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The Relationship between Taxation and Bilateral Investment Agreements – Case of the Slovak Republic

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ABSTRACT

One of the key characteristic features of the recent globalised world is cross-border investments. Due to this fact foreign investors and their investments in host countries need appropriate protection. Alongside with legal issues of protection of investors, another important issue arises too, namely necessity to eliminate double international taxation. Both issues, protection of foreign investors and investments plus elimination of double taxation, are covered by international, mostly bilateral treaties. This paper focuses on interaction between bilateral investment treaties and bilateral tax treaties, searching for potential overlap between them, and whether and how it is restricted. The paper is divided to the three sections, where first section focuses on the principles of treatment that are incorporated in the bilateral investment treaties. Second section puts under scrutiny detail relationship between bilateral investment treaties´ clauses and taxation. Third section surveys dispute settlement according bilateral investment treaties established by Slovakia. Detailed study of relation between bilateral investment and bilateral tax treaty shows, that in case of those treaties established by Slovak republic there is no overlap between them.

Keywords: investments, taxes, bilateral investment treaties, bilateral tax treaties, overlap, arbitration

INTRODUCTION

Slovakia uses bilateral investment treaties as an instrument for support and provision of guarantees in the area of international direct investment. Specifically, these treaties are called Agreements on Promotion and Mutual Protection of Investment. In terms of contents they contain especially the following: essential concepts definitions, provisions on promotion and protection of investment, provisions on national treatment and most-favored-nation clauses, provisions on the damage and possible losses liability in respect to the investment, provisions on possible expropriation, determination of possible performance criteria, provisions on transfer and assignment of rights, mechanisms of investment disputes treatment between the contracting party and investor entities as well as between the respective contracting parties, treaty performance and implementation guarantees as well as provisions on applicability and legal effectiveness.

The current status of the treaties is the following: signed treaties between Slovakia and some other country amounts to 55, out of which, nevertheless, there are 54 that are effective and valid – in February 2014 the Treaty with Indonesia was terminated. In order to facilitate the process of treaties conclusion, but mainly due to current results in the area of international investment arbitrations held because of the existence of the bilateral investment treaty, the Ministry of Finance of the Slovak Republic prepared a model bilateral investment treaty that represents the basis for negotiations with the third parties and derives from the current situation in the area of international arbitrations [14].

Pursuant to the new implemented regulatory framework within EU as well as pursuant to the Regulation (EC) No 1219/2012 of the European Parliament and of the Council prior the negotiation on the model treaty with the third parties the model treaty shall be sent to EU before its approval for authorization of the European Commission [8]. Since it has also been a long-term priority to review and renegotiate the valid bilateral investment treaties it has to be noted that also in this case the European Commission has to grant authorization and confirm that the bilateral treaty is in compliance with the European law and that it is not redundant.

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The intentions of Slovakia concerning establishment of conventions for avoidance of double taxation as well as treaties on investment promotion and protection have one common denominator in the fact that establishment of these treaties focus countries with which Slovakia has significant economic ties. In line with the document elaborated by the Ministry of Foreign Affairs, it has been a long-term priority of the Ministry of Finance to start expert level negotiations especially with the following countries: Nigeria, Botswana, Tanzania, United Arab Emirates, Laos, Hong Kong, Macao, Oman, Kazakhstan (the treaty has been already signed), Mongolia, Bahrain, Cambodia. Similarly, in a long-term perspective it is a priority of the Ministry of Finance to establish bilateral investment treaties with Georgia, Azerbaijan, Armenia, Kyrgyzstan, Uganda (the treaty is at the stage before signature), Rwanda and Qatar. In 2014 there was held the first round of expert negotiations on conclusion of the bilateral investment treaty between the Slovak Republic and Iran, in which case discussions have been already based on the model investment treaty. For 2015 Slovakia has it as a priority to hold/ conclude expert negotiations with Iran, United Arab Emirates, Ethiopia, Azerbaijan as well as Kyrgyzstan. Due to the fact that since 2004 Slovakia has been a member of the European Union, its membership in many multilateral and bilateral free-trade conventions was terminated. It concerns for example the Central European Free Trade Agreement that Slovakia left by acceding the EU. Slovakia as a member of the EU entered all the multilateral as well as bilateral treaties on free trade in which one of the contracting parties is represented by the European Union. For example it concerns free-trade agreements between the EU and Albania, EU and Lebanon, just as well as EU and Monte Negro.

PRINCIPLES OF TREATMENT IN THE BILATERAL INVESTMENT TREATIES ESTABLISHED BY THE SLOVAK REPUBLIC

Fair and Equitable Treatment

With regard to the subject matter of legislation concerning the international treaties on investment, as well as with regard to their scope, the fundamental provisions within the structure of BITs should include a provision providing for the mutual relationship of the countries - parties to the treaty in respect to the requirement of the fair and equitable treatment [3]. The contents and structure of BITs is substantially determined by and contingent on the main strategic objectives pursued by the countries – parties to the treaty in promoting and protecting the investment of the other country – party to the treaty, within its territory. This implies that also the concept and formulation of the provision on equal treatment will be subject to these objectives. Depending on how the states – parties to the treaty formulate provisions on equal treatment, it is in general possible to classify several types of formulations of the equal treatment provision.

