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PROTECTION OF FOREIGN INVESTMENTS AND ARBITRATION PROCEEDINGS: TRENDS OF RECENT YEARS

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Abstract
The article examines the evolutionary stages of the development of international investment arbitration, as well as key mechanisms for the protection of foreign investors, including the investor-state dispute settlement (ISDS) system. Particular attention is paid to the contemporary transformation of arbitration practice, driven by criticism of the lack of transparency in procedures, the high cost of proceedings, and interference with the regulatory sovereignty of states. Reform initiatives, including the project of a Multilateral Investment Court (MIC), aimed at increasing the legitimacy and effectiveness of the system, are analyzed. Illustrative arbitration cases are presented, demonstrating the pursuit of a balance between the protection of investors and the safeguarding of public interests. The work contributes to a deeper understanding of current trends in international investment protection and the legal regulation of investment relations.

Keywords: Foreign investments, international arbitration, investment disputes, international public law, investor protection, ISDS, investment treaties.

Novelty
The novelty of this scientific article lies in its comprehensive analysis of the transformation of international investment arbitration in the context of global challenges and reforms. Unlike most works, which predominantly focus on the historical-legal aspect or the technical characteristics of arbitration procedures, this article presents a systematization of the stages of development of investment

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arbitration with a focus on current reform trends, including the formation of new international institutions (e.g., MIC) and the reinterpretation of the content of investment agreements. Additionally, special attention is paid to the practice of specific arbitration cases, demonstrating the evolution of approaches to the balance between the interests of investors and the sovereign rights of states. This approach allows for a new understanding of the prospects for the further development of legal mechanisms in the field of foreign investment protection.

In the era of global economic integration and the increasing interdependence of national economies, the legal protection of foreign investments becomes a key factor determining the stability and attractiveness of the investment climate. In this context, international investment arbitration (IIA) serves as a priority instrument for resolving disputes between investors and host states.

Foreign investments are recognized as a key factor in economic growth, especially for states with emerging markets. However, the activities of investors are associated with significant risks, including political instability, nationalization of assets, the application of discriminatory practices, as well as unpredictable changes in the regulatory environment. To protect their legitimate interests, investors increasingly resort to the means of international investment arbitration, in particular, the investor-state dispute settlement (ISDS) mechanism. This system has undergone significant changes in recent years, driven by both critical analysis of existing procedures and practices, and the initiation of reforms by international organizations. These changes aim to improve the efficiency, transparency, and legitimacy of the ISDS system.

The analysis of the evolution of approaches to the resolution of investment disputes requires consideration of the key stages in the development of this legal institution. Various periodizations are proposed in the academic literature, based on certain historical and legal characteristics. One approach divides the development of investment arbitration into three main stages, depending on the transformation of the attitude towards the resolution of disputes between investors and states.

The **first stage** covers the first half of the 20th century. A characteristic feature of this period was the nationalization carried out in a number of countries, where private property, including foreign assets, was subject to complete alienation in

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favor of the state. This behavior of states provoked a sharp reaction from capital-exporting countries, which did not recognize the legality of nationalization acts without fair compensation and insisted on obligations to pay compensation. Expropriating states, on the contrary, referred to the provisions of their own legislation and refused to satisfy the corresponding demands. In addition, conflicts arose related to attempts to return property expropriated during the absence of owners in the territory of these states. In Russian legal doctrine, this issue was actively studied, in particular, from the point of view of the correlation between state sovereignty and obligations to foreign investors. Thus, it was argued: "Based on the principle of state sovereignty, the state has the exclusive right to regulate relations concerning property, including the right to its nationalization" [1].

The **second stage** falls between the 1950s and 1970s and is associated with the processes of decolonization, as well as the strengthening of the economic sovereignty of developing countries in Asia, Africa, and Latin America. During this time, recipient states of capital began to adopt specialized laws and investment codes regulating the procedure for the implementation and protection of investments. In practice, this was accompanied by an increase in the number of disputes caused by the unilateral termination or amendment of investment agreements, as well as the continuation of the practice of nationalization. Such actions by host states were interpreted by foreign investors and their countries of origin as a violation of international obligations. As a result, investors made claims for the international responsibility of states for non-compliance with the terms of treaties and principles of international law.

A significant event of this period was the signing in 1965 of the Washington Convention, which established the International Centre for Settlement of Investment Disputes (ICSID). The mechanisms for the protection of investors' rights provided within the framework of ICSID were fundamentally different from the traditional procedures operating within national judicial instances or commercial arbitration. They provided an independent and neutral platform for resolving conflicts between an investor and a state. Also during this period, steps were taken towards the codification of norms governing issues of jurisdictional immunity. In 1972, the European Convention on State Immunity was concluded,

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establishing standards limiting absolute immunity in commercial and investment matters, which contributed to expanding the possibilities for holding states accountable in arbitration forums.

Within the framework of the second stage of the development of the investment dispute settlement system, key legal doctrines were formed that defined approaches to the relationship between foreign investors and host states.

