

INTERNATIONAL COOPERATION: LEGAL ASPECTS

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LEGAL GUARANTEES FOR INTERNATIONAL INVESTMENT ACCORDING TO THE LEGISLATION OF THE RUSSIAN FEDERATION

This article analyses the notion and system of legal guarantees ensured by the foreign investments legislation, reviews its general feature, and focuses on the national regime for foreign investors. The author draws a conclusion that the existing system of special guarantees for foreign investors is neither effective nor prudent.

Key words: *investment activity, legal guarantees, foreign investment, national regime, safeguard clause.*

The attraction of foreign investment for the purpose of national economic development is a common practice in the world economic process determined by the existing trends towards the internationalisation of world economy. In Russia, foreign investment is one of the factors of the development of market relations; it brings not only capital but also new technologies, new production organisation, and fully-fledged management into the country.

In order for a country to attract international capital, it needs to provide a favourable investment climate, the key component of which is a legal mechanism of state guarantees for foreign investment. Traditionally, legal science defined the notion of “guarantee” as a system of ensuring the tangibility of rights established by legislation. Within investment law, state guarantees in the sphere of investment activity are considered as “obligations of the state in the field of legal support for investment activity, based on the rules of investment legislation and international agreements, and adopted with the purpose of property preservation and actual implementation of the investor rights on their territory” [1, p. 84]. A. G. Bogatyrev interprets guarantees for investor rights as the creation of certain conditions providing the agents of investment relations — regardless of subjective reasons — with an opportunity to carry out investment activity at any time [2, p. 22]. N. G. Doronina, who defends a similar position, specifies that guarantees are certain obligations assumed by the state in connection with investment [3, p. 86].

When studying the legal regime of investment activity, some authors arrive at a conclusion that the “existing in Russia national regime of economic activity is rather unattractive to foreign investors” and “the principle of the

national regime in Russia must be supplemented with a functioning system of benefits and guarantees for foreign investors” [4, p. 519]. This thesis can hardly be called undebatable, nor can it serve a strategic goal in the sphere of improvement of legislation on legal guarantees for investors.

The establishment of a privileged regime of economic activity is a characteristic of the developing countries, where foreign capital becomes a major tool of economic development. Most developed countries do not offer any special privileges for international investors. It means the liberalisation of investment regimes and establishment of uniform rules and guarantees for both national and international investors on the basis of the universally recognised principle of economic non-discrimination. The maximum degree of liberalisation was achieved in the framework of the European Union — it is home to an efficient and uniform investment space [5, p. 74—75]. The objective of Russia seems to be the creation of the same conditions and guarantees for investment activity and later, perhaps, its accession to this unified investment space.

The existing system of legal guarantees established for foreign investors in Russia appears to be complicated and not fully efficient. It is a multi-tier system.

First of all, one should mention international conventions and bilateral agreements on encouragement and mutual protection of investments with the participation of the Russian Federation, which stipulate legal guarantees for investors.

Secondly, there are federal laws establishing universal guarantees for all investors (Federal Law of February 25, 1999 No. 39-FZ *On investment activity in the Russian Federation conducted in the form of capital investments*) [6] and special guarantees for foreign investors (Federal Law of July 9, 1999 No. 160-FZ *On foreign investment in the Russian Federation*) [7].

Thirdly, individual federal laws governing certain types of investment activity contain regulations on the corresponding guarantees. For examples, such regulations can be found in the federal laws *On concession agreements* [8] of July 21, 2005 No. 115-FZ, *On special economic zones in the Russian Federation* [9] of July 22, 2005 No. 116-FZ, and *On the special economic zone in the Kaliningrad region and on amending certain legislative acts of the Russian Federation* [10] of January 10, 2006 No. 16-FZ, etc.

Moreover, the federal law *On foreign investment in the Russian Federation* (paragraph 2, Article 3) grants the constituent entities of the Russian Federation rights to adopt laws and other regulatory acts governing foreign investment concerning the issues within their competence or joint competence of the Russian Federation and its constituent entities. According to Article 17 of the said law, the constituent entities of the Russian Federation and municipal authorities, within their competence, can offer a foreign investor benefits, guarantees, finance and support of an investment project from the budget of the constituent entity, local budgets, and non-budgetary funds. A number of constituent entities exercised this right having included regulations on investment guarantees in their laws.

