

FEATURES OF FOREIGN INVESTORS' PROTECTION IN ADMINISTRATIVE LEGAL PROCEEDINGS OF UKRAINE

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Abstract. In a difficult economic situation in Ukraine, the attracting of foreign investment is the priority direction of economic development. In practice, there are often cases of violation of the foreign investors' rights by officials. Therefore, an important issue of the present is the study of the foreign investors' rights protection mechanism since they are important economic entities. Ukraine has an outflow of foreign investment. This is due to the imperfection of the current legislation, economic instability, corruption, unfairness of counterparties, unlawful actions of state bodies, and the absence of an effective mechanism to protect the rights of foreign investors. Therefore, *the objective* of the article is to study the peculiarities of administrative legal proceedings of foreign investors protecting, to analyse the current state of protection of foreign investors in Ukraine by administrative courts, and to analyse the problems that arise in practice. It should be noted that the researchers did not investigate the peculiarities of administrative legal proceedings of foreign investors' protection. A considerable attention is paid to protecting foreign investors in the context of economic legal proceedings. Therefore, the issue deserves special attention. *Methodology.* The authors substantiated the necessity to improve the current legislation concerning the protection of foreign investors in the administrative legal proceedings. Based on the analysis of the current legislation norms, one can conclude that most norms are only declarative. Therefore, the authors provide appropriate proposals for improving domestic legislation using positive foreign experience. *Results.* The article reveals the peculiarities of the appeal of decisions, actions and inactivity of the subjects of authority by foreign investors, the relevant judicial practice is analysed there, the European experience is investigated in order to implement it in domestic legislation. The authors discuss the current state of protection of foreign investors in Ukraine by administrative courts and the problems that arise in practice. Particular attention is paid to the lack of proper legal protection of foreign investors. In this regard, the appropriate proposals are provided by the authors that will contribute to improving the investment climate in Ukraine. *Practical implications.* Foreign investment has a positive effect on the economic situation of any state. In order to achieve investment attractiveness, Ukraine needs to provide it with adequate judicial protection. *Value/originality.* The urgent question of the present is the protection of foreign investors in the form of administrative legal proceedings. The necessary step is the implementation of positive international experience on this issue in domestic legislation.

Key words: economic development, economic transformation, foreign investor; administrative proceeding, subject of authority, judicial protection.

JEL Classification: D63, K40, K41

1. Introduction

Foreign investment is the engine of economic transformation in any country. In Ukraine, for the sake of economic change, foreign investments are needed. However, every foreign investor who puts his funds in the economy of another country should have guarantees of his rights protection. One of the most effective forms of such activities protection is judicial protection.

In practice, we often see that the subjects of authority, for example, tax authorities, customs authorities violate

the rights of foreign investors. Ineffective judicial protection of domestic courts leads to the fact that foreign investors appeal to international courts and this is not a positive indicator for Ukraine.

2. Statement of the article's task

In this regard, the study of the peculiarities of administrative legal proceedings of foreign investors protecting is relevant. Analysis of the issues that arise in

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practice in appealing of decisions, actions, the inaction of authority subjects, providing the suggestions for improving the current legislation based on the study of positive European experience are important issues today. This is the objective of our study.

Our task is to analyse the current legislation of Ukraine that regulates the actions of authority subjects appealing proceeding, relevant judicial practice, to identify the existing problems related to the protection of foreign investors in administrative proceedings, and to indicate the ways of its solution.

3. Review of the literature

The scholars did not pay enough attention to the study of administrative legal proceedings of the rights and interests of foreign investors' protecting. This issue is considered in general as a way of protecting the rights of investors and their protection in the context of economic legal proceedings. Therefore, the issue under investigation deserves special attention.

The following scholars, such as: O. Zeldina, O. Okhotnikova, O. Podtserkovny, O. Polyak, D. Prytyka, O. Semerak, O. Khrimly, and others, were engaged in the protection of investors' rights. However, there are some problems related to the rights of foreign investors' protection through administrative proceedings that remain unresolved.

