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LEGAL RESTRICTIONS AND INFORMAL LAND-USE PRACTICES OF CHINESE FARMERS ON THE RUSSIAN FAR EAST

The article is devoted to the analysis of legal forms and informal land-use practices existing among Chinese farmers on the Russian Far East. The main intention of the authors is to explore the reasons for the existence of sustainable practices circumvent legal restrictions of land rights of foreign citizens and legal entities, as well as determine the “limits of limitations” of land rights of foreigners (including property and land lease rights). Problem field of the research includes definition of trends of legal regulation in this sphere, classification of informal land-use practices by Chinese farmers, as well as a comparative description of the trends in legal regulation of land relations with foreign element in the Commonwealth of Independent States and Asia-Pacific countries. Methodology includes sociological methods (interview, participant observation) by which authors has obtained and classified information on informal land-use practices existing among Chinese farmers. Specially-legal methods (including comparative legal analysis and method of normative interpretation) were used to determine the regulatory trends in neighboring countries as well as to find out the limits of restrictions which may be imposed on foreigners land rights without contradiction with federal Constitution. Restrictive initiatives promoted recently by Ministry of agriculture not only make a visible contrast with the liberalization of land use in the neighboring countries of the Asia-Pacific region, but also are not adequate in light of the government's intentions to attract foreign investment into the economy of the Far East region. The fact that some subjective rights belongs to foreign citizens and legal persons in itself does not allow the government to restrict them more than such rights of Russian citizens. Moreover, further limitation invades in the very essence of the content (core) of the right for land. A further limitation of land-use rights of foreigners not only would repel investment, but will also encourage the development of informal land-use practices, which, in turn, are the breeding ground for corruption in local government, as well as in the controlling and supervisory authorities.

Key words: Chinese investment, agriculture, informal practices, land use, Chinese farmers, limitation of rights, Far East, Pacific Asia.

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There is a stereotype about the threats posed by the activities of enterprises with Chinese capital (CCE) in Russian agriculture in Russian society. It is believed that this activity meets only the interests of China which strives for large-scale exploitation of natural resources of our country. There is a cliché that Chinese farmers are abusing toxic chemicals, and under the pretext of working on farms a large number of Chinese enters Russia. This trend brings demographic risks and the threat of future rejection of Siberian and Far Eastern lands in favor of China. These theses are actively disseminated in the media and scientific literature (see eg. [1], [2]), creating a robust public discourse.

These theses also ignore the clearly positive role of the CCE in the economy of peripheral areas

experiencing difficulties of social and economic development, particularly in reducing the budget funding (the Far East and Trans-Baikal). For example, according to the Administration of Primorsky Krai, on the results of 2015 the CCE gave more than a quarter (26%) of the total volume of agricultural products produced in the region. Experts emphasize the fact that the CCE bring significant tax revenues for territories and provide employment of local people. [3]

The profit for Chinese investment in Russian agriculture market conditions (weakening of the ruble against the yuan and the image of the clean Russian agricultural production in the eyes of Chinese consumers) should increase the volume and quality of Chinese investment in Russian agriculture. However, analysis of the processes of the years 2014-2016 does not give us the opportunity to note the positive dynamics. In June 2015, when the Trans-Baikal Territory government announced plans to transfer 115 thousand hectares of vacant land to long-term (49-year) lease to Shanghai Corporation "Zhongjie" (also known as Zoje Resources Investment Co. Ltd.). These news caused a wave of public protests, inspired by the media and some political parties (for example, the Liberal Democratic Party). As a result, the authorities have refused from the idea of the deal which could revive the economy of the depressed region.

Contradictory assessments of both the investment proposal, as well as of possible consequences of its adoption, demonstrates poor knowledge of the problems of the Chinese activities in the Russian agriculture. The project of the Vladivostok group of scientists who have carried out in the years 2014-16 a number of field studies in the regions of the Far Eastern Federal District (DFO) including interviews with various categories of experts (government officials, businessmen, journalists, workers) and work with open data sources and participant observation (from the standpoint of an interpreter and legal counsel) has been founded in order to fill the vacuum of empirical information and analysis.

During this work it was found out that the value of the positive effects of the CCE activity is at least equal to the negative ones, and a number of stereotypes do not correspond to reality. For instance, the desire of Chinese farm workers to move to Russia for permanent residence has been obviously exaggerated. Plans for consolidation in Russia are only actual for a part of the business owners and managers, while workers directly serve as seasonal workers, and their stay in our country is due solely to income. The decrease or exchange rate relative to the yuan in 2014-15 (salaries in Russia remained at the same level) decreased the attraction of departure for seasonal work in Russia. Already in 2016, farmers faced with a serious problem of recruiting Chinese workers [4].

