

REFORMING THE LEGAL REGIME OF FOREIGN DIRECT INVESTMENT: A CATALYST FOR ECONOMIC GROWTH AND STABILITY

РЕФОРМУВАННЯ ПРАВОВОГО РЕЖИМУ ПРЯМИХ ІНОЗЕМНИХ ІНВЕСТИЦІЙ ЯК КАТАЛІЗАТОРА ЕКОНОМІЧНОГО ЗРОСТАННЯ І СТАБІЛЬНОСТІ

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Foreign direct investment (FDI) has emerged as a crucial driver of economic growth and globalization, influencing development across both developed and developing nations. This article delves into the legal regimes governing FDI, providing a comprehensive analysis of the regulatory frameworks that shape investment environments in different economics of the world. Through a detailed evaluation of various jurisdictions, the study examines international treaties and national legislations that create the legal landscape for foreign investors. While the volume of global FDI continues to rise, significant challenges persist for investors, including regulatory uncertainty, potential nationalism in investment policies, and inadequate protection of investor rights. Focusing on Ukraine, the article explores the country's legal framework deficiencies, including instability in legal frameworks, lack of coherent regulatory oversight, and absence of clearly defined national investment policy principles. The research underlines that a solid legal framework is indispensable for encouraging FDI and creating a sustainable investment climate. To provide actionable suggestions, several countries and their regulations towards FDI were analyzed, including the USA, the UK, the EU, and Germany. This comparative analysis aims to derive best practices that could inform Ukraine's investment policy reforms. It further argues that Ukraine's success in revitalizing its economy post-conflict relies heavily on its ability to reform investment regulations in alignment with global best practices. By examining successful international models, this article aims to provide a framework for Ukraine's policymakers to enhance investor confidence and promote long-term economic growth. Finally, it concludes that a thorough understanding of the legal regime governing FDI is essential not only for potential investors but also for policies that foster economic stability and development in a globalized world.

Key words: foreign direct investment, legal regime, international law, investment treaties, economic policy investment treaties, relative regime, national regime, Most-Favored-Nation regime, special regime, WTO, GATT, UNCTAD.

Прямі іноземні інвестиції (ПІІ) стали найважливішим фактором економічного зростання і глобалізації, що впливає на розвиток як розвинених, так і країн, що розвиваються. У цій статті розглядаються правові режими, що регулюють ПІІ, і проводиться всебічний аналіз нормативно-правової бази, що формує інвестиційне середовище в окремих економіках світу. На основі детальної оцінки різних юрисдикцій у дослідженні розглядаються міжнародні договори та національне законодавство, які створюють правові умови для іноземних інвесторів. Незважаючи на те, що обсяг глобальних ПІІ продовжує зростати, для інвесторів зберігаються значні проблеми, включаючи невизначеність в області регулювання, потенційний націоналізм в інвестиційній політиці і недостатній захист прав інвесторів. Приділяючи особливу увагу Україні, в статті розглядаються недоліки правової бази країни, включаючи нестабільність правової бази, відсутність узгодженого нагляду з боку регулюючих органів і відсутність чітко визначених принципів Національної інвестиційної політики. У дослідженні підкреслюється, що для заохочення прямих іноземних інвестицій і створення стійкого інвестиційного клімату необхідна надійна правова база. Для вироблення практичних пропозицій було проаналізовано кілька країн та їх нормативні акти щодо прямих іноземних інвестицій, включаючи США, Великобританію, ЄС та Німеччину. Метою даного порівняльного аналізу є виявлення кращих практик, які могли б стати основою для реформ інвестиційної політики України. У ньому також стверджується, що успіх України у відновленні економіки після конфлікту значною мірою залежить від її здатності реформувати інвестиційне законодавство відповідно до кращих світових практик. Мета цієї статті, в якій розглядаються успішні міжнародні моделі, – надати українським політикам основу для підвищення довіри інвесторів і сприяння довгостроковому економічному зростанню. Нарешті, він робить висновок, що глибоке розуміння правового режиму, що регулює прямі іноземні інвестиції, є важливим не тільки для потенційних інвесторів, але й для політики, що сприяє економічній стабільності та розвитку в глобалізованому світі.

