



Influence of investment legislation development on the investment climate of Kazakhstan

Influencia del desarrollo de la legislación en materia de inversión sobre el clima de inversión de Kazajstán

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ABSTRACT:

The article considers legal reforms aimed at improving investment legislation, which in its turn have a direct impact on the country's investment climate. As a result of the analysis of legal reforms conducted in the Republic of Kazakhstan for improving of investment legislation and investment attractiveness, the author comes to the conclusion that it is necessary to improve legal measures.

Keywords: foreign investment, investment attractiveness, investment climate, investment activity, investment support and protection

RESUMEN:

El artículo considera reformas legales dirigidas a mejorar la legislación de inversión, que a su vez tienen un impacto directo en el clima de inversión del país. Como resultado del análisis de las reformas legales llevadas a cabo en la República de Kazajstán para mejorar la legislación de inversión y el atractivo de la inversión, el autor llega a la conclusión de que es necesario mejorar las medidas legales.

Palabras clave: la inversión extranjera, el atractivo de la inversión, el clima de inversión, la actividad de inversión, el apoyo a la inversión y la protección.

1. Introduction

Careful attention to investment is due to the fact that investment plays an important role in the deepest foundations of economic activity and thus establishes the whole process of economic growth in the country as a whole. To date, investments are the main tool that provides the conditions for overcoming the current situation of the economic crisis, providing technological progress, as well as improving the quality of economic performance at the macro and micro levels. The most effective mechanism of socio-economic transformation is the activation of investment processes.

The investment policy of the state plays an important role in the formation and development of the economy of Kazakhstan, so the research topic is very relevant. With the help of

investment policy, it is possible to achieve such economic success as: stimulation of production growth, development of new technologies, increase of development of backward regions of the state, etc.

At this time, it is clear that one of the most effective and efficient methods of revival of investment activity in Kazakhstan is the import of international investments. This is due to the lack of funds to carry out the structural and investment policy of the Republic in its priority areas.

The investment policy of the state is one of the most important elements of the economic strategy of the country and is determined by its objectives and goals. The state policy aimed at attracting international investment capital in accordance with the logic of economic reforms, proceeds from the need to maximize its support for the structural restructuring of production in the conditions of crisis and high inflation, as well as the development of market reforms, a significant increase in investment activity of private and public investors (Saparova, Saparova & Saparova, 2016b).

The history of humankind shows that during the crisis period of advanced countries development, as a rule, the third world countries made an economic breakthrough.

Holland in the XVI century, England in the XVII, Germany in the XIX century, Russia of Peter's era, Japan after the end of the Second world war - here is not a complete list of examples of successful "catching up" development, which allowed these countries not only to make the way for decades, which others took centuries, but also to be in the vanguard of world economic progress, to consolidate a dominant position in their region (Begali, 2009).

For Kazakhstan, the attraction of foreign investment is relevant from the date of independence, due to the lack of own funds for the development of priority sectors, to strengthen financial stability and improve the country's status on the world stage.

The International Monetary Fund's research, which annually calculates the volume of foreign direct investment of foreign countries, states that foreign investment can be considered as foreign direct investment, if it involves the acquisition of more than 10% of the contribution in the authorized capital of the host country and allows the investor to maintain control and influence over the invested object.

Thus, foreign direct investment must be massive and long-term in order to ensure that the investor has constant control over the investment and a constant interest in it.

In almost all countries, including Kazakhstan, the implementation of investment projects with foreign participation is regulated by law, and a state strategy for the development and support of investments is being developed. In particular, conditions are created for the formation of a favorable investment climate in the country and favorable conditions for foreign investors.

Thus, it should be noted at the beginning, that there are different approaches and methods in the world in assessing the flows of foreign direct investment, and even different definitions in relation to this concept (Saparova, Saparova & Saparova, 2016a).

The processes of developing national investment policies of the vast majority of States are increasingly focused on new development strategies. At the present time, all countries are seeking to attract and promote foreign investment in order to strengthen their own productive capacity and sustainable development. At the same time, many States are currently strengthening the rules governing foreign investment, making greater use of industrial policies in strategic sectors, tightening selection and monitoring procedures and scrutinizing international mergers and acquisitions, some of these measures are taken for purely protectionist purposes (Analysis of investments in fixed capital in the Republic of Kazakhstan and the CES member States. JSC "Kazakhstan Institute of industry development", 2013).

