

**Interstate investment legal treatment as a factor of investment attractiveness****Kostiantyn V. Cherepovskiy<sup>a</sup>**<sup>a</sup>Institute of International Relations of Taras Shevchenko National University of Kyiv, Ukraine**Article Type: Expression of Opinion**

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**ABSTRACT**

**Purpose:** This paper aims to provide an analysis of the author's research in relation to legal investment treatments among participants who are not only interested in the topic of national economic development but would like to be aware of additional essential non-purely economic elements and factors of this desirable development.

**Methodology:** For this research, 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.

**Results/Findings:** The research highlights the significance of investment legal treatment as a contributor to local investment attractiveness, outlining the importance of developing state guarantees to protect foreign investments by delivering progressive European approaches.

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**1. INTRODUCTION**

A quick analysis of international investment arbitrations involving state participation shows that standards and guarantees of investment legal treatments have fundamental character. This kind of argument could be found in a position of agreed provisions of investment treatments at bilateral investment treaties (BIT), which usually follow the introduction of norms facilitating and encouraging investments, set from the very beginning in most BITs. However, does this fundamental character of legal investment treatment remain such an important rule

for international investment implementation? Scientific questions about corresponding dualism are the key to these hypotheses.

## **2. LITERATURE REVIEW**

According to the national legal encyclopedia of Shemshuchenko (1998), the legal regime is – a special legal order established for specific areas of public relations or whole society. This is better explained by Utebsky (1934), accordingly to whom it is a set of rules of conduct. Alekseev (1995) added that most regimes use certain legal regulations, and each of these differs by the predominance in its structure of a particular mode of legal influence. Finally, Matuzov (1996) focussed on other modern scientific sources of international law and added that the essence of a legal regime is just another manifestation of the normativity of law, which operates at a higher level, combining a set of legal means dictated by the appearing goals of the state into the single mounting structure.

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

## **3. RESEARCH METHODOLOGY**

The objective of this research is the scientific study of the importance of investment legal treatment as a factor of investment attractiveness of local investment-seeking opportunities. The study mainly focuses on the overall effectiveness of the corresponding legal remedies. It also aims to find how investment legal treatment intersects with other important transborder investment legal concepts and when this intersection would be most practical and productive.

## **4. DATA ANALYSIS**

### **4.1 The concept of the investment legal treatment**

Previous research conducted by Cherepovskyi (2022) outlined the obligations of states to ensure a specific legal treatment regarding international investments, which can be set out by combining canonized standards and principles of international law, which parties of BIT separately agree, constitute standardized juridical construct regarding investment treatment.

This promotes basic rules of attitude to cross-border investment established within jurisdictions or economic states.

Additionally, the Fair and Equitable Treatment, the Most-favoured-nation and The National treatment add to the common standard based on the well normative-rooted legal construct of equality to the general list of principles of conduct with foreign investment. Farkhutdinov (2010) adds the following standards: complete protection and security, protection from expropriation, protection against arbitrariness and discrimination, and the minimum standard of treatment accordingly to customary international law. These elements of the constructs have a similar nature of origin. Therefore, they could be characterized by fairly close law content, which differs significantly from the economic and juridical points of view.

Gazzini (2012) draws a general overview that international investment law originating from its basic norms is not essentially interested in the legal relations of a foreign investor and the host country of his investments. On the one hand, investors must comply with local laws and regulations when investing in the territories of the host states. On the other hand, 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 define how the host state shall treat foreign investors precisely.

By endorsing BIT, the contracting parties accept some obligations in addition to those stemming from customary international law and other applicable international treaties concerning exercising their sovereign rights within dealings with foreign investors. As aptly explained by the ICSID Award and Hungary (2006), where participants of private companies are concerned, "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 state guarantees for the protection of foreign investment**

The key in the legal theory of national law within this dualistic analysis is a slightly different concept: the state guarantees foreign investment protection. As already mentioned by Shemshuchenko (1998), this notion alludes to legally established guarantees from the state to ensure proper investment and encourage investment in foreign capital in priority sectors of the economy. Doronyna N.G. (2003) supports this definition by adding that such guarantees are

usually understood as the state's specific obligations concerning foreign investors' investment actions.

This argument was presented at the Economic Security in the Global Environment 2022 Conference held in Ukraine, Kyiv. Chernadchuk (2005) defines the state guarantees for the protection of foreign investment as creating conditions that provide 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**

The theoretical frameworks concerning the concepts of legal investment treatments (regimes) and the state guarantees for protecting investment are different but intertwined tightly.

This is confirmed by national research of investment law. Poiedynok (2013) notes that the analysis of the investment activity of regimes distinguishes two key topics, which are currently being studied in isolation. These are the legal treatments for foreign investors and the special management regimes. There are significant and generally practical connections between these topics, which consist in the fact that foreign investors can be catalysts for special management regimes or vice versa – where under special regimes, the participation of foreign investors is excluded.

For centuries, protecting this kind of investment was among the main problems of international investment law. It is necessary to add that today much attention is being given to the differentiation of expropriation actions, which includes compensation according to international law. The states also regulate public interest since consequences must not be compensated to investors (Volkova, 2021).

From this perspective, a delicate balance must be struck between the regulatory powers of the host state and the need to legally protect the interests of foreign investors (Gazzini, 2012). Consequently, such an approach surely arranges attractive and 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 subject to the following standardization, which includes: 1) stability of legislation; 2) non-interference in the activities of the subjects of investment activity of state

bodies, and their officials; 3) compensation of losses to investors; 4) use of income comes from investment (Khrimli, 2016).

