

**INVESTMENT POLICY IN THE NATIONAL LEGISLATION OF SINGAPORE AND
UKRAINE**

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Abstract

The thesis addresses the question of the impact of the national legislation on the flow of foreign direct investments through a comparative analysis of the legislation of Ukraine and Singapore. The thesis argues that the national legislation of Singapore has a significant positive effect on the flow of foreign direct investments into the country. It therefore makes suggestions about the possible application of the positive experience of Singapore in using the legal mechanisms in attracting foreign direct investments into Ukraine.

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Introduction

The pursuit of foreign investments in the modern world is becoming increasingly important. It creates competitive atmosphere among the states that are looking for investments and forces them to amend their national laws in order to make their countries more attractive for foreign investors. However, foreign investments do not always lead to sustainable development of a host country. The balance of interest between attracting foreign investments and protection of the national interests may create a serious problem for the state and its policy towards foreign investments.

According to the classical view, dependency is the main outcome of foreign investments. According to “dependency theory” through foreign investments developed countries just exploit the labour force and resources of host countries.¹ The other possible variant of foreign investments treatment is based on the presumption that foreign investments may have a positive effect on the country through bringing a package of capital, foreign exchange, technology, managerial expertise, skills and other inputs.² Some states, however, follow a different approach, the so called “middle path”.³ According to this model, development and modernisation of the economy of the state is possible with capital that only multinational corporations are able to provide. Therefore, the role of the state is to introduce such legislation that would be open enough to invite foreign capital into the country but at the same time to keep control over foreign investment⁴. Depending on the way of development chosen by the state, the appropriate policy is implemented into the national laws that influence the inflow of foreign investments and their structure.

¹ LINDA LIM & ENG FONG PANG, FOREIGN DIRECT INVESTMENT AND INDUSTRIALISATION IN MALAYSIA, SINGAPORE, TAIWAN AND THAILAND 85 (1991).

² *Id.*

³ M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 55-59 (3d ed. 2010).

⁴ *Id.*

This paper will compare two states in order to examine how national legislation affects the flow of foreign investments and what possible transplantations of successful national laws into different legal systems are. The first country analysed in this paper is Ukraine, which is a transition economy that is interested in foreign investments for the country's development but does not take appropriate measures to open its economy to foreigners. The second country introduced in the thesis is Singapore as an example of one of the most open economies that formed its development on the policy of openness towards foreign investors. Singapore based its successful development on attracting foreign investments and has often been presented as a model for other developing countries.⁵

The analysis of the national legislation of the states will be limited to foreign direct investment (FDI) in the meaning used in the Balance of Payment Manual (sixth edition) issued by the International Monetary Fund, which implies the existence of a significant degree of influence by the investor on the management of the enterprise.⁶ Such a limit on the scope of the research can be explained by the specific nature of portfolio investments that do not usually include the same benefits to the host state as foreign direct investments and therefore do not force the host state to take considerable measures to attract them into the economy of the country.

Numerous researches of the national legal systems of Singapore and Ukraine with regard to their attractiveness to foreign investors have been conducted. The major researchers of Singaporean legal systems covering its influence on foreign investors are Linda Lim, Eng Fong Pang who analysed the influence of foreign direct investments on the industrialisation of Singapore, Teck-Wong Soon, who addressed the issue of influence of state policy on the

⁵ Christoph Antons, *Japan as a model? Comparing Law and Development in Japan, Singapore, and Indonesia*, in *LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA* 216, 216 (Christoph Antons ed., 2003).

⁶ INTERNATIONAL MONETARY FUND, *BALANCE OF PAYMENTS AND INTERNATIONAL INVESTMENT POSITION MANUAL* 100-101 (6th ed. 2009) available at <https://www.imf.org/external/pubs/ft/bop/2007/pdf/BPM6.pdf>.

development of Singapore and Christopher J. Murphy, who dedicated his research to the analysis of the commercial laws of Singapore. The Ukrainian legal environment and its influence on foreign direct investments has been analysed by Maryna Tegipko and Daniil E. Fedorchuk. The work of Oleksiy Kononov is dedicated to the comparative study of foreign direct investments in Germany and Ukraine. However, previous research has not addressed the question of possible implementation of the legal solutions employed by Singapore to attract foreign investors into the legal system of Ukraine.

Since the implementation of Singapore's investment policy into the national Ukrainian legal system is different, the aim of this paper is to compare the national legislation of Singapore and Ukraine with a focus on the spheres important for attracting of foreign direct investments. As a result of the comparison the thesis will provide an evaluation of the national regulations that influence the inflow of foreign direct investments and make suggestions for possible improvement of national laws in Ukraine based on the experience of Singapore.

The first chapter of the paper will address the historic and economic background of the analysed states to provide the reader with the general overview of the preconditions that led to some particular choice of policy towards foreign investments. The second chapter will focus on the major spheres of Ukrainian legislation that influence the attractiveness of the state as a host for foreign direct investments and will point out the major problems in that area. The final chapter will be dedicated to the analysis of the major provisions of national laws that made attracting foreign investors successful in Singapore and will make proposals for their implementation in Ukrainian legislation.

Chapter 1 – Origins of Investment Policy Differences

1.1 Historical Considerations

In order to understand the different approaches of Singapore and Ukraine to foreign direct investments and to ensure that the methods used in Singapore for attracting foreign investors can be applied in Ukraine, it is necessary to look closely at the history of both states. This section will focus on the historical backgrounds of Singapore and Ukraine and the influence of the differences in the development of analysed countries on the inflow of foreign direct investments into them.

Singapore was granted the independence from British colonial authorities in 1958 when the State of Singapore Act was passed.⁷ The first attempts of a new state to industrialise its economy were oriented on import substitution strategy.⁸ It meant that economic development could have been achieved through local production for country's own needs. However, as soon as the attempt to establish a significant domestic market and to get access to raw materials through joining the Federation of Malaysia had failed⁹, Singapore was forced to switch its strategy to export oriented production.