Taking into account the level of development of Kazakhstan in less than 25 years of independence, we can say that the country is a leader in its region. One of the important directions of strengthening positions on the world stage is forced industrial and innovative development. In this regard, the Government is developing a number of programs, in the

development of which the experience of developed both Asian and European countries is studied. It should be noted that Kazakhstan focuses on the successful experience in certain areas, thus not copying foreign development strategies. It is no accident that President Nursultan Nazarbayev setting the task of Kazakhstan to make a modernization breakthrough to become one of the 30 developed countries of the world, mentioned South Korea as an example of the state that has passed this way in the last century (Kuzmin, 2014).

High investment activity is a necessary condition for the development of the economy, the successful implementation of structural reforms, the formation of production potential on a new scientific and technical basis, the strengthening of competitive positions in the world market. The emergence of the economic phenomenon of the "new industrial countries" of South-East Asia, the implementation of the transition to a broad-front development of modern knowledge-based industries was made possible by the rapid growth of investment in the economies of these countries. Of course, this was not an accident, and the world practice clearly shows significant changes in the organization of production activities has undergone due to the increasing flow of information, knowledge, closely associated with the increasing flow of capital from one state to another.

The problems of crises and the resulting global problems make it imperative that there be more coherent international cooperation in the use of available capabilities and resources.

The situation is such that large States with a strong industrial potential in a complex, diversified production are close and already insufficient domestic markets, and the basis for the successful development and increase of its competitiveness is the emerging single expanded economic space. Naturally, the expansion of companies in the conditions of Erasure of national barriers and greater openness of world markets becomes an imperative of the time, as in the world space inter-country barriers to the movement of goods, services and factors of production are increasingly weakened and private enterprise principles of economic activity are spread.

The sharp increase in the role of foreign economic factors in the development of the world market economy is clearly evidenced by the pace of development of world trade and capital exports in the form of private direct investment, which in the period after the second world war significantly exceeded the growth rate of world product and industrial production. In 80- e years, the growth rate of foreign direct investment was four times greater than the rate of growth of world output and three times - world trade (Esembaev, 2010).

From the moment of gaining independence the Republic of Kazakhstan attached great importance to the issues of organizational and legal regulation of relations concerning foreign investment.

In the Strategy "Kazakhstan – 2050", the Head of the State has set a long-term goal before the Government related to joining Kazakhstan into the list of 30 most developed countries in the world. One of the essential conditions for achieving this goal is the increase of investment attractiveness, which will lead to the improvement in the investment climate in Kazakhstan and the full integration of the country's economy into the world economic space (Nazarbayev, 2012).

As one of the priority tasks set by the Head of State to the Government of the Republic of Kazakhstan was the improvement of the position of the Republic of Kazakhstan in the World Bank's rating "Doing Business" (Nazarbayev, 2016).

According to the study conducted by the World Bank Group "Doing Business, 2017: Assessing the Quality and Effectiveness of Regulation", Kazakhstan takes the 36th position in 2017 in favor of entrepreneurial activity. It is generally accepted that the higher ranking position, will be better for the regulatory climate in conducting business.

The rating "Doing Business", or the ranking of comfort conducting business has been publishing for many years by the World Bank and the International Finance Corporation. Since that time it became one of the basic factors for world investors in making investment decisions, and for many states - in assessing its economic potential (The World Bank noted a number of achievements of Kazakhstan in the Doing Business ranking in 2017).

The analysis is based on the comparison of opinions of the World Bank experts participating

in the survey of the actual reforms carried out by the governments of the countries. Such objective analysis allows to determine the degree of competitive advantages and investment attractiveness of the economy, and the investment country climate. In addition to the analysis, the studies indicated the reasons that impede the development of entrepreneurship, recommendations for their overcoming, ways of further development of the business climate. For governments of different countries, this means the necessity to revise the regulatory acts, governing the activities of small and medium-sized businesses and their enforcement procedure (Kazakhstan in the Doing Business rating, 2017).

Great impact on the value of investments is provided by the conditions of doing business in a particular country, that is, what called an investment climate.

