

LAW AND PERFORMANCE: APPROACHES TO SETTING BOUNDARIES

Conception of Foreign Investment under Convention on the Settlement of Investment Disputes between States and Nationals of other States and Lithuanian Law

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Abstract

In the pursuit of economic development of emerging countries, capital is needed. To attract it, the Republic of Lithuania is struggling to enhance the investment climate of the country through international and domestic legal instruments. Therefore, it is vital that legal regime of foreign investment is in line with the international practice. The aim of this article is to analyze the conception of foreign investment under the laws of the Republic of Lithuania and also under Convention on the Settlement of Investment Disputes. First of all, we analyze the scope of application investor's rights and obligations under Convention on the Settlement of Investment Disputes. Here we emphasize the meaning of investment under the said convention and go further into analysis of the laws of the Republic of Lithuania in order to find out whether the foreign investment conception under the Law on Investment of the Republic of Lithuania is in line with the widely known conception of investment under the Convention on the Settlement of Investment Disputes. The second part of the article highlights the tendencies of recent international disputes on the matter.

Keywords: foreign investment, the ICSID Convention, Law on Investments, investor's protection.

Introduction

The definition of investor and investment is key to the scope of application of rights and obligations of investment agreements and to the establishment of the jurisdiction of investment treaty-based arbitral tribunals (OECD, 2008, p. 1). The conception of what constitutes foreign investment has changed over time because of the changing nature of international economic relations. The common known definition is that foreign direct investment reflects the objective of obtaining a lasting interest by a resident entity in one economy ('direct investor') in an entity resident in

an economy other than that of the investor ('direct investment enterprise'). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. Direct investment involves both the initial transaction between the two entities and all subsequent capital transactions between them and among affiliated enterprises, both incorporated and unincorporated (OECD, 1996). Accordingly, in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter – the ICSID Convention), the drafters chose not to define the meaning of investment within the ICSID Convention. Consequently, the decision gave rise to numbers of international scientific and practical debates in order to identify what constitutes the concept of foreign investment.

A clearer concept of foreign investment can also be beneficial to the possibilities to attract investments to the emerging countries, such as the Republic of Lithuania. By now, the conception of investment in the Law on Investments of the Republic of Lithuania (hereinafter – Law on Investments), also in bilateral or multilateral agreements on foreign investment protection (hereinafter – investment agreements) of the Republic of Lithuania is not clear. Therefore, where international disputes arise (Tokios Tokeles, 2004), sometimes it is also not clear whether certain kinds of business transactions (for instance, transactions in financial instruments that are issued by the issuer in the Republic of Lithuania) should be included in the meaning of investment. The question becomes even more relevant after the initiation of bankruptcy procedure of bank AB Snoras (a bank established in the Republic of Lithuania) where a number of investors and other concerned parties are intending to bring the investment related claims against the Republic of Lithuania to arbitration.

Therefore, due to the development of the world's financial system and development of international business relations, also in accordance to the recent arbitration practice

tendencies under the ICSID Convention, it is relevant to analyse the changes in the conception of foreign investment. The aim of this article is to analyze how the foreign investment protection is emphasized under Convention on the Settlement of Investment Disputes and find out whether the said conception is in line with the laws of the Republic of Lithuania

This article is organized as follows: first of all, we analyze the scope of application investor's rights and obligations under Convention on the Settlement of Investment Disputes. Here we emphasize the meaning of investment under the said convention and go further into analysis of the laws of the Republic of Lithuania in order to find out whether the foreign investment conception under the Law on Investment of the Republic of Lithuania is in line with the widely known conception of investment under the Convention on the Settlement of Investment Disputes. The second part of the article highlights the tendencies of recent international disputes on the matter.

The following methods were applied in the analysis: analysis and interpretation of research literature, analysis of legal documents and historical method.

1. Understanding the meaning of investment under the ICSID Convention and Lithuanian Law

Investment regime under the ICSID Convention and ICSID arbitrage practice

International investment treaties have distinct substantive features, and the institutional features and roles of arbitral tribunals under treaties are also distinctive. The mechanisms for the protection and promotion of foreign investment are, however, not an end in themselves. They are rather closely related to the goals of economic growth and development, in particular in developing countries. This was explicitly mentioned as an objective of the ICSID Convention that recognized 'the need for international cooperation for economic development, and the role of private international investment therein' (Kingsbury et al., 2009, p. 20). The ICSID Convention begins with the statement of the belief that such provision for the settlement of disputes arising from foreign investments will increase flows of foreign investment.

