ROLE OF NATIONAL TREATMENT CLAUSE IN PROTECTION OF FOREIGN INVESTORS; A CRITICAL STUDY WITH RESPECT TO BILATERAL INVESTMENT TREATIES

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Abstract : Many jurists and philosophers think that the alien should get equal treatment under the law because that alien submits to local conditions with benefits and burdens and to treat that alien unequally and to do any discrimination just because that person is a national of any other country would be against the principle of equality. National Treatment clause ensures that the foreign investors get the equally favourable conditions which the host nation gives to its domestic investors. Its motive is to encourage international investment. Under GATT the provision ie Article III which deals with the National Treatment clause prescribes the conditions which the contracting parties have to abide by incase they have agreed or they have have put national treatment clause in their trade agreement. GATT has various provisions and it treats internal measures very differently from border measures.

Index Terms - National Treatment, most favored nation, GATT,WTO.

INTRODUCTION

Many jurists and philosophers think that the alien should get equal treatment under the law because that alien submits to local conditions with benefits and burdens and to treat that alien unequally and to do any discrimination just because that person is a national of any other country would be against the principle of equality. But it is also true that certain unequal treatments are admissible on some basis and therefore, it cannot be contended that even aliens should get same political rights like the rights given to the citizens of any nation.[1]National Treatment clause is often invoked in WTO disputes. Domestic nations have this common tendency of invoking extra tough regulations and legislations for foreign investors in their nation in order to protect and promote national production and this ultimately makes the foreign investors reluctant in making investments in any foreign land and thereby it disrupts the overall economic welfare of the world.

[1]IAN BROWNLIE , PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 523-529 (7th ed.Seventh Edition, Oxford Publication) (2012)

Non-discrimination as captured by the most favored nation (MFN) clause has received substantial attention from economists but national treatment has only recently begun to receive formal scrutiny. National treatment clause means treating foreigners and locals equally ie. goods which are locally produced (in the host state) and the goods which are being imported from other nations(the foreign investors) should be treated equally by the host state.

This principle is applied on goods which have been imported ie. Charging customs duty on imported goods only will not be considered as the violation of this principle.

National treatment is a basic principle under the GATT and Article III clearly states that the member nations of WTO are required to give national treatment to the foreign investing nations. *Article III(2) of this says that the members of WTO shall not apply standards higher for the imported goods than those imposed upon the domestic goods of similar nature. Further, Article III(4) while dealing with international regulations and laws prescribes that the members of WTO shall accord imported products treatment no less favourable than that accorded to the domestic product of like nature.* However exception these rules have also been mentioned under Article III(8) of the GATT.

National treatment is a non-discrimination principle according to which the foreign products after being imported should get at least as favourable treatment as 'like' domestic products.[2]

Provision of National Treatment appears in Article III of General Agreement on Tariffs and Trade (GATT) 1947, Article VIII of General Agreement on Trade in Services and Article 3 in the Agreement on Trade-Related Intellectual Property Rights (TRIPS).for every WTO member provisions contained under these agreements are to be followed and governmental policies should also be made accordingly if such policies are dealing either directly or indirectly with the sale or distribution of imported goods, services and intellectual property. The national treatment clause effectively restricts the internal measures which a government may take and which may be unjust and unfair for foreign investors of that state.[3]

The main motive behind application of national treatment clause is to ensure that the foreign investors do not get discriminatory treatment by any host nation only because they do not belong to that nation and hence this principle ultimately focuses on encouraging international investment by providing favourable environment to the foreign investors for making investments.[4]

[2]Henrik Horn , *National Treatment in the GATT*, 96 The American Economic Review, 394-404 (2006)
[3] Henrik Horn , *National Treatment in the GATT*, 96 The American Economic Review, 394-404 (2006)
[4] OECD (2004), "Most Favoured Nation Treatment in International Investment Law", OECD Working Papers on International Investment, 2004/02, OECD Publishing

HISTORICAL BACKGROUND OF NATIONAL TREATMENT CLAUSE

This principle is not something very new and recent in fact even in Hebrew Law it was there.[5] The national treatment clause can also be seen in the agreements done between the Italian States during 11th Century.[6] During 12th century also the contract made between England and various states had this clause.[7] During 17th and 18th century also European powers while making shipping treaties provided for national treatment clause. And the Paris and Berne Conventions with respect to the intellectual property rights made in 19th century had national treatment clause. Hence, whenever people felt the need to encourage cross-border investments and develop business activities clauses like national treatment clause came into the picture.

