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IS THERE ANY CONTRAST BETWEEN FAIR AND EQUITABLE TREATMENT AND PUBLIC INTERESTS UNDER INTERNATIONAL INVESTMENT AGREEMENTS AND INVESTOR-STATE ARBITRATIONS?

Today, more than 3,200 international investment agreements (IIAs) have been concluded, and most of them address substantive and procedural protection mechanisms. One of the essential substantive standards is the standard of fair and equitable treatment and one of the procedural mechanisms is Investor-state Arbitration. Usually, when an investor investing in the host state, there can be no denying that there may be a conflict between the public interest and the investor protection mechanisms. The mechanism of fair and equitable treatment is one of the essential standards that may be harmed by the public interests, especially the protection of the environment. On the one hand, in accordance with this standard, the host states are obliged to create stable, fair, favorable and transparent conditions for investors. On the other hand, the states have a duty to the public interests of their countries and at a larger level the international community. **Purpose:** In this paper, we want to

show whether there is a discrepancy between the substantive standard of fair and equitable treatment and public interest in the text of the IIAs or in the arbitration procedure? **Methods:** general scientific methods of theoretical knowledge, as well as general logical methods and research techniques are used in analyzing existing investment agreements and Arbitration awards. **Results:** Examining the text of many of the IIAs, we came to the conclusion that there is no difference in the text of the agreements, in other words, the agreement encourages governments to strike a balance between investor protection standards and the protection of the public interest. However, in the implementation of agreements by the states, there is a difference between the two areas of protection of public interest and the standard of fair and equitable treatment, and here the arbitral tribunals must resolve the differences. **Keywords:** fair and equitable treatment; public interests; Investment agreement; Investor-state arbitration.

Introduction. Today, more than 3,200 international investment agreements have been concluded¹. The main purpose of these agreements is to protect investors in the first place. In order to protect investors, there are two categories of protectionist Mechanisms in investment agreements. First, the substantive protection Mechanisms, which include the national treatment, the most favoured nation clause, the fair and equitable treatment, expropriation and its manner of compensation². Second, procedural protection mechanisms, which include resolving disputes between two states or the investor and the host states through arbitral tribunals³. One of the most important standards of protection, which the arbitral tribunals also try to consider it as the most important standard of the investment protection, is the standard of fair and equitable treatment⁴. This standard has been considered in all multilateral

¹ UNCTAD, Investment policy HUB, International Investment agreements navigator [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements> (date accessed: 10.11.2021).

² Morocco – Russian Federation BIT (2016), arts 3(1).(2).(3), date of signature 15/03/2016 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5963/download> (date accessed: 10.11.2021).

³ Bahrain – Russian Federation BIT (2014), arts 8 & 9, date of signature 29/04/2014, date of entry into force 25/12/2015 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5974/download> (date accessed: 10.11.2021).

⁴ Aceris Law LLC, Compensation for Violations of the Fair and Equitable Treatment Standard, 14/06/2019 [Electronic resource]. URL: <https://www.acerislaw.com/compensation-for-violations-of-the-fair-and-equitable-treatment-standard/> (date accessed: 15.11.2021).

and bilateral investment treaties according to reviews conducted by this paper. As in article 3 of the Iran – Russian Federation BIT (2015) reads as follows, «Each Contracting Party shall ensure in its territory fair and equitable treatment of the investments made by investors of the other Contracting Party in respect of management, maintenance, enjoyment, use or disposal of such investments. The treatment shall be as favourable as that granted by the former Contracting Party to the investments of its investors or to the investments of investors of any third State, whichever the investor considers as more favourable»¹. It is also possible that some agreements do not use the term fair and equitable treatment but refer to this content. Such as IIA between Korea, Republic of – Uzbekistan BIT (2019), as states, «Each Contracting Party shall accord in its territory to investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment, or disposal of their investments, treatment no less favorable than that which it accords in like circumstances to its own investors (national treatment) or to investors of any third State (most-favored-nation treatment), whichever is more favorable. Also, Each Contracting Party shall accord in its territory to investments made in accordance with its laws and regulations by investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment, or disposal of their investments, treatment no less favorable than that which it accords in like circumstances to investments of its own investors (national treatment) or to investments of investors of any third State (most-favored-nation treatment), whichever is more favorable»². It is clear in this agreement that the fair and equitable treatment is close to the national treatment and most favoured nation clause. In other words, the criterion for measuring this standard is the observance of two other treatment. It is important to note that investment agreements today not only protect investors but also the public interest of the host states. In other words, the protection rules contained in investment agreements cover two areas, first, the substantive and procedural rules that consider the protection of investment and investors. Second, the substantive rules that take into account the protection of the public interest of international community and the host government. As in art 15 of the Kenya – Korea,

