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### **National legal regulation of foreign investments**

The article analyzes the international and national practice of legal regulation of foreign investments. The main issues necessary to attract foreign investors are also indicated. Adoption of special laws on foreign investment is caused by the necessity to attract foreign investment into the country's economy by creating a favorable climate and granting preferential treatment for foreign investments. The author emphasizes that the creation of the appropriate system of legal regulation of activities with the participation of foreign investors is not limited by creating a favorable regime for foreign investments or granting them benefits and preferences, first of all, it should take aim at ensuring and protecting social (public) interests. Therefore, the state has the right to install certain restrictions in implementation of foreign investments. As it is proved by the international practice of attracting foreign investment, the introduction of restrictions and withdrawals from the national regime and most-favored-national treatment for the placement of foreign investment is possible even in the conditions of maximized full liberalization of foreign investors' activity. Disclosing the general trend in the development of national legislation on foreign investments in different countries, the author believes that after the end of the investment policy aimed at attracting foreign investment that has led to economic growth and the welfare of the population, another process begins, when the differences between different legal regimes of foreign and national investment are obliterated. As a result, special legislation on foreign investment is replaced by a general legislation, including investment, civil, commercial legislations, etc.

*Keywords:* investment, national investment, foreign investment, legislation on foreign investments, investment activity, foreign investor, investment policy, foreign capital, investment area, investment field, investing.

The national legal regulation of foreign investment also plays an important role in the development of investment activities and investment relations. In general, there are two main approaches to the national legal regulation of foreign investments: 1) in developed countries (such as the United States, Germany, Great Britain, France, etc.), there are no special laws for foreign investments, since foreign investors have used the same rules and regulations that are applied to the activities of national investors. In developing countries (such as countries in Africa, Latin America and Asia), there is a special law on foreign investment, which is either Foreign Investment Codes or the laws on foreign investment or other investment laws [1; 35].

In general, the international practice of legal regulation of foreign investment considers that the adoption of special laws on foreign investment is caused by the necessity to attract foreign investment into the country's economy by creating a favorable climate and granting preferential treatment for foreign investment.

Due to the fact when studying the possibilities of investing abroad, investors usually study the political and legal situation in the country of potential investments [2; 239]. However, in the process of economic development of this or that country, there is no longer any need to create special conditions for foreign investors, therefore special laws on foreign investment are abolished.

In particular in Canada, the Law on Foreign Investment was enacted in 1973, and in 1985 was abolished in connection with the adoption of the Law on Investments in Canada [2; 242]. Consequently, the general trend in the development of the national legislation on foreign investment of different countries is that after the end of the investment policy aimed at attracting foreign investment that has led to economic growth and the welfare of the population. Another process begins, when the differences between different legal regimes of foreign and national investment. As a result, special legislation on foreign investment is replaced by general legislation, including investment, civil, commercial legislations, etc.

In Kazakhstan, special legislation on foreign investment lasted only 13 years. First, the Law of the Kazakh SSR «On Foreign Investments in the Kazakh SSR» was adopted on December 7, 1990. Then on December 27, 1994 a new Law «On Foreign Investments» was adopted, which had abolished the previous legislative act; and in connection with the adoption of the Law of the Republic of Kazakhstan «On Investments» on January 8, 2003, the Law of the Republic of Kazakhstan «On Foreign Investments» of 1994 was declared forfeited. Kazakhstani legislation on foreign investments provided for the possibility of granting both the national regime and the most favored national treatment to foreign investments as well as a whole range of

guarantees provided to foreign investors: guarantees against changes in legislation, guarantees against expropriation, guarantees against illegal actions by state bodies and officials, etc. As well as the possibility of obtaining additional benefits for foreign investments in priority sectors of economy and social sphere (articles 4-13).

In addition, the legislation on foreign investments provided for the possibility of establishing various restrictions. For example, it was stipulated that foreign investments could be invested in any objects and activities not prohibited for such investments by the legislative acts of the Republic of Kazakhstan, but there was no indication of which objects and activities are related to such investments. Further, in accordance with the legislation, the territories could be determined where the activity of foreign investors or enterprises with foreign participation can be limited or prohibited, based on the necessity to ensure national security.

