a matter of non-discrimination can be traced to the Calvo doctrine[19] at the end of the 19th century and the Hull doctrine[20]. Calvo doctrine, or more precisely Calvo clause, is "a dispute resolution clause providing that investors shall seek redress to claims arising out of or in connection with such contracts by exclusively relying upon the available local remedies, and waiving the right to invoke diplomatic protection of their States of nationality"[21]. The appearance of this clause is a significant step in the field of investment protection since it is still a matter of debate whether it is worth extending its effect to all current and future legal relations between host states and foreign investors. As for the Hull doctrine, it

[19] "*Calvo Doctrine*" (Encyclopedia Britannica Online 2020); https://academic-eb-com.ezproxy.uio.no/levels/collegiate/article/Calvo-Doctrine/18741, accessed 9 Sept. 2023

[20] Loukas Mistelis and Nikos Lavranos, *European Investment Law and Arbitration Review Vol. 6* (Brill 2021); https://jusmundi.com/en/document/publication/en-prompt-adequate-and-effective-compensation, accessed 26 Sept. 2023

[21] Cholvi Ferrer Irene, *Calvo Clause* (Jus Mundi, 2023), https://jusmundi.com/en/document/publication/en-calvo-clause, accessed 10 Sept. 2023

requires "prompt, adequate and effective" compensation for the expropriation of foreign investments[22]. These instruments can be considered the predecessors of the NT standard because they began to set a certain minimum standard for the treatment of foreign investors.

Subsequently, a new round of development occurred in the conditions of the post-WWII period, the goal of which was a transcendence from protectionism and nationalism to the free and open market[23]. It was during this period that, as a precursor to international investment law, international economic (trade) law gave rise to the first harmonized instruments (legal framework), such as Article 3 of The General Agreement on Tariffs and Trade (GATT 1947), Article 5.1.1 of the Technical Barriers to Trade (TBT Agreement 1995), and Article 3 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement). Unlimited solely by the desire to create conditions for economic prosperity, the international community also pursued the goal of creating a concept of interdependence between countries in order to eliminate the risk of dominance by one side or another.

An additional way to consolidate specific standards of relations between the host state and the investor was the formation of the 1970s New International Economic Order (NIEO) by the General Assembly[24]. The focus of its work was addressed not only to developing, but also to developing countries, both within and outside the UN system. It can be said without exaggeration that NIEO formulated fundamental principles from which other equally challenging ideas were derived, questioning some of the officially accepted principles of an international legal regime that the newly independent States did not recognize as their creation.[25] For example, it was established that "no State shall be compelled to grant preferential treatment to foreign investment"[26] as well as "where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful

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[22] *International Investment Law: A Changing Landscape A Companion Volume to International Investment Perspectives* (OECD 2005), 44, https://www.oecd.org/investment/internationalinvestmentagreements/40077899.pdf, accessed 10 Sept. 2023

[23] Patricia M. Goff, *Invisible Borders: Economic Liberalization and National Identity*, (Oxford University Press, 2000), 533, https://www.jstor.org/stable/3014032, accessed 10 Sept. 2023

[24] UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 3201 (S-VI): Declaration on the establishment of a new International Economic Order (1974), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2775/download, accessed 11 Sept. 2023

[25] F. Garcia Amador, *The Proposed New International Economic Order: A New Approach to the Law GoverningNationalization and Compensation*, (Lawyer of the Americas 1980) vol. 12, no.1, 1–58

[26] Charter of Economic Rights and Duties of States 1974, art 2 (a)

means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means"[27].

Notably, even the creation of the 1965 draft Convention on the Settlement of Investment Disputes between States and Citizens of Other States could not counter new ideas and better resolve the issue of protecting investor rights. In particular, the ICSID Convention merely provides a procedural mechanism enabling the protection of foreign investments. Nevertheless, thanks to the minimal consolidation of the procedural mechanism, the world economy began a process of liberalization, expressed in a rethinking of the rights of large investors. Namely, protecting the right to equal treatment between foreign and local investors began to acquire its original forms (national standard of protection).

Thus, although "numerous multilateral approaches have been taken to develop the substance of international economic law in a systematic and universally acceptable manner"[28]. Nevertheless, a unified and systematic approach to the formulation, interpretation, and application of the NT standard has yet to be found due to its complexity, expressed in the fact that it is a relative principle that is impossible to put into a simplified form. Customary international law, unfortunately, has failed to regulate the responsibility of the host state to the investor. Firstly, it established only a minimum standard of treatment (obviously insufficient), and secondly, it allowed foreign investors to receive the state's expropriation of investments.

However, the central and final period of the formation and systematization of the NT can be considered the period of the 90s, when such tools as the OECD National Treatment Instrument, the North American Free Trade Agreement, and the Energy Charter were created. If the OECD has declaratively established the principles of international investment and the notification procedure for member states about exceptions from national treatment, then the direct consolidation of what is meant by national treatment was achieved within the 1994 NAFTA Treaty Chapter 11 framework. In particular, Article 1102 states that a foreign investor is accorded treatment no less favorable than that the host state accords to its investors.

The Energy Charter Treaty of 1994, in turn, clarified the wording of the NT standard: *"Each Contracting Party shall endeavor to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph.*

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[27] Ibid., art 2 (c)

[28] Sundaresh Menon, *The Transnational Protection of Private Rights, PRACTISING VIRTUE INSIDE INTERNATIONAL ARBITRATION* (Oxford 2015); https://doi.org/10.1093/acprof:oso/9780198739807.003.0002, accessed 27 Sept. 2023

For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favorable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favorable"[29].

Thus, the above three legal frameworks became a new wave of development with NT standard emerged from 1994 and legal basis for the emergence and writing of numerous BIT's and IIAs[30]. It is important to emphasize that before this wave, the process of development of the NT standard began at the time of the appearance of the first BIT in 1959[31]. Moreover, in addition to these three legal frameworks, model BITs also played a significant role at this time, which will be discussed in the next chapter.

2.2. Scope and exceptions of the NT

NT standard operates as an obligation of a host state to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals[32]. Consequently, the main idea of this standard is to give protection not less favorable that to nationals. The scope of the standard varies as there is no uniformity about stages where it can applies and as there is a broad range of exceptions. However, consideration of model BITs, phases of the investment process, and exceptions to the application of the standard will shed light on their essence.

2.2.1. Model BITs

Model BITs have the same essence as BITs. However, they are prepared by the parties to negotiate a future agreement, and therefore, to the same extent, they reflect the ideas and thoughts of the parties. In other words, model BITs reflect the arrangements that states consider desirable for their foreign investment protection treaties.

The importance of model BITs in understanding the spread of the NT standard is expressed in the fact that they quite accurately formulate the definition of this standard. For example,

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[29] Energy Charter Treaty 1994, art 10 (2,3)

[30] Rudolf Dolzer, History, *Sources, and Nature of International Investment Law* (Oxford Scholarly Authorities on International Law, 2022), https://opil-ouplaw-com.ezproxy.uio.no/display/10.1093/law/9780192857804.001.0001/law-9780192857804-chapter-1, accessed 28 Sept. 2023

[31] Germany - Pakistan BIT (1959), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1732/germany---pakistan-bit-1959, accessed 28 Sept. 2023

[32] Dolzer R. & Schreuer C., *Principles of International Investment Law* (Oxford University Press, 2012), 198, https://ru.scribd.com/document/531308694/Dolzer-R-Schreuer-C-Principles-of-International-Investment-Law-2nd-Ed, accessed 28 Sept. 2023

Article 5 of the Asian-African Legal Consultative Committee Revised Draft of Model Agreements for Promotion and Protection of Investments (1985) defines the NT standard as:

(i) Each Contracting Party shall accord in its territory to the investments or returns of nationals, companies or State entities of the other Contracting Party treatment that is not less 119 favourable than that it accords to the investments or returns of its own nationals, companies or State entities.

(ii)Each of the Contracting Parties shall extend to the nationals, companies or State entities of the other Contracting Party, treatment that is not less favourable than it accords to its own nationals, companies or State entities in regard to management, control, use, enjoyment and disposal in relation to investments which have been received in its territory[33].

A roughly similar definition is contained in Article 3 of the Germany Model BIT 1991[34].

