Shpinev Iu.S.

PhD in law, Institute of state and law of the Russian Academy of Sciences, Moscow

ABOUT THE LEGAL NATURE OF INVESTMENTS

Summary

Despite the need to create a favorable investment climate, the legal regulation of investment in this country has a number of significant drawbacks. The quality of the legislative regulation of investment relations depends on an objective and deep understanding of the legal nature of investments. In this connection, the author aims to study various approaches to determining the legal nature of investments. The methodological framework for the research was formed by the methods of formal logic, as well as the specific scientific methods: technical-legal and historical-genetic. The author's position is based on the current legislation and opinions of the legal scholars on the legal nature of investments. Based on the analysis of the existing laws, the problem of defining investments in these acts and legal science is pointed out. Various approaches to the concept of the «legal nature» category are considered, as well as the opinions on the legal nature of investments and investment contracts. The author's definition of the category «legal nature» is proposed. As a result, it is concluded that in order to establish a single legal and scientific definition of investments, it is necessary to establish their legal nature, which, in turn, requires studying and describing the primary properties of investments at the time of the origin of this category in the framework of the economic science.

Keywords: investment, the legal nature of the concept of investment, the legal nature of investment, definition of investment.

Investment is now playing an increasingly important role in the beneficial development of all countries. Russia is no exception in this regard.

Given that market relations are developing in our country relatively recently, the legislation regulating investment activities is only continuing to take shape. The first laws regulating legal relations involving investment were adopted a little less than twenty years ago, and they arose in the context of rapidly developing market relations, when the law simply did not keep up with the economy.

To date, the considered sphere of legal relationship is not completely formed, she is actively developing, there are new forms of investment activity, the directions accompanying investment relations are changing dynamically – investment insurance [1, 227], the tax aspects of the investment [2, 8], electronic Commerce [3, 50], etc. meanwhile, we can confidently say that to date investment legislation is not systematized. Different legal acts regulating the same legal relations contain different definitions of investment. There is no single approach to the concept of investment in legal science.

In our view, in order to develop a unified doctrinal approach to the concept of investment, it is necessary, first of all, to determine the legal nature of investment. However, the content of the concept of legal nature is currently the subject of scientific disputes.

The author is sure that only by defining the legal nature of investments can we develop a reasonable, scientific definition of investment, which, as a result, would be fixed in legislative acts as a single legal definition.

At present, the concept of investment has not received its final legal formalization either in normative acts or in legal science.

Thus, according to Federal law № 39-FZ of 25.02.1999 «On investment activities in the Russian Federation carried out in the form of capital investments», investment refers to property and property rights that an investor invests in a business for the purpose of making a profit. In

accordance with the Federal law of 09.07.1999 № 160-FZ «On foreign investment in the Russian Federation», investment refers to the process of capital investment carried out by a foreign investor. In one normative act, investments are considered as an object of investment, and in another – as an action or investment process. At the same time, the above-mentioned normative acts regulate the same legal relations.

There is no unified position on this issue in the scientific community. Some scientists attribute investments to the object of civil rights or the subject of investment activity. This point of view is reflected in the works of A. G. Bogatyrev [4, 15], S. S. Zankovsky [5, 219] and others. Another part believes that investment is a process, and investment and investment activity are synonymous. This position is reflected in the works of O. M. Antipova [6, 29], V. V. Gushchin [7, 109] and others.

In addition to this, there are other, bolder proposals. Thus, T. A. Serebryakova means the object of investment under investment [8, 25], and D. V. Tyutin believes that since investments do not have a generally recognized legal status, when used in contracts, it can denote any relationship [9, 116].

However, it is not just the same definition of investment that there is no consensus in the scientific community. There are discussions on the definitions of many concepts related to investment relations or related areas. Such concepts include innovative economy [10; 919], investment contract and investment agreement [11; 133], etc.

This is due, in our opinion, to several reasons:

1. A planned economy is not conducive to deep study of the investment relationship. The few scientists who were interested in this problem were usually limited to the field of foreign investment. Thus, at the time of transition from a planned economy to a market economy, the concept of investment was not sufficiently studied in legal science.

2. The Transition from a planned economy to a market economy was so rapid that both science and legislation were almost unable to keep up with the constantly changing realities, which led, among other things, to the adoption of «Traw» investment laws.

3. Despite the fact that the first legislative acts on investment were adopted almost twenty years ago, the existing inaccuracies and contradictions have not been eliminated to date, which is due, in our opinion, to the fact that these norms lie «apart» from real legal relations, which in turn are regulated either by the norms of the Civil code of the Russian Federation, or narrowly focused special laws.

Meanwhile, a single and correct definition of the concept provides for the identification of its exact meaning and content. It is especially important to establish the economic content of the legal relationship and translate it into legal language in the field of business law.

It seems that it is the establishment of the legal nature of one of the concepts forming investment legal relations that will help to develop its scientific and legal definition.

Today, the term legal nature is probably one of the most popular in legal science. Scientific papers consider the legal nature of intellectual property [12, 38], judicial acts [13, 90] and many other legal concepts. Few PhD dissertations do without the paragraph Legal nature... .

But despite such a wide range of uses of this term in the legal literature, the question of its content remains open. Even in the middle of the last century, O. A. Krasavchikov noted that despite the fact that this category was actively used by Soviet legal scholars, the content of the term legal nature was not studied by anyone [14, 171].

However, in recent years, interest in defining the essence of this concept has increased and even acquired the role of scientific discussion.