Thus, in accordance with the legislation of the Republic of Kazakhstan on national security, it is established that in order to protect the national interests of the Republic of Kazakhstan, including preservation and strengthening industrial potential, the Republic of Kazakhstan, with the observance of guarantees provided to foreign investors, can monitor the condition and use of the facilities of the economy of the Republic of Kazakhstan, which are under the government and ownership of foreign organizations or organizations with foreign participation [3].

Alongside with this, it was stipulated that the requirements for ensuring national security are mandatory taken into account when concluding contracts for the use of the strategic resources of the RK, during the implementation of these contracts and monitoring of their execution. At the same time, the national security legislation stipulates that it is not possible to conclude international treaties that could prejudice national security or lead to the loss of state independence of the Republic of Kazakhstan and that would limit the sphere of sovereign rights of the Republic of Kazakhstan. In general, it must be admitted that the establishment of restrictions for foreign investors is widely used in international investment practices, and does not indicate a restriction on the rights of foreign investors.

The Law of the Republic of Kazakhstan «On Investments», which was adopted on January 8, 2003, lasted until January 1, 2016, i.e. before the entry into force of the Entrepreneurship Code of the Republic of Kazakhstan. 24 business articles were directly devoted to the regulation of investment activity in the Entrepreneurial Code of the Republic of Kazakhstan.

The Entrepreneurial Code of the RK gives the right to investors to invest in any objects and types of entrepreneurial activity, except in cases stipulated by the laws of the Republic of Kazakhstan.

The Entrepreneurial Code of the Republic of Kazakhstan provides investors with full and unconditional protection of rights and interests, which is ensured by the Constitution of the Republic of Kazakhstan, the Business Code and other normative legal acts of the Republic of Kazakhstan, as well as international treaties ratified by the Republic of Kazakhstan.

The investor also has the right for compensation of damage caused to him as a result of issuing acts by government bodies that do not comply with the legislative acts of the Republic of Kazakhstan, as well as a result of illegal actions (inaction) of officials of these bodies in accordance with the civil legislation of the Republic of Kazakhstan [4].

The main normative legal acts regulating investment relations in Kazakhstan are:

1. Entrepreneurship Code of the Republic of Kazakhstan;
2. Resolution of the Government of the Republic of Kazakhstan «On some issues of implementing state support for investments»;
3. Resolution of the Government of the Republic of Kazakhstan: «On approval of the list of investment strategic projects»;
4. The order of the Minister for Investments and Development of the Republic of Kazakhstan «On some issues of state support for investments»;
5. Resolution of the Government of the RK «On Approval of the Rules for Granting an Investment Grant»;
6. The Order of the Acting Minister for Investment and Development of the Republic of Kazakhstan «On Approval of the Rules for the Reception, Registration and Consideration of an Application for the Provision of Investment Preferences».

We believe that the creation of an appropriate system of legal regulation of activities with the participation of foreign investors is not limited by creating a favorable regime for foreign investment or giving those benefits and preferences; first of all, it should be aimed at ensuring and protecting social (public) interests. Therefore, the state has the right to impose certain restrictions on the implementation of foreign investments.

As it is demonstrated by the prevailing international practice of attracting foreign investments, the introduction of restrictions and withdrawals out of the national regime and most-favored national treatment in the placement of foreign investments is possible even in conditions of maximized liberalization of foreign investors' activities. For example, in the Annex to the bilateral agreement between the RK and the US on the promotion and mutual protection of investments, it is stipulated that the key industries related to national security and the preservation of sovereignty (military and some extractive industries, railway and aviation transport, river and sea navigation, agriculture and forestry, fishing, mass media, banking and insurance, mediation activities on the securities market); ownership of land, use of subsoil and other natural resources, including in the maritime exclusive zone; industries in which there is a state or private state monopoly (postal service, telegraph, telecommunications, production and supply of electricity, production and sale of alcoholic and tobacco products) [5; 86].

