AT THE INTERSECTION OF INTERNATIONAL TAX AND INVESTMENT TREATIES: PRACTICAL HURDLES OF INTERPRETATION

TIKHONOVA V., SHAMURZAEV A.

Viktoria Tikhonova — Paralegal in International Tax, SEAMLESS Legal, Moscow, Russia (viktoria.tikhonova@seamless.legal).
ORCID: 0009-0001-9260-4631.

Aibek Shamurzaev — Expert in public international law, Bishkek, Kyrgyzstan (shamurzaev.aibek@gmail.com).
ORCID: 0009-0004-6083-5867.

Abstract

The collection of taxes is one of the most important functions of a state. At the same time, taxation can present a significant challenge to fostering the investment appetite that is essential for state development. The tax regulations have historically been regarded as a significant impediment to investment, largely due to their inherent instability. Moreover, a detailed examination reveals that the tax and investment fields employ disparate terminology and are guided by conflicting objectives. It is therefore necessary to establish a balance in the resolution of disputes and the definition of the terminology used. In order to address the question of how tax law is interpreted and the issues that arise at the intersection with investment activities, the authors have conducted an analysis of doctrine, international and national legal sources and jurisprudence. The study presents a normative analysis of the controversial situations that arise when different branches of law intersect with one another, as well as proposed mechanisms to eliminate the problems arising from mutual interpretation of international tax and investment treaties.

Key words

tax law, investment law, treaty interpretation, OECD Model Tax Convention

Citation: Tikhonova V., Shamurzaev A. *At the Intersection of International Tax and Investment Treaties: Practical Hurdles of Interpretation* // Zhurnal VSHE po mezhdunarodnomu pravu (HSE University Journal of International Law). 2024. Vol. 2. № 4. P. 53–68.

https://doi.org/10.17323/jil.2024.24744

Introduction

In the context of attracting investment, tax law assumes a pivotal role, functioning as a conduit between the state and the investor. In the modern era, there is a great deal of competition between states for the attraction of capital, and the tax component plays a particularly significant role in this regard. The interpretation of tax legislation, the assurance of transparency and predictability within the tax regime, and the clarification of fundamental elements of the investment climate are not merely formal procedures; they are essential components of a well-functioning economy. The interpretation of tax legislation by the state has a significant impact not only on the volume of budget revenues, but also on the attractiveness of the state for foreign and domestic investors, and ultimately on the level of the well-being of citizens.

The objectives of bilateral tax treaties, that is to remove obstacles to the free movement of capital and to provide stability and predictability of taxation for investors, face the challenge of ambiguity in interpretation, particularly where tax law and investment law intersect. The disparate interpretations of analogous concepts by different authorities engender ambiguity in the practical application of treaties. A case in point is the definition of “dividends”. In the context of investment law, dividends are understood as the investor's right to receive them, i.e. the right to receive income. Conversely, tax law aimed at the taxation of profits considers dividends as income actually received by the taxpayer. Consequently, while the perspective of investment law regards dividends as unremitted income, the viewpoint of tax law is that the accrual of income in the bank account constitutes the receipt of that income. This distinction presents a significant challenge in the resolution of tax disputes, particularly in the international context. Furthermore, the very concept of “investment” may also be interpreted in a variety of ways, which can give rise to conflicts in the application of the legislation of different states. The resolution of such issues necessitates a more profound examination and a uniform interpretation of international tax treaties, with the objective of guaranteeing legal certainty and stability for all stakeholders in the investment process.

The majority of extant studies have been conducted with the specific objective of interpreting tax law or analysing investment law. In examining the interpretation of tax treaties, studies have employed an analysis and commentary of relevant sources, with a particular focus on the Organisation for Economic Co-operation and Development (hereinafter — OECD) Model Tax Convention on Income and Capital.[1] The interpretation of investment law is based on the principle of non-tax expropriation, which forms part of the wider context of investment protection.[2] Concurrently, the extant literature does not address the interpretation of specific tax law terms in the context of investment law, or vice versa.

In order to clarify the research question, the article is organised in such a way as to delineate the various issues that emerge at the nexus of the two branches in the process of interpretation and utilisation of pertinent terminology. The article is structured as follows: the first part discusses the principles and methods of tax treaty interpretation and their application by courts in investment disputes, as well as the possibility to employ additional sources of interpretation, including advisory acts and foreign practice, and how they affect the investor's position. The second part addresses the issues of mutual interpretation of tax treaties and investment law, elucidates the manner in which specific terms are interpreted within the context of tax law and investment law, examines the utilisation of tax clauses in investment treaties, and identifies practical challenges associated with litigation.

Accordingly, the study aims to evaluate potential controversies that may emerge from disparate interpretations or from the intrinsic variability of a singular mechanism. This work is primarily based on analysis of the regulatory framework and judicial practice, both at the national and international levels, as well as recommendations and model acts.

1. Peculiarities of international tax treaties' interpretation

Following the principles of international law and, particularly, the Vienna Convention on the Law of Treaties (hereinafter — VCLT), the interpretation of treaty terms should be conducted in accordance with their "ordinary meaning".[3] Given that a single term may have multiple meanings across different legal domains,[4] scholars advocate for the utilisation of internationally recognised terminology and interpretative frameworks.[5] In the context of international tax law, the OECD Model Tax Convention on Income and Capital that was drafted in 1963 by the OECD Fiscal Affairs Committee[6] and updated in 2017 (hereinafter — OECD Model Tax Convention), serves as a valuable standardisation tool. The question of the legal nature of the OECD Model Tax Convention as a tool for interpretation remains a topic of significant debate within the academic community. It is challenging to categorise the Convention within the methods outlined in Article 31 of the VCLT, primarily due to its non-binding nature.[7]

Article 31(3)(a) of the VCLT provides that a treaty may be interpreted on the basis of any subsequent agreement between the parties involved. Nevertheless, the OECD Model Convention cannot be regarded as such an agreement, since its recommendatory nature is explicitly stated in the text of the instrument.[8] Moreover, the courts have been known to apply the provisions of the OECD Model Tax Convention even if the states of the disputing parties[9] are not members of the OECD. Furthermore, the OECD procedure does not, in and of itself, render such an instrument legally binding.[10] It can be concluded from the explicit

---

1 Vogel K. *Double Taxation Conventions: a Commentary to the OECD-, UN- and US Model Conventions for the Avoidance of Double Taxation of Income and Capital with Particular Reference to German Treaty Practice* // Kluwer Law International B.V., 1997. P. 2556; Gidirim V. A. *Tolkovanie mezhdunarodnykh nalogovykh soglasheniy v zarubezhnoy praktike* [*The Foreign Practice of Interpretation of International Tax Agreements*] // Nalogi i nalogooblozhenie. 2016. № 2. P. 85–142; Engelen F. A. *Interpretation of Tax Treaties Under International Law: a Study of Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties and Their Application to Tax Treaties*. Italy : International Bureau of Fiscal Documentation, 2004. P. 590.

2 Davie M. *Taxation-Based Investment Treaty Claims* //Journal of International Dispute Settlement. 2015. Vol. 6. № 1. P. 203–204; Ranjan P. *Investor-State Dispute Settlement and Tax Matters: Limitations on State's Sovereign Right to Tax* // Asia Pacific Law Review. 2023. Vol. 31. № 1. P. 221–222; Hong H.-H. *Reconciling International Investment Agreements with Domestic Tax Laws Through Restructuring Taxation Clauses in International Investment Agreements* // Contemporary Asia Arbitration Journal. 2019. Vol. 12. № 1. P. 47.

3 United Nations. Vienna Convention on the Law of Treaties. 23 May 1969. 1155 U.N.T.S. 331. Arts. 26, 31.

4 Qureshi A. H. *The Public International Law of Taxation, Text, Cases and Materials*. Kluwer Law International, 1994. P. 135–136.

5 Vogel K. *Op. cit.* P. 37.

6 OECD. The Committee on Fiscal Affairs is the OECD. URL: https://www.oecd.org/ctp/newchairoftheoecdscommitteeonfiscalaffairs.htm (accessed: 26.02.2024).

7 Engelen F. A. *Op. cit.* P. 431–433.

8 OECD Model Tax Convention. Arts. 4, 13, 15.1.

9 The Court of Appeal (Civil Division) on Appeal from the High Court, Chancery Division of England & Wales. *Smallwood & Anor (Trustees of the Trevor Smallwood Settlement) v. Revenue and Customs*. № A3/2009/1047. Judgment of 8 July 2010. Para. 10.

