DOI 10.52468/2542-1514.2022.6(2).147-158

NATIONALIZATION (EXPROPRIATION) OF FOREIGN INVESTORS' PROPERTY: RELEVANT ISSUES

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Article info

Received –
2021 December 06
Accepted –
2022 April 11
Available online –
2022 June 20

Keywords

Nationalization, expropriation, private property, foreign investors, right of ownership, protection of foreign investments, private international law, Russian legislation

The subject. Foreign investments in the economy of states play an important role. As a consequence, priority should be given to the protection of foreign investments and the creation of favorable and stable conditions for the investors activities. This is especially important in cases of an unfavorable political environment, various internal and external conflicts. Cross-border investment activity is risky, and one of the possible risks is the nationalization (expropriation) of the property of foreign investors by the state-recipient of investments. This method of seizing private property is regulated by the state both at the international legal level and at the national level. The institution of (nationalization) expropriation of the property of foreign investors has its own specifics in Russian legislation in terms of terminological features and legal regulation with certain problematic aspects inherent in it.

The purpose of the article is to determine the content and correlation of the concepts of "nationalization" and "expropriation" in Russian law; to describe the main international approaches to regulation of these issues as well as Russian model. The authors try to describe the existing problems inherent in this institution in private international law in general and in Russian legislation in particular and suggest possible ways to solve them.

The methodology. The research was carried out using formal-logical, systemic, comparative, formal-legal methods, analysis and synthesis.

The main results, scope of application. The content and correlation of the concepts "nationalization" and "expropriation" in Russian law is determined, it is proposed to consider them synonymous. International approaches to regulating the nationalization (expropriation) of the property of foreign investor are examined. The regulation of this institution in Russia is considered; certain problems inherent in nationalization (expropriation) are investigated, possible ways to solve them are suggested.

Conclusions. It is now necessary not only to create conditions for attracting foreign investments, but also to ensure their safety in view of the development of cross-border investment activities. In particular, this can be achieved by establishing a detailed regulated procedure for the nationalization (expropriation) of the property of foreign investors, providing guarantees of compensation and legality in such seizure of their property. The institution of nationalization (expropriation) of property in private international law should be considered as one of the possible risks in the implementation of investment activities, which means that states should take measures to minimize risks in order to increase investment attractiveness. It can be achieved through detailed legislative regulation at the national level and a conclusion of international treaties (the "force of law" should be upheld, not the "law of force").

ISSN 2542-1514 (Print)

1. Introduction

In the modern world foreign investments play an important role in the economic life of states and, therefore, the promotion and protection of foreign investments should remain at a high level. Many states strive to create favorable conditions for attracting investments, including the creation and improvement of the mechanism of legal regulation of investment activities, protection of foreign investors and their investments. To achieve this, states sign international treaties and ratify conventions, improve national legislation. Nevertheless, despite all the measures taken, the activities of foreign investors are inextricably linked with a large number of risks, one of which can reasonably be considered the nationalization (expropriation) of investors' property by the state which they invest in. This conclusion is confirmed by numerous historical examples in situations of exacerbation of foreign policy conflicts. This problem has become especially relevant now, when foreign states have begun to seize the property of citizens and organizations of the Russian Federation that are on the sanctions lists and freeze Russia's foreign exchange reserves, forcing it to retaliate.

Nationalization (expropriation) is one of the forms of compulsory seizure of private property by the state. In the provisions of Russian legislation, this institution also finds its consolidation, has a historical specifics and can be applied both to the property of citizens and national legal entities, and to foreign citizens and legal entities. In this regard, and in the context of the development of cross-border investment activities, we believe it is relevant and necessary to study the institution of nationalization of the property of foreign investors, to describe the specifics of its terminology in Russian legislation and doctrine, to analyze the main international approaches to its regulation, to consider the provisions of Russian legislation and highlight certain problematic aspects, to suggest possible ways to solve them.

2. Correlation between the terms "nationalization" and "expropriation" in Russian law: history and modernity

Today, there is no consensus among researchers and in the field of law enforcement regarding the relationship between the terms “nationalization” and “expropriation”. Moreover, in this case, a distinction should not be made depending on the nationality of the owners of the seized property, since there is no uniform approach regarding the use of the concepts under consideration, both in the seizure of property of Russian citizens and legal entities, and of foreign ones. In practice, there is a variety of options for using these terms: sometimes they are written together as synonyms, sometimes they are mentioned as similar, but still different terms, there are also options for opposing them to each other. In connection with the mentioned above, for the purposes of this work, we believe it is necessary to define these two terms and relate them to each other, having studied the history of their appearance and use, as well as modern use.

