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Foreign investments in the Republic of Kazakhstan: the need to protect them by eliminating conflicts in arbitration proceedings

Abstract. Since gaining independence, the Republic of Kazakhstan has been an active participant in international relations, where the attraction of foreign investments is one of the main incentives for the further and stable development of our state.

Foreign investors in the Republic of Kazakhstan are among the main payers of taxes and other obligatory payments to the budget while transferring technologies and international experience.

In this connection for the purpose of creating a favorable investment climate the fundamental principles by which the state recognizes and protects private property, the right to entrepreneurial activity, and the expropriation of property for state needs with equivalent compensation are laid down [1].

Foreign investments and their legal regulation will be considered through the prism of theoretical and empirical methods of research.

The article considers the legal basis for the regulation of the investment activity of foreign investors in the Republic of Kazakhstan.

In addition, the article reflects ways of protecting foreign investors - the right to appeal to arbitration provided by international public treaties and potential difficulties in the execution of arbitral awards in the Republic of Kazakhstan.

The article reviews some international treaties, and their legal regulation, reveals conflicts and offers solutions.

Keywords: international treaties, public law, foreign investor, foreign investments, arbitration, pacta sunt servanda.

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Introduction

Kazakhstan, being an active participant in international relations, positions itself as a friendly partner that

respects the norms of international law. For these purposes, the Republic of Kazakhstan has signed more than 40 agreements on the promotion and mutual protection of investments with various countries.

In this regard, the subject of the study is international obligations and legislative acts of the Republic of Kazakhstan, where the purpose of the article is to identify problematic issues, as well as to make proposals to avoid collisions.

The Republic of Kazakhstan is a party to the following international agreements:

- Vienna Convention on the Law of Treaties (Vienna, May 23, 1969);

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, D.C., March 18, 1965);

- United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, December 2, 2004);

- Convention for the Protection of Investors' Rights (Moscow, 28 March 1997);

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

- Agreement on Procedures for Settlement of Disputes Related to Business Activities (Kyiv, 20 March 1992);

- Agreement on Procedures for Mutual Enforcement of Arbitral, Business and Economic Court Decisions in the Territories of the Member States of the Commonwealth (Moscow, March 6, 1998).

From 1994 to 2003, foreign investments were regulated by the special Law of the Republic of Kazakhstan "On Foreign Investments".

From 2003 to 2015 the activity of investors was fixed by the Law of the Republic of Kazakhstan "On Investments", which subsequently became a separate chapter in the Entrepreneurial Code of the Republic of Kazakhstan.

It is worth noting that there are taken steps to implement international treaties and to adapt the legislation of the Republic of Kazakhstan indicate a high interest of our country to attract and protect the interests of foreign investments.

Thus, the Republic of Kazakhstan is taking comprehensive measures on public and legal regulation of foreign investors' activities.

In addition, officials of our state carry out systematic work to attract transnational corporations.

On September 20, 2022, the President of Kazakhstan in New York, USA, within the framework of the Kazakh American investment round table held a meeting with representatives of big business, where he called to expand and diversify the economic presence in the economy of our country [2].

Also, on September 21, 2022, the Prime Minister of Kazakhstan met with the head of the United Arab Emirates, on the position of the need to expand cooperation in the field of investment, where the Government of Kazakhstan is ready to fully support investors [3].

In an article in "Kursiv" online edition dated December 3, 2021, it was noted that since 1991, more than \$370 billion of foreign investment has been attracted, and the main priority of the government is to support investors [4].

By the end of 2021, the state budget of the Republic of Kazakhstan was replenished by 10.7 trillion tenge, where 5.9 trillion tenge were directed by the 50 largest taxpayers. After analyzing these taxpayers, we can conclude that more than 30 out of 50 are enterprises with foreign participation [5].

Also noteworthy are the conclusions

in the article of review-analytical portal Strategy 2050 of June 28, 2021, where the success of our country to attract foreign investors is associated with high positions when compared with other countries [6].