10 OECD. Rule 18(b) Rules of Procedure of the Organisation for Economic Co-operation and Development // Revision as agreed by Council at its 1171st session, held on 17 April 2008 [C/M (2008)7, Item 88].

indications that the application of the OECD Model Tax Convention and its Commentary do not constitute an agreement under international law and do not fall within the scope of Article 31(3)(a) of the VCLT.

A different situation arises in the context of the application of Article 31(3)(b) of the VCLT. This article permits the consideration of "any subsequent practice in the application of the treaty", thereby enabling the utilisation of the OECD Model Tax Convention and the Commentary.[11] However, such practice is not always directly linked to the text of the treaty, which may create some difficulties of interpretation, especially if such practice is adopted by only one of the parties. For example, Double Tax Treaties (hereinafter — DTTs) are applied mainly by national courts, so there should be evidence that the specific approach to interpretation is firmly established in both states. It is also important to consider the role of the tax authorities, which utilise court practice as an auxiliary tool to justify a particular position. Consequently, the interpretation of specific legal norms is not carried out, but an indication of their proper application is provided, which serves to narrow or broaden the scope of the law. Such a process represents a modification of the law and, as a result, cannot be categorised as interpretation.[12]

Accordingly, there is no legal impediment to the utilisation of the OECD Model Tax Convention and the Commentary as the subsequent practice of the parties. Nevertheless, this approach should be confined to the interpretation of terminology, with a view to preventing the provisions set out in the agreements from being unduly modified.

The prevailing view is that the Commentary is used as a supporting resource. In accordance with Article 32 of the VCLT, which refers to the preparatory work for the treaty and the circumstances of its conclusion as supplementary means of treaty interpretation, it should be noted that the text employs the term "including" to indicate that these are examples and not an exhaustive list.[13] Consequently, the Commentary continues to fulfil its original function as a non-binding recommendation.[14] An alternative perspective exists, however, which regards the Commentary as a contextual element in the conclusion of an agreement.[15] This context encompasses international tax policy, domestic tax policy, and economic and political factors.

One of the earliest instances in which the OECD Model Tax Convention was employed as a basis for interpretation occurred in a case concerning the propriety of attributing the profits of a Canadian subsidiary to an investing parent company in the United Kingdom. The judge observed that, in accordance with the VCLT, he was obliged to interpret the Convention in good faith and in a manner that reflected the ordinary meaning of its terms. If the meaning remained ambiguous, the judge was entitled to resort to additional means of interpretation, of which he recognised the Commentary to the OECD Model Tax Convention.[16]

The courts have on numerous other occasions validated the utilisation of the Commentary as a source of interpretation, thereby endorsing this practice.[17] In particular, in cases concerning the non-discriminatory nature of tax treaties vis-à-vis the investor,[18] the tax authorities have advanced the argument that their interpretation is not aligned with the approach set out in the Commentary.[19]

The utilisation of the Commentary as a means of interpreting tax treaties is a beneficial practice for investors, as one of the objectives of the OECD Model Tax Convention is the protection of property and

---

[11] Lang M., Brugger F. *The Role of the OECD Commentary in Tax Treaty Interpretation* // Australian Tax Forum. 2008. № 23. P. 103.

[12] Resch R. X. *The Interpretation of Plurilingual Tax Treaties Theory, Practice, Policy*: *PhD.* Leiden Law School, The Netherlands, 2018. P. 51–53.

[13] Dörr O., Schmalenbach K. *Op. cit.* P. 620, 626–627.

[14] Baker P. *Double Taxation Conventions and International Tax Law: a Manual on the OECD Model Tax Convention on Income on Capital of 1992*. 2nd ed. London : Sweet & Maxwell, 1994. P. 13–15.

[15] Maisto G., Ward D., De Broe L., Killius J., Le Gall J., Miyatake T., Van Raad K., Avery Jones J., Ellis M., Goldberg S., Torrione H., Wiman B. *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model*. Amsterdam, NLD : IBFD, 2005. P. 39–40.

[16] Court of Appeal of England & Wales. *Pearson (H.M. Inspector of Taxes) v. Sun Life Assurance Company of Canada*. BTC 223. Judgment of 12 June 1986. Para 231.

[17] Supreme Court of the Russian Federation. *Definition № 306-ES21-23651 in case № A65-27690/2020 of 14 December 2021*; Supreme Court of Canada. *Crown Forest Industries Ltd. v. Canada*. 1995 CanLII 103 (SCC), [1995] 2 SCR 802, para. 55–62; Stewart K. *Tax Treaties-Exchange of Information-Use of IRS Subpoena Power in Response to Specific Requests for Information-United States v. United States. A.L. Burbank & Co.* // BYU Law Review. 1976. Vol. 1976. № 4. P. 1019.

[18] Chancery Division of England & Wales. *Boake Allen Ltd & Ors (including NEC Semi-Conductors Ltd) v. Revenue and Customs Commissioners*. № HCO100187 & others. Judgment of 23 May 2007, para. 5–23; Chancery Division of England & Wales. *UBS AG v. Revenue and Customs Commissioners*. № CH2005/APP/0539. Judgment of 7 February 2006. Para. 56–59.

[19] The Court of Appeal (Civil Division) on Appeal from the High Court, Chancery Division of England & Wales. *Smallwood & Anor (trustees of the Trevor Smallwood Settlement) v. Revenue and Customs*. № A3/2009/1047. Judgment of 8 July 2010. Para. 60–63.

investments. It provides investors with an additional defense mechanism in case their rights are violated by the tax authorities.

Furthermore, the OECD Model Tax Convention is significant in that it provides a mechanism for resolving inconsistencies in understanding, as set forth in Article 25. This mechanism takes the form of a mutual agreement to establish the meaning of interpretation and develop a common approach. The doctrine considers this procedure to be an integral part of tax law and recommends its use for the accurate interpretation of treaties.[20] A comparable approach is adopted by the UN International Law Commission.[21]

The utilisation of foreign practice in the interpretation of tax treaties remains a matter of contention, predominantly due to the discrepancies in the interpretation of analogous principles by disparate legal systems. Previously, it has been assumed that the judgments of the courts of the states involved in the dispute should be considered as a reliable source of information. However, the Commentary to the OECD Model Tax Convention, while proclaiming the principle of uniform interpretation, permitted the utilisation of the legislation of "another contracting state",[22] thereby indicating a shift towards the application of foreign court positions in the interpretation of contracts.

In practice, judges on occasion cite foreign case law in order to justify their decisions. To illustrate, in the context of interpreting an agreement between New Zealand and the United Kingdom, the court made reference to the stance adopted by a German court.[23] Similarly, a US court, in considering the interpretation of an agreement between the US and Japan, made reference to the reasoning of a German court in relation to a Dutch-German tax treaty.[24]

The UK courts have endeavoured to achieve a balance in the interpretation of the pertinent legislation. It is acknowledged that literal interpretation is not sufficient as it fails to take into account the context in which the treaty was drafted and subsequently interpreted.[25] However, the use of foreign practice is constrained by the authority and relevance of the foreign court, as well as the necessity to establish its own precedents and develop its own approaches in collaboration with other states.[26]

The position of the Russian courts on this issue can be characterised as relatively conservative. In addressing the matter of interpretation, the courts adhere to the principle of literal interpretation. Nevertheless, should this prove inadequate for determining the true meaning, systemic interpretation is employed, encompassing "the conduct of the parties prior to and throughout the contractual period".[27] The practice of referring to domestic positions and decisions on similar issues is a dominant feature of Russian jurisprudence. In general, foreign practice is accepted as evidence of a material fact.[28] However, it should be noted that Russian tax authorities frequently exchange information with foreign tax authorities, which disseminates their practice on interpretation issues.[29] Nevertheless, the fact that a foreign authority offers such an interpretation does not guarantee its acceptance by the court. This was demonstrated in the *Danone Russia* case, in which the Russian court rejected the interpretation of a tax treaty made by the French Ministry of Finance.[30]

The interpretation of international tax treaties is complicated by the differing legal approaches, particularly in tax law and investment law, that are in place. Under the VCLT, treaty terms are interpreted based on their ordinary meaning and in the context of the treaty. However, identical terms may have various meanings in different legal disciplines, resulting in inconsistencies.

The OECD Model Tax Convention, a widely employed instrument in practice, does not possess legally binding strength and does not qualify as a formal interpretative agreement under the provisions of

---

[20] Engelen F. A. *Op. cit.* P. 590.

