FOREIGN INVESTMENTS IN BELARUS:
RECENT DEVELOPMENTS IN
REGULATORY ISSUES

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FOREIGN INVESTMENTS IN BELARUS: RECENT DEVELOPMENTS IN REGULATORY ISSUES (1)

Introduction.

In the occasion of the Belarusian Investment and Economic Forum which took place in Minsk on 12-13 November 2009, it was discussed whether Belarus could join in the next few years the list of top 30 countries by easiness of doing business, as it has been pledged by governmental authorities (2). Irrespective of any analysis on the feasibility of this objective (3), it must be noted that to achieve this goal Belarus is undertaking relevant changes to the legal framework governing investments (both foreign and domestic) and a debate about the reform of the investment code is ongoing (4). An increase of foreign investments is therefore ex-

(1) The present paper is part of a research on FDI in the Republic of Belarus undertaken within the framework of UNCTAD-Virtual Institute. All opinions expressed in this paper exclusively reflect the authors' view.

(2) Further information on the Belarusian Investment and Economic Forum can be found in the website of the Belarus EU business council at the page: http://www.beubc.com/en/index.php?option=com_content&task=view&id=27&Itemid=43#faaf121109.

(3) For an analysis on the possibility to achieve such a goal and for a discussion of the policy options available, see: A. PETRUSHKEVICH, A. LASTIUK, E. M. ROSTIINA, Getting Belarus to the 30 top countries with the best business climate, Belarusian Institute for Strategic Studies, policy paper PP#02/2010EN, 01 March 2010.

potected, but this also makes it foreseeable an increase of disputes between foreign investors and the Belarusian State in relation to such foreign investments. This assumption could be explained in two ways. First of all, it can be argued that in principle more investments could also mean more occasions for investment-related disputes. Second, as it will be studied in depth in this paper, improvements in relation to the degree of openness of the economy and to the easiness to start a business, not necessarily correspond to substantial improvements of the standards of treatments afforded to investors after their admission. The mismatch between a more favourable legal environment to start business and an environment to carry out the business which still presents relevant shortcomings, could provide more occasions for the rise of disputes concerning alleged violations of International Investments Agreements (IIAs) of which Belarus is Party. The possible outcomes of such investor-State disputes will constitute the main topic of the paper. The focus will be on the hypothetical disputes concerning alleged claims of violation of two provisions contained in BITs of which Belarus is Party: the clause providing for fair and equitable treatment and the clause applicable to direct and indirect expropriation.

The paper adopts a multidisciplinary approach, which combines both an economic and a legal analysis of the issue (5). As a first step of the research, methods and instruments typical of the economic research will be adopted. A review of the main features of FDIs in Belarus will be undertaken, together with a more in depth study of the Belarusian business environment (with a focus on the legal framework governing investment activities) with the aim of investigating which is the degree of satisfaction of foreign investors in relation to the main issues affecting the investment and business environment in Belarus. This analysis will be largely based on the findings of a survey prepared for the Ministry of Foreign Affairs of the Republic of Belarus by a Study group of the Belarus State Economic University. As a second step a legal analysis will be undertaken, in order to study if and when the dissatisfaction of investors in relation to those issues which have been pointed out in the first "step", could give rise to investor-State legal disputes which could be submitted to international arbitration. It must be pointed out that it will be a discussion on hypothetical disputes and it will entail an effort to foresee how such disputes could be settled by international arbitral tribunals. This will imply an analysis of the international investment agreements to which Belarus is party and of the way their provisions could be applied by international tribunals, also taking into consideration previous decisions adopted by arbitral tribunals in disputes involving other States but concerning similar claims. This approach is even more necessary to the extent that so far investor-State disputes in Belarus have been mainly settled by local courts, while arbitration has been rarer and in particular no ICSID arbitration has been reported, even though Bilateral Investments Treaties (BITs) to which Belarus is party already provide for international arbitration (and ICSID arbitration too) as a method of settlement of investor-State disputes and even though Belarus is party to the ICSID Convention.

The present paper is part of a broader policy-oriented research and its findings could be taken into account when modifying Belarusian legislation applicable to foreign investments in order to simultaneously pursue the following goals: to attract more FDIs, to maximise the benefits they might bring to the host State economy and to ensure the highest level of compliance with the international obligation Belarus has undertaken when becoming Party of International Agreements on the protection of foreign investors.

1. The current low level of attractiveness of Belarusian economy: key facts and figures.

It has been proved by theory and practice that foreign direct investments (FDIs) not only are important as a source of foreign capital, know-how, technology and as a tool to improve access to international markets. Their importance is also related to the fact that efforts to attract them are related to the enhancement of structural reforms which could improve the general business climate and therefore increase the competitiveness of the economy of the host State (6). The impact of the inward FDIs on the

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transformation process from a socialist, centrally planned and administrative command economy to a market economy based on a sound and creative competitive environment is considerable, judging by the successful examples of Czech Republic, Poland, the Baltic Republics and other economies that have substantially overcome transition period. However, countries like Ukraine and Moldova, as well as some central Asian CIS countries, which are still struggling to complete transition, have had a relative poor economic performance in the last two decades and, especially in the case of Ukraine, the current economic crisis has had disruptive effects, with a fall of the GDP and of the industrial production. In Russia too the abrupt reforms which were implemented in the 1990s, in an attempt to swiftly achieve economic transition and to introduce neo-liberal economic paradigms produced widespread economic and social problems, which were partially overcome only during Putin’s presidency and with a more conservative approach to transition-related reforms. This reminds, once again, that although the completion of the transition, when successful, can be related to a higher level of economic development, the transition process in itself can be very long and painful and associated with severe social and economic problems (7). Therefore, any economic reform, included those aiming at opening up the domestic economy to foreign investments should be carried out very carefully. When studying the impact of FDIs on the modernization and development of a State with the economy in transition, it is necessary to know that not every FDI in every condition is good to achieve these objectives. The host State needs to find out which are the FDIs it needs, to control them and to regulate them in a manner consistent with its development goals. On the other side, such State control and regulation, must be exercised in a way consistent with the international commitment of which the host State is party, first of all in the interest of the host State itself (8). The present paper points out which are the features of the legal framework governing investments in Belarus which should be improved in order to increase their consistency with international commitments of which Belarus is party, and should therefore provide useful suggestions for the reform process undertaken in Belarus to attract more FDIs in a way consistent with domestic developmental goals.

