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FOREIGN DIRECT INVESTMENT AND NON-COMMERCIAL RISKS

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Abstract**—**The aim of this paper is to define non-commercial or political risks, determine their nature and genesis, and analyse their impact on foreign direct investment as an important element of foreign trade relations. Also, starting from the need to implement one of the postulates of international economic relations - the principle of free movement of capital - the paper analyses the extent of protection against certain non-commercial risks of the capital-exporting countries and capital importing countries. A significant part of the paper is devoted to the measures for international insurance of foreign direct investment against political risks, which were adopted as a result of the activities of the organs of the United Nations, the World Trade Organization and the Organization for Economic Co-operation and Development. Binding multilateral documents and regulations, created upon the initiative of the most developed countries of the world, have become an international legal framework for investments, and a matrix for building national investment legislations. Harmonisation of national legal standards for the protection of foreign direct investment was achieved through the membership in the Multilateral Investment Guarantee Agency which insures the countries from the political risks, but also during the process of settling investment disputes through the International Centre for Dispute Resolution, both headquartered in Washington, D.C. National and international insurance of foreign investments against political risks have been standardised and they guarantee the free movement of capital.

Keywords**—**foreign direct investment, non-commercial risks, transfer of profits, protective measure.

I. INTRODUCTION

FOREIGN investment is one of the aspects of the international movement of capital which, economically speaking, through the global allocation of productive assets, creates the conditions for optimal capital gain of foreign investor. It also contributes to the economic growth and provides other benefits for the recipient country. In comparative economic studies and international business practice foreign investment is defined as „transfer of funds and other capital assets from one country (capital-exporting country) into another (capital-importing country) with the aim to invest this capital into the operations of a company in the recipient country, for the purpose of direct or indirect participation in the profit of the company“ [5].

Foreign direct investment, as an aspect of international investment, implies investment with the aim to create an active economic interest that is being realised through the ownership right (10 per cent of investment, at least), control of business operations, and possibility to manage the invested capital by a foreign investor. Like any other business operation, foreign investment is subject to commercial and, in particular, non-commercial risks, which depend on the investment environment and the decisions by the state organs of the recipient country. General assumptions about the negative effect of political risks on foreign direct investment have been an axiom confirmed by the international business practice a long time ago. The aim of this paper is to see if the above stated thesis is true. In that context, the paper will define non-commercial risks involved in foreign investment and list the foreign investment protective measures by foreign investment exporting countries and by foreign investment recipient countries. In doing so, we need to keep in mind that the largest flow of foreign direct investment takes place between the industrialised countries, which, accordingly, play the role of both the country that exports and the country that receives foreign investment.

This paper will also cover the measures for the protection of all foreign direct investments under the international law, both through the legal framework governing international investment and through the activities of the international organisations. The paper will also cover direct or indirect application of legal provisions, i.e. their incorporation into national legislation.

II. DEFINITION OF RISK AND ITS TYPES

In legal theory, risk is defined as a threat of some future event that will result in damaging or destroying some contractual matters, i.e. a debtor may fail to perform his obligation in an obligation relationship. In the international economic relations, and foreign direct investment definitely falls into that category, a risk being an implied attribute of market economy, will negatively affect foreign investment. Unfavourable consequences of the risky event occurrence may be the result of force majeure, accident or activity planned in advance by a business entity or a state organ in the recipient country. Such circumstances are of utmost importance, because the establishment of responsibility for the incurred damage depends on them.

Business activities in specific market conditions, regardless of the area in which they are undertaken, imply certain types of risks. In foreign direct investment as a form of foreign trade operations, the subjects of contractual relations, the significance of the business deal and its goal, the complexity of the international and national procedures, the value of the investment, and the duration of the investment period proportionally increase the probability of damage occurence and complicate the position of a foreign investor in terms of his investment safety and exercising his corporative rights.

In the law and economics theory of international trade operations, risky events are generally divided into commercial and non-commercial, political risks. Commercial risks are more or less a universal category and occur on the national and international level in the sphere of economic and legal relations. As for foreign direct investment, the most significant and most common commercial risk is the risk that the investment will not be profitable, and in relation to it the problems regarding the recovery of outstanding debts due to bankruptcy or liquidation of the debtor, or court settlement, but also the risk of the exchange rate change which may, depending on the situation, fall into the category of non-commercial risks too.