For the purposes of the development of export-oriented manufacturing the support for foreign investors who could bring new technologies was established. Change of the policy represented the first steps of Singapore on the path to the opening its economy to foreign investors. The government focused on investment promotion of labour-intensive industries that

⁷ Walter Woon, *Singapore*, in *ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA* 314, 318 (Poh-Ling Tan ed. 1997).

⁸ Teck-Wong Soon & William A. Stoeber, *Foreign Investment and Economic Development in Singapore: A Policy-Oriented Approach*, 30 *THE JOURNAL OF DEVELOPING AREAS* 317, 320 (1996).

⁹ Woon, *supra* note 7 at 317 (stating that in 1965 Singapore became an independent republic).

were oriented on export.¹⁰ In 1967 the Economic Expansion Incentives Act provided tax incentives for investment, among which were tax exemptions on interest on foreign loans, royalties, know-how and technical assistance fees.¹¹ Such strategy led to the impressive growth of annual gross domestic product (GDP) of 13% from 1966 to 1973.¹²

However, as the small size of the country and, therefore, a limited amount of workforce became a real threat to the growth of economy, the government took actions on promotion of high-tech, high-skill and capital-intensive industries.¹³ However, these actions were terminated because of the economic crisis in 1973 and recession in 1974-1975. By incumbent prime-minister the situation was described in 1980 as follows: “In fear of recession and possible unemployment the country switched back to labour-intensive industries”.¹⁴

Further development of Singapore is characterised by the diversification of economy and increasing amounts of high-technology investments. For this purposes, state authorities continued to eliminate restrictions on foreign investments: by the late 1980 the distinction between local and foreign undertakings in most of the sectors of the economy was abolished.¹⁵

Upgrading of Singapore’s economy remains the primary aim of the government that attract foreign investors not only for producing high-tech goods in the country but also for designing them there. That would lead to the development of research and development and technological design skills within the country.¹⁶ As Deputy Prime Minister Dr. Tony Tan emphasized in 1999: “The most important challenge for the Singapore economy in the 21st century is to rapidly transit from a capital-intensive manufacturing and services economy to a

¹⁰ Soon & Stoever, *supra* note 8 at 322.

¹¹ TECK-WONG SOON & C. SUAN TAN, SINGAPORE: PUBLIC POLICY AND ECONOMIC DEVELOPMENT 10 (1993).

¹² Soon & Stoever, *supra* note 8 at 323.

¹³ Garry Rodan, *Singapore: Economic Diversification and Social Divisions in THE POLITICAL ECONOMY OF SOUTHEAST ASIA: AN INTRODUCTION* 148, 155 (Garry Rodan, Kevin Hewison, Richard Robison eds., 1997).

¹⁴ SOON & TAN, *supra* note 11 at 13.

¹⁵ Soon & Stoever, *supra* note 8 at 330.

¹⁶ *Id.* at 329.

globally competitive advanced knowledge economy with a strong and vibrant technopreneurship sector within the next decade.”¹⁷

The outcome of such rapid development that relied heavily on the foreign capital¹⁸ was that in just three decades, despite lack of natural resources and domestic market, Singapore was transformed from a poor maritime centre into a dynamic industrialised economy.¹⁹

The history of Ukraine as an independent state starts from the adoption of the Declaration of Independence of Ukraine on 24 August 1991.²⁰ At the very beginning of the development of independent state, Ukrainian government declared attracting foreign investments as a priority. On 13 March 1992 the first law that regulated foreign investment activity was adopted by the parliament. It introduced fiscal incentives in a form of tax holidays for certain types of foreign investments.²¹ However, the first attempts of the government to attract foreign investments were not successful: by the end of 1996 the total inflow of foreign direct investments constituted just USD1,438,200,000²². A further change of governmental policy that resulted into abolishment of tax holidays in 1997 had detrimental effects on the inflow of foreign direct investments.

¹⁷ Augustine H H Tan, Official Efforts To Attract FDI: Case Of Singapore's EDB (Aug. 27, 1999) (unpublished working paper) (on file with the National University of Singapore) available at <http://www.fas.nus.edu.sg/ecs/pub/wp/previous/AHTAN2.pdf>.

¹⁸ By the end of 2009 the total amount of foreign direct investments into the economy of Singapore constituted USD529,253,800,000. Singapore Department Of Statistics, *Foreign Direct Investments in Singapore by Country/Region 2005-2009*, SINGSTAT.GOV (Feb 1, 2011) <http://www.singstat.gov.sg/stats/themes/economy/biz/foreigninvestment.pdf>.

¹⁹ SOON & TAN, *supra* note 11 at xi.

²⁰ Postanova Verkhovnoi Rady Ukrainskoi RSR Pro proholoshennya nezalezhnosti Ukrainy [Resolution of the Supreme council of Ukrainian SSR on Declaration of Independence of Ukraine], VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 1991, No. 38, Item 502, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1427-12>.

²¹ Zakon Ukrainy Pro Inozemni Investytsii [Law of Ukraine on Foreign Investments], art. 32, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 1992, No 26, Item 357, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2198-12>.

²² Derzhavnyi Komitet Statystyky Ukrainy [State Committee of Statistics of Ukraine], Priami Investytsii [Direct Investments], UKRSTAT.GOV.UA, <http://www.ukrstat.gov.ua/> (follow “Statystychna Informatsiia” [Statistic information] hyperlink; then follow “Priami investytsii (na pochatok 1995-2011rr.)” [Direct investments (as of the beginning 1995-2011)] hyperlink) (last modified Feb. 18, 2011).

