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MODEL BILATERAL INVESTMENT TREATIES: COMPARATIVE ANALYSIS

МОДЕЛЬНІ ДВУСТОРОННІ ІНВЕСТИЦІЙНІ УГОДИ: ПОРІВНЯЛЬНИЙ АНАЛІЗ

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The article deals with the issue of international regulation of foreign direct investment by bilateral investment treaties. Foreign direct investment is a widespread tool used by corporations to develop their businesses. Thus, it demands effective and appropriate regulation on international level. The article indicates the necessity of international regulation of foreign direct investment. Such regulation is essential for the protection of investments and investors' interests. The international regulation of foreign direct investment may be as multilateral as bilateral. The author makes an attention on the fact that attempts to regulate the question in issue by multilateral investment agreements were failed, elucidating the reasons of it. The article shows that bilateral investment treaties were the solution of the problem of filling the gaps in respective international regulation, at least between several particular states. It makes clear the nature of such agreements, revealing the main features of their spread throughout the world. The article also states about provisions that may be found in bilateral investment agreements, emphasizing on the provisions of such treaties regarding procedural rights of the parties. The article states about the typical regulation of procedural rights of the parties by bilateral investment agreements. It reflects such definition as "treaty shopping". "Treaty shopping" is situation, which may be caused by including of depicting legal provisions into bilateral investment treaties. Hence, the article makes clear the consequences of creation of such situation to both host and home states. In addition to this, it illustrates the models of such treaties, namely - "European model" and "North America model", clarifying the distinctions between them.
Key words: foreign direct investments, bilateral investment treaties, international regulation, investors, investments, host state, home state.

Стаття присвячена міжнародному регулюванню прямих іноземних інвестицій двосторонніми інвестиційними угодами. Прямі іноземні інвестиції є поширеним інструментом, який використовується корпораціями для розвитку бізнесу, отже, вони вимагають дієвого та ефективного врегулювання на міжнародному рівні. У статті наголошується на необхідності саме міжнародного врегулювання прямих іноземних інвестицій, яке є важливим для захисту інвестицій та інтересів інвесторів. Міжнародне регулювання прямих іноземних інвестицій може бути як багатостороннім, так і двостороннім. Автор звертає увагу на той факт, що спроби врегулювати дане питання багатосторонніми інвестиційними договорами були невдалими. Стаття висвітлює причини, які стали перешкодою для багатостороннього врегулювання прямих іноземних інвестицій. Зважаючи на те, що двосторонні інвестиційні договори були та є способом вирішення проблеми заповнення прогалин у відповідному міжнародному регулюванні, щонайменше між двома конкретними державами, автор розглядає природу таких договорів та визначає головні причини їх поширення у світі. Крім того, у статті також розглянуті окремі положення двосторонніх інвестиційних угод, при цьому особливу увагу приділено одноманітному підходу до закріплення процесуальних прав сторін. У статті проаналізовано поняття недобросовісного використання договорів – ситуації, за якої може бути спричинена шкода внаслідок включення таких типових положень про процесуальні права сторін у двосторонні інвестиційні договори. У статті також розглянуті наслідки прояву зазначеної вище ситуації для обох сторін договору – приймаючої держави та держави місця походження. Автором використано порівняльно-правовий метод дослідження на прикладі двох найбільш розповсюджених моделей двосторонніх інвестиційних договорів – «європейської» та «північноамериканської».
Ключові слова: прямі іноземні інвестиції, двосторонні інвестиційні угоди, міжнародні врегулювання, інвестори, інвестиції, приймаюча держава, держава місця походження.

Relevance. Nowadays, foreign direct investment (FDI) is indispensable part of efficiency functioning economic system. Developed and developing countries as much as transitional countries consider FDI as essential factor of economic development and modernization. They liberalized their investment regimes and took other measures for getting FDI. Ukraine being a transitional country, also encourages foreign direct investments. Due to this, it establishes international relations and becomes a party to investments treaties. Thus, it is necessary to determine the international regulation of FDI to make question arising with regard to that issue clearer.

Recent researches. The issue about foreign direct investment was researched by Y. Kovalenko, T. Melnichuk, Leon E. Trakman, M. Sornarajah and others. Particularly, the bilateral investment treaties issue was researched by Michael A. Geist, Thomas Eilmansberger, Kenneth J. Vandevelde, T. Gazzini, Kenneth J. Vandevelde, Stephen J. Canner and others.