Ключові слова: прямі іноземні інвестиції, правовий режим, міжнародне право, інвестиційні договори, економічна політика, інвестиційні договори, відносний режим, національний режим, режим найбільшого сприяння, спеціальний режим, СОТ, ГАТТ, ЮНКТАД.

The contemporary landscape of international economic relations has witnessed significant shifts, particularly in the context of foreign direct investment (FDI), which plays a growing role in fostering economic development and stability. In light of recent developments, including a 3% increase in global FDI to \$1.37 trillion in 2023, as reported by the United Nations Conference on Trade and Development (UNCTAD) [1], the significance of robust legal frameworks governing FDI cannot be understated. Despite this rising trend, the presence of foreign capitals in domestic markets—along with their deep integration into local processes and interactions with local firms and consumers—has garnered significant attention and often raises concerns among host countries receiving FDI. Concurrently, the previously unchecked international expansion of domestic companies can result in capital flight, as well as the loss of essential technologies and equipment, thereby compromising economic security and providing competitive advantages to other nations.

In Ukraine, the government has launched an innovative initiative known as Advantage Ukraine. This electronic platform serves as a dynamic gateway for foreign investors, presenting over 500 investment projects and opportunities across ten distinct sectors of the economy [2]. By facilitating access to comprehensive data regarding these prospects, the platform aims to enhance transparency and encourage investment in the Ukrainian market. However, a thorough evaluation of the current investment climate reveals critical deficiencies within the existing legal and regulatory framework, in particular Ukraine's Law on the Foreign Investment Regime [3], Ukraine's Law on Investment Activity [4], Tax Code of Ukraine [5] and Economic Code of Ukraine [6]. The effectiveness of attracting foreign investment hinges on the robustness of this regulatory environment, as it provides the foundation for equitable and predictable conditions conducive to investment. Regrettably, numerous barriers persist that deter potential investors from engaging with the Ukrainian market, including:

1. **Instability and Unpredictability of the Legal Framework:** The existing legal framework suffers from a lack of stability and predictability, particularly due to the absence of clearly defined restrictions on sectors where investments are outright prohibited.

2. **Deficiencies in Regulatory Oversight:** The current legal framework exhibits significant deficiencies, including inadequate regulatory bodies, which present substantial challenges to the development of coherent investment policies. These deficiencies encompass critical issues such as the safeguarding of intellectual property rights, copyright protection, and the insurance coverage for foreign investments.

3. **Inadequate Limitations on Foreign Investment:** There exists a lack of sufficient limitations that are imposed on foreign investors, raising concerns about the potential for unfettered investment activities without necessary safeguards.

4. **Absence of National Principles for Investment Policy:** The lack of clearly articulated national investment policy principles undermines mechanisms designed to ensure investment security, further complicating the investment landscape.

These gaps not only highlight the immediate need for a comprehensive overhaul of Ukraine's investment policies but also emphasize the inclusion of these policies as integral components of the nation's economic strategy. As Ukraine seeks to rebuild and revitalize regions affected by conflict, it is imperative to recognize that foreign investment is a cornerstone of economic recovery. A meticulous examination of the legal landscape governing foreign investments in Ukraine reveals a consistent theme: the enhancement of the investment climate is inextricably linked to the establishment of a coherent and actionable legal framework. This legal architecture must be structured in a manner that not only protects investors' interests but also aligns with Ukraine's economic and political agenda as an independent and sovereign country.

In pursuit of effective measures to enhance FDI regulation, this study will also analyze the regulatory frameworks of foreign countries that have successfully attracted foreign investments. By assessing best practices and innovative approaches from these nations, we aim to derive insights that could inform and guide Ukraine's investment policy reform efforts. Therefore, this paper seeks to critically analyze different legal regimes that govern foreign investments in top-rated countries, positing that the efficacy of this framework is not merely theoretical but has profound implications for practical engagements. Understanding and reforming this legal context is essential for shaping Ukraine's economic trajectory and addressing the pressing challenges faced by potential investors.