LEGAL FRAMEWORK

PROVISIONS UNDER GATT

General Agreement on Trade and Tariffs mainly focuses on liberalizing world trade and economy and national treatment clause is on of those principles which helps in achieving this goal by ensuring the safety and protecting the interest of foreign investors in a different country which otherwise the government of that nation is not obliged to do.

ARTICLE III of GATT

According to the Article III of GATT members of World Trade Organization i.e. WTO are supposed to provide national treatment to other members. **Clause I of Article III** talks about the general principle according to which all the members are required to not to impose internal taxes or any other internal charges, laws, regulations and requirements which is capable of affecting imported or domestic products in a manner that protects domestic production. It reads as: The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production

Further **Article III:2** which says: The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or

[5] WILLIAM SMITH CULBERSTON, INTERNATIONAL ECONOMIC POLICIES 25-27 (D. Appleton Company, 1925) .

domestic products in a manner contrary to the principles set forth in paragraph 1.Hence, this Article deals with the internal taxes or other **internal** charges and says that the members of WTO shall not impose standards higher than the standards imposed on domestic products between imported goods and 'like' domestic goods, or between imported goods and 'a directly competitive or substitutable product.' **Article III:4** also deals with the National Treatment Principle and reads as: The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product. Therefore, according to this Article, all the members shall accord imported products treatment no less favourable than that accorded to 'like products' of national origin.

Hence, according to the rules prescribed by GATT like products are supposed to be treated equally even if the products have origin of different nations. But there is no legal provision or any definition to determine which products can be considered like and on what basis. However, for determining this, GATT panel reports have relied on criteria like the product's end uses in a given market, consumer tastes and habits, the product's properties, nature and quality, and tariff classification. WTO panels and the Appellate Body reports utilize the same criteria[6]but no legal definition for the same exists.

EXCEPTIONS TO GATT ARTICLE III

Though it is binding upon all the member countries to give national treatment to the foreign investors in their own state but exception to this rule also exists under Article III:8(a) which talks about government procurement and permits the government of the member states to purchase their local made goods i.e. the domestic products preferentially by making government procurement one exception to the national treatment rule.

It reads as : The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

Article III:8(b) reads as : The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products. Thus, it talks about another exception to the national

[6] Japan – Taxes on Alcoholic Beverages (WT/DS 8, WT/DS 10, WT/DS 11)

treatment principle which is subsidy. It says: Under this provision the member states are allowed for the payment of subsidies exclusively to domestic producers as an exception to the national treatment rule provided those subsidies does not violate other provisions of Article III.

OTHER EXCEPTIONS UNDER GATT

Further, according to **Article XVIII:C** of the GATT few exceptions are there regarding the applicability of National Treatment Clause which reads as:

SECTION:C

13. If a contracting party coming within the scope of paragraph 4 (a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, unless it has secured the concurrence of the CONTRACTING PARTIES in accordance with provisions of paragraph 18; Provided that, if the industry receiving assistance has already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.

15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them, that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

16. If it is requested by the CONTRACTING PARTIES to do so, the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur in the

proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.

17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.

18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party concerned shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

(a) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or

(b) if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this WTO ANALYTICAL INDEX GATT 1994 – Article XVIII (Jurisprudence) 6 Section has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded. The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

19. If a proposed measure of the type described in paragraph 13 of this Article concerns an industry the establishment of which has in the initial period been facilitated by incidental protection afforded by restrictions imposed by the contracting party concerned for balance of payments purposes under the relevant provisions of this Agreement, that contracting party may resort to the provisions and procedures of this Section; Provided that it shall not apply the proposed measure without the concurrence of the CONTRACTING PARTIES.

20. Nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Articles I, II and XIII of this Agreement. The provisos to paragraph 10 of this Article shall also be applicable to any restriction under this Section.

17. At any time while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party having recourse to this Section of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove; Provided that sixty days' notice of such suspension is given to the CONTRACTING PARTIES not later than six months after the measure has been introduced or changed substantially to the detriment of the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of

Article XXII of this Agreement. gives the member states freedom to develop their standard of living in the early stages of their development by promoting establishment of infant industries and hence, in such cases countries can invoke the provisions of Article XVIII C under which the state can notify other WTO members and initiate consultations and after those consultations successfully completed the member state can take measures which might not be in consonance with the GATT provisions.

Further **Article XX** of GATT provides for general exception in the application of national treatment clause thereby softening the impact of strict national treatment. This article says:

General Exceptions:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

a) necessary to protect public morals;
b) necessary to protect human, animal or plant life or health;
c) relating to the importations or exportations of gold or silver;
d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
e) relating to the products of prison labour;
f) imposed for the protection of national treasures of artistic, historic or archaeological value;
g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the

conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

PROVISIONS UNDER OTHER AGREEMENTS

Even after GATT was replaced by WTO provisions related to National Treatment Principle remained intact and later extended for agreements on goods, services and intellectual property. Article 5.5[7] of TBT Agreement i.e. Agreement on Technical Barriers to Trade deals with the national treatment principle applicable on services and service providers. Article 3[8] of TRIPS Agreement also talks about national treatment clause with regard to intellectual property rights. General Agreement on Trade in Services (GATS) also has provision for national treatment specifically for services and service providers under Article XVIII[9]

EFFECT OF NATIONAL TREATMENT CLAUSE

Every multilateral agreement administered by the World Trade Organization (WTO) contains a national treatment (NT) clause that requires member countries to not discriminate between imported goods and like domestic goods with respect to their internal taxes and domestic regulations. For example, Article III of the General Agreement on Tariffs and Trade (GATT) states that "the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale."[10]

EFFECT OF NATIONAL TREATMENT PRINCIPLE UPON FOREIGN INVESTORS

In a National Treatment Clause, the host country ensures to its foreign investors that it will give the same favourable treatment to the foreign investors the way it gives to its domestic investors.[11] However, this national treatment clause is not absolute in nature.

'Each party shall accord to investors of another Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management,

[7] With a view to harmonizing conformity assessment procedures on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of guides and recommendations for conformity assessment procedures.

[8] Article 3: National Treatment:

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection3 of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or

[9] Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

[10] Kamal Saggi and Nese Sara , *National Treatment at the WTO: The Roles of Product and Country Heterogeneity* , 49 International Economic Review, 1365 (2013).

[11] CEFTA Issues Paper ,*National Treatment Restrictions and Review of Bilateral Investment Treaties*, 12 (2010)

conduct, operation, and sale or other disposition of investments'.[12]Hence, if a state commits to its foreign investors that it will give national treatment to them then that state cannot make negative differentiation between its foreign investors and domestic investors.[13]

According to the glossary of WTO, *national treatment means the principle of giving others the same treatment as one's own nationals. GATT Article 3 requires that imports be treated no less favourably than the same or similar domestically-produced goods once they have passed customs i.e. this won't be applicable upon the levy of custom.*[14]

National Treatment serves as a device that blunts the use of internal instruments as tools of protectionism.[15] The national treatment obligation in GATT Article III(4) prohibits discrimination in "laws, regulations, and requirements" affecting the internal sale of like domestic and foreign goods[16] as there is a tendency among importing countries to discriminate between foreign investors and domestic investors. They prefer domestic investors over foreign investors mainly because in a democratic country like India domestic investors will be their vote banks whereas no such gain can be made by preferring foreign investors. And this tendency may lead to the unfair and unjust treatment of foreign investors ultimately leading to the reduction of global economic welfare.