[21] Sec. 3 Interpretation of the Treaties. Commentary to the Arts. 27, 28. *United Nations. Yearbook of International Law Commission 1966 Volume II* // Documents of the II part of the 17th Session and of the 18th Session Including the Reports of the Commission to the General Assembly. P. 220–221. URL: https://www.un-ilibrary.org/content/books/9789213624852/read (accessed: 26.02.2024).

[22] OECD Model Tax Convention. Para. 2, p. C(24)-1, para. 1.1, p. R(22)-5.

[23] New Zealand Tax Court. *CIR v. United Dominican Trust*. 197331 NZTC 61-028 (1973).

[24] United States Tax Court. *Taisei Fire and Marine Insurance Co. Ltd. v. Commissioner*. 104 TC 535 (1995).

[25] The Supreme Court of Judicature Court of Appeal (Civil Division) of England & Wales. *MEMEC Plc v. Inland Revenue*. № CHANF 96/1643/B. Judgment of 9 June 1998.

[26] House of Lords of the United Kingdom. *Fothergill v. Monarch Airlines Ltd*. UKHL J0101-3. Judgment of 10 July 1980. Para. 25.

[27] Ruling of the Moscow District Commercial (*Arbitrazh*) Court of 13 July 2022 № F05-14273/2021 in case № A40-180523/2020.

[28] Ruling of the Commercial (*Arbitrazh*) Court of the North Caucasus District of 25 October 2018 № F08-8669/2018 in the case № A32-39643/2017.

[29] Resolution of the Commercial (*Arbitrazh*) Court of the West Siberian District of 21 May 2020 № F04-1538/2020 in case № A75-13522/2019.

[30] Resolution of the Moscow District Commercial (*Arbitrazh*) Court of 29 March 2024 № F05-728/2024 in case № A40-28820/2023.

Article 31(3)(a) of the VCLT. Nonetheless, it is frequently invoked by judicial bodies in the resolution of disputes with an international dimension as an ancillary interpretative instrument. The application of Article 31(3)(b) of the VCLT permits the use of subsequent practice as a method of interpretation, yet its effectiveness is contingent on the consistency of the parties to the treaty. Jurisdictions such as the UK and the US are known to take foreign case law into account when interpreting a treaty, while others, like Russia, adopt a more conservative approach. For investors, the OECD Model Tax Convention provides a degree of legal certainty. This is facilitated by the mutual agreement procedure, but due to its non-binding nature and discretionary application by states, inconsistencies in interpretation persist. This highlights the continuing challenge of achieving greater harmonisation in the interpretation of international tax treaties.

2. Interpretation of tax treaties in the context of investment law

2.1. The concept of taxes in investment treaties

One of the primary aspects of regulation in investment treaties is the treatment of tax measures. It is essential to establish a clear understanding of what is encompassed by the term “tax measures” or “taxes” in the context of investment treaties between sovereign states. While international investment treaties do not explicitly define the concept of taxes or tax measures, they do delineate the legal framework for taxation.

In general, investment treaties address the issue of taxation in the context of the relationship between the sovereign rights of states and violations of investors' rights. This includes an examination of the criteria that are inherent in legitimate taxation.[31] The absence of a standardised treaty definition of taxes can be attributed to the fact that numerous states have disparate approaches to the definition of taxes in both domestic and international legal contexts. Furthermore, state signatories to investment treaties may have varying criteria for defining tax measures, and the enshrinement of a common standardised term may introduce complications to the treaty and tax regulation of treaty signatories. To illustrate, the classification of customs duties, export duties, tax deductions and allowances as tax measures in accordance with the provisions of the investment treaty represents a significant challenge.[32]

Commentators[33] also distinguish two directions in the definition of the term “taxes”, which are consistent with the features of the treaty and correlate with each other. The first direction concerns the concept of tax measures in their ordinary meaning, while the second one pertains to the meaning of the subject matter of the tax clause in investment treaties.

Accordingly, if the approach of defining tax measures in accordance with their ordinary meanings is adopted, the arbitrators employ a range of criteria, including:

- The functions of tax measures. The functionality of tax mechanisms can be categorised into four fundamental components. Primarily, the establishment of a pertinent legal instrument is necessary, establishing the framework within which tax measures operate. Second, specific categories of individuals or entities are obliged to adhere to the stipulated regulations. Third, the financial transactions involved in tax mechanisms necessitate the transfer of monetary sums to the designated authority, commonly referred to as the “state”. Last, the utilisation of funds derived from taxes is intended to serve public interests;
- The nature of the acts regulating tax measures in the legislation of the state signatory;
- The economic and legal effects of tax measures;
- The concept of tax measures from the standpoint of the domestic legislation of the state signatory in the context of the measure purposes; etc.[34]

Additionally, there are treaties that seek to restrict the scope of the “tax measures” definition in the context of investment legal relations. Accordingly, Article 21 of the Energy Charter Treaty defines tax measures as comprising any provision of the national legislation on tax measures of a Contracting Party,

---

31 Ozgur U. E. *Taxation of Foreign Investments Under International Law: Article 21 of the Energy Charter Treaty.* URL: https://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Taxation_of_Foreign_Investments_2015_en.pdf (accessed: 03.02.2025).

32 *EnCana Corporation v. Republic of Ecuador*. LCIA Case № UN3481. Award of 3 February 2006. Para. 142; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*. ICSID Case № ARB/04/19. Award of 18 August 2008. Para. 174–176.

33 *Taxes* // Jus Mundi – Wiki Notes. 23 September 2024; *Taxation Exclusions* // Jus Mundi – Wiki Notes. 30 September 2024.

34 *Nissan Motor Co., Ltd. v. Republic of India*. PCA Case № 2017-37. Decision on Jurisdiction of 29 April 2019. Para. 384–386; *Freeport-McMoRan Inc. v. Republic of Peru*. ICSID Case № ARB/20/8. Award of 17 May 2024. Para. 548.

in addition to any tax-related provision of a double taxation convention or any other international agreement or arrangement by which a Contracting Party is bound.[35] In consequence of the above, the arbitrators in the case of *Veteran Petroleum v. Russia* observed that there was no legal obligation to define the term "tax" in such treaties in a narrow manner.[36]

A significant number of disputes have highlighted the necessity to distinguish between tax measures and expropriation by the state. Consequently, arbitrators apply standards that differentiate between tax measures and expropriation. The aforementioned standards include those pertaining to the protection of tax measures;[37] the principle of national treatment;[38] the requirement of fair and equitable treatment;[39] the non-impairment standard;[40] and the countermeasure nature of taxes.[41]

Nevertheless, the arbitrators themselves emphasised that the presumption of legality corresponds to the sovereign right to collect taxes. Therefore, states have no obligation to adapt their tax regime to the interests of foreign investors, as the right to collect taxes supersedes the duty of states to accommodate the interests of foreign investors.[42]

To sum up, the absence of a standardised definition of taxes allows for different approaches to be taken by states, which in turn makes the harmonisation of regulations more challenging. Arbitral tribunals seek to utilise a range of criteria for the definition of taxes, taking into account factors such as the national legislation of the state party, international double taxation acts, the purpose of tax laws, and the tax policies of states. In instances where the determination of tax obligations in the context of investment treaties presents a particularly intricate challenge, arbitral tribunals may apply a range of standards in regulating the legal relationships associated with investments.

2.2. Tax clauses in the bilateral investment treaties

In the context of bilateral investment treaties (hereinafter — BITs), states seek to safeguard their interests and ensure a certain degree of autonomy in tax policy. Consequently, they endeavour to incorporate tax clauses into the treaties. The absence of such a clause significantly complicates the interaction between the investor and the national tax authorities, as well as the choice of applicable law and the interpretation of the treaty. In essence, all models of tax clauses contained in BITs can be classified into two principal categories: exclusionary and protective.

An exclusionary tax clause, as its name implies, excludes any taxation issues from the BIT. It is usually worded as follows: "The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by the Double Taxation Treaty Convention between the two Contracting Parties and the domestic laws of each Contracting Party".[43] In accordance with such a provision, any and all tax-related matters, including associated disputes, that emerge in the context of the safeguarding of investments or the implementation of international investment law would be governed by the tenets of international and national tax law.[44] The primary objective of a tax clause is to delineate the boundaries of the two legal domains as clearly as possible and to preclude the mitigation of tax law and tax disputes through investment arbitration, which, as will be demonstrated, represents the most comprehensive investor protection. Such a policy may be justified on the grounds of the inherent complexity of tax issues and the multiplicity of their interpretations.

