

# A cláusula do "Tratamento Justo e Equitativo" na Jurisprudência do ICSID

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## PERGUNTA

Qual é o entendimento dado pela Jurisprudência do ICSID à cláusula do "Tratamento Justo e Equitativo"?

## HIPÓTESE

Nos casos em que a interpretação do seu significado se torna relevante, o fator determinante para a adoção de um posicionamento ou outro é a corrente jurisprudencial e doutrinária vigente no momento em que o caso é decidido



## CONCLUSÕES

- O Primeiro caso foi o *Azinian v. Mexico*, que fixou um entendimento que foi reproduzido na maioria dos primeiros casos.
- No período de 1999 a 2002, 62,5% os casos seguiram a doutrina de que a cláusula do "tratamento justo e equitativo" não seria uma apólice de seguro para os investimentos, tendo como principais referências os casos *Azinian v. Mexico* e *Maffezini v. España*.
- No período de 2003 a 2013, 69% os casos seguiram a doutrina das expectativas legítimas, tendo como principais referências os casos *Metalclad v. USA* e *Tecmed v. Mexico*.
- Em um caso deste ano (8 de Abril de 2013), o *Arif v. Moldavia*, criticou-se a doutrina das expectativas legítimas, o que talvez seja o indício de um novo entendimento para os próximos anos

## MÉTODO

Método empírico:  
Análise quantitativa e qualitativa das sentenças arbitrais proferidas sob os auspícios do ICSID

## JUSTIFICATIVAS

- O ICSID é a mais relevante Câmara de Arbitragem em matéria de Investimento Estrangeiro Direto
- A cláusula do "Tratamento Justo e Equitativo" serve de embasamento para grande parte das controvérsias e seu entendimento é muito controverso

## BIBLIOGRAFIA BÁSICA

- ALVAREZ, José. The Public International Law Regime Governing International Investment. Brill Academic Pub. 2010
- BARBOSA, Flávio spaccacherche e MONEBHURRUM, Nitish. O Tratamento e a Proteção do Investimento Estrangeiro. Revista Brasileira de Arbitragem. Ed. Esp. 2011, pp.107-145.
- BISHOP, R. Doak, CRAWFORD James, et al. Foreign Investment Disputes: Cases, Materials and Commentary, Kluwer Law International 2005.
- DIHEL, Alexandra. The Core Standard of International Investment Protection, International Arbitration Law Library, Volume 26 Kluwer Law International 2012.
- DOLZER, Rudolf e SCREUER, Christoph. Principles of International Investment Law. Oxford University Press. 2008.
- EVANS Malcom D.. International Law. Oxford University Press. 3rd ed, 2010
- HORN, Norbert and KRÖLL, Stefan Michael. Arbitrating Foreign Investment Disputes, Kluwer Law International, 2004
- JENIS, Mark W. Little, Brown and Company. Second edition. 1993
- NEWCOMBE, Andrew and PARADELL, Lluís. Law and Practice of Investment Treaties. Kluwer Law International. 2009
- ROTHKOPF, Robert. The Rompetrol Group NV v Romania – treaty protections triggered by maltreatment of company officers. Disponível em: [http://kluwerarbitrationblog.com/blog/2013/05/24/the-rompetrol-group-nv-v-romania-treaty-protections-triggered-by-maltreatment-of-company-officers/]
- SASSON, Monique, Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law, Kluwer Law International 2010
- SCHREUER, Christoph. Fair and Equitable Treatment in Arbitral Practice. Offprints of the Journal of World Investment & Trade, Vol. 6, No.3. June 2005
- UNCTAD. Fair And Equitable Treatment, a Sequel. United Nations Conference On Trade And Development. Series on Issues in International Investment Agreements II. New York and Geneva, 2012
- VANDEVELDE, Kenneth J. A Unified Theory of Fair and Equitable Treatment. International Law and Politics. Vol. 43, pp. 43-106, 2010