According to the US law of 1934, transfer of television and radio stations to foreigners was forbidden. Since 1920, only US residents have been permitted to the shipping trade in the United States, and since 1958 and into the sphere of air transportation. In accordance with the US Mine Act 1972, the exclusive right in this field was assigned to residents. According to the US Atomic Energy Act, licenses for non-citizens of the United States for the production and use of nuclear energy, as well as for the possession of nuclear facilities are not allowed.

According to the US Federal Means Communications Act, a merger of telegraph companies is prohibited, in the outcome of which over 20 percent of their shares may be owned or controlled by foreigners; hereby foreigners in the United States do not have the right to own more than 25 percent of the property in the aircraft, in coasting or inland navigation vessels.

According to the US Foreign Direct Investment Act of 1990, the US Congress regularly reviews reports on US business activities with foreign investment [6; 311].

This practice has become widespread due to the fact that the state should guard the interests of its national (domestic) investors, and protect them from unwanted foreign competition in certain sectors and spheres of the economy. Alongside with this, states with developed economies try to protect domestic producers from foreign competition in sectors that are strategically important for the economy of their state.

As far as the states with developing economies concerned, foreign competition is undesirable for them, because, for example, in sectors with advanced technology, national investors are not yet able to compete on an equal footing with foreign investors. In addition, character measures of restrictive can also be applied when there is a threat of monopolization or domination of certain sectors of the economy by foreign investors, which, naturally, will negatively affect the state of competitiveness as a whole.

Consequently, among important directions in the national legal regulation of antimonopoly foreign investments regulation can be mentioned. At the same time, in the process of national and legal regulation of foreign investments there are common cases where states try to extend the effect of their domestic law to the international investment sphere.

For example, the USA has the Helms-Burton Act, which was signed in March 1996, is still in force. The main objective of the Helms-Burton Act is the economic isolation of Cuba. With the support of this law, pressure is exerted on individuals from other third countries in order to prohibit them to deposit investments in to the economy of Cuba. The Helms-Burton Act expressly states that an individual or a legal entity of the United States can submit a claim to the US Federal Court against any foreign person who conducts commercial transactions with property expropriated in the Republic of Cuba; as well as the right to deny visas to any person who realizes trade contracts in relation to the confiscated property in Cuba [6; 315-316].

Of course, the Helms-Burton Act has been heavily criticized, both by the legal scientists of most foreign countries, and by separate states (EU countries, Canada, Mexico, etc.). The EU Commission in November 1996 adopted a special act № 22713/06 on neutralizing the function of the law of the United States and other identical foreign laws having extra-territorial effect.

In this regard, the EU has warned the US government that the US assets will be frozen in Europe and identical restrictions on entry procedure will be introduced if the law is applied to EU citizens and companies [6; 316, 317].

We suppose that the Helms-Burton Act can be regarded as an attempt to interfere in the internal affairs of another state (the Republic of Cuba), as well as to restrict the right of citizens of other states to make investments into the economy of the country they wish, i.e. the right of the investor to determine independently the country - the recipient of capital. Together with this, one should also take into account the fact that cross-border mergers and acquisitions do not always positively influence the development of the econo-

my of the host state. To the main reasons for the possible negative impact can be related to: the mismatch of commercial objectives of TNCs and public goals of the states development that accept investments. At the same time, transfer of ownership of important enterprises to foreign investors can lead to the undermining of national sovereignty, equivalent to re-colonization [7; 36].

Serious concerns about cross-border mergers and acquisitions are experienced not only by developing countries, but also by countries with advanced economies (about 90 percent of all cross-border mergers and acquisitions, including most of the 109 mega-deals involving more than 1 billion US dollars each, occurred in countries with developed economy) [7; 28]. As an example, it may be the attempt of Japanese investors to purchase the Rockefeller Center in New York and the film studio in Hollywood, which provoked violent indignation in the American press [7; 34, 35]. All this demonstrates the necessity for a balanced and rational approach to attract foreign investments, as well as all-round registration, both positive and potential negative aspects associated with investing foreign capital.

