

Господарське право та господарське-процесуальне право
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LEGAL PROTECTION OF INVESTMENT ACTIVITIES IN UKRAINE
ПРАВОВИЙ ЗАХИСТ ІНВЕСТИЦІЙНОЇ ДІЯЛЬНОСТІ В УКРАЇНІ
ПРАВОВАЯ ЗАЩИТА ИНВЕСТИЦИОННОЙ ДЕЯТЕЛЬНОСТИ В
УКРАИНЕ

***Summary.** Ukraine is a country that has sufficient foundation for economic growth and attracting foreign capital, while our country has for many years been characterized by legislative, political and economic instability. That is why when investing in Ukraine a foreign investor raises a number of questions: a detailed study of all aspects of regulatory regulation of investment activity, analysis of the economic situation in the sector of interest, determine how to minimize its own risks and what guarantees of investment activity provides state, ways to protect their rights. Moreover, it is the guarantees and the method of protection of investments that is perhaps the most important aspect for investors.*

According to the investment legislation of Ukraine, the state guarantees the stability of the conditions for carrying out the investment activity and

respecting the rights and legal interests of the subjects of such activity. Public authorities and their officials shall not have the right to interfere in the activities of the subjects of investment activity, except when such intervention is permitted by the current legislation and is carried out exclusively within the competence of these bodies and officials, which is specified in the normative legal acts. No one shall have the right to restrict the rights of investors in the choice of investment objects, except as provided by law.

It is worth noting that for foreign investors the national regime of investment and other economic activity is established on the territory of Ukraine, except as provided by the legislation of Ukraine and international treaties of Ukraine. In addition, a preferential regime for investment and other economic activity may be established for foreign investors involved in the implementation of relevant state programs for the development of priority sectors of the economy, social sphere and territories. Despite such a large amount of guarantees and considerable economic potential, it is the reliability of state guarantees and ways of protecting one's own interests and the safety of the funds invested that are decisive factors for decision making. In Ukraine, a regulatory framework is in place, incorporating the domestic legislation of Ukraine, which regulates the procedure for resolving investment disputes between the state and investors, although some aspects require further improvement.

Key words: *foreign investment, investment promotion and protection agreements, international conventions, protection of rights and interests.*

Анотація. *Україна є державою, яка має достатнє підґрунтя для економічного зростання та залучення іноземного капіталу, водночас наша держава вже багато років характеризується законодавчою, політичною та економічною нестабільністю. Саме тому під час здійснення інвестування в Україну перед іноземним інвестором постає ряд питань:*

детальне вивчення усіх аспектів нормативно-правового регулювання інвестиційної діяльності, аналіз економічної ситуації у галузі економіки, що становить інтерес, визначитись яким чином мінімізувати власні ризики та які гарантії здійснення інвестиційної діяльності надає держава, способи захисту власних прав. При чому, саме гарантії та спосіб захисту інвестицій є чи не найбільш важливим аспектом для інвесторів.

Відповідно до інвестиційного законодавства України держава гарантує стабільність умов здійснення інвестиційної діяльності та дотримання прав та законних інтересів суб'єктів здійснення такої діяльності. Державні органи та їх посадові особи не мають права втручатися у діяльність суб'єктів інвестиційної діяльності, крім випадків, коли таке втручання допускається чинним законодавством і здійснюються виключно в межах компетенції цих органів та посадових осіб, що визначено у нормативно-правових актах. Ніхто не має права обмежувати права інвесторів у виборі об'єктів інвестування, за винятком випадків, передбачених законодавством.

Варто зазначити, що для іноземних інвесторів на території України встановлюється національний режим інвестиційної та іншої господарської діяльності, за винятком, передбачених законодавством України та міжнародними договорами України. До того ж для іноземних інвесторів, що залучені до реалізації відповідних державних програм розвитку пріоритетних галузей економіки, соціальної сфери і територій, може встановлюватися пільговий режим інвестиційної та іншої господарської діяльності. Не зважаючи на такий значний обсяг гарантій та значний економічний потенціал, саме надійність державних гарантій та способів захисту власних інтересів та безпека інвестованих коштів виступають вирішальним чинником для прийняття рішення. В Україні створена та діє нормативно-правова база, яка включає внутрішнє

законодавство України, якою врегульовано порядок вирішення інвестиційних спорів між державною та інвестором, хоча деякі аспекти потребують подальшого вдосконалення.