First of all, we should note that historically, the term “expropriation” should be recognized as the first, since it was used and studied in the second half of the 19th century. In particular, the institution of expropriation of property was investigated by one of the most prominent representatives of the Russian pre-revolutionary legal science G.B. Shershenevich and K.P. Pobedonostsev, whose works were later recognized as classics of Russian civil law. For example, Pobedonostsev considered expropriation as alienation by the state of private property or limitation of rights to it (establishment of easement) when it has sufficient grounds and is required “for any state or public benefit” [1, p. 496]. Shershenevich at the beginning of the XX century described expropriation in a similar way [2, p. 298-299]. We should also pay special attention to the work of M.V. Venetsianov, who investigated in detail the institution of expropriation. In his opinion, the history of the emergence and development of this institution can be counted from the end of the 18th century, when the economic order in Europe underwent significant changes, and the legal and political consciousness of Europeans developed sufficiently. At the same time, Venetsianov also

ISSN 2658-4050 (Online)

noted that the beginnings of the institution of expropriation can be found both in the Middle Ages and among the ancient Greeks and Romans. Generally, he defined expropriation as a forced "take away" by the state of property (property rights to it) when it is necessary "for generally useful enterprises" [3].

As we can see, the authors followed a similar approach in defining expropriation. Moreover, it is fundamentally important to note that they also drew attention to another key point of expropriation - the need to pay compensation. All of them emphasized this property, speaking of the need to "reward" the owner for the alienation of his property or limitation of rights to it. It was precisely the compensatory nature of expropriation retrospectively that makes it possible to distinguish it from nationalization, the most famous case of which took place in Soviet Russia at the beginning of the 20th century.

So, some domestic researchers, in particular, A.A. Danelyan [4, p. 27], as well as foreign ones, for example, G. White [5, p. 3], attribute the appearance of the concept of "nationalization" to the corresponding Decree of the Soviet government of 1918, according to which all recognized large enterprises, including those with the capital of foreign investors, were subject to compulsory confiscation into state ownership[1]. Nationalization was also provided for by other decrees of the Soviet government of that period[2]. The gratuitous nature of such a withdrawal can be explained by several reasons. First, the socialist ideology, which was characterized by the preference of the interests of society and the state to the private interests of individual and relatively few owners of the nationalized property (a similar situation took place in Cuba in the 1960s, when the demand of companies from the United States to pay compensation was rejected [6 , p. 86]). Secondly, the economic component, since, due to the significant share of foreign capital in Russian enterprises, the amount of compensation payments to foreign investors would be significant, which the government, which has not yet finally established itself in the new state, could not pay. Although it is worth noting that the USSR nevertheless settled part of the property claims of foreign investors: for example, in the 1986 Agreement with Great Britain on the settlement of mutual financial and property claims that arose before 1939, the parties agreed on the mutual offset of claims. However, of course, not all claims were fulfilled. At the same time, as the researchers note, at present there are many foreign companies investing in Russia, the capital of which was nationalized by the 1918 Decree [7, p. 265].

Despite the fact that the emergence and active use of the term "nationalization" is associated with the USSR, it is noteworthy that neither in the Fundamentals of Civil Legislation nor in the Civil Code of 1964 this term was used [8, p. 33]. In the doctrine of that period, in turn, the topic of nationalization was studied in the work of G.E. Vilkov, who defined nationalization as the compulsory alienation of private property into state ownership [9, p. 7]. Thus, the fact that in modern Russian legislation this term is found and used along with "expropriation", researchers associate precisely with the Soviet period, in particular, with the previously mentioned Decree of 1918 [10, p. 89].

In modern legislation, the content of the term "nationalization" is disclosed in par. 3 pp. 9 p. 2 of Art. 235 of the Civil Code of the Russian Federation (Civil Code of the Russian Federation). According to the normatively fixed definition, nationalization within the meaning of the Civil Code of the Russian Federation has all the key features of expropriation: the admissibility of the seizure of private property only by the state, the compensated and compulsory nature of such an expropriation.

It is also necessary to distinguish between the concept of nationalization and other concepts that are similar in nature, implying the seizure of private property by the state, namely: requisition

[1] Decree of the Council of People's Commissars of June 28 (15), 1918 "On the nationalization of the largest enterprises in the mining, metallurgical and metalworking, textile, electrical, sawmill and woodworking, tobacco, glass and ceramic, leather, cement and other industries, steam mills, enterprises for local improvement and enterprises in the field of railway transport" Available at GARANT.

