

ISSN 2224-5294

ҚАЗАҚСТАН РЕСПУБЛИКАСЫ
ҰЛТТЫҚ ҒЫЛЫМ АКАДЕМИЯСЫНЫҢ

АБАЙ АТЫНДАҒЫ ҚАЗАҚ ҰЛТТЫҚ
ПЕДАГОГИКАЛЫҚ УНИВЕРСИТЕТІНІҢ

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НАЦИОНАЛЬНОЙ АКАДЕМИИ НАУК
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КАЗАХСКИЙ НАЦИОНАЛЬНЫЙ
ПЕДАГОГИЧЕСКИЙ УНИВЕРСИТЕТ ИМ. АБАЯ

NEWS

OF THE NATIONAL ACADEMY OF SCIENCES
OF THE REPUBLIC OF KAZAKHSTAN

ABAY KAZAKH NATIONAL
PEDAGOGICAL UNIVERSITY

ҚОҒАМДЫҚ ЖӘНЕ ГУМАНИТАРЛЫҚ
ҒЫЛЫМДАР СЕРИЯСЫ



СЕРИЯ ОБЩЕСТВЕННЫХ
И ГУМАНИТАРНЫХ НАУК



SERIES OF SOCIAL AND HUMAN SCIENCES

6 (322)

ҚАРАША – ЖЕЛТОҚСАН 2018 ж.
НОЯБРЬ – ДЕКАБРЬ 2018 г.
NOVEMBER – DECEMBER 2018

1962 ЖЫЛДЫҢ ҚАҢТАР АЙЫНАН ШЫҒА БАСТАҒАН
ИЗДАЕТСЯ С ЯНВАРЯ 1962 ГОДА
PUBLISHED SINCE JANUARY 1962

ЖЫЛЫНА 6 РЕТ ШЫҒАДЫ
ВЫХОДИТ 6 РАЗ В ГОД
PUBLISHED 6 TIMES A YEAR

Б а с р е д а к т о р

ҚР ҰҒА құрметті мүшесі
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Меншіктенуші: «Қазақстан Республикасының Ұлттық ғылым академиясы» РҚБ (Алматы қ.)

Қазақстан республикасының Мәдениет пен ақпарат министрлігінің Ақпарат және мұрағат комитетінде 30.04.2010 ж. берілген № **10894-Ж** мерзімдік басылым тіркеуіне қойылу туралы куәлік

Мерзімділігі: жылына 6 рет.

Тиражы: 500 дана.

Редакцияның мекенжайы: 050010, Алматы қ., Шевченко көш., 28, 219 бөл., 220, тел.: 272-13-19, 272-13-18, <http://nauka-nanrk.kz>, social-human.kz

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Типографияның мекенжайы: «Аруна» ЖК, Алматы қ., Муратбаева көш., 75.

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Известия Национальной академии наук Республики Казахстан. Серия общественных и гуманитарных наук. ISSN 2224-5294

Собственник: РОО «Национальная академия наук Республики Казахстан» (г. Алматы)

Свидетельство о постановке на учет периодического печатного издания в Комитете информации и архивов

Министерства культуры и информации Республики Казахстан № 10894-Ж, выданное 30.04.2010 г.

Периодичность 6 раз в год

Тираж: 500 экземпляров

Адрес редакции: 050010, г. Алматы, ул. Шевченко, 28, ком. 219, 220, тел. 272-13-19, 272-13-18,
www.nauka-nanrk.kz / social-human.kz

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Адрес типографии: ИП «Аруна», г. Алматы, ул. Муратбаева, 75

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News of the National Academy of Sciences of the Republic of Kazakhstan. Series of Social and Humanities. ISSN 2224-5294

Owner: RPA "National Academy of Sciences of the Republic of Kazakhstan" (Almaty)

The certificate of registration of a periodic printed publication in the Committee of information and archives of the Ministry of culture and information of the Republic of Kazakhstan N **10894-Ж**, issued 30.04.2010