Ключові слова: іноземні інвестиції, угоди про сприяння та захист інвестицій, міжнародні конвенції, захист прав та інтересів.

Анотація. *Украина является государством, которое имеет достаточное основание для экономического роста и привлечения иностранного капитала, в то же время наше государство уже много лет характеризуется законодательной, политической и экономической нестабильностью. Именно поэтому при осуществлении инвестирования в Украину перед иностранным инвестором встает ряд вопросов: детальное изучение всех аспектов нормативно-правового регулирования инвестиционной деятельности, анализ экономической ситуации в области экономики, представляет интерес, определится каким образом минимизировать собственные риски и гарантии осуществления инвестиционной деятельности предоставляет государство, способы защиты своих прав. Причем, именно гарантии и способ защиты инвестиций является едва ли не самым важным аспектом для инвесторов.*

Согласно инвестиционному законодательству Украины государство гарантирует стабильность условий осуществления инвестиционной деятельности и соблюдения прав и законных интересов субъектов осуществления такой деятельности. Государственные органы и их должностные лица не имеют права вмешиваться в деятельность субъектов инвестиционной деятельности, кроме случаев, когда такое вмешательство допускается действующим законодательством и осуществляются исключительно в пределах компетенции этих органов и должностных лиц, определен в нормативно-правовых актах. Никто не вправе ограничивать права инвесторов в выборе объектов

инвестирования, за исключением случаев, предусмотренных законодательством.

Стоит отметить, что для иностранных инвесторов на территории Украины устанавливается национальный режим инвестиционной и иной хозяйственной деятельности, кроме случаев, предусмотренных законодательством Украины и международными договорами Украины. К тому же для иностранных инвесторов, привлеченных к реализации соответствующих государственных программ развития приоритетных отраслей экономики, социальной сферы и территорий, может устанавливаться льготный режим инвестиционной и иной хозяйственной деятельности. Несмотря на такой значительный объем гарантий и значительный экономический потенциал, именно надежность государственных гарантий и способов защиты собственных интересов и безопасность капиталовложений выступают решающим фактором для принятия решения. В Украине создана и действует нормативная правовая база, которая включает внутреннее законодательство Украины, которой дан порядок разрешения инвестиционных споров между государственной и инвестором, хотя некоторые аспекты требуют дальнейшего совершенствования.

Ключевые слова: иностранные инвестиции, соглашения о содействии и защите инвестиций, международные конвенции, защита прав и интересов.

Problem statement. Development of the investment legal relations and involvement of investments is not possible without an effective system of protection of investor's rights. In connection with that, an issue of investment climate improvement is specifically connected with state's capacity to ensure protection of the already attracted investments. Based on the above, necessity of examination of the legal regulation of the investment activity and ways of

investors rights protection is highly demanded. Especially in the terms of the current economic situation, when investments attraction is one of the main state policy priority.

Analysis of the latest researches and publications. Consideration of questions and problematic aspects in the area of investors rights protection and investing activity has been made by: Zeldina O.R. [1], Kossak V.M. [2], Poedinok V.V. [3], Prytyka U. D. [4], Stoika U.D. [5], Hrimli O.G. [6] and others.

Formulation of the objectives of the article (task setting). Legal and theoretical approaches analysis of the definition of concepts of national and investment security, determination of the role and place of investment security as a part of national security. Justification of the need to develop states economic security strategy with identification measures of investment security ensuring for the purposes of preventing any harmful effect on the national security of Ukraine.

