

Interstate investment legal treatment as a factor of investment attractiveness

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Abstract

Introduction: *Since this analysis as one of the main problem of modern international investment law defines the legal protection of international investments and the delimitation of actions of states that constitute expropriation or the measures taken by states under the right to regulate within public interest, these theses primarily devoted to one of the key components of international investment agreements — the investment legal treatment. Researching attention is also paid to legal interaction between the concepts of the investment legal treatment and the state guarantees for protection of foreign investment. Scientific and practical conclusions on the most important legal sources in the field of international investment activities are made, the direction for the next stage of researching work is preoutlined.*

Aim: *The aim of provided analysis is a scientific approbation of the intermediate results of the author's research on legal investment treatments among the audience which is not only interested in topic of national economies development, but probably would like to be aware of additional important non-purely economic elements and factors of this desirable development.*

Method: *For the mentioned aim the methods of scientific abstraction, logic and analytics, as well as expedients in the style of historicism of international law and philosophy of modern business have been applied.*

Findings: *Provided research significates investment legal treatment importance as one of factors of the local investment attractiveness, outlining importance of development of state guarantees for protection of foreign investments by delivering progressive European approaches as the examples, focusing on effective and productive balance reaching in the sphere of corresponding state regulation.*

Key Words: *international investment law, international investments, investment legal treatment, bilateral investment treaties, international investment arbitration, state guarantees for protection of foreign investments*

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1. INTRODUCTION

Even a fast analysis of international investment arbitrations with participation of states and subjects of economic activity with investments from abroad delivers understanding that standards and guarantees of investment legal treatments have fundamental character, which is always so at least for the mentioned legal practices. Kind of argument for this could be found in a position of agreed provisions of investment treatments at bilateral investment treaties (BIT), which usually follows the introduction norms for investment permitting and encouraging, being set from the very beginning in most of BITs. Does this fundamental character of legal investment treatment remain as the such in other important rules of international investment implementation? Scientific questions about corresponding dualism are the key at these theses.

2. LITERATURE REVIEW

According to the national legal encyclopedia of Shemshuchenko Y.S. (1998), the legal regime is — a special legal order which is established for certain areas of public relations or whole society. This is explained simpler by Utebsky B.S. (1934), accordingly to whom — it is a set of rules of conduct. Alekseev S.S. (1995) was adding that most of legal regimes use certain legal regulation, and each of these regimes is being differed by the predominance in its structure of a particular mode of legal influence. Another modern scientific sources of international law, focused research of Matuzov N.I. (1996), adds that the essence of legal regime is just another manifestation of normativity of law, which operates at higher level combining set of legal means dictated by the appearing goals of state into the single mounted structure.

The topic of legal regimes quite comprehensively studied in the framework of international law and general law theories, but the concept of legal treatment still leaves a number of insufficiently disclosed scientific issues regarding its practical specifics in certain branches of international law, and it is especially so for the international investment law. However, that is also obvious, the range of relevant scientific and practical issues of the researching topic goes beyond the field of scientific interest of the mentioned disciplines.

3. RESEARCH METHODOLOGY

Objective of this research is scientific study of investment legal treatment importance as of a factor of investment attractiveness of local investment-seeking objects. The study mainly focuses on overall effectiveness of the corresponding legal remedies. It also aims to find how investment legal treatment intercrossing with other important for transborder investments legal concepts, and when this intercrossing would be most effective and productive juridically.

4. DATA ANALYSIS

4.1. The concept of the investment legal treatment

Previous research stage results of the author (2022) outlined that the obligations of states to ensure a certain legal treatment in regard to international investments, which can be set out through combining of canonized standards and principles of international law which are separately agreed by parties of BIT, constitute standardized juridical construct regarding investment treatment, establishing within jurisdictions or states economic space the basic rules of attitude to cross-border investment.

Thus, additionally to the common standard on the basis of well normative-rooted legal construct of equality — The Fair and Equitable Treatment, as well as also the two more treatments in common — The Most-favoured-nation and The National treatment, to the general list of principles of conduct with foreign investment Farkhutdinov I.Z. (2010) adds the following standards: full protection and security, protection from expropriation, protection against arbitrariness and discrimination, the minimum standard of treatment accordingly to customary international law. These elements of the constructs have a similar nature of origin and could be characterized by fairly close law content, which, however, differs significantly from the economic and juridical points of view.

Gazzini T. (2012) draws a general supervision that international investment law proceeding from its basic norms is not in vain essentially interested in legal relations of a foreign investor and host country of his investments. Since, on the one hand, admitted to invest in the territories of the host states, investors must comply with the

local laws and regulations. And on another — the host state is fully entitled to exercise its regulatory powers over foreign investors. It means, that the ultimate purpose of any BIT is to precisely define how the host state shall treat foreign investors.

By concluding BIT, the contracting parties accept some obligations in addition to those which stemming from customary international law and other applicable international treaties — in relation to exercising of their sovereign rights within dealings with foreign investors. In the meantime, as it aptly explained at the ICSID Award at the case with participation of private companies and Hungary (2006), *according to „the basic international law principles [...] while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries... [T]he rule of law, which includes treaty obligations, provides such boundaries“.*

4.2. The concept of the state guarantees for protection of foreign investment

However, the key in the legal theory of national law within the topic of this dualistic analysis is slightly different concept, and that is — the state guarantees for protection of foreign investment. Already mentioned encyclopedic source of Shemshuchenko Y.S. gives definition to this notion, accordingly to which it is legally established guarantees from the state in order to ensure proper investment and encourage investment in foreign capital in priority sectors of the economy. This definition Doronina N.G. (2003) supports with adding that such guarantees are usually understood as specific obligations assumed by the state in connection with investment actions of foreign investor.