According to Sornarajah (2004), the ICSID was created in the belief that the provision of neutral arbitration facilities for investment disputes between foreign investors and host states will boost investor confidence in the host states which participate in the ICSID. Such increased confidence will result in flows of investment into these countries (Sornarajah, 2004, p. 72).

However, as mentioned above, ICSID does not determine the clear conception of an investment. Article 25 (1) of the ICSID provides that: 'The jurisdiction of the Centre¹ shall extend to any legal dispute arising directly

out of an investment between a Contracting State [...] and a national of another Contracting State [...]'. Therefore, the ICSID Convention only limits the Centre's jurisdiction to legal disputes arising 'directly out of an investment'. Some authors say, that the Executive Directors of the World Bank deliberately avoided including a definition of 'investment' in the terms of Article 25(1) of the ICSID Convention, because there was no possibility of the contractual ICSID Convention states coming to an agreement on the precise meaning of the term (Schreuer et al., 2009, p. 114–117). Equally, this approach was designed to enable the ICSID to accommodate not only the traditional types of investment, in the form of capital contributions but the new types of investment, including intellectual property, some types of financial instruments. However, other authors criticize the decision and states that it sparked off a stormy definitional debate which rages today (Hwang, 2010, p. 2-3).

The recent rise of investor's arbitration has revealed a diverse range of assets that have satisfied the test of being an 'investment' under the appropriate bilateral treaties and also the ICSID Convention. Therefore, in each case the tribunal of international investment disputes under ICSID had to make the decision, whether the business relations between the foreign and domestic entity has the meaning of investment under ICSID Convention. As a common rule says, if the arbitration is administered under the ICSID (arbitration), then the investment must not only qualify as an investment under the investment agreement but also satisfy the requirements of being an 'investment' under the ICSID Convention. This is often described as a 'double barrel' test, in which the investor will need to persuade the tribunal that the definition of investment is met under both the applicable investment agreement and Article 25 of the ICSID Convention. In fact, a number of arbitrations have turned on the issue of whether a particular interest is covered by the definition of investment under both these instruments. The answer to the question determines whether the tribunal has the jurisdiction to hear the 'investment dispute' (IISD, 2011, p. 5).

The first publicly known award to consider the meaning of investment in a detail was *Fedax NV. v. Republic of Venezuela*². According to Mortenson (2011), this early case exercise an explicit and self-conscious deference to state decisions about what policy structure will best take advantage of the international investment framework. In this early stage the tribunals simply looked at the consent document's definition of investment, assess whether it covers the asset or enterprise in question, and take that conclusion to be determinative of ICSID jurisdiction as well. Where consent is founded on an investment agreement, tribunals simply look at the investment agreement definition of 'investment'. Where consent is founded on a contractual arbitration clause, tribunals look to whether the contract explicitly invokes ICSID jurisdiction or defines investment in some other way. If the consent document's definition of investment

¹ ICSID Centre is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States with over one hundred and forty member States.

² *Fedax NV. v. Republic of Venezuela (Jurisdiction)* 5 ICSID Rep 183 (ICSID, 1997, Orrego Vicuna P, Heath & Owen).

(whether express or implied) extends to the thing in dispute, ICSID has jurisdiction (Mortenson, 2011, p. 272).