¹ Iran, Islamic Republic of - Russian Federation BIT (2015), date of signature 23/12/2015, date of entry into force 06/04/2017 [Electronic resource]. URL: [https:// investment-policy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3675/iran-islamic-republic-of---russian-federation-bit-2015-](https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3675/iran-islamic-republic-of---russian-federation-bit-2015-) (date accessed: 15.11.2021).

² Korea, Republic of Uzbekistan BIT (2019), art art 3 (1). (2), date of signature 19/04/2019 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6007/download> (date accessed: 15.11.2021).

Republic of BIT (2014), stated, «Nothing in this Agreement shall be construed: (a) to require a Contracting Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; (b) to prevent a Contracting Party from taking any actions which it considers necessary for the protection of its essential security interests; or (c) to prevent a Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security»¹. The challenge now is that there may be differences between these two sets of protectionist rules in the text or in the implementation of the agreements. In other words, states regulations related to the public interest may be enforced in a way that violate the standard of fair and equitable treatment and requires the presence of an arbitral tribunal. Hence, there are two hypotheses in the paper. First, given the existence of two sets of protectionist rules in investment agreements, there may be differences between these two sets of rules. Second, in the event of such disputes, arbitration awards and investment agreements must be used to resolve them.

In order to answer the paper question, is there any contrast between fair and equitable treatment and public interests, it uses the quantitative and qualitative methods and in line with the methods, not only analyzes the IIAs but also examines the awards for assessing the challenge. The paper proceeds in four steps: Part 1 focuses on the definition and realm of fair and equitable treatment and public interests under the bilateral and multilateral investment agreements. Second, the challenges between the fair and equitable and public interest will be analyzed under IIAs. The third part provides the fair and equitable treatment and public interests under the arbitration awards. The last part concludes.

1. The fair and equitable treatment and public interests under IIAs.

Since in this paper we want to examine the conflict between public interest and fair and equitable treatment, it is necessary to analyze their concepts and realms under international investment agreements.

Fair and equitable treatment. The requirement of «fair and equitable treatment» is a traditional standard of investment protection and is found in

¹ Kenya – Korea, Republic of BIT (2014), art 15, date of signature 08/07/2014, date of entry into force 03/05/2017 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3691/kenya---korea-republic-of-bit-2014-> (date accessed: 15.11.2021).

almost all investment agreements¹. In recent years, the concept of fair and equitable treatment has become important in investment relationships between states. While the first proposals for this standard for investment were made in various multilateral efforts in the immediate aftermath of World War II, this standard can be found more in the bilateral investment agreements as a key feature in international investment relationships. In principle, a fair and equitable standard is a measure by which the relationship between foreign direct investors and capital-importing states is assessed. It also acts as a signal to capital-importing states, as it at least indicates a state's willingness to adapt foreign capital under conditions that consider investor interests based on fairness and justice².

Agreements refer to «fair and equitable treatment» that must be applied to the nationals of the Contracting Parties. This standard has the ability to have different interpretations. At one point it was thought that this standard was higher than the minimum international standard. However, according to the NAFTA Commission, the standard of fair and equitable treatment was no more than the minimum standard of international and customary international law³. As stated in art 5 of the Iran, Islamic Republic of – Japan BIT (2016), «Investments of investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security in Territory of the other Contracting Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens»⁴. Or art 3(1) of the Singapore and Myanmar, states «Each Party shall accord to investments of investors of the other Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treat-

¹ See more information at: UNCTAD, Investment policy HUB, International Investment agreements navigator [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements> (date accessed: 18.11.2021).

