

The Private International Investment Concept and Categories

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Introduction

As in each national law system, and also in the international level, the term «investment» is treated «ad hoc». International practice, having not yet adopted a concise and relatively «stable» meaning at the term, refers to the text of International Treaties, Agreements, Contracts, in order to make adjustments and solve possible relative problem.

It should be stressed here that the concept is mainly set in its Economic dimension, with the Law Science and Justice employed - in cases - at a later stage.

Under this perspective, a multiple level approach of the term is attempted, with references to both texts of Foreign Treaties, Contracts and Agreements, and relevant (bilateral) Greek ones.

A further notice should be made that the subject has not yet been treated adequately by Science, Legislation, National Law Systems or International Law, given the high importance of foreign investment, in general.

According to the definitions of the IMF and of OECO, an FDI (Foreign¹ Direct Investment) is an investment that includes a long-term relation reflecting the continuous interest of a company/person of one country (the investor), on a company established in a different country.

The aim of the investor is the exercise of influence in the management of the company of the other economy. FDI is defined as the holding of 10% at least of the ordinary shares or of the voting share of a personal or public company.

The above definition is partially accepted by many countries - members of OECD and is a common place of reference for relevant enterprise action.

Thus, in the concept of the private FDI, the following categories can be described, combinations being possible amongst them.

1. See OECD: Detailed Benchmark Definition of foreign Direct Investment, Paris 1992.

I. Based on the «producer», the «owner» of the investment:

a. Private investment in which a private (person) or legal entity (Company, Bank, Consortium, Cooperative, of a country A invests in country B. Investment of this kind is the most common, due to the flexibility and possibility of bargaining on the terms and conditions, time and place of establishment, size and type of activity.

b. State-driven, or by other Entities of Public Law, of the investing country. Such FDI is usually of very large magnitude, and is usually a product of bilateral agreements between the investing and receiving country, or may be relevant to public investment.

c. Based on the above two categories, there may be a «third», mixed type FDI, in which the percentages vary without limits.

d. Another category is this of a multi-partite participation in which any of the above (a), (b) or (c) are met with Private, State or Public Entities of the receiving country.

Another category is the investment which springs specifically from International Organisations like the World Bank, the European Investment Bank, OECD, ONUDI, CAD, etc.

II. Based on the rationally expected and probable life-time of the foreign (as also the national) investment, it can be divided in:

a. Short-run investment, with usual life-time shorter than one year.

b. Medium-term investment, with usual life-time varying between one and five years.

c. Long-term investment, with a life-time longer than five years, without other (further) limits.

All the above - of course - are valid under common and stable «investment» and political situations, of which the stability is not always given or guaranteed.

III. Based on other criteria, the as above defined foreign Direct Investment may be:

a. Integrated, that is a one - off direct and one-phase investment.

b. Public or private. In the international economic literature two types of private investment are met:

- direct investment, and

- indirect investment, or portfolio investment.

Direct investment concern the creation or continuation of a permanent participation of foreign firms in national enterprises. In fact we have a short or medium term finance of national firms, from abroad, for productive or trade reasons.

In portfolio² investment occurs a transfer of economic resources from abroad for the purchase of shares or stocks of the national firms in portfolio investments, the foreign investors are interested in the largest possible returns of capital. It is practically a transfer of money from low-interest rate-areas to high-interest-rate ones, where capital is in demand. From the borrowers point of view the portfolio² investments are profitable, given that the opportunity cost of foreign capital is smaller than the domestic and the rates of return of such capital exceeds their costs.

2. See G. PETROCHILOS: *Foreign Direct Investment and the Development Process* Avebury, 1979, p. 1-15 and p. 33-47.

c. Following-up or secondary, as stemming from another activity, like the balancing benefits in a bilateral agreement, or the following-up responsibilities in a contract (e.g. selection of a Contractor for development of a Casino in Greece with the paralled responsibility of the contractor to build a marina at his own expenses, near the casino, or elsewhere).

d. Investment within the stock-market, with the service of specialists (stock-brokers), like purchase of stocks etc.

e. Monetary investment, in the meaning of capital being transferred from one country A to another B, through Banks or the Stoch-Exchange.

f. From another approuch, the leassing for a period of time, subject to an agreement, or the rental of patents can be considered as investment.

g. Long term investment of non-monetary type, like investment from one Country to another, where beyond the economic element of the investment there exist also factors as support for reconstruction, or aims for political influence.

h. Immaterial investment.

Immaterial investment is defined - internationally and in our country - the investment where the investor buys immaterial Bonds or logistical Bonds. Specifically in our country, the immaterial Bonds are covered by Law 2198/22.3.1994. Thus, the Greek State may borrow without issuing stocks, from private or legal entities and financial institution. These loans and their bonds are controlled by logistic transactions. The transactions are made by the Bank of Greece on behalf of the Greek State and terms are fixed by the Minister of Economics.

In this way, all the advantages of State-Bouds are valid (non-taxable, transferable) with no risks like loss of the paper, etc.

There is the possibility of purchases during the whole month and not only on fixed dates as with material-Bonds. In addition, with the system of immaterial bouds there are possibilities of investment in other ways, like with «futures», «options», etc. and flexibility in transfer of the bonds from bank to bank.