Current data seem to show that the Republic of Belarus hasn’t used FDIs as a vehicle for intensive economic growth and modernization of the economy yet. A huge gap between Inward FDI Performance Index (125 rank in 2006) and Inward FDI Potential Index (48 rank in 2006) in Belarus (9) which is the biggest in the transition economies group before the world economic crises, may serve as a proof. In fact, this lag can be interpreted in the sense that Belarus has a potential to attract much more FDIs than those it actually receives, but the lack of a proper legal and policy framework governing foreign investments has so far impaired such potential.

Inward FDI stocks in Belarus in 2008 were 6,679 million USD which allowed Belarus to take the fifth place following the three largest CIS economies, rich in resources (Russia, Kazakhstan, Ukraine) and Georgia (10). However, inward FDI stocks per capita show that Belarus has left behind only four countries (Moldova, Kirghizistan, Tajikistan and Uzbekistan) among 28 economies in transition. In 2008 the inward FDI stocks per capita for Belarus was 689 USD while for neighbouring countries it was much bigger: for instance, it was 1,499 USD in Russia, 1,017 USD in Ukraine, 4,238 USD in Poland and 5,789 USD in Lithuania.

These figures undeniably show that in comparison with the other economies in transition, small FDI inflows in Belarus indicate a less favourable business environment for both foreign and national investors. However, this could also mean that foreign investors may encounter a much lower competition in the sectors of their interest: therefore they may receive high profits in case they get an access to Belarusian market and more generally speaking they could enjoy the advantages the first movers typically obtain.

Also the structure and the composition of FDIs in Belarus shows some peculiarities of the difficulties Belarus has experienced so far in attracting stable FDIs flows which could provide not only capitals but also beneficial spillovers in the domestic economy, especially in terms of transfer of

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(8) In fact the host State which does not respect its international commitments on the protection of foreign investors not only risks to be required to pay compensation to affected foreign investors, but finally its attractiveness as a recipient of FDIs will be undermined.


technology and know-how as well as of access to international markets. In order to better understand this concept, it is preliminary necessary to remind which categories of capital flows fall within the notion of FDIs. According to a general definition «Foreign direct investment (FDI) is defined as an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate). FDI has three components: equity capital, reinvested earnings and intra-company loans.

— Equity capital is the foreign direct investor’s purchase of shares of an enterprise in a country other than its own.

— Reinvested earnings comprise the direct investor’s share (in proportion to direct equity participation) of earnings not distributed as dividends by affiliates, or earnings not remitted to the direct investor. Such retained profits by affiliates are reinvested.

— Intra-company loans or intra-company debt transactions refer to short- or long-term borrowing and lending of funds between direct investors (parent enterprises) and affiliate enterprises (11).

Analyzing the data on foreign investment inflows and the structure, as supplied by the Belarusian National Committee of Statistics (BNCS), the amount of the inflow of FDI into the Republic of Belarus since 2002 shows an upward trend. It was $4.8 billion in 2009. However, this trend is not as significant as the increase in foreign loans. This fact is a matter of great concern, as it attests that Belarus is choosing its economic integration not through equity FDI but through debt obligations.

The dynamics of FDI by components also gives reasons for concern: direct investors prefer to issue loans to their affiliates, rather than to open and expand new affiliates and thus to contribute to assets formation of the companies. In addition, investment inflows consisting in loans are less stable than equity FDI, as it is proved by the fact that during the recent economic crisis loans received by foreign investors have dramatically collapsed (12).


(12) On the debt of the Belarusian companies see: D. Krik, Macroecononiic growth based on unstable factors, in BELARUSIAN INSTITUTE FOR STRATEGIC STUDIES, Belarusian Yearbook 2009 - A survey and analysis of developments in the Republic of Belarus in 2009, Vilnius 2010, p. 243-244. However, it should be recalled that more than two thirds of the GDP of Belarus is produced by State-owned firms, therefore their financing is more related to the issue of loans received by the State. On this issue see, again D. Krik, cit., p. 241-242 and T. Maniownik, More loans instead of privatization, in BELARUSIAN INSTITUTE FOR STRATEGIC STUDIES, cit., p. 267-273.

The relatively unattractiveness of Belarusian economy and the persistence of a difficult legal and policy framework governing foreign investments emerges also from the analysis of the home country of most FDIs to Belarus. According to the data of the National Statistical Committee of Belarus, 52% of companies with foreign capital have originated from five neighboring countries: Russian Federation, Poland, Lithuania, Ukraine and Latvia. This is due not only to geographical proximity, but also to the persistence of political and economical ties which are explained by the membership of these countries to the USSR or more generally to the so called Eastern/ socialist Block. In addition, it seems that investors coming from a country with economy in transition or from a former country with an economy in transition, are best equipped to deal with the peculiarities of Belarusian economy and legal system. Moreover, they can be less demanding (than, for instance an investor from Western Europe) with respect to the business environment due to less differences in the business culture, and in general in the business climate (13). However, this also entails problems. If one of the positive consequence of FDIs is to enhance transfer

Figure 1. Breakdown of FDI flows into Belarus by components, 2002-2009 (per cent)

Note: Leasing is included in FDI according to official statistics of Belarus.

of new technology and know how, investments from countries like those of Western EU and from the UN could prove more useful than those, originating, for instance, from Russia and Ukraine. In any case, an increase of FDI’s from countries different from the main economic partners of Belarus which have been mentioned above could improve the diversification of the source of foreign investments in Belarus. Moreover this can help Belarus to improve its access to new international markets and to reduce its traditional dependency on Russia. It must be remarked that data concerning the home State of investors in Belarusian companies with foreign capital are very different from data regarding the origin of FDI’s flows and stocks, as it appears in figure 2. In fact, the geographical distribution of the inward FDI’s flows in Belarus in the period 2002 to 2008 shows that a considerable share of investments, about 85 per cent, originated from countries outside the CIS. Capital from Switzerland makes up more than half of the total inward flows - 52 per cent, and the direct investments from former and present offshore zones about 12 per cent (11% from Cyprus). However, judging by data in table 1, Switzerland is not among the home countries of investors which have established a considerable number of commercial organizations with foreign investments with significant FDI in equity.