It is noteworthy that today there are 88 such model agreements, and their creation continues around the world[35]. On the one hand, it indicates that they allow states to safely and accurately express themselves to foreign investors, thereby attracting investment. On the other hand, it is about creating a uniform approach to unifying and standardizing the treatment of foreign investors. The definition of the NT standard, even in early model BITs, quite clearly sets out exactly how its compliance should be ensured.

In general, both model BITs and the abovementioned legal frameworks worked as interdependent elements of a common whole since, at the same time, they formed a shared global understanding of what the NT standard is. Moreover, the significance of considering model BITs within the framework of this thesis is that they make it possible to revise the provisions of existing BITs and negotiate new BITs with a predetermined position.

2.2.2. Phases of investment process

Determining the extent of coverage of the national treatment rule is multifaceted since this standard is relative, depending on many factors. However, to streamline its operation, it is necessary first to establish at what phases or stages of the investment process it is applied.

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[33] Asian-African Legal Consultative Committee Revised Draft Of Model Agreements For Promotion And Protection Of Investments (1985), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2878/download, accessed 29 Sept. 2023

[34] Germany Model BIT (1991), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2864/download, accessed 29 Sept. 2023

[35] Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements, accessed 30 Novem. 2023

Frequently, BIT's and IIA's national treatment clauses specify in which stage it can be addressed, which is why it is commonly accepted that primarily it applies in the post-entry phases, which is the basis for much debate since both arbitral practice and scholars believe that the degree of investor protection would increase significantly if the spread of national treatment affected both the pre-entry and post-entry phases[36]. Some countries explicitly emphasize in their model BITs that they provide only post-establishment protection and does not cover the pre-establishment phase or matters of market access[37]. Interestingly, formulation of post-establishment protection was absent in the previous Italian model BIT 2003 version[38]. This ability to clarify or change the terms of future interaction with foreign investors again demonstrates the importance of having model BITs.

The pre-establishment phase typically includes the establishment and acquisition of investments. At the same time, post-establishment consisted of expansion, management, conduct, operation, maintenance, use, and sale or other disposition of investments[39].

As can be seen from the clarification of the constituent elements, the most beneficial from the point of view of the investor's interests is a combination of both stages. However, taking it as a basis would significantly upset the balance of interests of the parties since the receiving state would be forced, even before signing and adopting the relevant BIT, to take measures to introduce changes to domestic legislation.

From my point of view, a positive phenomenon can be considered that, in general, recently, there has been an increase in the number of IIAs with pre-entry phases, which is, for example, illustrated in The United States – Mexico – Canada Agreement (USMCA), because this eliminates the risks of subsequent litigation, which significantly saves the parties' time and resources. It is confirmed that countries, where pre-entry stages exist, are of greater interest to investors for security reasons.

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[36] Giorgio Sacerdoti and Niall Moran, *Non-Discrimination Clauses: Most-Favoured-Nation and National Treatment* (Oxford 2022); https://www-bloomsburycollections-com.ezproxy.uio.no/monograph-detail?docid=b-9781509929078&pdfid=9781509929078.ch-025.pdf&tocid=b-9781509929078-chapter25, accessed 29 Sept. 2023

[37] Italy Model BIT 2022, art. 3, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6438/download, accessed 29 Sept. 2023

[38] Italy Model BIT 2003, art. 3, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2819/download, accessed 29 Sept. 2023

[39] Jincheng Tongda & Neal, *The Investment Treaty Arbitration Review (8th Edition)* (Law Business Research, 2023), https://www.lexology.com/library/detail.aspx?g=26ccfa8d-cf71-41c9-8c36-686b1a96677e, accessed 29 Sept. 2023

Therefore, the share of foreign investment in these countries is higher than in those where such stages do not exist. Also, the preventive work of government agencies to protect foreign investments leads to the absence of the need, in principle, to seek arbitral protection.

2.2.3. Exceptions

As with other provisions aiming to protect foreign investors, the application of national treatment may be limited if justified by legitimate reasons. Exceptions to national treatment can be divided into general exceptions, subject-specific exceptions, and country-specific exceptions[40]. General exceptions are the leading group aimed at protecting particularly vulnerable areas, such as public health, order and morals, and national security (China–Turkey BIT (2015). Exceptions for specific items that affect the scope of intellectual property, tax provisions in bilateral tax treaties, prudential measures in financial services, or temporary macroeconomic guarantees[41]. A country-specific exception is where a contracting state reserves the right to treat domestic and foreign investors differently under its laws and regulations, particularly those that relate to specific sectors or activities[42]. Undoubtedly, the narrow focus of the last two groups of exceptions affects their possible intersection and coincidence, but this does not significantly impact the rights and interests of investors since this division is conditional.

The principal value of considering exceptions within the framework of this thesis is that their action and application can both upset the balance of interests of the parties and, vice versa, balance them. Hosting states in their policy should resort to exceptions to the work of the NT standard only in extreme cases, disclosing in detail the reasons that prompted them to use such a tool to protect their interests. In this case, foreign investors can predict the development of potential threats to their investments and ultimately invest more. Transparency and legal justification should be the primary vectors for developing exceptions to the NT standard.

Thus, the NT standard has its roots in international trade law, becoming an independent and self-sufficient principle in international investment law. At the same time, analyzing the scope of application of this provision in chronological order using the example of concluded

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[40] Jincheng Tongda & Neal *The Investment Treaty Arbitration Review (8th Edition)* (Law Business Research, 2023), https://www.lexology.com/library/detail.aspx?g=26ccfa8d-cf71-41c9-8c36-686b1a96677e, accessed 29 Sept. 2023

[41] China–Germany BIT 2003, art 3

[42] National treatment UNCTAD Series on issues in international investment agreements 1999, Vol. IV, 12, https://unctad.org/system/files/official-document/psiteiitd11v4.en.pdf, accessed 30 Sept. 2023

IIAs, it becomes evident that the degree of protection of investors on the part of host states continues to grow both in the area of investment stages and in objects that receive protection. However, developing the provisions on national treatment is not without shortcomings since, in general, everything is complicated by its multifaceted complexity. Arbitral practice only confirms the argument that the development of a unified formula for formulation, interpretation, and application is practically impossible since, each time, it is necessary to consider the unique conditions of a particular case.

3. COMPARATIVE ANALYSIS OF ARBITRAL PRACTICE IN APPLYING NT STANDARD

In order to establish how the NT standard is applied in practice, it is necessary to turn to arbitral practice. In particular, it is vital to compare cases in which a violation of the NT standard has been proven or disproved. The purpose of such an analysis is to answer why there is no uniform application of the NT standard and what causes the small number of cases with a proven violation of the NT standard. The analysis below is illustrative since it is intended to show the background of enforcing the standard. The main focus of the thesis is concentrated in Chapter 4, which focuses on what should be done to improve the efficiency of the NT standard, as well as what ideas for modernization exist today. Chapter 3 will compare the arbitral practice in which a violation of the NT standard has been either proven or merely alleged, as well as the interaction of the NT standard with other standards of protection.

Arbitration practice in international investment law consists of cases heard by different tribunals and institutions, so various databases have been developed to ease systematization and tracking. Such databases, collecting data on international investment law, are JusMundi[43], ITA Law[44], and Leiden University Libraries[45]. All these databases have in common that they allow users to search by category of case, year of consideration, and names of parties; that is, they greatly facilitate the search for the necessary information.

Nevertheless, it is necessary to note that the primary resource containing information on the consideration of disputes in international investment law, as well as systematizing this information, is the investment policy hub from UNCTAD. For this reason, the analysis of the

[43] Jus Mundi Search for International Law and Arbitration, https://jusmundi.com/en/search?page=1&lang=en&document-types%5B0%5D=case, accessed 30 Novemb. 2023

[44] ITA Law, https://www.italaw.com/browse, accessed 30 Novemb. 2023

[45] Leiden University Libraries, https://catalogue.leidenuniv.nl/discovery/dbsearch?vid=31UKB_LEU:UBL_V1, accessed 30 Novemb. 2023

cases cited in this work is based on the information presented on the UNCTAD database, which is the most reliable resource that enjoys international recognition and regularly updated data. At the same time, it is essential to undermine that this dissertation is a master's thesis and, therefore, is objectively limited to a specific framework. In particular, the subject of a detailed study was 9 cases[46] in which a violation of the NT was recognized. The remaining 158 cases[47], in which a violation of the standard was claimed but not proven, cannot be disclosed in total, both because they do not allow to see the complete picture of what exactly there are difficulties with applying the standard, and because of their volume. However, their analysis was based on a sample of cases presented in various sources, including scholarly articles, formed on the presence of significant and indicative conclusions of tribunals, which provide a comprehensive understanding of existing problems.