Furthermore, tax clauses serve to safeguard the interests of the state itself. This is achieved by enabling the state to exclude potential litigation on the grounds of discriminatory treatment of investors or preferential treatment accorded to residents. For example, such a clause is contained in the German Model BIT:

---

35 The Energy Charter Treaty, adopted on 17 December 1994. P. 7, Art. 21.

36 *Veteran Petroleum Limited v. The Russian Federation*. PCA Case № 2005-05/AA228. Final Award of 18 July 2014. Para. 1411–1413.

37 *Marvin Roy Feldman Karpa v. United Mexican States*. ICSID Case № ARB(AF)/99/1. Award of 16 December 2002. Para. 109.

38 *Cargill, Incorporated v. United Mexican States*. ICSID Case № ARB(AF)/05/2. Award of 18 September 2009. Para. 219–220.

39 *Plama Consortium Limited v. Republic of Bulgaria*. ICSID Case № ARB/03/24. Award of 27 August 2008. Para. 222, 268–270.

40 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*. ICSID Case № ARB/11/24. Award of 30 March 2015. Para. 785–798.

41 *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*. ICSID Case № ARB(AF)/04/5. Award of 21 November 2007. Para. 144–150.

42 *El Paso Energy International Company v. Argentine Republic*. ICSID Case № ARB/03/15. Award of 31 October 2011. Para. 295.

43 Agreement between the Republic of Uganda, on the one hand, and the Belgium-Luxembourg Economic Union (BLEU) on the other hand, on the Reciprocal Promotion and Protection of Investments, 1 February 2005. Art. 4, para. 4. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/423/download (accessed: 01.05.2024).

44 United Nations Conference on Trade and Development. *Taxation*. UNCTAD/ITE/IIT/16. New York; Geneva : UN, 2000. P. 7–8.

> (4) The treatment granted under this Article shall not relate to advantages which either Contracting State accords to investors of third States by virtue of an agreement for the avoidance of double taxation in the field of taxes on income and assets or other agreements regarding matters of taxation.
> (5) This Article shall not oblige a Contracting State to extend to investors resident in the territory of the other Contracting State tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to investors resident in its territory.[45]

The exclusion of tax benefits for investors in some Model BITs serves to protect domestic companies, thereby providing protectionist treatment.[46] Conversely, certain tax clauses in BITs permit a state to exercise its prerogative to modify tax measures at its discretion with respect to a specific matter. For example, the Netherlands Model BIT contains a provision that an investment agreement shall not be construed as precluding a state from implementing any tax measures aimed at curbing tax evasion in accordance with the prevailing tax legislation and double taxation treaties.[47] A comparable stipulation is included in Brazil's Model BIT, albeit with the objective of ensuring equitable tax administration.[48]

The protective tax clause indicates that the BIT addresses a limited range of issues, with further specification provided in the context of investor protection. These issues typically pertain to National Treatment and Most-Favoured-Nation Treatment. For instance, Canada's Model BIT contains stipulations indicating that the aforementioned regimes are applicable to all tax measures except “taxation measures on income, capital gains or on the taxable capital of corporations”.[49] In the event of a dispute over a tax measure related to National Treatment or Most-Favoured-Nation Treatment, the investor is entitled to treat the dispute as arising from a breach of the investment agreement. Other model BITs protect the investor by giving primacy to the investment agreement in the event of a conflict between the investment agreement and any tax treaty. The US Model BIT provides a mechanism whereby the competent authorities are responsible for determining whether any inconsistency exists in the case of a tax treaty.[50] It is not evident how these authorities are to be held accountable. It may be the case that what is being proposed here is a joint tax consultation mechanism, which would entail cooperation on the discussion of a specific measure and its subsequent application in light of the investment treaty.[51]

As can be observed, the presence of tax clauses is a common feature of BITs. However, the specific meaning attributed to these clauses is always subject to interpretation by the courts on a case-by-case basis. In the case of *Link-Trading JSC v. Moldova*,[52] the arbitral tribunal determined that customs duties and fees were subject to the BIT, specifically the term “tax”, given their analogous fiscal character and imposition exclusively by the state. In the present case, the arbitrators interpreted the concept of “tax” broadly, since in the classical sense customs duties have a different nature, being imposed as a barrier to the importation and exportation of goods.[53]

The question of the scope of the “tax” concept in BITs has been addressed by arbitrators on numerous occasions. In addition to direct taxes, the issue has also been considered in relation to indirect taxes.[54] In the case of *EnCana v. Ecuador,* the arbitrators' reasoning extended beyond the attributability of an indirect tax to the concept of “taxation” as set forth in the BIT. They also determined the precise scope of what could be considered “taxation” in the context of the BIT. Consequently, the term “taxation” is defined

---

45 Federal Ministry for Economics and Technology. German Model Treaty, 2008. Art. 3. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download (accessed: 1.05.2024).

46 The Government of the Republic of Ghana. The Republic of Ghana BIT Model, 2008. Art. 5. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2866/download (accessed: 01.05.2024).

47 Netherlands Model Investment Agreement on reciprocal promotion and protection of investments, 22 March 2019. Art. 10. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download (accessed: 01.05.2024).

48 The Federative Republic of Brazil. Model Cooperation and Facilitation Investment Agreement, 2015. Art. 11. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download (accessed: 01.05.2024).

49 Government of Canada. Model Agreement for the Promotion and Protection of the Investments, Model FIPA 2021. Art. 11. URL: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng#article-11 (accessed: 01.05.2024).

50 The Government of the United States of America. Model BIT, 2004. Art. 21. URL: https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (accessed: 01.05.2024).

51 Walde T., Kolo A. *Coverage of Taxation under Modern Investment Treaties* // The Oxford Handbook of International Investment Law / ed. by P. Muchlinski, F. Ortino, C. Schreuer. Oxford : Oxford University Press, 2008. P. 352–354.

52 Ad hoc Arbitration. *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*. Final Award of 18 April 2002. Para. 63–65.

53 Davidenko L. G. *Nalogi i tamozhennye platezhi* [*Taxes and Customs Payments*]. M : Intermedia, 2014. P. 131–132.

54 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*. ICSID Case № ARB/06/11. Decision on Annulment of the Award of 2 November 2015. Para. 544–549.

as “legal liability on a class of persons to pay money to the State in respect of some defined class of transactions, the money to be used for public purposes”.[55] Furthermore, the concept of taxation as a duty is also referenced by arbitrators in other cases.[56]

It would appear that arbitrators adopt a dual approach to the definition of the term “taxation”. In some instances, they interpret it in a narrow sense, referring solely to payments designated as “tax” by the state in question. Conversely, in other cases, they adopt a broader interpretation, encompassing all forms of fiscal payments. This initial approach appears somewhat imbalanced, as it could potentially result in a scenario where states impose tax payments without clearly identifying them as such.[57] The arbitrators' approach to defining a tax through its characteristic features appears to be a logical one, as it helps to distinguish taxes from other fiscal payments. It seems reasonable to posit that if the definition of “tax” through its characteristics is included alongside the general definitions given in investment agreements, this would provide clarity as to which measures are considered “tax” in the context of BITs.[58]

2.3. Defining “investor” via tax treaties

The efficacy of the implementation of a number of international treaties is contingent upon the precision and accuracy of the terminology employed. This assertion likewise extends to the domain of international tax treaties. However, in such cases, there may be instances where the definitions of specific terminology are absent from the treaty, particularly in relation to other branches of law. Consequently, a number of international tax treaties comprise merely fundamental terminology pertaining to the domain of tax law. In instances where the definitions of such terms are unclear, they are referenced against the national legislation of the contracting states. The examples are:

> In the application of this Agreement at any time by a Contracting State, any term not defined in this Agreement shall have the meaning given to it at that time under the law of that State, unless the context otherwise requires.[59]
> As regards the application of this Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a common meaning.[60]
> As regards the application of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the laws of that State for the purposes of the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.[61]

It is evident that tax treaties of different states employ different approaches with regard to the definition of terminology that is not explicitly delineated within the confines of the agreement. Furthermore, the OECD Model Tax Convention outlines the mechanism of interpretation through national law, which acknowledges the flexibility afforded by this provision of the article in terms of interpretation.[62] The freedom afforded by this approach can be considered both an advantage and a disadvantage. On the one hand, this approach provides flexibility and does not require the parties to modify the agreement in case of obsolescence and updating of legal terminology, as well as amendments to national legislation, in case of differences in narrow definitions.[63] On the other hand, this approach does not ensure completeness of interpretation, which raises problems of interpretation. Nevertheless, the contracting states are entitled to settle any disputes pertaining to the interpretation of specific terms through a mutual agreement