Table1. *Variants of formulation of the principle of fair and equal treatment in BITs established by the SR*

Type of the formulation of the principle of fair and equal treatment in BITs	Contracting State
the customary international law minimum standard	Kuwait, Mexico
a broader international law standard including other sources such as investment protection obligations generally found in treaties and general principles	Egypt, Cuba, Belarus, Bosnia&Herzegovina, Denmark, Canada, Croatia, Finland, Hungary, Germany, Israel, Jordan, Kenya, Korea PR, Korea, Lybia, Macedonia, Malaysia, Poland, Slovenia, Portugal, Romania, Russia, Malta, Moldava, Morocco, Netherland, Norway, Serbia, Singapur, Spain, Turkey, Sweden, Switzerland, Turkmenistan, United Kingdom,
the standard is an autonomous self-contained concept in treaties which do not explicitly link it to international law	Bulgaria, Latvia, Libanon
no FET	China, Finland

One of the classifications of the principle of fair and equal treatment formulations has been presented by the OECD document. It presents the following three types of formulations: first, the customary international law minimum standard; second, a broader international law standard including other sources such as investment protection obligations generally found in treaties and general principles);

third, the standard is an autonomous self-contained concept in treaties which do not explicitly link it to international law) [3]. Table 1 shows presence of the fair and equal treatment clause in its variations in the BITs established by the SR.

National Treatment and Most Favoured Nation Treatment

In the introduction to the analysis of this topic it is necessary to characterize the *national* legislation that relates to business activities of foreign persons in the SR, and thus in general govern treatment of foreign investors as well as investment in the SR. The basic piece of legislation regulating the rights and obligations of foreign persons doing business in Slovakia is the Commercial Code No 513/1991 Coll. of Laws. Art. 21 thereof sets out that foreign persons can implement business activities on the territory of the SR within the same scope and under the same conditions as Slovak nationals, and Art. 25 thereof set out rules of protection of property interests of foreign persons doing business in Slovakia, including expropriation and under which condition it can happen.

Depending on the subject matter, scope as well as objectives of the bilateral investment treaties, treaties established by different countries all over the world feature several variants of wording of the provision on national treatment. The review of various wordings of national treatment clause and its presence in the BITs signed by the Slovak Republic is shown in the table 2.

Table2. *Formulation of the provision on the national treatment in BITs signed by the SR*

Type of formulation of national treatment clause	BITs' Contracting States
No national treatment	Malaysia, Norway, Spain, Sweden
There is national treatment :	
Post-establishment national treatment	
Limited post-establishment national treatment	Chinba,
Full post-establishment national treatment	Bulgaria, Canada, Coratia, Hungary, Israel, Jordan, Kenya, Korea PR, Latvia, Malta, Netherland, Poland, Romania, Switzerland, Syria, Turkey
Pre-establishment national treatment	
Limited pre-establishment national treatment	Moldova
Full pre-establishment national treatment	
A mixed approach	Egypt, Denmark, Bosnia&Herzegovina, Denmark, Germany, Korea, Kuwait, Lebanon, Lybia, Portugal, Russia, Serbia, Macedonia, Mexico, Morocco, Slovenia, Singapur, Turkmenistan, United Kingdom

Formulations of the most-favored-nation clause (MFN) used in BITs all over the world can be divided to several types and categorized. Types of the MFN clause formulations as given by UNCTAD [12], [13], have been presented in table 3, which concurrently lists countries – parties to treaties, bilateral investment treaties containing specific variants of the MNF clause formulations.

Table3. *Formulation of MFN treatment clauses in BITs signed by Slovak republic*

Type of the formulation of the MFN clause	Contracting States
Extending MFN to *pre*-entry treatment	Germany, Canada, Denmark, Bosnia&Herzegovina, Cuba, Egypt, Korea, Libanon, Lybia, Portugal, Russia, Serbia, Singapur, Macedonia, Mexico, Morocco, Slovenia, Turkmenistan, United Kingdom
Limiting MFN to *post*-entry treatment	Korea PR, Kenya, Jordan, Israel, China, Hungary, Finland, Croatia, Bulgaria, Belarus, Latvia, Malaysia, Trukey, Malta, Moldova, Norway, Poland, Romania, Spain, Sweden, Swiss, Syria
Treating investors from different countries in different ways	none
The use of exceptions	none

Umbrella Clause

Umbrella clause represents additional protection to investors beyond the traditional international law standards. Its main purpose is to provide parrarel protection of individual investors whose individual contract was breached [11]. It means, that not only breach of international treaty obligations, here breach of BIT's obligation, but also brech of individual contracts' obligations between two private investors is under the protection of BIT. Frequent construction of umbrella clause states: „*Each party shall observe any other obligation it may have entered into whith regard to investments by nationals or companies of the other party*." Pararrel protection to individual investors whose individual contract was breached implies, that individual investor can initiate dispute settlement under provisions of concrete BIT. Further in the text we provide an overview of the presence and wordings of the umbrella clause in BITs of the SR. There are no disputes in Slovak jurisdiction regarding tax-related clauses in investment agreements which become subject to BIT signed by Slovakia due to an umbrella clause.