## CASOS SELECIONADOS

1. Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2. 1 November 1999
2. Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1. 30 August 2000
3. Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7. 13 November 2000.
4. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3. 21 November 2000
5. Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil. V. The Republic of Estonia Case No. ARB/99/2. 25 June 2001
6. Eudoro Armando Olguin v. Republic of Paraguay, ICSID Case No. ARB/98/5. 26 July 2001.
7. Mondev International Ltd. v. The United States of America. Case No. ARB(AF)/99/2. 11 October 2002
8. Marvin Feldman v. Mexico. CASE No. ARB(AF)/97/1. 16 December 2002
9. ADF GROUP Inc. v. The United States of America Case No. ARB(AF)/00/1. 9 January 2003
10. Tecnicas Medioambientales Tecmed S.A. V. Estados Unidos Mexicanos CASO No. ARB (AF)/00/2. 29 May 2003
11. The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America. Case No. ARB(AF)/98/3. 26 June 2003
12. Consortium rfcc v. Royaume du Maroc. AF. No ARB/00/6. 22 December 2003.
13. Waste Management, Inc. v. United Mexican States. Case N° ARB(AF)/00/3. 30 April 2004
14. CMS Gas Transmission Company v. The Argentine Republic. CASE NO. ARB/01/8 12 May 2005
15. Noble Ventures, Inc. v. Romania. ICSID Case No. ARB/01/11 12 October 2005
16. AZURIX CORP. v. The Argentine Republic. ICSID CASE NO. ARB/01/12. 14 July 2006
17. ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary ICSID Case No. ARB/03/16. 2 October 2006
18. PSEG GLOBAL INC. AND KONYA ILGIN ELEKTRİK ÜRETİM VE TİCARET LİMİTED Ş RKETİ v. Republic of Turkey, ICSID Case No. ARB/02/5. 19 Jan 2007
19. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile Case No. ARB/01/7. 21 March 2007
20. LG&E ENERGY CORP. LG&E CAPITAL CORP. and LG&E INTERNATIONAL INC. v. ARGENTINE REPUBLIC. ICSID Case No. ARB/02/1. 25 July 2007
21. M.C.I. POWER GROUP L.C. AND NEW TURBINE, INC. v. Republic of Ecuador ICSID Case No. ARB/03/6. 31 July 2007
22. COMPAÑÍA DE AGUAS DEL ACONQUIJA S.A. and VIVENDI UNIVERSAL S.A. v. ARGENTINE REPUBLIC. Case No. ARB/97/3. 20 August 2007
23. PARKERING-SOMPAGNIET AS v. Republic of Lithuania. ICSID Arbitration Case No. ARB/05/8. 11 September 2007
24. OKO PANKKI OYJ (formerly called: OKO Osuuspankki Keskuspankki OYJ); VTB BANK (DEUTSCHLAND) AG (formerly called: Ost-West Handelsbank AG); and SAMPO BANK PLC v. The Republic of Estonia. 19 November 2007
25. SEMPRER ENERGY INTERNATIONAL v. Argentine Republic. CASE NO. ARB/02/16. 28 September 2007
26. Desert Line Projects LLC v. The Republic of Yemen. ICSID Case No. ARB/05/17. 6 February 2008
27. HELNAN INTERNATIONAL HOTELS A/S v. THE ARAB REPUBLIC OF EGYPT. ICSID CASE NO. 05/19. 3 June 2008
28. METALPAR S.A. Y BUEN AIRE S.A. v. REPÚBLICA ARGENTINA CASO CIADI NO. ARB/03/5. 6 June 2008