The big role played by Switzerland and Cyprus reveals that in many cases FDI’s flows are not related to true investments but mainly consist in Belarussian capitals which are allocated to offshore centres and then re-invested in Belarus.

Figure 2 [FDI total inflows in Belarus by main home countries, 2002-2008] (S thousand)

Table 1. FDI in equity and number of commercial organizations with foreign investments by main home countries, 2008

<table>
<thead>
<tr>
<th>Countries</th>
<th>Number of commercial organizations with foreign investments</th>
<th>FDI in equity, S million</th>
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<tbody>
<tr>
<td>Germany</td>
<td>352</td>
<td>242598</td>
</tr>
<tr>
<td>Cyprus</td>
<td>287</td>
<td>138535</td>
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<tr>
<td>Latvia</td>
<td>242</td>
<td>21563,5</td>
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<tr>
<td>Lithuania</td>
<td>374</td>
<td>41805,9</td>
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<tr>
<td>Netherlands</td>
<td>63</td>
<td>109028</td>
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<tr>
<td>Poland</td>
<td>321</td>
<td>23394,6</td>
</tr>
<tr>
<td>Russia</td>
<td>1757</td>
<td>175175</td>
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<tr>
<td>United Kingdom</td>
<td>263</td>
<td>81384,5</td>
</tr>
<tr>
<td>USA</td>
<td>365</td>
<td>106729</td>
</tr>
<tr>
<td>Switzerland</td>
<td>61</td>
<td>14400,2</td>
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2. The result of the survey on the legal and policy framework governing FDIs in Belarus.

The evaluation of the investment climate in Belarus is conducted annually on the initiative of the Foreign Investment Advisory Council (14) and is based on individual interviews with heads or deputy heads of the companies with foreign investments. According to the Investment Code of the Republic of Belarus (15) (art.77, 91) companies with foreign investments are the legal entities with the share of foreign investments in their chartered capital equivalent to at least USD 20,000 and with a main objective of profit (earnings) generation and/or distribution of the earned profit among the participants. The data for the last survey were collected

(14) The Foreign Investments Advisory Council (FIAC), attached to the Council of Ministers of the Republic of Belarus, has been established in 2000. It is composed by the Prime-Minister of the Republic of Belarus (who is the Chair of the Foreign Investments Advisory Council), top-executives of a number of government bodies, and foreign firms and organizations (coordinated by Ernst & Young (Great Britain); the members include the German Economic Club; Zaxis Helomo (Germany); Stojz Agro Service (Germany); Slavneft TNC (RF); Gazprom (RF); Coca-Cola (Netherlands); Mayernik Medical (Denmark); Bahco-Bisov (Sweden); the International Finance Corporation Representation in Belarus; UNDP Representation in Belarus, etc.). The structure of FIAC comprises four working groups, whose target is the creation of a positive image of Belarus abroad, improving economic legislation, tax system, developing financial markets and financial institutions. Once a year a secretariat of FIAC organizes Investment and Economic Forum (for the last one, please, look here http://www.govemment.by/cn/cng_bin2009_video.html).

from October, 15th, to November, 25th, 2009, from the interviews of 500 respondents who represented the opinion of 10.31% of the whole number of Belarusian companies with foreign capital. With the use of new methodology, which is based on host-country determinants of FDI (19) and was introduced in 2008, the respondents have been offered to evaluate the attractiveness of the following categories of factors of the investment climate: the policy framework for FDI, economic determinants and business facilitation factors. Investors were required, during a fifteen-minute interview, to answer to a four pages questionnaire. It must be remarked that a detailed explanation of the meaning and of the content of each item has not been provided to interviewees. This means that, to a certain extent, the respondents were left free to interpret the questions by themselves. The present paper will focus on the first group of factors affecting the investment climate, which means, those related to the legal and policy framework governing FDIs in the Republic of Belarus. This group can be divided into four sub-groups, according to the level of satisfaction of foreign investors in relation to each factor. However, it must be preliminary remarked that, among the twenty seven factors which were chosen for the assessment of the policy framework for FDI in Belarus in 2009, the majority have proven to be unfavourable in 2009 just like in previous years.

Figure 1. Shows the percentage of the respondents who estimated each factor either positively or negatively
The first sub-group includes the following most unfavorable factors. (In parenthesis it is specified the percentage of respondents which consider them as not satisfactory).
- the system of sanctions imposed for the violation of terms and conditions of doing business (63.7%),
- red-tape level in the country (59.5%),
- the level of tax burden (59.1%),
- price regulation system (54.8%),
- the system of administrative procedures applied to the economic subjects (including the system of licenses for business) (55.7%).

For years foreign investors have highlighted the second and the third factors as huge hindrances for FDI. Thus, the level of tax burden as unfavourable factor of the investment climate was marked by 59% of respondents in 2006, 68% - in 2007 and 58.4% - in 2008. In addition, foreign investors admit the level of red-tape in Belarus as a factor which has been impeded FDI inflows for years. The same opinion was reflected in the surveys of 2006-2008.

The second sub-group of factors in the policy framework for FDI in Belarus comprises those which were defined as obstacles by 38-50% of respondents. Among them are the following:
- tax collection system,
- currency regulation system,
- the consistency of regulation as well as the terms and the conditions of doing business,
- the degree of the monopolization in the industrial sectors and services,
- transparency of changes in legal framework for business. This point is particularly important. As it will be better studied more in depth in the following chapters, the stability of the legal framework governing business activities and the level of transparency and predictability of changes of such framework has traditionally been considered a central issue by arbitrator settling an investor State dispute and especially when they are required to decide whether a violation of the fair and equitable treatment clause has occurred.