International experience shows that the provision of various benefits and the establishment of certain restrictions for foreign investors are quite compatible with each other and widely practiced in advanced economies, and for this there is no need for compulsory presence of a special act in this field.

In this regard, we have come to the conclusion that the repeal of the Law on Foreign Investments or the Law on Investments cannot automatically lead to an equalization of legal regimes of foreign and national investments due to the objectively existing differences between foreign private property and private property of individuals and legal entities of the RK. The study of the experience of foreign countries shows that the preservation of differences is quite compatible with the establishment of a common national regime for foreign investments, which, first of all, meets the interests of the state that accepts foreign investments, as it seeks to preserve economic and political independence, and also to stimulate national investors.

International experience proves that the main task of less developed countries is still to attract foreign direct investments not only in great volumes but of higher quality, which is characterized by the fact that they help to establish closer ties with the national economy, expand export orientation, introduction of advanced technologies, upgrading of employees' skills and other side effects [7; 3].

In this connection, at the present time, it is essential to create conditions for attracting foreign direct investments, but not to attract short-term (speculative) foreign capital, for which it is necessary to develop and implement a whole range of measures aimed at creating a favorable investment climate in the Republic of Kazakhstan. At the same time, it is important to avoid situations where foreign direct investment is mainly inserted in only one sector of the economy (from 1993 to 2000, more than 80 percent of cumulative foreign direct investment was invested into the oil sector) [8; 16], the work on attracting foreign direct investment into other sectors of the economy of Kazakhstan should be activated. To do this, one can appeal to the practice of foreign countries in attracting foreign investments, for example, the approach adopted in Malaysia, Singapore or Thailand, in compliance with which a significant focus on attracting foreign direct investment was introduced integrating the economy into the production networks of transnational corporations, or another approach should be investigated that has been adopted in the Republic of Korea and the Chinese province of Taiwan. It constitutes stages of developing domestic enterprises and property innovative capacity and the use of transnational companies mainly as a source of technology (basically without integrating them into economic structures). One more approach that is applied by the Hong Kong administration (PRC) where the gist of the matter consists in the maintenance of infrastructure and general management, while the allocation of resources is carried out considerably through market forces [9; 36].

As it is known, precisely it is the PRC that is the major recipient of foreign direct investments in Asia, whose inflows, for example, in 1998 amounted to 45 billion US dollars (we can mention for comparison, that in the Russian Federation, the volume of attracted foreign direct investment in 1998 amounted to only 2 billion US dollars) [9; 28].

Accordingly, alongside of the compliance with the general rules and standards aimed at creating a regime no less favorable for foreign investments than for national investments (and possibly more favorable), each state should develop its own strategy for attracting and applying foreign investments that would take into account real economic needs and opportunities as fully as possible (including the level of economic and social development, available and potential resources, the degree of economic and political stability, etc.).

Summing up, we can mark that one of the main shortcomings in regulating foreign investments is the imperfect and unstable legislation in this area (it's not just about investment legislation, but also about legislation on currency regulation, tax legislation, customs legislation, banking legislation, etc.).

Of course, the gaps in the national legal regulation of foreign investment can be filled up with the conclusion of bilateral international agreements on mutual protection and promotion of investments, the possibility to determine certain provisions and conditions in the investment contract, but this is not enough. Legal regulation of the activities of foreign investors, along with the provision of state guarantees and the provision of state support to foreign investors operating in priority sectors of the economy, also includes currency regulation; licensing regulation; tax regulation; customs regulation; antimonopoly regulation and the like. At the same time, the state uses various measures of control (methods and means of influence) as an incentive character (provision of investment preferences); of supervisory (control over observance of state norms, standards and rules); as well as measures of compulsory nature (which are used in cases of violation effective norms of the current legislation by investors).