29. BIWATER GAUFF (TANZANIA) LTD. v. UNITED REPUBLIC OF TANZANIA ICSID CASE NO. ARB/05/22. 24 July 2008
30. RUMELI TELEKOM A.S. v. TELSİM MOBİL TELEKOMİKASYON HİZMETLERİ A.S. ICSID Case No. ARB/05/16. 29 July 2008
31. DUKE ENERGY ELECTROQUIL PARTNERS & ELECTROQUIL S.A. v. REPUBLIC OF ECUADOR. ICSID Case No. ARB/04/13. 6 November 2008
32. Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt. ICSID Case No. ARB/04/13. 6 November 2008
33. L.E.S.I. S.p.A. et ASTALDI S.p.A. c/ République algérienne démocratique et populaire CIRDI No. ARB/05/3. 12 November 2008
34. PANTECHNIKI S.A. CONTRACTORS & ENGINEERS v. THE REPUBLIC OF ALBANIA. ICSID Case No. ARB/07/21. 30 July 2009
35. BAYINDIR INSAAT TURİZM TICARET VE SANAYİ A.Ş. V. Islamic Republic of Pakistan. ICSID Case No. ARB/03/29. 27 August 2009
36. EDF (SERVICES) LIMITED v. Romania. ICSID CASE NO. ARB/05/13. 8 October 2009
37. IOANNIS KARDASSOPOULOS and RON FLUCHS v. THE REPUBLIC OF GEORGIA. ICSID Case Nos. ARB/05/18 and ARB/07/15. 3 March 2010
38. GEMPLUS S.A. SLP S.A. GEMPLUS INDUSTRIAL S.A. de C.V. and Talsud v. THE UNITED MEXICAN STATES
39. Gustav F W Hamester GmbH & Co KG v. Ghana ICSID Case No. ARB/07/24. 18 June 2010.
40. AES SUMMIT GENERATION LIMITED and AES-TISZA ERŐMŰ KFT v. The Republic of Hungary. ICSID Case No. ARB/07/22. 23 September 2010.
41. ALPHA PROJEKTHOLDING GMBH v. Ukraine. ICSID Case No. ARB/07/16. 8 November 2010
42. Total S.A. v. Argentine Republic. ICSID Case No. ARB/04/1. 27 December 2010.
43. JOSEPH CHARLES LEMIRE v. Ukraine. ICSID CASE NO. ARB/06/18. 28 March 2011
44. GEAGROUP AKTIENGESELLSCHAFT v. Ukraine. ICSID CASE NO. ARB/06/16. 31 March 2011
45. Impregilo S.p.A. v. Argentine Republic. ICSID Case No. ARB/07/17. 21 June 2011
46. EL PASO ENERGY INTERNATIONAL COMPANY v. The Argentine Republic. ICSID Case No. ARB/03/15. 31 October 2011
47. TOTO COSTRUZIONI GENERALI S.P.A. v. REPUBLIC OF LEBANON. ICSID Case No. ARB/07/12. 7 June 2012
48. SWISSLIION DDO SKOPJE v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA. ICSID CASE NO. ARB/09/16. 6 July 2012.
49. ANTOINE GOETZ & CONSORTS ET S.A. AFFINAGE DES METAUX v. REPUBLIQUE DU BURUNDI. Affaire CIRDI No. ARB/01/2. 21 July 2012
50. OCCIDENTAL PETROLEUM CORPORATION OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY v. THE REPUBLIC OF ECUADOR. ICSID Case No. ARB/06/11. 5 October 2012.
51. BOSH INTERNATIONAL, INC and B&P LTD FOREIGN INVESTMENTS ENTERPRISE v. UKRAINE. ICSID Case No ARB/08/1. 25 October 2012
52. VANNESSA VENTURES LTD. v. THE BOLIVARIAN REPUBLIC OF VENEZUELA. ICSID CASE NO. ARB(AF)/04/6. 16 Jan 2013
53. MR. FRANK CHARLES ARIF v. REPUBLIC OF MOLDOVA. ICSID Case No. ARB/11/23. 8 April 2013
54. THE ROMPETROL GROUP N.V. v. ROMANIA. ICSID Case No. ARB/06/3. 6 May 2013