The findings of the survey are consistent with evaluations undertaken within the framework of international organizations. For instance, according to the annual IFC survey «Doing Business» the Republic of Belarus ranked last among 183 countries in 2010 in spite of considerable improvements in the other areas as the following: starting a business, dealing with licenses, employing workers, registering property, trading across borders, even getting loans (17) (see table 1).
The analysis helps to understand that the ineffective regulation of the business environment is related to the slow pace of transformation reforms in Republic of Belarus. The share of private sector in GDP of Belarus was 30% in 2009, which is the lowest among economies in transition, except Turkmenistan (19). The law level of attractiveness of FDI, as well as the not favourable business climate even for domestic investors, makes privatization process more difficult to carry out, thus preventing the achievement of economic transition.

The rank of Belarus by economic freedom assessment was 167 in 2009 that also shows a big gap in market institutions development (figure 4) and again Belarus stands before only Turkmenistan having economic freedom rate of 45. Moreover, it has the lowest indexes in the following spheres:

- finance freedom;
- property rights;
- investment freedom;
- freedom from corruption.


### Table 2. Changes in business environment in Belarus, 2007-2010 (ranks)

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<td>72</td>
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Source: The Heritage Foundation

### Figure 4. Index of Economic Freedom for countries of CIS region, 2009

The analysis of the policy framework for FDI in Belarus shows that investment climate is improving but many factors still hamper FDI flows (19).

Therefore it seems that the legal framework governing FDI, after they are admitted and they start their operations in Belarus, is improving much more slowly than the market access (the latter meant as the possibility for a foreigner to start a business in Belarus). For this reason it can be concluded that, in the current situation, a foreign investor can find it relatively easy to start a business in Belarus, but he still finds several difficulties in a second moment. As it will be studied in the following chapters, this is a point of the utmost importance for the present research. In fact, as most IIAs, included those to which Belarus is a party, do not oblige States to admit a foreign investor but only to treat him according to certain standards after he has been admitted, a situation in which a foreign investor can enter Belarusian market more easily but in which he will keep on not benefiting of proper standard of treatment can provide much more occasions for Belarus to violate IIAs it had ratified.

3. The legal and policy framework of the host State, the fair and equitable treatment and the issue of indirect expropriation.

After having pointed out which are the factors determining the Be-

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larusian legal and policy environment governing FDI's which are particularly unfavourable to FDI's (in the view of foreign investors themselves), the next step consists in studying whether the persistence of such factors can provide occasions for Belarus to breach the international commitments it has undertaken with respect to the protection of foreign investments, especially when it signed and ratified BIT's. In fact, there is not an automatic link between a widespread discontent about certain State policy on one side and on the other side a violation of one or more provisions of BIT's (20). Some features of the legal and policy framework governing foreign investments, although not favourable to foreign investors, could be not prohibited by IIAs or even they could be explicitly allowed by them (21). Of course, a mere prejudice to the interest of an investor does not amount in itself to a violation of a legal provision.

It is therefore necessary to briefly review the international instruments from the protection of foreign investors to which Belarus is Party as well as their provisions which are of particular importance in the analysis undertaken in the present paper. As of January 2008, Belarus has signed 56 BIT's and most of them have been ratified. Belarus is also party to some multilateral Treaties having a relevance for foreign investments: the Convention on Multilateral Investment Guarantee Agency of October 11, 1985, the European Energy Charter of December 17, 1994, the CIS Agreement on investment cooperation signed in 1993 in Ashgabat and the CIS Convention on Protection of Investor Rights signed in 1997 in Moscow. Since 1992 Belarus is also party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington D. C. in 1965 (the so called ICSID Convention). Belarus is also contracting party to 45 Double Taxation Treaties. In addition, as Belarus is one of the successor States of the Soviet Union, it is still bound by some agreements previously concluded by the USSR, although most of them have been renegotiated (22). Belarus is not a member of the WTO, therefore provisions on investments arising from WTO-related agreements do not apply.

In the present paper, the focus will be on BIT's which have been ratified by Belarus. A review of all their provisions would clearly fall outside the scope of this work and therefore the focus will be exclusively on a few provisions with which some aspects of the Belarusian legal framework can prove inconsistent (23). In particular, it must be studied whether the current legal framework governing foreign investments in Belarus provides occasions to breach 1) the clause contained in most BIT's limiting the possibility of host States to carry out direct and indirect expropriations (24) and 2) the fair and equitable treatment clause, which provides that foreign investors shall be treated in a fair and/or reasonable and/or equitable way (25). The violation of such clauses allows the investor, upon certain conditions, to apply to arbitral tribunals (for instance those organized by

(20) Currently BIT's have reached a high level of standardization, BIT's to which Belarus is a contracting party are not substantially different from the majority of BIT's. For an analysis of the content of IIAs and of BIT's in particular see, for instance: G. SACHSIUS, Bilateral Treaties and Multilateral Instruments on Investment Protection, in Recueil des Cours, Vol. 269, 1997, p. 251-454; UNCTAD, International Investment Agreements: Key Issues; UNCTAD, 2004.