Periodicity: 6 times a year

Circulation: 500 copies

Editorial address: 28, Shevchenko str., of. 219, 220, Almaty, 050010, tel. 272-13-19, 272-13-18,
[www:nauka-nanrk.kz](http://www.nauka-nanrk.kz) / social-human.kz

© National Academy of Sciences of the Republic of Kazakhstan, 2018

Address of printing house: ST "Aruna", 75, Muratbayev str, Almaty

NEWS

OF THE NATIONAL ACADEMY OF SCIENCES OF THE REPUBLIC OF KAZAKHSTAN

SERIES OF SOCIAL AND HUMAN SCIENCES

ISSN 2224-5294

<https://doi.org/10.32014/2018.2224-5294.41>

Volume 6, Number 322 (2018), 105 – 111

УДК 339.727.22

МРПТИ 06.81.12

A.Kh. Galiyeva¹, Zh.N. Sadu¹, M.T. Kulubekov², L.A. Kazbekova³¹Kazakh University of Economics, Finance and International Trade;²Kostanay Engineering Economic University after M. Dulatov;³Kyzylorda State University after Korkyt Ataalma_galiyeva@mail.ru, kmaksat_79@mail.ru**ASSESSMENT OF THE INSTITUTIONAL TERMS OF THE
FOREIGN INVESTMENTS ENCOURAGEMENT IN KAZAKHSTAN**

Abstract. Present article is aimed to analyze and assess the legislation of the Republic of Kazakhstan in the scope of foreign investment encouragement and actions implemented to improve investment encouragement of the country.

The research methodology is based on the methods of scientific knowledge, comparison, logical analysis, methods of analysis and synthesis.

The hind-sight study of the Kazakhstan legislation was conducted in the study in the scope of foreign investment encouragement. Discrepancies and contradictions have been revealed in the legal regulation of the investment activities, that cause certain difficulties for the legislation implementation. The measures taken in Kazakhstan to stimulate foreign investment have been studied and analyzed.

The results of the study can be applied for the development of strategically important documents to promote the investment activities in Kazakhstan. The main conclusions and practical recommendations may be used as well as methodological basis for the further deepen research of this matter.

Keywords: investment legislation, foreign investment, investment operations, investment dispute.

Introduction

Investment activity is an important condition for the economic growth of any state in the modern world. Kazakhstan constitute no exception; therefore, its investment attractiveness expansion is one of the main priorities for development. In light of the crisis phenomena in the global economy, competition between the countries has intensified to attract the investment. Therefore, to ensure the structural transformation of the economy and in terms of limited domestic sources of funds, the development and implementation of new investment policy oriented to the high rates of economic growth and economy efficiency improvement is of prime importance.

Subject to all these factors, the Republic of Kazakhstan since its independence believed and highlights the great importance of organizational and legal regulation of relations related to the foreign investments.

Hind-sight study of the investment legislation in Kazakhstan

The story of the Kazakhstan investment legislation formation and development starts with adoption of the first legislative act in this field - the Law "On Foreign Investments in the Kazakh SSR" dated December 7, 1990. This law established the legal regime for investments protection, as well as a number of tax incentives for foreign investors, that has been significantly important to attract first foreign investments to the republic economy [1].

The further step was made with the Law "On Foreign Investments" dated December 27, 1994, representing a kind of "second generation law". The changes amended were in line with the changes of the state policy towards investors, that was stipulated by both the economic development of Kazakhstan as a whole and beginning of the favorable investment climate formation in the country [2]. The investment legislation was further developed after adoption of the Law "On State Support of Direct Investments" dated February 28, 1997. This legislation was intended to regulate relations in respect of investment

activities in priority sectors of the economy, that insured the powerful rise of the production sector development [3].

Thus, Kazakhstan, being a full member of the international community, has established the actual foundations for the mutually beneficial cooperation with foreign investors.

Certainly the integration of the Republic of Kazakhstan in the world market has also affected the Kazakhstan legal framework at the international level. Kazakhstan joined a number of international organizations, and also became a party to various international treaties and agreements, both bilateral and multilateral. That caused the implementation of generally accepted international principles in the national legislation.