[2] As an example, we can also refer to the Decrees of the Council of People's Commissars of February 8, 1918 "On the nationalization of the merchant fleet" and of April 22 (9), 1918 "On the nationalization of foreign trade". Available at GARANT.

ISSN 2542-1514 (Print)

and confiscation. In the Civil Code, the concept of requisition is devoted to Art. 242, in which it is defined as the onerous seizure by the state of property from the owner in the event of an accident, natural disaster and other emergency circumstances [11, p. 14]. As we can see, a distinctive feature of the requisition is that for the seizure of private property extraordinary circumstances need to occur. The extremeness of certain circumstances is an evaluative concept. It causes a lot of difficulties both in theory and in law enforcement [12, p. 27]. The most common interpretation of this concept is contained in the Resolution of the Plenum of the Supreme Court of the Russian Federation of March 24, 2016, in clause 8 of which it was noted that an emergency implies the exclusivity of the situation and its unavoidable nature[3]. Nationalization, in turn, does not provide for conditions of emergency.

Further, we need to refer to Art. 243 of the Civil Code of the Russian Federation, which defines the concept of confiscation. Within the meaning of the aforementioned article, confiscation is a sanction applied in accordance with the procedure established by law to the owner of property when he commits an offense (crime). For example, clause "c" part 1 of Art. 104.1 of the Criminal Code of the Russian Federation provides for the seizure of money, valuables and other property used or intended, in particular, for the financing of terrorism and extremist activities. In addition, confiscation is also provided for in the commission of a civil offense, when property obtained as a result of a transaction may be seized for a purpose contrary to the foundations of law and order and morality (Article 169 of the Civil Code of the Russian Federation). Thus, confiscation, in contrast to nationalization, within the meaning of the considered provisions, is a sanction that the state applies to the owner of property for illegal acts committed by him. Of course, in case of confiscation, the owner of the property does not receive any compensation (compensation).

In turn, the concept of "expropriation" of the Civil Code of the Russian Federation and other federal laws do not operate. However, the fact that it is not used in laws does not mean at all that it is not used in Russian law at all. So, according to Part 4 of Art. 15 of the Constitution of the Russian Federation, international treaties are an integral part of the legislation of the Russian Federation. Therefore, we also need to pay attention to the bilateral treaties concluded by the Russian Federation with foreign states, and the conventions to which it is a party, in order to find out how the concepts we are considering are defined and used there.

As an example, we can refer to the Seoul Convention of 1985. So, in Art. 11 of this Convention the wording “expropriation or other similar measures” is used[4]. In general, the definition contained in that article includes all the same essential signs of expropriation that we have previously considered in this work and implies an act (action) on the part of the state, as a result of which the owner is deprived of his property or rights to it. In addition, we can consider the relationship of these concepts on the example of one of the bilateral agreements of Russia in the field of protection and encouragement of foreign investments. For example, in the Agreement between the Russian Federation and the State of Kuwait[5], the title of Article 5 uses the term “expropriation”, and the text uses both concepts under consideration, and they are listed as similar in content, but still independent. Similarly, these concepts are used in many other bilateral investment agreements concluded by the Russian Federation with foreign states (sometimes there are also options for combining them under the general

[3] Resolution of the Plenum of the Supreme Court of the Russian Federation of March 24, 2016, N 7 "On the application by courts of certain provisions of the Civil Code of the Russian Federation on liability for violation of obligations". Rossiyskaya Gazeta. 2016. No. 70.

[4] 1985 Seoul Convention Establishing the Multilateral Investment Guarantee Agency. The Convention was ratified by the Resolution of the Supreme Court of December 22, 1992, No. 4186-1. Bulletin of the Supreme Arbitration Court of the Russian Federation, special annex to No. 7. July 2001.

[5] Agreement between the Russian Federation and the State of Kuwait on the Encouragement and Reciprocal Protection of Investments of November 21, 1994. The Agreement was ratified by Federal Law of May 23, 1996, No. 49-FZ. Sobranie zakonodatelstva. 1997. No. 13. Art. 1474.

ISSN 2658-4050 (Online)

term "nationalization") [13, p. 68-69]. Thus, we see that the provisions of the considered international treaties of the Russian Federation also do not give us an unambiguous answer to the question of the relationship between the concepts of “nationalization” and “expropriation”. Nevertheless, having analyzed all of the above, we can reasonably consider them to be similar in content and key features.

Therefore, in the absence of clear differences between the terms “nationalization” and “expropriation” in modern Russian law, we believe it is possible to consider them synonymous and to define nationalization (expropriation) as compensated compulsory seizure of property from owners by the state in the public interests.