---

55 *EnCana Corporation v. Republic of Ecuador*. LCIA Case № UN3481. Award of 3 February 2006. Para. 177.
56 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*. ICSID Case № ARB/04/19. Award of 18 August 2008. Para. 171–177; *Burlington Resources, Inc. v. Republic of Ecuador*. ICSID Case № ARB/08/5. Decision on Reconsideration and Award of 7 February 2017. Para. 423–426.
57 Walde T., Kolo A. *Op. cit.* P. 320–324.
58 Hong H.-H. *Op. cit.* P. 60–61.
59 The Agreement Between the Government of the Russian Federation and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 7 September 2000. Art. 3.
60 The Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes of 29 August 1989. Art. 3.
61 The Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains of 19 June 2008. Art. 3.
62 OECD Model Tax Convention. Para. 78.
63 Ibid.

procedure as outlined in Article 25 of the OECD Model Tax Convention. The conclusion of a protocol to the USA-France DTT resulted in the parties agreeing on the use of several terms, including "resident", which in some cases refers to "cross-border *investments* made through certain entities"[64] (emphasis added). The USA-Australia DTT elucidates the concept of "dividends", which is designed to encompass "all arrangements that yield a return on an equity investment in a corporation as determined under the tax law of the State of source, as well as arrangements that might be developed in the future".[65]

Therefore, the contracting parties in the Additional Protocols seek to regulate the terminology directly related to tax law, whereas other concepts are elucidated by national legislation. Consequently, the concept of "investor" is interpreted through the lens of national legislation, with each case being evaluated on its own merits. The definition of "investor" is problematic even in the context of bilateral investment treaties. While these treaties do provide criteria for identifying a specific individual as an investor, they do not offer a clear and consistent definition of the term "investor".[66] Consequently, the concept of "investor" is interpreted by courts on a case-by-case basis, taking into account the specific facts and circumstances of each situation.[67] Nevertheless, whereas the courts are directed by particular criteria in the resolution of investment disputes, no analogous criteria are provided in the context of tax legislation. Consequently, when adjudicating tax disputes, courts typically rely on national legislation and precedent set by national courts to ascertain the meaning of pertinent terminology.

In their deliberations on the interpretation of the concept of "investor", the courts of the Russian Federation have sought to apply the tenets of national legislation. To illustrate, in the case of *Asstra Trade Services*[68] the Russian court was required to ascertain the identity of the investor in order to apply the appropriate tax rate on dividends paid. The company argued that the appropriate methodology was to categorise any foreign entity participating in a Russian company as an investor, provided that it had invested funds and property in the company. The Russian courts did not concur with this perspective. The courts held that, in the absence of a definition of the term "investor" in the Russia-Switzerland DTT, the law of the state in which the dividends were paid, namely Russian law, should prevail. In accordance with the legislation of the Russian Federation, an "investor" is defined as a foreign legal entity or natural person who has the right to invest in the state. In this context, investment is defined as the injection of foreign capital into a Russian organisation, amounting to a minimum of 10% of the total authorised capital of the organisation. Consequently, in order to qualify for the preferential tax rate provided for by the Russia-Switzerland DTT, it is necessary to be an investor in accordance with the Russian legislation governing foreign investments.[69] In general, the majority of Russian courts adopt this approach.[70] A distinctive feature of this methodology is the judicial interpretation of the term "investor" in conjunction with the related concept of "investment". There is a doctrinal position that the use of a specific term should be considered in conjunction with its particular syntax and context.[71] This approach is also evident in practice.[72]

---

[64] Department of the Treasury Technical Explanation of the Protocol of 13 January 2009 amending the Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, 31 August 1994, as amended by the Protocol on 8 December 2004. Art. 1.

[65] Department of the Treasury Technical Explanation of the Protocol Between the Government of the United States of America and the Government of Australia, 27 September 2001, amending The Convention Between the United States of America and Australia with Respect to Taxes on Income, 6 August 1982. Art. 6, para. 6.

[66] Nikièma S. H. *Best Practices Definition of Investor* // The International Institute for Sustainable Development, 2012.

[67] *Phoenix Action Ltd v. Czech Republic*. ICSID Case № ARB/06/5. Award of 15 April 2009. Para. 39, 55–57, 63, 68, 86–88; *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*. ICSID Case № ARB/98/7. Award of 1 September 2000. Para. 1–26*; Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*. ICSID Case № ARB/07/27. Award of the Tribunal of 9 October 2014. Para. 243, 256, 286; *Tokios Tokeles v. Ukraine*. ICSID Case № ARB/02/18. Decision on Jurisdiction of 29 April 2004. Para. 27–41.

[68] Resolution of the Commercial (*Arbitrazh*) Court of the North-Western District of 25 May 2023 № F07-5095/2023 in case № A56-106038/2022.

[69] Federal Law of 9 July 1999 (as amended by 8 August 2024) № 160-FZ "On Foreign Investments in the Russian Federation". Art. 2.

[70] Resolution of the Commercial (*Arbitrazh*) Court of the Far Eastern District of 26 June 2020 in case № A59-4486/2019; Resolution of the Seventh Arbitration Appeal Court of 16 May 2018 in case № A27-331/2017; Resolution of FAS North-Western District of 12 April 2010 in case № A26-3052/2009; Resolution of FAS Moscow District of 17 September 2007, 24 September 2007 № KA-A40/9418-07 in case № A40-8013/07-80-33.

[71] Wittgenstein L. *Filosofskie raboty. Chast' I* [*Philosophical Works. Part I*]. M. : Gnozio Publishing House, 1994. P. 15; Bayramkulov A. K. *Tolkovanie dogovora v rossiyskom i zarubezhnom prave* [*Interpretation of a contract in Russian and Foreign Law*]. M. : Statut, 2016. P. 224.

[72] United Kingdom House of Lords Decisions. *Charter Reinsurance Company Ltd v. Fagan*, UKHL J0522-4 (1996). P. 13–14.

An alternative methodology observed in practice employs the concept of “dividends” to delineate the investor. As previously stated, the remit of tax treaties is limited to defining fundamental concepts; the term “dividends” is not among them. Nevertheless, the OECD Model Tax Convention defines “dividends” as profits distributed to shareholders and participants in a legal entity.[73] In order to resolve the question of what state party to the Russia-Czech Republic DTT is entitled to tax, the court[74] referred to the position of the Supreme Court of the Russian Federation, which stipulates that the recipient of dividends is to be considered an investor.[75] This interpretation is also evident in Russian practice, albeit less frequently than the aforementioned alternative.[76]

A comparison of these approaches reveals that the latter case entails a broader interpretation of the concept of “investor” than the former. In the latter case, any foreign participant entitled to receive dividends is recognised as an investor irrespective of its shareholding. In contrast, in the former case, a required percentage of participation must be met. Thus, if the narrower interpretation implying the required percentage of participation is applied, there is a risk that the right to a preferential tax rate may be unreasonably denied.

Similarly, German courts employ comparable methodologies when evaluating the foreign shareholding in a German company with the objective of recognising a foreign entity as an investor. In considering the application of the tax clause, a German court determined that a 30% stake in a company constituted an investment.[77] In another case, the court considered the possibility of recognising a contribution to a fund as an investment. In doing so, the court referred to the national legislation on investment funds and the German Fiscal Code, which imply the possibility of such an investment.[78] However, the courts did not assess the participation criterion. The approach of the German courts appears to be more flexible, allowing for a number of mechanisms through which foreign investments may be recognised as such. Consequently, it is classified as an investment if it is deemed to fall within the scope of the aforementioned approaches.

It is noteworthy that the UK courts adopt a distinctive approach, utilising the positions established by judges in other cases. To illustrate, in the case of *GE Financial Investments v. HMRC*, the presiding judge referred to the stance previously articulated by another judge, namely that in determining whether an investment in real estate with subsequent rental is to be classified as such, it is essential to evaluate the extent of involvement. In such instances, this is not comparable to the mere passive receipt of income (dividends).[79] In the case of *Salaried Persons Postal Loans Ltd v. HMRC*,[80] the court considered the Articles of Association of the company in question, which had been incorporated for the purpose of investment, to determine whether its activity constituted investment or business. The court thus rejected the argument that the activity was business-related and recognised the company as an investment company. The approach of the UK courts is to define investment based on the actual circumstances and objectives of the parties involved, which differs significantly from the purely legal interpretation by the Russian and German courts. Although this approach appears to be quite flexible and allows for all circumstances to be taken into account, it remains casuistic, which may have a negative impact on the investor due to the lack of clear criteria and the necessity for interpretation of other terms.

