THE CONFLICT BETWEEN MINIMUM STANDARD OF TREATMENT AND NATIONAL TREATMENT OF ALIENS

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INTRODUCTION

The public international law deals with various standards and principles to determine the degree of treatment that should be given to the foreigners or the aliens, as they are referred. The same finds its relevance in the question that what should be the law of state responsibility for any injury or damage caused to an alien in the host country. There are two major doctrines that talk about the same and lays down a formulated mode of determining the manner in which such aliens should be treated in a foreign land and in which manner the responsibility should be affixed on a State, are the "*minimum standard of treatment*" and the "*national treatment of aliens*". The two doctrines portray the same aim and purpose of protecting the interests of the foreigners in a situation wherein they come to a different state for various purposes. On one hand the doctrine of minimum standard of treatment refers to a norm of customary international which governs the treatment of the aliens by the way of providing a minimum set of principles which States, irrespective of their domestic legislations and practices, should follow and confine to while treating aliens, *i.e.,* foreigners, while dealing with them and their property.[1] On the contrary, the norm of national treatment propagates that aliens should be expected to be subjects of the equal and fair treatment which the nationals of the State are subjected to irrespective of any other law.[2] The term "aliens" and the protection of their rights and interests in the host state, finds its importance as they, as a segment, embody their state.[3] They are dependent on the two states, the host country as well as the state of which they are the nationals. The customary international law gives the national state the power to claim on behalf of their nationals, in their interest.[4] It is also observed by some scholars that the aliens, when subjected to protection, are more prone to protection in the host country as under the international law than in the national state. [5]The conflict between

[1] C. Rousseau, Droit International Public, Paris, 1970, p. 46

[2] Mark. W. Janis, "*An Introduction to International Law*", Second Edition, Little, Brown and Company, 1993, p.41.

[3] Vincent Chetail, *"The Human Rights Of Migrants In General International Law: From Minimum Standards To Fundamental Rights",* Pg 227 (225-255)

[4] Island of Palmas (U.S. v. Neth.), Hague Ct. Rep. 2d (Scott) 83, 93 (Perm. Ct.Arb. 1928)

[5] H. Lauterpacht*,"International Law And Human Rights",*1950, Pg. 121

them is observed to arise when aliens are expected to be treated with the minimum standards of international law, independent of the law that governs the citizen of the state in question. The degree of difference between the two standards of treatment results in a debate which questions the validity of such improved treatment of aliens as compared to the nationals of the state in the light of the international standards set and that to be mandatorily be complied with.[6] The obligation behind the same being that any violation of the norm of minimum standard of treatment threatens the international responsibility of the state towards the alien citizen and also paves a way for a legal action. Such a conflict poses a threat in terms of situations wherein the national treatment itself is insufficient for the citizens as well as the aliens and also, where the fair and equitable national treatment provides a much stronger shield than what is mandated by the minimum standard of treatment. The present article seeks to understand and establish the conflict between the two norms of minimum standard of treatment and national treatment of aliens as envisaged in practice and the difficulties arising due to the efforts made to equate the two standards, especially in the case of developing countries, which have held their doubts regarding the acceptance of such norms. It also seeks to discuss the various aspects that surround the two standards of treatment of nationals as well as aliens of the State in question.

THE DOCTRINE OF MINIMUM STANDARD OF TREATMENT

The doctrine of minimum standard of treatment is one of the formulated ways which the developed countries propagate and support for the determination of the appropriate degree of treatment that should be given to the aliens. In mechanism proves to be a substantive and an important aspect in determining the state responsibility in case of violation of any right of the foreigner. The rationale behind the doctrine is to affix the bare minimum degree of protection that an alien State should guarantee to the alien or the foreigner. The origin of the doctrine is traced back to the "doctrine of denial of justice", which shaped a more civilised version of diplomatic protection.[7] In the dated times, a separate branch of law was dedicated to this aspect of public international law, which solely talked about the responsibility of the state if and when violating the rights of an alien or causing any damage to him.[8] The need of such doctrine was realized in the early times when the States propagated policies to protect the interests of their citizens. This protection extended to intervention in the policies of the host country also, in case of need.[9] These instances demanded the existence of a standard that would provide satisfactory protection to the

[6] Mark. W. Janis, *"An Introduction to International Law"*, Second Edition, Little, Brown and Company, 1993, Pg. 56

[7] Adriana Sánchez Mussi, *"International Minimum Standard of Treatment*", 2000, Pg. 3

[8] C. F.Amerasinghe, *"State Responsibility For Injuries To Aliens*", 1967, Revue Ge´Ne´Rale De Droit International Public, Pg. 5,5-29,110-30

