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S.P. Moroz¹**¹Doctor of Law, Professor
Caspian Public University
Republic of Kazakhstan, Almaty
E-mail: spmoroz@list.ru
ORCID: 0000-0002-6852-7883**

KAZAKHSTAN'S INVESTMENT LEGISLATION: PAST, PRESENT AND FUTURE

Annotation:

This article is devoted to the study of the formation and development of investment legislation in the Republic of Kazakhstan. The author identifies five stages of the formation of Kazakhstan's investment legislation from 1990 to the present. The author describes each stage of the development of investment legislation, analyzes all the enacted legislative acts and reforms that have been implemented to attract investors to the country's economy. It is noted that the Republic of Kazakhstan since its independence has taken serious steps to create a favorable investment climate, and certain results in this direction have been achieved, but there are also problems. It is emphasized that cardinal changes in the country's investment policy, constant reforms in the public administration system, the creation of various state bodies to regulate investors' activities have a negative impact on Kazakhstan's investment attractiveness.

In this regard, the author concludes that it is necessary to change the investment policy in the field of granting tax preferences, improve the investment and tax legislation of Kazakhstan to ensure proper protection of investors' rights.

Keywords: investment legislation, Kazakhstan's legislation, investor, investment climate

С.П. Мороз¹

¹заң ғылымдарының докторы, профессор
Каспий қоғамдық университеті,
Қазақстан Республикасы, Алматы қ.
E-mail: spmoroz@list.ru
ORCID: 0000-0002-6852-7883

ҚАЗАҚСТАННЫҢ ИНВЕСТИЦИЯЛЫҚ ЗАҢНАМАСЫ: ӨТКЕНІ, БҮГІНІ ЖӘНЕ БОЛАШАҒЫ

Аңдатпа:

Бұл мақала Қазақстан Республикасындағы инвестициялық заңнаманың қалыптасуы мен дамуын зерттеуге арналған. Автор 1990 жылдан қазіргі уақытқа дейінгі Қазақстандағы инвестициялық заңнаманың дамуының бес кезеңін белгілейді. Автор инвестициялық заңнаманы дамытудың әрбір кезеңін сипаттап, барлық қабылданған заңнамалық актілерге және ел экономикасына инвесторларды тарту мақсатында жүзеге асырылған реформаларға талдау жүргізеді. Қазақстан Республикасы тәуелсіздік алғаннан бері қолайлы инвестициялық ахуал қалыптастыру бағытында байыпты қадамдар жасалып, бұл бағытта белгілі нәтижелерге қол жеткізілгенімен, проблемалардың да бар екендігі атап өтіледі. Елдегі инвестициялық саясаттағы түбегейлі өзгерістер, мемлекеттік басқару жүйесіндегі бітпейтін реформалар, инвесторлардың қызметін реттейтін түрлі мемлекеттік органдардың құрылуы Қазақстанның инвестициялық тартымдылығына кері әсерін тигізетіні атап өтілді. Осыған байланысты автор инвесторлардың құқықтарын тиісінше қорғауды қамтамасыз ету үшін салықтық преференциялар беру саласындағы

инвестициялық саясатты өзгерту, Қазақстанның инвестициялық және салық заңнамасын жетілдіру қажет деген қорытындыға келеді.

Түйінді сөздер: инвестициялық заңнама, Қазақстан заңнамасы, инвестор, инвестициялық ахуал

С.П. Мороз¹

¹доктор юридических наук, профессор
Каспийский общественный университет
Республика Казахстан, г. Алматы
E-mail: spmoroz@list.ru
ORCID: 0000-0002-6852-7883

ИНВЕСТИЦИОННОЕ ЗАКОНОДАТЕЛЬСТВО КАЗАХСТАНА: ПРОШЛОЕ, НАСТОЯЩЕЕ И БУДУЩЕЕ

Аннотация:

Данная статья посвящена исследованию становления и развития инвестиционного законодательства в Республике Казахстан. Автор выделяет пять этапов становления инвестиционного законодательства Казахстана с 1990 года по настоящее время. Автор описывает каждый этап развития инвестиционного законодательства, анализирует все принятые законодательные акты и реформы, которые были реализованы для привлечения инвесторов в экономику страны. Отмечается, что Республика Казахстан с момента обретения независимости предприняла серьезные шаги по созданию благоприятного инвестиционного климата, и в этом направлении достигнуты определенные результаты, но есть и проблемы. Подчеркивается, что кардинальные изменения в инвестиционной политике страны, постоянные реформы в системе государственного управления, создание различных государственных органов по регулированию деятельности инвесторов негативно сказываются на инвестиционной привлекательности Казахстана. В этой связи автор приходит к выводу о необходимости изменения инвестиционной политики в сфере предоставления налоговых преференций, совершенствования инвестиционного и налогового законодательства Казахстана для обеспечения надлежащей защиты прав инвесторов.

