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**ЮРИСДИКЦІЙНІ СПОСОБИ
ВИРІШЕННЯ ІНВЕСТИЦІЙНИХ
СПОРІВ ЗА УЧАСТЮ ІНОЗЕМНИХ
ІНВЕТОРІВ: НАПРЯМИ
ВДОСКОНАЛЕННЯ**

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Інвестор зацікавлений вкладати кошти в економіку тієї країни, яка має ефективний механізм захисту його прав, у тому числі, дієві способи вирішення інвестиційних спорів за участю іноземних інвесторів

У статті досліджено способи вирішення інвестиційних спорів за участю іноземних інвесторів під призмою їх ефективності. Встановлено відсутність в Україні дієвого способу вирішення інвестиційних спорів. Наголошено про те, що існуючі переваги вирішення інвестиційних спорів у Міжнародному комерційному арбітражі та Морської арбітражної комісії зводяться нанівець порядком виконання рішень цих органів в Україні. Виокремлено недоліки вирішення інвестиційних спорів за участю іноземних інвесторів в Україні в адміністративних та господарських судах. Зазначено, що досягти ефективності у вирішенні судами України інвестиційних спорів можна тільки шляхом реформування судової си-

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**JURISDICTIONAL METHODS FOR
RESOLUTION OF INVESTMENT
DISPUTES INVOLVING FOREIGN
INVESTORS: AREAS FOR
IMPROVEMENT**

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Investor is interested in investing in the economy of a country that has an effective mechanism for protecting his rights, including efficient ways to resolve investment disputes involving foreign investors

The paper explores ways to resolve investment disputes involving foreign investors through the prism of their effectiveness. The lack of an effective way to resolve investment disputes in Ukraine is established. It is noted that the existing advantages of resolving investment disputes in the International Commercial Arbitration Court and the Maritime Arbitration Commission are nullified by the procedure for implementing the decisions of these institutions in Ukraine. The disadvantages of resolving investment disputes with the participation of foreign investors in Ukraine in administrative and economic courts are discussed. It is noted that it is possible to achieve efficiency in resolving investment disputes by the courts of Ukraine only by reforming the judicial system of

стеми України та запровадження нових підходів до розгляду інвестиційних спорів.

Метою статті є обґрунтувати пропозиції щодо запровадження в Україні ефективних юрисдикційних способів вирішення інвестиційних спорів за участю іноземних інвесторів.

Методами дослідження є загальнонаукові та спеціальні методи наукового пізнання.

Наголошено про те, що головною перевагою створення в Україні спеціалізованого інвестиційного суду України має стати максимальне прискорення вирішення інвестиційних спорів за участю іноземних інвесторів, забезпечення суддівського корпусу суддями, які володіють ґрунтовними знаннями інвестиційного законодавства, адже інвестиційні відносини, поміж розгалуженого національного законодавства, також регулюються великою кількістю міжурядових угод про сприяння та взаємний захист інвестицій, які укладаються урядом України із урядами відповідних країн та визначають основні питання взаємин сторін в галузі інвестиційної діяльності, володіють належним рівнем професійної англійської мови.

Зроблено висновок про доцільність створення в Україні Вищого інвестиційного суду України з наділенням його правом вирішення інвестиційних спорів як суду першої інстанції та можливості оскарження його рішень тільки до Верховного суду України, пред'явлення особливих кваліфікаційних вимог до судів такого суду.

Ключові слова: інвестиційний спір, суд, захист, інвестиції, іноземний інвестор, економіка, держава

Investments and their effective use are the key to the development of the Ukrainian economy. Without attracting foreign investment to the economy, it is difficult to imagine the post-war reconstruction of our country. We agree with E.Kupaihorodsky, who argues that the current economic situation in Ukraine shows that foreign direct investment in the country's economy is becoming, without exaggeration, the necessary "blood" for many economic shifts and reforms [1].

At the same time, it is well known that an investor is interested in investing in the economy of a country that has an effective mechanism for protecting his rights, including efficient ways to resolve investment disputes involving foreign investors. However, law enforcement practice indicates a low efficiency in resolving these disputes in Ukrainian courts. Thus, in judicial practice, there is no

Ukraine and introducing new approaches to the consideration of investment disputes.

The aim of the article is to substantiate proposals for the introduction in Ukraine of effective jurisdictional methods for resolving investment disputes with the participation of foreign investors.

Research methods are general scientific and special methods of scientific knowledge.

It is noted that the main advantage of creating a specialized investment court in Ukraine should be the maximum acceleration of the resolution of investment disputes involving foreign investors, providing the judiciary with judges with a thorough knowledge of investment legislation because investment relations, among the extensive national legislation, are also regulated by the number of intergovernmental agreements on assistance and mutual protection of investments, which are concluded by the government of Ukraine with the governments of the respective countries and determine the main issues of the relationship of the parties in the field of investment activities, have the appropriate level of professional English.

It is concluded that it is expedient to create the High Investment Court in Ukraine with the right to resolve investment disputes as a court of first instance and the possibility of appealing its decisions only to the Supreme Court of Ukraine, presenting special qualification requirements to the judges of such a court.