In the absence of a definition of the term “investor” in tax treaties and the OECD Model Tax Convention, the term remains effectively undefined. Despite the possibility of a uniform interpretation of the term through a protocol to a tax treaty, the interpretation is ultimately made by national courts, which may adopt disparate approaches. This may have a detrimental impact on the taxation of investor income.

73 OECD Model Tax Convention. Arts. 23A, 23B.

74 Resolution of the Commercial (*Arbitrazh*) Court of the North-Western District of 21 February 2023 № F07-861/2023 in case № A56-32007/2022.

75 Para. 9 “Review of the practice of court resolution of disputes related to the protection of foreign investors”, approved by the Presidium of the Supreme Court of the Russian Federation, 12 July 2017.

76 Resolution of the Moscow District Commercial (*Arbitrazh*) Court of 27 May 2016 № F05-6667/2016 in case № A40-116746/2015; Resolution of the Moscow District Commercial (*Arbitrazh*) Court of 25 January 2017 № F05-21597/2016 in case № A40-442/2015.

77 Bundesfinanzhof (BFH). *Unionsrechtsmäßigkeit der Hinzurechnungsbesteuerung im Drittstaatenfall*, BFH 22.05.2019 I R 11/19 (I R 80/14), StuB 23/2019 S. 939. Para. 17–24.

78 Bundesfinanzhof (BFH). *Mithilfe einer Pool-Finanzierung angeschaffte Investmentanteile; Abzug von Zinsaufwendungen bei nur mittelbarem Zusammenhang mit steuerfreien Einnahmen*, ECLI:DE:BFH:2023:B.131223.XIR39.20.0. Para. 2–28.

79 First-Tier Tribunal Tax Chamber. *GE Financial Investments v. HMRC*, STI 1715, UKFTT 210 TC (2021). Para. 72–81.

80 English and Wales High Court. *Salaried Persons Postal Loans Ltd v. HMRC*, STC (SCD) 851, (2005). Para. 28–49.

2.4. The interpretation of tax legislation in the context of investment disputes

Dispute settlement through arbitration is a right guaranteed by BITs, and this is one of the main reasons why investors tend to prefer dispute settlement under these treaties. The mechanism offered by the OECD Model Tax Convention is based mostly on mediation, which does not always guarantee a result. In addition, the competent tax authority assesses the merits of the case and has every right to make a decision,[81] and if such a decision is rejected for political or economic reasons, the investor's rights are not protected. In addition, the question remains as to whether only the substantive part, which includes the assessment of the correctness of the calculation of the tax, penalties and fines, and not the points of law, can be challenged.[82] The issue of the degree of the tax authority involvement also remains unresolved, as the OECD Model Tax Convention cannot prescribe a direct obligation to settle disputes. Dispute resolution through the mechanism of the Convention is reduced to uncertainty in the effectiveness of protecting the investor's rights, so it is logical to choose investment arbitration in this case.

The inclusion of an arbitration clause in tax treaties is allowed under the OECD Model Tax Convention,[83] however, there are many obstacles to the functioning of this mechanism. One of the main problems is the referral itself, which is limited to a certain category of cases. Furthermore, only if a national court or administrative body has not decided on a similar issue will a case be brought before an arbitral tribunal.[84] This decision is largely dictated by the will of the states themselves, which do not want to leave the question of tax policy to private arbitrators and thus jeopardise their own sovereignty.[85] Simultaneously, several states[86] have enhanced their DTTs with a provision pertaining to the potential for arbitral dispute resolution in instances where mutually agreeable negotiations prove unsuccessful in resolving disagreements. An examination of the US-Germany DTT[87] reveals that the scope for individuals to enter into arbitration is restricted to the competent public authority and other persons whose tax obligations may be directly impacted by the mutual agreement arising from such consideration. While it appears that investors are entitled to utilise this provision to arbitrate disputes, several factors must be considered. These include the dispute directly involving the investor's state and the possibility of different interpretations of "other persons", which may prevent the dispute from being considered by the arbitral tribunal. Notwithstanding the existence of this mechanism, there is a marked reduction in the possibilities for investor protection, as it is very difficult to utilise it in case of an unlawful decision.

It is equally important to consider the issue of the exclusion of the investor as a claimant. It is a matter of fact that, as tax treaties are concluded between states, only they are entitled to arbitration and the taxpayer-investors are unable to represent their interests in arbitration. Consequently, the arbitration clauses present in tax treaties appear to be an ineffective mechanism for the protection of investor's rights, as they leave a broad scope for discretion to tax authorities and states that, for political and other reasons, are not inclined towards arbitration.

Furthermore, even if a taxpayer is successful in obtaining an arbitration award under the terms of a tax treaty, there is no guarantee that the award will be enforced. The award is only binding on the states that are party to the agreement, and if one of the states is unwilling to enforce the award, it will remain unenforced because tax treaties do not provide for enforcement.[88]

---

[81] Limor R. *Taxpayers' Lack of Standing in International Tax Dispute Resolutions: an Analysis Based on The Hybrid Norms of International Taxation* // Pace Law Review. Vol. 34. № 3. 2014. P. 1068–1070.

[82] Ault H. J. *Improving the Resolution of International Tax Disputes* // Florida Tax Review. 2023. Vol. 7 № 3. P. 140.

[83] OECD Model Tax Convention. Art. 25(5).

[84] Ibid.

[85] Bird-Pollan J. *The Sovereign Right to Tax: How Bilateral Investment Treaties Threaten Sovereignty //* Notre Dame Journal of Law, Ethics and Public Policy. 2018. Vol. 32. № 1. P. 119.

[86] Agreement Between the Federal Republic of Germany and the French Republic for the Avoidance of Double Taxation With Respect to Estate, Inheritance and Gift Taxes of 12 October 2006. Art. 14. URL: https://docs.pca-cpa.org/2016/01/France-Germany-DTT-2009.pdf (accessed: 27.01.2025); The EU Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/463/EEC) of 20 August 1990. Art. 4(2). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41990A0436&from=de#d1e612-10-1 (accessed: 27.01.2025).

[87] The Protocol Amending the Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes of 29 August 1989, as amended by the Protocol on 1 June 2006. Art. 24. URL: https://www.irs.gov/pub/irs-trty/germanprot06.pdf (accessed: 27.01.2025).

[88] Chaisse J. *International Investment Law and Taxation: From Coexistence to Cooperation*. E15 Initiative. Geneva: International Centre for Trade and Sustainable Development and World Economic Forum, 2016. P. 10.

The aforementioned factors contribute to an increase in the demand for investment arbitration procedures. In particular, tribunals may consider tax issues pertaining to the payment of value-added tax (hereinafter — VAT),[89] the accuracy of tax audits,[90] and licensing matters within exclusive economic zones with a reduced tax regime.[91] However, these issues must be linked to violations of investment protection regimes such as expropriation, fair and equitable treatment or discrimination. In contrast to the provisions set forth in tax treaties, an investor whose state has entered into a BIT is entitled to submit an appeal directly to arbitration. Furthermore, investment arbitration is more advantageous for the investor, as the dispute is heard by independent arbitrators in accordance with the rules of arbitration, and the application procedure does not necessitate the completion of a mandatory bureaucratic process. This indicates that the investor's rights are afforded greater protection under the auspices of a BIT.

Furthermore, a BIT affords the investors the opportunity to have their rights safeguarded even in the event that the outcome of proceedings in domestic courts is deemed unsatisfactory by the investor. For instance, in the case of *Deutsche Bank v. Sri Lanka*[92] the investor's claims regarding the accuracy of the formula for calculating taxes on petroleum products were rejected by the Supreme Court of Sri Lanka. However, upon consideration of the dispute under investment arbitration, the tribunal determined that the state had breached the principle of fair and equitable treatment. Furthermore, in contrast to tax arbitration, investment arbitration is equipped with a mechanism to enforce arbitral awards. For example, Article 53 of the International Centre for Settlement of Investment Disputes (hereinafter — ICSID) Convention[93] equates an arbitral award with the national decision of a contracting state. Consequently, the obligation to enforce such an arbitral award falls upon the states parties. In the event of non-enforcement, the World Bank, of which the ICSID is an agency, is empowered to impose indirect measures such as conditionality of funding.[94]

It is important to note that one of the mechanisms for the enforcement of awards in investment arbitration is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter — New York Convention). Article I (1) of the New York Convention stipulates that the Convention applies to the recognition and enforcement of arbitral awards made outside the state in which enforcement is applied for.[95] This signifies that if an investment dispute has been arbitrated *ad hoc* (for instance, under UNCITRAL rules) or under various arbitral institutions (ICC, SCC, LCIA, etc.), the award falls within the scope of the New York Convention and may be enforced in the states parties. However, in cases where enforcement of an ICSID award proves difficult, some jurisdictions and scholars allow for the residual application of the New York Convention as an additional enforcement mechanism.[96] Consequently, the New York Convention emerges as a pivotal instrument for enforcing arbitral awards in investment disputes outside the ICSID regime, potentially offering an ancillary mechanism for investor protection in jurisdictions where the enforcement of ICSID awards encounters legal impediments.