Ключевые слова: инвестиционное законодательство, законодательство Казахстана, инвестор, инвестиционный климат.

Introduction

Investment legislation of the Republic of Kazakhstan has passed five main stages in its formation and development.

The first stage is the forming stage of investment legislation, initially, as legislation on foreign investments. The beginning of this was the enactment of the Law of the Kazakh SSR "On Foreign Investment in the Kazakh SSR" dated December 7, 1990 [Bulletin of the Supreme Council of the Republic of Kazakhstan, 1990, No. 50], which aimed to attract foreign investment, advanced technology and management experience, assuming that the necessary guarantees to foreign capital are provided. Despite the fact that the main provisions of the Law of the Kazakh SSR on foreign investments were more declarative in nature, there were positive aspects in its enactment: firstly, it was the first act that legally established the already existed investment relations in the Republic; secondly, this legislative act determined the procedure for attracting foreign investment in our country economy for four years, and, in general, it contributed to foreign capital inflows; thirdly, for

the first time foreign investors were provided with guarantees of their activities, so the inclusion of a section on guarantees for foreign investments increased the interest of potential investors and significantly affected their activity.

It is noteworthy that the formation of investment legislation almost coincided with the formation of the Republic of Kazakhstan as an independent state, which was initiated by the Declaration on State Sovereignty of the Kazakh SSR dated October 25, 1990 [Bulletin of the Supreme Council of the Republic of Kazakhstan, 1990, No. 44]. The Constitutional Law on State Independence of the Republic of Kazakhstan was preceded by the Law on Investment Activity, enacted during Kazakhstan's existence as a Soviet Socialist Republic on June 10, 1991 [Bulletin of the Supreme Council of the Republic of Kazakhstan, 1991, No. 24], which was in force for the longest period of time compared to all the other acts in that time regulating investment relations, since it was canceled only in 1997. And in this, in our opinion, its only dignity – in all other respects, it has had virtually no impact on invest-

ment relations, as it has become inapplicable from the moment of its publication.

The second stage in the development of investment legislation begins with the enactment of the Law of the Republic of Kazakhstan "On Foreign Investment" on December 27, 1994 [Bulletin of the Supreme Council of the Republic of Kazakhstan, 1994, No. 23-24], which abolished the former Law of the Kazakh SSR "On Foreign Investment in the Kazakh SSR" dated December 7, 1990. This law determined the basis for attracting foreign investments into the economy of the Republic of Kazakhstan, fixed state guarantees provided to foreign investments, established the main organizational and legal forms of their implementation, and also determined the procedure for resolving disputes involving foreign investors. It is noteworthy that the Civil Code of the Republic of Kazakhstan (General Part) was adopted on the same day as the Law on Foreign Investment, which once again shows how important it was for Kazakhstan to attract new foreign investments, since there were no national ones at that time.

A distinctive feature of the second stage in the development of investment legislation is that a significant part of the legislative and regulatory acts adopted at that time was temporary and had no long-term prospects.

The beginning of *the third stage* in the development and improvement of investment legislation was the enactment of the Law "On State Support for Direct Investment" on February 28, 1997 [The Law of the Republic of Kazakhstan "On State Support for Direct Investment" of 28 February 1997], which defined such main tasks as: introduction of new technologies, advanced equipment and know-how; saturation of the domestic market with high-quality goods and services; state support and stimulation of domestic producers; development of export-oriented and import-substituting industries; creation of new jobs; improvement of the natural environment; etc.