With the expected immaterialisation of other investment product - such as stocks of the Stock Exchange - opportunities will keep enlarging in these new investment products.

i. Another approach of the term (international) investment may be done with the texts of International Agreements or Inter-State Contracts. Thus, as investment is regarded «goods, responsibilities and interests»³ or «goods» rights and interests»⁴, while the term «capital investment» includes all categories of goods, rights and interests⁵.

IV. The concept in other contracts⁶

1. The term «investment», means any kind of property that is destined to be invested by one Contracting Party and is accepted by the other Contracting Party, according to its

3. *E.g. Agreement Belgium - Moroccos, 1985.*

4. *E.g. Agreement Switzerland - Tunis, 1983.*

5. *E.g. Agreement Netherlands - Senegale, 1979.*

6. *Law 2136/1993 ratification of the agreement between the Governments of the Greek Republic and the Peoples Republic of China for the promotion and bilateral protection of investment. See also law 2182/1994 ratification of the agreement of Goverments of Greek Republic and the Republic of Bulgaria for the promotion and bilateral protection of investmen.*

legislation in redevance to the Agreement. It specifically can contain (but not exclusively):

- a) Capital and fixed property and other rihths such as mortgage, insurance, deposit etc.
- b) Company shares, stocks, bonds and any other participation liste.
- c) Loans, debts and other economic contracts.
- d) Rights of industrial property, know how, technology, fame, etc.
- e) Submission of business rights under a law or a contract, such as for research, development, or exploitation of natural resources.
- f. Goods, that under leasing agreement belong to the owner but in use by the Contract beneficiary in his own territory.

2. The term «returns» means the income of an investment and specifically (but not exclusively) includes, profits, interest, dividents, surplus value, legal industrial rights and other receipts.

3. The term «Investor» includes:

- a) As regards the Greek Republic: privates with the greek nationality and public entities - according to Greek Legislation, based on Greek territory.
- b) As regards the Peoples' Republic of China: privates with nationality or the Peoples' Republic of China and economic entities according to the Laws of P.R.C. and based on its territory. Or more⁷.

1. The term «investment» means assets of any kind and any contribution in goods in any kind of economic activity and specifically but not exclusively:

- a) Fixed or not property and any other right as mortgage, deposits, insurances, and other rights.
- b) Shares and other sort of participation in companies.
- c) Money expected and any other economic expectation due to contracts.
- d) Rights such as patents, blueprints etc.
- e) Submissions of business rights of public law for the exploitation or research of natural resources.

No change in the legal form of the invested goods or capital can change. Their status of «investment» under this Agreement.

The above investments are carried out according to the Legislation of the receiving country.

2. The term «investor» means:

- a) Any private who has the Greek or Moroccan nationality according to Greek

7. Law 2245/1994 ratification of the agreement between the Governments of the Greek Republic and the bilateral promotion and protection of investments.

Const. GE. ATHANASSOPOULOS: La notion d' investissement productif privé. Bruxelles, 1994, p. 7.

Legislation or this of the Kingdom of Morocco, respectively and carries out investment in the other Contracting Party.

b) Any public entity which is based on the Republic of Greece or Kingdom of Morocco and accords to the respective legislation, and carries out investment in the territory of the other Contracting Party.

3. The term «return» means the cleared earnings of an investment and specifically, but not exclusively profits, interest, dividends, earnings due to industrial rights, including administrative earnings according to contracts and the receiving country's legislation.

The reference of the terms regarding investment made by Law 2248/10-11-1994 is characteristic, regarding the Agreement between the Governments of Greek Republic and the Russian Federation for the promotion and bilateral protection of investment.

The term «investment» means any kind of property being invested by the investor of one Contracting Party on the territory of the other Contracting Party, according to the legislation of the later and includes specifically but not exclusively:

- a) Fixed or not property and any rights on it.
- b) Company shares, stocks and any kind of participation in companies or enterprises.
- c) Money expectation or other economic expectations due to contracts.
- d) Rights such as industrial rights, industrial fame, technical procedures and know-how.
- e) Rights that are submitted according to a law or a contract for business activity relevant to an investment including rights for research, development or exploitation of natural resources.

f. Leasing. The term «investor» means for every Contracting Party:

- a. Privates having the nationality of one contracting Party and according to its legislation.
- b. Public entities according to the legislation of one contracting party and being based on its territory, as long as the private of legal entities have the right according to the legislation of one Contracting Party to carry out investments on the territory of the other Contracting Party.

The term «Returns» means the income brought by an investment and includes specifically, but not restrictively profits, interests, dividends surplus value, industrial rights and other earnings (article 1).

In most Contracts and Agreements the term Investment focuses on three homocentric cycles.

- a. It covers firstly goods, rights and interests and property rights and interests.
- b. It includes rights and goods which are considered by the legislation of the country to «consist the concept of investment».
- c. Consists of Catalogues, of goods/rights/responsibilities, actions/positive actions, which being mentioned in a Contract or Agreement ad hoc, the mentioned elements consist by themselves «investment» and are regarded legally respectively.