The adoption of the Law “On Investments” dated January 8, 2003 is a new confirmation of Kazakhstan’s efforts to create favorable investment climate and attract external resources to the economy of the country. The law combined the provisions of two invalid laws - on foreign investment and on state support for direct investment, with certain amendments to the new law concerning the of parity conditions, common guarantees and preferences both for foreign and domestic investors. This law became “an indicator of the Kazakhstan’s ongoing efforts to create a favorable investment climate and encourage the external resources to the country's economy [4].

After adoption of the Commercial Code in the Republic of Kazakhstan (hereinafter referred as CC) dated October 29, 2015, the Law “On Investments” became invalid, and many of its provisions were reproduced in Chapter 25 (Articles 273-296) of the new code.

If we closely study the content of the legal regulation applicable for the investments relations in Kazakhstan, it is necessary to note that the CC standards provide the investor with full and unconditional remedies of rights and interests, ensuring him the right to compensation for harm caused by the acts issued by governmental bodies not relevant 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 contract terms concluded between investors and government bodies of the Republic of Kazakhstan, except for the amendments to the contracts made upon mutual agreement of the parties.

Article 279 of the CC states that the forced seizure of the investor’s property (nationalization, seizure) for the state needs is permitted only in exceptional cases provided for by the laws of the Republic of Kazakhstan. In the event of nationalization, the Republic of Kazakhstan shall reimburse the investor in full with the losses incurred as a result of legislative acts publicized in the Republic of Kazakhstan on nationalization. The investor property can be seized only with compensation of the property market value. The cost of compensation for the property seized from the owner may be challenged by him in the court.

The investors are provided with a number of benefits and preferences under legislation. Therefore, in accordance with provisions of Art. 283 of CC the investment project (including the investment priority project) is provided with following types of investment preferences: 1) exemption from customs duties and value added tax on imports; 2) state in-kind grants. The investment priority project is provided with tax preferences and investment subsidies. For investors operating in the priority sectors and investing in the amount of at least 2 million MCI, certain benefits are provided separately in accordance with bylaws. So, they are exempt from paying corporate income tax, land tax for a period of 10 years, property tax for 8 years. They are reimbursed up to 30% of the actual costs of construction and installation work and equipment purchase.

In addition, they may attract the foreign labor without any quotas and permits (for the period of project implementation, as well as one year after the commissioning). Broadly speaking on the positive aspects of CC governing the investment relations, it is necessary to note some points that complicate the legal regulation of the investors remedies. Thus, a number of researchers are critical in respect of some rules of Commercial Code concerning investment.

Definition of the terms “investment”, “investment activity”, “investment dispute” specified in the Law of the Republic of Kazakhstan “On Investments” and later reproduced in the CC, does not comply with international law [5]. First, instead of the general definition of the term of investment, specified in the Energy Charter Treaty dated December 17, 1994, as “all types of assets owned or controlled directly or indirectly by the Investor [6], paragraph 1 of article 274 of the CC provides detailed in terms of form, but narrower in content, the concept of investment: “Investments are all types of property (except for goods

intended for personal need), including financial leasing items from the time of leasing agreement, as well as the rights for them contributed by the investor in the charter capital of the legal entity or increase of fixed assets used for business operations, as well as for the public-private partnerships project implementation, including the concession project "[7].

Second, under legislation of the Republic "the investment dispute is a dispute arising from contractual obligations between the investors, including large investors, and government bodies in connection with the investor's investment activities". However, "in all international treaties, an investment dispute is defined as a dispute between the investor and state in all investments related issues, not only arising from the contractual relations [5]. For example, under Washington Convention on the investment disputes settlement procedure between the states and foreign persons dated 1965, the disputes arising from the relations between the foreign private person and recipient state over the private individual's investment are classified as investment disputes [8].

The above discrepancies and contradictions in legal regulation cause certain difficulties for the legislation implementation to be discussed below.

