

General Characteristics of Investment Legislation

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ABSTRACT: This article gives interested readers an opportunity to get a common understanding of modern views on the place of legal regulation of investment activity in the system of international law. The article also includes a brief overview of the history of development of the investment law since the XIX century. Moreover, the article analyzes various ways to resolve international investment disputes, including those under the Washington Convention on the settlement of investment disputes between States and nationals of other States of 1965 (The ICSID Convention), the Seoul Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) of 1985 and The Energy Charter Treaty of 1994. Besides, much attention is paid to some problematic issues and inconsistencies that exist in the international investment legislation.

Keywords: investment, international investment legislation, national investment legislation, legal regulation, Washington Convention of 1965, Seoul Convention of 1985, Energy Charter Treaty of 1994, “soft law”, codification.

INTRODUCTION

Investments play a decisive role in the functioning and development of the world economy, ensuring the reproduction of fixed assets - buildings, structures, vehicles, machines, machine tools, equipment necessary for the production of finished products, and providing the opportunity to introduce advanced technologies into the production process.

To ensure the effectiveness of investments in the economy of any state, it is necessary, first of all, to ensure their legislative consolidation, the creation of a developed system of investment legislation, and an effective mechanism for the implementation of legal norms regulating investment relations. If the legislation provides for fair and stable rules of conduct and protects the property rights to the objects in which investments have been made, this will

reduce investment risks and activate the process of development of investment activities. However, if relations arising from investment activity (investment relations), insufficiently regulated by the state, and the legislation is controversial, has many gaps, often varies, and is not able to protect the rights and legitimate interests of investors, it could eventually stop the flow of foreign investments into the economy of the country [13].

In this regard, for several decades now, the world community has been paying special attention to creating conditions for the adequate international legal regulation of investment relations, ensuring legal protection of foreign investors and their investments through improving the efficiency of the judicial system, developing non-state forms of dispute resolution, improving legislation in the field of investment activities and other related areas of national economies and the world economy [20].

MAIN BODY

Legal regulation of foreign investment exists both at the international and national levels. However, the priority in the legal regulation of investment issues is mostly given to international norms, since international legal protection of investments is more effective for attracting them than guaranteeing a similar protective mechanism in national legislation.

International legal regulation of foreign investment, along with national law, emerged at the end of the XIX century. Initially, the form of regulation of foreign investment was the norms and institutions of maritime and commercial law, as well as bilateral agreements on trade, navigation, concessions, etc. [13]. For example, China concluded a series of bilateral treaties with such States as Great Britain (1842), the United States (1844), France (1844), Russia (1858), Germany (1861), Austria-Hungary (1869), and Japan (1871), which regulated the legal regime of foreign entrepreneurs in the course of concession activities in the coal mining industry and in railway construction [8].

Since the mid-twentieth century, the United States and other capital-exporting countries have been actively concluding special international treaties and agreements to regulate investment relations on a bilateral basis [1]. In the 60-90 years of the last century, there were two main directions in the bilateral regulation of investment relations: the United States concluded investment guarantee agreements that regulated the protection of foreign investment from political risks and were concluded in a simplified manner (by exchanging notes); Germany drew up treaties on the promotion, facilitation, and protection of foreign investment, which, in turn, covered a wider range of relations, including other guarantees provided for foreign investment, and were drawn up, on the contrary, with the implementation of all stages of the negotiation and ratification process [13].

At the end of 1980, the number of bilateral investment agreements in the world was 181, but by the end of 1999, a sharp increase in their number was observed - 1856, the main

reason for which was the collapse of the USSR and the emergence of many independent States [5].

For many years in the international investment system, the main "centers of power", that is, the main investors and recipients of investments (both at the public and private levels), are the United States, the EU States, and Japan [19].