² Fair and equitable treatment, (UNCTAD/ITE/IIT/11(Vol.III)), PP 10-18 19, May 1999 [Electronic resource]. URL: <https://unctad.org/system/files/official-document/psi-teiid11v3.en.pdf> (date accessed: 18.11.2021).

³ United nations, fair and equitable treatment. New York : United Nations, 1999, pp 22–31.

⁴ Iran, Islamic Republic of – Japan BIT (2016), art 5, date of signature 05/02/2016, date of entry into force 26/04/2017 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3578/download> (date accessed: 18.11.2021).

ment and full protection and security»¹. In fact, this standard requires host countries to create stable, fair, favorable and transparent conditions for investors [1, p. 130]. As stated in agreement between Morocco – Russian Federation BIT (2016), «Each Contracting Party shall in the territory of its State accord to investors of the State of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable than that it accords, in like circumstances, to its own investors or to investors of any third State depending on which treatment the investor considers as more favourable»². Also, the Colombia – Republic of Korea BIT (2010) reads as follow, «Each Contracting Party shall accord in its territory to investments made in accordance with its laws and regulations by investors of the other Contracting Party as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable than that which it accords in like circumstances to investments of its own investors (national treatment) or to investments of investors of any third State (most-favoured-nation treatment), whichever is more favourable». These words show that the fair and equitable standard is a broad concept because it encompasses the both national treatment standard and the most-favoured-nation clause. In other words, in order to observe the standard, the national treatment and the most-favoured-nation clause must also be observed.

Public interests. Public interest means the interests that belong to the people of a country or to the people of the world. Of course, if an investor in the host state invests, the public interest of the host state or the global public interest may be jeopardized. Therefore, in addition to investor protection, investment agreements also consider the protection of the public interest. There are many examples of public interest and the most important of them include what is relevant to the peace and security of the host state and the world and also about the health, plants, life, animals, environment and climate. As stated in As in art 15 of the Kenya – Korea, Republic of BIT (2014), stated, «Nothing in this Agreement shall be construed: (a) to require a Contracting Party to furnish any information, the disclosure of which it considers contrary to its essential security interests;

¹ Myanmar – Singapore BIT (2019), date of signature 24/09/2019, arts 3, [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6006/download> (date accessed: 18.11.2021).

² Morocco – Russian Federation BIT (2016), arts 3(1).(2).(3), date of signature 15/03/2016 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5963/download> (date accessed: 10.11.2021).

(b) to prevent a Contracting Party from taking any actions which it considers necessary for the protection of its essential security interests; or (c) to prevent a Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security»¹.

In addition, the art 17 of the Korea, Republic of Uzbekistan BIT (2019) has extended the words and says, «Nothing in this Agreement shall be construed: (a) to require a Contracting Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; (b) to prevent a Contracting Party from taking any actions which it considers necessary for the protection of its essential security interests: (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment; (ii) taken in time of war or other emergency in international relations; or (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or (c) to prevent a Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security; (d) to prevent a Contracting Party from adopting, maintaining, or enforcing any nondiscriminatory legal measures: (i) designed and applied for the protection of human, animal or plant life or health, or the environment; (ii) related to the conservation of living or non-living exhaustible natural resources»².

2. The challenge between the fair and equitable treatment and public interest within the IIAs. According to the main hypothesis of this paper, when an investor actually invests in the territory of the host government, there may be a challenge between the investment interest and the public interest. Namely it is clear that the ever-increasing expansion of investment poses significant risks to the environmental statute [2, p. 791]. In other words, investment, both traditionally and modernly, also has public and envi-

¹ Kenya – Korea, Republic of BIT (2014), art 15, date of signature 08/07/2014, date of entry into force 03/05/2017 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3691/kenya---korea-republic-of-bit-2014-> (date accessed: 15.11.2021).