From the moment of change of the government in 2005 through national uprising the inflow of foreign direct investments as can be seen from Table 1.1 raised rapidly. It can be explained by the high expectations foreign investors had about the reforms planned by the government. In 2006 Ukrainian economy received the highest amount of foreign investments in its history – USD8,303,400,000.²³ However, the absence of real reforms in the economy, political instability in the country and economic crisis in the world led to the decreased amounts of foreign direct investments in 2007-2010 (see Table 1.1).²⁴

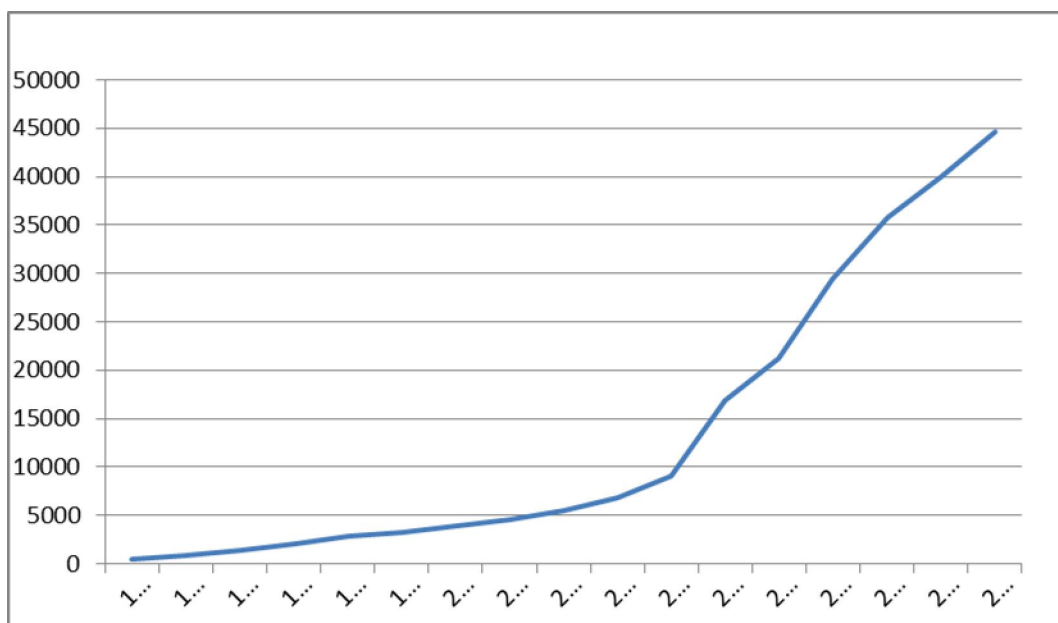


Table 1.1 – Dynamics of Foreign Direct Investments in Ukraine, USD mln²⁵

The government repeatedly argued that the creation of investment-friendly climate in the country has the priority in its work.²⁶ However, no substantial measures have been taken in order

²³ *Id.*

²⁴ *Id.*

²⁵ The table is created by the author based on the data provided by Derzhavnyi Komitet Statystyky Ukrainy [State Committee of Statistics of Ukraine], *supra* note 22.

²⁶ See e.g. the latest statement of the Prime Minister of Ukraine M. Azarov: “We want to create a normal investment climate in the country”. Mykola Azarov: Uriad Pragne Stvoryty Spryiztlyvyi Investytsiinyi Klimat [Mykala Azarov: The government strives to create a favourable investment climate], KMU.GOV.UA, http://www.kmu.gov.ua/control/uk/publish/article?art_id=244121796&cat_id=243311332 (last modified Mar. 11, 2011).

to attract foreign direct investments in practice. It should be admitted, that the latest efforts on deregulation of the economy and reduction of bureaucratic obstacles in the country²⁷ may become efficient steps on the way of attracting foreign direct investments. Nevertheless, the overall result of Ukraine's initiatives in attracting foreign direct investments as Table 1.1 shows cannot be characterised as successful.²⁸

Based on the analysis of the different historical paths of Ukraine and Singapore, a few major differences that affect the development of the countries with respect to the role of foreign investments in their economy can be distinguished.

First of all, Singapore has always been friendly to foreign investors. The roots of the Singapore's hospitality to foreign investments lie in its colonial history. Foreign investments played an important role in Singapore since it was founded in 1819 as a free port and was developed as an entrepot for the Southeast Asian region.²⁹ Ukraine, on the contrary, has never in its history experienced such close interactions with the international market. As a part of the Soviet Union, Ukraine had no opportunity to establish free trade relations with foreign countries.

Another difference lies in the attitude of the population to the reforms conducted by the government. The fear of Singaporean people of invasion by hostile neighbours that created a constant state of emergency that was used by the state in order to carry out unpopular reforms for the sake of future development.³⁰ The importance of such unpopular actions of the Ukrainian government as reforming of pension system and rising of tariffs on gas for population was

²⁷ see e.g. Zakon Ukrainy Pro Vnesennia Zmin do Deiakykh Zakoniv Ukrainy Shchodo Sproshchennia Umov Vedennia Biznesu v Ukrainin [Law of Ukraine on Amending Some Laws of Ukraine on Simplification of Business Conditions in Ukraine], VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 2010, No 9, Item 76, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1759-17>.

²⁸ By the end of 2010 the total amount of foreign investments into the economy of Ukraine constituted USD44,708,000,000. Derzhavnyi Komitet Statystyky Ukrainy [State Committee of Statistics of Ukraine], *supra* note 22.

²⁹ LIM & PANG, *supra* note 1, at 51.

³⁰ Christoph Antons, *supra* note 5 at 239.

repeatedly emphasised by international experts.³¹ However, the opposition of the population to any worsening of their state even for the sake of future development makes conducting of the reforms very problematic for the government.