General review representation. According to the part 5 article 55 of the Constitution of Ukraine everyone shall have the right to protect his/her rights and freedoms from violations and illegal encroachments by any means other than prohibited by law. This clause of the Constitution of Ukraine does not set a valid list of forms of protection of violated rights, but directly indicates on existence and legitimacy of these methods. [7]

Terms «protection», «legal protections», «protection of rights and interests», «judicial protection» have appeared repeatedly in the current legislation of Ukraine. According to the article 13 of the Constitution of Ukraine state ensure protection of rights of all property rights holders [7]. In part 2 article 20 of the Commercial Code of Ukraine it is determined that each business entity has the right to protect their rights and legitimate interests. [8] In the current regulatory legal acts of Ukraine, the terms “protection”, “methods of protection”, despite their rather frequent use, are usually not well defined.

The definition of the concept of "investment protection" is contained in article 19 of the Law of Ukraine "On investment activity", according to which it is a complex of organizational, technical and legal measures aimed at creating conditions that contribute to the provision of investments, the achievement of the goal of making investments, effective activity of investment and reinvestment, protection of legal rights and interests of investors, including the right to receive (income) from investments. [9] The state guarantees the protection of investments irrespective of ownership, including foreign investments. Investment protection is ensured by the legislation of Ukraine and international treaties of Ukraine. Investors, including foreign ones, are provided with an equal treatment, which excludes the application of discriminatory measures that could impede the management of investments, their use and liquidation, as well as the conditions and procedure of export of invested values and results of investments. State guarantees for the protection of investments are a system of legal norms that are aimed at protecting investments and do not address the issues of financial and economic activity of participants of investment activities, and their payment of taxes, fees and obligatory payments [9].

In accordance with the Law of Ukraine "On the regime of foreign investment", the state establishes the following guarantees of investment activity for a foreign investor:

- national investment regime, with the exception of those provided for by the legislation of Ukraine;
- guarantees in case of changes in legislation;
- guarantees in case of forced seizures, as well as illegal actions of state bodies and their officials;
- establishes compensation and compensation for losses to investors;
- guarantees in case of termination of investment activity;

- guarantees for the transfer of profits, income and other funds received as a result of investment activities [10].

In section 2 article 18 of the Law of Ukraine "On investment activities" it is determined that investments cannot be nationalized free of charge, requisitioned or measures equal in consequences cannot be applied to them. [9] Similar provisions are contained in section 3 article 397 of the Commercial Code of Ukraine. [8] State authorities and their officials shall not have the right to requisition foreign investment, with the exception of cases of rescue during a natural disaster, accident, epidemic, epizootic. According to section 4 of article 397 of the Commercial Code of Ukraine, state authorities and their officials do not have the right to requisition foreign investment, except in exceptional cases on the basis of a decision of bodies authorized by the Cabinet of Ministers of Ukraine, and in the manner established by the laws of Ukraine. Compensation paid in these cases to a foreign investor must be adequate, effective and determined at the time of execution of the decision on compensation for losses. The amount of compensation for this decision should be immediately paid in the currency in which the investment was made, or in another currency acceptable to the foreign investor in accordance with the currency legislation. The law may provide for interest on the amount of compensation (part 6 of article 397 of the Civil Code) [8]. Thus, the state guarantees protection of investments attracted to the Ukrainian economy, full compensation for damage caused and the right to demand the implementation of these measures.

As already noted, investors have the right to sue in order to protect violated rights in court. By definition, in clause 26 of the Law of Ukraine "On the regime of foreign investment" it is determined that disputes arising between foreign investors and the state regarding state regulation of foreign investment and the activities of enterprises with foreign investment are subject to consideration in the courts of Ukraine, unless otherwise specified by international treaties of Ukraine. All other disputes are subject to consideration

in the courts of Ukraine or by agreement of the parties - in arbitration courts, including abroad [10].

Article 123 of the Commercial Procedural Code defines by law that when considering cases involving violation of the rights of foreign investors in the courts of Ukraine, the last one are equal in status to domestic business entities and enjoy all the procedural rights and guarantees provided by law [11].