Table4. *Presence of an umbrella clause in BITs signed by Slovak Republic*

Umbrella clause *is* included in BIT and it is based on...	
... national law	Egypt, Cuba, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Finland, Hungary, Germany, Jordan, Kenya, Korea PR, United Kingdom, Turkmenistan, Turkey, Syria, Switzerland, Sweden, Spain, Singapore, Serbia, Russia, Romania, Portugal, Poland, Norway, Netherland, Morocco, Moldova, Mexico, Malta, Malaysia, Macedonia, Lybia, Libanon, Kuwait, Korea
... customary international law	Canada
Umbrella clause is not included in BIT	
	Denmark

Let us provide brief information on national law which regulates investor State dispute settlement (hereinafter ISDS) when foreign element is involved. Under the legislation of the SR, in case the state undertakes any business-related obligations towards an entrepreneur, the state acquires the status of a legal entity. All business-related contractual relations between the state and entrepreneur are being considered as the so-called *absolute business deals*, and in accordance with Article 261 of the Commercial Code, which is a mandatory provision, these deals are governed by the Commercial Code. This Code, in its part III, provides for business contractual relations with a foreign element. Pursuant to the provision 9 of the Act No. 97/1963 Coll. on international private and procedural law, the contracting parties can make a choice of law, also the legal system by which they shall be governed in case of dispute. In the event when the contracting parties do not make any provision in respect to choice of law in the contract, it is necessary to determine, by means of conflict-of-law rules as well as fall-back rules which legal system shall govern the business contractual relations between the contracting parties – this applies also in case when one of the contracting parties is the State, for example this happens in case of state contracts when the contractor is a foreign investor. The governing law shall be determined by courts of the SR in accordance with Article 31 – Governing law and its assessment in accordance with the Act No. 244/2002 Coll. on arbitration, as amended, effective as of 1.1.2015.

TAXATION ISSUES AND ITS COVERAGE IN THE BILATERAL TAX TREATIES OF SLOVAKIA

Relationship between Bilateral Investment Treaties and Bilateral Tax Treaties

To understand position of BITs and BTTs in the Slovak internal legislation and possible relation between them, including risk of their overlap, it requires explanation of a relationship between international public law and internal legislation in the Slovak Republic.

The general legal theory differentiates three models of relationship between the international public law and national laws: 1/ the *monistic* theory with primacy of the internal law, 2/ *dualistic* theory, 3/ *monistic* theory with primacy of the international law. Depending on which model the state applies also the international treaties become or do not become, as in case of the dualistic model, a constituent part of the internal legal system. While in applying the dualistic theory the international treaties and the internal legal regulations are separated and do not affect each other, in the third model the international treaty prevails over the internal legal system– and that is also the model that Slovakia

applies and accordingly also the way of transformation of international treaties into the internal legislation is provided for in the Constitution of the Slovak Republic.

BITs as well as BTTs represent both of the types of international treaties that are being transposed into the internal legislation only subject their adoption by the National Council of the Slovak Republic and ratification by the president of the Slovak Republic – they are presidential treaties. According to the article 7 para 5 of the Slovak Constitution self-executed international treaties that were ratified by the National Council of the Slovak Republic, ratified and published in required way prevail over internal legal acts and laws.

The relation of BTTs in respect to the internal legal system has been provided for not only by articles 7 para 4, 5 of Slovak Constitution, but also in in two additional pieces of legislation having the force of a law. The first concerns the Act No. 595/2003 Coll. on income tax, where Article 1 (2) sets out the statutory priority clause of the international treaty primacy over the internal tax regulation. Similarly Article 45 (1), that provides for treatment of methods for avoidance of double taxation, sets out that the international treaty shall be superior to this act. The other piece of legislation is the Act No. 563/2009 Coll. on tax administration (hereinafter only as tax rules). The provision of Article 162 hereof that contains the statutory priority clause of primacy of the international treaty over the internal tax regulation as well as the Article 160 providing for competences of the Ministry of Finance of the Slovak Republic in relation to foreign countries.

BITs as well as BTTs represent both of the types of international economic treaties of general type, they are self-executed, which means, that it is not necessary to adopt any other internal law to make them valid part of internal legislation the Slovak Republic, and both they represent international treaties with direct effect, both of them directly establish rights and obligations to individuals and juridical persons.

Eventually, when international treaty like BIT or BTT is adopted by the National Council of the Slovak Republic and ratified by President of the Slovak republic, both BIT as well as BTT gets the same, equal position within the internal legal system of the Slovak Republic, and both of them prevail over other internal Slovak legal acts. This is why it is inevitable to avoid that they overlap in any way – it concerns a general requirement of *coherence* of the legal system as a whole.

Appearance of an overlap between BIT and BTT that have equal position in internal legislation of the Slovak Republic depends on whether the *scope* of BITs and BTTs is different and defined precisely, and with the view of the coherence of the legal system as a whole. Majority of BTTs, especially those adopted by sovereign Slovak Republic follow the OECD Model Tax Convention. Its Article 1 defines a personal scope of treaty (*rationae personae*) and states that "this Convention shall apply to persons who are residents of one or both Contracting States". The Article 2 of BTTs concluded by the Slovak Republic provides provision on subject-matter (*rationae meritae)* by presenting the list of taxes covered. In case of BITs signed by the Slovak Republic the scope of the treaty can be understood indirectly from the Preambles. Even if the wordings are not identical, the main goal is expressed in Preambles as follows: "governments of the Slovak Republic and the other Contracting State desire to intensify economic cooperation to the mutual benefit of both Sates and intend to create and maintain favourable conditions for *investments* of *investors* of one State in the territory of other State." This provision in Preambles implies, that persons covered by BITs are investors and subject covered are investors' investments. The legal definitions of investor and investment are included in the Article 1 of BITs.

Based on the above examination of the scope of BTTs and BITs it is possible to conclude, that there is not overlap between them, as the scope of each of them is different, they cover different subject-matter, namely, she scope of the BTTs is taxes covered, while the scope of the BITs is investments of investors.

Actually, there might be potential of an overlap between BITs and BTTs of the SR, however not as a result of overlapping *scopes* of BITs and BTTs, but as a result of incorporation of a most favorite nation clause (MFN) at least into the one of couple of treaties (BITs-BTTs). The devil lies in details, and the danger of potential overlap between BITs and BTTs lies in the fact, that most BITs signed by the SR contain MFN clause. For example, MFN clause in BIT between Slovakia and Bulgaria provides: "*Neither Contracting Party shall accord to investments made in its territory by investors of the other Contracting Party, treatment less favourable than that accorded to investments made by its own investors or by investors of any third State, whichever is more favourable*."