(22) See for instance: Belarus-Netherlands BIT, art. 6 "Neither of the Contracting Parties shall take any measures of expropriation, nationalization or any other measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the measures are taken in the public interest, on a non discriminatory basis, are contrary to any obligations assumed by the Contracting Party taking such measures, and are taken in accordance with due process of law, and provided that such legislation or other provisions do not amount to a breach of the BIT." Belarus-Sweden BIT art. 4 Neither contracting Party shall take any measures deprving, directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with [...] Belarus - United Kingdom BIT: "Investments of nationals or companies of either Contracting Party shall not be nationalized or expropriated or subjected to measures having effect equivalent to nationalisation or expropriation [...] except for [...]"; Belarus-Switzerland BIT, art 5 "Aucune des Parties Contractantes ne prend, directement ou indirectement, des mesures d'expropriation, de nationalisation ou toute autre mesure ayant le même caractère ou le même effet, à l'exception des investissements d'investisseurs de l'autre Partie Contractante, si ce n'est pour des raisons d'intérêt public et à condition que ces mesures ne soient pas discriminatoires, qu'elles soient conformes aux conditions, à l'exception des investissements d'investisseurs de l'autre Partie Contractante, si ce n'est pour des raisons d'intérêt public et à condition que ces mesures ne soient pas discriminatoires, qu'elles soient conformes aux prescriptions nationales et qu'elles soient limitées au paiement d'une indemnité adéquate.". BIT Belarus-Cyprus: "Investissements d'investisseurs de la partie Contractante de l'autre partie Contractante ne seront pas expropriés, nationalisés ou soumis à toute autre mesure ayant le même caractère ou le même effet, à l'exception des investissements d'investisseurs de l'autre Partie Contractante, si ce n'est pour des raisons d'intérêt public et à condition que ces mesures ne soient pas discriminatoires, qu'elles soient conformes aux prescriptions légales et qu'elles donnent lieu au paiement d'une indemnité adéquate.". BIT Belarus-Latvia "Investissements d'investisseurs de la partie Contractante de l'autre partie Contractante ne seront pas expropriés, nationalisés, ou soumis à toute autre mesure ayant le même caractère ou le même effet, à l'exception des investissements d'investisseurs de l'autre Partie Contractante, si ce n'est pour des raisons d'intérêt public et à condition que ces mesures ne soient pas discriminatoires, qu'elles soient conformes aux prescriptions légales et qu'elles donnent lieu au paiement d'une indemnité adéquate.". Belarus-Switzerland BIT, art 5 "Aucun des investisseurs de l'autre partie Contractante ne prend, directement ou indirectement, des mesures d'expropriation, de nationalisation ou toute autre mesure ayant le même caractère ou le même effet, à l'exception des investissements d'investisseurs de l'autre Partie Contractante, si ce n'est pour des raisons d'intérêt public et à condition que ces mesures ne soient pas discriminatoires, qu'elles soient conformes aux prescriptions légales et qu'elles donnent lieu au paiement d'une indemnité adéquate.". Belarus-Sweden BIT, art. 4 Neither contracting Party shall take any measures deprving, directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with [...]

(23) M. BAVIER, cit., p. 18-20.

(24) For an overview of the circumstances in which the conduct of the host State, although prejudicing the interests of the foreign investor, does not amount to a breach of the provisions of a BIT, for instance because it allows the host State to pursue certain public goals of political importance, see: UNCTAD, The protection of national security in IIAs, 2009; UNCTAD, p. 25-55; W. BIS RAM, La prise en compte de l'intérêt général et des impératifs de développement dans le droit des investissements, in Journal du droit international (Cluett), 2008.

not impair the management, maintenance, use enjoyment or disposal thereof as well as the acquisition of goods and services and the sale of their production, through unreasonable or discriminatory measures"; Belarus-United Kingdom BIT, art. 2: "Investments of national or companies of each Contracting Party shall at all times be accorded fair and equitable treatment [...]"; Belarus-Switzerland BIT, art. 5: "ChaA Partie Contractante assurera sur son territoire un traitement juste et equitable aux investissements des investors de l'autre Partie Contractante".


Quite consistently, Tribunals have found that if the damage to the foreign investor occurs in a context of lack of stability, predictability, consistency and transparency of the conduct of the host State, this could amount to a breach of the fair and equitable treatment clause. In addition, if the host State through its actions makes the investor legitimately expect a certain treatment or a certain State conduct and if later such legitimate expectations are frustrated by the conduct of the host State acting in bad faith, a further evidence of the violation of the fair and equitable treatment clause is provided (27).

With respect to indirect expropriation, it has been pointed out that a State acts or conducts, committed in the exercise of its sovereign regulatory power and entirely depriving the investor of the enjoyment of its assets, gives rise to the obligation upon the State to pay compensation if the following conditions occurs. Regulatory measures adversely affecting the foreign investor shall have expropriatory character when they do not provide meaningful benefits to the State itself, they are not proportional when compared with the burden imposed to the investor, they are adopted in a way which does not ensure a minimum level of transparency, consistency and respect for the law, they determine a frustration of the legitimate expectations of the investor (28). In their decisions, Arbitral Tribunals have referred to the above mentioned issues in very different way. In some cases


Among the arbitral decisions which provide useful elements for the analysis of the content of the fair and equitable treatment clause and supporting the finding of the present paper see, for instance: Técnicas Medioambientales Tecned, S.A. v. The United Mexican States; ICSID No. ARB(AF)/00/2, award, May, 29, 2003; par.152-174; Metalclad Corporation v. The United Mexican States; ICSID Case No. ARB(AF)/97/1, award, August 30, 2000; par. 99; Occidental Exploration and production company v. Ecuador, London Court of International Arbitration; award, July, 1, 2004; par.183-185.

(28) The assessment of the existence and of the subsequent frustration of legitimate expectations is a very important element which is considered by arbitral tribunals. Legitimate expectations can be defined as the expectation that the investor acting in good faith is reasonably and legitimately induced to have by the same conduct of the host State. For the notion of legitimate expectations and transparency see: A. KOTIA, Regulatory transparency, in P. MUCHELNIK, F. ORTINO, FREDERO and C. SCHREUER, ed., cit., p. 617-636; S. FIELLA, cit., p. 373-400; M.G. PARIS, cit., p. 383 ss.; A. RENROCH, cit., p. 452-458. Several arbitral decisions discussed the role of legitimate expectations of the investors and/or of transparency in order to assess whether an indirect expropriation or a breach of the fair and equitable treatment clause has occurred. See, for instance, the following cases: Técnicas Medioambientales cit., par.122 and 149-174; Waste Management, Inc. v. United Mexican States, ICSID Case No ARB(AF)/00/3, award April 30, 2004, par. 159; Azurix Corp v. The Argentine Republic, ICSID case No. ARB/01/12, award, July 14, 2006, par. 316-323.
they took into consideration only some of them. Therefore the list provided here is neither exhaustive, nor the elements quoted must necessarily occur simultaneously (29).