Attitude of the local population to foreigners and foreign money is crucially important for developing of investment-friendly climate. In Singapore the local population did not object to the foreign investments coming into the city. Former leader of Singapore who ruled for three decades, Lee Kuan Yew stated:

What made Singapore different in the 1960s from other countries of Southeast Asia was that she had no xenophobic hangovers from colonialism... We have never suffered from any inhibitions in borrowing capital, know-how, managers, engineers and marketing capabilities. Far from limiting the entry of foreign managers, engineers and bankers, we encourage them to come.³²

On the contrary, the attitude of Ukrainian people to foreigners became one of the reasons that caused insufficient inflow of foreign investments into the country. Population of Ukraine used to live behind the Iron Curtain and is, in general, hostile to other nations. The confirmation of this statement can be found in examples of unfair practices of Ukrainians towards foreign partners.³³

Moreover, control of the economy also played an important role in determining the way of development of the states. As a free port, Singapore did not develop a class of national entrepreneurs who might object to the inflow of foreign capital into the country.³⁴ Chinese merchants who dominated the economy of Singapore had no objection to the substantial flow of

³¹ See e.g. the Letter of Intent of the government of Ukraine to Dominique Strauss-Kahn, Managing Director of International Monetary Fund, IMF.ORG (Dec. 10, 2010), <http://www.imf.org/external/np/loi/2010/ukr/121010.pdf>.

³² SOON & TAN, *supra* note 11 at ix.

³³ see e.g. Alpha Projektholding GMBH v. Ukraine, ICSID Case No. ARB/07/16, Award (Nov. 08, 2010), ICSID.WORLDBANK.ORG, [HTTP://ICSID.WORLDBANK.ORG/ICSID/FRONTSERVLET?REQUESTTYPE=CASERH&ACTIONVAL=SHOWDOC&DOCID=DC1751_EN&CASEID=C108](http://ICSID.WORLDBANK.ORG/ICSID/FRONTSERVLET?REQUESTTYPE=CASERH&ACTIONVAL=SHOWDOC&DOCID=DC1751_EN&CASEID=C108).

³⁴ LIM & PANG, *supra* note 1, at 51.

foreign capital into the country at the end of 1960s – beginning 1970s.³⁵ Presence of the national interest in the development of the state is the major historical precondition that distinguishes Ukraine from Singapore. National bureaucracy that controlled economy of the state was not ready to share its privileged position with the foreign investors. It was especially stressed during the shady privatisation in which state authorities typically favoured national capital.

Finally, the role of the government influenced the way of the development of the countries. The role of the state both in Ukraine and Singapore has been historically high. Singapore like Ukraine relies heavily on administrative guidelines in the regulation of the life in the country,³⁶ which makes this regulation flexible enough to respond quickly to the changing environment. In Ukraine, however, unlike in Singapore, reliance on administrative guidelines led to the different results, namely unpredictability of the Ukrainian legal system, because of high level of corruption and bureaucracy.³⁷

All abovementioned factors have formed the current state policies of Singapore and Ukraine with respect to the foreign investments. Therefore, these differences are reflected in the legal systems of the analysed countries and must be taken into consideration when analysing and implementing Singaporean experience into Ukrainian laws.

1.2 Economic Considerations

This section will address economic conditions of Singapore and Ukraine as the host states for foreign investments and impact of these conditions on the inflow of foreign direct investments.

³⁵ *Id.*

³⁶ Christoph Antons, *supra* note 5 at 239.

³⁷ Ukraine takes position 134 among 176 states with the highest level of corruption. TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2010 (2010) *available at* <http://www.transparency.org/content/download/55725/890310>.

The analysis of the economic differences will help to understand the origins of the investment policies of the states and, therefore, will provide an insight into the reasons of different legal rules with respect to foreign investments.

The first significant difference that makes the development of Singapore different from many other countries, including Ukraine, is the absence of national capital and national industry in the beginning of the independent development of the state. Singapore as a free port did not have fear of being dominated by the foreigner capital because the developed industries were absent and, therefore, there was nothing to dominate. As a result, the economy of the city-state was completely open to the foreigners from the very beginning of the development. In Ukraine, where national capital played an important role in the development of the country, the situation was different. Presence of large population and powerful industrial facilities from the Soviet Period led to the situation in which national capital protected his interests and limited the inflow of foreign investments into the economy of the country to avoid undesirable competitors on domestic market.³⁸ The protection of national capital was especially emphasised during the early stages of privatisation when large portions of national facilities were transferred to local businesses. Sinn and Weichenrieder described such situation as following: “Selling state assets to foreigners is often seen as selling the family silver and encounters widespread political resistance.”³⁹

The other important economic factor that makes the development of Singapore different from the development of Ukraine is its size. Small size of Singapore influenced the orientation of the economy on manufacturing for export and, therefore, became the other force that led to the

³⁸ MARINA TEGYPKO, FOREIGN INVESTMENTS IN UKRAINE: VENTURE FACTORS AND THE WAYS OF THEIR DIMINUTION 8 (2000).

³⁹ Hans Werner Sinn & Alfons Weichenrieder, *Foreign Direct Investments and the Privatization Process in Eastern Europe*, 12 ECONOMIC POLICY: A EUROPEAN FORUM 180 (1997).

opening of the economy to foreign investors who had an ability to sell the goods manufactured in Singapore on their domestic markets. The size of the economy also influenced the labour market of Singapore. Absence of free workers forced Singapore to establish high capital-consuming industries and attract foreign investors in order to intensify the development of high-tech industries. As a result of government's efforts, the amount of FDI is primarily directed to export-oriented manufacturing with the increasing share of intensive-capital industries investments such as high-tech sector.⁴⁰ The sphere of services, especially financial services is also a recipient of substantial part of foreign investments.⁴¹ Significant size of Ukraine has created peculiar economic conditions such as big domestic market, presence of raw materials and large labour market. These are all the conditions the absence of which in Singapore forced it to follow its strategy of open economy. Ukraine, on the contrary, had the alternative of following the different path and concentrating its efforts on the promotion of the national market closed for foreigners.

Economic preconditions of development of both states differ substantially. Singapore literally had no choice but to open its economy in order to achieve economic development. Ukraine always had an opportunity and temptation of protecting its national capital. These differences are reflected in the national legislation of both countries and must also be kept in mind while formulating proposals concerning transplantation of Singaporean models into Ukrainian legal system.