A great number of regulations on investment guarantees have not resulted in greater efficiency in legal control. When it comes to legislation,

quantity does not always transform into quality. The provision of a legislative framework for investment guarantees is no exception. On the one hand, there is duplication of regulations on guarantees in different regulatory acts. On the other hand, there are legislation conflicts, when the investor meets the criteria stipulated by different acts containing regulations on guarantees. It concerns, first of all, foreign investors. One cannot help but ask whether it is reasonable to have specific laws regulating only foreign investment against the background of adoption of laws that contain uniform regulations and control individual legal forms of investment, regardless of whether the investor is a national or international company [11, p. 81]. It is offered to consider the national legal regulation of investment in Russia as conducted within uniform legislation [12] and, therefore, to abandon the provision of special guarantees for foreign investors. It is sufficient to establish a national regime on the basis of the economic non-discrimination principle preserving restrictive exceptions for foreign investors, which can be stipulated by the federal law only to the degree necessary to protect the foundations of the constitution, morality, health, rights and legitimate interests of other persons, and to organise the country's defence and ensure the state security. For example, the federal law *On procedures of making foreign investments in business entities of strategic importance to the national defence and security* of April 29, 2009 No. 57-FZ [13].

Despite the significant number of legislative acts containing regulations on investment guarantees, the spectrum of guarantees covered by Russian legislation is not very broad. All of them are listed in the federal law *On foreign investment in the Russian Federation*, which, in its present form, regulates only the relations pertaining to state guarantees of the rights of international investors making investment in the Russian Federation.

At the same time, most of the said guarantees for foreign investors can hardly be classed as real guarantees, which is duly emphasised in legal literature [14, p. 101—102]. For example, the law mentions as a guarantee the right of a foreign investor to “make investment in the Russian Federation in any forms under the legislation of the Russian Federation” (Article 6). Article 13 stipulates the right to purchase shares and other securities of Russian commercial organisations as well as public securities; Article 14 specifies participation of foreign investors in privatisation; Article 15 guarantees the foreign investor the right to land, other natural resources, buildings, constructions, and other types of immovable property. All the legal opportunities listed above stem from the national regime offered to foreign investors. Thus, their entrenchment as special guarantees does not seem necessary. A foreign investor — whom the national regime (not less favourable than the legal framework for Russian investors) extends to — enjoys all the above rights, and their classification as individual guarantees does not bring anything new into legal regulation. Let us consider, for instance, the guarantee of proper dispute settlement (Article 10). Can one speak of improper dispute settlement in relation to other investors? I think not.

Foreign investors give priority to safety of investment. Thus, the guarantee of indemnity in case of nationalisation or requisition of property and the

guarantee against unfavourable for the foreign investor (and the commercial organisation handling the foreign investment) changes in legislation must be given special attention.

Article 8 of the federal law *On foreign investment in the Russian Federation* stipulates that the property of a foreign investor or a commercial organisation handling foreign investment is not liable to compulsory alienation, including nationalisation and requisition, with the exception of cases and due to the reasons stipulated by a federal law or an international agreement of the Russian Federation. Thus, the real guarantee is not the prohibition of nationalisation, but full indemnity in case it is conducted.

The existence of such guarantees should be interpreted as aspirations of the state to ensure maximum security of foreign investors' property and refusal to take measures towards its compulsory alienation. At the same time, the Russian Federation reserves the right to nationalise or otherwise alienate foreign investment in certain cases. Such actions are a sovereign right of the state recognised in a number of international documents. "The traditional Western doctrine recognises the right of the state to expropriation, but requires that it is implemented:

- for the public good;
- in the legal framework;
- without discrimination;
- followed by swift, adequate and efficient indemnity [4, p. 534]".