In terms of their universality, commercial risks are common elements of business operations, and foreign contracting parties protect themselves against them by employing standard legal measures to secure and ensure the obligation performance. Therefore, commercial risks are not a factor that could significantly influence the distribution and degree of attractiveness of the environment for foreign investments. This, however, does not hold true for non-commercial or political risks. What are non-commercial risks on foreign investment and how are they qualified?

III. NON-COMMERCIAL RISKS

Non-commercial or political risks result from the events occurring as a consequence of force majeure or some actions resulting from direct or forced decisions by state organs of a recipient country. What is common to all commercial risks is their adverse effect that manifests as the hindered capital movement and poor economic and legal environment for investment. In legal theory and business practice, no dilemmas generally arise regarding the identification of political risks and their types. It is more or less agreed that non-commercial risks include nationalisation, confiscation, expropriation, contract non-performance, abandoning hard currency, war, armed conflicts, civil disturbance, risks related to repatriation and transfer of profit, and acts of god. Classification of non-commercial risks in the international practice is not harmonised, despite the efforts to standardise and classify them by the Organisation for Economic Co-operation and Development. In their Study on the investments into the developing countries in 1978, the OECD classified non-commercial risks into three groups. The first risk group includes confiscation, nationalisation and general expropriation of foreign productive assets without just compensation to foreigners. This risk group also lists indirect nationalisation, which implies more or less hidden discriminatory measures the capital-receiving country undertakes toward foreign investors. The second risk group includes risks of war, which further include revolution, uprising, civil disturbance and civil war. Thus, in addition to international factors (war) this risk group also lists internal political problems. The third group of non-commercial risks includes risks related to money transfer, i.e. capital repatriation and profit transfer. It seems that the third group should also include indirect nationalisation, whose scope of undertaken discriminatory measures against foreign investors is much wider, but the result is the same.

The differences in risk systematisation are mostly insignificant and are the result of solving practical issues that national agencies for risk management and insurance face when they invest in the economies of other countries. International private insurance companies have a somewhat different approach to covering foreign direct investment risks. In their operation, they put greater emphasis on the principle of profitability, whereas the portfolio of the insured risks is more or less standardised, as are the terms and ways of risk coverage. In addition to general commercial principles to which they adhere, national insurance companies of the exporting countries also keep in mind the national interests of their respective countries.

The interest of the capital-exporting countries is most directly threatened by coercive measures imposed by the government of the recipient country when they confiscate the assets of a foreign investor without compensation or with some compensation. In the context of those measures, the most drastic one is definitely confiscation, which is in its essence a penalty (fine) in the form of property which the organs of the recipient country set. Confiscation is the alienation of property owned by a foreign business entity or individual without compensation. But, for confiscation it is more adequate to say that it is a coercive institution from the domain of criminal law than a measure typical for solving a problem on the domain of international economic relations. This type of risk implies the right of the host country to take over – confiscate - the property of a company or individual if it they establish that their business operations or the result achieved through the usage of such property does not comply with the law or if they establish that movables or immovables are used for gaining illegal profit, smuggling, distribution of narcotics, and other illegal activities [7].

Nationalisation definitely takes the most significant place among non-commercial risks. By its scope and importance, nationalisation falls into a group of economic and political measures carried out by a state, and it is particularly dangerous if implemented without compensation. Through the nationalisation process, the property of a company in a branch of industry, or on a wider level, is from private ownership changed into state ownership to become a base for a new concept of economic development. Although being a measure whose occurrence is related to the establishment of a socialistic state, nationalisation returned into the international economic and political life through the neo-colonial struggle for national liberation of recent colonies in Africa and Asia in the 1960's and 1970's. Nationalised companies in the leading branches of industry become a material base for building a new society and economic growth.

In the last couple decades, nationalisation as an economic and political measure by a state has been more an exception. It is most often carried out in times of war or acts of god that have grave material consequences, and then it is temporal in its character. Negative international effects of nationalisation are mostly eliminated as being contrary to the general principle of the free movement of capital. And if any country decides to nationalise its industry, it is responsible to pay just compensation to a foreign investor for his nationalised assets.