4. Analysis of the investment climate in Ukraine

Negative trends in the development of the Ukrainian economy, the annexation by the Russian Federation of the Autonomous Republic of Crimea, the war in the East of Ukraine, the instability of Ukrainian legislation lead to low investment position of Ukraine.

The Hamburg Institute of the World Economy (HWWI) together with the independent audit and consulting company BDO International Business

Compass ranked the investment attractiveness of the countries (from 2016). According to it, at the end of 2008, Ukraine occupied the 18th place, in 2015 it went down to 89 positions, in 2016 – the 130th place in this ranking. Consequently, from 2008 to 2016, Ukraine managed to make very adverse developments (International Business Compass, 2016). If we analyse the chart below, then it can be seen that in 2017 and in the first quarter of 2018, the inflow of direct investment in Ukraine is also not high (Official site of the State Statistics Service of Ukraine, 2018).

The economic growth is impossible without the involvement of foreign investors who will invest their money in the Ukrainian economy. However, every investor seeks to have a guarantee that in a foreign country he will receive the effective legal protection of his legitimate rights and interests. Therefore, the priority task for our state is to create favourable conditions for the activity of foreign investors. This will be facilitated by the effective judicial protection of foreign investors from illegal decisions, actions or inaction of the state, its bureaucracy, which, unfortunately, remain the main "raiders" in the country. The administrative courts protect the foreign investors from the arbitrariness of officials.

5. Protection of foreign investor by the administrative court

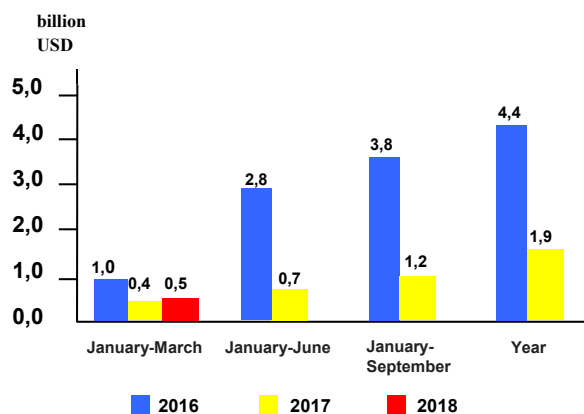
The authorities and local self-government have repeatedly stressed the need to attract foreign investments into the Ukrainian economy and create favourable conditions for investors. However, recently, de facto, the outflow of foreign investment has been observed in Ukraine. Because of this, our country does not properly protect foreign investors.

In accordance with the Law of Ukraine "On the Regime of Foreign Investment", the legal guarantees of foreign investments protection are divided into:

- guarantees from changes in legislation;
- guarantees from forced removal, as well as illegal actions of state authorities and its officials;
- compensation and indemnification to foreign investors;
- guarantees in case of termination of investment activity;
- guarantees of income transfer, profits, and other amounts in connection with foreign investments (rada.gov, 1996).

As to judicial protection, G. P. Timchenko notes: 1) the judicial form of protection is the activity of judges who are the bearers of the judiciary in accordance with the Constitution; 2) the judicial form of protection is as much as possible adapted to the resolution of disputes related to the violation or the possibility of violating subjective rights and legitimate interests since the activity of courts for resolving disputes takes place in a special

The inflow of direct investments (equity) in Ukraine (aggregate sum from the beginning of the year)



procedural form; 3) the judicial form of protection is universal since any subjective right and legitimate interest may be defended in court (O. Xrimli, 2016).

One of the ways of protecting the rights of investors is the recognition by the court of invalid acts of the authorities. Beside this, there is guarantees compensation to investors caused by unlawful actions or inactivity of the authorities, as well as guarantees compensation to investors in case of adoption by the bodies of state power or local self-government acts that violate the rights of investors.