For a comprehensive comparative analysis of the application of NT provision, I propose to divide known treaty-based ISDS cases into two groups:

1. cases in which violation of NT was granted;
2. cases in which NT was claimed but not proven for any reason.

Before contrasting the presented practice in these two categories of cases, it is necessary to determine what criteria for assessing violations of the NT standard are used by the tribunals. The evaluation criteria used by the tribunals do not always coincide in different cases since they depend on the agreement that governs the relations of the disputing parties and the plot of the case itself. Such a problem with various criteria is likely associated with the versatility and complexity of the NT standard. However, the criteria established in the FTA are generally accepted. For example, within the framework of NAFTA Chapter 11, the following "Three-fold test" was developed, expressed in Article 1102:

i. The "treatment" must be "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition" of the relevant investments;

ii. The investor or investments must be "in like circumstances" compared to the investor or investment of the respondent State (the "comparator") and;

iii. The treatment must have been less favorable than that accorded to the comparator[48].

The first criterion sets the basic principle of relations with foreign investments, addressing all areas of their action. While the term "like circumstances" means that the allegedly

[46] Investment Policy Hub, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement, accessed 30 Novemb. 2023 at 18:00

[47] Ibid

[48] North American Free Trade Agreement 1992, art 1102 (1, 2, 3)

discriminatory measures adopted vis-à-vis a foreign investor or investment should be compared with those adopted towards a similarly situated national or foreign investor or investment (i.e., a comparator)[49]. Lastly, "less favorable" treatment refers to the fact that both the foreign investor and the comparator must receive equal treatment in all respects from the state, excluding discrimination in any form.

On the other hand, tribunals also tend to apply general criteria, considering two issues, the presence of which is necessary to decide whether a violation of national treatment has occurred:

i. the appropriate comparator; and

ii. the extent to which the treatment accorded to the investor and his investment is consistent and fair with the treatment accorded under the same conditions to a domestic investor.

3.1. Cases in which a breach of NT was found

In all 9 cases[50] from 1998 to 2014, it can be tracked that the decisions were mainly regulated by NAFTA (6) and BITs (3[51]). This fact allows us to understand that a favorable consideration for an investor of a case with recognition of a violation of NT standard may be partly influenced by the framework within which agreement the parties resolve the dispute. In this case, NAFTA is a more advantageous framework, and the geography of the case, namely, between which countries (continents) the conflict arose. Surprisingly, the object of dispute (investment) in 3 out of 4 cases involving Mexico was sugar syrup, which indicates that systemically essential categories of the country's economy are of particular importance from the point of view of violation. It is also of analytical interest that in 8 out of 9 cases, the United States of America is represented either on the side of the defendant or in the person of its investors. It would not be justified to speculate about that, but the pattern is likely due to the more detailed and comprehensive protections provided by NAFTA.

Therefore, a substantive examination of the evaluation criteria is necessary, firstly, in order to see their positive and negative aspects (the extent to which they reflect the essence of the NT

[49] Dr. Algazzar Alia, *Similarity / In Like Circumstances (Jus Mundi, 2023)*, https://jusmundi.com/en/document/publication/en-similarity-in-like-circumstances, accessed 4 Oct. 2023

[50] OLIN v. LIBYA (2014), CLAYTON/BILCON v. CANADA (2008), CARGILL v. MEXICO (2005), ADM v. MEXICO (2004), CARGILL v. POLAND (2004), CORN PRODUCTS v. MEXICO (2004), OCCIDENTAL v. ECUADOR (I) (2002), FELDMAN v. MEXICO (1999), MYERS v. CANADA (1998)

[51] Cyprus - Libya BIT (2004), Poland - United States of America BIT (1990), Ecuador - United States of America BIT (1993)

standard). Second, to determine whether the used criteria themselves are the problem that is causing the number of cases with proven violations of the NT standard to be only 9.

3.1.1. Like circumstances

Speaking about "like circumstances," it is impossible not to touch upon the historical connection of this term with international trade law since its meaning and enforcement are inextricably linked with the understanding available in this area of law. This connection still determines the development of this criterion since it has been incorporated to a certain extent into international investment law.

The question of what constitutes "like circumstances" as understood and applied by the tribunals is still complex, open, and controversial because it depends upon the "facts of a given case"[52], the "legal context, and the specific circumstances of any individual case"[53], and taking into account "all the circumstances of each case"[54]. This duality and versatility in the assessment of "like circumstances" used by the tribunals have led to ambiguous and contradictory results in arbitral practice, and this could not be avoided even in cases where the wording of the provisions in the relevant frameworks is almost identical. For example, in the case *Cargill, Incorporated v United Mexican States*, the tribunal stated that while the argument that cane sugar and high fructose corn syrup are "directly competitive or interchangeable products" is relevant, it is not determinative of whether the producers of those products are in "similar circumstances"[55]. Whereas in the case of *Pope & Talbot v. Canada*, the tribunal points out other circumstances: in determining "similar circumstances," it is necessary to take into account the material facts and that an important element of the surrounding facts will be the nature of the measure impugned. "Similar circumstances" were defined by the justification for the challenged measure. It was not an abstract definition of "similar circumstances"[56].

[52] POPE & TALBOT INC v. GOVERNMENT OF CANADA, [1999] (2001) 33, https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf, accessed 6 September 2023

[53] TOTAL S.A. v. ARGENTINE REPUBLIC, [2004] ICSID 04/01 (2013) ARB 106, https://www.italaw.com/sites/default/files/case-documents/italaw7199.pdf, accessed 6 September 2023

[54] S.D. MYERS, INC. v. GOVERNMENT OF CANADA [1998] (2000) 66, https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf, accessed 11 September 2023

[55] CARGILL, INCORPORATED v. UNITED MEXICAN STATES [2005] ICSID 05/2 (2009) ARB, https://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf, accessed 5 September 2023

[56] POPE & TALBOT INC v. GOVERNMENT OF CANADA, [1999] (2001) par. 205, https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf, accessed 6 September 2023

Thus, from the presented analysis, it follows that despite the formed criteria for assessing violations of the NT standard, their interpretation and enforcement affect a uniform understanding of the standard's work by tribunals and parties to disputes.

3.1.2. Discriminatory treatment

To begin with, the essential issue in these cases was whether there was discriminatory treatment. To identify this, tribunals will often look at what nationality the investor is and in what country he carries out investment activities, as well as whether discrimination occurs *de jur*e or *de facto*. The former refers to measures that on their face treat entities differently, whereas the latter includes measures that are neutral on their face but which result in differential treatment[57]. However, de facto discrimination is just as inconsistent with treaty-based national treatment obligations as is de jure discrimination[58]. It is noteworthy that difficult circumstances arise if the investor has dual citizenship or renounces citizenship/long-term non-residence in the host country with which the investor had a long-term relationship since, in such cases, a dispute arises about the scope of the investor's rights and the degree of his protection.

One of the main problems in establishing the existence of discrimination is that simply determining whether an investor and similarly situated individuals are treated equally is not a sufficient or comprehensive measure to establish the presence or absence of discrimination. In other words, no test can determine this unambiguously since everything depends on examining the context in which the measure is established and applied and the specific circumstances of each case[59]. In other words, based on arbitral practice, the NT standard's application is largely context dependent.

A potential solution to this problem is the development of uniform criteria based on arbitration practice with mandatory harmonization of all existing norms. The criterion "like circumstances" needs to unify what should be considered similar: for example, not only the purpose of the product, its properties, and characteristics, the possibility of replacement by others, but also competition with other products (market comparison). Non-discrimination should consider not only the investor's nationality at the time of consideration of the case but

[57] ARCHER DANIELS MIDLAND COMPANY v. TATE & LYLE INGREDIENTS AMERICAS, INC v THE UNITED MEXICAN STATES [2004] ICSID 04/5 (2009) ARB 64, https://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf, accessed 6 September 2023.