² Korea, Republic of Uzbekistan BIT (2019), art 17(1), date of signature 19/04/2019 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4898/korea-republic-of---uzbekistan-bit-2019-> (date accessed: 10.11.2021).

ronmental consequences [3, p. 168]. So in this section we examine whether there is a challenge in the text of the agreements or in the implementation of investment agreements.

The purpose of the agreement is stated in the in preamble to the agreements. Preamble to the Cameroon – United Kingdom Economic Partnership Agreement (2021) speaks on the perfect relationship as stated, «the parties convinced that this Economic Partnership Agreement will create a new and more favourable climate for their relations in the areas of economic governance, trade and investments and create new opportunities for growth and development»¹. Also, in line with the objective of the Georgia - Japan BIT (2021), «the parties Desiring to further promote investment in order to strengthen the economic relationship between the Contracting Parties; and recognising that a stable framework for investment will maximise effective utilisation of economic resources; and Recognising the growing importance of the progressive liberalisation of investment for stimulating initiative of investors and for promoting prosperity in the Contracting Parties»². In accordance with the objectives of these agreements, it is clear that when an economic cooperation or investment development agreement is signed, governments actually want to create the best and most meaningful conditions for investment and in fact, they want to avoid any obstacles in this way.

There is also a principle in some Investment agreements called the principle of Observance of Obligations. As in IIAs between Iran and Japan stated, «Either Contracting Party shall observe any obligation it has entered into with respect to investments of investors of the other Contracting Party»³. Hence, although the protection of investment is an obligation under the agreement and all treatments like Fair and equitable treatment, national treatment and most-favoured-nation clause must be observed, the protection of the public interest is also an obligation and must be observed. So when in

¹ Cameroon – United Kingdom Economic Partnership Agreement (2021) [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements> (date accessed: 21.11.2021).

² Georgia – Japan BIT (2021), date of signature 29/01/2021 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6078/download> (date accessed: 21.11.2021).

³ Iran, Islamic Republic of – Japan BIT (2016), date of signature 05/02/2016, date of entry into force 26/04/2017 [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3578/download> (date accessed: 21.11.2021).

an agreement like the Myanmar – Singapore BIT (2019)¹ or the agreement between Morocco and Japan² or the Energy Charter Treaty³ that comes with both rules to protect the investor and rules to protect the public interest, this shows The purpose of the agreement is to protection both categories of rules and both categories of obligations must be observed in line with the purpose of the treaty and the principle of observance the obligations.

In fact, the text of the agreements, which have both categories of obligations, is aimed at balancing the obligations, because otherwise, bringing these two categories of protection rules together would be futile. In addition, in the objectives of the some agreements explicitly mention that a balance must be struck between the rules of investor protection and the protection of the public interest. As the international energy charter, «calls on the states to recognize the three most challenging global areas of energy security, economic development and environmental protection, and to work towards sus-

¹ Myanmar – Singapore BIT (2019), date of signature 24/09/2019, arts 3 to 8 (minimum standard of the treatment, national treatment, most favoured nation, expropriation, compensation for losses, transfers) and 29 and 30 (nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures: (a) necessary to protect public morals or to maintain public order (b) necessary to protect human, animal or plant life or health) [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6006/download> (date accessed: 21.11.2021).

² Morocco – Japan Bit (2020), date of signature 08/01/2020, arts 2 to 4 (promotion of investment, national treatment and most favoured nation, general treatment) and 19 and 21 (Each Contracting Party shall refrain from encouraging investments by investors of the other Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labour standards) [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5908/download> (date accessed: 21.11.2021).

³ Energy charter treaty, 1994, part 3, art 10 (1): (Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.), And arts 18-19: (In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety) [Electronic resource]. URL: <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> (date accessed: 21.11.2021).

tainable development»¹. The words show that the agreement needs to sustainable development, so it is obvious the sustainable development can't attain without good balance between the various interests in investment.