[9] M. Sornarajah, *"The International Law on Foreign Investment",* (CUP), 1994, pp. 8-20, 27-37

aliens. The doctrine of minimum standard of treatment can be attributed as a set of rules or principles that would prevail for the aliens, in order to protect them and their interests, even in the instances when the same is denied to the nationals of the host State.[10] The doctrine poses an obligation on the host State to fulfil these minimum code of treatment towards the alien citizens as the violation of the same points the state responsibility on the State. The violation might result in an action against the State by the injured alien if the alien has spent all the local remedies available to him. The applicability of the doctrine extends not only to the instrumentalities of the State but also the injuries caused by a private person.[11] A few landmark cases, like that of the Neer[12] and the Roberts[13] case re-defined the concept of minimum standard of treatment and helped in setting the validity of the same. The cases related to the State of Mexican in the role of the host State. In the case of Neer, a United Nations' citizen was murdered on the street and the wife of the deceased challenged the investigation conducted by the Mexican authorities. The arbitral award held that the same could not be regarded as the violation of the minimum standard of treatment. The award explicitly defined the ambit of the doctrine in the terms that in order to constitute an act or omission as the violation of the doctrine, there should be an intentional neglect of duty, malicious intention or an paucity of the governmental action that would be reasonable to be termed as a violation of the international standards of treatment, to a man of prudence.[14] The other case of Roberts involved the confinement of the U.S national along with forty other men, in a small cell with no sanitary or humanly facilities. The court while addressing the case stated that the equality cannot be seen as the ultimate test of ill-treatment by a host state. Though, the same is of relevance while affixing the merits of the case and the complaint. The point of determination lies in the fact if the alien is treated with the "ordinary standards of civilization". It was decided in the favour of the U.S national as the treatment he was posed to was considered to be inhuman in nature.[15] Though, since the twentieth century, the two cases have establishes the validity of the doctrine , yet the applicability is questioned by the developing states in context of them being able to comply with the set standards and the doubts arising due to the same reason. In the same lines of reference, though the doctrines of minimum standard of treatment and fair and equitable treatment are considered to be at par, yet they prove to be only overlapping in nature and not the same. Though, the doctrine is a known customary international law and widely accepted, the same is also objected by some of the scholars on

[10] C. Rousseau, *"Droit International Public, Paris",* 1970, Pg. 46
[11] *"Restatement of the Law Third*", The American Law Institute, The Foreign Relations Law of the United States, Volume 2, American Law Institute Publishers, 1987
[12] U.S.A. (L.F. Neer) v. United Mexican States (1926) 4 RIAA 60
[13] Roberts v. United Mexican States (1926) 4 RIAA 77
[14] "*The Centre for International Environmental Law Issue Brief*", International Law on Investment. August, 2003, Pg. 1
[15] *ibid*

the basis of the formula that it states. As stated, the doctrine of fair and equitable treatment is a more feasible option of the Tribunals while affixing liability of the state as compared to the doctrine in question.[16] The reason behind the same being that the Tribunal does not consider the violation in the issue of the degree of standard but on the basis of the fairness and equability. The critique of the same falls in lines with the fact that the boundaries of the standards are vague and are conveniently trespassed by the countries for their own benefits.

DOCTRINE OF NATIONAL TREATMENT OF ALIENS

On the contrary to the doctrine of minimum standard of treatment, the present doctrine talks states that the aliens should be given the same treatment as that to the nationals of the State, this doctrine ensures that the aliens are not treated in a manner less than of the nationals and they are given equal protection by the host State. Such a doctrine is supported, mainly, by the developing countries as they demand the protection of their nationals at par with the protection attributed to the citizens of the other states, in cases wherein their nationals go to foreign State. The doctrine finds its relevance in cases, wherein the standards set under the international law fall short of the degree of protection that should be provided to the aliens. They are then compared to the nationals of the host country who are provided with more protection, being the citizens of the state, than the aliens going to the host country. This may happen in case of developed host state wherein the administrative policies may be providing more than what is stipulated in the minimum standard of treatment. The concept states that the aliens must be treated on the same level and with the same degree of protection as compared to the nationals of the State. Accordingly, the only exception to be made with the same should be of political rights and the related protection.[17] This doctrine also ensures that the aliens are not encouraged or empowered to claim more rights in the host state as compared to what are available to the nationals of the same state. The violation of the same would affix the responsibility on the host state when a difference of treatment is observed between the aliens and the nationals.