Investment environment improvements

The organizational measures aimed to implement the tasks in order to ensure the favorable investment environment are to be reviewed below. In this context, it is necessary to note about the establishment of the Council of Foreign Investors under the President of the Republic of Kazakhstan dated June 30, 1998, the main task of that is to develop recommendations and proposals on many issues of investment activity, in particular, determine the main areas of the investment policy of the Republic of Kazakhstan and improve the investment climate in the Republic of Kazakhstan. Thus, the 30th plenary meeting of the Foreign Investors Council under the President of the Republic of Kazakhstan was held in Astana on June 22, 2017.

State Investment Committee of the Republic of Kazakhstan was established on March 27, 1997, later it was transformed into Investment Agency of the Republic of Kazakhstan in 1999, that was the central executive body not a part of the Government, exercised leadership, as well as within the limits stipulated by the legislation, inter-branch coordination and other special executive and licensing functions in the scope of state support of direct investments in the Republic of Kazakhstan.

At the moment, after public administration system optimization, the State Institution "Committee on Investments of the Ministry of Investment and Development of the Republic of Kazakhstan" operates, that is a department of the Ministry of Investments and Development of the Republic of Kazakhstan and it conducts regulatory, selling and control functions, as well as participating in the implementation of the strategic functions of the Ministry in the field of public investment and investment support policies, creating the favorable investment environmental climate, establishment, operation and elimination of the special economic zones.

The Investment Committee works hard to ensure the comfortable working environment for investors. Therefore, investors have no longer need to contact the various government agencies to obtain a number of permits. Each investor is able to obtain all government services necessary for the investment projects implementation in the Investor Services Sectors opened under the "one-stop shop" principle in the Public Service Centers. This mechanism will enable to reduce significantly the bureaucratic and administrative burden for the investors. Overall there are 19 investor services sectors already operating in Kazakhstan: 2 - in Astana, 3- in Almaty, 1 investor services sector in each regional center, whereas in 2015 consolidated tool to obtain public services was available only for investors implementing priority investment projects. But every investor may apply to consult for and receive all permits already starting from the current year. For example, investors may obtain the permission for land use, the documentation necessary for construction, architectural planning task, enter into an investment contract and so on. All that an investor needs to do is to prepare a package of documents upon his request, and the rest of the process will be executed and monitored by the Investor Services Sector [9].

Introduction of the investment ombudsman into public administration was notable innovation in the organizational and legal system to improve the investment activity, its legal status and competence are defined in Articles 314-317 of the Commercial Code of the Republic of Kazakhstan. Based on this code, the investment ombudsman is an official (determined) by the Government of the Republic of Kazakhstan, who is in charged for the protection of the investors' rights and legitimate interests. In order to ensure and

protect the rights and legitimate interests of investors, the investment ombudsman examines the investors' appeals on the issues arising in course of investment activities in the Republic of Kazakhstan and makes recommendations for their permit, including interaction to the state authorities; assists investors in addressing the emerging issues under pre-court and out-of-court procedure; develops and submits recommendations to the Government of the Republic of Kazakhstan concerning the investment legislation improvement in the Republic of Kazakhstan.

The Regulation on the activities of the investment ombudsman was approved by the Decree of the Government of the Republic of Kazakhstan dated December 26, 2015 No. 1069, paragraph 16 of that stipulates that the investment ombudsman shall send report on the results of its activities annually in March to the Government of the Republic of Kazakhstan.

To date, a working group has been nominated, including the deputy heads of many ministries and departments of the Republic of Kazakhstan in order to review the issues objectively and make recommendations for the Investment Ombudsman.

In 2017, 43 appeals were sent to the Investment Ombudsman - Minister for Investment and Development of the Republic of Kazakhstan, out of which appropriate measures have been taken on 11 appeals to ensure the observance and protection of rights and legitimate rules of the investors (issues were resolved in favor of investors), recommendations were made on 18 appeals (clarifications given, meetings held), 14 appeals were out of Ombudsman competence (subject of dispute between business entities, legal proceedings, etc.).

