

## DEFINITION AND LEGAL REGULATION OF BILATERAL INVESTMENT TREATIES

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### **Abstract**

*Bilateral treaties on the promotion and mutual protection of investments have fundamental importance in the international legal regulation of investment relations. Their main goal is to ensure, through legal means, the relative stability of reproduction and freedom of movement of capital in the framework of the global economic system, and especially to ensure the influx of foreign investment in developing countries, protecting against the so-called non-commercial risks. International bilateral agreements on the promotion and mutual protection of investment are special interstate agreements, the subject of regulation of which are relations arising in connection with the investment of foreign private capital. One of the important factors in the rapid conclusion of the bilateral investment treaties (BIT) was the strong desire of citizens and companies in an increasing number of industrialized countries to make direct investments in other countries and the need for reliable international legal protection that arose in this regard. Foreign investors, with all the desire, could not rely only on the laws of the state - importer of capital, since in this case the investment risk would increase. As historical experience has shown, developing countries can change the law after investments have already been made.*

**Keywords:** investment, bilateral treaty, mutual protection of investments, double taxation, capital investment, residency, principle of territoriality.

The world's first BIT was signed on November 25, 1959 between Pakistan and Germany [8, 215]. As of 2019, there were 2,912 bilateral investment treaties, of which 2354 are in force. Germany, the United States and France are among the countries with the most bilateral investment treaties [9]. In 1960-70s there have been many cases where host governments have obstructed investment projects or even forcibly seized foreign capital. The main reason for the conclusion of BIT in the 80s and 90s. of the last century was that due to a decrease in the receipt of funds in the form of assistance from developed countries, developing countries increasingly felt the need for foreign investment [6, 283-285]. By signing BITs with many capital exporting countries, developing countries and countries with economies in transition have initiated massive capital mobilization. Apparently, this trend continues in the XXI century.

The use of trade agreements in the export of capital is explained by the fact that the export of capital and the export of goods are interdependent and interdependent processes in the world market. In addition, relations arising in international trade are similar in form and content to relations arising in connection with investing capital abroad. Therefore, many developed countries (England, France, Japan, Netherlands) began to use trade agreements as a form of regulation of relations on the export and import of capital. It is noteworthy that their forerunners were the so-called "treaties of friendship, trade, navigation, and later they became known as the "treaties of friendship and economic relations".

Of course, bilateral agreements on the promotion and mutual protection of investments are of fundamental importance in the international legal regulation of investment relations. Their main goal is to ensure, through legal means, the relative stability of reproduction and freedom of movement of capital within the framework of the global economic system under the conditions of the socio-economic crisis, and especially to ensure the influx of foreign investment in developing countries, protecting against the so-called non-profit (pop business) the risks [5, 122-124].

Why did bilateral legal investment cooperation begin only in the early 60s of the last century? The fact is that up to this point, the export and import of capital was not regulated at all or was regulated unilaterally, that is, exclusively in the interests of Western European countries that concluded treaties and agreements on the division of spheres of influence - spheres of capital application.

After developing countries gained political independence, the situation changed radically and there was a need for legal regulation of export and import of capital. Another reason for the rapid growth of bilateral special agreements is connected and follows from the state system of insurance of foreign private investments. Such an insurance system exists in Japan, USA, Germany and other countries.

International bilateral agreements in the field of foreign investment, as a form of legal regulation in relation between developed and developing countries, have much in common due to the commonality of the investment policies of these countries.

Speaking generally about the content and structure of bilateral investment agreements, they usually begin with a preamble, where the main objective of the agreement is fixed, that is, mutual encouragement and protection of each other's investments. Next, the types of property that are subject to legal protection are determined. As a rule, in all articles, the legal regime for the implementation of foreign investment activity is established, the procedure for the repatriation of profit received by a foreign investor is specifically explained. The agreements fix the conditions for the payment of compensation in the event of a state withdrawal from the foreign investor of the property, grounds, procedure and forms of compensation payments.

Most agreements also provide for the payment of compensation for losses incurred by a foreign investor as a result of war or civil unrest. The procedure for the settlement of disputes in connection with the implementation of foreign investment activities is provided for in all bilateral investment agreements, as well as regarding the interpretation and application of the provisions of the agreement between the contracting parties. But, despite many common features, each bilateral agreement on the protection of investment is somewhat peculiar, has its own characteristics.