The origin of the doctrine is traced back to 1890s, the First International Conference of American States held in Washington. It finds its recognition as an accepted concept of state responsibility by the way of inclusion in various treaties like Convention relative to the Rights of Aliens, 1902, the 1928 Convention on the Status of Aliens and the Montevideo Convention on the Rights and Duties of States, 1923. The rationale behind the doctrine is that each state, irrespective of the capabilities of the same, should grant every

[16] F. A. Mann, *"British Treaties fort the Promotion and Protection of Investments"*, The British Year Book of International Law 52 (1981): 241, 244

[17] Vincent Chetail, *"The Human Rights Of Migrants In General International Law: From Minimum Standards To Fundamental Rights",* Pg 235 (225-255)

alien or the nationals of the other countries, the benefit of the State attributing from the same set of laws and administration that the host state is posing on their nationals. This would include the same policies, laws, protection and the same system for justice. The said doctrine has not been accepted by the various States in consensus because of the various reasons that are attributed by the developed states in favour of the doctrine of minimum standard of treatment. The reason for the same being that though the contention of treating all the individuals, aliens and nationals as equal stands just and valid, yet in cases where the protection given to the nationals themselves are not up to the mark, how can the aliens be forced to be treated in the same parlance. It is this degree of difference that marks the debate regarding the applicability of the two doctrines open.

CONFLICT BETWEEN THE DOCTRINES

The conflict between the two doctrines of minimum standard of treatment and the national treatment of aliens arise due to the degree of protection that these two doctrines provide to the aliens. On one hand, the doctrine of national treatment of alien states that the foreigners should be subject to the treatment which is at par with the treatment which is accorded to the nationals of the state, whereas, minimum standard of treatment states that the aliens should be granted a set of basic rights and protection irrespective of the fact that the same degree of protection is being given to the nationals of the host state or not.

The question of conflict between the two laws arise from the fact that the branch of international law poses two contradictory and poles apart concepts in the form of the two above mentioned doctrines. It is the ambiguity in the present status of the applicability of these two doctrines that the debate relating to the choice of the one of the two principles has taken up the top spot. On one hand, the developing countries have propagated the ideology of national treatment of aliens as they deem fit in complying with the same and on the other hand, the developed states vote for the doctrine of minimum standard of treatment. The reason for the same being that aliens, under any circumstances should not be treated below a degree, as set by the law and the same should be applicable in the host country irrespective of the fact that the similar or the same degree of protection can be provided to the nationals of the host State or not. [18] The questions surrounding the conflict or the debate are regarding the rights that are applicable to the aliens in the host state as per the minimum standard of treatment but the same are not applicable to the nationals of the state due to the lack of policies in the host state. The question that arises is, how an alien can be granted a right which is not available to the national of the state, as the first duty of the state is towards the nationals and not the aliens. On the other hand, if the doctrine of national treatment of aliens is followed, the question that arises is that how can

[18] Shivam Bhardwaj, *"National Treatment Clause In An International Investment Agreement: Determining The Standard Of Enforcement"*, 2014, 147 (145-154)

an alien be subjected to protection which is lesser than what is receives in his national state and also, every state has the duty to protect the rights of the nationals as well as the aliens or else it would result in sanction. In the same lines of thought, the debate between the two seems to be of question. On one hand, the treaties support and propagate the doctrine of national treatment and on the other hand, the doctrine of minimum standard of treatment is accepted as the customary international law. Also, as stated in the case of Chattin Claim[19], it was held that the international standards of civilization should be considered. Also, as per the case of Glamis Gold[20], the award stated that the standard as under the minimum standard of treatment is same as that was what was stated in the Neer case.

Therefore, it can be said that though both the doctrines find their relevance in the international law and are a part of the same goal, they are conflicting in nature. It is because of the same conflict that the present situation regarding the status of the applicability and the acceptability of these two doctrines are in question, in regards to affixing the responsibility of the State in case of any breach towards the aliens. On the same parlance, a special consideration should also be made to the treatment of the nationals and a sense of quality to them. The two doctrines, though aiming towards the same eye, opt for different methods and thereby different modes of achieving the protection of the aliens in foreign states. From the discussion, it can be seen that the doctrine of minimum standard of treatment has been the concept granting the protection of interests and providing the rights to the aliens as under the human rights law. On one hand, the debate of choosing one of the doctrines and the contradictory ideas that the doctrines pose are seen. On the other hand, the human rights law has seen the combination of the two in providing rights to the aliens. The branch ensures that their certain core rights that the aliens should be granted irrespective of the availability of rights in the host state and also that there is equality between the rights granted to the aliens as well as the nationals of the state. Despite, the various efforts to reconcile the two doctrines, the conflict between the two remains and there is some amount of ambiguity in the application of the same.

[19] Chattin Claim (US v Mexico) (1926) 4 RIAA 282
[20] Glamis Gold Ltd v United States (Award of 30 June 2009)