EFFECT OF NATIONAL TREEATMENT PRINCIPLE UPON HOST STATE

In the absence of National Treatment clause in any trade agreement members of that trade agreement are not bound to give the same favourable condition for trade to the foreign investors which they give to their domestic investors. And hence, the government will be free to impose whatever domestic taxes according to their whims and fancies and they can also legally undo any tariff agreement which any lead to arbitrary imposition of different sales taxes for imported and for domestic products. There will be a risk in investing into any foreign land if non discrimination principles like National treatment clause does not exist.[17] By virtue of such a clause the states will be bound to give foreign investors equal opportunity by following the principle of pacta sunt servanda. This clause makes the foreign investment more safe and secure and ultimately contributes in encouraging foreign trade and investment thereby developing the world economy.

[12] Article 1102 (1) of *North American Free Trade Agreement* signed between US.-Can.-Mex. dated Dec. 17, 1992.
[13] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONALINVESTMENT LAW 198-199 (2nd ed. Oxford University Press 2012) (2008).
[14] https://www.wto.org
[15] Kamal Saggi and Nese Sara , *National Treatment at the WTO: The Roles of Product and Country Heterogeneity* , 49 International Economic Review, 1365 (2013)
[16] Robert W. Staiger and Alan O. Skykes ,*International Trade, National Ttreatment and Domestic Regulation*, 4 The Journal of Legal Studies, 149-203 (2011)
[17] Henrik Horn , *National Treatment in the GATT*, 96 The American Economic Review, 394-404 (2006).

EFFECT OF NATIONAL TREATMENT UPON FOREIGN INVESTMENTS

National Treatment Principle is a non-discriminatory principle which has the power of making global trade and foreign investment more liberal. By imposing domestic taxes and regulations in a discriminatory way in order to prefer or develop domestic trade over foreign investment it would create a barrier in the development of international trade and investment. Foreign investors will be reluctant in making investment due to unstable and lack of surety in investing their capital and national treatment principle comes to their rescue by prohibiting countries from using domestic taxes and regulations to offset the value of tariff concessions and hence, it proves to be a very strong, powerful and significant tool in promoting trade liberalization by promoting international trade and foreign investments.

ENFORCEMENT OF NATIONAL TREATMENT CLAUSE

By enforcing national treatment clause security to the foreign investors can be ensured which will encourage international trade and investment thereby contributing in the development of world economy. National treatment clause has power to check and stop unfair and unjust practices against foreign investors by the State government. According to this clause, the government of any state is bound to provide same opportunity and same favourable condition which it gives to its domestic investors.

But implementing national treatment clause if tightened to a certain limit can affect the welfare measures of any state and it can also distort national policy setting. For eg., if the state government of an underdeveloped country is providing certain subsidy to it's own producers then providing same subsidy or any other favourable condition to the rich foreign investor of any developed and advanced nation will be an obstruction in the development of economy of that country. Hence, National Treatment clause can sometimes put unreasonable burden upon the government by compelling it to give equal opportunity to unequal categories of investors.

As is clear, the notion of likeness lies at the heart of NT as prescribed by GATT/WTO. However, the practical implementation of NT is beset with diffi culties, the most fundamental of which is that competing products from different countries are often differentiated from one another. For example, although a Toy ota Camry and a Ford Taurus are close substitutes (but yet not of identical quality), a high end Lexus is substantially superior to either car. It is not obvious whether the notion of like products should include all three cars in the same category.

THE ISSUES IN THE APPLICATION OF NATIONAL TREATMENT CLAUSE:

- Fulfilment of criteria of like situation or like circumstances which is a sine-qua-non for the application of this rule.
- Determination of whether the treatment given to foreign investors is equally favourable like it is for domestic investors.
- Also, if a less favourable treatment is being given to the foreign investors then such treatment must have a valid justification and if intention has any role to play.[18]

There are no specified rules laid down anywhere to determine what the LIKE SITUATION or the LIKE CIRCUMSTANCE mean. While interpreting the word like circumstances in the case of Fledman versus Mexico[19] the tribunal said it implies having same business. But then in the case of Occidental versus Ecuador[20] the tribunal said national treatment clause cannot simply be applied only by taking into consideration the sector in which that particular activity is undertaken.