In accordance with article 410 of the Civil Procedure Code of Ukraine, foreigners, stateless persons, foreign legal entities, foreign states (their bodies and officials) and international organizations (here and after - foreign persons) are entitled to apply to the courts of Ukraine to protect their rights, freedoms and interests. Foreigners have procedural rights and obligations on an equal basis with individuals and legal entities of Ukraine, with the exceptions established by the Constitution and laws of Ukraine, as well as international treaties, the consent of which is provided by the Verkhovna Rada of Ukraine [12]. Given that a significant part of the national legislation of Ukraine consists of international treaties, the consent of which is provided by the Verkhovna Rada of Ukraine, the rights established by international treaties should be considered.

In accordance with clause 1 of Protocol № 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, every natural or legal person has the right to respect for his property, no one can be deprived of his property except in the public interest and under the conditions provided by law and general principles of international law [13]. Based on this, a foreign investor who is not satisfied with the decision of the judges of Ukraine has the right to apply to the European Court of Human Rights.

In addition to the courts of Ukraine and the European Court of Human Rights, a foreign investor has the opportunity to protect violated rights in investment arbitration. In the framework of investment arbitration, disputes between such a foreign investor and his partners, as well as between the investor and the state in which the investment is made, are considered. The specificity of

the International Investment Arbitration lies in the fact that in most cases the role of the arbitration clause is actually played by the corresponding bilateral international agreement of Ukraine with another state on the promotion and protection of foreign investment. Ukraine is a member of many international legal treaties, including bilateral in the field of protection and investment promotion, which are today signed and entered into force in relation to most countries of Europe and the whole world.

Referring to Bilateral Investment Protection Treaties, it should be noted that certain aspects of the settlement of investment disputes can be identified directly in such Agreements. For example, according to clause 11 of the Agreement between Ukraine and the Federal Republic of Germany on the Promotion and Mutual Protection of Investments of 15 February 1993 stipulates that in the event of a non-amicable settlement of an investor-state dispute, the case shall be referred to the ad hoc arbitral tribunal for six months. resolution of the case in accordance with the provisions of the Agreement, unless the parties to the dispute agree on another procedure. In doing so, the Agreement also provides the parties with an opportunity to negotiate a settlement in accordance with the procedure established by the Washington Convention on the Settlement of Investments Disputes between the State and Foreign Persons in 1965 [14].

According to clause 9 The Agreement between Ukraine and the Republic of Austria on the Promotion and Mutual Protection of Investments of 8 November 1996 provides as follows. If it is not possible to settle the dispute amicably within three months, the dispute may be settled either by an arbitral tribunal in accordance with the provisions of the Convention on Investment Disputes between the State and Foreign Persons of 1965, or by an ad hoc arbitral tribunal [15].

In turn, clause 9 The Agreement between the Government of Ukraine and the Government of the French Republic on Mutual Assistance and Mutual Protection of Investments establishes a norm similar to that stipulated in the

Agreement between Ukraine and Germany; the Centre for the Settlement of Investment Disputes, established under the 1965 Convention on the Settlement of Investments Disputes between the State and Foreign Persons [16].

In accordance with clause 13 of the Agreement between the Government of Ukraine and the Government of Canada, the Canada for the Promotion and Protection of Investments permits a direct appeal to the International Centre for the Settlement of Investment Disputes, without a prior request from a national court. Clause 7 of the same Agreement with the Government of the Republic of Turkey provides for the possibility of appealing to: a court of the relevant jurisdiction of the Contracting Party in whose territory the investment activity was carried out; or to the International Centre for the Settlement of Investment Disputes, ad hoc arbitration tribunals established under the Rules of Procedure of the United Nations Arbitral Tribunal for International Trade (UNISTRAL), any other arbitral tribunal, or in accordance with arbitration rules, including but not limited to The Istanbul Arbitration Centre (ISTAC) or the relevant institution of Ukraine, if the parties to the dispute so agree [18].

Concerning the definition of jurisdiction in relevant investment disputes at the level of international treaties to which Ukraine is a party to bilateral agreements on the promotion and protection of investments, which contain rules governing the procedure for the settlement of disputes involving the investor and the host state. There are various options here: national courts, ad hoc proceedings, institutional international commercial arbitration courts.