The significance of the Law "On State Support for Direct Investment" is that with its enactment, firstly, the formation of Kazakhstan's special legislation on direct investment began; and, secondly, the investment legislation of Kazakhstan has moved to a qualitatively new stage in its development. Prior to the enactment of the Law on Direct Investment, the country's investment policy was aimed at increasing foreign investment and creating a legal regime more than the most favorable for them. Ultimately, the effectiveness of foreign investments was minimal, due to the fact that they were mainly invested in subsoil use, which could not have a tangible impact on the development of the country's economy and led only to increased subsoil expansion by foreign investors. As a result, a large part of foreign investments was specula-

tive in that period. As a consequence, along with the enactment of the Law on Direct Investment, serious amendments and additions were made to the Law on Foreign Investment. Among the reasons that led to this, we can mention the multi-million losses incurred by the state, under contracts concluded between national investors and foreign investors under government guarantees due to the violation of contractual obligations by the Kazakh party at that time. The Foreign Investors' Council under the President of the Republic of Kazakhstan was established in 1997.

The fourth stage began with the enactment of the Law of the Republic of Kazakhstan "On Investment" dated January 8, 2003 ["Kazakhstanskaya Pravda" of 11 January 2003, No. 9-11 (23948-23950)], which combined the rules regulating relations related to investments and established a general legal regime for foreign and national investments, providing guarantees to investors operating in Kazakhstan. In particular, guarantees for the legal protection of investors' activities in Kazakhstan (full and unconditional protection of the rights and interests of investors by laws and other normative acts of Kazakhstan, as well as international treaties ratified by Kazakhstan; the right to recover damages caused to an investor as a result of issuing an act of a state body that does not comply with the legislation, and also as a result of action (inaction) of officials of these bodies, according to the civil legislation); guarantees for the use of income; guarantees for the rights of investors during the nationalization and requisition.

An analysis of the main provisions of the Law on Investments allows us to conclude that the generally positive idea of establishing a single legal regime for foreign and national investments was not fully realized in practice: instead of raising the legal status of national investors to the level of foreign investors, the legal status of foreign investors was equated with the legal status of national investors. Accordingly, no one benefits from this approach to the problem of creating equal conditions for carrying out investment activities in the Republic: national investors - because their legal status has not changed; foreign investors - because their legal situation has worsened.

In order to improve the investment climate in the country, after numerous reforms in the field of public administration, in 2014 the Ministry for Investments and Development of the Republic of Kazakhstan, the National Investors' Council under the President of the Republic of Kazakhstan were established, and a new institution of the Investment Ombudsman was created, which is an official appointed by the Government of Kazakhstan to perform the following functions: 1) consideration of investors' appeals on issues arising in

the course of investment activities, and making recommendations for their resolution, including interacting with state bodies; 2) assisting investors in resolving emerging issues in out-of-court and pre-trial procedures; 3) developing and submitting recommendations to the Government to improve the legislation of the Republic of Kazakhstan.

The fifth stage in the development of Kazakhstan's investment legislation begins on January 1, 2016 with the entry into force of the Entrepreneurial Code of the Republic of Kazakhstan dated October 29, 2015 No. 375-VZRK (hereinafter - RoK Entrepreneurial Code) ["Kazakhstanskaya Pravda" of 3rd November 2015, No. 210 (28086)]. Since the same date, the following laws have lost their force: the Law of the RK dated January 31, 2006 "On Private Entrepreneurship" [Bulletin of the Parliament of the Republic of Kazakhstan, 2006, No. 3]; the Law of the RK dated March 31, 1998 "On Peasant or Husbandry Farms" [Bulletin of the Parliament of the Republic of Kazakhstan, 1998, No. 2-3]; the Law of the RK dated January 8, 2003 "On Investment" ["Kazakhstanskaya Pravda" of 11 January 2003, No. 9-11 (23948-23950)]; the Law of the RK dated December 25, 2008 "On Competition" [Bulletin of the Parliament of the Republic of Kazakhstan, 2008, No. 24]; the Law of the RK dated January 6, 2011 "On State Control and Supervision in the Republic of Kazakhstan" [Bulletin of the Parliament of the Republic of Kazakhstan, 2011, No. 1]; the Law of the RK dated January 9, 2012 "On Government Support for Industrial and Innovation Activity" [Bulletin of the Parliament of the Republic of Kazakhstan, 2012, No. 2].

Without going into details, we only note that when developing the RoK Entrepreneurial Code, one of the most priority tasks was set – the systematization of norms regulating entrepreneurial activity and their unification in a single legislative act, so that one legislative act was enacted to replace the numerous acts regulating entrepreneurial relations, which would establish the general principles of entrepreneurship in the Republic of Kazakhstan. However, this task has not been solved.