Hence, there still remains a controversy as to when and how this national treatment clause should be invoked. However, the court in the case of SD Meyers versus Canada[21] the tribunal tried to lay down few rules which are to be considered while invoking the national treatment clause while considering the Article 1102 of NAFTA and said it is required to be assessed first that whether the foreign investor complaining of not getting equal treatment belongs to the same sector and while interpreting the word sector wide connotation should be given and it must include both the economic sector and the business sector.

Also, in practice tribunals refrain from giving a very narrow meaning while interpreting the terms for applying the national treatment clause.[22] Still, there exists an ambiguity and vagueness which is needed to sorted in order to make the application of this clause more uniform throughout the world. Hence, there still remains a controversy as to when and how this national treatment clause should be invoked. However, the court in the case of SD Meyers versus Canad[23] the tribunal tried to lay down few rules which are to be considered while invoking the national treatment clause while considering the Article 1102 of NAFTA and said it is required to be assessed first that whether the foreign investor complaining of not getting equal treatment belongs to the same sector and while interpreting the word sector wide connotation should be given and it must include both the economic sector and the business sector.

[18] Henrik Horn , *National Treatment in the GATT*, 96 The American Economic Review, 394-404 (Mar 2006)
[19] Kamal Saggi and Nese Sara , *National Treatment at the WTO: The Roles of Product and Country Heterogeneity* , 49 International Economic Review, 1365 (2013).
[20] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONALINVESTMENT LAW 198-199 (2nd ed. Oxford University Press 2012) (2008)
[21] Fledman v Mexico, Award, 16 December 2002, para 171
[22] Occidental v Ecuador, Award, 1 July 2004, para 173
[23] SD Meyers v Canada, 1st Partial Award, 13 Nov 2000

Also, in practice tribunals refrain from giving a very narrow meaning while interpreting the terms for applying the national treatment clause.[24]Still, there exists an ambiguity and vagueness which is needed to sorted in order to make the application of this clause more uniform throughout the world.

Issues have also been arisen when differentiation is done between the foreign and the domestic investors but the reason for such differential treatment is not the nationality but any other ground which is also not valid and justified. Various nations argue that for the sake of developing their national economy and promoting the growth of domestic investors the like treatment cannot be given to the foreign investors. So what actually is meant by the discriminatory treatment is the problem faced by various tribunals because no rules and laws are there for determining it. One view says that the discriminatory treatment will be the one where national treatment is refused to be given.[25] Moreover, in the case of Thunderbird v Mexico[26], tribunal said that the aggrieved need not show that differential treatment given to him is due to the reason of nationality and just by showing that equal treatment is not given would suffice. Hence, social policy behind a governmental measure will have nothing to do and cannot make a valid ground for not giving national treatment to the foreign investors.[27]

However, when such equal treatment is refused to be given to the foreign investors on the ground of some valid reason then whether it would be an infringement of the national treatment clause. Though nowhere in any treatment it can be explicitly mentioned that any kind of differential treatment would be allowed but generally it is considered to be implied that to an extent equal treatment can be refused to the foreign investors provided there exists a valid ground for the same. While considering the like circumstance factor, the regulations and rules made by the government of the host state should also be considered for the sake of protecting the public interest.[28] And the subsidies given to gteh domestic investors was held to be valid in this case and not violative of national treatment clause. But while applying this exception to the national treatment clause controversy remains intact due to the fact that no list of grounds either inclusive exclusive is there where domestic investors can be preferred over foreign investors and hence, this remains elusive therefore very much ambiguous and this again creates problem in the uniform application of the national treatment clause.

Issue also arises with regard to the intention i.e whether a discriminatory treatment would be justified if there is no mala fide intention of the host government to favour and prefer the domestic investors over the foreign investors. Whether the differential treatment done not on the basis of nationality but on the basis of other factors would amount to the violation of national treatment clause. There exists a dual approach regarding this issue. One view thinks intention is relevant whereas according to the other

[24] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONALINVESTMENT LAW 200 (2nd ed. Oxford University Press 2012) (2008).