Keywords: investment dispute, court, defense, investment, foreign investor, economy, state

unified approach to determining the jurisdiction of cases involving a foreign investor, the procedure for notifying foreign investors about the date and place of the trial of a dispute, etc. This, together with other factors, reduces the investment attractiveness of our country. However, the state has a positive obligation to take active measures to ensure human rights [2, p. 35]. Ensuring social and economic human rights in the context of our state's post-war reconstruction largely depends on the investment climate.

The legal aspects of resolving investment disputes with the participation of foreign investors are enshrined in a wide range of legal acts, among which are the Commercial Code of Ukraine, the Law of Ukraine On Investment Activity №. 1560-XII dated September 18, 1991, On the Foreign Investment Regime №. 93/96-VR dated March 19, 1996, On the Protection of Foreign Investments in Ukraine No. 1540a-XII dated September 10, 1991, laws of Ukraine on special economic zones and a special regime for investment activities in priority development areas in the relevant regions of Ukraine, the Economic Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine, etc. However, the analysis of their provisions gives grounds to state the need for their improvement because a significant part of the relevant provisions needs to be clarified and detailed. This concerns, first of all, the legislative definition of the concept of an investment dispute, which is not taken into account in the procedural legislation and the peculiarities of the terms for the consideration of disputes by courts with the participation of foreign investors, etc.

The following scientists studied certain aspects of investment disputes involving foreign investors: I.M. Zlakoman [3], V.V. Kudryavtseva [4], S.M. Palamarchuk [5], V.M. Stoika [6], D.E. Fedorchuk [7] and others. At the same time, the legal aspects of the effectiveness of their solution remain little researched in modern domestic doctrine, which necessitates a theoretical refinement of the issue raised in the study.

The above determines the relevance of the study, the aim of which is to substantiate proposals for the introduction of effective jurisdictional methods of resolving investment disputes with the participation of foreign investors in Ukraine.

The work is based on general scientific and special methods of scientific knowledge.

The definition of “investment dispute” is crucial in crucial importance in the process of researching ways to resolve investment disputes involving foreign investors. It should be noted that this definition is not defined at the legislative level, and its interpretation is debatable in the scientific literature. Taking into account the purpose of this study, we state that we share the opinion of scientists on the definition of an investment dispute as a conflict between two or more persons regarding their rights and obligations in the process of investment activity, which can be settled by conciliation, and in case of its non-application or the ineffectiveness of its use – judicial or arbitration order (disputes arising from the imperfection of the current investment legislation of the country, as well as non-compliance of the current investment legislation with new social and economic relations; disputes due to the failure to take into account investment risks, etc.) [3, p. 8].

The implementation of jurisdictional methods of resolving investment disputes with the participation of foreign investors is carried out as arbitration, the main of which is the International Centre for Settlement of Investment Disputes (hereinafter referred to as ICSID), the International Court of Arbitration of the International Chamber of Commerce in Paris, the Arbitration Institute of the Chamber of Commerce in Stockholm, the International Commercial Maritime Arbitration commission operating both under the Ukrainian Chamber of Commerce and Industry and state judicial institutions, including administrative and economic courts of Ukraine.

Today, the resolution of investment disputes by arbitration is ambiguously assessed. In particular, K.B. Bondar argues that foreign investors prefer the arbitration of such disputes, given the independence and impartiality of the arbitration tribunal compared to domestic courts, as well as the high competence of arbitrators in international investment disputes [8, p. 4].

In our opinion, it is noted that the existing advantages of resolving investment disputes in the International Commercial Arbitration Court and the Maritime Arbitration Commission are nullified by the procedure for implementing the decisions of these institutions in Ukraine. Thus, in accordance with Article 58 of the Regulations of the International Commercial Arbitration Court at

the Chamber of Commerce and Industry of Ukraine, which was approved by the decision of the Presidium of the Chamber of Commerce and Industry of Ukraine No. 18 dated April 17, 2007, the execution of the arbitration award is carried out in accordance with the Law of Ukraine On International Commercial Arbitration and civil procedural legislation of Ukraine by applying to the competent state court at the location of the debtor or by applying to the competent state court of the country of the debtor's location, and in accordance with Article III of the Convention on Recognition and Enforcement, which recognize and enforce the ICAC decision in accordance with the procedural legislation of this country [9]. Law enforcement practice indicates a rather difficult process of recognizing the decisions of such courts because often the courts leave such petitions without consideration or without satisfaction due to the lack of evidence of a proper notice of the hearing, the impossibility of providing the court with properly certified documents, etc.

In light of the above, the introduction of effective state methods for resolving investment disputes with the participation of a foreign investor is relevant.

As E. Kupaihorodsky rightly writes, the protection of property rights and ensuring the freedom of entrepreneurial activity of a foreign investor is achieved, among other things, by effective and fair state courts, the leading place in the hierarchy of which is occupied by the National Court. This state body protects the property of a foreign investor by making binding decisions. It ensures that it freely, without obstacles, carries out investment activities on the territory of the recipient state [1].

