

PROBLEMS OF INTERPRETATION OF THE CONCEPT OF “INVESTMENT” IN BILATERAL INVESTMENT TREATIES

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Annotation: Various approaches to the definition of investments in international bilateral agreements were analyzed. The advantages and disadvantages of a broad and a limited definition were examined based on the experience of countries in Europe and Central Asia.

Key words: investment, asset-based definition, enterprise-based definition, assets, bilateral international agreements.

Recently, investment disputes between foreign investors and the state have become more visible, and their growth is causing special problems for governments, especially in developing countries. This is because, firstly, investment disputes usually require large financial resources for both the state and the foreign investor, secondly, they damage the investment reputation of the state involved in the dispute in the international arena, and lastly, such disputes may last for 4-5 years or even longer.

As a rule, investment disputes between a state and a foreign investor related to investments within the scope of investment activities are usually settled between the parties through proceedings in the courts of the host country, negotiations between the parties

In turn, there are terms in national and international legislation that allow the international arbitration tribunal to interpret certain norms in a broad way, including the term “investment” that has led to negative arbitration awards for countries in the arbitration dispute involving many developing countries.

The “asset-based definition” includes “all types of assets” and lists the types of assets that can be considered investments. The concept of investment presented in agreements on mutual promotion and protection of investments concluded between Uzbekistan and other countries is based on “Asset-based definition”, which creates the possibility of a very broad interpretation of the concept of investment. This leads to the inclusion of portfolio investments, government debt and commercial contracts in this concept.

“Enterprise-based definition” is made only on the basis of direct investments (Foreign direct investments), in which assets with investment characteristics are recognized as investments. That is, an investment is recognized as an investment only if it has certain established characteristics by arbitrators. For example, “Salini v. Morocco” case [1], the arbitral tribunal emphasized that investment has four characteristics [2]. These criteria have been used in one form or another in subsequent cases. As mentioned above, the “enterprise-based definition” includes an enterprise and its related assets, portfolio investments are not recognized as investments.

The key benefits of moving to an “enterprise-based definition” include:

1) It prevents investors from making unreasonable claims against the state.

The signing of bilateral international agreements between states is causing an increase in the number of investment disputes against the state. To date, the Republic of Uzbekistan has concluded about 52 bilateral interstate agreements on mutual promotion and protection of investments, and a number of multilateral international documents containing regulations in

the field of investment activities have been ratified. In addition, these documents contain provisions that include the procedure for resolving investment disputes, that is, the “arbitration clause”.

It has been involved in many investor-state disputes against Central Asian countries alone, and as of July 2022, Kazakhstan has participated as a respondent in 19 arbitration disputes against the country, Kyrgyzstan - 17, Turkmenistan - 16, and Uzbekistan - 9. Each of these countries has at least once faced a dispute over the interpretation of the concept of “investment”. If we look at the example of Kyrgyzstan alone, “Stans Energy Corp. v Kyrgyzstan”, “Beck v Kyrgyzstan” and “OKKV v. In Kyrgyzstan” cases, the concept of “investment” was extensively analyzed by the courts, and Kyrgyzstan’s objections to the court's jurisdiction were rejected [3].

The BITs of neighboring countries are similar and all use the concept of asset-based investment.

Analogously, India, after losing many disputes related to the interpretation of the concept of investment, wants to enter into agreements based on the "enterprise-based definition" with all 69 countries, canceling the BITs.

2) Avoids huge costs associated with arbitration.

It is no secret that the arbitration procedure involves significant costs. In all ICSID-administered and non-ICSID-administered cases, the Center charges the parties an annual fee, currently US\$42,000, for its services in arbitration and conciliation proceedings. This fee is usually split equally between the parties. The Center also charges staff \$200 per hour for services in mediation and fact-finding processes. In addition, in addition to the costs payable to the Center, the investment arbitration procedure includes expert, interpreter, travel and accommodation expenses, and compensation payments to be paid by the losing party. All this adds up to a huge sum [4]. Here a question arises, are we not paving the way for future multi-million state expenditures while trying to increase the flow of investments by allowing a broad interpretation of the concept of “investment”?

3) The concept of investment based on “Enterprise-based definition” is starting to be used by most countries.

The concept of investment based on the “Enterprise-based definition” is not only entering Indian practice, but is also reflected in the United States-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020. According to article 12.1 of this agreement, the following are not recognized as investments:

- (i) an order or decision issued in a judicial or administrative proceeding;
- (ii) monetary claims arising from a) commercial contracts for the sale of goods or services by an individual or enterprise in the territory of one of the parties to an enterprise in the territory of the other party, or b) the extension of credit under commercial contracts [5].

In addition, the FTA between Singapore and Mexico, which entered into force on November 12, 2009, and many Free Trade Agreements (FTAs) with Australia, Chile, Colombia, Israel, Jordan, Morocco, Oman, Panama, Peru and Singapore also contain an analogous definition of investment. According to the UNCTAD study, this approach is a new trend among new treaties. In addition, in 2012, the USA [6] and in 2021, Canada [7] developed model bilateral international agreements (Model BIT). They provide an enterprise-based definition of investment and specify which types of assets are not recognized as investments.

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