To contextualize this analysis, it is important to define Foreign Direct Investment (FDI) as investments made by a company or individual in one country in business interests in another country, typically through the establishment of business operations or the acquisition of assets [7]. In the Treaty between Ukraine and the United States regarding the promotion and mutual protection of investments, Article 1 outlines a broad definition of "investment." This term encompasses a variety of investment types made in the territory of one party by citizens or companies of the other [8]. Such investments can include shares, debt obligations, service contracts, and any other means of putting capital into the market. It covers both tangible and intangible assets, which consist of rights such as mortgages, collateral, business stakes, and financial claims tied to these investments. Furthermore, it includes intellectual property rights and any necessary licenses and permits. Different treaties between Ukraine and other countries present variations in the definition of investments. For example, an agreement with Portugal refers to investments as "a type of asset" associated with leasing arrangements [9], while an agreement with Singapore encompasses business concessions related to the exploration and extraction of natural resources [10]. The agreement with Germany characterizes

investments as "all types of property values," which aligns with the domestic legislative framework [11]. The legislator in Ukraine has opted not to alter the existing definition set forth in the Civil Code, as it maintains consistency across international agreements [12]. It is clear, that FDI plays a crucial role in the economic development of host countries by facilitating technology transfer, creating jobs, and enhancing productivity. However, the legal frameworks governing FDI are complex and often vary significantly. Moreover, the concept of a legal regime governing foreign investments is inherently diverse, lacking a uniform definition across jurisdictions. Fundamentally, the legal regime applicable to foreign investors encompasses a range of conditions that regulate investment activities, as well as an array of benefits and guarantees that protect the rights and legitimate interests of foreign stakeholders. Today, it is common to categorize legal regimes pertaining to foreign investment into two primary types: absolute and relative regimes.

1. **Absolute Regime** offers comprehensive protection and guarantees for foreign investments, ensuring that such investments are safeguarded from arbitrary actions by the host state. This framework provides a high level of security for foreign investors, thereby fostering a conducive environment for investment inflows.

2. **Relative Regime** affords foreign investors a tiered set of rights, privileges, and protections, which may be more or less favorable than those granted to domestic investors or investors from other specified countries. Relative regimes can be further specified as follows: a) **National Regime**, guarantees that foreign investors are granted rights equivalent to those afforded to domestic investors. In this scenario, a state provides foreign investors with the same rights, benefits, and privileges it extends to its own nationals and legal entities, including domestic maritime vessels; b) **Most-Favored-Nation Regime (MFN)** is codified in the General Agreement on Tariffs and Trade (GATT). Article 1 of GATT, titled "General Treatment of the Most Favored Nation," establishes the following rule: "Any advantage, favor, privilege, or immunity granted by any Contracting Party concerning any product originating from any other country or destined for any other country must be immediately and unconditionally extended to the same product originating from the territories of all other contracting parties or intended for those territories." [13]; c) **Preferential Treatment** refers to a particular economic regime that a state may grant to foreign investors from specified countries, which does not apply to investors from third countries. Preferential treatment is often designed to promote economic cooperation and investment ties between specific nations; d) **Special Regime** is characterized by contractual arrangements wherein specific rights, benefits, and privileges are conferred reciprocally between contracting states. Such regimes are usually clearly delineated in bilateral or multilateral agreements, ensuring that the expectations and obligations of the involved parties are explicitly stated; e) **Special and Differentiated Treatment** generally pertains to developing countries and encompasses a variety of concessions aimed at facilitating their economic development. Benefits may include preferential customs duty rates in developed markets for exports, and an obligation from developed countries to provide technical assistance to align the legislative frameworks of developing nations with World Trade Organization (WTO) standards.

Understanding these legal regimes is crucial for analyzing how different nations craft their foreign investment policies. In this context, examining the modern approaches to foreign investment policy among the world's largest economies provides valuable insights, as their foreign economic strategies often serve as models for other jurisdictions.

