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THE CONCEPT OF AN INVESTMENT IN BILATERAL INVESTMENT TREATIES

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Abstract

The definition of the term investment is usually an integral part of the Bilateral Investment Treaties (BIT) general provisions. The definitions are set broadly and they refer to "every kind of profit" or "every kind of investment in the state territory", and are supplemented with an incomplete list of specific examples. The dominant view in investment practice is that the term investment is extensive, which includes traditional forms of capital investment, as well as investments in the services sector, technology, engineering, construction, and the like.

The notion of investment can also be defined by the parties themselves (host state and foreign investor) by mutual agreement. Therefore, the basic aspects in defining the term investment are the form and nature of the activity, not the area of economic activity.

The subject of this paper is a normative analysis of the provisions contained in the Bilateral Investment Treaties signed by the Republic of North Macedonia, which refer to the term investment. The subject of analysis will also be the arbitration practice of the International Center for Settlement of Investment Disputes (ICSID) regarding the determination of the term investment.

Keywords: *investment, ICSID, BIT.*

INTRODUCTION

Nowadays, Foreign Direct Investments are recognized as a powerful force for supporting the economy of developing countries and the least developed countries in the world. The two basic legal forms in which foreign

direct investment can occur are Bilateral Investment Treaty - BIT (agreement between two countries containing reciprocal rights and obligations) and Multilateral Investment Treaty - MIT.

The emergence of Bilateral Investment Treaties, as a means for promoting and protecting the investments, coincides in time with the conclusion of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States in Washington on March 18, 1965, or more commonly known as the Washington Convention. The main aim of the adoption of the Washington Convention was unique - the protection and promotion of foreign investments. The signatories believed that a structured method of dispute resolution would foster international investment and that such investment would spur economic development (Grabowski 2014, 289).

The number of international treaties for protection and promotion of investments has been constantly growing in recent decades: in 1980 there were only a hundred agreements, and in 1992 more than four hundred, so that in 2001 the number increased to 1800, and today it is more than 3000 treaties, signed by about 180 countries. This trend also is followed by the Republic of North Macedonia, which has, so far, signed thirty-nine agreements for the protection and promotion of investments.⁶⁹

DETERMINATION OF THE DEFINITION OF INVESTMENT - RATIONE MATERIAE PRECONDITION FOR BIT APPLICATION

Bilateral Investment Treaties usually contain a definition of the term “investment” which is protected by the specific treaty, within the introductory provisions (Newcombe and Paradel 2009, 66). The definitions are set broadly and refer to "every kind of profit" or "every kind of investment in the territory", and then are supplemented with an incomplete list of specific examples. A typical definition of the term “investment” in this context is the definition contained in the 1989 Bilateral Investment Treaty concluded between the United Kingdom and the USSR⁷⁰. The EU follows an asset-based approach with an exemplary list of protected assets and is thereby in contrast to NAFTA adopting a comparatively broad definition. The investment definition in the EU-Vietnam FTA is phrased the following:

⁶⁹ <https://arhiva.finance.gov.mk/en/node/6727>

⁷⁰ Article 1 (a) of the BIT, available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2235/download>

“Investment” means every kind of asset which is owned or controlled, directly or indirectly, by investors of one Party in the territory of the other Party, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and for a certain duration. Forms that an investment may take include:

(i) tangible or intangible, movable or immovable property, as well as any other property rights, such as leases, mortgages, liens, and pledges;

(ii) an enterprise, shares, stocks, and other forms of equity participation in an enterprise including rights derived therefrom;

(iii) bonds, debentures, and loans and other debt instruments, including rights derived therefrom;

(iv) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(v) claims to money, or other assets or any contractual performance having an economic value;

For greater certainty, “claim to money” does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural or juridical person in the territory of a Party to a natural or juridical person in the territory of the other Party, or financing of such contract other than a loan covered by subparagraph (iii), or any related order, judgment, or arbitral award.

(vii) intellectual property rights as defined in Chapter Y of this Agreement [Intellectual Property] and goodwill;

Returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments” (Kube 2019, 200-201).

The term “investment” in Bilateral Investment Treaties signed by the Republic of North Macedonia is determined similarly, as in most Bilateral Investment Treaties. As a representative example, we can refer to the definition contained in Article 1 of the Agreement concluded between the Macedonian Government and the Finnish Government on the Promotion and Protection of Investments⁷¹:

“For the purpose of this Agreement:

⁷¹ Available at: https://finance.gov.mk/wp-content/uploads/2020/12/Finska.1_0.pdf

1. The term "investment" means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party including, in particular, though not exclusively:

(a) movable and immovable property or any property rights such as mortgages, pledges, leases, usufruct and similar rights;

(b) shares in and stocks and debentures of a company or any other form of participation in a company;

(c) claims to money or rights to performance having an economic value;

(d) intellectual property rights, such as patents, copyrights, trademarks, industrial designs, business names and geographical indications, as well as technical processes, know-how and goodwill; and

(e) concessions conferred by law, by administrative act or under the contract by a competent authority, including concessions to search for, develop, extract or exploit natural resources."