As a consequence of MFN clauses that are incorporated in the BITs of Slovakia, shouldn't there be any legal constraint, potential conflict between BITs and BTTs may become true. To illustrate potential of conflict between BIT and BTT, which has its root in an incorporation of MFN clause into the BITs, consider a following example: Assume, there are effective BITs and BTTs signed between Slovakia and country X, and Slovakia and Russia. Providing, that Slovakia is host country of two investors, one from Country X and second from Russia. Assume that each investor earns interest sourced in host country - Slovakia. According the BTT between Slovakia and Syria the treaty withholding tax rate on interest in Slovakia is 5%, while according the BTT Slovakia – Russia the withholding tax at source (Slovakia) is not charged, as the Article 10 of the BTT Slovakia – Russia states that only resident country of beneficial owner (here Russia) may impose tax on interest received by its resident from Slovakia. Based on the MFN clause incorporated in the BTT between Slovakia and Country Syria, investor from Syria might be eligible to claim the same favorable tax treatment of interest sourced in Slovakia, which means no withholding tax at source on interest paid to beneficial owner, resident of Syria, who is investor in Slovakia. Fortunately, potential conflict of BITs and BTTs does not come true – thanks to the exemption from MFN clause in case of taxes.

To prevent overlap between BITs and BTTs which has its root in MFN clause incorporated in BITs signed by Slovakia, the favourable tax treatment set in national tax provisions, supranational law of integrated groups of countries where Slovakia is member, and more favourable tax treatment contained by BTTs must be excluded from the scope and application of the most favourable nation clause incorporated in BITs signed by Slovakia.

To summarize, BITs and BTTs both have equal position in internal legislation of the Slovak Republic. Even if they have different scope and subject-matter (*rationae materiae*), i.e. taxes versus investments of investors, incorporation of the MFN clause into the BITs signed by Slovakia makes overlap between BITs and BTTS potentially possible, shouldn't there be exclusion of tax matters from BITs. There might be a potential risk that a conflict between BITs and BTTs appear shouldn't there be any exclusion of more favourable tax treatment set by BTTs from the scope of MFN clause incorporated in the BITs. BITs signed by Slovakia do not contain any provision which would ensure that either BITs or BTTs prevail in case of conflict between them. To ensure avoidance of overlapping between BITs and BTTs there has been used the exclusion of provisions on MFN treatment affecting provisions on tax issues [6]. Next section – Coverage of Taxes and Carve-Out Clause provides details about the form, construction and scope of an exclusion of tax matters from the scope of the MFN clauses incorporated in the BITs signed by Slovakia.

Coverage of Taxes in the Bilateral Investment Treaties

BITs concluded between the Slovak Republic and other Contracting State do not contain explicitly any listing of taxes covered or not covered by a BIT. The table below provides an overview of taxes in respect to a BIT. The table outlines provisions contained in individual BITs, where individual states – parties to the treaty are not obliged to provide investors of the other party any tax allowances in the way as they provided them to some third party. That means that the principles of national treatment and the most-favoured-nation clause are not applied to the given situations. All the treaties, either in the article on National Treatment and MFN or possibly in some other Article (e.g. the Treaty with Mexico has the clause included in Article 6 – Exemptions), contain a clause pursuant to which one of the contracting parties is not obliged to provide investors of the other party any advantages/treatment deriving from the international treaty related to taxing due to the existence of a BIT.

The treaty on promotion and mutual protection of investment between the Slovak government and Kuwait contains the clause: „*The Provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege, which may be extended by the former Contracting Party by virtue of any international agreement or arrangement relating wholly or mainly to taxation.*" Similar wording of this clause, nevertheless in Article 6 – Exemptions, appear also in the Treaty on promotion and mutual protection of investment between the Slovak Republic and the United Mexican States, nevertheless this clause has been complemented by a provision treating a possible conflict between the BIT and DTT as follows: „ In the event of any inconsistency between this Agreement and any tax-related international agreement or arrangement, the later shall prevail. " The latter implies that the provisions of the international treaty concerning the taxes override the provisions of the BIT.

Table5. *An overview of coverage of taxes in BITs*

Type of coverage of taxes	Contracting State
International agreements or arrangements relating wholly or mainly to taxation/tax matters	Kuwait, Turkey, Macedonia, Syria, Moldova, Belarus, Egypt, Turkmenistan, South Korea, Tajikistan, Cuba, Uzbekistan, India, Jordan, Morocco, Mexico, North Korea, Denmark, Portugal, Malta, Hungary, Latvia
international agreements or arrangements , any domestic legislation, relating wholly or mainly to tax issues/taxation	Vietnam, Sweden
International agreements, arrangements or any domestic legislation, relating wholly or mainly to taxation	Ukraine, Serbia, Malaysia, Israel, Lebanon
double taxation agreement	China, Switzerland, Bulgaria, Netherlands, Poland
any Avoidance of Double Taxation Treaty between the two Contracting Parties and the domestic laws	Singapore, Norway
any international agreement on avoidance of double taxation or any other international arrangements on reciprocal basis regarding tax matters/issues	Russia, Bosnia and Herzegovina, Germany, Greece
other	USA, Canada

The agreement between Czechoslovakia and Sweden in National treatment and MFN contains the following clause: „The provisions of paragraph (1) of this Article shall not be construed so as to oblige one Contracting Party to extend to investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from any international agreement, international arrangement or domestic legislation relating wholly or mainly to taxation." Pursuant to this wording it concerns a similar approach as in the first case, nevertheless the formulation of the tax topic represents a broader understanding of the tax issues. Contrary to the first case, the treaty also encompasses internal legal rules related to taxing.