This research presents findings that explore and identify emerging trends in FDI regulation among major global players, including the United States, the UK, and EU countries. The objective is to formulate recommendations for refining

Ukraine's foreign investment policy in light of these insights. Each country possesses its own regulatory framework that governs FDI. These regulations encompass the following aspects: a) Investment Approval Process: Many countries require foreign investors to obtain prior approval before making investments, particularly in sensitive sectors such as telecommunications, energy, and defense; b) Ownership Restrictions: Host countries may impose restrictions on foreign ownership in specific industries, mandating local partnerships or limiting the percentage of foreign equity; c) Tax and Incentive Structures: Jurisdictions may offer tax incentives or concessions to attract FDI, including tax holidays, reduced rates, and customs duty exemptions [14].

In considering these diverse regulatory frameworks, it becomes clear that each country adopts its own approach to FDI regulation, shaping the investment landscape in unique ways. For instance, when examining the United States, it is essential to recognize that the regulation of foreign direct investment (FDI) operates primarily at the federal level, while specific provisions are further detailed at the state level. A key observation from analyzing this regulatory landscape is that industry-specific legislation forms the foundation for foreign investment activities in the United States. Significant federal laws that influence foreign investors, e.g. Foreign Direct Investment and International Financial Information Improvement Act of 1990 [15], and others. These statutes collectively define foreign investments and investors, outlining the authority of government agencies involved in regulating investment processes. It is important to note that tax-related matters concerning investment activities are handled at the state level.

Furthermore, certain sectors of the economy impose restrictions on foreign investors, requiring them to navigate a special verification process to gain access. Industries such as defense, energy and mining, aviation, telecommunications, and banking fall under this category. The Committee on Foreign Investment in the U.S. (CFIUS) possesses the authority to conduct initial investigations into transactions involving foreign investment. The Law on Foreign Investment and National Security, adopted in 2007, along with the Exxon-Florio amendment, further strengthened this oversight [16].

Following the implementation of the Foreign Investment Risk Review Modernization Act (FIRRMA), CFIUS's powers have expanded significantly, with an increased number of transactions now subject to scrutiny, including long-term real estate leases [17]. Some transactions now require prior notification and registration with the Committee. In February 2020, new rules came into effect, further augmenting CFIUS's authority to review a wider array of contracts across various industries, particularly procurement contracts located near U.S. military facilities.

While FIRRMA emphasizes procedural considerations, it does not explicitly define "national security." This term appears to be fluid and contingent upon evolving global economic conditions. The concept of national security also intersects with specific industry laws that underpin U.S. investment statutes. For example, mergers and acquisitions involving foreign investors are prohibited when an American company is engaged in defense contracts exceeding \$500 million. Consequently, it becomes evident that there are notable exceptions within American industry legislation that restrict foreign investors.

Despite these limitations, an analysis of the regulatory framework governing FDI in the United States and relevant international agreements indicates that foreign investors enjoy significant opportunities to operate alongside American businesses. The advantages of the American investment legislative framework include streamlined procedures for establishing enterprises, the absence of currency controls, and a lack of special stipulations for registering foreign investments. Additionally, foreign investors are not impeded in their ability to repatriate

profits. On the state level, authorities actively promote foreign investment, recognizing its potential to foster economic growth by enhancing the appeal of certain industries through subsidies, tax incentives, and specialized programs.

In the European Union (EU), the foreign direct investment (FDI) regulation process consists of a set of laws and regulations aimed at encouraging and regulating cash flows from both EU member States and third countries. To ensure the safety and transparency of investments while maintaining an open and attractive environment, the regulatory framework has undergone significant changes in recent years. The EU Regulation 2019/452, which came into force on April 10, 2019, is the key element of the FDI regulatory system in the European Union [18]. While the adopted bill does not oblige EU states to use a single mechanism, if implemented, it must comply with certain requirements set out in the Regulations. States are required to: send annual reports to the commission on the implementation of FDI in their territory; consider the effect of investments on critical infrastructure, technologies, and dual-use goods; assess the investor's access to government-important information; explore the investor's connections with their national government. The Regulation also establishes provisions for cooperation and information exchange between EU states and the European Commission. Importantly, its provisions apply only to companies from non-EU countries and do not restrict investments between EU member states or with external partners.