⁴⁰ LIM & PANG, *supra* note 1, at 36.

⁴¹ *Id* at 60.

Chapter 2 – Impact of the National Legislation on Foreign Direct Investment Flow in Ukraine

In order to analyse the impact of national laws on foreign direct investment flow it is important to understand why these laws matter for foreign investors. Linda Lim and Eng Fong Pang, for example, in their research on industrialization in Malaysia, Singapore, Taiwan and Thailand argue that political and macroeconomic stability, trade and financial liberalisation, infrastructure and skill development together with policies to reduce information gaps and transaction costs for foreign investors play a more important role than favourable investment legislation and fiscal incentives in attracting foreign investments.⁴² At the same time they admit that foreign investors pay attention to the national legislation of the potential recipients of investments.

The argument that the legal system of the host country affects foreign direct investment inflow rests on the assumption that investors structure their activity in order to reduce transaction costs and the role of effective legal system, therefore, is to reduce these costs.⁴³ It means that the legal environment is one of the determinants that influence the decision to invest in a particular country. Moreover, as the research of Amanda Perry shows, Western investors are usually sensitive to rule of law and, consequently, will not rely on informal mechanisms in structuring their economic activity in the host country.⁴⁴ It means that Western investors especially pay attention to efficiency of legal system. As the data on foreign direct investment outflow shows, the Western countries are major investors who control more than 70% of the world foreign direct

⁴² LIM & PANG, *supra* note 1, at 179.

⁴³ Amanda Perry, *Effective Legal System and Foreign Direct Investment*, 49 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 782 (2000).

⁴⁴ *Id.* at 798

investment outflow.⁴⁵ This means that host countries with effective legal systems that reduce transaction costs are more likely to attract a portion of the FDI into their economies.

It is important therefore to determine which laws are essential for foreign investors and affect the transaction costs in the state. The first block of legislation comprises the rules that are aimed at regulating the activity of foreign investors in order to ensure that this activity will not harm the host country. The first section of this chapter will examine such laws in Ukraine and will clarify what impact on attracting foreign direct investments they have. The second block of laws that affect foreign investors includes general commercial laws that influence both local and foreign investors and affect the transaction costs of the economic activity. Major fields of Ukrainian commercial laws that are of high importance for foreign investors such as company law, intellectual property and transfer of technology laws, tax law as well as foreign exchange regulations will be analysed in the subsequent sections.

2.1 Foreign Direct Investment Regulations

As a general rule, developing countries have a special law that regulates the activity of foreign investors and may either regulate any type of foreign investments or be limited to the regulation of a separate industry.⁴⁶ This section will analyse the legislation that is primarily addressed to regulation of foreign investments in the host country. It will deal with the protection of foreign investors, the guarantees provided by the government to them and limits imposed on the foreign activity in Ukraine.

⁴⁵ Based on the data of U.N. CONFERENCE ON TRADE AND DEVELOPMENT. WORLD INVESTMENT REPORT 2010: INVESTING IN A LOW-CARBON ECONOMY, at 167, U.N. Sales No. E.10.II.D.2 (2010) available at http://www.unctad.org/en/docs/wir2010_en.pdf.

⁴⁶ Alan S. Gutterman & Robert Brown, *Law Affecting Business and Commercial Activity*, in COMMERCIAL LAWS OF EAST ASIA 27, 37 (Alan S. Gutterman & Robert Brown eds., 1997).

The major law that regulates foreign investments in Ukraine is the Law "On the Regime of Foreign Investments" (Foreign Investments Law). It defines foreign investment through the special subject of the investment: a foreign investor. According to the Foreign Investments Law foreign investors include "persons engaged in investment activity within the territory of Ukraine", namely: legal entities, established according to legislation other than Ukrainian legislation; natural persons who are foreigners, who are not Ukrainian permanent residents and who are legally and otherwise competent; foreign countries, international governmental and non-governmental organizations; other foreign participants in investment activity, who are recognized as such by the legislation of Ukraine.⁴⁷ The definition of the foreign investments is broad enough to cover foreign direct investment in the meaning that is usually attributed to them and used for the purposes of this paper.

According to the Foreign Investments Law, the regulation of foreign investment is based on the principle of national treatment which means that foreign investors enjoy the same privileges as national investors with the exceptions provided by national legislation and international agreements of Ukraine. Among these exceptions are limits on foreign investment activity in the field of broadcasting: establishing of television or broadcasting companies by foreigners is not allowed.⁴⁸ In accordance with the current Ukrainian legislation, foreigners are

⁴⁷ Zakon Ukrainy Pro Rezhym Inozemnoho Investuvannia [Law of Ukraine On the Regime of Foreign Investments], art. 1, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 1996, No 19, Item 80, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=93%2F96-%E2%F0>.

⁴⁸ Zakon Ukrainy Pro Telebachennia i Radiomovlennia [Law of Ukraine On Television and Broadcasting], art. 12, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 1994, No 10, Item 43, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3759-12&p=1300786320310825>.

also precluded from owning agricultural land.⁴⁹ Under the Land Code a foreigners may possess land on the basis of either lease rights or rights to the use of land.⁵⁰

At the same time Ukraine reserves the right to grant incentives to business entities which carry out projects with the attraction of foreign investment that are implemented according to governmental programs for the development of priority sectors of the economy, the development of social services or the development of territories.⁵¹ However, at the present moment there are no such incentives that are addressed specifically to foreign investors.

The main implication of distinguishing between foreign investments is granting special guarantees to them. Foreign Investments Law provides for the following guarantees to the foreign investors: 10-year protection against legislation change; a ban to nationalize, confiscate or seize investment by governmental authorities; reimbursement of all damages caused to an investor; a right to wind up the business and repatriate profits.⁵² However, in order to enjoy the abovementioned guarantees the foreign investment should be registered with the appropriate local state authorities within three business days of their contribution.⁵³ Besides the guarantees provided by the state, the other important effect of registration of foreign investments is the exemption from custom duty of property that is imported into Ukraine by a foreign investor as a contribution to the statutory fund of an entity.