[25] Lauder v Czech Republic, Award, 3 Sep 2001, Para 200
[26] Award, 26 Jan 2006, para 177
[27] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONALINVESTMENT LAW 201-203 (2nd ed. Oxford University Press 2012) (2008).
[28] SD Meyers v Canada, 1st Partial Award, 13 Nov 2000

approach intention is not the decisive or essential factor instead impact of such measure on the investment is the main determining factor.[29] Though most bilateral investment treaties have national treatment clause but there also exists a clause providing that it would subject to the domestic law.

Therefore, this dual approach brings the ambiguity in the applicability of this clause which is not favourable from the legal point of view.

BILATERAL INVESTMENT TREATIES AND NATIONAL TREATMENT CLAUSE[30]

The treaties containing national treatment clause whereby investors are provided favourable condition for making investment mainly aims at liberalizing international trade and encouraging the world economy.

BIT BETWEEN AZERBAIJAN AND THE UNITED SATES CONTAINING NATIONAL TREATMENT CLAUSE MADE IN THE YEAR 1997:

ARTICLE II of the treaty deals with the national treatment clause which says that, "*with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments,* ***each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment")*** *or to investments in its territory of nationals or companies of a third country (hereinafter "most favored nation treatment"), whichever is most favorable (hereinafter "national and most favored nation treatment"). Each Party shall ensure that its state enterprises, in the provision of their goods or services, accord national and most favored nation treatment to covered investments."*

Hence, according to this treaty national treatment would be given to the investors post establishment in the host state.

However, the national treatment given in the aforementioned Clause 1 of Article II is not absolute in nature and further the clause 2 of the same article provides for exceptions in case of certain business activity as provided in the annexure of the treaty where the host state may refuse to give the national treatment to the foreign investors. Therefore, national treatment clause will be invoked according to this bilateral investment treaty but in exceptional cases it cannot be invoked by the contracting parties.

[29] Siemens v Argentina, Award, 6 Feb 2007.
[30] Available at: http://unctad.org/en/docs/iteiia20065_en.pdf

BIT BETWEEN CANADA AND COSTA RICA MAD IN THE YEAR 1998:

The Artcile III of this bilateral Investment treaty deals with the national treatment clasue to be given by the host state to the foreign investors which reads as follows: "*each Contracting Party shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party on a basis* ***no less favorable than that*** *which, in like circumstances, it permits such acquisition or establishment by: investors or prospective investors of any third State;* ***its own investors or prospective investors.*** *"*

In this treaty also exception to favourable treatment given to the foreign investors is also mentioned under clause 2 of the treaty according to which contracting parties have exception is case the business activity falls under the list mentioned in Sections I, II, III and VI of this Agreement.

Hence, in this BIT national treatment clause though not specifically mentioned unlike in the BIT between US and Azerbaijan but it does talk about giving the same favourable treatment which is given to its own investors which means the same thing. Therefore, in this bilateral investment treaty also national treatment clause cannot be invoked absolutely as in certain cases domestic investors will get preferential treatment by the government thereby defeating the purpose of the national treatment clause.

CANADIAN MODEL BIT OF 2004:

Article 9 of this BIT which talks about Reservations and Exceptions to the various Articles including the Article 6 of the BIT which deals with the National Treatment clause according to which *"the foreign investor and the investment must be accorded treatment no less favourable than that accorded to domestic investors (national treatment)".*

As per the exception provided under Article 9 national treatment clause cannot be invoked for the foreign investors with respect to business activities enlisted in the Annexure II of the treaty.

Hence, this bilateral investment treaty again contains certain exceptions under which national treatment principle cannot be invoked when foreign investors indulge in the business activities enlisted in the list of exception and in those cases domestic investors will get preferential treatment and hence, national treatment clause cannot be applied absolutely even though the bilateral investment treaty between the two states contains provisions for giving equal treatment the way domestic investors are given.

BIT BETWEEN JAPAN AND VIETNAM MADE IN YEAR 2003:

Article 2 clause 1 of this bilateral investment treaty deals with the provision related to national treatment clause which is as follows: *Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as "investment activities").*

Hence, according to this Article the contracting parties are obliged to give same favourable environment to their foreign investors the way they give to their domestic investors in the matters related to investments.