Issue. Foreign direct investment (FDI) as a part of economic internationalization appeared as consequence of a rapid globalization. Globalization is defined as the process of reducing barriers between countries and encouraging closer economic, political, and social interaction. In order to the increasing development of mentioned processes, many undertakings got an opportunity to extend their business activity and have begun to create new business strategies involving FDI. Due to the above-mentioned, there arise the question – which economic transaction may be called as FDI? To make it clear, FDI occurs ordinarily when an entity, usually a corporation, from one state, the home state, makes a physical investment in another state, the host state. Typically, such investment involves building a factory and investing in machinery, equipment, and related corporate assets [1, p. 5]. FDI became more popular among companies, and domestic legal regulation regarding investment sphere could not govern all aspects of foreign direct investments that might arise. The widespread necessity of effective legal protection of investments and investors' interests also required some external regulation. This problem may be resolved by international regulation of FDI. However, many attempts to govern this issue on the multilateral level were failed. Nowadays, there is no multilateral agreement, which may fully regulate that area. Such situation is the evidence of the existence of conflicting approaches to the problem of foreign investment protection and the existence of contending systems relating to the treatment of foreign investment. Many drafts of proposed documents aimed to ensure as much protection as it possible to FDI. But they were not accepted by capital – importing

states. Non-governmental organizations (NGOs) also preclude the coming into force of such multilateral agreements. They rose objections to treaties, which provide only investment protection without addressing issues regarding environmental problems or human rights violation caused by or associated with FDI. Some NGOs also emphasized that such agreements directed exclusively on the protection of the rights of multinational corporations and did not concern the interests of the common population and the poor. All in all, the issue of concluding multilateral treaties concerning FDI became more complicated because of the activity of NGOs on the international level. [2, p. 236]

Thus, there has been an absence of a rapid development of international law that may meet the needs of FDI [2, p. 184]. Such statement was reflected by the International Court of Justice in the Barcelona Traction Case: 'Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane' [3].

Notwithstanding on the absence of rapid development of international law in this sphere, there was a real need in it. Therefore, states decided to solve that problem by concluding bilateral investment treaties (BITs) to ensure that, as between them at least, there would be definite rules relating to FDI. BITs provided the parties with the opportunity to set out definite norms that would apply to investments made by their nationals in each other's territory.

The first negotiations regarding bilateral investment treaties were started in order to the initiative of Germany and Pakistan in 1959. After that, the use of the BITs has become truly international, with virtually every developed state and over 90 developing states having entered into at least one [4, p. 684]. Germany was a leader in negotiating BITs by 1991. Switzerland, France, the United Kingdom, and the Netherlands followed it. By 1996, there were almost 1600 investment treaties among the world, the majority of which were concluded between European and developing countries. For instance, France entered into more than 100 BITs. This is a significant number even though France, when the BITs tendency appeared, elected not to enter any BIT with developing countries that belongs to the French monetary zone [5, p. 477]. The USA, which began to establish international relations concerning FDI from 1982, have become a party to 58 BITs by 2020. At the same time, Ukraine is a party to 70 BITs. Nowadays, the amount of BITs constitutes more than 2600 [6]. However, BITs were slow in gaining international acceptance. Some third world countries were reluctant to enter into BITs. To illustrate, Latin American countries have long opposed BITs because the mechanism for settlement of disputes between investors and host countries contradicts the Calvo tradition by waiving the contracting Parties' right to exercise diplomatic protection on behalf of their investors. Nevertheless, even the Calvo tradition could not prevent Latin American countries from taking part in the BITs movement [5, p. 481].

Bilateral investment treaties consist of such concepts as national and most-favored nation (MFN) treatment to foreign investment. To make it clear, national treatment reflects prohibition of discrimination between foreign and domestic investors. At the same time, most-favored nation (MFN) treatment prohibits discrimination between all of foreign investors. BITs also establish standards of governing of the expropriation of investments and the payment of adequate compensation, and provide for the transfer of funds for investment at reasonable exchange rates [7, p. 660].

The most BITs, which were concluded in the last decade have a similar basic structure and content. But issues concerning the underlying rationale and the degree of protection are mostly governed individually by each treaty. Now, there used basically 2 model of BITs:

1) the "European model" based on the Abs-Shawcross Draft Convention model endorsed by OECD Ministers in 1962;

2) the "North American model" developed in the early 1980s.