The treaty on promotion and mutual protection of investment between the Lebenese Republic and the Slovak Republic is based on the approach similar to the first case, nevertheless this provision has been extended by the internal legislation concerning the taxing, namely: : *„The Most favored Nation Treatment shall not be construed so as to oblige one Contracting Party to extend to investors of the other Contracting Party and their investments made in the territory of this Contracting Party, the advantages resulting from: ..... b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation."*

In case of the BIT of the former Czechoslovakia and Switzerland it has been stated that the BIT provisions must not be used to gain preferences deriving, inter alia, from DTT: *„The treatment of the most favoured nation shall not apply to privileges which either Contracting Party accords to investors of a third State by virtue of a double taxation agreement or an agreement establishing a free trade area, a customs union or a common market."*

The treaty between the Slovak Republic and Singapore in its Article 4 on the National treatment and the Most-favoured-nation clause does not allow to use the preferences in the area that is covered by DTT and internal regulations, namely: *„The provision of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by any Avoidance of Double Taxation Treaty between the two Contracting Parties and the domestic laws of each Contracting Party."*

The treaty between former the Czech and Slovak Federative Republic and USA on the mutual promotion and protection of investment contains a specific approach to the tax issues in a separate BIT. This specific treaty sets out directly a condition of just and impartial treatment in respect to

implementation of the tax policy. (Article XI: : *„With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.").* Concurrently, this treaty accurately specifies interconnection of this treaty as well as the areas of taxing. This is why the previous provision continues as follows: *„Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article III; (b) transfers, pursuant to Article IV; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time."*

The BIT between the Slovak government and the Russian Federation contains an exemption from the MFN clause and the national treatment due to the existence of a treaty on avoidance of double taxation, or possibly some other agreement related to taxing, namely as follows: : *„The most favored nation treatment granted in accordance with Item 1 of this Article, shall not apply to benefits, which the Contracting Party is providing, or will provide: ... c) on the basis of the agreements to avoid double taxation, or of other agreements relating to taxation issues."* That means that it is not possible to apply the most-favored-nation clause to the existing treaties on avoidance of double taxation, i.e. to the topic of direct taxes. The same approach has been included also in the Treaty between the Slovak Republic and Bosnia and Herzegovina on promotion and mutual protection of investment, nevertheless this treaty covers the tax issues in a broader sense, i.e.: *„any international agreement on avoidance of double taxation or any other international arrangements on reciprocal basis regarding tax matters."*

The broader definition concerning not providing the possibility of applying the BIT advantage has been used in the treaty between the SR and Canada on promotion and protection of investment, where the Article 4 Exemptions strictly sets out that the preferences shall not be provided due to participation of the party to the convention related to the tax system. It concerns specifically the clause given in subsection 4, letter c.): *„The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party, or to the investments or returns of such investors, the benefits of any treatment, preference or privilege resulting from participation in: ..... (c) any existing or future convention relating to taxation."*

Table6. *An overview of conditions subjecting the free transfer of payments*

Type of the conditions subjecting the free transfer of payments	Contracting State
After fulfillment of tax obligations	Kuwait, Turkey, Ukraine, South Korea, Cuba, Russia, North Korea, Bulgaria, Malta, Latvia
After fulfillment of financial obligations	Vietnam, Macedonia, Syria, Bosnia and Herzegovina, Moldova, India, Jordan, Morocco (also fiscal obligations)
No tax or financial requirements	Lebanon, Mexico, Singapore (non-discriminatory character), Belarus, Egypt, China, Turkmenistan, Uzbekistan, Tajikistan, Switzerland, Canada, Malaysia, Norway, Sweden, Denmark, Germany, Portugal, Greece, Hungary, Poland
Other	Serbia (legal or other obligations), Israel (fiscal obligations), USA (specific definition of tax matters)

BITs provide investors with a provision that the contracting party guarantees the other party free transfer of payments related to the investment in and out of their territories including a transfer covering for example proceeds, license fees, etc. Many treaties concluded between Slovakia and some other countries contain an article called Transfers that includes also tax issues, i.e. conditions subjecting the free transfer of payments. Table 6 presents an overview of possible free transfer subject to meeting of individual tax/financial conditions in the treaties established between the SR and some other country.

Article 6, Transfers, of the BIT between the Government of the Slovak Republic and the Government of the Republic of Cuba sets out a clause as follows: *„The Contracting Parties shall guarantee to free*

transfer of payments related to investments and returns, after fulfilment of tax obligations." The latter implies that the treaty shall guarantee free movement of capital, nevertheless only upon settlement of an applicable tax with the relevant tax administrator. The BIT between the SR and Russia defines the tax issues in a more specific way, namely by determination that the transfer shall be possible upon payment of assessed taxes and fees. The wording of the specific clause pursuant to the Article 6, Transfers of Payments Related to the Investment, subsection 1: *„Each Contracting Party shall guarantee to investors of the other Contracting Party, after they have paid appropriate taxes and charges, free transfer...:"*

The Treaty between the Republic of India and the Slovak Republic on promotion and mutual protection of investment includes a clause incorporated in Article 6, Transfers, which states the following: *„Each Contracting Party shall guarantee to investors of the other Contracting Party, after fulfilment of their financial obligations, the free transfer of payments, including principals, and returns related to their investments."* In this case there has not been explicitly given that upon settlement of the tax obligation, but there has been applied a broader approach in the form of meeting the financial commitments.