In the short economic dictionary of the prominent scientist N.Azriliyan, the following definition of the term "investment climate" is given: the totality of political, economic, social and legal conditions that maximally favor the investment process; equal for domestic and foreign investors, equal in terms of attractiveness of the conditions for investing capital into the national economy (Azriliyan, 2010).

Another group of researchers gives a more specific definition of the investment climate. For example, I.M. Volkov and M.V. Gracheva affirm that the concept of the investment climate includes a set of economic, social, political and cultural conditions that ensure the commercial attractiveness of investments in a particular country (Volkov & Gracheva, 2004).

Studying the investment attractiveness of Kazakhstan is of great interest, not only in the Commonwealth of Independent States, but throughout the world. Therefore, we believe that this research contributes to the growth of scientific and theoretical studies of the problems of legal regulation of foreign investment, including the issue of investment attractiveness, on the basis of which the investment climate is determined.

2. Methodology

The inflow of foreign capital to any state, as well as the efficiency of investment is determined by the presence of factors of investment "attractiveness" of the recipient countries' economies, i.e. factors taken into account by investors in the development of investment strategy in the new market. These include political, economic, social, financial, organizational and legal factors, as well as socio-cultural and geographical factors. The combination of these factors inherent in a country to the recipient, is called its investment climate. The unfavorable investment climate in the country exceeds the risk of investment, with the recipient country incurring higher costs due to the lack of significant investment and low efficiency of working capital. A systematic view of the factors affecting the investor is an important element in the development of public policy to attract and use capital, as well as provides an opportunity to understand the motivation of a foreign partner.

According to the opinion of foreign investors of the Republic of Kazakhstan is an attractive market. The Republic is characterized by a wealth of natural resources, the presence of a sufficiently skilled workforce and high scientific and technical potential. Foreign investors themselves among the factors of investment "attractiveness" in Kazakhstan called the factors:

- access to raw materials / natural resources;
- large market potential;
- the potential profit margin;
- stay ahead of the competition;
- strategic location for entrepreneurship;
- low labor costs;
- government subsidies;
- tax initiatives.

The results of marketing research showed that the prevailing reasons affecting the inflow of investments of Kazakhstan is access to raw materials and natural resources and a large market potential. The potential of the profit rate is one of the three main reasons that influenced the decision to invest, was brought by the Respondent to third place in terms of

the degree of investment "attractiveness" of Kazakhstan.

In the world hierarchy, Kazakhstan is referred to the States with developing economy. Huge reserves of mineral resources, oil and gas allow us to hope that in the foreseeable future the Republic will acquire the status of an industrial country (now it is such countries as South Korea, Taiwan). To make this prospect come true, the wealth hidden in the depths must be extracted, processed, implemented and delivered to the consumer. In the context of the difficult geographical situation on the Euro-Asian continent, the vast territory, the lack of modern transport and communication systems, human resources and, most importantly, financial support, cannot do without foreign investment.

The increasing globalization of the world economy at its initial stage is likely to benefit all developing countries, including Kazakhstan. This investment and new technology and the modern pace of development of the industry.

Foreign investors investing their capital in the economy of Kazakhstan can be divided by the volume of capital investment, by industry and regional distribution of finance, as well as by the country of origin.

The main forms of attracting foreign direct investment in the Republic today is equity participation in joint ventures; the creation of enterprises fully owned by foreign investors; portfolio investment, as well as lease and concession.

The need to attract foreign capital to Kazakhstan is due to limited own funds, the need for advanced technologies and advanced forms of labor organization and management, as well as the need for Kazakhstan's participation in the global integration process and international division of labor.

A sufficiently high level of foreign investment is necessary for the Republic to quickly resolve the socio-economic problems of market relations, increase the export potential of the finished product and a departure from its raw material orientation.

When attracting foreign investment into the country, it is necessary to take into account the state interests of the country, its economic and environmental security, the competitiveness of products and technologies in the world market (Artykbaeva, 2015).

The writing of this article is based on the analysis of normative legal documents that regulate investment relations. Also were analyzed stages of the legislation development of Kazakhstan which are regulating investment relations, the current Business Code of the Republic of Kazakhstan (BC RK) (October 29, 2015) and the Civil Procedure Code of the Republic of Kazakhstan (CPC RK) (October 31, 2015).