The main distinction between these two models is that the "European model" mainly applies to the post-entry phase. At the same time the "North American" one also covers investment at the pre-establishment phase. Although the recently concluded bilateral investment agreements reflect the traditional "European approach", by which binding obligations were imposed only in relation to the post-establishment phase, the number of treaties also consist of pre-establishment rights is on the rise. Such BITs have predominantly been concluded by Canada, the United States and, more recently, Japan. [8, p. 386]

In order to the different models of BITs, they also govern differently the concepts of treatment and other possible relations, which might be established between the parties. To illustrate, as it has already mentioned, the provisions regarding national treatment and most-favored nation (MFN) treatment were common for the most of BITs. Many European bilateral investment treaties ensure only MFN treatment, which create the possibility of discrimination of foreign investors in comparison to domestic ones. This gives domestic competitors a protected position in its markets, denies foreign investors a level playing field, and inhibits competitive forces from generating the highest standard of living and most efficient use of scarce capital resources. Moreover, European BITs generally do not ban performance requirements such as export mandates or local content. In contrast, the USA has not so great amount of BITs as Europe, but the scope of that treaties is more comprehensive. The United States BITs envisage both national treatment and MFN for the right to establish and operate an entity, a ban on a large number of performance requirements, transfers of profits and capital in a hard currency, expropriation provisions consistent with international law, and state-to-state and investor-to-state dispute settlement procedures. [7, p. 661]

A central feature of BITs is the provisions regarding procedural rights, typically the entitlement to submit investment-related disputes to arbitration. Investors frequently have an agreed, and relatively convenient, forum to enforce their substantive rights. In addition, many BITs offer investors a certain choice as to which arbitration regime to use, and most BITs permit inter alia arbitration before the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). In recent years there has been a significant increase of such BIT arbitrations [8, p. 386]. It was reported that, since 1972, there were registered 706 cases by 2018, and several pending claims have been valued in excess of $100 million [9].

It is typically for many BITs to allow companies incorporated under the law of the host state to submit claims to international arbitration against the host state, providing that such companies are controlled by nationals of the other party to the bilateral investment treaty. The control, mentioned in previous sentence, defines not as actual or ultimate control, but as merely legal capacity to control, means that a company owned through many corporate intermediaries may have numerous controllers of different nationalities. In such circumstances, the investment would be protected by a BIT between the host state and any nation whose company was in the chain of ownership. An intermediary may be inserted into the chain of ownership for the sole purpose of securing the protection of a BIT.

This feature of BITs mainly criticised as allowing "treaty shopping". The "treaty shopping" may entail inconvenient consequence for the host state. That consequence is that,

because investors generally are free to reorganize their investments and to insert intermediaries at will, the host state must assume that any foreign investment potentially may acquire the protection of any bilateral investment treaty to which the host state is a party at any time. Moreover, a host state may be entirely unaware of a corporate reorganization that has brought an investment within the protection of a BIT. The prudent host state must treat all foreign investment as if it is protected by a bilateral investment agreement, as indeed it may become at any time. In effect, obligations assumed in a bilateral agreement potentially are obligations *erga omnes* – obligations, which are owed toward all. Further, the generalizing effect of the corporate-nationality rules is supplemented by the generalizing effect of the MFN clauses in most BITs, which allow investments protected by one BIT to claim the protections of other BITs to which the host state is also a party.

The consequence of "treaty shopping" for the home state is that it may find that the benefit of its agreements is being used by investors with which it has no link other than having allowed the investor to incorporate a company under its laws. Such investors may use freely the protections that the home state obtained for investors with which it does have a substantial economic link, such as the presence of the investors' assets in the territory of the home state. These protections may have come at the price of concessions made by the home state that the such investors' own states have not made because they have not entered into a BIT with the host state [10, p. 183].

Conclusions. To summarize above-indicated, it should be noticed that bilateral investment treaties were a successful alternative to multilateral regulation of FDI on international level. They cover all necessary question related to foreign direct investments and investors, especially their protection. The models of BITs show the differences in regulation of FDI throughout the world. At the same time, BITs may consist of such provisions (for example procedural rights provisions) that may influence negatively the parties to them. They do not affect states by its presence in the treaty, but in case of their application- they may lead to inconvenient consequences for states. Thus, during the conclusion of the certain treaty, states have to take into account that fact and provide more specific and rigid substantive rules.

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