The creation of a bilateral international legal investment protection was given a new impetus in the 70-80s of the last century. The BIT network increased markedly in the 90s. Then the number of such agreements reached more than 1,100. Two-thirds of them were concluded in the 90s.

To encourage capital inflows, they establish clear, simple, and enforceable rules that improve the investment climate. Along with ensuring and encouraging the admission of investments, guarantees of high standards of treatment, they are called upon to provide legal protection under international law, as well as access to international dispute resolution tools in case of their occurrence. At the same time, bilateral investment agreements regulate issues that foreign investors consider important, but which are not regulated by the national legislation of the recipient country of capital, and thereby they are aimed at creating a more reliable transparent, and therefore stable and predictable, legal regime for foreign investors than it does national law.

Following the path of Western European countries, the United States launched its own program for concluding bilateral investment agreements and the number of BITs has increased since 1981.

Japan has been exporting capital since the 1960s. Some other Asian countries that have also begun to participate in bilateral agreements to create a favorable climate for their national investors. By 1991, Kuwait had signed 11 BITs, and Japan had concluded treaties with Egypt, China and Sri Lanka. Although, as a rule, BIT is concluded between an economically developed and a developing country, sometimes two developing or two industrialized countries concluded such agreements. An example is the BIT between Morocco and Egypt, or China and Thailand. The most notable is the second type of agreement between the United States and Canada, signed in 1988 with the goal of creating a free trade area between the two countries [10]. It included a

special chapter (Chapter 16), which, in essence, was a bilateral investment agreement and was in many ways similar to the BIT that the United States concluded with other countries.

At the end of the 80s of the last century, a new stage began in the history of the spread of bilateral investment agreements, which was associated with the collapse of the so-called socialist camp. The states of Eastern Europe, as well as a number of Asian countries that have embarked on the path of a market economy that previously were hostile to foreign capital, massively began to conclude BITs with economically developed countries in the hope of obtaining capital and advanced technologies.

According to information received by the International Center for the Settlement of Investment Disputes, of the 183 BITs that were signed between January 1, 1989 and June 30, 1992, 76 countries participated in Eastern and Central Europe [7, 326].

For example, the USSR in 1989-1990. signed a BIT with Great Britain, Italy, France, Germany (in total with 14 countries of Western Europe). Poland has signed investment protection treaties with Germany and the USA, and Vietnam has entered into a similar agreement with Australia.

As for the countries of Latin America, for a long time they stubbornly resisted the introduction of foreign capital, and in the same 80s of the 20th century, they began preparatory measures for concluding bilateral investment agreements.

One of the important factors in the rapid conclusion of the BIT was the strong desire of citizens and companies in an increasing number of industrialized countries to make direct investments in other countries and the need for reliable international legal protection that arose in this regard. Foreign investors, with all the desire, could not rely solely on the laws of the state-importer of capital, since in this case there would be an increased risk. As historical experience has shown, developing countries can change the law after investments have already been made. In the 60s and 70s of the XX century, there were many cases where the governments of the host countries obstructed investment projects or even subjected foreign capital to forced seizure.

But the main reason for the active conclusion of BITs in the 80s and 90s of the last century was that due to a decrease in the receipt of funds in the form of assistance from developed countries, developing countries increasingly felt the need for foreign investment. By signing BITs with many capital exporting countries, developing countries and countries in transition have initiated mass capital mobilization.

Thus, BITs played an invaluable role in the formation and consolidation of international legal standards in the field of foreign investment on a bilateral basis. They had a great influence on similar contractual practices, in particular on the development of the Energy Charter Treaty (ECT) as a model for the interaction of institutional structures necessary to stimulate investment and trade in energy and related industries around the world.

Double taxation, violating the principle of non-discrimination in international law, impedes the proper implementation of investment activities. In general terms, the concept of double taxation can be expressed as follows: this is a situation when one and the same subject is taxed with comparable taxes in relation to the same object of taxation in two or more states for the same period.

Double taxation is caused, first of all, by the fact that the procedure for determining the tax base and the rules for determining taxable income (entrepreneurial profits, interest, royalties, dividends, etc.) in different countries have their significant differences.

The development of problems of international cooperation in the field of taxation has a long history. Back in the League of Nations from 1921 to 1945. several expert groups worked on these issues [1, 43-45]. Prepared special reports were submitted to the Finance Committee of the League of Nations. It was recommended that the solution of interstate tax problems can be implemented through the conclusion of international tax conventions on a multilateral basis. Based on this, the League of Nations has developed two draft model tax conventions between interested states. Subsequently, the OOD Finance Committee, having taken the baton on this

issue, conducted further research on this issue.