[58] CARGILL, INCORPORATED (United States of America) v. REPUBLIC OF POLAND [2004] ICSID (2008) 78, https://www.italaw.com/sites/default/files/case-documents/italaw9275.pdf, accessed 7 September 2023

[59] S.D. MYERS, INC. v. GOVERNMENT OF CANADA [1998] (2000) 62, https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf, accessed 11 September 2023

also their relationship with other countries since having citizenship does not reflect a possible connection with other countries. Additional criteria for assessing violations of the NT standard may also be implemented, for example, comparing the potential damage to the interests of the investor and the host state from the measure taken. Moreover, the specifics of a single case must be considered passed through the prism of the "spirit" of the national regime and not its letter (literal interpretation). This measure must be used carefully to ensure it is not abused against the host country and the tribunal beyond its powers. However, without criteria by which the decision maker evaluates their similarity, conclusions of "discrimination" are arbitrary and subjective[60].

3.2. Cases in which breach of NT was alleged

Given that NT is a relative standard, the main idea from the presented case law is that there is no precise methodology for performing the analysis to identify a violation. In particular, a technique that compares the behavior of the host state concerning other investors or their investments is equally effective. The reason for this is that any issues that arise during the consideration of a dispute must be oriented toward specific facts. Consequently, an appropriate criterion in one case may be different from another. In any case, neither the treatment nor the similarities or differences between the relevant circumstances can be considered in insulation[61]. Each time, the unique circumstances directly related to the intended appeal to the investor and his investments must be considered.

As for the general analysis of cases in which a violation of the NT was not proven, it is impossible to draw an unambiguous conclusion as to why there are so many more such cases than those in which a breach of the NT standard was found. Again, because the tribunals assess each case individually, using different criteria, and also, importantly, because the interests of the investor can be protected not only by the NT provision but also by other related standards, which will be discussed at the end of this chapter.

3.2.1. Less favorable treatment

[60] Andrew D. Mitchell, David Heaton, and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Elgar International Investment Law series, 2016), https://www-elgaronline-com.ezproxy.uio.no/display/9781785368103/08_chapter2.xhtml, accessed 10 Oct. 2023

[61] VENTO MOTORCYCLES, INC. v. UNITED MEXICAN STATES [2017] ICSID 17/3 (2020) ARB 66, https://www.italaw.com/sites/default/files/case-documents/italaw11903.pdf, accessed 16 October 2023

This stage includes establishing whether the investor receives less favorable treatment from the state than the domestic comparator due to legislative regulation, internal policies, and other measures. Tribunals often try to determine how broadly or limitedly the local comparator should be treated since this will determine whether an investor can demonstrate less favorable treatment to himself. Also, a differentiation need not violate domestic law contrary to the national treatment standard[62]. The Tribunal outlined its position regarding this in the case of *Lauder v Czech Republic*: "For a measure to be discriminatory, it does not need to violate domestic law, since domestic law can contain a provision that is discriminatory towards foreign investment, or can lack a provision prohibiting the discrimination of foreign investment"[63]. In analyzing the case law, tribunals generally tend to take a narrower approach, which makes it quite difficult to prove a violation of National Treatment. In the *AES v. Hungary (II)* case, the Tribunal stated that: "To establish less favorable treatment, a claimant need identify only one domestic investor/investment in like circumstances that are treated more favorably; it is irrelevant whether any other domestic investor is treated equally to or less favorably than the foreign investor"[64]. That is why, most likely, there are more cases with unproven violations of the national regime than those where it was found. Once the relevant comparator in Methanex was found to be an identical domestic comparator, it is unsurprising that the Tribunal found that "There is no more or less favorable treatment here. The treatment is uniform, for the ban applies to all MTBE manufacturers"[65]. The narrow approach employed in *Methanex v U.S.A* "runs the risk of excluding swathes of discriminatory conduct from the scope of national treatment"[66].

Also, discrimination, as well as in arbitral practice with a proven violation of the National regime, is understood not only de jure but also de facto. For example, this position was expressed by the Tribunal in *Alpha v Ukraine*: "Such discrimination may arise de jure if there is a government policy, such as a law or regulation, that discriminates against domestic and

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[62] Rudolf Dolzer, *VIII Standards of Protection* (Oxford Scholarly Authorities on International Law 2022), https://opil-ouplaw-com.ezproxy.uio.no/display/10.1093/law/9780192857804.001.0001/law-9780192857804-chapter-8?prd=OSAIL#law-9780192857804-chapter-8-div1-50, accessed 18 October 2023

[63] RONALD S. LAUDER v. The Czech Republic [1999] (2001) 48, https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf, accessed 18 October 2023

[64] AES SUMMIT GENERATION LIMITED AES-TISZA ERÖMÜ KFT v. REPUBLIC OF HUNGARY (II) [2007] ICSID 07/22 (2010) ARB 256, https://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf, accessed 16 October 2023

[65] METHANEX CORPORATION v. UNITED STATES OF AMERICA [1999] ICSID (2005) ARB 253, https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf, accessed 16 October 2023

[66] J Kurtz, *The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents* (20 European Journal of International Law 2009), https://academic.oup.com/ejil/article/20/3/749/402388, accessed 16 October 2023

foreign investors, or de facto if the measure is not clearly or inherently discriminatory but discriminates against domestic and foreign investors in a manner that applies"[67]. In *Archer Daniels Midland v Mexico*, the Tribunal also confirmed the existence of such forms of discrimination, stating: "The national treatment obligation under Article 1102 is an application of the general prohibition of discrimination based on nationality, including both de jure and de facto discrimination. The former refers to measures that on their face treat entities differently, whereas the latter includes measures which are neutral on their face but which result in differential treatment"[68].

Although the less favorable treatment indicates that discrimination based on nationality is prohibited, "whether they apply to distinctions that are not based on nationality but are still not justified on rational grounds"[69]. For example, in the case *Feldman v Mexico*, the Tribunal said: "it is not self-evident, as the Respondent argues, that any departure from national treatment must be explicitly shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances… For practical as well as legal reasons, the Tribunal is prepared to assume that the differential treatment is a result of the Claimant's nationality, at least in the absence of any evidence to the contrary"[70]. Thus, providing evidence of discrimination without a national characteristic was sufficient. However, this approach was not widely used.

Political decisions are also not sufficient in all cases to prove the existence of discrimination since they can be justified by their error[71].

The above features again indicate the significant complexity of the national regime since the tests that make it possible to establish its violation are characterized by ambiguous interpretation and, as a result, law enforcement.

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[67] ALPHA PROJEKTHOLDING GMBH v. UKRAINE [2007] ICSID 07/16 (2010) ARB 149, https://www.italaw.com/sites/default/files/case-documents/ita0026.pdf, accessed 16 October 2023

[68] ARCHER DANIELS MIDLAND COMPANY and TATE & LYLE INGREDIENTS AMERICAS, INC. v. THE UNITED MEXICAN STATES [2004] ICSID 04/05 (2007) ARB 64, https://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf, accessed 17 October 2023

[69] POPE &.. TALBOT INC v. THE GOVERNMENT OF CANADA [1999] (2001) 35, https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf, accessed 16 October 2023

[70] MARVIN FELDMAN v. MEXICO [1999] ICSID 99/1 (2002) ARB 149, https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf, accessed 17 October 2023

[71] GAMI INVESTMENTS, INC. v. THE GOVERNMENT OF THE UNITED MEXICAN STATES [2002] (2004) 36, https://www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf, accessed 17 October 2023

3.2.2. Like circumstances

Analysis of cases with unproven violations of the national regime shows that one of the obstacles on the investor's path is the need for more indication of what circumstances are like in national treatment clauses. In some cases, the tribunals made comparisons of circumstances based on specific facts[72]. This approach is based on an assessment of specific facts, taking into account aspects that can influence the determination of what is recognized as the same circumstances, such as the business and regulatory environment[73]. In other cases, in order to assess whether the investor and the local comparator were operating in the same sector of the economy, tribunals had to differentiate between "like circumstances" or "like situations" since these concepts are not identical[74]. The difference in the approaches of the tribunals in cases in which a breach of the NT was proven, and those in which a violation was not found is that in the former, "in like circumstances" is interpreted narrowly and refers to the same business[75], and in the latter refer to local producers in general: "and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken"[76]. For instance, in *Merrill & Ring v Canada*, the tribunal concluded that: "NAFTA tribunals have, on several occasions, considered various factors in assessing whether investors are 'in like circumstances'… The environment, trade, the nature of services and functions, and public policy considerations are (p. 256) found among such factors. It also explains why it is not enough on occasions to compare solely in the same sector of economic activity, and it might be necessary, as in Occidental, to consider whole sectors of the economy and business"[77].