3. The main international approaches to the regulation of nationalization (expropriation)

Having defined the concept of nationalization (expropriation) and revealing its key features, we believe it appropriate to further consider the approaches to regulation of this institution existing in international law, and also describe how it is regulated in Russia.

First of all, we should note that in international law there are several main approaches to the nationalization (expropriation) of the property of foreign investors: the theory of the "minimum international standard" and "national standard", as well as the socialist doctrine [14]. The theory of the international minimum standard assumes the protection of the property of a foreign investor with the help of international law, regardless of what standards of nationalization (expropriation) are established in the recipient country of foreign investment in relation to the seizure of the property of its own citizens and legal entities [15]. Traditionally, the theory of the international minimum standard includes several fundamental conditions under which the nationalization (expropriation) of the property of a foreign investor is recognized as permissible: non-discriminatory nature and implementation in the public interest [16, p. 113].

Separately, it is worth dwelling on one more "standard", which is also often included in the theory under consideration, namely, the requirement to pay compensation to the owner of the expropriated property, moreover, compensation should be "fast, adequate and effective." Such compensation is traditionally referred to in the doctrine as the "Hull formula". It owes its name to US Secretary of State Cordell Hull, who in 1938, during a dispute between the United States and Mexico over the nationalization of oil fields owned by American companies, demanded that Mexico pay "immediate, adequate and effective compensation" [17, p. 95-96]. The Hull's formula received its greatest distribution until the 1970s of the XX century [18], but it has not lost its relevance in our time. In particular, it is enshrined in paragraph "d" clause 1 of Art. 13 of the 1994 Energy Charter Treaty. Today, however, there is no consensus among specialists regarding the necessity and expediency of its application. So, I.Z. Farkhutdinov in his work in 2005 noted the gradual departure of practitioners, as well as theoretical scientists from the application of Hull's formula [19, p. 125]. As one of the key reasons that influenced this process, he singled out the dissatisfaction of developing countries with the conditions for quick, adequate and effective nationalization, which, for obvious reasons, are unprofitable for them. Among foreign scientists who oppose Hull's formula, we can single out R. Dolzer [20, p. 561].

Arbitration practice also applies differently to the Hull formula. For example, the need to comply with the Hull formula criteria is confirmed in the ICSID decision in the case “Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica ", which stipulates that the receiving state (the state-recipient of investments) has the right to expropriate foreign property for public purposes, subject to the payment of prompt payment of adequate and effective compensation[6]. On the other hand, another decision of investment arbitration, considered in the work of I.Z. Farkhutdinov. Thus, in the decision in the Ebrahimi case, the following was noted: “The theory and practice of international law does not support the conclusion that the norm on immediate, sufficient and valid compensation is a

[6] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final award, February 17, 2000. [Electronic resource] // Italaw.com URL: https://www.italaw.com/cases/3413 (accessed: 01.05.2021).

reflection of the standard of international law" [19, p. 275]. In practice, other formulations are also used, for example, "clear" [21]. Thus, we see that a unified approach has not yet been formed in terms of compensation criteria. As rightly noted by K.E. Ksenofontov: "In fact, neither in the doctrine nor in the practice of international investment law there is a single standard of compensation" [22, p. 62]. Nevertheless, even in the absence of an established approach to the definition of compensation, we can reasonably believe that, along with the condition of non-discriminatory nature and public interests as the goal of nationalization (expropriation), it is included in the criteria of the doctrine of the international minimum standard.

A different approach to the provision of guarantees to foreign investors in the field of regulation of nationalization (expropriation) is enshrined in the theory of the national standard. It is also known as the principle of national treatment or the "Doctrine of Calvo" (after the name of the Minister of Foreign Affairs of Argentina Carlos Calvo (1822-1906)) [23, p. 102]. The principle under establishes a regime "no more favorable" for foreign investors than for citizens and legal entities of the state receiving investments. The essence of this principle is as follows: despite the fact that international standards in the field of nationalization (expropriation) are not denied, the provision of guarantees to foreign investors and the regulation of the procedure of seizure of their property is possible only on the basis of the national legislation of the state-recipient of investments [24, p. 125]. Moreover, in addition to guarantees and procedures in accordance with the principle of national treatment, foreign investors cannot also use diplomatic protection and apply to a court other than the national one, in particular, to specialized international arbitration [25]. The supporters of the principle of national treatment are, usually, the countries-recipients of investments, which was especially clearly observed after the liberation of the countries of Asia and Africa from the colonial regime, which resulted in massive nationalizations and, as a result, long-term investment disputes between the former owners of the nationalized property and these countries. [26].