Into consideration of the world economy crisis phenomena, nowadays competitions between states to attract investment have intensified. Therefore, in order to ensure structural transformations of the economy and in the conditions of limited internal sources of financing, the development and implementation of a new investment policy of the state aimed at securing high rates of economic growth and increasing the efficiency of the economy becomes extremely important.

In modern conditions, when in the Republic of Kazakhstan all possible efforts are made to ensure the growth of the Kazakhstani economy under conditions of worsening of the situation in the world markets (Nazarbayev, 2015) the state investment policy has become one of the key issues. Therefore, the investment policy of Kazakhstan is directed to rational, effective use of investments, and to the creation of a favorable investment climate.

However, it cannot be provided without stable and unified investment legislation.

3. Results

The first peak of interest to a foreign direct investment (FDI) in Kazakhstan appeared in the mid-1990s. Precisely that time, were taken important steps to improve the investment climate of the republic, including the creation of a legislative framework (base).

Investment legislation in Kazakhstan has been improving on the way to the settlement of the following relations:

- the main directions of the investment policy;
- principles of investment activity;
- objects of investment activity;
- bases of state regulation of investment activity;
- licensing of investment activities;
- peculiarities of taxation in the sphere of investment activity;
- insurance of investment risks;
- organizational and legal forms of investment activity;
- investment contracts;
- investment projects (development and implementation);
- responsibility of investors for the violation of investment legislation.

In most countries of the world there is the concept of an innovative and investment climate. It is specified by complicity and complexity. This concept includes such factors as the political, legal and economic situation in the host country, as well as the social climate. In order to improve the innovative and investment climate in the country on June 12, 2014, President N. Nazarbayev signed the Law on Improving the Investment Climate, which provides unprecedented measures to support investors (the Law of the Republic of Kazakhstan on Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Improving Investment climate, 2014). This is the introduction of a large-scale stimulus package to attract a new wave of investment and transnational corporations.

There are 10 special economic zones in Kazakhstan, each with a specific sectoral focus. Participants of the SEZ are provided with a package of benefits and simplification of licensing procedures. In 2015, the work on the implementation of the second phase of the Industrial and Innovative Development Program until 2019 has begun (the State Program for Industrial and Innovative Development of the Republic of Kazakhstan for 2015-2019, 2015). The spheres proposed for investment are specific promising areas.

Six priority sectors are identified: metallurgical complex, oil refining complex, food industry, chemical industry, industrial production (mechanical engineering), and building materials. The unique conditions created for investors, the lowest taxes and the stability of the relationship between investors and the state intend to turn Kazakhstan into one of the leading industrial and logistic hubs between Europe and Asia (Official website of the Embassy of the Republic of Kazakhstan in the People's Republic of China, 2017).

In Kazakhstan, the system of investment legislation has been constantly improved. Changes in the legislation were influenced by the factors such as changes in the economic conjuncture in the country and in the world that exerted a reverse influence on the state policy in the field of investment, the need to eliminate gaps and collisions in legislation in the course of law enforcement practices, and other issues. Many of the problems that Kazakhstan faces, in terms of innovative development, can be lifted with the help of a qualitative legal framework.

The formation of foreign economic legislation in Kazakhstan was initiated by three interrelated laws adopted in late 1990: On Free Economic Zones in Kazakhstan (November 30, 1990), On Foreign Investments in Kazakhstan (December 7, 1990); On the main principles of foreign economic activity of Kazakhstan (December 15, 1990). The Law of the Kazakh SSR "On Foreign Investments in the Kazakh SSR" (June 26, 1992) of December 7, 1990, which laid the foundation for the process of attracting foreign investment, advanced technology and managerial experience. The law to a certain extent contributed to the country's transition to the generally accepted principles of business management in the world.

Later, the Law on Currency Regulation in Kazakhstan (June 13, 1991) and the Law on Concessions in the Republic of Kazakhstan (December 23, 1991) were adopted. On December 27, 1994 the second Law "On Foreign Investments" was adopted. The Law of the Republic of Kazakhstan "On Foreign Investments" (December 27, 1994) of December 27, 1994, secured state guarantees provided to foreign investments, established the main organizational and legal forms for their implementation, as well as determined the procedure for resolving disputes with the participation of foreign investors.