Another category of cases in which investors have chosen to resolve a dispute through investment arbitration concerns cases of state tax abuse. To exemplify, the arbitration resulted in a favourable outcome for the investor due to the imposition of export duties by the state that were inconsistent with the national regime, thereby violating the investor's rights.[97] Another illustrative case is *RosInvestCo v. Russia*,[98] in which the arbitral tribunal considered a case of expropriation for tax evasion in the context of a tax treaty between states. In the case of *Mobil Corp. v. Venezuela*,[99] the tribunal ruled that indirect

---

[89] ICSID. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*. Decision on Annulment of the Award of 2 November 2015. Para. 527–549.

[90] PCA. *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award of 18 July 2014. Para. 68.

[91] *Antoine Goetz et consorts v. République du Burundi*, ICSID Case № ARB/95/3. Award of 21 June 2012. Para. 95–105.

[92] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*. ICSID Case № ARB/09/2. Award of 31 October 2012. Para. 30, 47.

[93] ICSID. Convention on the Settlement of Investment Disputes between States and Nationals of Other States // International Centre for Settlement of Investment Disputes. 1818 H Street, N.W. Washington, D.C. 20433, U.S.A. April 2006.

[94] Baldwin E., Kantor M., Nolan M. *Limits to Enforcement of ICSID Awards* // Journal of International Arbitration. 2006. Vol. 23. P. 1; World Bank. OP 7.40 – Disputes over Defaults on External Debt, Expropriation, and Breach of Contract, revised in February 2012. Para. 2–8.

[95] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards // New York, 10 June 1958.

[96] Kinnear M., Grob F. *The Residual Application of the New York Convention to ICSID Awards.* Chapter 73 // Reflections on International Arbitration / ed. by J. Bédard, P. Pearsall. Juris Publishing, 2022. P. 887–900.

[97] *Marvin Roy Feldman Karpa v. United Mexican States*. ICSID Case № ARB(AF)/99/1. Correction and Interpretation of the Award of 13 June 2003. Para. 8–15.

[98] *RosInvestCo UK Ltd. v. The Russian Federation*. SCC Case № V079/2005. Final Award of 12 September 2010. Para. 268–271.

[99] *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al) v. Bolivarian Republic of Venezuela*. ICSID Case № ARB/07/27. Award of the Tribunal of 9 October 2014. Para. 281–282.

expropriation was unlawful due to a considerable increase in the tax burden. While the primary motivation in these cases is the state's seizure of the investor's assets under the guise of tax policy, and such cases are typically not subject to tax treaty regulation, arbitrators have addressed taxation principles such as fairness and predictability of taxation. Consequently, it can be argued that BITs also encompass specific tax terminology that requires appropriate interpretation.

The question of the definition of the term "investment" was also addressed by the Russian commercial (*arbitrazh*) courts, which ruled in favour of the investor. Thus, the complexity of tax measures in Russian law is further compounded by the absence of a pre-trial procedure, which is not provided for by arbitration. This leads to the question of which party has standing as a plaintiff in the case of a parent and subsidiary company and to which court it should apply. If to assume that the parent company that made the investment is entitled to its defence, it would be unable to appeal the decision of the tax authority through the administrative procedure, as the decision is not considered to directly affect the rights of the parent company, i.e. the original investor.[100] Consequently, in such a case, the administrative appeal procedure is unavailable to the foreign investor, and therefore the judicial procedure is not available either. Consequently, an appeal against a tax measure is only possible through the mechanism provided by the BIT.

The primary objective of investment law is to safeguard the rights of investors. This is achieved through the implementation of two fundamental principles: the fair and equitable treatment and the non-discrimination of investors.[101] In order for an investor to obtain protection by means of investment arbitration, it is necessary to demonstrate that a decision made by the tax authority in question violates one of the aforementioned principles. However, this presents a significant challenge, as the rulings are based on the application of Russian law. In such cases, it would be necessary to prove that the tax authority's approach is indeed different from previous ones and discriminates against the investor. Nevertheless, there is no guarantee that the investor will be able to have the case heard, as the new approach may be applicable to all organisations.

The issue does not arise if the investor is entitled to act on behalf of a subsidiary, in which case the protection of its rights is provided by the national mechanism. However, should the Russian individual refrain from contesting the actions of the tax authority, it is presumed that the investor will be able to safeguard its investment only in the event of indirect expropriation, given that such an occurrence would be readily discernible as a violation of investment principles.[102] Therefore, although appealing, initiating a challenge to a tax decision through arbitration is not a straightforward process. This is due to the necessity of proving a breach of the BIT, which can be challenging. Furthermore, the option of arbitration involves avoiding the administrative settlement process and selecting independent arbitrators, which adds another layer of complexity.

A distinct issue arises when a subsidiary contests a tax ruling on its own behalf. An Italian energy company made an investment in a Russian organisation, which utilised those funds to enhance the functionality of equipment. The investments in question were subject to a tax incentive designed to encourage taxpayers to upgrade their assets.[103] The tax incentive was subsequently revoked, yet it remained applicable to the investments already made. The tax authority held the view that the requisite tax on investments should nevertheless be paid. The stance of the tax authority was predicated on the assertion that the Italian company had not made capital investments in accordance with the provisions set forth in the Law on Investment Activities,[104] and that there existed no pertinent agreements within the case file. The court highlighted the tax authority's misinterpretation of the concept of "investment".[105] The court's reasoning was as follows: when interpreting the notion of "investment", the tax authority failed to consider the intention of the domestic legislator to exempt the taxpayer from tax. It was therefore

---

[100] Order of the Federal Tax Service of Russia of 26 August 2019 № MMV-7-17/418@ (Registered with the Ministry of Justice of Russia on 5 December 2019 № 56704). Para. 96–106.

[101] Dolzer R., Kriebaum U., Schreuer C. *Principles of International Investment Law*. New York: Oxford University Press, 2008. P. 187.

[102] *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation*. SCC Case № 24/2007. Award on Preliminary Objections of 20 March 2009. Para. 62–63.

[103] Tax Code of the Russian Federation, para. 8, item 4 of Art. 374 and item 25 of Art. 381 (in force at the time of the commented judgement).

[104] Federal Law № 39–FZ (ed. on 25 December 2023) "On investment activity in the Russian Federation, carried out in the form of capital investments" // SZ RF 1 March 1999, № 9, 25 February 1999. Art. 1096.

[105] Resolution of the Moscow District Commercial (*Arbitrazh*) Court № F05-34562/2023 in case № A40-130509/2020 of 31 January 2024.

necessary to consider the economic substance of the transactions in question, which were carried out with the intention of contributing funds to the purchase of new equipment. This could be considered an investment, and therefore the concept of “investment” should be interpreted in light of this economic substance.

In this case, the court interpreted “investment” in accordance with the legislator's intentions and the purpose of the tax incentive, rather than the generally accepted meaning. This attitude had a positive impact on the final decision and the protection of the rights of the ultimate investor. The approach was also endorsed by the Supreme Court of the Russian Federation.[106]

Consequently, the procedure for resolving the dispute between the state and the investor is contingent upon the interpretation of the concepts of “investment” and “tax measures”. The issue remains problematic due to the public nature of tax disputes. However, if they are interpreted as violations of investor’s rights, the dispute is referred to arbitration.

Conclusion

The issue of the intersection between international tax law and investment law is complex and lacks a universal solution. The interpretation of key concepts utilised in both domains frequently encounters inconsistencies. The absence of a unified methodology for interpretation requires a case-by-case examination.

The judicial practice, while offering a variety of approaches to resolving such conflicts, does not provide an unambiguous answer. The incorporation of a specific exclusion clause in investment agreements can serve as a partial solution to this problem by clearly delineating the respective spheres of application of tax law and investment law. Nevertheless, the inclusion of such a clause does not entirely eliminate the contradiction, necessitating the further development of mechanisms for the interaction and interpretation of legislation in both spheres.