In the context of coercive state measures that act as a non-commercial risk on foreign investment, expropriation is also very significant. Expropriation is a state measure in the form of taking privately owned property for the purpose deemed to be for public interest. Taking of private property for public interest is always followed by just compensation, and the expropriator, i.e. the state, is responsible to pay the market value for the expropriated property to a foreign investor. Legal guarantees as a protection against expropriation are, as a rule, stipulated by the contract on foreign investment, but also by the laws that govern foreign investment in the recipient country. The legal protection system in the recipient country most often stipulates that state interest in property expropriation shall be laid down by law, and it implies transparent and democratic passing of laws, in order to provide legal security for foreign investment.

Non-performance of foreign investment contracts, as a decision by the state organs of the recipient country, is manifested as non-recognition of the contract, its annulment, or refusal to perform under the contract as a whole or some of its parts. Classification of this risk as a non-commercial one is based on the presumption that the contracted parties in foreign investment contracts are not equal. This presumption starts from the principle of a sovereign government on the territory of the capital-reciving country, where a state is a carrier of ius imperium. In modern international economic relations, in which a country acts as a contracting party, the country is treated as a contracting party with equal authority and responsibility and as a carrier of ius gentium, so this type of risk has more the attributes of a commercial than a political risk. Certainly, this statement is true if a recipient country has the status of a contracting party in foreign investment agreements. If not, the measures of the state authorities that would affect the performance of the foreign investment contract, in which the recipient country acts as a carrier of sovereign economic empowerment, would be the measures against non-commercial risk on foreign investment.

Non-introduction of a convertible currency is a typical form of non-commercial risk on foreign investment. Convertibility of a currency is defined as a feature of the currency to be exchangeable to other currencies without limitation at the valid exchange rates. When a currency becomes convertible, it expresses that feature in all ongoing transactions with foreign countries through its substitutability with all world currencies. As an economic and financial category, convertibility is not in a sole decision-making competence of the national central bank. It also depends on meeting certain economic requirements both on national and international level.

Behind a convertible currency of a state should stand a stable, strong and productive economy, and its trade, i.e. its balance of payments should not be negative. Even if there is some balance-of-payment deficit, it should not be long-term, and especially not high, because these are also the parameters of political instability and uncompetitive economy. International component of convertibility implies international recognition of the said currency in payment operations, that is its ability to be exchanged for some other also internationally recognised currency. Non-introduction of a convertible national currency would, thus, be a measure of a bank of issue in the recipient country that would have an adverse effect on the existing foreign investment, but also on the overall economic and political environment of the recipient country.

Therefore, general political and social environment, with adequate prosperous economic environment, provide basic preconditions for foreign investment. The neoliberal concept of economic development in modern world implies free movement of goods, services, labour and capital, and a state should create its own and accept the international legislative framework, and guarantee their implementation. In doing so, a country should provide stable political environment, regular democratic parliamentary elections, functioning of the state of justice, and, of course, stable economy and a stimulating economic and legal environment for foreign investment. The countries with unstable political situation, frequent elections, and social tensions are unfavourable environment for foreign investment (Following the democratic changes in 2000, Serbia has become an attractive destination for foreign investors. However, the assassination of Prime Minister Zoran Djindjic in March 2013 created a negative image about the political climate in Serbia, which, among other things, slowed down the foreign capital flow into Serbia. The judgment of foreign investors was quite logical: How safe is it to invest in Serbia where neither prime minister is not safe? According to the data provided by the National Bank of Serbia, 1,071 and 796 million dollars were invested in Serbia in 2003 and 2004, respectively). In addition to the above, favourable investment environment in a country also implies simplified and transparent procedures needed to register foreign investments, eliminate arbitrarity, and decrease bureaucracy. Both national and international practice show that foreign investors and local capital recipients are far more satisfied if instead of state apparatus, local authorities appear as their partners (The results achieved in China, which as early as in the 1980's has created economic zones that attracted the leading multinationals, show that that the contracts concluded by the state organs with the foreign partners have not always been in harmony with optimal interests of the local communities. In Serbia, the Municipality of Indjija is the most attractive destination for foreign capital investment, because the local authorities simplified the procedures in their competence).