Finally, the last of the abovementioned and the least popular one is the socialist (communist) doctrine. As we noted earlier, socialist views on the relationship between private and public interests give a clear preference to the latter. This circumstance implies the conviction that during the nationalization (expropriation) of property, including foreign investors, the state should not pay compensation to the owners. The most famous examples of such nationalization took place in Soviet Russia in 1917-1918, as well as in Cuba in the 1960s. We suppose that today such an approach to nationalization should be considered unacceptable.

4. Legal regulation of nationalization (expropriation) of the property of foreign investors in Russia: grounds and guarantees provided

The provisions of Russian legislation applied in the field of regulation of nationalization (expropriation) of foreign investors' property are enshrined both at the highest level in the Constitution of the Russian Federation and in sectoral regulatory legal acts (Civil Code of the Russian Federation), special federal laws, as well as international treaties concluded by the Russian Federation.

We suppose it appropriate to begin consideration of the legal regulation of nationalization (expropriation) with the main provisions enshrined in the Constitution of the Russian Federation. So, part 3 of Art. 35 of the Constitution of the Russian Federation stipulates the following: "Forced alienation of property for state needs can be carried out only on condition of prior and equivalent compensation." We can see that the above proposal contains several conditions previously considered by us, under which nationalization is recognized as permissible. First, an indication of state needs as a basis for the compulsory alienation of property. In fact, this provision enshrines the ability of the state to alienate the private property of individuals, including foreign investors, only when it is required by the public interests [27, p. 134]. Secondly, the condition of preliminary and equivalent compensation to the owner of the alienated property is also fixed, in other words, the requirement to pay compensation.

ISSN 2658-4050 (Online)

Further, let us turn to the Civil Code of the Russian Federation and the Federal Law "On Foreign Investments"[7]. The Civil Code of the Russian Federation deals with nationalization para. 3 pp. 9 p. 2 of Art. 235 and Art. 306, the provisions of which also apply to foreigners [28, p. 165]. In the articles mentioned above, in addition to the previously considered conditions, the owner's right to full compensation for losses incurred as a result of the nationalization of his property is enshrined. The Federal Law "On Foreign Investments in the Russian Federation", being special in relation to foreign investments and their legal regulation, in turn, in Art. 8 lays down several fundamentally important guarantees to foreign investors. First, a guarantee of protection against nationalization (expropriation) of property. The meaning of this provision is that the investor is guaranteed protection against the forced seizure of his property otherwise than on the grounds provided for by federal law or an international treaty of the Russian Federation. Thus, the legislator provides protection to foreign investors from illegal forms of seizure of property. Illegal nationalization can be recognized if it does not meet the criteria of non-discrimination and retaliation, withdrawal, is not carried out on the grounds provided and (or) in violation of the established procedure. Secondly, the guarantee of payment of compensation for the alienated property and compensation for losses. At the same time, the provisions under consideration do not determine the size or specific conditions of nationalization, and therefore the terms of compensation are traditionally enshrined in international investment treaties of the Russian Federation.

Earlier, we found out that the issue of compensation to the owners of nationalized property in private international law can reasonably be considered problematic due to the lack of consensus regarding the claims that should (or should not) be presented for compensation. Thus, some practicing lawyers and researchers talk about the need for "quick, adequate and effective" compensation, others are of the opinion that such requirements should not be perceived as mandatory, which means that the establishment of compensation requirements for the nationalization (expropriation) of property remains at the discretion states. Both of these approaches can be found in bilateral investment agreements concluded by the Russian Federation with foreign states [14]. For example, the Agreement between Russia and Italy enshrines the condition of quick, effective and adequate compensation[8]. Somewhat different claims are made for compensation in the Agreement between Russia and Macedonia, in which the parties limited themselves to securing claims for "effective and adequate" compensation[9].

Thus, having studied the features of the legal regulation of nationalization (expropriation) in Russia, we believe it possible and appropriate in the next chapter to consider the current problems and possible risks arising from the seizure of the property of investors by the state. It should be noted that some of them are exclusive for Russian legislation Russia, since they are the result of certain shortcomings (gaps) in the legislation, while others are inherent in the institution of nationalization (expropriation) of property in private international law.

5. Problematic aspects of the institution of nationalization (expropriation) of the property of foreign investors

It seems that a common problem inherent in the institution of nationalization in private international law is the possibility of abuse by the recipient states of their sovereign rights, which inevitably creates a threat of violations of the principles and conditions of this type of forced

[7] Federal Law of July 9, 1999, No. 160-FZ "On Foreign Investments in the Russian Federation" (entered into force on 12.06.2018). Sobranie zakonodatelstva. 12.07.1999. No. 28. Art. 3493.