In case of the Treaty between the Slovak government and Vietnam the issue of the interconnection of taxes and BIT has been provided for in the Article 2, Scope, subsection 3, where it has been explicitly defined that this Treaty does not relate to tax issues. The wording of the relevant clause is as follows: „*This Agreement shall not be applicable to a) tax measures...*"The given provision unambiguously sets out that this specific treaty does not deal with any tax issues.

Articles on transfers of some of the treaties do not set any preconditions for provision of the free transfer, namely by some specific meeting of a tax obligation or financial commitments. E.g. the treaty between the Slovak Republic and Republic of Lebanon on promotion and mutual protection of investment in Article 6, Transfers, states the following: *„Each Contracting Party shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of their investments and transfer payments related to investments. Such payments shall include in particular, though not exclusively:.."*.

In case of the Treaty between the SR and Israel on promotion and mutual protection of investment, the clause in the Article 6, Repatriation of Investment and Returns goes as follows: *„Each Contracting Party shall, in respect of investments, guarantee to investors of the other Contracting Party all the rights and benefits regarding the unrestricted transfer of their investments and returns which were in force on the day the current investment was implemented; provided, however, that the investor has complied with all his fiscal obligations and has fulfilled all the requirements of the exchange regulations."*. This treaty conditions the free transfer by meeting of statutory contributions payment on the side of the investor.

There is a special case of the BIT concluded between the Czech and Slovak Federal Republic and USA, in which on one side the parties undertake to allow for free transfer of investment related payments, whereas on the other they specifically set out the taxes that are eligible for such transfers pursuant to the Article V. The wording of the clause is as follows: *„...either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers."* The above implies that this treaty allows imposing tax on transfers of payments related to the investment by means of direct taxes.

Taxation and Expropriation

The BITs in the SR include a special provision that regulates the topic of expropriation and compensation. Mostly it concerns Art. 5. It focuses protection of the ownership right of a foreign investor in specific cases, namely protection against expropriation, since the SR as a party to the treaty undertakes to refrain from expropriating investment implemented within the territory of the SR. Nevertheless, there is an exemption, a case also covered by the above mentioned provisions of the sources of the SR constitutional law and Commercial Code, specifically cases of expropriation that are, nevertheless, only possible under the following conditions: 1/ in case of a public interest laid down by law, 2/ in case it relates to internal needs of the expropriating party, 3/ based on principle of non-discrimination and 4/ based on principle of compensation that has to be immediate, reasonable and effective.

Provisions of the Charter of Fundamental Human Rights as well as those of the Constitution of the SR include a generally formulated guarantee of human rights protection which is further specified by

means of a positive legal representation formulating specific legal relevant rules in respect to all legal entities, especially to state authorities, guaranteeing, *inter alia*, also the right to property (Art. 20).

Within the national legal system of the SR the legal concept of the expropriation has been considered in connection with constitutional guarantees of the ownership protection that is being classified as one of the first generation fundamental human rights. Protection of the ownership right in the SR has been guaranteed by the Constitution of the SR as well as by the constitutional law of the Charter of the FHRF. Within the scope of the first Section of the FHRF Charter, in Art. 11 and in the Constitution in Section 2 – Fundamental rights and freedoms, in the Art. 20 there has been provided a constitutional guarantee of private property protection. Namely, everybody has the right to own a property and the right of ownership of all the owners has the same statutory content and protection. The succession is guaranteed. Nevertheless, not every property can represent an object of ownership, since there has been laid down a reservation, that certain property can be excluded from the private property by law and that it can (it is allowed) to be only in the ownership of the state, municipality or designated legal entities: and also that the law can set out that certain things can only form a property of citizens or legal persons having their residence in the Slovak Republic. The constitutional law of the SR applies the Roman legal principle of ownership elasticity, meaning that ownership guarantees not only the rights of the owner *erga omnes* but also the obligations. Execution of ownership rights is not unlimited, since the ownership obliges, and it cannot be abused in prejudice to rights of the other parties or in conflict with general interests protected by law. Concurrently, the execution of the ownership must not cause damage to human health, nature or environment – nevertheless, not in absolute terms, but only beyond the extent specified by law. The protection of the ownership rights has been guaranteed by the Constitution of the SR as well as by the Charter of FHRF by the fact, that it has been guaranteed that expropriation or forced limitation of the ownership right is possible only in public interest, namely on the basis of the law and for some compensation. Articles on ownership in both of the sources of the constitutional law of the SR also set out that taxes and fees can be imposed only on the basis of law.

Art. 20 of the Constitution and the corresponding Art.1 (1) of the additional protocol to the Convention guarantee the fundamental right to ownership protection as well as right to property protection. The Constitutional Court in 9 cases ... As regards the topic of discrimination, the number of objections concerning breach of prohibition of discrimination is not negligible (11,77 %). It follows the number of objections related to violations of the fundamental right to have the matter heard without undue delay (37,42 %), violations of the right to judicial protection (33,30 %) and of the fundamental right to property (16,15 %).

World literature does not provide any single uniform definition of the concept of "indirect expropriation". In case we define the indirect expropriation on the basis of two its critical effects, *1) the effects of measures and 2) the severity of those effects*, it can be stated that in the Slovak Republic we have not seen any court case dealing with any indirect expropriation, including even be that through abuse of taxes or through devastating taxes. The best-known case involving the risk of expropriation of a company of a foreign investor and which was treated through an international arbitration was a case of the company *Achmea B.V. (The Netherland), Claimant vs. The Slovak Republic, Respondent. PCA Case No. 2013-12*. The claimant objected to breach of the international treaty on promotion and protection of investment between the Netherlands and Slovakia.