Starting from the first half of the 1980s, the **third stage** in the development of the international investment protection system begins. Its key factor was the opening of the markets of Eastern European countries, which significantly expanded the investment space and actualized the need for clearer legal regulation of relations between investors and host states. In response to the increased risks associated with investing capital in transition economies, capital-exporting states began to develop and implement national foreign investment insurance programs. These programs aimed to minimize political and regulatory risks by providing guarantees from state structures.

One of the significant international achievements of this period was the signing on October 11, 1988, of the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) [2]. This specialized agency of the World Bank was created to encourage the flow of foreign direct investment into developing countries by providing insurance protection against non-commercial (political) risks, such as expropriation, currency restrictions, breach of contract, and political instability. MIGA's activities played an important role in the institutionalization of the protection of foreign investors and the strengthening of confidence in the investment climate in countries with transition economies.

The modern architecture of the legal protection of foreign investments is the result of the convergence of norms of public and private international law. The foundation of this system is bilateral (Bilateral Investment Treaties, BITs) and multilateral (Multilateral Investment Treaties, MITs) investment agreements, aimed at establishing a favorable legal regime for foreign investment. These agreements typically contain provisions on protection against expropriation, fair and equitable treatment, and dispute settlement mechanisms, which helps to strengthen investor confidence and stimulate capital inflow.

The main principles enshrined in investment agreements include [3]:

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Table 1 – Principles in Investment Agreements

Principle	Description
Fair and Equitable Treatment (FET)	Ensures the protection of foreign investors from discrimination, arbitrariness, and unfair treatment by the host state.
Protection against expropriation (direct and indirect)	The state has no right to alienate an investor's property without legal grounds and without the payment of fair compensation.
Freedom of transfer of funds	Investors are granted the right to the free transfer of profits, capital, and other monetary funds abroad.
National treatment	Foreign investors should be granted a regime no less favorable than that granted to domestic (national) investors.
Most-Favored-Nation (MFN) treatment	A foreign investor is ensured a regime no less favorable than the conditions granted to investors from any third countries.

Экспортировать в Таблицы

Of particular importance in the investment protection mechanism is the settlement of disputes between an investor and a state. In addition to ICSID, which we mentioned above, alternative arbitration mechanisms are widely used in modern practice:

1. **UNCITRAL Arbitration Rules**, developed by the United Nations Commission on International Trade Law, which define the procedural aspects of arbitration proceedings.
2. **ICC Arbitration**, which is one of the most recognized and respected institutions of international arbitration.
3. **SCC Arbitration Institute**, specializing, in particular, in the resolution of disputes involving states formed in the post-Soviet space.
4. **London Court of International Arbitration (LCIA)**, which is an authoritative platform widely used in the consideration of investment disputes [4].

In the last decade, there has been increasing criticism of the investor-state dispute settlement (ISDS) system, traditionally applied within the framework of bilateral investment treaties (BITs) and multilateral treaties. One of the key arguments of critics is the lack of transparency in arbitration procedures, which manifests itself in the closed nature of proceedings and limited public access to information about the decisions taken.

In addition, the significant financial burden of arbitration processes is noted. According to UNCTAD data (2020), the average amount of costs incurred by the

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parties in investment arbitration is approximately 8 million US dollars, including the remuneration of arbitrators and the payment for the services of legal consultants [5]. This factor creates barriers to access to justice, especially for developing countries and small enterprises.

Inconsistency in the application of legal norms and precedents in arbitration practice also poses a serious problem. There are cases where disputes similar in substance are resolved by arbitral tribunals in diametrically opposite ways, which reduces the predictability of the system and undermines confidence in it among investors and states.

Criticism of the possibility of investors challenging legitimate regulatory measures taken by states to protect public interests, such as public health, environmental protection, and social justice, is particularly acute.

In response to these challenges, a number of states have initiated the revision or termination of existing BITs. In particular, the Republic of South Africa terminated a number of investment agreements in 2013, citing the need to adapt investment protection mechanisms to the tasks of national development. India developed a new model BIT in 2016, significantly limiting the grounds for investors to file claims. Indonesia also refused to automatically extend a number of BITs, emphasizing the priority of protecting state sovereignty in matters of regulating investment activity.

In response to the growing criticism of the ISDS system, initiatives aimed at forming a more sustainable and institutionalized mechanism for resolving investment disputes are actively being discussed. One of the most promising projects is the European Union's proposal to create a Multilateral Investment Court (MIC) [6]. The concept of the Multilateral Investment Court (MIC), proposed in 2017, represents an alternative approach to traditional ad hoc arbitration proceedings. The distinctive characteristics of the MIC are: the existence of a permanent institutional structure, the introduction of an appellate mechanism, as well as increased requirements for the independence and impartiality of judges. This initiative, supported by a number of states, including Canada, Singapore, and Uruguay, reflects the aspiration of the international community to form a more balanced, predictable, and legitimate system for resolving investment conflicts.

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In addition to institutional reforms, changes are observed in the content of new investment agreements. Modern treaties strive for a clearer definition of the right of states to regulate in the public interest, including issues of healthcare, environmental protection, and the observance of labor standards.