But like most of the BITs this BIT also has exceptions in which contracting party may refuse the investors from the nation of the other contracting party to give national treatment in the investments done in the sectors mentioned under Annex II of this BIT which is supposed to be given as per the rules laid down under the Article 6 of this Bilateral Investment. However, this Article is very lengthy with seven clauses and detailed provisions which in a nut-shell also says that it does not allow any new non-conforming measures and it can only be introduced only in "exceptional circumstances".

Hence, by virtue of exceptions contained in the bilateral investment treaty the domestic investors and the foreign investors cannot be treated equally in all cases thereby making the presence of national treatment clause to an extent worthless as government can still prefer its own domestic investors in the exceptional cases.

Therefore, after analysing aforementioned bilateral investment treaties and their clause containing national treatment principle it is evident that no bilateral investment treaty contains any provision with regard to the implementation of national treatment clause in which it can be applied absolutely. In every bilateral investment treaty there is a provision in which host state can refuse the foreign investors to treat in the way it treats the domestic investors and hence making the presence of national treatment clause to an extent valueless.

National Treatment clause is often invoked in WTO disputes. Domestic nations have this common tendency of invoking extra tough regulations and legislations for foreign investors in their nation in order to protect and promote national production and this ultimately makes the foreign investors reluctant in making investments in any foreign land and thereby it disrupts the overall economic welfare of the world.

National treatment clause means treating foreigners and locals equally ie. goods which are locally produced (in the host state) and the goods which are being imported from other nations(the foreign investors) should be treated equally by the host state.

This principle is applied on goods which have been imported ie. Charging customs duty on imported goods only will not be considered as the violation of this principle.The main motive behind application of national treatment clause is to ensure that the foreign investors do not get discriminatory treatment by any host nation only because they do not belong to that nation and hence this principle ultimately focuses on encouraging international investment by providing favourable environment to the foreign investors for making investments.[31]

National Treatment clause ensures that the foreign investors get the equally favourable conditions which the host nation gives to its domestic investors. Its motive is to encourage international investment. Under GATT the provision ie Article III which deals with the National Treatment clause prescribes the conditions which the contracting parties have to abide by incase they have agreed or they have have put national treatment clause in their trade agreement. GATT has various provisions and it treats internal measures very differently from border measures.

Under the GATT border measures are more regulated and conditions laid down are needed to be strictly followed for eg., tariff levels are bound, import and export quotas or export subsidies are prohibited whereas in the case of internal measures the power to the contracting parties is given more. They are free to agree upon the terms and conditions according to their wish and comfort this is majorly due to reason that not uniform conditions can be laid down
for all states and for all types of situations related to international trade and investment and not all difficulties can be foreseen and the regulatory needs can be pre-determined.[32]

But again not everything can be left solely on the discretion and wish of contracting parties and there has to have some regulation to control such agreements and hence, GATT gave the defense of National Treatment as a non-discriminatory measure in order to protect foreign investors in a foreign land from being discriminated solely on the basis of nationality.

Today almost every bilateral investment treaties contain this clause of giving national treatment to the investors of the contracting parties. It is a kind of protection given to the foreign investors in a foreign land where the government of his own state cannot provide security and safety related to the investment. However, this clause has no absolute application and almost all treaties containing national treatment clause has a clause

[31] OECD (2004), "Most Favoured Nation Treatment in International Investment Law", OECD Working Papers on International Investment, 2004/02, OECD Publishing

[32] Henrik Horn , *National Treatment in the GATT*, 96 The American Economic Review, 394-404 (2006)

of exception where the host nation can refuse the foreign investors the national treatment if the business of such investor falls into the ambit of exceptions mentioned in the treaty. Hence, this non absolute applicability of this clause creates ambiguity in its application. From legal point of view also it is not justified as it creates hurdle in the uniform application of this clause.

Also, there remains a dispute as to the requirement of intention while determining whether the intention has any role to play to check whether the act of the host state is infringing or violating the principle of national clause.

SUGGESTIONS

- Fixed rules should be introduced regarding implementation of National Treatment Principle in the Bilateral Investment Treaties as it lacks uniformity.

- For bringing more precision and uniformity a definition of 'like products' and criteria for determining like products should be laid down.