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### Ли Шань

## Шетел инвестицияларын ұлттық-құқықтық реттеу

Мақалада шетелдік инвестицияларды құқықтық реттеудің халықаралық және ұлттық тәжірибесі талданды. Сондай-ақ шетелдік инвесторларды тарту үшін қажетті негізгі сәттер көрсетілді. Шетел инвестициялары туралы арнайы заңдар қабылдау шетелдік инвестициялар үшін қолайлы ахуал жасау және жеңілдетілген режим ұсыну жолымен ел экономикасына шетелдік инвестицияларды тарту қажеттілігінен туындайды. Автор шетелдік инвесторлардың қатысуымен қызметті құқықтық реттеудің тиісті жүйесінің жиынтығын құру шетелдік инвестициялар үшін қолайлы жағдай жасау режимін беру немесе оларға жеңілдіктер мен преференциялар болуы ғана емес, ол, бірінші кезекте, қоғамдық (жария) мүдделерді қамтамасыз етуге және қорғауға бағытталуы тиіс екендігін атап өтеді. Сондықтан мемлекет шетелдік инвестицияларды жүзеге асыру кезінде белгілі бір шектеулер белгілеуге құқылы. Шетелдік инвестициялар тартудың қалыптасқан халықаралық тәжірибесі көрсеткендей, шетелдік инвестицияларды орналастырған кезде ұлттық режим және неғұрлым қолайлы режимге шектеулер және алып тастауларды енгізу шетелдік инвесторлардың қызметін барынша толық ырықтандыру жағдайында да мүмкін. Автор әртүрлі елдердің шетелдік инвестициялар туралы ұлттық заңнамасын дамытудың жалпы үрдісін аша отырып, экономиканың өсуіне және халықтың әл-ауқатын арттыруға әкеп соғатын шетел инвестицияларын тартуға бағытталған инвестициялық саясат аяқталғаннан кейін ұлттық және шетелдік инвестициялар арасындағы әртүрлі құқықтық режимдердің айырмашылықтарын жоятын басқа процесс басталады деп санайды. Нәтижесінде, шетелдік инвестициялар туралы арнайы заңнама, оның ішінде инвестициялық, азаматтық, сауда және т. б. қоса алғанда, жалпы заңнамамен ауыстырылады.

*Кілт сөздер:* инвестиция, ұлттық инвестиция, шетелдік инвестиция, шетелдік инвестиция туралы заңнама, инвестициялық қызмет, шетелдік инвестор, инвестициялық саясат, шетелдік капитал, инвестиция саласы, инвестиция аясы, инвестициялау.

## Национально-правовое регулирование иностранных инвестиций

В статье анализируются международная и национальная практика правового регулирования иностранных инвестиций. Также указываются основные моменты, необходимые для привлечения иностранных инвесторов. Принятие специальных законов об иностранных инвестициях вызвано необходимостью привлечь иностранные инвестиции в экономику страны путем создания благоприятного климата и предоставления льготного режима для иностранных инвестиций. Автор подчеркивает, что создание надлежащей системы правового регулирования деятельности с участием иностранных инвесторов не сводится только к созданию благоприятного режима для иностранных инвестиций или предоставлению им льгот и преференций; в первую очередь, оно должно быть направлено на обеспечение и защиту общественных (публичных) интересов. Поэтому государство вправе устанавливать определенные ограничения при осуществлении иностранных инвестиций. Как показывает сложившаяся международная практика привлечения иностранных инвестиций, введение ограничений и изъятий из национального режима и режима наибольшего благоприятствования при размещении иностранных инвестиций возможно даже в условиях максимально полной либерализации деятельности иностранных инвесторов. Раскрывая общую тенденцию в развитии национального законодательства об иностранных инвестициях разных стран, автор считает, что после окончания инвестиционной политики, направленной на привлечение иностранных инвестиций, приведшей к росту экономики и повышению благосостояния населения, начинается другой процесс, когда стираются различия между разными правовыми режимами иностранных и национальных инвестиций. В результате специальное законодательство об иностранных инвестициях заменяется общим законодательством, в том числе инвестиционным, гражданским, торговым и т.п.

**Ключевые слова:** инвестиция, национальная инвестиция, иностранная инвестиция, законодательство об иностранных инвестициях, инвестиционная деятельность, иностранный инвестор, инвестиционная политика, иностранный капитал, область инвестиции, сфера инвестиции, инвестирование.

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