Consequently, existing practice in cases of unproven violation of NT standard also supports the argument that today, no established approach can unambiguously solve the problem that tribunals in different cases may refer to opposed conclusions on the same issues discussed

[72] BAYINDIR INSAAT TURIZM TICARET VE SANAYI A.Ş. v. ISLAMIC REPUBLIC OF PAKISTAN [2003] ICSID 03/29 (2009) ARB 114, https://www.italaw.com/sites/default/files/case-documents/ita0075.pdf, accessed 18 October 2023

[73] GRAND RIVER ENTERPRISES SIX NATIONS, LTD., ET AL. v. UNITED STATES OF AMERICA [2004] (2011) 41, https://www.italaw.com/sites/default/files/case-documents/ita0384.pdf, accessed 18 October 2023

[74] CHAMPION TRADING COMPANY AMERITRADE INTERNATIONAL, INC. v. ARAB REPUBLIC OF EGYPT [2002] ICSID 02/9 (2006) ARB 30, https://www.italaw.com/sites/default/files/case-documents/ita0148.pdf, accessed 18 October 2023

[75] MARVIN FELDMAN v. MEXICO [1999] ICSID 99/1 (2002) ARB 171, https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf, accessed 18 October 2023

[76] OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY v. THE REPUBLIC OF ECUADOR [2002] LCIA 3467 (2004) UN 60, https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf, accessed 18 October 2023

[77] MERRILL & RING FORESTRY L. P. v. THE GOVERNMENT OF CANADA [2006] ICSID 07/1 (2010) UNCT 38, https://www.italaw.com/sites/default/files/case-documents/ita0075.pdf, accessed 18 October 2023

earlier. At the same time, it cannot be said that this is a gap in rulemaking or incorrect law enforcement; instead, this is a consequence of the fact that the NT standard is relative.

3.3. Regulatory purpose

The tribunals, having examined the case's circumstances and correlating them with the criteria for violating of the NT standard, such as discriminatory treatment and "like circumstances," should go to the next stage. In all cases, if the tribunal finds it justified to raise the third stage (the reasonableness of the measures taken by the host state), as often no further consideration is required if the previous criteria have not been proven, then the conclusions on this part may largely influence the final decision. In other words, rebut the likeness found based on differentiation among investors due to a legitimate regulatory purpose.

First, it is necessary to distinguish between protectionist intentions and the protection of public interests since, in general, justification for violating the national regime is allowed to protect public interests. Although in the *SD Myers* case in 2000, the tribunal tried to argue that violation of national treatment was justified for protectionist purposes, this trend was not reflected in subsequent decisions.

One of the main factors necessary to justify a violation of the NT is that instead of intent, which "is not necessarily conclusive in itself," "the word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that violates Chapter 11[78]. For example, in *ADF v. United States*, the national treatment standard was not violated because the "exception" was applied to foreign investors and domestic comparators. The Thunderbird decision sheds light on another aspect, as it demonstrates that although gambling was illegal in Mexico, poor enforcement of that prohibition could not justify the plaintiff's argument that "reliance on NAFTA Section 1102 to protect the equality of non-enforcement requirements in the area of activity that the Contracting Party considers illegal[79].

However, not all "justifications" for violating national treatment are convincing. As demonstrated by recent cases such as *Piero Foresti, Laura de Carliand others v Republic of South Africa*, these differentiations in treatment can touch upon essential political issues that go

[78] S.D. MYERS, INC. v. GOVERNMENT OF CANADA [1998] (2002) 64, https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf, accessed 18 October 2023

[79] INTERNATIONAL THUNDERBIRD GAMING CORPORATION v. THE UNITED MEXICAN STATES [2002] (2006) 60, https://www.italaw.com/sites/default/files/case-documents/ita0431.pdf, accessed 19 October 2023

much further than the simple definition of an industrial policy or the intentional protection of certain key economic sectors[80].

Thus, the validity of recognizing the national treatment standard as comprehensive and relative is justified since its scope goes beyond protecting investors both from protectionism and other measures that are legal in the host state but contrary to international law.

Although the main focus of this thesis is the NT standard, one would still like to ask whether this standard is so separate and self-sufficient as to eliminate the need for other investor protection standards, such as MFN and FET. The answer to this question will be clarified in the next paragraph.

3.4. Relationship and interdependence of NT with other standards

NT provisions, together with MFN provisions and provisions on the prohibition of arbitrary or discriminatory measures, belong to a group of relative standards requiring a comparator vis-à-vis the treatment of a foreign investor or investment [81]. Indeed, having analyzed existing case law and regulations, it becomes evident that proving a violation of NT is also tricky because investors resort to using similar standards in international investment law. The reason for this is the ability to protect their interests through several tools/standards, not just national treatment. Presumably, it is due to the fact that investors would not be able to obtain the proper level of protection if there was only one standard.

FET is a standard of international investment law that sets a quality requirement for the interference of host state regulatory and adjudicatory systems with foreign investments.[82] This standard relates to national treatment primarily in the form of the legal consequences of unilateral statements and the conditions under which they can be considered binding[83]. Also, FET covers discrimination like NT, delimiting only areas such as prohibiting discrimination on race, sex, or religious belief, while NT deals with discrimination based on nationality. At the same time, FET is an independent standard. Unlike national treatment and MFN treatment, it is

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[80] Leïla Choukroune, *National treatment in international investment law and arbitration: A relative standard for autonomous public regulation and sovereign development* (Law 2014, 2014), https://www-elgaronline-com.ezproxy.uio.no/edcollchap/edcoll/9781783471218/9781783471218.00017.xml, accessed 19 Oct. 2023

[81] Cisár Ivan, *National Treatment* (Jus Mundi, 2023), https://jusmundi.com/en/document/publication/en-national-treatment, accessed 21 Oct. 2023

[82] Nicolas Angelet, *Fair and Equitable Treatment* (Max Planck Encyclopedias of International Law, 2022), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e2055#:~:text=1%20Fair%20and%20equitable%20treatment%20('FET')%20is%20a,%3B%20Investments%2C%20International%20Protection), accessed 21 Oct. 2023

[83] Legal Status of Eastern Greenland (Denmark v Norway), Judgment, 5 April 1933, PCIJ Series A/B № 53, 22, 69

governed exclusively by international law and independent from the treatment accorded to investments of host state nationals[84]. Intriguingly, certain investment treaties specify that national treatment is the minimum level of FET (e.g., Article 3(1) of the Argentina-Czech Republic BIT [1996]). This conclusion confirms how closely the standards in international investment law are related to each other, mainly how general and specific the differences are between FET and NT.

The International Law Commission (ILC) has defined MFN treatment as follows: "Most-favoured-nation treatment is a treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State or to a third State or to persons or things in the same relationship with that third State[85]. It is known that MFN rules operate differently in international investment. In the chronological context of the BITs, given that NT was not typical, reference to MFN provisions was unified to ensure that in the absence of a national treatment standard, host states could guarantee the affected foreign investor no less favorable treatment. Apart from what it provides to a third foreign investor, it would also provide future protection for the investor on equal terms when national treatment provisions arise. For this reason, most existing IIAs today have rules on MFN provisions, which are inextricably linked with NT standard as a complementary element contained in one chapter or article. In line with the above, given that, as interpreted by the IIAs, NT is the indispensable standard of treatment that host states must guarantee to ensure equal rights across their borders for the benefit of foreign investors, it is clear that "MFN is considered in IIAs like a subordinate treatment standard. MFN treatment is used in IIAs as a secondary treatment standard"[86]. It happened because the MFN principle is the predecessor of the NT, which is why, in case law, investors often resort to protection through both standards. Also, both some BITs and free trade agreements provide for investment reforms. They do so by granting NT and MFN to foreign investors in the preestablishment phase, i.e., a right to invest in conditions no less favorable

[84] ALEX GENIN, EASTERN CREDIT LIMITED, INC. AND A.S. BALTOIL v. THE REPUBLIC OF ESTONIA [1999] ICSID 99/2 (2001) ARB 91, https://www.italaw.com/sites/default/files/case-documents/ita0359.pdf, accessed 22 October 2023

[85] Article 5 of the Draft articles on most-favoured-nation clauses (ILC Draft), (Yearbook of the international Law Commission, 1978), Vol. II, Part Two, p. 21

[86] UNCTAD Series on Issues in International Investment Agreements II *MOST-FAVOUREDNATION TREATMENT* (UNITED NATIONS, 2010), 1, https://unctad.org/system/files/official-document/diaeia20101_en.pdf, accessed 23 October 2023

than those that apply to nationals of the host country (NT) or nationals of any third country (MFN)[87].