However, due to both: the expanding number of international companies and also the development of international business relations *Fedax* case precedent could not come in line with the changes in international business. Therefore, the most popular qualification criteria for 'an investment' under Article 25 (1) ICSID Convention are known as the *Salini* factors or *Salini* tests. In *Salini v. Morocco case*³, the tribunal, while recognizing that the parties could, in principle, agree on the kind of disputes that could be submitted to arbitration under the treaty, went a step further than in *Fedax* and explicitly recognized the existence of objective criteria that have to be met if a particular asset is to be considered an 'investment' for the purposes of the ICSID Convention. The tribunal considered that its jurisdiction depended upon not only the existence of an 'investment' within the meaning of the applicable under investment agreement, in this case the investment agreement between Italy and Morocco, but also on the basis of the ICSID (IISD, 2011, p. 6). *Salini v. Morocco case* it was required five conditions to identify an investment under the ICSID Convention, i.e. certain duration of the investment, regularity of profit and return, assumption of risk when investing, substantial commitment and significance for the host state's development. According to the *Salini* criteria, the duration of the investment shall be reasonably long for the investment (usually – at least two years). However, the risk accompanying any investment transaction is a unanimously accepted criterion, as much by doctrine as by arbitrators. According to Manciaux (2008), the problem is that this criterion gives way to very diverse interpretations that show that there is no agreement on the appropriate meaning to attribute to this term (Manciaux, 2008, p. 456-457). Nevertheless, it is clear that the ICSID Convention provisions do not mean that any risk shall be considered as the assumption of risk. Therefore, in some cases of ICSID tribunal went forward and recognized that *Salini* criteria are too formal. Some tribunals have followed 'the *Salini* test', other tribunals have rejected it, while still others have suggested modifying it into three, five, and six-part tests. Some tribunals have modified one or more of the *Salini* criteria, insisting, for example, that the investor must contribute 'substantial' assets or must make a 'significant' contribution to the development of the host state (Bechky, 2012, p. 2-3). In some cases, the development of the host state is narrowed to the economic development of the state. For instance, according to García-Bolívar, as ICSID Centre is a part of the World Bank Group, the wording of World Bank's documents should be relevant. One of those documents is the 1992 Guidelines for Treatment of Foreign Investors. Although, not a binding document, but a set of recommendations intended to be incorporated by countries into their laws, it states in its preamble that it is recognized that: [a] greater flow of foreign direct investment brings

substantial benefits to ... the economies of developing countries ... through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade". Therefore, the author believes that a dispute about an investment that does not contribute to economic development could be left out of the scope of the jurisdiction of an ICSID tribunal if a teleological interpretation of the ICSID Convention is made (García-Bolívar, 2010, p. 601, p. 590).

The aforesaid shows that the tribunal (arbitrators) must consider the degree to which the criteria of conception of investment have been fulfilled and, if any of the hallmarks are not satisfied or only superficially satisfied, the tribunal must balance the fulfilment of the other satisfied hallmarks against any hallmarks that are not satisfied in its determination as to whether it has jurisdiction (Hwang, 2010, p. 30). Therefore, even *Salini* criteria is used or rejected on case-by-case basis. As the legal grounds and background of the international disputes varies, in every case the tribunal judges fairly subjectively decides whether the *Salini* test is too narrow or, in other case, too wide. Consequently, *Salini* test should be considered as the fundamental, but not the single hallmarks, in order to satisfy the criteria of an investment under the ICSID Convention.

Investment regime in Lithuania

The aim to attract foreign investment was set by the Republic of Lithuania shortly after it regained its independence. The first law on foreign investment was adopted on the 29th of December, 1990. Later, in 1995, the Parliament of the Republic of Lithuania enacted an updated old version. Consequently, the Law on Foreign Capital Investment in the Republic of Lithuania was adopted. This law was replaced with the Law on Investments on the 7th of July, 1999, that with further amendments exists now.

Moreover, we should emphasize that foreign investment in Lithuania is regulated and protected by numerous investment agreements. Such agreements prevail over the provisions of the laws of the Republic of Lithuania⁴.

According to the Law on Investment, the investments should be considered as funds and tangible, intangible and financial assets assessed in the manner prescribed by laws and other legal acts, where they are invested in order to obtain from the object of investment profit (income), social result (in the areas of education, culture, science, health and social security as well as other similar areas) or to ensure the implementation of state functions.

The Law on Investments also defines the main international principles of foreign investment, such as equal protection and treatment of domestic and foreign investors (Article 5). Therefore, foreign investors enjoy the same rights and obligations relating to commercial

³ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, Award, ICSID Case No ARB/02/13, IIC 208 (2006), despatched 31 January 2006, ICSID.