Decree of the President of the Republic of Kazakhstan having the force of the "Oil Operations Act" (April 18, 1994) which was adopted on June 28, 1995. The decree of the President of the Republic of Kazakhstan, having the force of the Law, "On Oil" (June 28, 1995) was adopted. The decree "On Oil" had the most serious impact on the concept and content of the Law on Subsoil and Subsoil Use. The Decree of the President of the Republic of Kazakhstan, having the force of, "Subsoil and Subsoil Use Act" was adopted on January 27, 1996.

On February 28, 1997, the Law of the Republic of Kazakhstan "On State Support of Direct Investments" was adopted. There was the task in Kazakhstan to attract national capital, to provide favorable conditions for national investors.

The further development of the legislation on foreign investment was due to the adoption on January 8, 2008 of the Law of the Republic of Kazakhstan "On Investments", in which, in its essence, the norms of two invalid legislative acts were combined: on foreign investments and on state support of direct investments, with the introduction of certain new amendments to the new law concerning the creation of parity conditions, uniform guarantees and preferences for both foreign and domestic investors. This law became "an indicator of Kazakhstan's ongoing efforts to create a favorable investment climate and attract foreign resources to the country's economy" (Batalov, 2003).

In connection with the adoption of the BC RK on October 29, 2015, "Investments Act" has lost its force, and many of its provisions have been reproduced in Chapter 25 (articles 273-296) of the new Code.

If we consider the substantive side of the legal regulation of relations related to investments in Kazakhstan, it should be noted that the norms of the BC provide the investor with full and unconditional protection of rights and interests, guaranteeing him the right for compensation the harm caused to him as a result of issuing acts by government agencies that do not correspond to the laws of the Republic of Kazakhstan. As well as illegal actions (inaction) of officials of these bodies in accordance with the civil legislation of the Republic of Kazakhstan; guarantee the stability of the terms of contracts concluded between investors and state bodies of the Republic of Kazakhstan, except cases when amendments to contracts are made by agreement of the parties.

Speaking in general about the positive aspects of the norms of the BC RK that regulate investment relations, it is necessary to dwell on some issues that complicate the legal regulation of the protection of investors' rights.

The BC of the RK names all investors as entrepreneurs, perhaps this definition is not entirely correct, since not all investors are entrepreneurs, and not every investment activity is entrepreneurial (Entrepreneurship Code of the Republic of Kazakhstan, October 29, 2015). Investments can be deposited not only to the objects of entrepreneurial activity, but also in other types of activities, most important thing, that they are aimed at generating profit or income in the future. For example, the acquisition of real estate, art objects, antiques by individuals, taking into consideration that their price will constantly grow, is a profitable investment that can bring profit (income) in the future. This is recognized as an investment in the whole world, but these objects in this case are not objects of entrepreneurial activity, so it is not worth limiting the objects of investment activity to the scope of entrepreneurial activity. Similarly, the purchase of shares or bonds is an investment funding, but the individual investor does not automatically become an entrepreneur, his status does not change, hence, such strict limits of investment activity objects are not justified (Nukusheva, 2016).

Some Kazakhstan researchers have criticized some of the norms of the BC RK concerning investment. According to M. K. Suleimenov, the definition of the terms "investment", "investment activity", "investment dispute", given in the Law of the Republic of Kazakhstan "On Investments" and then reproduced in the BC RK, contradict the norms of international law (Suleimenov, 2017). Firstly, instead of a general definition of the concept of investment specified in the Energy Charter Treaty of December 17, 1994 as "all types of assets owned or controlled directly or indirectly by the Investor" (the Energy Charter Treaty, December 17, 1994), in clause 1 of Article 274 of the BC of the Republic of Kazakhstan, the concept of investments detailed in form but narrower in the content is given: "Investments are all types

of property (except for goods intended for personal consumption), including items of financial leasing from the time of contract conclusion as well as having the rights for them, financed by the investor in the authorized capital of the legal entity or the increase in fixed assets used for entrepreneurial activities, as well as for the implementation of the project of public-private partnership, including the concession project”(Entrepreneurship Code of the Republic of Kazakhstan, October 29, 2015).