In addition, the International Chamber of Commerce and the Organization for Economic Co-operation and Development (OECD) began to address these issues. The UN Economic and Social Council (ECOSOC) in resolution 486 (XVT) of July 9, 1953 stated that tax incentives for private investors provided by both highly developed and underdeveloped states are of great practical importance [11]. The resolution recommended highly developed countries to unilaterally or when concluding tax agreements the application of special provisions in which income from foreign investment would be taxed only initially in that country, where it was received. This recommendation has been supported by the International Chamber of Commerce.

In short, international double taxation dramatically increases the costs of foreign investors, which in turn inhibits business activity in the international arena. And this already negatively affects the freedom of movement of capital and services in the world market. Therefore, the problem of eliminating or minimizing double taxation and its consequences is, in principle, common to all states. Due to its capabilities, each state is trying to solve it by concluding bilateral double taxation treaties.

The practice of concluding interstate agreements in this area began about 40 years ago. By the way, it should be noted that such a practice is a very effective form of resolving international legal problems related to taxation, in view of the inherent nature of such an international treaty of conciliation. This explains the spread of such agreements on a global scale [4, 123].

Initially, international double tax treaties were concluded, as a rule, between Western countries on the basis of model conventions developed under the auspices of the OECD in 1963 and 1977. The provisions of these multilateral treaties are legally non-binding, that is, advisory, in nature. But many countries introduce into their agreements between themselves a number of their provisions almost verbatim. This practice contributes to the international harmonization of the application and interpretation of their provisions and rules.

The aforementioned OECD model conventions have been developed by the economically developed countries themselves, that is, by the capital exporters themselves. Therefore, it is clear whose interests they primarily take into account. And the main recipients of foreign investment today are developing countries and countries with economies in transition. In this regard, in 1979, the UN developed a Model Convention for use in the development of double taxation agreements between developed and developing countries, as well as countries with economies in transition.

In addition, the principle of residency (place of residence and place of stay of an individual or legal entity) and the principle of territoriality are basic concepts for determining the tax status of a person in most countries of the world. The principle of residency means the establishment of a tax on all income, including income received abroad, from persons with a permanent residence in certain countries.

Taxation on the basis of territoriality is defined as the taxation of income received in the territory of these countries, excluding the presence of a permanent residence of persons who received these incomes. Here is the action of an exemplary mechanism when the same income can be taxed several or more times. Or, income derived from a source in one country received by a person with a permanent residence in another country may be taxed in both countries at the same time.

This problem would not have arisen if all countries used only the principle of residence in their tax laws. But no state can practically completely refuse to use the principle of territoriality, that is, not to tax the source of income that makes up the tax base due to being on its territory.

On this issue, various, sometimes diametrically opposed, opinions are expressed in the literature. So, the English scientist M. Boskin claims that the criterion of residency to prevent double tax press is clearly preferable. The question is for whom? Yes, this criterion is undoubtedly beneficial for a tax gatherer, since only a country of permanent residence can fully assess its financial situation, social condition for receiving taxable income and, thus, properly

taxing the net income of a taxable subject [2, 54].

Other researchers, for example, H.Kuroda from Japan, on the contrary, argue that the criterion of territoriality is more effective in eliminating double taxation. This method helps streamline tax control in one country, regardless of whether the taxpayers are permanently resident, and thereby minimize tax evasion cases [3, 184].

Thus, international bilateral cooperation in the field of ensuring legal guarantees of foreign investments has a rather long history. For almost the entire 20th century, states on a bilateral basis step by step approached the most optimal forms and methods of encouraging and protecting foreign investments in their own territory. Starting with trade agreements on friendship and mutual assistance, countries subsequently began to use widely bilateral special agreements aimed at ensuring the free movement of goods and capital. Of course, we are talking about bilateral international agreements, on the promotion and mutual protection of investments and agreements on the elimination of double taxation.

Bilateral interstate agreement is the most convenient and effective form of proper provision of legal guarantees of foreign investment due to the fact that it provides the ability to more detailed regulation of the mechanism for the implementation of common goals and objectives in this area. Despite this, bilateral interstate cooperation, although being one of the important legal segments, cannot replace the multilateral international legal regulation of foreign investment.

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