Thus, we can conclude that the effectiveness of the NT standard must be considered in conjunction with the MFN and FET since both case law with cases where a breach of the NT was proven, and those in which a violation was not found indicate that investors always aim to protect their interests through the combination of these standards.

Consequently, the conclusion that the NT standard could be more applicable or require significant improvement will be biased and contrary to reality.

4. COMPETING INTERESTS OF THE INVESTOR AND THE HOST STATE AS A PREREQUISITE FOR REFORMING THE NT STANDARD

As already partially noted in the second Chapter of the thesis, it is necessary to distinguish between the competitive interests of the host state and the investor. These interests are competing or clashing because there is a potential risk of conflict between maximum protection for investors and the freedom of the host state to prioritize their local investors.

In particular, there are two perspectives:

1. Foreigners should receive less favorable treatment compared to local ones;
2. Foreign investors should not give better treatment than domestic comparators (preferential treatment of foreign investors)[88].

While the first group is prominent and is widely discussed and supported in the international community, the second remains outside of the mainstream. However, precisely placing a foreign investor in a more preferable (advantageous) position is becoming an increasingly pressing problem. This aspect contradicts such a fundamental constitutional ideal as equality before the law regardless of citizenship. Unsurprisingly, there is a growing debate in the international community about the crisis of legitimacy and "backlash"[89]. Consequently, it undermines confidence in the institution of foreign investment itself, as it pursues only the interests of foreign investors. Some scholars refer to this as the foreign privilege problem: the essential characteristic and premise of the law is that it protects only foreign investors[90].

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[87] Ibid

[88] Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy* (European Journal of International Law, 2020), https://academic.oup.com/ejil/article/31/1/289/5882074, accessed 28 Sept. 2023

[89] Franck, *The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law through Inconsistent Decisions* (Fordham Law Review, 2005), 73(4) 1521

[90] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd edn, 2012), at 44; J. Crawford *Brownlie's Principles of Public International Law* (8th edn, 2012), at 611

Nevertheless, the competing interests of the investor and the host state make achieving a universally balanced approach that equally considers both parties' interests without any signs of infringement difficult. Also, the situation is complicated because the NT standard is "delocalized"[91]. In this regard, the presence in the host state of a sufficiently developed and balanced system of legislation that equalizes foreign and local investors will not have the desired effect. The reason for this is that the tribunals will primarily address to international connotations and customary international law and case law. Suppose the existing investment arbitration regime aims to move away almost wholly from national courts to international courts, justifying this by more effective protection of foreign investors in relation to local ones. In that case, it is worth paying attention to the fact that there is discrimination against host States. Namely, the disparagement of their domestic legislation and courts puts the foreign investor in a more advantageous position. It is advantageous because the local investor often seeks international protection immediately without going to the host state's courts.

This chapter will examine the role of constitutional regulation by the host state, which influences the application of the NT standard, as a consequence - the existing contradictions between domestic and international law, the justification for the privileged status of a foreign investor, and finally the reasons and vectors for the development of the NT standard.

4.1. Constitutional inequality as a barrier to the implementation of NT standard

It is known that countries' constitutions may provide particular preferences to specific groups of the population or national minorities based on entirely legitimate reasons. In this case, it is impossible to talk about the illegality of such allocation since this is the discretion of a particular state. However, any other foreign investor can expect to formally receive the same privileges as a particular category, referring to the NT standard. Thus, the host state will be forced either to refrain from singling out specific categories of its citizens who deserve particular preferences and, therefore, discriminate against its investors in relations with foreign ones or to provide the same rights to foreign investors, making such a division meaningless. Confirmation of this phenomenon can be seen in the example of Norway, in Article 41 of the Sami Convention of The Nordic Countries, in which the Sami people are given special treatment and guarantees in reindeer husbandry as a business activity[92]. It can also be seen from

[91] Leon E. Trakman, *Investor-State Arbitration* (The journal of World Investment & Trade 15, 2014), https://www8.austlii.edu.au/au/journals/UNSWLRS/2014/5.pdf, accessed 28 Sept. 2023

[92] Sami Convention of The Nordic Countries (2017)

arbitral practice that in each case, the host state bears the burden of proving that an intentional violation of the NT standard must be justified based on specific criteria since, otherwise, it will be regarded as a less favorable treatment: "The Tribunal, therefore, considers that the Respondent has failed to prove that the difference between the treatment accorded to Olin and the treatment accorded to its national competitors was justified"[93].

Nevertheless, from the point of view of international law, it does not either provide any real basis for conceptualizing the relationship between a state and its own citizens as a 'constitutional' problem[94]. It is well illustrated in the European Court of Human Rights (ECtHR) cases of *James and Lithgow*, in which the court was required to determine whether it was an infringement of equal treatment to provide foreign investors with more excellent protection of private property rights than domestic investors. The court concluded that unequal treatment had an "objective and reasonable justification" since there could be justifiable reasons for granting special rights to foreigners, including that they might be more vulnerable and less connected to solidarity with social and political processes in the country[95].

Thus, despite the interconnectedness of domestic and international law, the constitutional principle of equality before the law inherent in domestic legislation still needs to be fully reflected at the level of international regulation. It, in turn, leads to an increase in the problem of the legitimacy of international norms since the one-sided approach to protecting only foreign investors gives rise to reasonable doubts and questions among the legislative bodies of individual states. That is why, to consider this problem more substantively, it is worth paying particular attention to how failure to comply with the principle of balancing the interests of the parties (foreign investors and the host state) can lead to significant conflicts and contradictions.

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https://www.regjeringen.no/contentassets/eac999412c5a4fd083fa35f6e6c7380b/nordisk-samekonvensjon-norsk.pdf, accessed 24 October 2023

[93] OLIN HOLDINGS LIMITED v STATE OF LIBYA [2014] ICC 20355 (2018) MCP 60 https://www.italaw.com/sites/default/files/case-documents/italaw9766_0.pdf, accessed 25 October 2023

[94] Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy* (European Journal of International Law, 2020), https://academic.oup.com/ejil/article/31/1/289/5882074, accessed 28 Sept. 2023

[95] JAMES AND OTHERS v. UNITED KINGDOM [1984] ECHR 8793/79 (1986) 63, https://hudoc.echr.coe.int/#{%22fulltext%22:[%22JAMES%20AND%20OTHERS%20v.%20UNITED%20KINGDOM%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57507%22]}, accessed 25 October 2023; LITHGOW AND OTHERS v. UNITED KINGDOM, [1984] ECHR 9006/80, 9262/81, 9263/81/, 9265/81, 9266/81, 9313/81, 9405/81 (1986), https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Lithgow%20and%20Others%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57526%22]} , accessed 25 October 2023

4.2. Contradictions between the system of domestic and international law

The validity of referring within the framework of this thesis specifically to the arbitral practice of ISDS in the form of ICSID jurisprudence is also justified because this system provides a significant privilege to foreign investors and not to host states. "While foreign investment protection in the past relied principally on diplomatic and military intervention from powerful home states[96], the international investment regime today allows foreign investors to obtain an arbitral award that is enforceable against the host state in the national courts of almost any country where the state has assets, just as a commercial arbitral award rendered in a dispute between private parties"[97].

That is, returning to the problem with the conflict of domestic and international legislation, the NT standard, the provisions of which are applied by international commercial arbitration, comes into unequal resistance with the internal norms of states trying to equalize domestic investors with foreign ones. This process is carried out by diminishing the importance of the domestic judicial system, which a foreign investor can skip and apply directly for international protection. Additionally, such a mechanism is becoming more common due to the fact that parties are resorting to entering into arbitration agreements.