Chapter 25 of the RoK Entrepreneurial Code "State Support for Investment Activities" is the previously valid Law of the RK dated January 8, 2003 "On Investment" (initially both of them consisted of 24 articles, but later Chapter 25 of the RoK Entrepreneurial Code was supplemented with Article 295-1 "Conclusion and Termination of a Special Investment Contract", Article 295-2 "Agreement on Investment", Article 296-1 "Forms of Control over Compliance with the Terms of Investment Contracts", Article 296-2 "Procedure for Organizing and Monitoring Compliance with the Terms of Investment Contracts", and Article 291

"Investment Subsidy" was excluded). We believe that this legislator's approach to the regulation of investment activity does not meet the demands of contemporary practice, and in theory it is very doubtful. Firstly, all investors were automatically recognized as entrepreneurs, which, of course, is not the case. Secondly, all the shortcomings and miscalculations of the Law on Investment gradually "migrated" to the RoK Entrepreneurial Code. Thirdly, they significantly reduced the scope of the RoK Entrepreneurial Code in the field of investment activities, limiting it only to issues of state support.

In general, the legislative innovations are aimed at ensuring that investors comply with the terms of contracts on preferences, and, accordingly, to tighten control over their activities. On the one hand, it is questionable whether it is appropriate to establish new administrative barriers for investors, but on the other hand, it is impossible not to support the legislator's desire to streamline investment relations and to ensure proper protection of public interests. It should be noted that with the adoption of the Entrepreneurial Code, the problems of improving investment legislation have not been resolved, but on the contrary have become more complicated, since the investor regularly encounters new changes in legislation, and the system of state bodies is constantly changing. Therefore, the fifth stage in the development of investment legislation can be characterized as the absorption stage of investment legislation by entrepreneurial legislation.

This period can also be described as a stage of searching for new ways to boost investment activity in the Republic of Kazakhstan, especially with the participation of foreign investors. We are talking, in particular, about the Constitutional Statute dated December 7, 2015 "On the Astana International Financial Centre" [Bulletin of the Parliament of the Republic of Kazakhstan, 2015, No. 24]. The AIFC is a financial hub for the countries of Central Asia, the republics of Transcaucasia, the EAEU, the countries of the Middle East, the territory of Western China, Mongolia and Europe. The legal regime of the AIFC is based on the principles, norms and precedents of the law of England and Wales and standards of leading global financial centres.

Kazakhstani legislation will be applied on a subsidiary basis, in part to matters not governed by AIFC Acts. At the same time, the official language of the AIFC is English. Office work and court proceedings are conducted in English. All transactions are concluded in English. The Astana International Financial Centre has an independent AIFC Court, separate from the judicial system of the Republic of Kazakhstan, with the involvement of judges of the international level and the Inter-

national Arbitration Centre, which will consider disputes if there is an arbitration agreement between the parties [www.aifc.kz/tseli/, access as of 20 September 2021].

In order to encourage potential investors and increase their confidence in our judicial system, the Civil Procedure Code of the Republic of Kazakhstan dated October 31, 2015 (hereinafter referred to as the RoK Civil Procedure Code) [Bulletin of the Parliament of the Republic of Kazakhstan, 2015, No. 20-VI], explicitly stipulates that the Specialized Interdistrict Economic Court of Nur-Sultan considers civil cases regarding investment disputes, except for cases within the jurisdiction of the Specialized Interdistrict Administrative Court of Nur-Sultan, as well as claims of state bodies against investors related to the investor's investment activities, with the participation of: 1) a foreign legal entity (its branch, representative office) carrying out entrepreneurial activity in the Republic Kazakhstan; 2) a legal entity created with foreign participation in the manner prescribed by the legislation of the Republic of Kazakhstan, fifty or more percent of voting shares (participation shares in the authorized capital) of which belong to a foreign investor; 3) investors in the presence of a concluded contract with the country for investment. The Specialized Interdistrict Administrative Court of Nur-Sultan considers investors' claims regarding the appeals against administrative issuances, actions or inactions by administrative authorities, officials (paragraph 3 of Article 102 of the Administrative Procedure Code of the Republic of Kazakhstan dated June 29, 2020 (hereinafter - the RoK Administrative Procedure Code) [Bulletin of the Parliament of the Republic of Kazakhstan, 2020, No. 13].