⁴ Nevertheless, usually the meaning of investment under the bilateral treaties is not narrower comparing with the Law on Investments.

activities as Lithuanian domestic investors. Generally, foreign investors have free access to all sectors of the economy. However, some exceptions are provided in Article 8 of Law on Investments and other laws. According to the said law, the foreign capital shall not be invested in sectors relating to the security and defence of Lithuania (*'activities guaranteeing state security and defence'*). Moreover, in certain cases the foreign investor must fulfil licensing requirements prior to execution of an investment⁵.

Where the investment disputes concerning the rights and lawful interests of a foreign investor rises, the said may be settled according to the investment agreement between the parties, by the courts of Lithuania, international arbitration or by other institutions. In case of investment disputes, foreign investors also have the right to apply to the ICSID⁶.

The main forms of investment in Lithuania are provided in Article 4 on Law on Investments as follows: the establishment of an enterprise or the acquisition of a part or whole authorized (ownership) capital in an operating enterprise registered in Lithuania; the acquisition of securities; the creation, acquisition and increase of the value of long-term assets; the lending of funds or other assets to enterprises in which the investor owns a stake allowing to control such enterprise or influence it considerably; the conclusion of concession or leasing agreements.

It should be pointed out that foreign entities may establish branches or representative offices which do not have the status of legal entity. Under the Law on Investments, investments are considered to be money market funds and other tangible, intangible and financial assets, appraised under applicable procedures, which are invested for the purposes of generating profit (income), social results (educational, cultural, scientific, health, social security and in other similar spheres) or to ensure the implementation of State functions.

To sum up the abovementioned, the Lithuanian legal regime shows that the concept of investment and also the legal regime of the foreign investments protection in the Republic of Lithuania is relatively broad. Therefore, there is a risk that, in some cases, the foreign entities might abuse their rights by claiming that they made the investment under the Law on Investments. However, on the other side, a liberal approach of defining investments can give greater flexibility in the protection of investments as these acquire more sophisticated forms. In this regard, investments can be seen often as bundles of transactions, some of which may be pure commercial contracts, but which together form an investment process (UN, 2011, p. 63).

Nevertheless, the question emerges whether the concept of investment is precise enough to distinguish what should be considered as an investment. For instance,

in case national legal regime of foreign investor's country is different from the laws in the Republic of Lithuania, or the laws the Republic of Lithuania has changed (Parkerings-Compagniet AS v Lithuania, 2007), shall Lithuania be responsible for of the mismatches of laws? The consequence of the broad concept of investment under Lithuanian laws is that the right to decide what should be included in the meaning of the investment and investment protection, and what we should be opted-out from the said is left to the ICSID arbitration under the current ICSID arbitration case-law (or other arbitration tribunals, that are not the matter of discussion in this article).

2. Recent Trends: Financial Instrument's owners' Protection under Lithuanian Law and ICSID

According to Article 4 of the Law on Investment, *'any type of securities'* are included in the definition of the investment. Nevertheless, there we should draw the attention at the difference between the simple acquisition of all types of securities and acquisition of the securities as an investment under the Law on Investment. For instance, primary shares in companies are the vehicles for the foreign investment. These are not shares that are ordinarily traded. Vice versa, ordinary securities circulate through stock exchanges or through other markets or means and are used in order to raise capital for ventures. Therefore, argument for the inclusion of such investments is that they are an important means of encouraging capital flows, and that it is in the interests of developing states that their flows should be encouraged. However, the argument against is that their inclusion in investment treaties would mean that the host state owes a duty of protection to unascertainable holders of securities whose identities would continuously change. In addition, the latest financial crisis has shown that such investment can be rapidly pulled out of a state. Therefore, the economic value of such securities should be questionable.

The latest tendencies on interpretation of the ICSID Convention Article 25 show that the treatment of shareholders and also owners of other financial instruments has controversially changed during the last decades. To look formally, acquiring of financial instruments does not meet Salini criteria and other common known criteria of investment, because we may not predict, how long such *'investment'* will last, what is the fundamental significance to the development of the host state and etc.