Most often, the investors face difficulties in the field of tax, customs and labor law, as well as in licensing and land relations. In this regard, UGSHCC, MFA and MID signed memorandum of cooperation in the business forum. The document provides for the establishment of the special Project Office "Protecting Investments", conducting joint monitoring for the law compliance while conducting the audits of the investment entities and preventing the violations of the law by the state authorities, prompt exchange of information, and holding joint meetings regularly.

In order to form the master international center of the financial services, where special legal regime will operate, the President signed the Constitutional Law of the Republic of Kazakhstan dated December 7, 2015 "On the International Financial Center "Astana" (hereinafter referred to as IFCA). The international financial center in Astana officially started its operations on January 1, 2016. But 2016-2017 years were preparatory ones - this is the infrastructure establishment, attraction of international investors, drafting the legislation. The Center began to work in full scale from January 1, 2018. The investors are provided with unprecedented conditions to conduct operations in IFCA with no analogues in the post-Soviet space: exemption for a number of taxes for a period of up to 50 years, simplified labor and visa regimes. For example, since 2017, the financial center can be visited by all OECD countries under visa-free regime. In addition, high-tech infrastructure is provided for the international specialized exhibition "Astana EXPO-2017" with ready-made high-class office premises [10] to accommodate the IFCA.

The separate legal procedure on investment disputes was established in order to implement the program "Ensuring the supremacy of the statute law" of the Strategy of the President of the Republic of Kazakhstan N.A. Nazarbayev - "100 steps" [11], and specialized investment board was arranged in the Supreme Court of the Republic of Kazakhstan based on that. In accordance with subparagraph 2 of article 28 of the new CCP of the Republic of Kazakhstan, jurisdiction of the Supreme Court includes, where specialized judicial board is established, the consideration of investment disputes according to the rules of the first instance court, where large investor being the party. Processing of civil cases under investment disputes, except for cases in the Supreme Court jurisdiction, as well as in other disputes between investors and government agencies related to the investor's investment activities, are assigned to the jurisdiction of Astana court. The appeals of the judicial acts on the investment disputes of Astana court are also reviewed by the specialized board of the Supreme Court of the Republic of Kazakhstan.

Establishment of the International Council was provided under "100 Steps" plan of the nation based on the model of the Foreign Investors Council under the President of the country. Being the consultative and advisory body under the Supreme Court, the Council of 12 authoritative foreign and Kazakhstan lawyers and scholars, now established, is focused on development of recommendations concerning advanced international standards implementation in the national justice system, giving opinions on specific legal cases related to the investment disputes processing.

An indicator proving the efficiency of the investors' rights judicial protection is that outcomings of the special analysis of the civil cases between businessmen and state bodies treated in the Supreme Court revealed the following: "Over the past 6 years, legal acts have protected the rights of legal entities, including foreign investors, for total amount exceeding 240 billion tenge. For comparison, only about 40 billion tenge was recovered in favor of state authorities" [12]. Thus, an example of the effective protection of the investor's rights was the decision of the specialized board of the Supreme Court on the application of Zhaikmunai LLP concerning illegitimacy of the state authorities' actions - RGA "State Revenue Department in the West Kazakhstan region". Having proceeded this dispute, the Supreme Court satisfied the application of Zhaikmunai LLP, deemed illegal and canceled the notice of the tax audit results on the additional accrual of corporate income tax and fines [13].

Overall, based on statistics voiced in the official press 21 applications have been received from the large investors in the Supreme Court of the Republic of Kazakhstan in 2016, out of them 2 cases were treated essentially under the rules of the first instance court, 11 were submitted to Astana court, 1 was returned to the specialized inter-district economic court of the West Kazakhstan region, 7 cases were reviewed under appeal procedure. Astana court received 37 applications from the investors, 11 cases were treated on the merits with resolution, 9 applications were returned, 9 were submitted under jurisdiction, the rest are pending. It is necessary to consider the problematic issues of the legislation application. The Supreme Court of the Republic of Kazakhstan was unable to take over all the disputes between large investor and state authorities due to controversial definition of certain concepts in the CC in regards of investment activities, in particular, the term of investment dispute.