The term "investment" was defined in a very similar way in the Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Bulgaria on the reciprocal protection and promotion of investments.⁷² The only exception is that the list with five examples contained in the BIT with Finland is expanded with an additional point:

"(f) rights to goods, intended for the creation of economic value or economic purposes, which, on the basis of a leasing contract and in accordance with national law, are given for use by a lessee in the territory of one of the Contracting parties, by an owner who is a national of the other Contracting Party or a legal entity established in the territory of that Contracting Party."

Article 1 from the Agreement concluded between the Macedonian Government and the Italian Government on the mutual promotion and protection of investments firstly defines the term "investment" in a positive way as⁷³:

"any kind of property invested by a natural or legal person of a Contracting Party in the territory of the other Contracting Party, in conformity with the

⁷² Available at: <https://finance.gov.mk/wp-content/uploads/2020/12/Bugaria.1.pdf>

⁷³ Available at: https://finance.gov.mk/wp-content/uploads/2020/12/Italija.1_0.pdf

laws and regulations of that Party, irrespective of the legal form chosen, as well as of the legal framework."

Then, in the next paragraph the term "investment" is defined in a negative context:

"it does not include claims under business transactions whose object is acquiring goods or services or credits, unless it concerns loans which, according to their aim and scope, have a form of participation (similar to loans for participation)."

The list with examples provided by this Agreement is expanded with the additional new item:

"(f) any increases in value of the original investment."

All Bilateral Investment Agreements concluded by the Republic of North Macedonia contained a common provision, which reads as follows:

*"Changes in the legal form of investments (invested or reinvested) shall not affect their designation as "investment" for the purpose of this Agreement."*⁷⁴

Similar definitions, with minor variations in the context of the terms and the scope of the investment, are contained in most Bilateral Investment Treaties. These definitions include direct and indirect investments and modern contractual and other types of transactions that have economic value.

THE CONCEPT OF THE "INVESTMENT" ACCORDING TO THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES PRACTICE

The determination of the concept of "investment" has proved to be the most problematic in the practical application of the Washington Convention. This is because the final version of this Convention does not contain a definition of the term "investment" despite extensive discussions and numerous proposed definitions during the preparatory work.

⁷⁴ Article 1 from the Agreement between the Macedonian Government and Belgo-Luxemburg Economic Union on the reciprocal promotion and protection of investments.

According to some authors, the concept of “investment” introduced by the Washington Convention covers only foreign direct investments (Branko, 294-295). In practice, however, it is adopted the broader meaning of the term “investment”, covering the investments in services and technology (Redfern and Hunter 1992, 55), construction, and engineering (Trajković 2000, 139) as well as traditional forms of capital investment.

This indicates that the key issue in defining the term "investment" is not the areas of economic activity covered by it, but the form and nature of the activity (McLachlan, Laurence and Matthew 2007, 165).

In legal theory, investing usually means any investment of capital in a way that income or profit can be expected for the investor (Knuštek 2002, 26). A key fact that distinguishes investment from ordinary consumption is the expectation of some positive but uncertain effect from the undertaken activity.

The arbitration practice of the International Center for the Settlement of Investment Disputes has made a significant contribution to defining the notion of investment. This is quite understandable since one of the competences of the ICSID in the determination of its jurisdiction is to decide whether the dispute arose out of an investment.

Fedax N.V. v. the Republic of Venezuela is the first ICSID case in which the jurisdiction of the Centre has been objected to on the ground that the underlying transaction does not meet the requirements of an investment under the Washington Convention.⁷⁵ The request for arbitration concerns a dispute arising out of certain debt instruments, issued by the Republic of Venezuela and assigned by way of endorsement to the claimant Fedax N.V. The Republic of Venezuela has objected to the jurisdiction of the Centre on the ground that the company cannot be considered to have invested for the purposes of the Convention because it acquired by way of endorsement the promissory notes issued by the Republic of Venezuela in connection with the contract made with the Venezuelan corporation Industrias Metalúrgicas Van Dam C.A.⁷⁶ The Republic of Venezuela has argued in this respect that Fedax N. V: ‘s holding of the above-mentioned promissory notes does not qualify as an "investment" because this transaction does not amount to a direct foreign investment involving "a long term transfer of financial resources - capital flow - from one country to another (the recipient of the investment) to acquire interests in a corporation, a transaction which normally entails certain risks to the potential

⁷⁵ Fedax N.V. v. Republic of Venezuela (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction, July 11, 1997, para. 25.