At the same time, a comparative analysis of the corresponding articles of the repealed 1991 law on foreign investment and the current law shows that the latter lacks the universally recognised in international law rule of possible nationalisation only in case this measure is taken "for the public good" as well as the mentioned "swift, adequate and efficient indemnity". Apparently, the legislators believed it would be sufficient to have such international norms and principles documented in agreements on encouragement and mutual protection of investment concluded between the Russian Federation and other states [1, p. 400]. However, this logic suggests that the inclusion of the guarantee itself in the law is redundant, since the said provisions are embraced by the mentioned agreements.

The repealed law contained provisions stating that nationalisation is possible only in exceptional cases, when "these measures are taken for the public good", and must be followed by "swift, adequate and efficient indemnity". It is unclear why they were rejected. Anyway, it hardly improves the quality of legal regulation. It seems that there is an urgent need to emphasise prompt indemnity, since late payments will entail considerable damages for foreign investors, including loss of profit. Moreover, the new law, in contrast to the earlier one, did not stipulate compensation for the loss of profit and mentioned other types of indemnity without giving proper definitions.

Of equal importance and great practical value for investors is the guarantee against unfavourable changes in legislation called a stabilisation clause or a grandfather clause in legal literature [15, p. 156]. The analysis of the content of regulations on stabilisation to changes in law makes it possible to identify two principal approaches aimed at safeguarding the rights of investors. The

first (more widespread) approach focuses on pending new legislative acts over a certain period of time in relation to the corresponding investors; the second concerns changing the articles of the agreement with the investor (for instance, federal laws of concession agreements or product-sharing agreements). The federal law *On foreign investment in the Russian Federation* uses the first approach. This guarantee was absent in the earlier 1991 law on foreign investment. Thus, the inclusion of the stabilisation clause in the current law can be interpreted as an important step towards greater legal safety of foreign investors in case of political or economic instability.

Article 9 of the law stipulates a guarantee against the unfavourable for the foreign investor (or the commercial organisation handling the foreign investment) change in the legislation of the Russian Federation under a number of conditions and with certain limitations. The phrasing of the article seems to be rather unfortunate. As N. N. Voznesenskaya aptly mentions, “this article is a good example of how not to formulate a provision of law [14, p. 115]. In general, the essence of the guarantee is non-application, over the period of implementation of a priority investment project (but for not more than seven years since the financing of such a project was commenced), of new federal laws and other regulatory acts of the Russian Federation (with a few exceptions), as well as amendments and supplements to them, which lead to an increase in the overall tax burden on the activity of a foreign investor and a commercial organisation handling the foreign investment for the purpose of implementing priority investment projects, or a regime of prohibitions and limitations in relation to foreign investors in the Russian Federation in comparison to the overall tax burden and regime extending to them as of the day the financing of the priority investment project through foreign investment was commenced. However, I would like to make several comments.

Firstly, one should mention that a similar guarantee in relation to all investors, including foreign ones (since the national regime extends to them too), is contained in paragraph 2, Article 15 of the federal law *On investment activity in the Russian Federation carried out in the form of capital investments* of February 25, 1999 No. 39-FZ. So the law on foreign investments simply duplicates it.

Secondly, the identification of a scope of persons, to whom the said guarantee is extended, is rather unfortunate. The mentioned regulations concern investors implementing priority investment projects, but the period covered by the guarantee does not coincide with the payback period of such projects. At the same time, the law on foreign investment (sub-paragraph 2, paragraph 1, Article 9) extends the scope of persons liable to the guarantee to any commercial organisations with the share of foreign investors in the authorised capital stock of more than 25%, regardless of whether the investment project enjoys the status of a priority one. However, it is still unclear, over what period and in which way these economic entities can use the said guarantee.

Thirdly, the efficiency of the guarantee is undermined both by the limited scope of persons it is extended to and by numerous exceptions that make it possible to deny this guarantee (according to a set of regulatory acts, a payback period of the investment project, calculation of overall tax burden, etc).

In conclusion, one can say that the existing system of special guarantees for foreign investors is inefficient and inadequate. Legal investment guarantees should not be determined by the nationality of the investor and should be uniform for all of them.

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