Taxation and Transfer of Capital

Provisions related to the transfer of capital consist of the following parts: first, clause on provision of free transfer of payments related to the investment; second, specification of payments covered by free movement; third, specification the transfer implementation: immediate transfer, in free convertible currency and determination of exchange rate; and fourth, restrictions and limitations in case of extraordinary events.

We have outlined the topic of free transfer of capital in Chapter 3, focusing on tax aspect in the given clause. In connection with determination of payments related to the investment it is necessary to note that in every treaty there have been explicitly listed individual payments, while concurrently it does not represent a full determination of income. Currently used BITs between Slovakia and some other country each feature different determined type of payment, to which a specific BIT will refer. E.g. the BIT between the Slovak Republic and Syria states the following:

"Each Contracting Party shall guarantee to investors of the other Contracting Party, after fulfillment of their financial obligations, the free transfer of payments, including principals, and returns related to their investments. Such transfers shall include, in particular, though not exclusively: a. net profit, capital gains, dividends, interest, royalties, fees and any other current income accruing from investments; b. proceeds accruing from the sale or the total or partial liquidation of investments; c. funds in repayment of loans related to investments; d. earnings of nationals or residents of the other Contracting Party who are allowed to work in connection with investments in its state territory; e. initial capital and additional funds necessary for the rn'llntcnancc or development of the existing investments; and f. compensation pursuant to Articles 4 and 5."

Table 7provides an overview on types of restrictions that have been included in the specific treaties.

Table7. *Types of restrictions*

Type of restriction	*Contracting State*
for elimination of fundamental economic disequilibrium	*Kuwait*
adoption of safeguard measures, bankruptcy, insolvency, criminal offences,...	*Vietnam, India, Singapore, Malaysia*
balance of payments difficulties, economic sanctions, monetary and exchange rate policies	*Turkey, Lebanon, Syria, Jordan, Morocco*
balance of payments difficulties,	*Bosnia and Herzegovina, Morocco*
none	*Ukraine, Serbia, Egypt, China, Turkmenistan, Uzbekistan, Cuba, Russia, Tajikistan, Bulgaria, Sweden, Denmark, Portugal, Hungary, Latvia, Poland, Malta, Greece, Germany, Switzerland, Israel, Croatia, North Korea, Norway, USA*
balance of payments difficulties, monetary and exchange rate policies	*Mexico, Belarus, South Korea, Moldova*
insolvency, criminal offences, issuing, trading or dealing in securities	*Canada*

As an example we present specification of these restrictions pursuant to the BIT between Slovakia and Lebanon:

„Notwithstanding paragraphs (1) and (2) above, a Contracting Party may adopt or maintain measures relating to cross-border capital and payment transactions, particularly but not limited to the following cases: a) in the event of serious balance of payments and external financial difficulties or threat thereof; or b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies; or c) in the exceptional cases of economic sanctions."

Slovakia does not have any exit tax established within its existing tax legislation.

DISPUTE SETTLEMENT ACCORDING THE BITs AND BTTs EFFECTIVE IN SLOVAKIA

The Ministry of Finance of the SR is obliged to administer and manage the international investment arbitrations, since it is the sponsor of BITs. The MF implements its activities related to management of international arbitrations regardless of departmental (sector) pertinence of the merit of the case. In all of the concluded BITs Slovakia has set out the procedure for dealing with disputes between the investor and state [4]. Nevertheless, it has to be noted that in case of some of the first BITs Slovakia as a state has an inferior position, as the given treaty has been set up focusing high level of investor protection. It concerns e.g. BIT between the Czech and Slovak Federative Republic and USA. In 1993 Slovakia signed the Convention on settlement of investment disputes between member states and private investors of other member states, in the follow up in 1994 it was ratified and the Convention entered into force in Slovakia on 26th June, 1994. Thereby Slovakia became a member of the International Centre for Settlement of Investment Disputes (ICSID). Individual treaties on mutual promotion and support of investment incorporate the possibility of disputes settlement amicably. The investor as well as the state is provided with the possibility to settle the dispute prior the dispute is lodged for arbitration. In accordance with the specific BIT, the parties have different time limits for settling the dispute, either 3 months or usually 6 months time limit to settle the dispute amicably. In

case the parties fail to reach an amicable settlement within the specified time-limit, or in case that the party has no interest in solving the dispute in an amicable way, the investor as well as the state are entitled to submit the case to the arbitration court established *ad hoc* in compliance with the rules of arbitration of the UN Committee for International Commercial Law (UNCITRAL), to the international centre for settlement of disputes related to investment (ICSID) or to the local court.

As at present Slovakia has faced 12 arbitrations due to the clause on dispute settlement between Slovakia and an investor from a different country [4]. The development of the number of arbitrations has been illustrated in figure 1, where it is possible to follow the trend. In recent years there have been initiated in total smaller number of complaints to start such arbitration proceedings.