⁷⁶ Ibid., para 18

investor Venezuela has further argued that in the light of the rule of interpretation laid down in Article 31.1 of the 1969 Vienna Convention on the Law of Treaties, the term "investment" should be interpreted "in good faith following the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose. Under such an interpretation in Venezuela's view, investment in an economic context means "the laying out of money or property in business ventures so that it may produce a revenue or income. Venezuela contends that this particular interpretation is necessary to accommodate the definition of investments as comprising "every kind of asset" as that phrase appears in Article 1 (a) of the 1991 Agreement.⁷⁷

The Tribunal unanimously decided that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal, stating as follows:

*"The Tribunal considers that the broad scope of Article 25 (1) of the Convention and the ensuing ICSID practice and decisions are sufficient, without more, to require a finding that the Centre's jurisdiction and its competence are well-founded. In addition, as explained above, loans qualify as an investment within ICSID's jurisdiction, as does, in given circumstances, the purchase of bonds. Since promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this."*⁷⁸

The Fedax arbitral tribunal's position was confirmed in the **Salini case**:⁷⁹

"The doctrine generally considers that investment infers: contributions, certain duration of performance of the contract and participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of the performance of the contract. As a result, these various criteria should be

⁷⁷ Ibid., para 19

⁷⁸ Ibid., para. 29

⁷⁹ Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ISCID Case no. ARB/00/4), Decision on jurisdiction, July 2001, para 52

assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here."

Ultimately, the Salini tribunal set out four objective "elements" of investment for ICSID jurisdiction, including a) the contribution, b) certain duration, c) participation in the risks, and d) the contribution to the economic development of the host State, which later became the famous "Salini test". Subsequently, many tribunals have adopted the Salini approach to articulate objective criteria for the notion of "investment" under the ICSID Convention and concluded that such elements should not be set aside by the consent of parties in investment treaties. In the **Patrick Michell v Congo** annulment, for example, the ad hoc Committee held that: *"the parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment."* It is thus repeated that, before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT (Chaisse, Choukroune and Jusoh 2021, 33-34).

The Tribunal in the case **Mihaly International Corporation v. Sri Lanka**⁸⁰, found that the costs incurred in preparing for the conclusion of the public contract, including the amount spent on planning the financial and economic modalities necessary for the negotiation and finalization of the contract, did not constitute an investment under the Treaty between the United States of America and the Democratic Socialist Republic of Sri Lanka concerning the Encouragement and Reciprocal Protection of Investment:⁸¹

"The Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment. The only reference made by the Claimant to the BIT, in particular, Article II(2), is not to any extended definition of investment but to existing "investment" or investment in esse or in being, which is to be accorded "fair and equitable treatment". In the case under review, the Tribunal finds that the Claimant has not provided evidence of such an investment in being which qualifies for "full protection and security." Failing to provide evidence of admission of such an

⁸⁰ Mihaly International Corporation v. Democratic Socialist Sri Lanka (ICSID Case no. ARB/00/2), para 61.

⁸¹ Signed September 20, 1991; Entered into Force May 1, 1993.

investment, the Claimant's request for initiation of a proceeding to settle an investment dispute is, to say the least, premature."

CONCLUSION

Bilateral Investment Treaties are the basic legal instruments for the protection and promotion of investments in developing countries and the least developed countries in the world. The term "investment" is determined in very different ways in particular BITs. Generally, the definition of the term "investment" is set in a broad mode and it refers to "every kind of profit" or "every kind of asset" and is supplemented with an incomplete list of specific examples. This kind of list can be defined positively or negatively.

The Republic of North Macedonia follows the trend of concluding bilateral investment treaties and so far, had signed thirty-nine agreements for the protection and promotion of investments. The term "investment" in Bilateral Investment Treaties signed by the Republic of North Macedonia is determined similarly, as in most Bilateral Investment Treaties.

The Washington Convention does not contain a definition of the term "investment." Therefore, the arbitration practice of the International Center for the Settlement of Investment Disputes has made a significant contribution to defining the notion of "investment." *Fedax N.V. v. the Republic of Venezuela* is the first ICSID case in which the jurisdiction of the Centre has been objected to on the ground that the underlying transaction does not meet the requirements of an investment under the Washington Convention. Lately, in the *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* case, ICSID set out four objective "elements" of investment for the purpose of ICSID jurisdiction, including a) the contribution, b) certain duration, c) participation in the risks, and d) the contribution to the economic development of the host State.

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