Previously, the shareholder rights used to be protected only where the host state gives its consent to treat the corporate vehicle for the investment as a foreign corporation for the purpose of ICSID arbitration (Sornarajah, Law on Foreign Investment p. 10). However, adhering to many investment agreements' unequivocal definition of stock shares and other financial interests as investments, ICSID tribunals following the deferential approach have found promissory notes⁷ and minority stock

⁵ Nevertheless it should be stressed that licensing requirements are equal to the requirements for the domestic legal entities.

⁶ As of the 5th of August, 1992, the Republic of Lithuania is a contracting state under the ICSID Convention.

⁷ Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 29 (July 11, 1997), reprinted in 37 I.L.M. 1378 (1998).

shareholdings⁸ to be the investments regardless of the type of corporation and regardless of the purpose of the investment. Finally, after decision in the *Abaclat* case⁹ the ICSID tribunal broke the line between the ordinary investment and the investment under the ICSID Convention (and also the Law on Investment).

In the *Abaclat* case the ICSID tribunal analysed two fundamental questions: firstly, whether the ICSID may accept the mass claims and, secondly, what financial instruments may be considered as an investment. Among other things the respondent stated that the accepting of mass claims would change the nature of ICSID claims as it was envisioned, from one focused on studied analysis of the grievances brought by an individual investor for a singular, precise harm, to one focused on mass or class claims in which the circumstances of each claimants can no longer be realistically examined and the peculiarities of each investment are ignored in favor of the lowest common denominator (*Abaclat*, 2011, p. 185). However the tribunal decided, by a majority, that it had jurisdiction to hear 'mass claims' brought by over 60,000 Italian bondholders because the ICSID Convention 'does not constitute an impediment to their admissibility' (*Abaclat*, 2011, p. 216).

Secondly, the tribunal rejected Argentina's arguments that the financial instruments, such as the sovereign bonds should not be considered as an investment under the investment agreement between Italy and Argentina and also the ICSID Convention. This tendency shows that an unjustifiable refusal by a state to honour its sovereign debt is likely to breach the terms that allow investors to pursue international arbitration claims under the ICSID Convention. The tribunal stated that the financial instruments have various forms and all the obligations under such financial instruments that were issued by the respondent (Argentina) should be treated as an investment.

On the one hand, the decision shows the higher treatment of the ordinary investors under the ICSID Convention. This should foster the growth of such minor shareholder's protection within the ICSID Convention countries. Hence, one may emphasize that, according to the *Abaclat* case, the unilateral breach of investors rights (unilateral change of payment obligations) should be considered as the breach of an investment agreement (and also ICSID Convention). On the other hand, the *Abaclat* decision has some threats. First of all, such decision might

presume that any of the investment (all financial instruments transactions) in the host state should be considered as an investment under the ICSID Convention. Some authors believe, that in such a case, the host country would have to accept the risk of the investment without the liability (Shreuer, 2010, p 6). Therefore, such *strict liability* regime would not be in line with the aims of ICSID Convention¹⁰. Secondly, according to Michael Waibel (2007), the ICSID arbitration on sovereign debt instruments could fundamentally alter the dynamics of future sovereign debt restructurings. Bondholders might be able to obtain compensation, even though the contractually prescribed majority accepted the restructuring. The ICSID arbitration could blow a hole in the international community's collective action policy (Waibel, 2007, p. 715).

Conclusions

As the concept of investment is relatively broad under the laws of the Republic of Lithuania and investment agreements, the international investment-related claims shall easily meet the ICSID Centre jurisdiction criteria. However, the conception of foreign investment under the Law on Investments should be explained more precisely. In case the Republic of Lithuania is not in international agreement on foreign investment with foreign investor's country, more precise definition would lead to brighter landmarks of the conception of foreign investment.

Although there is no concept of binding precedent in investment treaty jurisprudence, subsequent tribunals have referred to the *Salini test's* approach, the others went further to new approaches on the conception of investment. Therefore, it should be concluded that definition of investment under Article 25 (1) should at least consist of the hallmarks, such as, commitment, duration, risk, and significant contribution to host state's economic development.

Although the ICSID tribunal decision to hear the mass claims is controversial, it is the substantial step towards the improvement of investor's protection worldwide. The mass claims will widen the number of investors that may expect to protect their rights and rightful interests under the ICSID Convention.