[8] Agreement between the Government of the Russian Federation and the Government of the Italian Republic on the Encouragement and Reciprocal Protection of Investments dated April 9, 1996. The Agreement was ratified by Federal Law No. 154-FZ dated December 17, 1996. Sobranie zakonodatelstva. 1999. No. 6. Art. 758.

[9] Agreement between the Government of the Russian Federation and the Government of the Republic of Macedonia on the Encouragement and Reciprocal Protection of Investments dated October 21, 1997. The Agreement was ratified by Federal Law No. 80-FZ dated May 30, 1998. Sobranie zakonodatelstva.1998. No. 50. Art. 6104.

ISSN 2542-1514 (Print)

seizure of property. Nationalization (expropriation) in itself is a risk for foreign investors, which, in particular, is stated in Art. 11 of the previously mentioned 1985 Seoul Convention. This is explained by the fact that the state is not always able to compensate the owners the full cost of the nationalized property and to compensate for the losses, and, moreover, they do not always want to do so. In the same case, if the recipient state decides, referring to its rights as a sovereign [29, p. 108], it will be extremely difficult to seize the property of foreign investors without reason and in violation of the established procedure. The previously mentioned examples of nationalizations carried out in the last century in Soviet Russia, Cuba, in the states of Asia and Africa are clear evidence of this. To counter such abuses, various legal remedies have been developed to protect foreign investment. These include: an investment insurance mechanism, the creation of platforms for the settlement of investment disputes between states and foreign investors (for example, ICSID), the enshrining of various protective clauses on the payment of compensation in the concluded agreements and domestic legislation, and others.

Nevertheless, risks still exist and can be especially pronounced in emergency situations, for example, during epidemics or wars, when states are forced to take various coercive measures in order to protect the population in the public interest (for the benefit of society as a whole, and not of individual individuals). With regard to the expropriation of property, Shershenevich drew attention to the fact that the question of the "general usefulness" of its goal is of political and not legal matter [2, p. 299], which means that the risks of abuse by the state in such circumstances increase many times over. Accordingly, in order to prevent such situations, joint efforts of the entire world community are required, since in view of globalization and the gradually increasing integration of the economies of individual states, only coordinated and concerted actions will help to avoid abuses, economic losses and possible violations of human rights in general and the rights of foreign investors in particular.

Another problem, but already in relation to the institution of nationalization (expropriation) of property in Russia, seems to be the imperfection of legislative regulation in this area, which manifests itself in several aspects. Firstly, this is the lack of a clear definition of the concepts of nationalization and expropriation, their definition as synonyms, or, on the contrary, differentiation. In Russia, the terminology of nationalization (expropriation) of private property by the state has a pronounced specificity, manifested in the presence of two concepts, which, with a certain degree of convention, as we found out earlier, in fact, mean the same thing. As a consequence, in practice, this needs to be specified in the provisions of bilateral investment treaties in order to avoid difficulties of understanding and misinterpretation. With regard to the doctrine, the presence of these two concepts in Russian law causes controversy among researchers regarding their relationship and definition. It seems advisable to reflect this specificity in the provisions of the Civil Code, to consolidate the terms “nationalization” and “expropriation”, to define them, or simply relate to each other. Such measures will clarify the provisions of the legislation and clarify the content of this institution in Russian law.

Secondly, another problem is the lack of detailed legislative regulation of the nationalization (expropriation) of the property of foreign investors and the payment of compensation to them, in particular, the absence of the specific law regulating nationalization. On the one hand, these issues are usually regulated by bilateral investment treaties of the Russian Federation with foreign states, on the other, as we found out earlier, the provisions of these treaties may differ to a certain extent. We suppose that it would be appropriate to establish uniform provisions for the conditions and procedure for paying compensation to foreign investors in the event of the nationalization of their property. It should be noted that in the Law of the RSFSR "On Foreign Investments in the RSFSR"[10] (invalidated) such provisions were enshrined. So, for example, in Art. 7, the requirement for "prompt, adequate and

[10] Law of the RSFSR of July 4, 1991, N 1545-I "On Foreign Investments in the RSFSR" (entered into force on 10.02.1999). Bulletin of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR. 07/18/1991. No. 29. Art. 1008.