It was noted in the legal press in this regard that "by the definitions of the Supreme Court, a number of civil cases on applications of large investors to the state revenues departments in various regions about appealing notifications on non-confirmation of the authenticity of the value added tax refund amount were submitted to the Astana court because they were attributed to the other investment related disputes. It is followed from the content of the applications submitted that the disputes are related mainly to the tax legislation general provisions execution by the investors, but not any special terms of the subsoil contract. Similarly, several civil cases were filed to the large investors for the environment damage compensation by the environmental departments of various regions under Astana court jurisdiction. The reason was specified that the disputes do not arise from the contractual obligations between the investor and state authority, but related to the compliance with the legal requirements by the investors for the air pollution compensation excess the established rates" [14].

Results and discussion

Based on the Article 294 of the CC of RK "The system analysis of CC standards allows us to conclude that "contractual obligations" arise from the "investment contract" concluded in the form of "model-based contract" between investor and authorized state investment authority [15]. However, "investment contract, that is, a contract for the investment project implementation that provides for the investment implementation and presented, does not correspond to any of the two indicia necessary to treat the dispute under this contract as investment one. It is quite enough to revise the Articles 2881-293 of CC on the procedure for granting investment preferences to understand that these are ordinary administrative relations, such as tax, customs and others. The investor develops the investment project, then applies to the authorized investment body for preferences, authorized body proceeds the application and, if there are any conditions established in the Law in advance, decides whether provide or not to provide the investment preferences. Hereto there are no any contractual relationships" [5].

Therefore, some authors propose to resolve the issues of controversial definition of the "investment dispute" term in the CC by amending the subparagraph 2 of article 28 of the Code of Civil Procedure of the Republic of Kazakhstan, replacing the phrase "on the investment disputes, where large investor is a party" with the words "disputes of the large investor and state authorities related to the investment activities implementation".

We believe that such amendment to the CCP rule will enable to authorize the RK Supreme Court to settle all disputes between large investor and state authorities arising from the both contractual and non-contractual relations. Prior to amending the legislative acts, the gap in the law can be filled in by the regulatory resolution adopting of the Supreme Court of the Republic of Kazakhstan. To date, the website of the Supreme Court of the Republic of Kazakhstan contains only the answers to the questions regarding investment disputes [16].

While settlement the disputes not only investment but ordinary commercial disputes as well the foreign investors may apply the most of international arbitration and arbitration courts, special study is necessary to cover the issues to apply there and therefore it will not be presented in the current work. It is necessary to emphasize only that limitations existing in their activities shall be understood. In particular, it is necessary to keep in mind that international arbitration and arbitration courts located in the Republic of Kazakhstan may only process the disputes arising from the civil law contracts [17].

In addition, a new institute for the investors' rights protection in Kazakhstan was established in 2018 - financial court under Astana International Financial Center. The above court is independent in its activities, and it is not included in the judicial system of the state [18]. The AIFC court is authorized to process the disputes: arising between the participants of AIFC, bodies of the Center and (or) their employees; concerning any operation carried out in the Center and subordinate to the rules of the Center; submitted to the Center upon mutual agreement of the parties. The rules of common law along with the continental law valid in Kazakhstan will be applied in this court. Legal proceedings will be conducted in English. Also, an International Arbitration Center will be established here, settling the disputes in the event of arbitration agreement between the parties.

Conclusions

The results of the study confirmed the existing shortcomings of the investment legislation in Kazakhstan. Thus, in the Law of the Republic of Kazakhstan "On Investments" and later on reproduced in the Commercial Code, the terms "investment", "investment activity", and "investment dispute" contradict to international law. The term "investment" in Kazakhstan legislation gets narrower meaning, and term "investment dispute" derives only from the contractual relationship between the investor and government agencies. However, "in all international treaties, an investment dispute is defined as a dispute between the investor and state in all matters related to investments, not only arising from the contractual relations. All this undoubtedly affects the investment climate in the country. In connection with the above circumstances, it is proposed to amend the Law of the Republic of Kazakhstan "On Investments" and other specified regulatory documents, bringing their provisions and definitions in compliance with international law.