In practice, the mentioned problem with actual discrimination against local investors at the international level is ambiguous. In other words, the NT standard sometimes acts as positive discrimination for a foreign investor. On the one hand, a local investor must be protected by the laws of his country. On the other hand, a foreign investor entering into direct competition with the first will have an extensive toolkit at his disposal: domestic and international laws. In this case, it is unfortunately impossible to talk about discrimination from the point of view of the law, since double protection (international and domestic) of a foreign investor is not prohibited. However, foreign investors are often multinational companies such as Shell, with enormous financial, administrative, and legal resources. All this is contrasted with small and medium-sized businesses in individual countries, for example, represented by a car repair shop, which cannot compete with large foreign investors, facing insufficient protection of their interests. Regrettably, problems of this kind lead to the popularization of protectionist policies and an imbalance of interests of the parties. However, it should be noted that, after all, many states are

[96] C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Univ of California Pr, 1985), at 147ff; Miles, supra note 5, at 47ff

[97] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965, 575 UNTS 159; Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, 330 UNTS 38

personally interested in the imbalance problem since foreign investors have some privileges simply because they bring significant financial influence. Local business is left aside as the last thing worthy of attention, so to speak, the "lower classes" of the national economy[98].

Consequently, in the context of consideration of arbitral protection, international arbitration institutions still play an active role in substituting and supplanting the domestic legislation of host states, patronizing foreign investors. As critics such as Schneiderman and Julian Arato argue, for example, investment arbitration, unlike domestic courts, is endowed with a relative singularity of purpose that tends to overshadow the other challenges courts must face when domestic law is applied and shaped[99].

However, the main question remains whether such a privilege for foreign investors under the NT is justified.

4.3. Reasonableness of the privileged status of a foreign investor within the framework of the NT standard

Having previously established that a foreign investor has certain privileges compared to local ones, it is essential to determine whether the foreign investor should have such privileges. First of all, this status is due to the presence of a minimum level of guarantees of the rights of foreign investors. That is, international law was forced to create such a level of investor protection since it is presumed that the judicial system of the host state will discriminate against citizens of other countries. Indeed, host states are still unfriendly to the protection of foreign investors and are often prone to investment protectionism. Therefore, the figure of a foreign investor was always considered more vulnerable and, therefore, required increased attention. It was the reason for developing this minimum standard of treatment into a rather persistent privilege.

The denial of state policies that are closed to foreign investment is a serious obstacle to understanding why the NT standard has increased patronage of the interests of foreign investors. It is known that the desire for globalization and general interdependence after the Second World War was a response to a long period of isolation of states, expressed in the exclusion of everything foreign. The NT provisions in the IIA made it possible to ensure equal treatment of foreign investors to a certain extent by intervening and limiting to some extent the freedom in

[98] Simon Lester, *Rethinking the International Investment Law System* (Journal of World Trade, 2015) 211, at 217, https://www.cato.org/sites/cato.org/files/articles/jwt-49-2-lester.pdf, assessed 26 October 2023

[99] Julian Arato, *Two Moralities of Consistency* (Oxford University Press, 2021), note 35, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3876383, assessed 27 October 2023

measures taken by both the states themselves and domestic investors. Moreover, the NT standard's basic idea was that it simply imposes on states the responsibility to act in legal relations as a "civilized government" that does not divide investors into strangers and their own[100]. Also, an essential function of granting privileges to foreign investors through the NT provision is that a foreign investor can independently protect his interests without waiting for his state to intervene in this process or even become his representative in relations with the host state. In essence, the foreign investor received a particular international legal personality, which undoubtedly made it possible to speed up resolving disputes and improve economic and financial exchange between states. Edwin Borchard noted that "long before Article 38 of the Statute of the Permanent Court of International Justice made the "general principles of law recognized by civilized States" the source of general international law, foreign ministries, and arbitral tribunals relied on such general principles to work out a free minimum which they were constantly used in interstate practice"[101]. Just as the language of NT standard in many modern BITs is criticized for its vagueness and ambiguity, this quotation from Edwin Borchard reveals and, at the same time, limits the scope of the justifications that can be mentioned when drawing attention to the imbalance in the provision of privileges to a foreign investor.

Based on this, increasing the relevance of the dialogue on reforming the NT standard is a reasonable decision. For example, Santiago Montt has proposed the "renewed Calvo doctrine," which is that the protection of a foreign investor within the framework of international investment law is considered a stronghold of the symbiosis of the traditions of municipal constitutional and administrative law[102].

However, a more significant vector for overcoming the imbalance of the parties, from my point of view, will be an attempt not to develop a formula or a more detailed description of NT provisions and the criteria for its violation but to strive for a mutual exchange of experience between international bodies and host states in terms of the application of specific measures to protect rights of foreign investors. It is the respect of national systems, in particular the judicial system, that can significantly improve law-making itself. The validity of this conclusion is based on the fact that many countries adhere to a system of checks and balances between the legislative, judicial, and executive powers; therefore, the expectation is that the judiciary will

[100] Elihu Root, *The Basis of Protection to Citizens Residing Abroad* (Cambridge University Press, 1910) 16, at 20–21

[101] Edwin Borchard, *The Minimum Standard of the Treatment of Aliens* (Michigan Law Review, 1940) 445, at 449.

[102] Santiago Montt, *State Liability in Investment Treaty Arbitration* (Hart Publishing, 2009), supra note 5, at 22–23

be independent and capable of being guided in its proposals, not by the financial interests of an individual State, but by the interests of investors looks pretty reasonable. It is no coincidence that the so-called Neer formula, the essence of which is that in order to establish the existence of a violation, it must be expressed in "violation, bad faith, willful neglect of duty or insufficient government action so far from international standards that all reasonable and impartial persons with would readily admit its inadequacy,"[103] does not find sufficient support. This is probably because both international investment law and the domestic national law of host states have evolved significantly.

A significant addition that reflects the essence of the NT standard is the introduction of a uniform requirement to exhaust the host state's domestic remedies. Although this may be perceived as a barrier to foreign investors, this decision will ensure equal treatment for both foreign and local investors. Therefore, excluding this principle could significantly lead to an unreasonable imbalance of interests of the parties, in particular, to provide a foreign investor with a more privileged position in the form of international and domestic judicial protection.

As a result, even though foreign investors still have more privileges, current trends in the development of international investment law and the insignificant share in the practice of cases with proven violations of NT standard confirm that there is no reason for significant concern. However, it is worth monitoring this process in constant dynamics.

4.4. Reasons for the need to modernize the NT standard

Modernization of the NT standard is one of the critical discussions today. Firstly, it is predetermined by necessity to shift the accepted general focus that the NT standard, which is a composite tool of the international dispute resolution system, serves only the foreign investor's interest. For this reason, host states insist on appealing to domestic courts. If it were presumed that the NT standard was not only an international means of protection but also served the interests of both parties (the host state and the foreign investor), then this would lead to greater trust. In this case, when drawing up model BITs, receiving states would be ready to include provisions on the NT standard in a more voluminous and specific form.

Secondly, modernization is dictated by the need to eliminate uncertainty about how the NT standard can positively impact closing the gap in its interpretation and application between developing and developed countries. It is known that the justification of the existing

[103] LFH NEER AND PAULINE NEER (USA) v. UNITED MEXICAN STATES (US-Mexican General Claims Commission) [1926] (2006), https://www.transnational-dispute-management.com/downloads/27819_case_report_neer_v_mexico_1926.pdf, accessed 28 October 2023

international system for ensuring the protection of foreign investors and their investments is based on the postulate that it promotes the free movement of capital and also guarantees predictability and clarity to the parties. Indeed, the international standards of FET, MFN, and NT are designed to create legal certainty in those countries where the rule of law is not ensured at the proper level. Nevertheless, who and how can objectively assess in which states the level of legal consciousness and legitimacy is high or low seems a very dubious approach. Representing an original 'grand bargain' struck between developed and developing countries, where the developed countries promise capital and the developing countries make a promise of protection of capital in return for the prospect of more capital in the future,' investment treaties are designed not to improve domestic rule of law in the developing countries but, instead, to provide a substitute for it[104]. A good illustration of the above argument is that if there was a genuine interest in improving the domestic legislation of the host state, the international community would try to develop mechanisms for interaction with the legal system of the host States, the work of which would ultimately result in an effective mutual exchange of knowledge, experience, and practice.

It can be rightly noted that when compiling BITs, countries have the legal freedom to reflect in the text aspects significant for their legal system in the context of the work of that same NT. However, both the provisions of the NT, which are almost always incorporated from existing customs and arbitral practice, and the internal legal regulation of the host states remain outside the brackets. In other words, these aspects should be considered since the states, and not local investors, are involved in this process. Moreover, the most significant interest in the conclusion of a BIT by the host state is the protection of its investors in another country and not within its borders.

Consequently, the reasons for reforming the NT standard are reasonable but must be assessed from the point of view of taking into account the interests of the foreign investor and the host state.