As it can be seen, many elements contributing to determine whether an indirect expropriation or a violation of the fair and equitable treatment has occurred are the same, and, as stated above, the main difference between an indirect expropriation and a violation of the fair and equitable treatment should be found mainly in the extent to which the value of the investor’s assets is destroyed. For this reason, when the next chapter will analyze some aspects of the legal and policy environment of Belarus, it will discuss its consistency both with the fair and equitable treatment clause and with the provisions of (indirect) expropriation.

It must be remarked that an interpretation of the fair and equitable treatment clause and of the notion of indirect expropriation as developed by arbitral tribunals and as briefly described above can prove unfavourable for developing countries and economies in transition (like Belarus, especially in this specific period). In fact, in the same time such countries start to open up their economy and to attract more foreign investments, they are still struggling to improve their investment climate and to afford a higher protection to investors (and not only foreign investors but also domestic ones). Therefore, as the legal framework governing investment operations in their territory still presents very relevant shortcomings, the risk of committing breaches to the fair and equitable treatment clause or acts tantamounts to indirect expropriation remains high (30).

A positive development for these countries can be represented by some recent decisions of arbitral tribunals which, when applying the fair and equitable treatment clause, took into consideration also the conduct of the investors in relation to the situation of the host States in which they operate. According to this approach “Fair” should mean consistent with the domestic law of the host State, which in turn must be consistent with IIA's and other applicable sources of international law. "Equitable" should mean that all the interests at stake, both those of the investors and of the host State, must be adequately taken into consideration, together with all relevant circumstances which are specific of the case at issue. In other words, the principle of equity should help to rebalance the principles of fairness and respect of the law in the assessment of the conduct of the Host State. This means, first of all, that if a conduct of a State which adversely affects the activity of the investor is a consequence of a previous illegal or unconscious conduct of the investor himself, in this case the latter cannot claim a violation of the fair and equitable treatment clause. Secondly, this means that the notion of legitimate expectations must not be understood as an absolute concept, but rather in relative terms and precisely in relation to the situation of the host State. The particular economic, social and political situation of the host State contributes to determine which the legitimate expectations of the foreign investors must be. If an investor has unreasonable expectations on the predictability, stability and transparency of the legal, administrative and political system of the host country and if later such expectations are frustrated by the conduct of the host State, the investor cannot claim that a violation of the fair and equitable treatment clause has occurred. In fact investors must be aware that the level of consistency and stability of the framework governing business activities in a developing country or in a country with economy in transition could be different from the one of a developed country. If a foreign investor decides to invest in a developing country or in an economy in transition, it does so because it expects that the higher risk he undertakes will be remunerated by higher returns. IIAs must not be an insurance against wrong business assessments made by the investors or against the consequences that disappointed but also unreasonable expectation might entail (31). These developments in State-investor arbitration can reduce the risk for Belarus to be required by arbitral tribunals to pay compensation from affected investors. In fact, conduct of the Belarusian Authorities which adversely affect

(29) For a more detailed and analytical analysis of the elements taken into consideration when assessing the existence of an indirect expropriation, as well as for a survey of the relevant arbitral awards, see: A. Reinisch, cit., p. 432-458; Y.L. Fortier, S.L. Detmer, cit., p. 293 ss.; M.G. Parisi, cit., p. 383 ss.; R. Marlies, cit., p. 276 ss.; Kunoy, Burin, cit., p. 342 ss.; S. Fiutta, p. 375-395.

(30) M. Babkier, cit., p. 9-10.
foreign investors but which are, at least in part, the consequence of an unconscious conduct of the foreign investors or which had to be predicted and taken into account by a sufficiently aware foreign investor who acts in good faith, shall not be regarded as amounting to a breach of the fair and equitable treatment clause and therefore shall not give rise to an obligation upon Belarus to pay compensation.

4. Indirect expropriation, fair and equitable treatment and Belarusian legal environment.

In chapter 2 it has been found which are the features of the Belarusian investment climate which are considered not favourable by foreign investors. In chapter 3 an explanation has been provided of two of the clauses of BITs ratified by Belarus which could be breached by acts or conduct of Belarusian Authorities, given the current legal framework governing investments activities in Belarus. In this chapter an attempt will be made to study which are in detail the unfavourable features of the Belarusian legal framework governing foreign investments which can really provide opportunities to breach the provisions on the fair and equitable treatment and on the (indirect) expropriation contained in those BITs to which Belarus is Party. The main issues which will be considered will be the following: registration procedures, issuance of licences and permits, regulatory changes, transparency of the legal system, the role of sanctions and penalties in case of failure to comply with the numerous and complex provisions, the recourse to State contracts, taxation and tax administration.

First of all, it must be reminded that most business activities can be undertaken in the Belarusian territory only after the investor has successfully completed a registration procedure, which, with respect to foreign invested companies, is governed by art. 83 to 90 of the investment code. In any case, both domestic and foreign investors need to be registered prior to commencing their operations, the main differences consisting in the documents which must be submitted to competent authorities. According to art. 14 of the Decree number 11 of the president of the Republic of Belarus of 16 March 1999 «Concerning the Streamlining of Procedures for State Registration and Winding-up (Termination) of Business Entities» (as amended 17 December 2007) the authorities in charge of registration of commercial organizations with foreign investment are regional executive committees and the Minsk City Executive Committee, save when commercial organizations apply for undertaking their activity in a free economic zone, as in this case the registering authority is the administration of free economic zone itself. Exceptions are provided for banks and non-banking credit and financial organizations with foreign investment, which shall apply for registration to the National Bank of the Republic of Belarus, and

for insurance organizations with foreign investment, whose authority in charge of registration is the Ministry of Finance (14). The registration procedures, which traditionally has been long and complicated, now has made smoother and extremely fast. Investors consider the easiness of registering and starting a new business as one of the best aspects of the Belarusian investment climate. In addition, as registration procedures are mostly related to the phase of admission of the investment and not to the post-entry phase and as the former is not governed by BITs ratified by Belarus, registration issues by themselves are not susceptible to become the object of an investment dispute between the foreign investor and the Republic of Belarus (15).