At this time, the international investment relationship is governed mainly by three universal conventions: Convention on the settlement of investment disputes between States and citizens of other States (Washington Convention of 1965), the Seoul Convention, and the Energy Charter Treaty of 1994. These include the following questions: a) consideration of investment disputes; b) insurance of foreign investors; c) promotion and protection of investments in the energy sector.

The ICSID Convention

The Convention on the settlement of investment disputes between States and citizens of other States was formulated by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) on 18 March 1965 and entered into force on 14 October 1966, when it was ratified by 20 countries [9]. As of 2020, 143 countries have ratified the Convention to become the Contracting States. In accordance with the provisions of the Convention, the International Centre for Settlement of Investment Disputes (ICSID) provides facilities for conciliation and arbitration of investment disputes between the Contracting States and nationals of other Contracting States [3]. According to Article 25 of the Convention, "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre".

The ICSID Convention devised a system that carefully balances the interests of investors and host countries. It gives private investors direct access to an international forum. Moreover, provisions of the ICSID rules, assure investors that refusal or abstention by the State party to the dispute to participate in the proceedings after it has consented to ICSID arbitration cannot frustrate the ICSID arbitral process [18].

The MIGA Convention

Along with ICSID, the World Bank Group includes the international organization Multilateral Investment Guarantee Agency (MIGA), established in 1988 and based on the provisions of the Seoul Convention, which in turn was adopted on October 11, 1985. As of 2020, 181 States are members of MIGA, 157 of which are developing and 25 industrialized countries [11].

This Agency carries out insurance activities for investors, guaranteeing them the protection of deposits and compensation in case of losses incurred by the investor. It undertakes to pay the investor a certain amount of insurance, depending on the losses suffered by the investor in respect of foreign investments made in the territory of developing countries.

Article 11 of the Seoul Convention lists the following types of covered risks [12]:

1. Currency Transfer;
2. Expropriation and Similar Measures;
3. Breach of Contract;
4. War and Civil Disturbance.

Article 57 (b) of the Seoul Convention stipulates that “Disputes concerning claims of the Agency acting as subrogee of an investor shall be settled in accordance with either:

1. the procedure set out in Annex II to this Convention, or
2. an agreement to be entered into between the Agency and the member concerned on an alternative method or methods for the settlement of such disputes» [12].

The procedure set out in Annex II involves [12]:

1. Conducting negotiations;
2. Use of conciliation;
3. Appeal to Arbitration.

Thus, the existence of MIGA is intended to protect foreign investment from such measures as expropriation, requisition and confiscation.

The Energy Charter Treaty

The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998. Nowadays there are fifty-three Signatories and Contracting Parties to the Treaty [6]. It contains provisions relating to the promotion and protection of investment in the energy sector.

“The Treaty's provisions focus on four broad areas:

- the protection of foreign investments, based on the extension of national treatment, or most-favored nation treatment (whichever is more favorable) and protection against key non-commercial risks;
- non-discriminatory conditions for trade in energy materials, products and energy-related equipment based on WTO rules, and provisions to ensure reliable cross-border energy transit flows through pipelines, grids and other means of transportation;
- the resolution of disputes between participating states, and - in the case of investments - between investors and host states;
- the promotion of energy efficiency, and attempts to minimize the environmental impact of energy production and use” [6].

Nevertheless, the Energy Charter Treaty of 1994 is entirely aimed at protecting the rights of foreign investors, and a state wishing to join this Treaty must be ready to give up part of its sovereign rights. For example, the Russian Federation, which is a huge producer of energy resources, in the development of which foreign and Russian investors are ready to invest, currently does not intend to become a party to this Agreement [4], which is considered a well-founded decision.

“Soft Law”

The so-called “soft law” (“green law”) in legal science is acts that do not contain strict and precise obligations of States and serve to fill existing gaps, strengthen argumentation, formulate legal positions, as well as interpret General or vague legal norms. It is used as an antithesis to legally binding (“hard”) legislation [10].

As a rule, “soft law” includes resolutions of the UN General Assembly, codes of conduct and other acts, including international treaties, the subject of which is to unite the efforts of States in a particular area, which does not imply that they assume any specific obligations [7].