Thus, there is a transformation of modern investment arbitration practice from a paradigm of primarily protecting the interests of investors to a more balanced model that takes into account both the economic interests of business and the sovereign right of states to carry out regulatory activities to protect public interests.

In confirmation of this trend, let us consider the modern arbitration practice in the field of international investment protection, which demonstrates an increased desire of arbitral tribunals to achieve a balance between the rights of investors and the sovereign rights of states. An analysis of three illustrative cases that have significantly influenced the development of investment arbitration is proposed.

Table 2 – Illustrative Cases in Investment Arbitration

Case	Subject of Dispute	Decision and Significance
Vattenfall v. Germany (II) [7]	Germany's decision to phase out nuclear energy after the Fukushima nuclear accident. The company claimed a violation of investment expectations and losses due to the premature closure of nuclear power plants.	Peaceful settlement in 2021 with compensation paid to Vattenfall. Confirmation of the state's right to environmental regulation, provided that international investment obligations are respected. Strengthened the position on the need to balance environmental policy and investment protection.
Philip Morris v. Uruguay [8]	Strict anti-tobacco regulations in Uruguay (restrictions on packaging and advertising of tobacco products). The company claimed a violation of its rights as an investor.	In 2016, the ICSID tribunal ruled in favor of Uruguay. Confirmation of the priority of public health protection over the rights of investors. Establishing a precedent for the right of states to regulate in the public interest, which is not equivalent to expropriation.
Yukos v. Russia [9]	Actions of the Russian state against the oil company Yukos (tax claims, asset seizures, bankruptcy).	In 2014, the Permanent Court of Arbitration tribunal in The Hague ordered Russia to pay more than US$50 billion to Yukos shareholders. Recognition of Russia's actions as indirect expropriation violating the provisions of the Energy Charter Treaty. Establishing a practice of protecting investors from abuse of sovereign powers, but with subsequent debates about the limits of arbitration intervention in matters related to the public interest.

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Thus, based on the analysis of the presented cases, it can be concluded that modern investment arbitration demonstrates a tendency to seek a compromise solution in which the protection of the investor's legitimate investment expectations is balanced by the need to ensure the state's ability to exercise its regulatory powers. The consideration of public interests, including healthcare, environmental safety, and energy policy, indicates a shift in emphasis from the unilateral protection of investments to a multifaceted assessment of the legitimacy of state intervention.

The analysis of international practice shows that the protection of foreign investments and the settlement of disputes involving states require continuous adaptation to changing economic and social conditions. The reform of the arbitration system aims to create a more just, transparent, and balanced mechanism that ensures both the protection of investors' rights and the preservation of the sovereign prerogatives of states. In the future, further development of new standards, the integration of environmental, social, and governance (ESG) factors, as well as the expansion of multilateral cooperation in the field of investment jurisdiction [10] can be expected. These trends are aimed at increasing the efficiency and legitimacy of the foreign investment protection system in the context of globalization.

REFERENCES:

1. Vilkov G. E. Nationalization and International Law. - M.: [s. n.], 1962. - 142 p.
2. Ministry of Foreign Affairs of the Russian Federation. Multilateral International Treaties [Electronic resource]. - URL: https://www.mid.ru/ru/foreign_policy/international_contracts/international_contracts/multilateral_contract/50977/ (accessed: 16.05.2025).
3. Dolzer R., Schreuer C. Principles of International Investment Law. - 2nd ed. - Oxford: Oxford University Press, 2012. - 454 p.
4. OECD. Investor-State Dispute Settlement: Public Consultation on Reform Options [Electronic resource]. - 2021. - URL: https://www.oecd.org/investment/investor-state-dispute-settlement.htm (accessed: 16.05.2025).

5. UNCTAD. World Investment Report 2020. - Geneva: United Nations, 2020. - 248 p.
6. European Commission. Multilateral Investment Court Project [Electronic resource]. - URL: https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en (accessed: 16.05.2025).
7. Rattsakuten. Dispute Resolution Case [Electronic resource]. - URL: https://rattsakuten.com/dispute-resolution-case/ (accessed: 16.05.2025).
8. IISD. Philip Morris v. Uruguay [Electronic resource]. - URL: https://www.iisd.org/itn/2018/10/18/philip-morris-v-uruguay/ (accessed: 16.05.2025).
9. IISD. Yukos v. Russia: Issues and Legal Reasoning Behind US$50 Billion Awards [Electronic resource]. - URL: https://www.iisd.org/itn/2014/09/04/yukos-v-russia-issues-and-legal-reasoning-behind-us50-billion-awards/ (accessed: 16.05.2025).
10. Institute of Law and Public Policy. To Change or Not to Change: Investment Arbitration Between Big Business and National Interests [Electronic resource]. - URL: https://legalacademy.ru/sphere/post/izmenit-nelzya-ostavit-investicionnyi-arbitrazh-mezhdu-krupnym-biznesom-i-nacionalnymi-interesami (accessed: 16.05.2025).