A group of most radical non-commercial risks includes armed rebellion, civil disturbance that may result in war, and war itself. Civil disturbance that grows into war, and armed rebellion are the results of radical solving interior social differences and conflicts between social groups that fight to come to power using force. In both cases they lead to an inadequate political, security, and, consequently, economic environment for foreign investment. The same consequences, yet of a much wider scope, are produced by war as a way of solving international disputes between two or more countries through the armed conflict. War, as the most violent form of settling disputes between two or more countries, and how to overcome it is stipulated by the Charter and other fundamental documents of the United Nations, that have established a system of collective security in the world.

A group of non-commercial risks also includes the risk related to profit repatriation and transfer. Such a risk is created by the introduction of restrictive state measures by the capital-receiving country. With these measures the importing country prevents or impedes free repatriation of a foreign investor's profit into the capital-exporting country and retransfer of the invested assets.

The third group of non-commercial risks comprises acts of god, but one could not say that they are the product of the political will of the recipient country, they are rather events that in no way depend on the will of the contracting parties, they are the result of force majeure.

There is no doubt that non-commercial risks de-stimulate the capital flow on the international level. Given that direct investments are beneficial both for the exporting and importing countries, the system of protection against non-commercial risks is in the interest of the contracting parties and also the international community as a whole. Hence, the system of legal protection of foreign investment is very complex and includes compatible measures for the protection of investments by the capital-exporting countries, capital-importing countries, and international community through global or regional international economic and financial organisations.

IV. Protective measures by a capital-exporting country

Statistics show that 68.6 per cent of total foreign direct investment in 2010 were invested by the most developed 20 countries in the world. Simultaneously, that same year, the economies of the Group 20 absorbed almost two thirds of total foreign direct investment in the world [6]. Each G-20 member and the OECD country presumably has established a firm legislative framework for protecting their own interests in the country they are investing in. Also, the structure of the economic systems of the leading countries in the world has been established and is functioning on the same principles. In bilateral economic relations, these countries achieve a high level of co-operation, and on the political level their activities are more or less co-ordinated. But what is the relation between these countries, on one side, and the developing or underdeveloped countries, and the transitional countries, on another, like? Furthermore, are the relations between the industrialised countries and the developing countries built on the principles of equality and sovereignty?

Although power, as the element of bilateral communication and settling of disputes, has been, as a rule, eliminated by the international law, we witness its (mis)use in modern international relations. In these relations, power is for a country a means of implementing not only its own political, but also economic interests. Capital has always, guided by economic laws, flowed from the economies of the most developed countries, that produce surplus, to the economies of the developing countries where there is a permanent need for, but also a chronic lack of resources. In that context, the position of the capital-exporting country and the capital-importing country on the international capital market suggests the unequal position of the contracting parties. When there is great demand for capital, foreign direct investment included, the price of the capital increases and the recipient countries often find themselves in a situation to offer foreign investors a more privileged position in comparison to domestic investors.

In addition to this de facto unequal position between the capital-exporting country and capital recipient country, the capital-exporting countries also strongly apply diplomatic protective measures in order to secure their investment abroad. The capital-exporting countries have to use their diplomatic protective measures for their multinationals in accordance with the public international law and its regulations. The above measures are aimed at protecting property rights of foreign investors coming from the capital originating country, and this protection is secured through the diplomatic protective measures and international legislation which enables them to bring a case to arbitration or before the International Court of Justice. A separate form of diplomatic protection, among other things, includes the so called „lump sum“ international bilateral agreements concluded between a capital-exporting and capital-importing country. Based on these agreements, the recipient country pays to the capital-exporting country a lump sum from which the latter reimburses the damage caused to the investor.