There is a risk that recent ICSID tribunal decisions (e.g. *Abaclat* case) may open ways to the strict liability of the host member states and unburden the dynamics of future sovereign debt restructurings. Supposedly, the liability of host member state should cover such damages that were made on state's direct responsibility.

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⁹ *Abaclat and others v. the Argentine Republic*, 2011 (hereinafter – *Abaclat* case). In 2001 Argentina defaulted on its debt and suspended payment on its sovereign bonds. In 2005 it launched a voluntary exchange offer pursuant to which existing bonds would be exchanged for new bonds on revised terms. Shortly afterwards Argentina also passed a law which unilaterally modified its payment obligations under the bonds. The claimant bondholders, who initially numbered 180,000, declined to participate in the exchange offer and, in 2006, filed the Request for Arbitration with ICSID. In 2010 Argentina launched a second exchange offer on modified terms. Many claimants accepted the 2010 exchange offer, leading to their withdrawal from the proceedings and a reduction in the number of claimants to 60,000 (<http://www.allenoverly.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&itemID=64707&prefLangID=410>).

¹⁰ Please also see: *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka* 4, 1990, *Tecced v. Mexico*, ICSID 2003.

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Užsienio investicijų koncepcija pagal Konvenciją dėl valstybių ir kitų valstybių piliečių ginčų investicijų srityje sprendimo ir Lietuvos teisę

Santrauka

Pagrindinis investicijų pritraukimo tikslas – ekonomikos augimas. Įvairios valstybės (tarp jų ir Lietuva), siekdamos pritraukti užsienio kapitalą, siekia užtikrinti, kad užsienio investuotojams būtų taikomas toks pat teisinis režimas kaip ir valstybės viduje veikiantiems verslininkams. Siekiant šio tikslo dar 1990 metais buvo priimtas pirmasis Užsienio investicijų Lietuvos Respublikoje įstatymas. Vėliau šis įstatymas kelis kartus tobulintas, keičiamas nauja redakcija, siekiant užpildyti reguliavimo spragas, sudaryti kuo palankesnes sąlygas užsienio investuotojams.

Dabartinio Lietuvos Respublikos investicijų įstatymo 2 straipsnio 1 dalis investicijas apibrėžia kaip pinigines lėšas ir įstatymais bei kitais teisės aktais nustatyta tvarka įvertintą materialų, nematerialų ir finansinį turtą, kuris investuojamas siekiant iš investavimo objekto gauti pelno (pajamų), socialinį rezultatą (švietimo, kultūros, mokslo, sveikatos ir socialinės apsaugos bei kitose panašiose srityse) arba užtikrinti valstybės funkcijų įgyvendinimą. Investicijų įstatymo 2 straipsnio 6 dalyje pateiktas investavimo objekto apibrėžimas, kuriame nurodoma, kad investavimo objektu laikytinas nuosavas ūkio subjekto kapitalas, visų rūšių vertybiniai popieriai, ilgalaikis materialusis turtas ir ilgalaikis nematerialusis turtas. Pažymėtina, kad Investicijų įstatyme pateiktas apibrėžimas yra gana platus, todėl Lietuva, sudarydama tarptautines sutartis dėl investicijų skatinimo ir investicijų apsaugos, dažnai nuo jo nukrypsta. To pasekmė – susitariančių šalių ūkio subjektų investicijoms galioja tarptautinėje sutartyje nurodyta formuluoė.

Kylančius užsienio investuotojo (investuotojų) ir Lietuvos Respublikos ginčus dėl jų teisių ir teisėtų interesų pažeidimo (investicinius ginčus) šalių susitarimu nagrinėja Lietuvos Respublikos teismai, tarptautiniai arbitražai ar kitos institucijos. Atkreiptinas dėmesys, kad investiciniai ginčai taip pat sprendžiami atsižvelgiant į tarptautinių sutarčių nuostatas, o investuotojas turi teisę kreiptis į Tarptautinį investicinių ginčų sprendimo centrą (toliau - ICSID).