Thus, by agreement of the parties, consideration of disputes arising from investment activity is also possible by arbitral tribunals, in particular those located abroad. However, in this context it should be remembered that according to article 6 of the Law of Ukraine "On Arbitration Courts" of a case, one of the parties in which there is a public authority, a body of local self-government, a state institution or organization, a state-owned enterprise, are not subordinate to the arbitration courts [19].

At the same time, it should be noted that the Law of Ukraine "On arbitration courts" does not cover international commercial arbitration. Thus, according to the provisions of the Law of Ukraine "On international commercial arbitration" the International Commercial Arbitration Court or the Maritime Arbitration Commission at the Chamber of Commerce and Industry of Ukraine may, by agreement of the parties, be transferred, in particular, disputes of enterprises with foreign investments created in the territory of Ukraine, or disputes of participants of these enterprises with other subjects of law of Ukraine. As the state of Ukraine is subject to the law of Ukraine, both the disputes of enterprises with foreign investments with the state and disputes with the state of foreign investors - participants of these enterprises fall under the jurisdiction of the Law of Ukraine "On international commercial arbitration" [21].

At the same time, it should be noted that the existence of a positive decision of the national court of Ukraine, the arbitral tribunal, international investment arbitration and even the decision of the European Court of Human Rights does not mean that the violated rights will be restored, since it raises the question of the implementation of such a decision.

One of the ongoing investment arbitrations is the International Centre for Settlement of Investment Disputes (ICSID), a feature of this arbitration is that it has jurisdiction to hear cases between an investor and a state or between states. The main legal instrument governing the issues of dispute resolution and activity at the International Centre for Settlement of Investment Disputes is the Washington Convention on the Procedure for the Settlement of Investment Disputes between States and Foreign Persons. In Ukraine, the decisions of the International Centre for the Settlement of Investment Disputes are implemented in accordance with the provisions of the New York Convention on the Procedure for the Recognition and Enforcement of Foreign Arbitral Awards on 10.06.1958.

Returning to the International Centre for the Settlement of Investment Disputes, it is worth noting that, unlike ad hoc and other private arbitrations, this centre is a specially created organization whose main purpose is to settle investment disputes and, unlike other arbitrations, is permanent and effective. on the basis of an international convention. The legal status of the Centre, an international institution, while the other institutions are private entities. The procedure for dealing with cases is defined in clause 42 of the Washington Convention, which provides that arbitration, shall consider the dispute in accordance with the law, subject to the agreement of the parties. In the absence of the agreement of the parties, the Arbitration shall apply the law of the Contracting State which is the party to the dispute and the rules of international law that may be applied. Arbitration may not make uncertain decisions (non liquet decisions), citing the absence or ambiguity of legal rules. A significant advantage of dealing with investment disputes in ICSID is the fact that the investor is in no way dependent on the diplomatic relations existing between the countries, the dispute is solved solely on the basis of the rules of law.

Thus, it is seen that judicial protection of foreign investors has its own peculiarities. One of the key features is that foreign investors have a wide range of options to exercise their right of defence. It is the right to apply to the national courts of Ukraine, the European Court of Human Rights, the opportunity to hear cases in the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine and at the specially formed International Centre for the Settlement of Investment Disputes. It should be noted that this method of protection of the violated rights is long enough and requires a lot of effort on the part of the foreign investor, which as a whole influences the investment image of the state.

That is why the guarantees of investment activity are extremely important for improving the investment image and investment attractiveness of the state.

Conclusions from this study and prospects for further exploration in this area. Based on the analysis of legal acts, investors who invest in Ukraine have sufficient guarantees for the protection of their activities and the restoration of violated rights. At the same time, improvement requires a mechanism for the enforcement of court decisions, since the implementation of a court decision is ineffective without creating the conditions and mechanisms for its timely execution.

The biggest risk for a foreign investor is that he/she may be deprived of the expected results. It is important to understand that the amount of capital that will be further attracted to the country's economy depends on the reliability of guarantees for the judicial protection of the rights and legitimate interests of investors in the case of their violation. Thus, the national legislation of Ukraine creates all the necessary conditions for investors to protect the violated rights, instead of some improvement requires the procedure of enforcement in Ukraine of decisions of international institutions.

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