Similar effect have the „common private and legal means of protection, such as the establishment of a mortgage or other forms of security for foreign investments, and special forms of guarantees and investment insurance, which in their essence guarantee to physical and legal entities in the capital-exporting country the right to secure their foreign investment with domicile state insurance funds“[2]. Legal foundation for such a protection is a guarantee contract concluded between a foreign investor and a competent institution in his country (a state fund or agency), which undertakes the obligation that in case of secured risk, they cover the damage caused to the investor. By covering the damage, the exporting country, through the principle of subrogation, undertakes the right to compensation of the amount it paid to its investor from the recipient country. This type of guarantee is stipulated in bilateral agreements on encouragement and protection of foreign investment signed between the capital-exporting country and the recipient country. Although this type of guarantee stimulates the international capital flow, foreign direct investment included, as it provides additional guarantees to a foreign investor, we believe that its results are not always positive. Namely, it is hard to get over the impression that the procedure for determining the occurrence of the insured case, and the amount of coverage, would not wear the national colours of the state institution and its business entity. It seems that the relating potential disputes that could arise may additionally burden the relations between the two countries. However, it should be stressed out that the industrialised countries, which are also the world's largest investors, as socially responsible countries, have established institutions under direct state control that are directly in charge of the protection of their investors from non-commercial and commercial risks in the recipient country (In Germany, which is a leading European country by its capital export, the guarantee is requested from HERMES, and a final decision rests on the Inter-Ministerial Committee for Export Guarantees. The risk of Austrian exporters with its guarantees covers the Financial Institute of the Government of Austria, whereas the guarantees for the exporters from the USA are provided by the state agency, the Corporation of Foreign Private Investors).

As a rule, a foreign investor gains the right to manage and effectively control the business entity in the recipient country, into which he invested his assets, proportionally to the percentage of his share in the assets ownership. In case of foreign investment in the recipient country, the national legislation of the capital-exporting country stipulates that the company or other form of business operations in a foreign state has the obligation to act in compliance with the foreign investment regulations of the domicile, capital-exporting country. And it is this very national legislative framework that allows, limits or forbids the „export“ of capital from their own country into a foreign one. The principle of the so called personal character of the regulations creates an obligation to respect the legislation of the country where the business entity that invests abroad is seated. As a consequence of recognising personal character of the regulations, a request has been made by domicile countries to apply exterritorial application of national legislation. In the domain of income taxation, it has become a legitimate right in the domicile country. Also, based on the territorial validity-of-the-right principle, the foreign investor is also obliged to respect the legislation of the recipient country. The problem of double taxation appeared to be de-stimulating, so it has been solved on the level of bilateral economic relations between capital-exporting countries and capital-importing countries through bilateral agreements on avoiding double taxation. Conclusion of such bilateral agreements stimulates foreign direct investment.

V. PROTECTIVE MEASURES BY A CAPITAL-RECEIVING COUNTRY

Political risks affect the investment climate and are a limiting factor for foreign investments in general, foreign direct investments included. Therefore, it is of crucial interest for the capital-importing countries to build a complex system of legal guarantees and efficient measures to protect the property interests of foreign investors. Namely, the flow of foreign capital directly depends on the security and efficiency of the protection guaranteed by national legislation on investment, because the inflow of foreign capital directly depends on the degree of security and efficiency of the national legislation to protect the investments.

In comparative law, the protection of foreign investors by public law has been raised to the level of constitutional norms which start from non-discrimination of the market participants and acceptance of the national treatment principle. Foreign investors are guaranteed equal rights, equal legal position, and business operations under the same conditions and in the same way they are guaranteed to domestic players, i.e. they are guaranteed national treatment. The field of foreign investment in the comparative law is regulated with the norms, predominantly with separate laws, although some countries regulate this field with a general system of commercial legislation (In Slovakia, in the late 20th century, the domain of foreign investment was regulated with the provisions of the Company Law, and in Poland with the provisions of the Commercial Code from 1934. Today, in the Republic of Croatia the issue of foreign investment is regulated under the Corporations Act, but also with the Investment Promotion Act and lex specialis rule.). In both cases, consistency of the legal system implies compatibility of investment regulations and, of course, their compliance with the constitution. International legal component of public guarantees by a recipient country is obtained through its membership in international organisations established with the goal to protect foreign investments.

Foreign investment protection measures by a recipient country are, of course, focused on the guarantees that cover damages resulting from non-commercial risks. In comparative law, the capital-importing countries guarantee to foreign investors that they will provide compensation for the damage resulting from nationalisation, expropriation, or other similar measure undertaken by a competent state organ, in the real value of the lost property. Private ownership may be expropriated only exceptionally and due to a certain interest, in cases and in a manner stipulated by law, with full, unconditional compensation without delay. The Croatian Constitution stipulates that the rights gained through capital investment shall not be decreased by law or other acts, and ensures free transfer of income and invested capital from the recepient country once the investment ends. Similar solutions are provided in the legislation of Bosnia and Herzegovina and its entities. Namely, the property of foreign investors can not be nationalised, expropriated or requisitioned. In case a public interest has been established, the property of a foreign investor may be nationalised or expropriated, and in such cases, foreign investors are guaranteed the right to receive an adequate, prompt and just compensation, providing that the compensation for the expropriated property may not be less than the market value of the subject of expropriation.