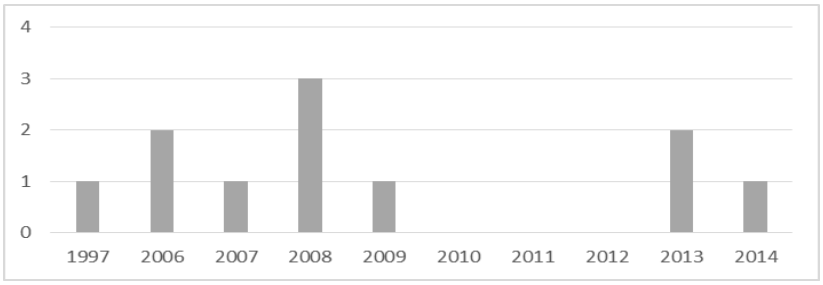

Fig1. *Development of the number of arbitrations*

Table 8 provides an overview on implemented as well as on-going arbitrations initiated by the investors who claimed that provisions of the BIT between Slovakia and the country of origin of the investor had been violated.

The table 8 also shows that Slovakia won five investment arbitrations that can be added up also to the arbitration concerning the EURAM Bank AG, in which case the arbitration tribunal decided in favor of Slovakia since the Euram Bank concurrently addressed also other courts thereby depriving the arbitration tribunal of its jurisdiction to rule on the action. Two arbitrations ended to the detriment of the state, one arbitration procedure was terminated by the tribunal itself (Branimír Menšík and one procedure was terminated by agreement on arbitration termination of both the parties (US Steel) [5]. Neither of the above given arbitrations related to tax issues.

Table8. *An overview of arbitrations involving investment issues where one party is Slovak republic*

Initiation Year	Case title	Home State of investor (claimant)	Arbitration Rules	Outcome/Status of proceedings	Termination year
1997	Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic	Czech Republic	ICSID	In favour of the investor	2004
2006	Branimir Mensik v. Slovak Republic	Switzerland	ICSID	Discontinued	
2006	Jan Oostergetel and Theodora Laurentius v. The Slovak Republic	Netherlands	UNCITRAL	In favour of the State	2012
2007	Austrian Airlines v. Slovak Republic	Austria	UNCITRAL	In favour of the State	2009
2008	Achmea B.V. v. Slovak Republic (formerly Eureko v. Slovak Republic)	Netherlands	UNCITRAL	In favour of the Investor	2012
2008	HICEE v. Slovak Republic	Netherlands	UNCITRAL	In favour of the State	2011
2008	Alps Finance and Trade AG v. Slovak Republic	Switzerland	UNCITRAL	In favour of the State	2011
2009	EURAM Bank AG v. Slovak Republic	Austria	UNCITRAL	Denied claim	2012
2013	Achmea B.V. v. The Slovak Republic II	Netherlands	UNCITRAL	In favour of the State	2014
2013	U.S. Steel Global Holdings I B.V. (The Netherlands) v. The Slovak Republic	Netherlands	UNCITRAL	Discontinued	
2014	EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic	Canada; United States of America	ICSID	Pending	

As for BTTs signed by the Slovakia, neither of them contains the type of an arbitration clause as shown in the Art. 25 para 5 of the OECD MTC. There are following types of dispute settlement clauses: first one allows Contracting States to enter direct mutual communication to solve problem, second, Contracting States' competent authorities may also directly consult together, third the competent authorities of the Contracting States may communicate with each other *directly*, including through a joint *commission* , forth, competent authorities of the Contracting Parties may communicate directly and tax dispute will be solved only based on the provisions of individual BTT [10]. Table 9 provides closer look on methods to solve tax disputes according the BTTs established by Slovak Republic.

Table9. *Presence of the arbitration clauses in the BTTs established by the Slovak Republic*

Description of the arbitration clause	Contracting State
***Direct mutual communication* between Contracting Parties'competent authorities**	Indonesia, Italy, Germany, Syria, japan, United Kingdom, Canada
Contracting states' competent authorities may also *directly consult*	Russia, USA, Belgium, Turkmenistan, Sri Lanka, Netherland, Australia, Ukraine, Yugoslavia, Vietnam, Malta, Izrael, Nigeria,
The competent authorities of the Contracting States may communicate with each other *directly*, including through a joint *commission* …	Brazil, Georgia, Finland, Croatia, Island, Luxembourg, Czech rep., Korea, Kazakhstan, Libya, Bulgaria, Latvia, Ireland, Singapur, Estonia, Slovenia, Romania, Belarus, Switzerland, Macedonia, Sweden, Spain, Cyprus, Norway, South Africa, China, Austria, Denmark, France, India, Turkey, Kuwait, Poland, Greece, Yugoslavia, Tunisia, Uzbekistan, Moldova, Lithuania,
competent authorities of the Contracting Parties may *communicate directly* and tax dispute will be solved only based on the provisions of *individual BTT*	Mexico

CONCLUSION

This paper studies relation between bilateral investment treaties and taxation, mainly bilateral tax treaties.

The paper is divided to the three sections, where first section focuses on the principles of treatment that are incorporated in the bilateral investment treaties. Principles of fair equitable treatment, national treatment and most favoured nation treatment regulate treatment of domestic and foreign investors. If most favoured nation treatment was applied in both kinds of treaties, risk of treaties overlap might appear. Therefore second section studies in detail relationship between bilateral investment treaties´ clauses and taxation. To determine, whether there is overlap between bilateral investment treaties, bilateral tax treaties and tax legislation in Slovak republic, several topics are covered: relationship between bilateral investment treaties and bilateral tax treaties, coverage of taxes in bilateral investment treaties and whether a carve out clause is present in Slovak bilateral investment treaties, and provisions guiding taxation and transfer of capital. Third section surveys dispute settlement according bilateral investment treaties established by Slovakia, and it provides also overview of arbitrations involving investment issues where one party is Slovak republic.

Detailed study of relation between bilateral investment and bilateral tax treaty shows, that in case of those treaties established by Slovak republic there is no overlap between them.

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