There are also some well-known and important multilateral investment and trade agreements that work together to balance the public interest and investment interests. Like the Morocco Agreement (April 1994) which established the World Trade Organization². The preamble to the agreement states that the parties recognize that their relationship must be developed in such a way as to enable the optimal use of the world's resources in accordance with the objective of sustainable development. So that it considers both the protection and preservation of the environment and leads to economic development.³ Also in line with a decision under (the Marakesh Agreement) entitled «Trade and Environment», the parties are advised to adopt protectionist policies in both the environmental and trade areas⁴. The United States, Canada, and Mexico recently signed an Economic and Trade Agreement in November 2018, which entered into force in July 2020. A noteworthy point in this agreement is that in order to achieve sustainable development and balance between economic and public interests, a whole chapter is dedicated to the protection of public interests, specifically the environment. It calls on the three states to protect the environment, human health, plants, animals and natural areas in their economic relations⁵.

Therefore, in the text of the mentioned agreements, there is no difference between the rules of protection of investment and the rules of protection of public interest and truly the IIAs want the states to balance between the rules. But states may not be able to strike a balance between investor protec-

¹ International Energy Charter, Agreed text for adoption in The Hague at the Ministerial Conference on the International Energy Charter, on 20 May 2015, title 1 [Electronic resource]. URL: https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf (date accessed: 28.11.2021).

² Agreement establishing the World Trade Organization (Marakkesh agreement) [Electronic resource]. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2784/download> (date accessed: 28.11.2021).

³ Marakkesh agreement, preamble [Electronic resource]. URL: https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (date accessed: 21.11.2021).

⁴ Marrakesh Agreement establishing the World Trade Organization (with final act, annexes and protocol). Concluded at Marrakesh on 15 April 1994, decision on trade and environment, p. 133 [Electronic resource]. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-A-31874-English.pdf> (date accessed: 21.11.2021).

⁵ United States – Mexico – Canada Agreement (USMCA), Signature 30 November 2018 [Electronic resource]. URL: http://www.sice.oas.org/Trade/USMCA/USMCA_ToC_PDF_e.asp (date accessed: 21.11.2021).

tion and public interest protection within performing the agreement, and there may be differences. As stated in the next under some of the arbitral awards.

3. The challenge of the Fair and equitable treatment and public interests under the arbitration. Today, foreign investors are increasingly challenging regulatory measures taken by host states to protect the public interest, especially the environment, and claim that these actions violate investment protection obligations [4, p. 2]. Hence, they rely more on the violation of the standard of fair and equitable treatment. Investors expect to operate within a legal and orderly framework. On the other hand, arbitral awards have shown that states also have the right to make the necessary legal changes in the public interest. Therefore, such changes can destroy the investor's expectations about the outcome of his investment [5, p. 793]. As we have seen, investment treaties require member states to protect the public interest too. Therefore, in this way host states exercise their authority to maintain the public interest. But the exercise of authority by states is not without limitation, but they must implement public policies with a view to observe the fair and equitable treatment. As in «Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania», ICSID stated, «Economic, social, environmental and legal conditions and problems are naturally dynamic and unstable. Successful public infrastructure and public services are essential to adapt to these changes. Accordingly, state policy should be able to evolve in order to ensure adequate infrastructure and services with observing the fair and equitable treatment of investments»¹.

Judicial procedure equates fair and equitable treatment with the requirement of legal stability in the legal environment of the host state. As ICSID believes that, «the fair and equitable treatment is inextricably linked to the stability and predictability of the host state's legal system»². Also, in «Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia» the tribunal states, «According to international law, this treatment generally means providing a basic and general standard that is separate from the domestic law of the host state but must be interpreted in the interests of

¹ Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 Mar 2015, Hirsch M. Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law // The Journal of World Investment & Trade, Vol. 12, 2011, p. 783 [Electronic resource]. URL: <https://www.italaw.com/cases/3003> (date accessed: 21.11.2021).

² CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, 12 May 2005. Hirsch M. Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law // The Journal of World Investment & Trade, Vol. 12, 2011, p. 783 [Electronic resource]. URL: <https://www.italaw.com/cases/288> (date accessed: 21.11.2021).

the stability of the host state»¹. However, arbitrators have concluded that standard of fair and equitable treatment under the investment agreements cannot prevent legal changes by the host states. In other words, it is true that governments have a duty to create stable conditions for investors, but this task is not equivalent to stabilizing conditions for investors. This was acknowledged in «AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary» in 2010 that «the state can adapt its legal framework with the circumstances»². The point is that the original legal framework must remain, and the new legal reforms must be fair and predictable, taking into account investment conditions. As ICSID stated, «While the investor is promised protection against unfair change, it is well established that the host government has the right to make a reasonable degree of change in response to variable circumstances in the public interest. As a result, the fair and equitable treatment should not be seen as an obstacle to legal changes, but rather that subsequent changes should be made in a fair, continuous and predictable manner, taking into account investment conditions»³.

Now we need to know what is the extent of these changes by the host state. Arbitration Award believes that, «the host state must not exceed the legal requirements for a public interest in exercising its Authority»⁴. Also in

¹ Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, 25 Jun 2001 Hirsch M. Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law // The Journal of World Investment & Trade, Vol. 12, 2011, p. 783 [Electronic resource]. URL: <https://www.italaw.com/cases/484> (date accessed: 21.11.2021).

² AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22, award, 23 septamber 2010, para 9.3.29 Hirsch M. Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law // The Journal of World Investment & Trade, Vol. 12, 2011, p. 783 [Electronic resource]. URL: <https://www.italaw.com/cases/193> (date accessed: 21.11.2021).

³ Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award, 25 November 2015, para 7.77. Hirsch M. Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law // The Journal of World Investment & Trade, Vol. 12, 2011, p. 783 [Electronic resource]. URL: <https://www.italaw.com/cases/380> (date accessed: 21.11.2021).

⁴ Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay) Hirsch M. Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law // The Journal of World Investment & Trade, Vol. 12, 2011, p. 783 [Electronic resource]. URL: <https://www.italaw.com/cases/460> (date accessed: 21.11.2021).

«Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain», ICSID analyses, Absent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs. As other tribunals have observed, «[i]n order to adapt to changing economic, political and legal circumstances the State's regulatory powers still remain in place». «[T]he fair and equitable treatment standard does not give a right to regulatory stability *per se*. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability. The question presented here is to what extent treaty protections, and in particular, the obligation to accord investors fair and equitable treatment under the Energy charter treaty, may be engaged and give rise to a right to compensation as a result of the exercise of a State's acknowledged right to regulate»¹. Ultimately ICSID resulted that, «The Energy Charter Treaty did not bar Spain from making appropriate changes to the regulatory regime» [5, p. 783]. According to what has been said, considering that states have the right to make legal changes to the investment environment, there is a challenge in implementing the provisions of the investment agreement between protecting the public interest and fair and equitable treatment and as we have seen, The arbitral tribunals will eventually sentence the host state to compensate if there are illegal changes.

Conclusion. One of the most important standards of protection, which also is considered as the most important standard of the investment protection, is the standard of fair and equitable treatment. Today, this standard has been considered in all multilateral and bilateral investment agreements. It is important to note that investment agreements today not only protect investors but also focus on the public interest of the host states. In other words, in investment agreements there are two protection areas, first, the substantive and procedural rules that consider the protection of investment and investors. Second, the substantive rules that take into account the protection of the public interest of international community and the host state. Having two differ-

¹ Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para 362 Hirsch M. Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law // The Journal of World Investment & Trade, Vol. 12, 2011, p. 783 [Electronic resource]. URL: <https://www.italaw.com/cases/5721> (date accessed: 21.11.2021).