Considering the key topic of this conference (*Economic Security*) we add that national scientific and pedagogical source by Chernadchuk V.D. (2005) defines the state guarantees for protection of foreign investment as creation of conditions that provides participants in investment relations with the opportunity to carry out investment activities at any time, regardless of any subjective reasons.

4.3. The intercrossing of international law and national law investment concepts

Provided theoretical overviewing delivers that the concepts of the legal investment treatments (regimes) and the state guarantees for protection of investment are different, but intertwined tightly.

This could be confirmed by national researches of investment law. Poiedynok V.V. (2013) notes that the analysis of regimes of investment activity clearly distinguishes two key topics, which are being considered mostly in isolation. These are, actually the legal treatments for foreign investors, as well as the special management regimes. Continuing with the researcher theses, there are significant and generally practical connections in between of these topics, which consist in the fact that foreign investors can be detonators of special management regimes, or vice versa — when under special regimes the participation foreign investors is excluded at all.

Recalling, that among the main problems of international investment law remains for centuries the protection of these kind of investments, it is necessary to add that today a very prominent place likewise is given to the differentiation of actions of expropriation, which is the subject to compensation in accordance to the international law, and to the measures which are taken under right of states to regulate in public interests, since their consequences must not be compensated to investors (Volkova I.O., 2021).

From this perspective exactly, a delicate balance needs to be struck between the regulatory powers of the host state and the need to legally protect the interests of foreign investors (Gazzini T., 2012). Consequently, just such approach surely arranges attractive and truly fruitful conditions for broad and active incoming international investment exchange.

4.4. Analysis of legislation

According to the legislation of Ukraine, guarantees of the rights and interests of foreign investors are the subject to following standardization which includes: 1) stability of legislation; 2) non-interference in the activities of the subjects of investment activity of state bodies, their officials; 3) compensation of losses to investors; 4) usage of income comes from investment (Khrimli O., 2016).

In the meantime, the analysis of legislation of the most developed countries of Europe turns out that there are not special rules governing foreign investment in European Union. The relevant role is assigned to general legislation, where according to Art.207 of the Lisbon Treaty (amendment to the Treaty on European Union) of 2007, the exclusive competence for the regulation of foreign direct investment

is vested to the EU's central bodies. This allows, as we known, to conclude separate and complex investment agreements.

In fact, European legislator sets not a direct element for the inflow of foreign investment, but the effective governance and control from the united countries. Among the latest Dmytryk O.O. (2019) singles out: 1) special laws establishing the procedure for the introduction of foreign direct investment, their functioning, the limits of control by central and local authorities; 2) bodies exercising control over the actions of foreign investors; 3) special reporting rules for foreigners; 4) control over the movement of currency; 5) legal protection of foreign direct investment.

For theoretical notes and according practices this could be separately recorded through classification of state guarantees for protection of foreign investment by forms of legal regulation, where just a triad of elements exists: 1) establishing the conditions for investment activities; 2) supervision and control in the investment sphere; 3) guarantees of the rights and legitimate interests of investment entities from abroad. The special procedure for foreign investments attracting and admitting to the strategic sectors of economy is the well-established international practice, which in reality is one of the most effective modern tools for protection of national interests.

Practically the following negative consequences of attracting international investment are most often mentioned in the relevant supporting communications: the likelihood of host state to lose control of national production or choosing its own development strategy; risks come from the threat to lose national or national economic sovereignty by too strong dependence from the countries of origin of incoming capital, in other words — forced increase in dependence from the foreign capitals; depletion of national natural resources or environmental pollution; reducing of competitiveness level of domestic producers; withdrawal of capitals and other.

5. CONCLUSION

Summing up, we note that the regulation of foreign investment is carried out mainly by the national law, which is influenced by the international law. Norms of national law establish the key legal factors in the content of the legal regime of foreign investments

treatment, which in economic and legal essences become national, preferential or restrictive.

The choice of specific legal means to regulate foreign investment usually depends on current considerations within social-economic and political spheres, as well as important conditions of global, regional or local nature. The norms of international investment agreements provide important foundations for clarification, addition and exclusion to national manifestations of normativity of law, which in turn stem from the peculiarities of the general international normative and economic landscapes.

The institute of state guarantees of investment protection is one of the most important achievements of modern international investment law, which is designed in order to ensure establishment of a certain investment legal regime in accordance with international norms and rules, which however will affect not only investment sphere. The general instability of national branches of law, insufficient functioning of relevant legal mechanisms, and the lack of localization of important progressive international legal norms may hinder functionality of such international law institution. All mentioned can be corrected by available international legal means, but their limitation also may be the problem of «self» implementation of international organs decisions.

Thus, the next stage of the study on legal investment regimes should focus on the analysis of effective international litigation practices, their impact on sectoral lawmaking, and possibly the range of issues related to the effectiveness of other relevant international legal instruments.

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