In accordance with Art. 7 of the Law of Ukraine "On the Judiciary and Status of Judges" everyone is guaranteed the protection of his rights, freedoms, and interests within a reasonable time by an independent, impartial, and fair court established by law (rada.gov, 2016).

In order to protect its violated right, the foreign investor, first of all, must apply to the court with the claim. The claim provides the investor with the opportunity to exercise his right to protection. It is advisable to distinguish the following of the foreign investor protection mechanism: 1) the appeal of a foreign investor to court with a claim; 2) consideration of this claim in court; 3) the decision by the court; 4) execution of the court decision in case of claims' satisfaction.

Therefore, in order to protect his violated rights, the foreign investor, first, must apply to the national court with the corresponding claim that is the most effective means of the subjective law protection. A claim is a public legal instrument that is used to bring proceedings; it is a kind of "starter" of a competitive judicial mechanism. The significance of the claim form is its universality and engagement of those who are interested in restoring property relations and law and order by the subjects of the court (Kolesov, 2004).

If we analyse the court practice in Ukraine, we can conclude that foreign investors to the customs authorities file most claims.

As for example, let us analyse the case No. 2a-4168/09/2670 of August 20, 2009. The District Administrative Court of Kyiv considered the claim of the Ukrainian-Hungarian Limited Liability Company "Intercomtrans" to the State Customs Service of Ukraine for the recognition of the tax clarification such that does not comply with the law. It had been established that the plaintiff, in this case, is the enterprise with foreign investments, and accordingly, such enterprises have privileges on the import duty. The customs authority has ordered to pay import duties in connection with the fact that corporate rights have been sold to another non-resident. The court refused to comply with this claim. At present, many cases are dealt with in administrative courts, where foreign investors are claimants (Osoblyvosti sudovogho zakhystu inozemnykh investoriv v Ukrajinu, 2018).

The actual issues of the present are tax disputes. Investigating this category of cases lawyers come to the

idea that administrative courts protect the tax authorities themselves, not taxpayers. Very often the burden of proof lies with the taxpayer, although in accordance with the legislation of Ukraine should be the opposite.

In 2017, the procedural legislation of Ukraine has undergone significant changes. On October 03, 2017, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts". In accordance with the Code of Administrative Legal Proceedings of Ukraine, the jurisdiction of administrative courts extends to the cases in public legal disputes.

It should be noted that in practice, there are problems of power separation between economic and administrative courts. In accordance with the Code of Administrative Proceedings of Ukraine, administrative courts consider public legal disputes. These are the disputes, in which the subject of authority is obligatory one (Code of Administrative Legal Proceedings of Ukraine: Law of Ukraine № 2747-IV of July 6, 2005)

It is necessary to pay attention to certain categories of disputes that could not be divided between courts of different jurisdictions. Thus, the permanent dilemma between economic and administrative courts was resolved in the new edition of the Civil Code of Ukraine, and it was determined that the cases concerning the appeal of acts (decisions) of business entities and their bodies, officials in the field of organization and implementation of business activity fall under the jurisdiction of economic courts. An exception is made in relation to acts (decisions) of the subjects of power authorities taken for the fulfilment of their power management functions, and disputes of which the individual is a non-entrepreneur. These disputes fall under the jurisdiction of the administrative court (Zeljdzina, 2018).

By the way, in France, the Conflict Tribunal was created. This is the specialized court for disputes over jurisdiction. Such an institution also should be introduced in Ukraine.

It should be noted that, according to the CALP, administrative courts do not consider the claims that are derived from the claims of private legal disputes. There is no need to appeal to the courts of different jurisdictions for solving the single controversial situation. A foreign investor, when appealing to an administrative court with a public legal claim, may also combine it with a claim for damages to him.

When filing a claim to a court, a foreign investor must ask the court to apply measures to secure a claim in order to guarantee the execution of a court decision. Indeed, in practice, there are the cases when the court decision has come into force, but it is impossible to execute it, and it remains only a sheet of paper.