ent sets of protection rules under the IIAs can make some difference. But in this article, we understood that the difference between these two sets of rules is in the area of enforcement and not in the text of the agreements themselves. Because in the text of the investment agreements we see they encourage the member states to create a more favourable climate economic relationship and create new opportunities for growth and development. In accordance with the objectives of the agreements, it is clear that when an economic cooperation or investment development agreement is signed, governments actually want to create the best and most meaningful conditions for investment and in fact, they want to avoid any obstacles in this way. There is also a principle in some Investment agreements called the principle of Observance of Obligations. Hence, although the protection of investment is an obligation under the agreement and all treatments like Fair and equitable treatment, national treatment and most-favoured-nation clause must be observed, the protection of the public interest is also an obligation and must be observed. In these agreements, the purpose is to protect both categories of protection obligations and must be observed in line with the purpose of the treaty and the principle of observance the obligations. In fact, the text of the agreements, which have both categories of obligations, is aimed at balancing the obligations, because otherwise, bringing these two categories of protection rules together would be futile. In addition, in the objectives of the some agreements explicitly mention that a balance must be struck between the rules of investor protection and the protection of the public interest. Therefore, in the text of IIAs, there is no difference between the rules of protection of investment and the rules of protection of public interest and truly the IIAs want the states to balance between the rules. But as we have shown, there is a difference in implementing the agreements. Because today we see many claims that submitted to the arbitration tribunals. Many of the Investors as claimant relied upon the violation of the standard of fair and equitable treatment. Claimants expect to operate within a stable legal and orderly framework but awards have shown that states also have the right to make the necessary legal changes on behalf of the public interest. Therefore, such changes can destroy the investor's expectations about the outcome of his investment. But the exercise of authority by states is not without limitation, but they must implement reforms with a view to observe the fair and equitable treatment. By the way, standard of fair and equitable treatment under the investment agreements cannot prevent legal changes by the host states. In other words, it is true that governments have a duty to create stable conditions for investors, but this task is not equivalent to stabilizing conditions for inves-

tors. The point is that the original legal framework must remain, and the new legal reforms must be fair and predictable, taking into account investment conditions. In other words, the host state should not go beyond the legal limits of reforms.

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**СУЩЕСТВУЕТ ЛИ ПРОТИВОРЕЧИЕ МЕЖДУ
СПРАВЕДЛИВЫМ И РАВНОПРАВНЫМ РЕЖИМОМ
И ОБЩЕСТВЕННЫМИ ИНТЕРЕСАМИ В СООТВЕТСТВИИ
С МЕЖДУНАРОДНЫМИ ИНВЕСТИЦИОННЫМИ
СОГЛАШЕНИЯМИ И АРБИТРАЖНЫМ
УРЕГУЛИРОВАНИЕМ СПОРОВ
МЕЖДУ ИНВЕСТОРАМИ И ГОСУДАРСТВАМИ?**

На сегодняшний день заключено более 3200 международных инвестиционных соглашений (МИС), большинство из которых касается материально-правовых и процессуальных механизмов защиты. Одним из важнейших материально-правовых стандартов является стандарт справедливого и равноправного режима, а одним из процессуальных механизмов является арбитраж по спорам между инвесторами и государствами. Как правило, когда инвестор осуществляет инвестиции в принимающем государстве, нельзя отрицать возможности возникновения коллизии между общественными интересами и механизмами защиты инвесторов. Механизм справедливого и равноправного режима является одним из важнейших стандартов, которым может быть нанесен ущерб общественными интересами, особенно это касается охраны окружающей среды. С одной стороны, в соответствии с этим стандартом принимающие государства обязаны создавать стабильные, справедливые, благоприятные и прозрачные условия для инвесторов. С другой стороны, государства несут ответственность за благо общественных интересов своих

стран и, в более широком смысле, они несут ответственность и перед международным сообществом. **Цель:** установить, существует ли противоречие между основным стандартом справедливого и равноправного режима и общественными интересами в текстах МИС или в процедуре арбитражного урегулирования спора. **Методы:** при анализе существующих инвестиционных соглашений и арбитражных решений использовались общенаучные теоретические методы познания, а также общие логические методы и исследовательские методики. **Результаты:** изучив тексты многих МИС, был сделан вывод о том, что в текстах соглашений отсутствуют какие-либо противоречия, иными словами, соглашение поощряет правительства к установлению баланса между стандартами защиты инвесторов и защитой общественных интересов. Однако при реализации соглашений возникает разногласие между двумя сферами защиты общественных интересов и стандартом справедливого и равноправного режима, и в этом случае арбитражные суды должны урегулировать разногласия.

Ключевые слова: справедливый и равноправный режим; общественные интересы; инвестиционное соглашение; арбитраж по спорам между инвесторами и государствами.

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