ISSN 2658-4050 (Online)

effective compensation" was enshrined, in Art. 8 - on the payment of compensation "without unreasonable delay in the currency in which the investments were originally made, or in any other foreign currency acceptable to a foreign investor." There are no such or similar provisions in the current Law on Foreign Investments. Accordingly, in order to unify and to avoid risks associated with the discretion of law enforcement officers [30], which takes place in the absence of detailed legislative regulation of a particular field, we believe it is possible to clarify the provisions of the law regarding the grounds and procedure for nationalization (expropriation) of foreign investors' property and payments to them.

6. Conclusion

Currently, there is a process of economic integration of individual countries, the trade turnover is gradually increasing, and cross-border investment activities are developing. In these conditions, it is important to remember the need of protecting the rights of foreign investors, preventing abuse by states in relation to their property and striving to create the best possible conditions for attracting new foreign investment, ensuring stability and predictability of activities for investors.

Having studied the institution of nationalization (expropriation) of the property of foreign investors and having examined its various aspects, we came to the following conclusions.

First, in Russian law, the terms “nationalization” and “expropriation” can, with a certain degree of convention, be considered synonymous, and they can be defined as compensated forced seizure of private property by the state when it is required by state (public) needs.

Secondly, in private international law, there are several main approaches to regulating the nationalization (expropriation) of the property of foreign investors: the theory of the international minimum standard, the theory of national treatment, as well as the socialist doctrine (the last of these is the least widespread and supported).

Third, Russian legislation is characterized by a comprehensive regulation of the nationalization (expropriation) of the property of foreign investors. Given that the provisions of laws and international treaties, in general, regulate in detail the procedure and grounds for this method of seizure of private property, it is necessary to highlight some aspects seem to be problematic: lack of clarity in the definition and correlation of the terms "nationalization" and "expropriation" , as well as the failure to establish in the law detailed regulation of the nationalization (expropriation) of the property of foreign investors and the payment of compensation to them.

Finally, another, more general problem of nationalization (expropriation) in private international law is the threat (and now its actual embodiment) of abuse on the part of investment recipient states while confiscating property from investors. To prevent this problem, efforts of both individual states and the world community as a whole are required. This will minimize the risks of foreign investors, provide them with the necessary guarantees and ensure the protection of their rights in case of nationalization (expropriation) of their property. If nationalization is going to be used as a tool of foreign policy pressure, then this will negatively affect the possibility of economic cooperation, create a threat of a situation in which strength (economic development and political influence of one country or a group of countries) is a determining factor, and existing agreements between countries are not provided and not guaranteed.

REFERENCES

1. Pobedonostsev K.P. *Civil law course. The first part: Patrimonial rights.* Moscow, Statut Publ., 2002. 800 p. (In Russ.).

2. Shershenevich G.F. *Textbook of Russian civil law*. Moscow, Statut Publ., 2017. Vol. 5. 832 p. (In Russ.).

3. Venetsianov M.V. *Expropriation from the point of view of civil law*. Kazan, Imperial University Publ., 1891. 114 p. (In Russ.).

4. Danelyan A.A. Nationalization in international law: yesterday, today, tomorrow. *Agrarnoe i zemel'noe pravo = Agrarian and land law,* 2013, no. 12 (108), pp. 27–32. (In Russ.).

5. White G. *Nationalization of Foreign Property*. London, 1961. 288 p.

6. Danelyan A.A. International legal indemnity in the implementation of foreign investment activities. *Agrarnoe i zemel'noe pravo = Agrarian and land law,* 2014, no. 3, pp. 85–90. (In Russ.).

7. Farkhutdinov I.Z., Trapeznikov V.A. *Investment law*, textbook for universities. Moscow, Yurait Publ., 2021. 273 p. (In Russ.).

8. Danelyan A.A. Theory and practice of contemporary international law regarding the problem of forced removal of foreign ownership. *Mezhdunarodnyi pravovoi kur'er = International legal courier*, 2014, no. 5, pp. 32–39. (In Russ.).

9. Vilkov G.E. *Nationalization and international law*. Moscow, IMO Publ., 1962. 136 p. (In Russ.).

10. Ksenofontov K.E. *Expropriation of the property of a foreign investor in international investment law*, Cand. Diss. Moscow, 2014. 256 p. (In Russ.).

11. Kuznetsova S.A. Problems of the legislation of the Russian Federation on the limitation and termination of property rights in emergency situations. *Vestnik Sankt-Peterburgskogo universiteta MVD Rossii = Bulletin of the St. Petersburg University of the Ministry of Internal Affairs of Russia*, 2013, no. 4, pp. 13–16. (In Russ.).