Secondly, the legislation of the Republic established that “an investment dispute is a dispute arising from contractual obligations between investors, including major investors, and government agencies in connection with the investment activities of a depositor”. However, “in all international treaties, an investment dispute is defined as an investor's dispute with the state on all issues related to investments, not only arising from contractual relations” (Suleimenov, 2017). For example, in the Washington Convention on the Procedure for the Settlement of Investment Disputes between States and Foreign Persons in 1965, disputes arising from the relationship between a foreign private person and the state as a recipient of private investment are attributed to investment disputes (Washington Convention, 1965).

The above-mentioned discrepancies and contradictions in the legal regulation cause certain difficulties in the implementation of the norms of legislation.

Among various forms of protection of the law, a leading role is played by the judicial form of protection of investors' rights as a universal, historically developed, detailed regulation of civil procedural law (Dautbayeva, 2011), which provides a special procedure for examining investment disputes.

In order to implement the program “Ensuring the Rule of Law” of the Strategy of the President of the Republic of Kazakhstan, N. A. Nazarbayev – “100 steps” (Nazarbayev, May 20, 2015) there was created a separate legal proceeding on investment disputes, and on its basis a specialized investment board was organized in the Supreme Court of the Republic of Kazakhstan. In accordance with subparagraph 2 of Article 28 of the Civil Procedural Code of the Republic of Kazakhstan (Civil Procedure Code of the Republic of Kazakhstan, October 31, 2015), the jurisdiction of the Supreme Court in which a specialized judicial panel was established includes consideration of the rules of the court of first instance of investment disputes to which the major investor is a party. Consideration of civil cases on investment disputes, except cases that are subject to the Supreme Court, as well as other disputes between investors and state bodies related to the investment activity of the investor, are attributed to the jurisdiction of the court of Astana. Revision of the judicial decisions on the investment disputes of the court of Astana is also carried out by the specialized board of the Supreme Court of the Republic of Kazakhstan.

The plan of the nation “100 Steps” envisaged the creation of the International Council on the basis of the model of the Council of Foreign Investors under the President of the country. Being a consultative and advisory body to the Supreme Court, the established Council of 12 authoritative foreign and Kazakhstani lawyers and scientists, are focused on developing recommendations on the implementation of advanced international standards in the national justice system, giving conclusions on specific court cases related to the consideration of investment disputes.

Along with the positive moments of support and protection of investors, it is necessary to dwell on problematic issues of application of the norms of legislation.

Due to the controversial definition of certain concepts in the BC RK relating to investment activities, in particular, the concept of an investment dispute, the Supreme Court of the RK could not undertake to consider all disputes of a major investor with state bodies.

In this case, the expansion of the authority of the Supreme Court of the Republic of Kazakhstan can be achieved without introducing changes in the BC of the Republic of Kazakhstan. Namely, in subparagraph 2 of Article 28 of the Civil Procedure Code of the Republic of Kazakhstan, the words “on investment disputes involving a large investor” were replaced by the words “on the disputes of a major investor with state bodies related to the implementation of investment activities” or “on disputes related to the implementation of investment activities of the investor, in which the parties are a large investor and a

government body". We believe that the introduction of such a change to the jurisdiction of the Supreme Court of the Republic of Kazakhstan will include all disputes of a major investor with government agencies.

4. Conclusions

Thus, conducted studies have shown that every year the number of measures of the state support for investors increases, but their quality leaves much to be desired. For example, new tax benefits have been introduced, a "single window principle" has been introduced for investors who have entered into a contract, assistance in collecting and preparing documents, instituting an investment ombudsman institution to protect their rights and interests, etc. However, the Republic of Kazakhstan fails to succeed to promote investment attractiveness for potential foreign and national investors.

In our opinion, the main reason is the instability of the legislation of the Republic of Kazakhstan, as well as frequent changes in the system of public administration. In fact, the investor daily faces additional difficulties and problems caused by the emergence and abolition of various ministries and departments, changing their competence, transferring authority to other agencies, appointing new managers, etc. All these steps, possibly justified in conditions of overcoming the negative consequences of the international financial crisis, ultimately, lead to a deterioration of the investment climate in Kazakhstan.

In this regard, a whole range of measures is needed that could interest a potential investor in implementing major innovation projects in our country.

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