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ҚАЗАҚСТАНДАҒЫ ШЕТЕЛДІК ИНВЕСТИЦИЯ ТАРТУДЫҢ ИНСТИТУЦИОНАЛДЫҚ ЖАҒДАЙЫН (ТАЛАПТАРЫН) БАҒАЛАУ

Аннотация. Мақаланың мақсаты – шет ел инвестицияларын тарту аумағындағы Қазақстан Республикасының заңнамасын және елдің инвестициялық тартымдылығын арттыру бойынша атқарылатын шараларды талдау және бағалау.

Зерттеу әдістемесі ғылыми таным, салыстыру, логикалық талдау, синтез әдістерін қолдануға негізделеді.

Зерттеуде Қазақстанның шет елдік инвестицияларды тарту бойынша заңнамасына ретроспективалық талдау жүргізілген. Инвестициялық қызметті құқықтық реттеудегі қарама-қайшылықтар мен оқшылықтар айқындалған, олар заңнама нормаларын жүзеге асыру барысында нақты қиындықтар туғызады. Қазақстанда шет елдік инвестицияларды ынталандыру мақсатында іске асырылатын іс-шаралар қарастырылып, сараланған. Заңнаманы жетілдіру бойынша рекомендациялардың 2 сценарийі ұсынылған – өзгерістер енгізу; ешбір өзгеріссіз қосымша нормативтік актілер қабылдау.

Жүргізілген зерттеу нәтижелері Қазақстандағы инвестициялық қызметті ынталандыру бойынша стратегиялық маңызы бар құжаттарды әзірлеу кезінде қолданысын табуы мүмкін. Сондай ақ негізгі ұйғарымдар мен тәжірибелік рекомендациялар осы мәселе бойынша зерттеулерді әрі қарай тереңдету үшін әдістемелік негіз ретінде пайдаланылуы мүмкін.

Түйін сөздер: инвестициялық заңнама, шетелдік инвестициялар, инвестициялық қызмет, инвестициялық дау.

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ОЦЕНКА ИНСТИТУЦИОНАЛЬНЫХ УСЛОВИЙ ПРИВЛЕЧЕНИЯ ИНОСТРАННЫХ ИНВЕСТИЦИЙ В КАЗАХСТАНЕ

Аннотация. Цель статьи – анализ и оценка законодательства Республики Казахстан в области привлечения иностранных инвестиций и реализуемых мер по повышению инвестиционной привлекательности страны.

Методология исследования основана на применении методов научного познания, сравнения, логического анализа, методов анализа и синтеза.

В исследовании проведен ретроспективный анализ законодательства Казахстана в области привлечения иностранных инвестиций. Выявлены разночтения и противоречия в правовом регулировании инвестиционной деятельности, которые вызывают определенные трудности при реализации норм законодательства. Рассмотрены и проанализированы меры, предпринимаемые в Казахстане для стимулирования иностранных инвестиций. Предложены 2 сценария рекомендаций по совершенствованию законодательства – внесение изменений; и принятие дополнительных нормативных актов без корректировки законодательства.

Результаты проведенного исследования могут быть применены при разработке стратегически важных документов по поощрению инвестиционной деятельности в Казахстане. Также основные выводы и практические рекомендации могут быть использованы в качестве методической основы для дальнейшего углубления исследований по данной проблеме.

Ключевые слова: инвестиционное законодательство, иностранные инвестиции, инвестиционная деятельность, инвестиционный спор.

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Редакторы *М.С. Ахметова, Т.А. Апендиев, Д.С. Аленов*
Верстка на компьютере *А.М. Кульгинбаевой*

Подписано в печать 08.12.2018
Формат 60x881/8. Бумага офсетная. Печать – ризограф.
17,7 п.л. Тираж 500. Заказ 6.