In Ukraine, there is a need to create the judicial body that would deal with issues of protecting the property

rights of foreign investors and ensuring their unrestricted investment activity. It is advisable, in conjunction with the Supreme Court of Intellectual Property, Supreme Anti-Corruption Court, to establish the Supreme Court on Foreign Investment. One of the categories of cases that would have the right to consider this court would be the disputes of foreign investors with the state authorities of Ukraine.

One of the peculiarities of the judicial protection of a foreign investor is the issue of the real execution of the decision. Enforcement proceeding is the final stage of the trial. Without the execution of court decision, the meaning of justice is lost. The decision of the administrative courts is quite a complicated category of enforcement proceedings since the party of the trial is the state and the decisions are executed by the state executive service.

In practice, the problematic issue is the court control of its decisions' implementation. In accordance with Art. 382 of the CALP of Ukraine, a court that has passed a judicial resolution in an administrative case may oblige a subject of authority that is not in favour of a decision to file a report on the execution of a court decision in a court order. As a result of consideration of the report of the authority subject on the execution of a court decision, or in the absence of such a report, the judge may decide to set a new term for filing a report, impose a fine on the responsible subject of authority in amount from twenty to forty subsistence minimum for able-bodied persons (Code of Administrative Legal Proceedings of Ukraine: Law of Ukraine № 2747-IV of July 6, 2005).

Thus, based on the foregoing, one can see that such a control consists of the court right to require an official to report on the execution of the relevant court decision. That is, to oblige officials to submit the report is the right of the court and not its duty.

In practice, there are cases where the plaintiff applies the court with a statement to obligate the defendant to submit a report on the implementation of the decision, but the court refuses to comply with such an application, in fact, ignoring the claims of the plaintiff. We believe that such a gap in the legislation will enable unfair subjects of authority to refrain from executing judicial decisions in favour of foreign investors. It is necessary for the legislator to amend the current legislation and to consolidate the duty of the court to oblige officials who "lost" the case in the court to submit a report on the execution of the court decision in time determined by the court.

6. Conclusions of the study and prospects for further exploration in this direction

In order to improve the economic situation in Ukraine, it is necessary to attract foreign investors. To do this, it is necessary to form clearly the policy of economic development. In order to increase the flow of foreign investment, it is necessary to improve the investment climate by reducing administrative barriers, tax pressure on business, and guarantee effective judicial protection.

The important issue today is the overcoming of corruption in the government that actually frustrates foreign investors, generates an outflow of foreign investments from the country. The Ukrainian government should ensure legal protection of foreign investment. In addition, a foreign investor must have proper judicial protection in our country.

The judicial protection form is universal and takes precedence over other forms of protection. It is effective because the court decision finally resolves the case. Other forms of protection acquire this character only at the request of the conflicting parties.

The administrative courts protect the rights, freedoms, and interests of individuals, the rights and interests of legal entities from violations of authorities' subjects. In practice, the cases of the rights, freedoms, and interests of foreign investors' violations by officials are often encountered. Therefore, these economic entities must apply to the court in the procedure of administrative legal proceedings, that is, an appropriate requirement to protect their rights and interests.

In Ukraine, the problem is that practically many norms of law have only declarative character, and the courts do not fully protect the foreign investors, which promotes the outflow of foreign investment from our state and negatively affects the economic situation in Ukraine. Actual issues of the present are the real implementation of administrative courts' decisions because without its execution such a judicial decision remains a simple sheet of paper. It is important to provide an effective mechanism for the execution of such court decisions.

When analysing the CALP of Ukraine, one can come to the conclusion that it is aimed at increasing the level of the protection of foreign investors' rights in Ukraine. However, a number of issues remain unresolved and impede the effective investment to the Ukrainian economy. Therefore, the legislator should take into account the positive foreign experience, in particular, the European Union countries to address the relevant issues.

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