Ukraine separates foreign investments for the purpose of granting to them additional guarantees. Such foreign investors-friendly legislation reflects the policy oriented on attracting foreign investors. Therefore, the specific legislation on attracting foreign direct investments in

⁴⁹ Zemel'nyi Kodeks Ukrainy [Land Code], art. 22, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 2002, No 3-4, Item 27, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2768-14&p=1300786320310825>.

⁵⁰ *Id.*, art. 33,35.

⁵¹ Zakon Ukrainy Pro Rezhym Inozemnoho Investuvannia [Law of Ukraine On the Regime of Foreign Investments], *supra* note 47, art. 7.

⁵² *Id.*, art. 8-12.

⁵³ *Id.*, art. 13.

Ukraine could be recognised as one that improves investment climate and encourages foreign investors to come into the country. However, the efficiency of the attraction depends not only on the guarantees provided by the government but also on the general business environment in the country, which is to be analysed below.

2.2 Company Law

The section will address the mechanisms available for establishing a business in Ukraine and the efficiency of those mechanisms in terms of speed and costs for investors. Of the highest interest for foreign investors are the entities that limit the liability of a foreign company. Therefore, this section will focus on such business entities available for carrying on the business in Ukraine as limited liability companies, companies with additional liability, stock companies, branches and representative offices.

A limited liability company limits the liability of the owners to the extent of their contribution to the statutory fund of the company⁵⁴. It has much simpler and cheaper procedure of incorporation compared to the creation of a stock company. A limited liability company in Ukraine has, however, negative characteristics such as a ten persons limit established for the number of co-owners of the company⁵⁵. A company with additional liability represents a kind of limited liability company. The essential characteristic of such a type of company is that its members are liable for obligations of the company within the limits established in the charter and

⁵⁴ Tsyvil'nyi Kodeks Ukrainy [Civil Code], art. 140, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 2003, No 40-44, Item 356, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=435-15&p=1300786320310825>.

⁵⁵ Zakon Ukrainy Pro Hospodarski Tovarystva [Law of Ukraine On Commercial Companies], art. 50, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 1991, No 49, Item 682, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1576-12&p=1300786320310825>.

proportionally to their shares.⁵⁶ Given the absence of limits on the number of members this type of company is used for creating limited liability companies with more than ten members by establishing in the charter low limits on the personal liability of the members.

Stock companies according to the Law “On Stock Companies” (aktsionerni tovarystva) are divided in two groups: public and private⁵⁷. The major privilege that is granted to public stock companies is the absence of limits on number of shareholders, whereas 100 shareholders is a limit in private stock companies⁵⁸. However, according to Ukrainian law public companies are required to conduct annual independent audit and to disclose its financial statements.⁵⁹ Moreover, according to one of the most contradictory provisions of Ukrainian company law,⁶⁰ public companies are required to be listed on at least one stock exchange.⁶¹

In Ukraine minimum capital requirements are established for limited liability and stock companies. For LLC, the minimum capital constitutes just 1 minimal wage⁶² that is established by the state and constitutes now UAH941 (approximately EUR83). The amount of the minimum capital for stock companies is much higher and constitutes 1250 minimal wages⁶³ (UAH1,176,250 or approximately EUR103,850).

The mechanism of establishing branches of foreign companies with the exception of the existing regulation on registering branches of foreign banks is absent in Ukraine.⁶⁴ The procedure of registration of foreign representative offices (predstavnytstvo) is stipulated in the Instruction

⁵⁶ Tsyvil'nyi Kodeks Ukrainy [Civil Code], *supra* note 54, art. 151.

⁵⁷ Zakon Ukrainy Pro Aktsionerni Tovarystva [Law of Ukraine On Joint Stock Companies], art. 5, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 2008, No 50-51, Item 384, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=514-17&p=1300786320310825>.

⁵⁸ *Id.*

⁵⁹ *Id.* art. 75, 78.

⁶⁰ See e.g. Mykhailo Lukashenko, Pro pidvodni kameni obov'iazkovoï prozedury listynhu [Underlying potential problems of obligatory listing procedure], *Pravovy tyzhden'* [Legal weekly], December 01, 2010 at A8.

⁶¹ Zakon Ukrainy Pro Aktsionerni Tovarystva [Law of Ukraine On Joint Stock Companies], *supra* note 57, art. 24.

⁶² Zakon Ukrainy Pro Hospodarski Tovarystva [Law of Ukraine On Commercial Companies], *supra* note 55, art. 52.

⁶³ Zakon Ukrainy Pro Aktsionerni Tovarystva [Law of Ukraine On Joint Stock Companies], *supra* note 57, art. 14.

⁶⁴ Oleksiy Kononov, Foreign Direct Investment in Ukraine and Germany: A Comparative Study 41 (Apr. 2, 2007) (unpublished LL.M. short thesis, CEU) (on file with the CEU Library).

on State registration of Representative Offices and allows registering the representation office without the purpose of economic activity in Ukraine.⁶⁵

The procedure of registration of business entities in Ukraine is complicated, slow and costly. All these factors put Ukraine in 118th place in the rank of the ease of starting business in the world.⁶⁶ The time-consuming and complicated procedure of registering business entity, getting the approval on the preparation of the company seal and the interaction with numerous state authorities leads to the result that a period up to four weeks is needed for incorporation of a company in Ukraine⁶⁷. Incorporation of stock company takes significantly more time and efforts because of numerous interactions with the Security Exchange Commission of Ukraine.⁶⁸ Even relatively low fees for registration of a business entity (UAH170 that is approximately EUR15)⁶⁹ do not improve the situation with the ease of starting a business in Ukraine.