On the other hand, analysis of the legislation of the most developed countries of Europe shows that there are no special rules governing foreign investment in the European Union. Instead, the relevant role is assigned to general legislation. According to Art.207 of the Lisbon Treaty (amendment to the Treaty on European Union) of 2007, the exclusive competence for regulating foreign direct investment is vested to the EU's central bodies. This allows, as we know, to conclude separate and complex investment agreements.

European legislation does not set a natural element for the inflow of foreign investment, but the effective governance and control from the united countries. Among the latest, Dmytryk (2019) singles out: 1) special laws establishing the procedure for the introduction of foreign direct investment, their functioning, and 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 purposes, this could be separately recorded through the classification of state guarantees for the 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) guarantee of the rights and legitimate interests of investment entities from abroad. Moreover, the procedure for attracting and admitting foreign investments to strategic sectors of the economy is a well-established international practice and one of the most influential modern tools for protecting national interests.

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

## 5. CONCLUSION

Summing up, we note that the regulation of foreign investment is carried out mainly by national law, which is influenced by international law. Norms of national law establish the critical legal factors in the content of the legal regime of foreign investments treatment, which in economic and legal essence, become national, preferential or restrictive.

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

The state guarantee of investment protection is one of the most significant achievements of modern international investment law, which is designed to establish a particular investment legal regime in accordance with international norms and rules. However, the general instability of national branches of law, the poor functioning of relevant legal mechanisms, and the lack of localization of important progressive international legal norms may hinder the functionality of such international law institutions. All the above can be corrected by international legal means, but their limitation may be the problem of "self" implementation of international organ decisions.

Thus, the next stage of the study on legal investment regimes should focus on analyzing 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.

## REFERENCES

ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary, ICSID Award (ARB/03/16), Award, 2 October 2006, p.423.

Alekseev, S.S. (1995). *Teoriya prava. Yzdanye 2-e, pererabotannoe y dopolnennoe.* — M.: Yzdatelstvo BEK, p.243.

Cherepovskiy, K.V. (2022) Dva kliuchovykh komponenty suchasnykh mizhnarodnykh investytsiynykh dohovoriv. *Teoretycheskye aspekty yurysprudentsyy y voprosy pravoprymeneniya.* №3(57). — M., Yzd. «Ynternauka». URL: [<https://www.internauka.org/conf/law/lvii/334784>].

Chernadchuk, V.D. (2005). Investytsiine pravo Ukrainy: navchalnyi posibnyk. Za red. V.D.Chernadchuka. – 2-he vyd., pererob. i dop. - Sumy: VTD «Universytetska knyha»; K.: VD «Kniahynia Olha», §8.2. URL: [<https://buklib.net/books/37105/>].

Dmytryk, O.O. (2019). Rozvytok biznes-seredovyscha v Ukraini: okremi aspekty pravovoho zabezpechennia / Dmytryk O.O., Tokarieva K.O., Monohrafiia, Kharkiv, pp.125-131.

Doronyna, N.H. (2003). Hosudarstvo y rehulyrovanye ynvestytsyy / Doronyna N.H., Semyliutyna N.H. Moskva: Horodets-izdat, p.86.

Farkhutdynov, Y.Z. (2010). Mezhdunarodnoe ynvestytsyonnoe pravo y protsess. Uchebnyk. M.: "Prospekt". URL: [<http://netprava.ru/ek/b32/>].

Gazzini, T. (2012). Bilateral Investment Treaties / T. Gazzini, E. De Brabandere (eds.). International Investment Law: The Sources of Rights and Obligations, VU Research Portal, p.14.

Khrimli, O.G. (2016) Derzhavni harantii yak sposib zakhystu prav investoriv / Pidpriemnytstvo, hospodarstvo i pravo. - № 2, pp.61-65.

Matuzov, N.Y. (1996). Pravovye rezhymy: voprosy teoryy y praktyky / N.Y. Matuzov, A.V. Malko. Pravovedenye: zhurnal. – 1996. – № 1, p.17.

Poiedynok, V.V. (2013) Pravove rehuliuвання investytsiinoi diialnosti: teoretychni problemy. Monohrafiia / Nizhyn.: TOV «Vydavnytstvo «Aspekt-Polihraf», pp.283-285.

Shemshuchenko Yu.S. (1998). Yurydychna entsyklopediia: v 6 tomakh. Redkol.: Yu.S. Shemshuchenko (holova redkol.) ta in. – K.: «Ukr. entsykl.» URL: [<https://leksika.com.ua/legal/>].

The Lisbon Treaty: Third edition. Foundation for EU Democracy, Denmark – 2009. URL: [<http://en.euabc.com/upload/books/lisbon-treaty-3edition.pdf>].

Utebskyi, B.S. (1934). Sovetskaia yspravytelno-trudovaia polytyka. – M.: Sovet. zakonodatelstvo, p.176.

Volkova, I.O. (2021). Zabezpechennia rivnovahy mizh zakhystom investoriv vid nepriamoï ekspropriatsii ta pravom derzhavy na rehuliuвання / Naukovyi yurydychnyi zhurnal. Pravovi novelty. Mizhnarodnyi universytet biznesu i prava. №14, pp.70-80.