However, according to art. 80 of the investment code, «certain kinds of activity, the list of which is established by the legislative acts of the Republic of Belarus, can be carried out by the commercial organization with foreign investments only on the basis of special permits (licences)». The provisions governing the grant of a license are contained in the Decree number 17 of the president of the Republic of Belarus of 14 July 2003 «Concerning Licensing of Certain Types of Activities» (as amended on 26 November 2007). Licences are issued by various State agencies, including ministries, State committees and departments as well as regional and city executive committees, according to the kind of activity the investor desires to undertake; the lack of a centralised authority in charge of this operation can cause inconsistencies and discriminations. The amendment of 2007 to the decree 17 has reduced from 150 to 52 the number of activities requiring a license and the documentation package which must be submitted to obtain it has been simplified. Nevertheless, it has been argued that in


(14) For instance, the Belarus - Switzerland BIT, art 2 only provides that "Chaque Partie Contractante encouragera, dans la mesure du possible, les investissements des investisseurs de l'autre Partie Contractante sur son territoire et donnera ces investissements conformément à ses lois et règlements". The provision doesn't seem to provide a legal obligation upon Belarus to admit Swiss investments, but only to make efforts to encourage them, as far as it can. In addition, admission must always be consistent with existing Belarusian law and regulations, so that Belarusian existing laws and regulation which do not favor the admission of Swiss investments are not inconsistent with the BIT. Art. 2 of the Belarus-Sweden BIT provides for similar terms: "Each Contracting Party shall, subject to its general policy in the field of foreign investment, promote in its territory investments by investors of the other Contracting Party and shall admit such investments in accordance with its legislation". See also art. 2 of the Belarus- Cyprus BIT: "Каждая Договаривающаяся Сторона обязуется на своей территории содействовать осуществлению, насколько это возможно, инвестиций инвесторов другой Договаривающейся Стороны и договориться такие инвестиции в соответствии со своим законодательством" Belarus remains free to determine its law and regulation applicable to the admission of foreign investments and the BITS shall not affect such provisions. For a more general discussion of the provisions contained in BITS related to the entry phase of foreign investments see UNCTAD, Admission and establishment; UNCTAD 2002.
many cases the obligation to obtain a license has been replaced by equally burdensome administrative requirements (14). On September the 1st, 2010 decree 450 was passed, further reducing the number of businesses for which licences are required: this is a clear signal that governmental authorities, really mean to reduce Ilw ll11111ber

Bc1arus have been made smoother (as foreign investors) problems persists in relation to the L'aet that l'or most activities complex and long procedures in order to obtain or renew licences are required: this

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carried out an indirect expropriation, depending whether the re l'usai to grant or to renew a licence partially or completely deprive the investor of

breached the fair and equitable treatment clause or even to have unlawfully

to the particular legai regime governing trade in land in Belarus. In the past, the value of its investments (37). A quite simi/ar problem can rise in relation

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and unpredictable way, refuses to renew it, this could be regarded as an act of indirect expropriation of the immovable assets located on the leased land. In this case too, lack of transparency of the procedures, bad faith of State authorities and frustration of investors' legitimate expectations are determinant for arbitral tribunals when assessing whether the possible non-renewal of the lease of land may be regarded as an act of indirect expropriation or a breach of the fair and equitable treatment. However it must be noted that the specific issue of land lease or land purchase is not considered particularly problematic by foreign investors, as a relative majority of them declare they are satisfied with terms and condition to purchase and rent real estate. Therefore, this specific issue does not deserve further comments.

An important aspect of the Belarusian investment climate which is considered not satisfactory by investors is the consistency and the stability of laws and regulations affecting business operations. In addition, as it is complained by foreign investors, changes in the legal framework governing investments occur in an opaque and unpredictable way, consistently with the general lack of transparency of the decision making and the administrative procedures in Belarus. Investors, therefore, fear that new business regulation can unexpectedly impose upon them high costs or, in general, reduce the profitability of their operations. In relation to this aspect it must be reminded that the most unfavourable aspect of the Belarusian investment climate is the system of sanctions imposed for the violation of terms and conditions of doing business (which is judged as not satisfactory by 63.7% of the respondents). Therefore, the combination of sudden and unpredictable regulatory changes, lack of transparency and heavy and highly punitive sanctions for those investors who are unable to immediately comply with the new applicable provisions, can determine a situation in which the adversely affected investor can successfully claim that he has not been accorded a fair and equitable treatment according to the wording of the BITs or even that it has suffered an indirect expropriation of its assets.

Art. 44 of the investment code, envisages the possibility for a private investor to conclude an agreement with the State «for the purposes of rendering the State support at realization of certain investment projects having the significant importance for the economy of the Republic of Belarus.» Such agreements (which seem to fall into the category or State contracts) can provide for rights and obligation other than those already provided in the investment code and in the other applicable law and regulations, upon both the Republic of Belarus and the investor. The rights and obligations which can be provided in an agreement with the State are listed at art. 46 of the investment code, which inter alia provides for the right of investors to refer future disputes to arbitrations instead of to


(16) On the issue of the lack of transparency and predictability, which has been pointed out in the survey as one of the most disappointing aspects of the Belarusian investment climate, see below.

(17) It could be added that there are Bts explicitly providing that the host country has an obligation to grant necessary licenses and permits if it decides to admit an investment. See for instance the Belarus-Switzerland BIT, art. 2 reads: "Lorsqu'elle aura admis un investissement sur son territoire, chaque Partie Contractante délivrera, conformément à ses lois et réglementations, les autorisations qui seraient nécessaires en relation avec cet investissement, y compris avec l'exécution de contrats de licence, d'assistance technique, commerciale ou administrative.

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domestic courts (40). These provisions are integrated by the Ordinance of the President of the Republic of Belarus No. 10 dated 6 August 2009 (41).

