Developing a Coherent Basis for International Minimum Standard of Treatment

Kluwer Arbitration Blog
May 9, 2018

Hannepes Taychayev (Korea University)

Please refer to this post as: Hannepes Taychayev, 'Developing a Coherent Basis for International Minimum Standard of Treatment', Kluwer Arbitration Blog, May 9 2018, http://arbitrationblog.kluwerarbitration.com/2018/05/09/developing-coherent-basis-international-minimum-standard-treatment/

International Minimum Standard of Treatment (IMST) is one of the most important protection standards available to non-domestic investors under international law. The standard has been a subject of controversy on a number of occasions (see, for instance *Saluka v. Czech Republic*). Much of the controversy and debate arise with respect to the relationship of IMST to the Fair and Equitable Treatment (FET), and other non-discrimination doctrines such as National Treatment (NT).

Some rules of international law are ascribed a greater legal significance in foreign investment law and this requires knowledge of their interpretation and application (Dolzer and Schreuer 2011, p.17). For instance, the IMST has made its way from international criminal cases into international investment law. The content of the standard is broad and largely undefined (Leite 2016, p. 372). The standard has developed into a broad prohibition of unfavorable governmental discrimination directed at the aliens. This makes it susceptible to partisan use and interpretation in construction of state obligations under international law.

The standard is not native to the field of international investment law *per se*; it is the sum of rules that developed from various fields of international law out of disputes on the status of aliens (Dolzer and Schreuer 2011, p. 3). The emergence of IMST was motivated in large part by a desire to protect the aliens by international law against arbitrary and unacceptable actions of the host state. It could be argued that the standard is based on an understanding that "the standard provided at the time by some foreign countries sometimes fell below that which should be accepted" (Gallus, p. 14). In the context of a dichotomy between the developed and the developing countries, it could be argued that the standard was created through the audacity of political will of certain powerful states.

In order to understand IMST it is important to examine the genealogy of the standard which inevitably leads to discussing a thesis postulated in *Neer v. Mexico (1926)*. The Commission in the *Neer case* stated:

> … the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

The Neer argument was discussed in NAFTA cases such as *S.D. Meyers v. Canada* and *Pope & Talbot, Inc. v. Canada* (Leite 2016, p. 373). The thesis postulated by the Neer Commission has become, although with certain degree of controversy, the vantage point from which the application of standard under international investment law has been interpreted (Dolzer and Schreuer 2011, p. 6).

However, the approaches to the rule taken by the Tribunals in the *Case of James and others v. The UK* (1986) and *Joseph Charles Lemire v. Ukraine* (2011) may arguably not be sustainable. The European Court of Human Rights (ECRT) in the Case of *James and others v. UK* (1986) held that:

> … a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, *non-nationals are more vulnerable to domestic legislation*: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and *there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest* than non-nationals (*emphasis added*)

In the *Joseph Charles Lemire v. Ukraine* (2011) the Tribunal declared that:

> *Foreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State* and may thus, as a matter of legitimate policy, be granted a wider scope of protection. (emphasis added)

The fundamental premise underlying the two judgments justifying and requiring the host state to grant unequal treatment to the aliens is that they lack a political clout in the host state. The criteria stipulated by both Tribunals for determining whether the aliens should be granted an extra layer of protection solely based on the grounds that they do not have a say in the political process of the host state can have far reaching implications.

First, in the context of a social reform, an argument could be put forward that the nationals of a host state are entitled to elect or designate the authors of a reform and be consulted on its adoption in open societies and functioning democracies. In other words, the mere fact that the local population is deprived of the opportunity to elect and designate the authors of the social reform could render the claim of the alien of a preferential treatment vulnerable.

Second, it is important to ask ourselves if devising a legitimate policy for a state is charging tribunals with duties beyond their equipment. Meddling with public policy issues of a state without its express consent caused opposition in the past.

Third, an argument could be made that states grant the aliens the protection of international law in the hope that their nationals will be able to take advantage of the rule abroad. In this sense it is a mere mutually beneficial arrangement employed by states for the benefit of their nationals. In the context of international investment law, it is a marketing tool for a host state intended at attracting the foreign capital.

The argument put forward by the two Tribunals also proves difficult to sustain under the logic of customary international law. Under international law the lawmaking authority and control over the

regime rests in the hands of sovereign entities – states. Nominally, sovereign states are all independent and equal. Hence, the value and authority of international law depends upon voluntary participation of states in its development, observance and enforcement. The consent of states ensures the validity of a norm in international law and there is no higher norm in the international system from which a valid norm could be drawn. The States might consent to treat foreigners better and practice the rule but it is either out of considerations for their own nationals abroad or using it as a market tool. But there is not much proof that they do it so because aliens lack political representation. In other words, through there is a widespread practice of states grating preferential treatment to the aliens there is little proof that they are doing so because the foreigners lack a political clout in the host state.