At the same time Chinese farmers violate legislation, and primarily land legislation. The state doesn't have comprehensive control mechanisms over the activities of foreign investors in agricultural area and over the existence of "bypassing" of land legislation. The authors make the assumption that in this case we see an example of symbiosis between the interests of not only the farmer, tending to increase revenue and reduce costs, but also the interests of his Russian counterparts in the face of partners and representatives of the authorities. Informal practices thus appear to be the most acceptable to all interested subjects

Dynamics of legal regulation

Historically, the dynamics of land rights of foreigners in Russia were mixed. According to M.A. Bobryashov, "the amount of land rights of the mentioned persons in various historical periods depended on domestic and foreign policy in general and on policies in respect of foreign individuals and legal persons" [5, p. 10]. Throughout the history of pre-revolutionary Russia, foreigners have been enjoying the right to land equally with the most privileged classes of Russian nationals, since the state was interested in attracting public and foreign technology. During the Soviet period in connection with the course of the economic self-sufficiency and the building of socialism foreign

nationals and legal entities were almost completely devoid of even the limited rights to use the land, of Soviet citizens and organizations.

The liberalization of land relations and the need for foreign investment have led to the gradual restoration of foreign legal forms of land use. In 1989, with the adoption of the Principles of Lease Legislation of the USSR foreign citizens have got the right to use the land lease. However, ownership and lifetime inheritable possession of agricultural land in the legislative acts of the RSFSR of 1990-1992 has been banned for foreigners [6, p. 105]. Since 1992, in accordance with the Presidential Decree number 631, they were allowed to acquire ownership of land in the privatization of them located on the state and municipal enterprises. In general, this period of the development of land legislation was aimed "at enhancing the participation of foreign individuals and legal entities in land relations," [7]

The Constitution of the Russian Federation confirmed the policy of liberalizing the legal regulation of land relations with a foreign element. First, paragraph 2 of article 9 of the Constitution confirmed the right to private ownership of land, and secondly, part 3 of article 62 established a national regime of the legal status of foreign citizens in Russia. As pointed out by the Constitutional Court of the Russian Federation in its judgment of 23.04.2004 Nr. 8-P, the national regime of rights and obligations applies to land relations, allowing foreigners to acquire property and to possess, use and dispose of land, taking into account the limitations set by law. The Court rejected the argument that the rights of foreigners threaten the sovereignty and territorial integrity of Russia, pointing to the fundamental distinction between dominium and imperium: «in the provision of land in private ownership to the acquirer is not a part of transferred state territory, but only a plot of land as an object of civil rights, that does not affect the Russian Federation's sovereignty and its territorial integrity".

At the beginning of the 2000s land legislation has marked the trend on limit the land rights of foreigners [8, p. 258]. First, paragraph 3 of Article 15 of the Land Code has provided a ban on the possession of foreign nationals and legal entities of land in the border areas, the list of which is set forth in the Presidential Decree № 26 dated 09.01.2011. Second, Article 3 of the Federal law "On the turnover of agricultural land" dated 24.07.2002 excluded the possibility of transferring ownership of foreign citizens, foreign legal entities, as well as Russian legal entities with predominant foreign participation in respect of this category of land. Third, part 2 of Article 28 of the Federal Law "On Sea Ports in the Russian Federation and on Amending Certain Legislative Acts of the Russian Federation" dated 08.12.2007 banned foreign citizens and organizations from owning the land within the boundaries of seaports.

A new wave of restrictions was initiated in the second half of 2015 after the announcement of plans to transfer rent Chinese investors to large areas of land in the Trans-Baikal region. Ministry of Agriculture has prepared amendments to the law "On Agricultural Land Transactions", proposing to limit the maximum term of the lease of land in this category by foreigners 10 years (in the discussion period was increased to 15 years [9]), and is limited to 5% the proportion of land within a municipality, which can be owned by a foreign entity[10].

The cases of informal land use by Chinese farmers in the Amur region have been described by N.P. Ryzhova [11]. She established the existence of significant volumes of CCE activities that do not take into account the Russian statistics (especially in terms of access to land). In fact, Chinese farmers cultivated a much larger area than they use officially. This situation is possible due to one of several informal arrangements.