Praktikoje nekyla abejonių, kad, pasirinkus alternatyvų ginčų sprendimo būdą, tarptautiniams investiciniams ginčams spręsti dažnu atveju pasirenkamas ICSID arbitražas. Tačiau pažymėtina, kad Konvencijoje dėl valstybių ir kitų valstybių piliečių ginčų investicijų srityje sprendimo (toliau – ICSID konvencija) nėra konkretaus investicijų apibrėžimo. Remiantis ICSID konvencijos 25 straipsnio 1 dalimi, investicijų apsaugos sutarčių jurisdikcinės nuostatos reikalauja, kad ginčas būtų susijęs su investicijomis. Be to, remiantis logine bei lingvistine ICSID 25 straipsnio analize, su investicijomis gali būti susijęs tik toks ginčas, kuris kyla dėl jau įvykdytų investicijų.

Atsižvelgiant į itin dažnai cituojamą sprendimą Salini byloje (Salini v. Morocco, 2006), investicijos turėtų turėti šiuos pagrindinius požymius: 1) pakankamai ilgą sutarties dėl investicijos vykdymo terminą; 2) pelno ir atitinkamai rizikos prisiėmimą investuojant; 3) esminį šalies įsipareigojimą (investicijos faktinis įvykdymas); 4) akivaizdžią investicijos naudą priimančiosios šalies vystymuisi.

Atkreiptinas dėmesys ir į tai, kad ICSID konvencijos preambulėje pažymima tarptautinio bendradarbiavimo ekonominiams vystymuisi būtinybė ir privačių užsienio investuotojų svarba šioje srityje. Taigi ICSID prasme užsienio investicijos turi skatinti priimančiosios valstybės ekonominį vystymąsi ir plėtrą, apčiuopiamai prisidėti ne prie konkretaus verslo, tačiau bendrai – valstybės augimo.

Pažymėtina, kad, anot daugelio autorių, nuo Salini byloje nurodytų taisyklių ICSID arbitražo praktikoje dažnai yra nukrypstama (Mortenson, 2011; Manciaux, 2008). Pavyzdžiui, remiantis Salini kriterijais, finansinė priemonė, tokia kaip valstybės išleisti ne nuosavybės vertybiniai popieriai (obligacijos), nevisiškai atitinka investicijos sampratą pagal ICSID. Tačiau paskutinės tendencijos ICSID arbitražo praktikoje rodo, kad investicijoms į finansines priemones Salini kriterijai nėra taikomi. Tai akivaizdžiai parodo Abaclat byla (Abaclat, 2011), kurioje sprendžiamas

masinio ieškinio arbitraže galimumo bei valstybės išleistų ne nuosavybės vertybinių popierių (obligacijų) priskirtinumo investicijoms klausimas.

Abaclat byloje arbitrai nusprendė, kad ICSID konvencija nedraudžia teikti masinių ieškinių. Taigi šis sprendimas sudaro galimybę daugeliui investuotojų, kurie neturėjo galimybės kreiptis į ICSID arbitražą dėl didelių kaštų, tuo pasinaudoti. Be to, konstatuota, jog į ICSID konvencijos 25 straipsnio 1 dalies investicijų sampratą patenka bet kokios finansinės priemonės. Manytina, kad šis sprendimas turėtų sąlygoti panašių investicinių ginčų atsiradimą kitose ICSID konvencijos valstybėse.

Manytina, kad, viena vertus, naudinga tai, kad finansinių priemonių laikymas investicija išplečia investicijų apsaugos apimtį pagal ICSID. Kita vertus, yra nuomonių, kad tokia ICSID sprendimų praktika apsunkintų operatyvaus valstybių skolų restruktūrizavimo galimybę (Waibel, 2007). Manoma, kad remiantis šia praktika valstybės, išleidusios valstybines obligacijas, negalės būti tikros, kad tokių skolų restruktūrizavimas nesukels atsakomybės pagal ICSID investicijų apsaugos taisykles. Tai keltų grėsmę kad valstybės atsakomybė būtų suabsoliutinama, o tai prieštarautų ICSID arbitražo praktikai. Įvairių autorių nuomone, subjekto atsakomybė negali kilti be kaltės (Schreuer, 2010). Taigi ICSID prasme turėtų būti apsaugotas tik toks turtas, kuris prarandamas dėl tiesioginės valstybės kaltės.

Reikšminiai žodžiai: užsienio investicijos, ICSID konvencija, investicijų įstatymas, investuotojų teisių gynimas.

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