4.5. Potential reformation of the NT standard

As mentioned earlier, NT is a relative standard, so proposals for its reform cannot imply generally accepted approaches.

[104] Salacuse and Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain* (Harvard International Law Journal, 2005) 67, at 77; Kenneth J. Vandevelde *Bilateral Investment Treaties: History, Policy and Interpretation* (Thomas Jefferson School of Law, 2010), at 57

The leading solution, which is the most reasonable for improving the efficiency of the NT standard, is inextricably linked with the conclusion of the previous chapter. In particular, a new mechanism of interaction and law-making is needed, considering the interests of the foreign investor, the host state, and the domestic investor. However, this rather extraordinary proposal can be put into practice by creating a single rule-making platform where the views, experiences, and knowledge of all parties in the investment process can be taken into account. A similar opinion can be found in the submission about the reformation of the international investment regime through a framework convention on investment and sustainable development that says: "The Framework Convention would provide States a practical, efficient, and flexible mechanism to move beyond the current investor-protection centered system, and to allow countries and other stakeholders to address the challenges and advance the objectives of sustainable development by developing and implementing new approaches to the support and regulation of transnational investment"[105]. Criticism mainly arises based on the lack of clearly defined responsibilities for foreign investors who are in the position of having rights.

Interestingly, the United Nations Commission on International Trade Law (UNCITRAL) took this problem very seriously, which is why a Working Group III (WGIII) was created to develop specific proposals for reforming Investor–State Dispute Settlement as a whole[106]. For this reason, it can be reasonably considered that the framework convention responds to those requests that exist not only in the field of the NT standard but also in other vital areas of international investment law. This measure, of course, can influence the creation of a unified approach in the interpretation and enforcement of the NT standard since the framework convention includes the possibility of its revision by host States and making innovative proposals or criticism. In particular, this concept may include, in addition to the former, criteria for assessing violations of NT standard already developed and recognized by arbitration tribunals to eliminate future contradictions in arbitral practice. Also, it would be worth regulating the very process of interaction between a foreign investor and the host State at the stage of mediation (out-of-court dispute resolution) in order to create an equal environment for

[105] Matthew C. Porterfield, Lise Johnson and Brooke Skartvedt Guven *Reforming the International Investment Regime through a Framework Convention on Investment and Sustainable Development* (Harrison Institute for Public Law Georgetown Law, 2020), https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/a_framework_convention_on_investment.pdf, assessed 28 October 2023

[106] Report of the United Nations Commission on International Trade Law Fiftieth Session, para. 264, A/72/17 (3-21 July 2017), https://undocs.org/A/72/17, assessed 29 October 2023

both parties and provide independent competent mediators, which will significantly affect the speed of resolution of conflict issues.

The second possible vector for developing the reform of the NT standard in international investment law is the universal recognition of the requirement for the mandatory exhaustion of all available judicial measures of protection within the borders of the host state before applying to international courts[107]. An exception should be cases when an arbitration agreement is concluded between the parties within the framework of an investment agreement. Despite the acceptable criticism of such a measure, justified by the fact that in this case, the rights of a foreign investor to protect his interests in the court that he has the right to choose will be limited, from my point of view, there are more positive aspects to such a decision. Firstly, this measure will contribute to the rapid development of the domestic investment legislation of the host state since the need to regulate investment relations will increase, and already adopted norms will need to be improved over time. Secondly, professional judges will inevitably replenish the judicial system with their approaches and proposals for protecting the rights of foreign investors and the state itself. Finally, the joint work of the legislative and judicial authorities will lead to the possibility of formulating accurate, relevant, and balanced proposals for the development of treatment standards in international investment law for their consideration in the international arena. That is, this will ultimately create fertile ground for both the framework convention and will be able to reflect as accurately as possible what the whole society needs, and not just some lobby group.

However, the above measures, while reasonable and logical, simultaneously demonstrate that any process of reform of international investment law, including the treatment of foreign investors, cannot be achieved through several measures. By its nature and essence, the NT standard is partly a guideline and a principle and not a rule that can be expressed in a quantified form. To a certain extent, the creators of the standards for the treatment of foreign investors wanted to preserve for the parties and tribunals the possibility of their interpretation and expansion of the scope of the NT standard. Consequently, complex and dual issues such as applying the NT standard require extremely elaborate and deliberate measures before implementation.

To summarize this chapter, a detailed examination of the NT standard illustrates that there has been a positive trend in its development and clarification of its scope over the past few

[107] Cholvi Ferrer Irene, *Calvo Clause* (Jus Mundi, 2023), https://jusmundi.com/en/document/publication/en-calvo-clause, accessed 10 Sept. 2023

years. In particular, new BITs were developed and adopted with a preestablishment phase of protection, the wording of the NT standard acquired a single generally accepted form, and a more explicit scope of the standard was established. Therefore, there are all the necessary grounds for continuing work on its modernization since this process consists of constant movement.

5. CONCLUSION

As one of the minimum standards for protecting investor rights, the NT standard is essential for the fair regulation of legal relations with the host state. It is impossible to disagree that the nature of this standard is historically connected with international trade law and that this principle is developing independently within the framework of international investment law.

Since the emergence of the first BITs and the further development of the NT standard within the framework of the OECD and NAFTA, the significant influence of international trade law has been noticeable. However, the NT standard began its independent development at the moment when the host states began to form their model BIT based on own experience. An essential stage in developing the coverage of the NT standard was the reassessment of the investment process phases. In particular, the new BITs began to contain both pre-entry and post-entry phases of activating the work of the NT standard. Both phases appear to be in the interests of foreign investors and host states.

The exceptions of the application of the NT standard must always correspond to the needs of a particular period. It is necessary to ensure that host states do not rely unduly on such exceptions and that foreign investors do not question such measures in reasonable doubt.

As it was found out in Chapter 3 of the thesis, the existing criteria for assessing violations of the NT standard are multifaceted and, at times, vague, but at the same time, they serve practical tools for tribunals. At the same time, refinement of these criteria is necessary to bring their enforcement into a uniform system, as this will bring transparency and clarity not only for the parties to investment relations but also for the tribunals. In particular, including an additional criterion to compare the potential harm to the interests of the investor and the host state could significantly affect tribunals' application of the NT standard.

Through the analysis of case law, it became clear that the NT standard is necessary, irreplaceable, and must continue to develop. Other standards, such as FET and MFN, although partly similar to the NT standard, are additional means of protecting investors, but not substitutes. The NT standard meets the needs of foreign investors and host states. However, a particular imbalance of these opposing interests sometimes results in discriminatory treatment towards foreign or local investors. The solution to the problems indicated in the introduction are the following measures:

• the insignificance of the number of cases with a proven violation of the NT standard indicates that it is not used enough, and its more active application is desirable. More active application of the standard can be achieved through more precise and transparent wording of this standard in the BIT and through preestablished phase protection;

• the criteria for assessing the presence or absence of a violation of the NT standard should be unified, if possible, taking into account already developed arbitral practice, but with the possibility of flexible consideration of the characteristics of each case.

Regarding the role of the NT standard (empirical and potential) in investment treaty arbitration, first of all, it is worth paying attention to the fact that there are currently proposed reforms. In particular, the creation of a Framework Convention will include other interested parties in the circle of subjects participating in the development and finalization of provisions on the NT standard. Namely, the subjects should be host states, investors, and legal experts. Second of all, the implementation of the duty for foreign investors is to exhaust all available remedies provided by the domestic law of the host state before resorting to international tribunals.

Speaking about the reforms themselves, covering the essence and practice of the NT standard, we can conclude that changing the very essence of the standard seems like it could be more justified. Firstly, because the standard is comprehensive and relative, limiting or changing it may bring more negative than positive consequences. Secondly, it is more of a guiding principle than a strict rule/law. However, reforming the case law itself, as previously noted, is a necessary step since the opposite conclusions of the tribunals on similar circumstances of the cases give rise to contradictions. Rethinking and developing uniform approaches for tribunals based on many previously considered disputes should have the desired effect.

However, the key proposal was the proposal to create a platform for the mutual exchange of experience between international bodies and host states in terms of applying specific measures to protect the rights of foreign investors. Such a measure of mutual respect for the national and international systems can overcome existing gaps in using the NT standard.

In conclusion, the NT standard and other standards create certainty for the future of foreign investment and contribute to a more sustainable development of the investment market

worldwide. Consequently, the importance of the existence of the NT standard in international investment law must be considered.

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