At the same time, according to the US News & World Report, at the end of 2021, Kazakhstan was in 75th place out of 78 countries studied by the rating participants which also took into account the quality of life, level of entrepreneurship, flexibility, social importance, logistics, cultural influence, accessibility to entrepreneurship, development of the legal framework. [7]. A more detailed methodology on how the ranking was compiled can be found on the website of the US News & World Report [7.1].

As follows from the finprom made based on the above data from US News & World Report, the level of development of entrepreneurship in the Republic of Kazakhstan was estimated at 0.9 out of 100 points and unflattering in all categories of the rating. The rating is based on a study by US News & World Report, which surveyed more than 17,000 respondents from around the world to assess the perception of 78 countries in 73 different indicators. [8].

Because of the relevance of the issue, the author considers it relevant to look at the situation by applying scientific and legal analysis to determine the investment attractiveness of the country, as well as its legal regulation.

In this regard, according to the geopolitical situation of 2022 to improve the quality and quantity of attracted investors, it is necessary to ensure the safety of foreign capital by adapting and updating the legal acts for the needs of foreign capital.

The Entrepreneurial Code of the

Republic of Kazakhstan provides guarantees of the legal protection of investors' activities on the territory of the Republic of Kazakhstan, the use of income, rights of investors during nationalization and requisition, publicity of state bodies about investors, and ensuring investors' access to information related to the implementation of investment activities [1].

According to the Law of the Republic of Kazakhstan "On Legal Acts" the Constitution of the Republic of Kazakhstan has the highest legal force [9], and the current law in the Republic of Kazakhstan, including international and other obligations of the Republic, where ratified international treaties have priority over its laws [10].

The above law specifies the hierarchy of legal acts, in the presence of contradictions in the norms of normative legal acts of different levels the norms of the higher level act [9].

In this case, the Law of the Republic of Kazakhstan "On International Treaties of the Republic of Kazakhstan" provides requirements in which cases international treaties are subject to ratification [11].

However, the question remains open about the status of international treaties not ratified by the Republic of Kazakhstan and how to act in the presence of contradictions of legal acts with these treaties?

For example, the Republic of Kazakhstan joined the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the so-called New York Convention, in accordance with the Decree of the President of the Republic of Kazakhstan. This Convention was not subsequently ratified [12].

In this connection, a question arises how to apply the conditions of the New

York Convention in the presence of contradictions with the legal acts of the Republic of Kazakhstan?

For example, the Law of the Republic of Kazakhstan "On Arbitration" provides that arbitration has no right to consider disputes with the participation of state bodies, enterprises, as well as legal entities 50 and more percent owned by the state in the absence of the consent of the authorized body [14].

According to the requirement of the law, it follows that the London Court of International Arbitration (LCIA) cannot consider a dispute involving a national company without the permission of the authorized body of Kazakhstan? Will these authorized bodies be able to challenge the execution of the LCIA decision in the courts of the Republic of Kazakhstan on the grounds of the lack of consent of the state body?

So that, it follows from the New York Convention that the participating countries recognize written agreements by which the parties undertake to submit disputes to arbitration [13].

For example, as noted in the article by A.K. Myrzakhanova, E.M. Abaideldinov, according to the international obligations assumed, the states are obliged to strictly and fully implement the decisions of international arbitration courts on disputes to which they are parties [15].

This statement is confirmed by the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan "On the application of norms of international treaties of the Republic of Kazakhstan", where international treaties provide the right to judicial protection of legitimate interests of organizations, therefore, the

courts must start from the requirements of international law within the jurisdiction of the Republic of Kazakhstan [16].

In addition, in the above Resolution of the Supreme Court, it is stated that international treaties concluded before the adoption of the Constitution of 1995 are valid and retain priority over the legislation of the Republic of Kazakhstan if such priority is expressly provided for by the laws [16].