In 2018, the Ministry for Investments and Development of the Republic of Kazakhstan was reorganized by transforming into the Ministry of Industry and Infrastructural Development of the Republic of Kazakhstan, and the functions and powers in the field of forming the state policy on attracting investment were transferred to the Ministry of National Economy of the Republic of Kazakhstan, and the functions in the field of implementing the state policy on attracting investment were transferred to the Ministry of Foreign Affairs of the Republic of Kazakhstan. In our opinion, this is absolutely unacceptable – it is impossible to artificially separate the functions of republican state institutions in the field of investment – one ministry is responsible for the formation of investment policy, and the other – for its implementation.

In this regard, first of all, it is necessary to revise the investment policy. Today, the standard set of investment preferences includes exemption from customs duties and state in-kind grants, previously the number of investment preferences includ-

ed tax benefits. Initially, since 1997, tax benefits consisted in full or partial tax exemption for up to 10 years (including lowering the income tax, land tax and property tax rates to 100% of the basic rate for up to 5 years from the date of conclusion of the contract, as well as for a subsequent period of up to 5 years, lowering the rate of income tax, land tax and property tax within no more than 50% of the basic rate in accordance with the second subparagraph of Article 7(1) of the Law of the RK "On State Support for Direct Investment" [The Law of the Republic of Kazakhstan "On State Support for Direct Investment" of 28 February 1997]; then, since 1999, the period for granting tax benefits has been reduced to 5 years (including exemption from land tax and property tax for up to 5 years from the date of conclusion of the contract, as well as exemption from income tax for up to 5 years from the date of receipt of taxable income, but not more than 8 years from the date of conclusion of the contract in accordance with the second subparagraph of Article 7(1) of the Law of the RK "On State Support for Direct Investment" ["Kazakhstanskaya Pravda" of 05 August 1999, No. 187-188]. Since 2003, investment tax preferences have been granted for a period determined depending on the volume of investments in fixed assets, but not more than 5 years (in accordance with paragraph 1 of Article 16 of the Law of the RK "On Investment" ["Kazakhstanskaya Pravda" of 11 January 2003, No. 9-11 (23948-23950)]). Since 2014, tax preferences and investment subsidies have been provided only for investment priority projects [Bulletin of the Parliament of the Republic of Kazakhstan 2014, No. 11]. Since 2016, tax exemptions have been granted for a special investment project (including exemption of imports of raw materials and (or) materials under a special investment contract from value added tax in accordance with the third subparagraph of Article 290(2) of the RoK Entrepreneurial Code ["Kazakhstanskaya Pravda" of 3rd November 2015, No. 210 (28086)], and tax preferences have been granted for a priority investment project (including a reduction in the amount of calculated corporate income tax by 100 percent; application of a coefficient of 0 to land tax rates; calculation of property tax at the rate of 0 percent to the tax base in accordance with the first subparagraph of Article 290(2) of the RoK Entrepreneurial Code).

It is clear that the legislator first widened the list of investment preferences as much as possible and then shortened it by excluding tax preferences, but subsequently abandoned the complete exclusion of tax preferences, replacing the term "tax preferences" with the term "preferences on taxes". In our view, the complete rejection of tax preferences was a major mistake, the consequences of which we are still overcoming,

because there is still a selective approach to their granting - not to all investment projects, but only strategic and special ones.

Of course, we should not return to the policy of attracting an investor "at any cost"¹, which was practiced in the early and mid-1990s. But the policy of strengthening and tightening state control over the investor's activities, which began at the dawn of the 2000s and continues to this day, must also change.

Thus, we can come to the disappointing conclusion that all those positive and very important steps that the legislator previously took to ensure proper protection of investors' rights have been destroyed today – there is no special investment

legislation, there are no new breakthrough investment projects. It is possible that Kazakhstan has strengthened its position in international ratings, but this, unfortunately, does not have any significant effect on the increase of investment activity in our country, both from national and from foreign investors. We need real steps to improve the current legislation, and, first of all, the tax legislation of the Republic of Kazakhstan. Along with this, it is necessary to reconsider the legislator's position regarding the investment legislation of the Republic of Kazakhstan, because without creating a favorable investment climate we will not be able to overcome the crisis.

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¹ At that time, it was only about foreign investors, since there were no national investors yet, since the initial accumulation of capital had not yet occurred.

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