In the field of international investment law, soft law includes:

1. UN General Assembly Resolution No. 626 of December 21, 1952, on the right to free exploitation of natural resources and resources [22];
2. UN General Assembly Resolution No. 1803 (XVII) of December 14, 1962 "Inalienable sovereignty over natural resources” [21];
3. UN General Assembly Resolution No. 3171 (XXVIII) of 17 December 1973 on permanent sovereignty over natural resources;

4. UN General Assembly Resolution No. 3201 of 1 May 1974 on the Declaration on the establishment of a new international economic order;
5. UN General Assembly Resolution No. 3281 (XXIX) of 12 December 1974 on the Charter of economic rights and obligations of States;
6. The OECD Code of Liberalization of capital movement from 1961 [14];
7. ICC guide to the international investment of 29 November 1972;
8. OECD Declaration of 12 June 1976 on international investment and multinational enterprises;
9. The management of the World Bank on the legal regime for foreign direct investment from 1992.

It is worth noting that there are different views on the legal force of these documents. B. Cheng believes that the resolutions of the UN General Assembly are legally binding since they are a custom in international law [2]. R. Dolzer believes that if the resolutions do not establish the usual rules of law, they at least cancel the existing ones [15]. Other scholars (A. A. Fatouros, H. V. Houtte, I. Seidl-Hohenveldern, B. H. Weston), on the contrary, believe that, as a general rule, the resolutions of the UN General Assembly are of a recommendatory nature [16]. I. Shihata rightly notes that “soft law” becomes customary law and is thus recognized as binding on the parties when it is the general practice of States that consider themselves legally bound by this practice [17].

Conclusion

So, to improve the investment climate of the country, it is important to have an effective system of ensuring the property rights of the investor, which can guarantee the rights of the investors and, if necessary, provide them with appropriate tools and ways to protect their rights. Just as ensuring property rights is an essential factor of entrepreneurial activity and the engine of economic growth in general, so proper protection of the rights of foreign investors is a key prerequisite for increasing investment activity on the part of foreign investors. Pertaining treaties international investment law, comprised comprising a simple set of standards, such as fair and equitable treatment, the payment of compensation in case of expropriation, non-discriminatory treatment, most-favored-nation and national treatment, full protection and security the abidance to contractual promises between the foreign investor and the host state, protect foreign investments abroad and contribute to its success story.

However, the current norms of international investment legislation, despite their old evolutionary history, do not fully provide the necessary international legal regulation of investment relations, due to the increasing number of complications of a foreign element. In the current context of the internationalization of investment activities and the growing number of cases involving transnational companies, a multilateral (universal) international treaty on investment activities is required, the adoption of which will allow for the necessary consolidation of the norms of international investment law, normalize the existing customary norms of international law and bring them into a coherent system. Also, the diverse nature of investment disputes, including such issues as human rights, labor rights, and environmental problems, cannot be adequately regulated by the norms of civil, administrative, or financial law alone and require a special holistic legal regulation of numerous and diverse relations through the application of special principles, legal means and forms, and methods of legal influence that provide the necessary combination of norms of various branches of law.

Besides, the current investment legislation is, in general, not structured, internally contradictory, contains numerous gaps in the regulation of investment relations and does not ensure the harmonization of investment law. In this regard, the codification of investment legislation is required, since it will allow to combine in one act the norms governing the entire complex of investment relations; establish a unified framework for the legal regulation of the relations under consideration and, thus, eliminate existing gaps and inconsistencies in the norms.

Thus, the analysis of international legal documents devoted to the regulation of foreign investment shows that the multilateral level of their regulation has both positive aspects and disadvantages. However, as the role of international legal instruments in modern conditions increases, many countries of the world set themselves far-reaching goals concerning multilateral regulation of foreign investment and the creation of an international legal framework for the development of investment law norms.

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