First, the land can be issued on Russian "straw persons": the Chinese farmer can be officially registered as an employee, but in fact he owns the land on the "sublease" rights or disposes the land on the basis of a verbal agreement with the landlord [11, p. 20]. Thus, according to farmers interviewed, most of Chinese citizens work as seasonal workers only formally. In fact, they sublease the land, using their Russian partners only as an intermediary in their relations with the authorities. Another variant of this scheme is to rent lands from the Russian citizen, bound by

personal relationship of trust with the Chinese citizen - the LLC founder. In the latter case, a Russian citizen is a nominal owner of agricultural land which is actually owned by a citizen of the CCE.

Second, the land can be cultivated by Chinese farmers without any legal basis, but with the knowledge of the regulatory authorities. This Chinese farmer may have a fictitious lease contract [11, p. 19], or not have any documents at all, having concluded an oral agreement with the administration which owns the land [11, p. 20].

Third, the object of the gripping of lands by the Chinese can be a land plot which has the formal owner of the number of individuals, but which is not cultivated in practice [12].

Obviously, such practices are investor's "respond" to administrative barriers.

Limits of restrictions on the rights of foreigners on land

Many APR countries in their constituent instruments proclaimed the equality of rights of citizens and foreigners in their constituent instruments, but in order to maintain the security and preservation of the national sovereignty each state provides certain restrictions of the rights of foreign nationals [13, p. 118-120]. In the countries with a long tradition of resettlement, the population of which was formed mainly due to immigration (USA, Canada, Australia) foreigners are allowed to buy lands with certain restrictions. Other countries are covered by fears of the influx of immigrants from other cultures and prohibit the acquisition of land ownership (eg, Indonesia, Singapore). At the same time the main trend is the expansion of legal forms of land usage for foreign citizens and legal persons in order to attract foreign investment. [14] Even in China, despite the absence of private ownership of the land, the land rights of citizens and foreigners have been gradually expanded through the development of contracting land use and land lease institutions [15, p. 334] [16, p. 120-122].

In contrast to the Asian-Pacific countries, in most post-Soviet states dominates a restrictive approach to the regulation of the land rights of foreigners. Thus, a comparative legal analysis of the Belarusian and Kazakh legislation shows the consolidation of the land social function which is the result of balance between the private interests of citizens and legal persons on the profit from the use of land as the objects of immovable property and the public interest, which is due to necessity of land protection [17, p. 105]. Another CIS countries also strengthened restrictions in the legal regulation of this sector, which may be the factor of deterrent of foreign investments in the agricultural sector [18].

Restrictive changes also take place in Russia after the liberalization of the 1990s - early 2000s. In addition to existing restrictions of the rights of foreigners who owned some land categories measures substantially limiting the term of the lease, as well as the elimination of the foreign element in the property right up to the level of the final beneficiaries of legal entities are also discussed. These initiatives not only make a visible contrast with the marked trend in the neighboring countries, but also are not readily apparent in light of the government hopes to attract foreign investment into the economy of the Far East region. In this aspect, even the new Russian initiatives in the form of a free port and territories priority development can not solve the problem of foreign investors in the agricultural sector, as it does not alter the common mode of land use, and limited areas of economic zones although provide a simplified procedure for land allocation, but are designed primarily turn on the location of industry facilities, in extreme cases - livestock, but not to create farmland. To attract investments in the latter case it is necessary not to create special legal regimes, and the total liberalization of the regime of legal regulation, namely, the establishment of limits of restrictions on the land rights of foreigners.

The right of private ownership of land is not absolute and does not belong to rights which in accordance with Part 3 article 56 of the Constitution can not be restricted under any circumstances. [19] Under Part 3 of Article 55 of the Constitution, this right may be restricted by federal law, but only to the extent that this is necessary in order to protect the constitutional order, morality, health, rights and lawful interests of others, national defense and state security. In this case, in the opinion of the Constitutional Court the balance of the rights of foreigners to land and other constitutional values (land as the basis of life and activity of the people, the priority of the rights of Russian citizens to own land, rational and efficient use of land and its protection, the protection of economic sovereignty Russia, its integrity and inviolability of the territory) should be provided. This affiliation of certain subjective rights of foreign citizens and legal persons does not allow their limitation in comparison with the rights of Russian citizens, unless such limitation is not dictated by the presence of the specific circumstances referred to in paragraph 3 of Article 55 of the Constitution. The restriction of land lease term of 10 or 15 years invades the very essence of the content (core) of land use right [20, p. 231], since the amounts to less than the payback period of investment projects in agriculture. It seems that the further restriction of land use rights of foreigners will not only repel investment, but will also encourage the development of informal land-use practices, which, in turn, are the breeding ground for corruption in local government, as well as among the control and supervisory public authorities.

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