Also noteworthy is the case if an unratified international treaty concluded by the Republic of Kazakhstan after the adoption of the current Constitution, the rules other than in the civil legislation are established, the courts are obliged to be guided by the provisions of paragraph 3 of Article 4 of the Constitution [16].

Based on the Resolution of the Supreme Court it follows that the courts of the Republic of Kazakhstan in executing the decisions of arbitration courts must be guided by the provisions of the New York Convention, rather than the legal acts of the Republic of Kazakhstan in the presence of conflicts.

At the same time in the hierarchy of legal acts, the place of normative decisions of the Supreme Court in case of conflicts with the legal acts of the Republic of Kazakhstan is not defined.

In their article the authors Myrzakhanova A.K., and Abaideldinov E.M. propose to introduce into the Constitution a provision on the supremacy of decisions of international courts over the decisions of national courts [15].

This proposal is questionable since the judiciary is exercised on behalf of the Republic of Kazakhstan [10]. Also, the Civil Procedure Code of the Republic of Kazakhstan provides only for the

procedure for recognition and enforcement of foreign court judgments, and arbitral awards of foreign arbitral tribunals [17].

In addition, the sentence mentioned in the above article, where "decisions of international courts must be recognized as binding for decisions of national courts" [15] is unnecessary, since the United Nations Convention on Jurisdictional Immunities of States and their Property, ratified by the Republic of Kazakhstan in 2009, provides that "a State may not invoke immunity from jurisdiction in proceedings before a court of another State in respect of any question or matter if it has expressly consented to the exercise of jurisdiction by that court" [18].

Thus, the courts of the Republic of Kazakhstan should not review the decisions of foreign judicial bodies, on their merits.

However, the authors Bonnitcha D., and Brevin S. noted that in arbitration practice there are situations where arbitration courts award, in addition to the actual costs incurred, huge compensation for state interference in planned investments, which were never implemented, were not built, and unreceived future profits. In this connection, there may be reasonable doubts about the compliance of the arbitral award with the principles of justice [19].

In his article, J.G. Basin expresses doubts about this issue and notes that "the most vulnerable and at the same time practically the most important link of the named order is the possibility of a state court, which has taken for execution an arbitration court decision, to check the correctness of this decision and depending on this - to issue (or refuse to issue) an order for execution" [20].

At the same time, in their work

"Application of the concept of "public policy" in arbitration," the authors Kaldybaev A., and Linnik A. expressed concern about the fact that the courts of the Republic of Kazakhstan misunderstand what is public policy, respectively cancel the decisions of arbitrators.

Considering the above-stated and the importance of foreign capital the author concludes with the necessity of the creation of favorable legal conditions for foreign investments where legislative acts of our country should unify with the international obligations, as a result, these measures can improve the attractiveness of our country for foreign capital.

Conclusion

Foreign investments are the most powerful stimulus of economic development. Our country in the conditions of the competition is obliged to provide the best conditions for attraction of the qualitative foreign capital and technologies.

In this connection authorized bodies of the Republic of Kazakhstan for the encouragement of investments, it is necessary to adhere strictly to the principle "Pacta sunt servanda" where each operating contract is obligatory for its participants and should be carried out by them in good faith" [21].

In conclusion, it should be noted that according to the Concept of Investment Policy of the Republic of Kazakhstan until 2026, approved by the Government on July 15, 2022, "the main objective of investment policy is to create favorable conditions for foreign and domestic investors and implementation of investment projects aimed at ensuring modernization, structural changes and sustained rates of

national economic growth that contribute to a high quality of life of the population The work in this direction will be carried out taking into account the available raw material potential, competencies, and economic efficiency" [22].

In this regard, in order to avoid conflicts in law enforcement practice, authorized bodies need to make changes and additions to the relevant legal acts, in particular:

1. Eliminate paragraph 10 of Article 8 of the Law of the Republic of Kazakhstan "On Arbitration", which in practice raises many questions from foreign investors when implementing joint investment projects with entities of the quasi-public

sector.