The company law in Ukraine gives to investors sufficient mechanisms for establishing a business in Ukraine or acquiring an existing one that would meet the particular needs of the investor. Moreover, the absence of any additional requirements as to nationality of the directors, absence of restrictions on the holding of the portion of company's equity by the residents creates climate that is friendly to foreign investors. However, the general regulations that are the same both for local and foreign investors still mean the problems that may become a reason not to

⁶⁵ Instruction On the Procedure of Registration of Business Entities' Representative Offices in Ukraine, Order No. 30, approved by the Ministry of Foreign Economic Relations and Trade of Ukraine, Jan. 18, 1996, registered by the Ministry of Justice, Jan. 24, 1996, No. 34/1059 (Ukr.) *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z0034-96>.

⁶⁶ *Ease of Doing Business in Ukraine: Starting a Business*, DOINGBUSINESS.ORG, <http://www.doingbusiness.org/data/exploreeconomies/ukraine#starting-a-business> (last visited Mar. 27, 2011).

⁶⁷ *Id.*

⁶⁸ Regulation On the Procedure of Registration of Issue of Shares for the Establishment of Joint Stock Companies, Resolution No. 1639, approved by the State Commission for Securities and Stock Market, Dec. 30, 2009, registered by the Ministry of Justice, Apr. 02, 2010, No. 273/17568 (Ukr.) *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z0273-10>.

⁶⁹ Zakon Ukrainy Pro Derzhavnu Reiestratsiiu Iurydychnykh Osib ta Phisychnykh Osib-Pidpriyemstiv [Law of Ukraine On State Registration of Legal Entities and Private Entrepreneurs], art. 10, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 2003, No 31-32, Item 263, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=755-15&p=1300786320310825>.

invest into the country. Starting from the point of establishing of a business entity in Ukraine, foreign investors face the overregulation and complexity of Ukrainian legal system that increases the costs of operation there. The very first issue in attracting of foreign investors is giving them an opportunity to establish a business entity in the host state with the minimum time and costs. The Ukrainian system, unfortunately, does not allow this.

2.3 Intellectual Property and Technology Transfer Laws

Developing countries that lack scientific and financial capabilities to develop innovations in the country are highly interested in transfer of technologies from developed countries. This implies, however, that foreign investors transferring their assets in a form of intellectual property will be protected from any unauthorised use of their technology. Intellectual property laws are of high importance for the adequate protection of interests of foreign investors in the host country. At the same time, with the development of international legal framework with regard to intellectual property, the efficiency of enforcement mechanisms has become a primary concern for protection of intellectual property rights. This section will analyse the legal framework for intellectual property rights protection with a focus on enforcement procedures. Special attention will be paid to the legislation that specifically regulates technology transfer.

Ukraine is a party to major international treaties and conventions on intellectual property: Paris Convention, Berne Convention, Madrid Agreement, Nice Agreement, Singapore Treaty etc. Ukraine as a member of WTO and a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIP) undertook obligations to harmonise the national legislation with international standards. However currently, provisions of WTO TRIPs and WIPO digital

treaties remain unimplemented into the national laws.⁷⁰ Implementation of the legal rules that are already developed by the international community does not take much efforts of the state. The issue of enforcement of these rules is the major problem that Ukraine presently faces.

Prevailing negligence of the protection of intellectual property rights in Ukrainian society results in mild court sentences in criminal and administrative cases.⁷¹ Low fines in criminal procedures that constitute from UAH300 to UAH1700 (approximately EUR26 - EUR150) are not effective for precluding repeated offences. Usage of illegal software is often treated as a minor offence and does not result in any penalty.⁷² The data of year 2007 shows that Ukraine has one of the highest rates of software piracy in Europe – 85%.⁷³ Such situation with the weak protection of intellectual property results in keeping Ukraine in the 2010 Special 301 Watch List⁷⁴ that include countries identified by the Office of the United States Trade Representative as having serious intellectual property rights deficiencies⁷⁵. The weak enforcement does not allow effective protecting of right-owners and, therefore, limit their investments into the Ukrainian economy in a form of technology transfer. Such situation is a real threat for the developing country, because it limits the opportunities of modernisation of the economy.

As far as technology transfer is concerned, Ukraine regulates with a Law “On State Regulation of Activities in the Sphere of Technology Transfer” a number of issues that may affect the national interest. In particular, the law does not allow making contracts that stipulate

⁷⁰ International Intellectual Property Alliance, *Ukraine: 2011 Special 301 Report on Copyright Enforcement and Protection*, IIPA.COM, <http://www.iipa.com/rbc/2011/2011SPE301UKRAINE.pdf> (last visited Mar. 27, 2011).

⁷¹ Bureau of Economic, Energy and Business Affairs, U.S. Department of State, *2010 Investment Climate Statement – Ukraine*, STATE.GOV, (Mar.2010), <http://www.state.gov/e/eeb/rls/othr/ics/2010/138162.htm>

⁷² See e.g. Decision of the Lisichansk City Court of Lugansk region of March 19, 2009, case No. 3-550/2009, <http://www.reyestr.court.gov.ua/Review/3655879>.

⁷³ *Seventh Annual BSA and IDC Global Software Piracy Study*, PORTAL.BSA.ORG (May 2010), http://portal.bsa.org/globalpiracy2009/studies/09_Piracy_Study_Report_A4_final_111010.pdf.

⁷⁴ Office of the United States Trade Representative, *2010 Special 301 Report*, USTR.GOV (Apr. 2010), http://www.ustr.gov/webfm_send/1906.