According to I. V. Matveev, legal nature is the essence of a particular phenomenon and can be described through its characteristics [15, 11]. A.V. Zakharov believes that the term legal nature primarily answers the question of the branch belonging to the rule of law [16, 52]. E. G. Komissarova, considering the essence of this concept, comes to the conclusion that the category

of legal nature is most closely related to such concepts as legal assessment, legal qualification, legal regime, function. The scientist believes that the definition of legal nature makes it possible to characterize a particular phenomenon from the point of view of law, determine its role and place among similar phenomena, as well as «identify its Foundation (legal root)» [17, 27]. S. V. Malyugin considering the reasons for the emergence of the concept of the legal nature and highlighting its key features gives its definition, legal nature, by which he understands a set of constant the essential characteristics of the legal object, which manifest themselves in the process of learning and allow us to determine the meaning of a legal phenomenon, but also to establish the identity of the legal fact the hypothesis of the rule of law, or other object associated with the entitlement, the relevant legal category[18, 53]. We should agree with N. P. Aslanyan and T. V. Novikova, that such a contradictory and confusing definition does not clarify the content of the category legal nature [19, 28]. These authors, having conducted a serious study of the use of the term legal nature, rightly note that if legal science recognizes the phrase as a legal term (including due to its wide application in the legal literature), its content should differ from similar, but at the same time do not coincide with it concepts: legal essence, legal characteristics, etc.

Continuing their research, N. P. Aslanyan and T. V. Novikova convincingly prove that the term legal nature is not identical to the term legal essence. There is no doubt about the authors conclusion that in contrast to the legal nature of the entity must describe, first, the properties of the legal phenomenon, acquired during his appearance, in other words «the essence at birth», because as was correctly stated by the authors on the example agreement, the essence of the phenomenon in a given time may not always be its primary nature [20, 17]. The authors proposed meaning of the term legal nature, as well as the detailed history of its application, allow us to propose the following definition for discussion. Legal nature – a legal category that describes the main primary properties of a legal phenomenon, acquired by it, as a rule, at the time of its occurrence, as well as its generic (branch) affiliation. It should also be noted that in addition to the legal «primary essence at birth» when determining the legal nature, it is necessary to establish its actual, non-legal essence, if this concept came to law from another scientific field.

Currently, there are many works in which the authors, using different approaches, try to determine the legal nature of investments, but scientists have not come to a consensus.

Thus, some authors, having introduced the phrase «legal nature of investment» in the title of a work or part of it (Chapter, paragraph), no longer return to this concept in the course of the narration, and the reader only has to guess what the author meant by legal nature [21; 22; 23].

N. A. Dukhno and I. Yu. Tselovalnikova consider the legal nature of investments in order to define investment law in the system of branches and justify its allocation to an independent branch of law. Quite rightly, the authors point out that a comprehensive understanding of investment depends on the effectiveness of legal regulation of investment relations. When considering the legal nature of investments, the authors note the close connection of the latter with business activity and with such an economic category as capital [24, 30-38].

Considering the legal nature of investment relations, R. B. Bozorov highlights such features as their connection with a certain risk and investment [25, 107].

It should be noted that the legal nature of investment contracts, rather than investments, is the most frequently discussed subject of scientific research. According to V. N. Lisitsa, the study of the legal nature is of great importance, since it helps to define such a contract, identify its qualifying features, and establish its place in the system of other contracts [26, 271].

M. I. Braginsky notes that by its legal nature, an investment agreement is a simple partnership agreement [27, 79], while according to A. p. Sergeev, an investment agreement by its legal nature is a Commission or Commission agreement [28, 90]. Considering the issues of the legal nature of investment agreements, L. M. Buslayeva defines these agreements as a complex legal agreement that has elements of many civil law agreements, and also identifies their

essential features [29, 82]. V. I. Laskovy connects the legal nature of investment legislation with the civil nature of investment structures, which, in the author's opinion, can determine their (investment structures) sectoral nature and content [30, 72]. A. V. Beletskaya considers the legal nature of the investment contract and agreement also in order to establish sectoral differences between them, pointing out that the investment contract reflects public-law relations, while the investment contract of public-private partnership has a private-law nature [31, 14].

Thus, the vast majority of scientists consider the legal nature of an investment contract from the position of attributing it to a particular branch of law. It should be noted that the prevailing view points to the dual nature of investment relations, which are regulated by both dispositive rules of civil law and mandatory rules of administrative law.

As for the legal nature of investments, as mentioned above, it is impossible to study it without describing their primary properties with a mandatory consideration of the economic component. In our opinion, it is necessary to consider in detail the works of Richard Catillon, Francois Quesnay, Anne Robert Jacques Turgot, and Adam Smith.

Thus, R. Catillon was the first to introduce the concept of entrepreneur, proved the need for primary capital before starting business and identified risk as one of the main conditions for attributing any activity to business [32, 31]. F. Quesnay, studying the functioning of farms, came to the conclusion that initially accumulated capital is necessary to start farming, which is further divided into primary, initial and current investments [33, 279-287]. Turgot, defining five types of the most possible use of pre-accumulated capital, highlights among them the investment of capital in the cultivation of agricultural land and the development of factories [34, 624], which, in our opinion, is nothing more than investment in fixed assets. Further development of the doctrine of investment we see in the work of A. Smith, in which he introduces the concept of fixed and working capital and gives its classification [35, 291-297].

Thus, the author concludes that the definition of investment is currently one of the most important tasks of business law. It is impossible to do this qualitatively without understanding the legal nature of investments, to identify which it is necessary to study and describe the primary properties of investments at the time of the origin of this category in the framework of economic science.

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