12. Bogdanov E.V. Challenges of compulsory seizure of private property by the state through requisition, confiscation and nationalization under the civil legislation of Russia. *Lex Russica*, 2020, vol. 73, no. 2, pp. 25–32. DOI: 10.17803/1729-5920.2020.159.2.025-032. (In Russ.).

13. Dorofeeva Yu.A. Nationalization and expropriation as the basis for the compulsory termination of the right of private property by the state. *Vlast' Zakona = The Rule of the Law*, 2016, no. 2 (26), pp. 59–73. (In Russ.).

14. Ayupov A.Z., Berger E.V., Kholkina M.G. *Commentary to the Federal Law of July 9, 1999, No. 160-FZ "On Foreign Investments in the Russian Federation"*. 2012. Available at Garant. (In Russ.).

15. Labin D.K. *International law for the protection and promotion of foreign investment*. Moscow, Yustitsiya Publ., 2019. 296 p. (In Russ.).

16. Veselkova E.E. Certain types of guarantees provided to foreign investors. *Khozyaistvo i pravo = Business and law*, 2012, no. 4, pp. 112–118. (In Russ.).

17. Demieva A.G., Sobolev I.D. Evolution of legal regulation of investment activity and the problem of hidden forms of nationalization and expropriation. *Agrarnoe i zemel'noe pravo = Agrarian and land law*, 2016, no. 3, pp. 95–97. (In Russ.).

18. Danelyan A.A. Nationalization in modern international law. *Zakon = Law*, 2014, no. 4, pp. 142–151. (In Russ.).

19. Farkhutdinov I.Z. *International investment law*. Moscow, Walters Kluwer Publ., 2005. 432 p. (In Russ.).

20. Dolzer R. New Foundations of the Law of Expropriation of Alien Property. *American Journal of International Law*, 1981, vol. 75, pp. 553–589. DOI: 10.2307/2200686.

21. Danelyan A.A. Expropriation of foreign investment: problems of compensation. *Pravo i ekonomika = Law and Economics*, 2014, no. 1, pp. 58–63. (In Russ.).

22. Ksenofontov K.E. Protection against expropriation of the property of a foreign investor: international legal standards. *Vestnik federal'nogo byudzhetnogo uchrezhdeniya "Gosudarstvennaya registratsionnaya palata pri Min-*

isterstve yustitsii Rossiiskoi Federatsii = Bulletin of the federal budgetary institution State Registration Chamber under the Ministry of Justice of the Russian Federation, 2012, no. 4, pp. 60–65. (In Russ.).

23. Danelyan A.A. Nationalization of foreign investment in international investment law. *Pravo i gosudarstvo: teoriya i praktika = Law and state: theory and practice*, 2014, no. 2, pp. 100–104. (In Russ.).

24. Farkhutdinov I.Z. Access and protection of foreign investments in international law. *Zhurnal rossiiskogo prava = Journal of Russian Law*, 2005, no. 2, pp. 119–130. (In Russ.).

25. Doronina N.G., Semilyutina N.G. *International private law and investments*, Monograph. Moscow, Institute of Legislation and Comparative Law under the Government of the Russian Federation Publ., 2012. 272 p. (In Russ.).

26. Farkhutdinov I.Z. The latest in international investment law. *Zakonodatel'stvo i ekonomika = Legislation and economics*, 2005, no. 8, pp. 61–68. (In Russ.).

27. Karpov M.V. Nationalization: trends in the development of doctrine and legislation. *Lex Russica*, 2016, no. 5, pp. 133–146. DOI: 10.17803/1729-5920.2016.114.5.133-146. (In Russ.).

28. Yulov D.V. The Expropriation of the Property of Foreign Investors in Private International Law. *Aktual'nye problemy rossiiskogo prava = Actual problems of Russian law*, 2016, no. 12, pp. 164–174. DOI: 10.17803/1994-1471.2016.73.12.164-174. (In Russ.).

29. Solovova Yu.V. Legal and illegal expropriation: the impact of their differentiation on the standard of compensation. *Khozyaistvo i pravo = Business and law*, 2012, no. 4, pp. 106–112. (In Russ.).

30. Vaipan V.A. *Implementation of the principle of social justice in legal regulation of entrepreneurial activity*, Monograph. Moscow, Yustitsinform Publ., 2020. 696 p. (In Russ.).

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BIBLIOGRAPHIC DESCRIPTION

Evstratov A.E., Guchenkov I.Yu. Nationalization (expropriation) of foreign investors' property: relevant issues. *Pravoprimenenie = Law Enforcement Review*, 2022, vol. 6, no. 2, pp. 147–158. DOI: 10.52468/2542-1514.2022.6(2).147-158. (In Russ.).