It is established in doctrine and in arbitral decisions that a mere breach of a State contract is different from a breach of a BIT (42). Therefore, if State authorities of the Republic of Belarus do not abide by an investment agreement concluded pursuant to art. 44-46 of the investment code, this, by itself, is not sufficient to enable the investor of a State with which Belarus has entered into a BIT to start an arbitration proceeding (especially if before an ICSID tribunal) in accordance with the wording of the BIT at issue and lamenting the violation of the BIT itself. However, agreements with the State could contribute to the formation of legitimate expectations of the investor. If Belarusian authorities enter into an agreement with a foreign investor pursuant to art. 44 of the investment code, they make him legitimately expect that they will support his investments in Belarus and that they mean to accord him certain rights and benefits. Therefore an unjustified and sudden breach of such agreements, especially when it is followed by the lack of effective remedies offered to the investor to obtain compensation, can allow the investor himself to claim that the host State is causing a damage to him and at the same time, it is behaving in bad faith, it is frustrating the legitimate expectations of the investors and it is acting in an unpredictable and non-transparent manner. As it has been pointed out above, all these elements could constitute a breach of the fair and equitable treatment clause or, depending on the severity of the damage suffered by the investor, an indirect expropriation.

A last aspect which deserves attention is related to taxation. Although efforts have been made, and are still ongoing, to reform the tax system in Belarus (for instance, between 2005 and 2007, a total of 17 categories of taxes were eliminated) investors are still not satisfied both with the overall tax burden, and with the administration of the tax system. The number of taxes is very high and, differently from the majority of countries, taxes are levied monthly; this increases the costs of compliance and the possibility to fail to comply in time with all the applicable provision, with the subsequent risk for the investor of being subject to harsh penalties (43).


It must be reminded that, in principle, a State is free to determine its level of taxation and the way it levies taxes; moreover, most BITs and IAs explicitly exclude tax issues from their scope of application (but merely provide a working definition of tax). Tax treaties, in any case, do not impose obligations upon contracting parties in relation to the amount of taxes they can levy, but essentially they focus on cooperation between the tax authorities of the contracting parties and on the measures aiming at avoiding double taxation or tax avoidance. Nevertheless, in certain cases taxation and tax administration could be regarded as a form of creeping expropriation or as entailing a breach of the fair and equitable treatment clause. The focus should not be on the name of the measure at issue (which means, whether the State authorities define such measure as a tax or as related to tax administration), but it should be on the effects of such measure on the investor. If the objective and the effect of a measure is to destroy or severely reduce the value of an investment in a selective way, the fact is called “tax” does not, by itself, ensure its exclusion from the scope of a BIT (except otherwise provided by the BIT itself) (43). If Belarusian authorities mean to use the tax system as a tool to harass a foreign investor, then this could amount to a breach of the BITs. It should be noted that Belarusian authorities could find this relatively easy, as the complexity, unpredictability and scarce transparency of the tax administration, combined with the existence of strict sanctions and penalties in case of failure to comply with tax provisions, offer several opportunities to trouble investors (44). If there is no intention of using taxes to harass investors, but the investor is simply damaged by the ordinary administration of the tax system in this case it is more difficult for him to prove that a violation of the fair and equitable treatment clause or even an indirect expropriation has occurred. What has been told in chapter 3 applies, in the sense that, at least according to some recent doctrinal and jurisprudential developments a foreign investor deciding to start business in Belarus should be aware of the difficulties it can encounter and, inter alia, of the peculiarity of the local tax system. If he is not ready to cope with such difficulties he is free to choose not to invest in Belarus. Likewise, if he has unreasonable expectations on the predictability, stability and transparency of the Belarusian tax system and if later such
expectations are frustrated by the conduct of the host State, the investor cannot claim that a violation of the fair and equitable treatment clause has occurred.

**Conclusions.**

This article has tried to understand which are the factors determining the policy and legal framework governing foreign investments in Belarus in relation to which investor-State disputes are more likely to arise and if, as a result of the submission of such disputes to international arbitration, Belarus might be deemed to have breached provisions of BITs to which it is Party.

The article has first studied which are the aspects in relation to discontent among investors is more widespread, and then it has studied whether this discontent can be related to a breach, committed by Belarusian authorities, of the provisions applicable to BITs. It has then studied which features of Belarusian laws and regulations could prove inconsistent with the international commitments Belarus has undertaken when entering into BITs, or which can contribute to creating the conditions for a breach by Belarusian authorities of such international instruments. The main findings can be summarised as follows.

- **Procedures to register a new business in Belarus** have been made smoother (and the level of investor satisfaction from this standpoint is high). Nevertheless, for most activities complex and long procedures in order to obtain or renew further licences and permits are necessary (in this area we find a low level of satisfaction of investors). When a licence is not obtained or not renewed after the investor has already provided a relevant contribution of capitals and after State authorities have made him reasonably expect that the licence would have been granted, this could amount to an indirect expropriation or, more frequently, to a violation of the fair and equitable treatment clause, especially if the whole process is characterized by lack of transparency and predictability.

- Investors complain about the frequent and often non-transparent changes of the complex regulatory framework applicable to investments. When such changes cause losses to investors, if they occur in an opaque way and in presence of further circumstances which has been analyzed, an arbitral tribunal might deem this can amount to a breach of the fair and equitable treatment clause or even to an indirect expropriation.

- In many cases State authorities conclude with the investors investment agreements (according to art. 46 of the investment code) which provide for further rights and obligations upon the investor. A conduct of Belarusian authorities inconsistent with the commitments it previously undertook when concluding an investment agreement could result into the frustration of the legitimate expectations of the investors and therefore this could provide an evidence that a violation of the obligation to ensure fair and equitable treatment has occurred.

- **The level of taxation and the administration of the tax system** are regarded by investors as extremely burdensome and potentially unfair. In certain cases taxation and tax administration could be regarded as a form of creeping expropriation or as entailing a breach of the fair and equitable treatment clause, when they are used in order to squeeze selected investors.

In order to achieve the goal of reducing the risk of violating BITs to which it is Party, Belarusian Authorities should try to improve the above mentioned features of the legal framework governing investment operations. In this way Belarus could minimize the risk of being required to pay compensation, as a result of investor-State arbitration, to investors which have been adversely affected by the conduct of Belarusian authorities. In addition, and this point is even more important, this could improve the overall investment climate of Belarus, increasing its ability to attract more FDIs and to create more favorable business conditions also for its domestic investors.