A recipient country, due to the changing market conditions, often changes its investment legislation and by doing so de-stimulates foreign investors and aggravates their position. These measures are manifested as the introduction of additional or new taxes, foreign currency restrictions, introduction of new custom duties and fees, export bans, and non-issuance of import licenses. Their effect and consequences on foreign investments are equal to those of the nationalisation risk, but are due to their slow effect in the international business practice defined as "creeping" or indirect nationalisation. In reality, there are two ways of preventing the adverse effects of the indirect nationalisation.

The first way is the regulation that the rights and obligations of the investors stipulated by the law may not be abolished or annulled when subsequent laws and by-laws, which are less favourable for foreign investors than the existing ones, come into force. This legal standpoint is relatively easy to implement in legislations where foreign investment regulations are concentrated in one codified form. In the countries which have adopted a combined system of legislation in the domain of foreign investment, such as the Republic of Serbia, the risk is more visible. However, if the newly passed laws are more favourable than the existing ones, a foreign investor has the right to chose as paramount the law that is more favourable for him. These regulations shall be a part of the said laws. Secondly, an additional legal mechanism for eliminating the indirect nationalisation occurrence risk stipulates that the contracting parties, by articulating their autonomous will, enter the mentioned clauses in the contract.

War, armed conflict and civil disturbance, being the extreme non-commercial risks over the past decades, have in large part been the subject of international legislation on the protection of foreign investment, as they are to date, so we are going to present them below. However, measures of the recipient country may also cover the risks of war, armed conflict and civil disturbance (In autumn 2001, the Turkish Parliament approved the draft law that extended the scope of rights tr;ated to the protection of foreign investment against non-commercial risks. The draft law stipulates additional insurance of foreign investments against political risks, such as war, putsch, devaluation, and change of the currency value) [10].

The freedom of capital movement as a fundamental element of foreign investment is in particular threatened through the risk of money transfer. A transfer risk may, in its essence, be defined as a non-commercial risk which involves the introduction of state measures by a capital-importing country in order to prevent or in a certain way hider the free transfer of profit and repatriation of the invested capital, especially if these measures are introduced in a discriminatory, arbitrary or unjust manner [4].

With laws on foreign investment and foreign exchange operation, the capital-importing countries legally eliminate this kind of non-commercial risk and guarantee to a foreign investor the free transfer of all financial and other assets regarding his foreign investment. The solutions of comparative law in the national legislations of the capital-importing countries typically recognise the right to transfer the assets on condition that the investors pay an income tax, a dividend tax and other obligations stipulated by law, and based on public revenues related to the transferred amount. And, secondly, a transfer of the amounts obtained based on the decrease of the principal of the company being a subject of foreign investment, may be carried out only on the condition that the foreign investor had previously paid to the recepient country the customs debt for the part of the equipment imported free of duty, which after the decrease of the principal remains uncovered with foreign investment [1].

VI. International Legal Protection of Foreign Investment

Given the scope and significance of foreign investment in national economies of the countries, both capital exporters and capital importers, the issue of foreign investment protection has early obtained its international dimension (It is generally thought that the issue of international legal protection of foreign direct investment against non-commercial risks has been raised back in 1960's when the revolutionary Cuban Government carried out expropriation of property of the foreign companies operating there.). Namely, the interest of the industrialised countries was twofold. Highest percentage of foreign direct investment is placed between the most developed countries, so at the same time they play the role of a capital exporter and capital importer. Also, the most developed countries are major foreign investors in the economies of the developing and underdeveloped countries where non-commercial risks are the highest. Given the fact that the problems related to foreign investment are international in character, creation of the standards for their international legal protection had to obtain a universal form.