2. To supplement subparagraph 1) of Article 2 of the Law of the Republic of Kazakhstan "On Arbitration" with the notion of what is the public order of the Republic of Kazakhstan without reference to other legislative acts.

3. To provide in the legislation of the Republic of Kazakhstan that execution of foreign arbitration awards shall carry out only within the framework of the Astana International Financial Centre Court (AIFC). The function of issuing a writ of execution by the AIFC Court is already provided for in sub-paragraph 1) of paragraph 40 of the Rules of the AIFC Court.

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Қазақстан Республикасындағы шетелдік инвестициялар: төрелік талқылаулар кезінде коллизияларды жою арқылы оларды қорғау қажеттілігі

Аңдатпа. Тәуелсіздік алған сәттен бастап Қазақстан Республикасы халықаралық қатынастардың белсенді қатысушысы болып табылады, онда шетелдік инвестицияларды тарту мемлекетіміздің одан әрі және тұрақты дамуы үшін негізгі ынталандырулардың бірі болып табылады.

Бүгінгі таңда Қазақстан Республикасындағы шетелдік инвесторлар технологиялар мен халықаралық тәжірибе трансферін жүзеге асыра отырып, салықтар мен бюджетке төленетін өзге де міндетті төлемдердің негізгі төлеушілерінің бірі болып табылады.

Осыған байланысты қолайлы инвестициялық ахуал құру мақсатында мемлекет жеке меншікті, кәсіпкерлік қызметке құқықты танитын және қорғайтын, мемлекет мұқтажы үшін мүлікті тең бағамен өтеу кезінде иеліктен шығаруды жүзеге асыратын іргелі қағидаттар қаланды [1].

Шетелдік инвестициялар және оларды құқықтық реттеу теориялық және эмпирикалық зерттеу әдістерінің призмасы арқылы қарастырылады.

Мақалада шетелдік инвестициялық қызметті реттеудің құқықтық негіздері қарастырылған.

Түйін сөздер: халықаралық шарттар, қоғамдық құқық, шетелдік инвестор, шетелдік инвестициялар, төрелік, *pacca sunt servanda*.

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Иностранные инвестиции в Республике Казахстан: необходимость их защиты путем устранения коллизий при арбитражных разбирательствах

Аннотация. С момента обретения независимости Республика Казахстан является активным участником международных отношений, где привлечение иностранных инвестиций является одним из основных стимулов для дальнейшего и стабильного развития нашего государства.

На сегодняшний день иностранные инвесторы в Республике Казахстан являются одними из основных плательщиков налогов и иных обязательных платежей в бюджет, одновременно осуществляя трансфер технологий и

международного опыта. В этой связи с целью создания благоприятного инвестиционного климата заложены фундаментальные принципы, которыми государством признаются и защищаются частная собственность, право на предпринимательскую деятельность, осуществляются отчуждения имущества для государственных нужд при равноценном возмещении [1]. Таким образом иностранные инвестиции и их правовое регулирование в статье изучены через призму теоретического и эмпирического методов исследований.

Целью исследования является определение возможных причин возникновения вопросов при реализации международных договоров в сфере защиты интересов иностранных инвесторов. В статье рассмотрены правовые основы регулирования инвестиционной деятельности и иностранных инвесторов в публично-правовых отношениях, где значимость этих отношений для репутации Республики Казахстан трудно переоценить.

Кроме того, в статье отражены способы защиты иностранных инвесторов - право на обращение в арбитражи, предусмотренные международными публичными договорами, и потенциальные трудности при исполнении арбитражных решений в Республике Казахстан. В статье проведен обзор некоторых международных договоров, их правового регулирования, выявлены коллизии, предложены решения.

Таким образом практической значимостью статьи, по мнению автора, является устранение коллизии, где в законодательстве установлено требование, противоречащее международным обязательствам Республики Казахстан.

Ключевые слова: международные договоры, публичное право, иностранный инвестор, иностранные инвестиции, арбитраж, *pacta sunt servanda*.

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