Ensuring a guarantee of a fair and impartial resolution of investment disputes on the territory of Ukraine was recognized by I.M. Zlakoman as one of the areas for improving state guarantees of investment protection [3, p. 6].

Investment disputes involving foreign investors in Ukraine are resolved in administrative and economic courts, and the process of their resolution has drawbacks. M. M. Lazarenko highlights the following shortcomings: 1) when resolving a dispute, the court is usually guided by domestic legislation, which is often incomprehensible to the investor and burdens the investor's rights; 2) international investment disputes are mostly quite complex, and judges cannot perfectly understand the details of the case, which can lead to their unfair decision (among the reasons – excessive workload of judges, low professional level, etc.); 3) the recipient state, through various mechanisms of administrative influence, can quite easily “turn” the court's decision in its favor [10, p. 63].

Despite the above, the role of courts in protecting investors' rights is not disputed by either scientists or practitioners. Thus, I.M. Ryzhenko, A.V. Rybas argue that creating conditions for implementing investment projects is possible provided that reliable judicial protection of the rights and interests of entrepreneurs and investors in Ukraine is guaranteed [11, p. 118].

It is possible to achieve efficiency in resolving investment disputes by the courts of Ukraine only by reforming the judicial system of Ukraine and introducing new approaches to the consideration of investment disputes.

As N.A. Novikova rightly notes, the need to reform the domestic judicial system today is conditioned by the distrust of society and foreign investors in the ability of Ukrainian justice authorities to fully perform their functions [12, p.87].

The proposal to establish the High Court for Foreign Investments was expressed by lawyer E. Kupayhorodskiy, who believes that the creation of an objective, impartial, fair court that would ensure the efficient protection of the rights of foreign investors in Ukraine within a reasonable time would contribute to a significant increase in confidence in Ukraine as a recipient country of foreign direct investment [1].

Supporting such a proposal, we should add that the main advantage of creating a specialized investment court in Ukraine should be the maximum acceleration of resolving investment disputes with the participation of foreign investors, providing the judicial corps with judges who have a high level of professionalism in a particular area of relations. The above is because when resolving investment disputes, the judges must have a thorough knowledge of investment legislation since investment relations, in addition to extensive national legislation, are also regulated by a large number of intergovernmental agreements on the promotion and mutual protection of investments, which are concluded by the government of Ukraine with the governments of the respective

countries and determine the main issues of relations in the field of investment activities. The judges must have the appropriate level of a foreign language to quickly and reliably understand the content of investment agreements with the participation of foreign investors and the legislation of other countries.

Moreover, an additional guarantee of ensuring the European principle of the finality of a court decision should be the impossibility of challenging the decision of this court in the appeal and cassation procedure.

An additional reason for the expediency of the existence of specialized courts is the introduction in Ukraine of two specialized courts - the High Court for Intellectual Property and the High Anti-Corruption Court.

The need to create specialized courts is not disputed by judges either. In particular, B. Lvov believes that due to the specialization of judges, the quality of legal proceedings should be improved, and the time frame for considering cases should be reduced, which, in turn, will contribute to improving the investment attractiveness of Ukraine [13].

Suggestions for creation are also expressed in the scientific literature. In particular, B. Derevianko notes the expediency of creating the High Investment Court of Ukraine to protect the rights of foreign investors, the effectiveness of which is indisputable for considering disputes with a claim value up to 10,000 US dollars and which would be indispensable when considering disputes with a claim value up to 1,800 US dollars [14, p. 326]. Supporting the scientist as a whole, it should be noted that there are no arguments for determining the price of a claim when assessing the effectiveness of the functioning of the outlined specialized court. They are convinced that the effectiveness of legal proceedings should not depend on the price of the claim because all foreign investments need the same effective judicial protection.

However, it is worth supporting the position of E. Diadiuk, who, without denying the creation of a special judicial institution, emphasizes that the primary task for Ukraine is to ensure the functioning of a respected, professional, objective and independent judicial system of Ukraine, which can provide a fair and predictable process for resolving all types of disputes and only then it is necessary to discuss the creation of a specialized investment court, which should include highly qualified judges from different jurisdictions, including British, American, French, German, etc. [15]. Other countries are also trying to improve the country's investment climate by creating specialized courts. In particular, since January 1, 2016, the Republic of Kazakhstan has introduced a special procedure for considering investment disputes by the Supreme Court of the Republic of Kazakhstan and the Astana city court as courts of first instance.

Conclusions. Considering the above, it is expedient to create the High Investment Court in Ukraine with the right to resolve investment disputes as a court of first instance and the possibility of appealing its decisions only to the Supreme Court of Ukraine, presenting special qualification requirements to the judges of such a court.

The above changes are proposed to be made to Art. 4 of the Law of Ukraine On the Judiciary and the Status of Judges №. 1402 of June 02, 2016 [16].

The proposals will increase the investment attractiveness of Ukraine, which is extremely important at the present stage of its reform and European integration processes.

Justification of proposals on the procedure for resolving investment disputes with the participation of foreign investors should be the subject of further scientific research.

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