First of all, within the scope of activities of the United Nations, and as an expression of neo-colonial struggle for sovereignty, the freed countries fought for the Declaration and the Programme of Action on the Establishment of a New International Economic Order, the Resolution on the Development and International Economic Co-operation, and the Charter of Economic Rights and Duties of States by the UN General Assembly. These international documents incorporate a state's sovereign right over its national resources and, accordingly, the right to use these resources for economy purposes, including the right to define the conditions under which these resources will be entrusted to foreign investors. At the same time, the Charter of Economic Rights and Duties of the States adopted in 1974, grants to the states the right to nationalisation, expropriation and nationalisation of the property of foreigners, without discrimination, and with appropriate compensation to the owner. Since the acts adopted by the UN General Assembly do not have a direct scope of application, an international universal standard was established in order to harmonise the national legislations of the countries. The Economic and Social Council of the United Nations has founded the Centre on Transnational Corporations and the Commission on Transnational Corporations, which in 1996 brought a Codex on Behaviour of Transnational Corporations. However, the process of establishing an international system for foreign direct investment protection, which is a system of recommendations in its character, did not take place exclusively under the wing of the United Nations.

Namely, the Organisation for Economic Co-operation and Development, which today gathers 30 industrial countries, made the Draft Convention on the International Protection of Foreign Property, followed by the Multilateral Agreement on Investment in May 1995. The main goal of the project was to provide the same investment conditions to foreign investors, and legal protection like the one provided to the host (national treatment) in the OECD countries, the signatories of the agreement. As early as in 1976, the OECD adopted the Declaration and the decision on international investment and transnational companies, that recommended to the member countries to provide national treatment to transnational companies within the limits of their respective national law.

The influence of the World Bank on the domain of foreign investments, and through them on national legislations of the member countries is carried out through its three institutions: International Finance Corporation (IFC), International Centre for Settling Investment Disputes (ICSID) and Multilateral Investment Guarantee Agency (MIGA). MIGA has been established as a specialised agency of the International Bank for Reconstruction and Development and represents a significant multilateral safety mechanism for the protection of foreign direct investment. MIGA has a status of international legal entity, i.e. it is an independent international organisation. Its headquarters are in Washington, D.C., and membership to MIGA is open to all World Bank members, and Switzerland. MIGA has been established to encourage foreign direct investing in the member countries of the Agency, in particular in the developing countries. It insures foreign direct investment against non-commercial (political) risks and promotes investing in the developing countries, and in the countries of the Central and Eastern Europe. Interestingly, MIGA insures only new foreign investments from any member state directed into another member state – a developing country. Thus, the industrialised countries have achieved the institutionalised protection of capital they invest in critical areas, through the projects that would lead to the development of the host country. Currently, MIGA has 174 member countries, it has capital of over one billion euro, and it contracts the insurance against political risks on the 15-year period.

The Agency protects foreign investors against the risk of expropriation, nationalisation (indirect nationalisation included), and confiscation of property, the actions that result in the reduction or elimination of property, limited control over it or limited right to manage it. MIGA also covers the risk of the non-performance, repudiation or termination of the contract by the government of the recipient state, and insures against damage resulting from them, when the contract has been signed with the host company. War, civil disturbance, and the resulting damage of the property of the foreign investor due to military operations, civil disturbance, uprising, sabotage and terrorist acts are covered by the Agency's insurance. The risk of bans and limitations on the transfer of money by a foreign investor from the capital-importing country may also be covered by the Agency's insurance.

The Agency also protects against losses arising from the investor's inability to convert local currency value (capital, interest, principal, profits and royalties) into hard currency to transfer the money outside the host country. It also protects against long delays in buying foreign currency, or the limitations in the scope and amount of the currency set by the host country, unfavourable regulations and value loss. It should be stressed out that MIGA does not cover local (national) currency depreciation in the host country [1].

The Agency provides risk insurance in such a way that it covers 90 per cent of the net value of the insured investment, that may be up to 50 million dollars, and up to 95 per cent of debt. However, MIGA also provides international protection to the company of the recipient country, giving it guarantees that a foreign investor will meet his obligations with regard to environmental protection measures and respect of social standards.

Harmonisation of trade rules under the International Investment Law was also enabled through the Multilateral Trade Agreements administered by the WTO, such as the Agreement on the Conditions for Trade-Related Foreign Investment, the Agreement on Trade-Related Investment Measures (TRIMs), General Agreement on Trade in Services (GATs), Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPS), and Multilateral Agreement on the Liberalisation of Banking, Insurance and Trade in Securities.