As previously noted, the primary regulation of foreign direct investment (FDI) occurs at the individual state level. In Germany, regulatory oversight is categorized as follows: a) Intersectoral Checks for mergers and acquisitions in the defense sector, a mandatory regulatory review is triggered if the foreign investor acquires at least 10% of the shares; b) Industry Checks: These checks apply to transactions involving critical sectors of the economy, where the required ownership threshold for a mandatory review may range from 10% to 20%. The control of foreign investments is governed by the German Foreign Trade and Payments Act (AWG) [19]. Importantly, the mandatory notification regime applies only to transactions involving investors from outside the EU or EFTA before they are finalized.

In the United Kingdom, the regulation of foreign direct investment is governed by the National Security and Investment Act (NSIA), which took effect in January 2022 [20]. Under this law, notification requirements for certain FDI transactions can be either mandatory or voluntary. The NSIA applies to transactions occurring within the UK as well as to foreign companies acquiring minority stakes in UK businesses or supplying goods and services to British consumers. Merger control is mandatory for transactions in any of the 17 designated "sensitive sectors." Parties involved in these transactions must notify the Secretary of State prior to proceeding. Among these sensitive sectors, certain areas receive heightened scrutiny, including logistics, energy, IT and data/communications infrastructure, as well as the acquisition of facilities accessed by British security services.

Based on the analysis of the specific legal regimes and regulations governing Foreign Direct Investment across various countries, we can draw several key conclusions. The interplay between national laws, international treaties, and economic contexts underscores the necessity of crafting regulatory frameworks that prioritize both investor protection and sustainable development. As globalization reshapes the investment landscape, it is imperative for policymakers to ensure consistency and transparency in their FDI regulations. This balance is crucial for attracting foreign capital while safeguarding the public interest. The evolution of Ukraine's foreign direct investment (FDI) regulatory framework necessitates a comprehensive legal approach that aligns with international best practices while addressing the unique needs of the nation [21]. From an international legal standpoint, it is crucial for the state to adopt an investment policy that is

mutually beneficial for both domestic and foreign investors. This policy should prioritize openness and transparency, minimizing verification processes to only involve national security concerns when necessary.

Establishing a robust regulatory system for foreign capital flows is essential. This system must comprise a blend of legal, economic, and technological frameworks that effectively coordinate foreign capital movement across micro, regional, and national levels. An essential prerequisite for attracting foreign investment is the provision of reliable property rights guarantees. This includes ensuring legal clarity around ownership, fostering transparency in privatization processes, and maintaining a stable economic environment to enhance investor confidence [22, p. 30–55].

Improving governance transparency through mechanisms for disseminating legal and economic information can significantly accelerate decision-making for economic actors and curtail opportunities for misconduct. A successful market system should be characterized by a well-structured and adequately compensated government, clear and predictable legislation, a transparent regulatory environment, a firm commitment to combating corruption, a functional legal and judicial system, an efficiently regulated financial sector, and a comprehensive public welfare system.

Advancing investment in strategic sectors is crucial, as it not only meets national structural policy priorities but also

stimulates demand, revitalizes fixed assets, and supports production growth. It is imperative for efforts to attract foreign investments to finance enterprises that demonstrate operational efficiency, enable technology transfer, establish optimized distribution systems, and nurture a new generation of skilled managers.

Incorporating legislative measures that guarantee foreign investors' rights, liberalize investment regulations, and enhance the country's investment attractiveness is key to increasing the inflow of foreign capital. Moreover, fostering strong institutional foundations, including the development of highly qualified professionals for joint ventures, is critical to achieving enduring success. The implementation of a consistent state policy aimed at protecting and guaranteeing foreign investments, regardless of ownership forms, will foster an equitable investment landscape that eschews discriminatory practices.

The state's primary objectives in the realm of foreign investment should encompass the establishment of a comprehensive legislative framework, the creation of favorable legal and economic conditions to enable market dynamics, and the development of vital institutional infrastructures. By integrating these elements into the FDI regulatory framework, Ukraine can enhance its appeal to foreign investors, stimulate economic growth, and promote sustainable development, aligning with both national interests and global investment trends.

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