Notwithstanding the increasing need for the harmonisation of tax law and investment law in the context of globalisation, numerous contradictions in the interpretation of pivotal concepts persist. The existence of differences in legal systems, coupled with the diversity of entities with special status, renders the formulation of a unified approach to the resolution of emerging disputes a challenging endeavour. However, each such conflict represents a valuable learning experience that contributes to the further development and integration of both branches of law. This necessitates a continuous pursuit of novel mechanisms and formulations within international agreements, with the objective of eliminating contradictions and ensuring a more transparent and equitable implementation of norms pertaining to both tax law and investment law.

It is important to acknowledge the complexity and extent of the task of eliminating inconsistencies in the interpretation of international tax and investment treaties. This is a task that requires concerted coordination between international organisations and national governments. One possible solution to this challenge is to develop a standardised approach to a multilateral legal framework that clarifies the relationship between tax law and investment law. For this purpose, a specialised unit under the auspices of the OECD or the United Nations could be established to provide authoritative guidance on controversial terminology. Concurrently, the development of a thesaurus, analogous to the OECD Model Tax Convention, comprising definitions of key concepts and particular instances of their implementation, along with those pertinent to taxation and investment, is deemed more pragmatic. Furthermore, the enhancement of coordination among tax authorities through international cooperation frameworks, such as the OECD's BEPS Inclusive Framework Programme, is a conceivable prospect. The implementation of such a programme would serve to facilitate the establishment of consistent interpretative practices.

It is anticipated that these mechanisms will serve to eliminate ambiguity and limit reliance on extraneous sources of interpretation, such as domestic legislation or judicial precedents. These sources frequently result in inconsistent application and mitigation of conflicts between tax law and investment law. The ultimate consequence of these factors is the contribution to a more stable and predictable international environment.

---

[106] Decision of the Supreme Court of the Russian Federation № 305-ES24-7176 in case № A40-130509/2020 of 15 May 2024.

МЕЖДУНАРОДНЫЕ НАЛОГОВЫЕ И ИНВЕСТИЦИОННЫЕ ДОГОВОРЫ: ТОЧКИ ПЕРЕСЕЧЕНИЯ И ПРАКТИЧЕСКИЕ СЛОЖНОСТИ ТОЛКОВАНИЯ

ТИХОНОВА В. Р., ШАМУРЗАЕВ А.

Тихонова Виктория Романовна — помощник юриста, департамент международного налогообложения, SEAMLESS Legal, Москва, Россия (viktoria.tikhonova@seamless.legal).
ORCID: 0009-0001-9260-4631.

Шамурзаев Айбек — эксперт в области международного права, Бишкек, Кыргызстан (shamurzaev.aibek@gmail.com).
ORCID: 0009-0004-6083-5867.

Аннотация

Взимание налогов является одной из наиболее важных функций государства. Вместе с тем, налогообложение может представлять собой серьезное препятствие к стимулированию инвестиционного потока, необходимого для развития государства. Сфера налогового законодательства исторически считалась значительным барьером для инвестиций, в основном из-за присущей ей нестабильности. При этом при более детальном рассмотрении выясняется, что налоговая и инвестиционная отрасли права подходят к определению терминологии по-разному и руководствуются противоречивыми целями. Вследствие этого необходим баланс в разрешении споров и определении используемых терминов. Для решения вопроса о толковании налогового законодательства и проблем, возникающих на стыке с инвестиционной деятельностью, авторы провели анализ доктрины, международных и национальных правовых источников, а также судебной практики. В исследовании представлен нормативно-правовой анализ спорных ситуаций, возникающих при пересечении различных отраслей права, а также предложены механизмы устранения проблем взаимного толкования международных налоговых и инвестиционных договоров.

Ключевые слова

налоговое право, инвестиционное право, толкование договоров, Модельная конвенция ОЭСР

Для цитирования: Тихонова В. Р., Шамурзаев А. *Международные налоговые и инвестиционные договоры: точки пересечения и практические сложности толкования* // Журнал ВШЭ по международному праву. 2024. Т. 2. № 4. С. 53–68.

https://doi.org/10.17323/jil.2024.24744

Список литературы / References

Ault H. J. (2023) Improving the Resolution of International Tax Disputes. Florida Tax Review, vol. 7, no. 3, pp. 138–151.

Baker P. (1994) Double Taxation Conventions and International Tax Law. A Manual on the OECD Model Tax Convention on Income and Capital of 1992, 2nd ed., London: Sweet & Maxwell.

Baldwin E., Kantor M., Nolan M. (2006) Limits to Enforcement of ICSID Awards. Journal of International Arbitration, vol. 23, pp. 1–24.

Bird-Pollan J. (2018) The Sovereign Right to Tax: How Bilateral Investment Treaties Threaten Sovereignty. Notre Dame Journal of Law: Ethics and Public Policy, vol. 32, no. 1, pp. 107–133.

Bayramkulov A. K. (2016) Tolkovanie dogovora v rossiyskom i zarubezhnom prave [Interpretation of a contract in Russian and Foreign Law], Moscow: Statut. (In Russian).

Chaisse J. (2016) International Investment Law and Taxation: From Coexistence to Cooperation, E15 Initiative, Geneva: International Centre for Trade and Sustainable Development and World Economic Forum.

Davidenko L. G. (2014) Nalogi i tamozhennye platezhi [Taxes and Customs Payments], Moscow: Intermedia. (In Russian).

Davie M. (2015) Taxation-Based Investment Treaty Claims. Journal of International Dispute Settlement, vol. 1, no. 6, p. 202–227.

Dolzer R., Schreuer C. (2008) Principles of International Investment Law, New York: Oxford University Press.

Dörr O., Schmalenbach K. (2018) Vienna Convention on the Law of Treaties: a Commentary, Berlin, Germany: Springer.

Engelen F. A. (2004) Interpretation of Tax Treaties under International Law: A Study of Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties and Their Application to Tax Treaties, Italy: International Bureau of Fiscal Documentation.

Gidirim V.A. (2016) Tolkovanie mezhdunarodnykh nalogovykh soglasheniy v zarubezhnoy praktike [The Foreign Practice of Interpretation of International Tax Agreements]. Nalogi i nalogooblozhenie, vol. 2, pp. 85–142. (In Russian).

Hong H.-H. (2019) Reconciling International Investment Agreements with Domestic Tax Laws Through Restructuring Taxation Clauses in International Investment Agreements. Contemporary Asia Arbitration Journal, vol. 12, no. 1, pp. 41–70.

Lang M., Brugger F. (2008) The Role of the OECD Commentary in Tax Treaty Interpretation. Australian Tax Forum, vol. 23, pp. 95–108.

Limor R. (2014) Taxpayers' Lack of Standing in International Tax Dispute Resolutions: An Analysis Based on The Hybrid Norms of International Taxation. Pace Law Review, vol. 34, no. 3, pp. 1068–1070.

Maisto G., Ward D., De Broe L., Killius J., Le Gall J., Miyatake T., Van Raad K., Avery Jones J., Ellis M., Goldberg S., Torrione H., Wiman B. (2005) The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model, IBFD; Amsterdam; NLD.

Kinnear M., Grob F. (2022) The Residual Application of the New York Convention to ICSID Awards, Chapter 73. In: Bédard J., Pearsall P. (eds.) Reflections on International Arbitration, Juris Publishing, pp. 887–900.

Nikièma S. H. (2012) Best Practices Definition of Investor, The International Institute for Sustainable Development.

Qureshi A. H. (1994) The Public International Law of Taxation, Text, Cases and Materials, Kluwer Law International.

Ranjan P. (2023) Investor-State Dispute Settlement and Tax Matters: limitations on State's Sovereign Right to Tax. Asia Pacific Law Review, vol. 1, no. 31, pp. 219–234.

Resch R. X. (2018) The Interpretation of Plurilingual Tax Treaties Theory, Practice, Policy. Doctoral Dissertation, Leiden Law School; The Netherlands.

Stewart K. (1976) Tax Treaties-Exchange of Information-Use of IRS Subpoena Power in Response to Specific Requests for Information-United States v. United States. A.L. Burbank & Co. BYU Law Review, vol. 1976, no. 4, pp. 1019–1037.

Vogel K. (1997) Double Taxation Conventions: a Commentary to the OECD-, UN- and US Model Conventions for the Avoidance of Double Taxation of Income and Capital with Particular Reference to German Treaty Practice, Kluwer Law International B.V.

Walde T., Kolo A. (2008) Coverage of Taxation under Modern Investment Treaties. In: Muchlinski P., Ortino F., Schreuer C. (eds.) The Oxford Handbook of International Investment Law, Oxford: Oxford University Press, pp. 352–354.

Wittgenstein L. (1994) Filosofskie raboty. Chast' I [Philosophical Works. Part 1], Moscow: Gnozio Publishing House. (In Russian).