Conclusion of numerous multilateral agreements by world and regional international organisations in the domain of investment law resulted in the harmonisation of national legislation on foreign direct investment and creation of international standards. Of course, they were the foundation for concluding bilateral agreements on encouraging and protecting the investments. These bilateral agreements incorporate generally accepted standards in terms of most-favoured-nation treatment and national treatment of foreign investors, and they also incorporate generally accepted international protective measures against non-commercial risks.

If the disputes between the contracting parties over the damages incurred due to, among other things, non-commercial risks, can not be settled peacefully, the international legal protection of foreign investments is sought before the international arbitration bodies. Specialised agency for the investment disputes is the International Centre for Dispute Resolution, a part of the International Bank for Reconstruction and Development, headquartered in Washington, D.C. The competence of the International Centre for Dispute Resolution and the arbitration bodies, being established for a specific dispute, is regulated by the Convention on the Settlement of the Investment Disputes between Nationals and States of Other States ratified in 1965. Mediation as a manner of pre-court conference or the arbitration process, carried out by the Centre, may be started up, in writing, by any country that signed the Convention, or its national.

A special legal protection is guaranteed to foreign investors by the Convention in the process of recognition or enforcement of judicial awards. The Convention, in Article 54. stipulates that each contracting state shall recognise any award rendered as binding and enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgement of a court in that state. In this manner these judgements are equalised with the judgements by the national courts, and their enforcement should be in compliance with the regulations in force on the territory where the reinforcement is requested.

VII. CONCLUSION

Foreign direct investment, as a form of the international capital flow, is a crucial element for the development of national economies and internalisation and globalisation of world production and trade. FDI in the state of contemporary developmental stage, take on the function key factor of any economy and the trade became the main mechanisms of globalization of world economy [7]. Foreign investment is characterised by a new legislative framework, high investment value, long-term realisation and proportionally increased probability of damage to be sustained by a foreign investor as a result of a risk occurrence of non-commercial nature. In the international economic relations an agreement has been reached about the definition of a political risk, which comprises: nationalisation, confiscation, expropriation, non-performance of a contract, non-convertibility, war, armed conflicts, civil disturbance, risks related to repatriation and transfer of profit, and acts of god. Analysis of trends in foreign direct investment in Serbia is given in papers [3, 9].

The axiom that political risks - occurring in the form of coercive measures of the recipient country state organs - affect the interest of the capital-exporting countries has been proved through the establishment of the protective mechanisms in the national legislations, on one hand, and by signing many bilateral agreements on encouraging and protection of the investments between the capital-exporting and capital-importing countries. The concept of establishing the national investment legislation has been in comparative law raised to the level of constitutional norm that prevents discrimination of the participants on the market and promotes the principle of national treatment. Further development of the legal protection of foreign investors has been enabled through the system of general and special economic laws on foreign investment and other aspects of foreign trade operations. At the same time, on the international level, global and regional international trade organisations initiated the administration of multilateral agreements on the protection of foreign direct investment. The initiators were, of course, the industrialised countries, which are also the greatest capital exporters. They did it through the bodies of the United Nations, the World Trade Organisation, the World Bank and the OECD. Within the World Bank, the Multilateral Investment Guarantees Agency (MIGA) has been established with the aim to encourage, promote, and insure foreign direct investment against non-commercial risks. The above acts of the international organisations contributed also to the harmonisation of national investment legislations and present a legal framework for foreign investment. The activity of specialised arbitration bodies within the International Centre for Disputes Resolution, which is a part of the World Bank, headquartered in Washington, D.C., much contributed to the harmonisation of the international practice.

Free movement of capital, especially foreign direct investment, has become a constituent element of modern international economic relations. Foreign direct investment, according to basic economic postulates, is sold on the markets where the capital, in the broadest sense of the word, is scarce. In addition to economic risk, which is an evident companion of any investment, that is investment into the economies of other countries, there are also other risks - political or non–comercial.

States whose undertakings have been the largest investors through a network of universal and regional economic and financial organizations in the past seven decades, through a broad institutional framework drawn up measures to protect foreign investment. The process of protection of foreign investment is realized, on the one hand, through the harmonization of provisions of national legislation with the international investment rules and international organizations, and, on the other hand, by building mechanisms of arbitration and resolution of court disputes arising from foreign investment.

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