⁷⁵ John T. Masterson, Jr., *Enforcement of Trademarks and Copyrights under the WTO Agreement of Trade-Related Aspects of Intellectual Property Rights*, in *INTERNATIONAL TRADEMARKS AND COPYRIGHTS: ENFORCEMENT AND MANAGEMENT* 1, 20 (John T. Masterson, Jr. ed., 2004).

the payments that considerably exceed the price of the technology and its components; unreasonably limit the volume of production; establish the right of the transferor to set the sales or re-export price of the products manufactured with the use of the technology so transferred etc.⁷⁶

At the same time, the abovementioned law stipulates an incentive for transfer of technology into Ukraine. The incentive is the subsidy of custom duty paid for the equipment and materials transferred to Ukraine for the purpose of technology transfer project implementation.⁷⁷ Such specific incentive is aimed at the modernisation of the economy through attracting of technologies. However, introduction of incentives for foreign investors does not seem to be important in the situation where the general protection of intellectual property rights does not allow the foreign investors to defend their interests.

2.4 Tax Law

Tax regulations differ from country to country, creating competitive advantages for attracting foreign investments into economy of the states. Apart from tax rates, such issues as the quality of the potential host country's tax administration and tax treaties with the home country of the foreign investor in order to avoid potential double taxation are considered by foreign investors.⁷⁸ What is more, enacting of legislation that stipulates incentives, especially fiscal concessions, for foreign investors became widely used by the developing countries.⁷⁹ Despite the general rule that

⁷⁶ Zakon Ukrainy Pro Derzhavne Rehuliuвання Diyalnosti u Sferi Transfertu Tekhnolohii [Law of Ukraine On State Regulation of Activities in the Sphere of Technology Transfer], art. 18, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 2006, No 45, Item 434, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=143-16>.

⁷⁷ *Id.*, art.22

⁷⁸ ALEX EASSON, TAXATION OF FOREIGN DIRECT INVESTMENT: AN INTRODUCTION 18 (1999).

⁷⁹ E. I. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 34 (1965).

“investors are generally much more concerned with the general features of the systems than with special incentives”,⁸⁰ special tax incentives may become an essential factor that influences the decision to invest in the particular country. This section will address the issue of Ukrainian tax legislation with regard to the rates, general issues of tax administration and availability of tax treaties. The availability of fiscal incentives and their influence on the investment climate will also be analysed.

The reasons that usually cause dissatisfaction with the host country are “inconsistent tax laws, erratic tax administrations and an overall excessive tax burden”.⁸¹ All of these factors were present in Ukraine until recently. The newly adopted Tax code was aimed at eliminating major problems of national tax system. However, as will be shown below, the results of this attempt are controversial.

The general rate of the corporate profit tax in Ukraine is 23% from the 1 April 2011.⁸² Provisions of the new Tax Code introduced step-by-step reducing of the tax rate to 16% by the 1 January 2014⁸³. Together with the reducing of value added tax (VAT) from present 20% to 17% by the 1 January 2014⁸⁴ it will substantially lighten the tax burden that businesses in Ukraine currently face. As far as VAT involved, the Tax Code impose the duty of paying VAT only on businesses whose turnover exceeds UAH300,000 (approximately EUR26,700). Despite the lightening tax burden, the new code does not eliminate the problem of extreme number of taxes and duties that businesses should pay in Ukraine: it establishes eighteen national and five local

⁸⁰ EASSON, *supra* note 78, at 20.

⁸¹ *Id.* at 18

⁸² Podatkovyi kodeks Ukrainy [Tax Code], part XX, sec. 4, art. 10, OFITSIINYI VISNYK UKRAINY [Official Bulletin of Ukraine] 2010, No 92, Item 3248, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2755-17&p=1300786320310825>.

⁸³ *Id.*

⁸⁴ *Id.*, at part XX, sec. 1, art. 10.

taxes and duties, which do not include the payments to social funds, like pension fund or social security fund.⁸⁵

The problem of tax administration is one of the most serious problems in the attractiveness of Ukraine for foreign investments. Ukrainian system has been criticised for excessive powers of tax authorities.⁸⁶ The new Code does not eliminate this problem, but grants even more powers to the State Tax Authority, among which are the power to conduct audit in special cases without any preliminary notice to the taxpayer and additional powers to conduct non-scheduled audits.⁸⁷

The general problem of tax administration that affects both national and foreign businesses is its instability. Such instability can be illustrated by the numerous letters of the State Tax Authority that interpret the application of the laws in an unpredictable way and often contradict each other or even interpretation of the parliament.⁸⁸ This situation reveals another problem of tax legislation in Ukraine: provisions of tax laws are ambiguous and give the power to state authorities to interpret them in a case-by-case manner that increases the possibility of corruption. The new Tax Code does not solve this problem and follow the tradition of ambiguous wording.⁸⁹ Another issue that causes instability in the national tax system of Ukraine is the problem with the reimbursement of VAT to exporters. Dealing with the fiscal problems during the recession of 2008-2009, the government owed the taxpayers about USD2,000,000,000 by the

⁸⁵ *Id.*, at part I, art. 9,10.

⁸⁶ TEGYPKO, *supra* note 38, at 9.

⁸⁷ Podatkovi kodeks Ukrainy [Tax Code], *supra* note 82, part II, chapter 8, art. 78, 80.

⁸⁸ See e.g. Lyst Derzhavnoi Podatkovoï Administratsii do Derzhavnykh Podatkovykh Administratsii v AR Krym, Oblastiakh, mistakh Kyievi ta Sevastopoli [Letter from the State Tax Authorities to the Tax Authorities in AR Crimea, regions, cities Kyiv and Sevastopol] No. 2963/7/10-1017/302 (Feb. 03, 2011), <http://dpa.lg.ua/raz/17/230211.1.htm>.

⁸⁹ See, e.g. Podatkovi kodeks Ukrainy [Tax Code], *supra* note 82, part V, art. 196, paragraph 196.1, subparagraph 196.1.14.

end of 2009⁹⁰. The new tax code created mechanism of automatic refund of VAT to exporters who fall under certain conditions. However, this mechanism does not appear to solve the problem: the first list of companies that can expect automatic reimbursement of VAT include just twenty four names.⁹¹

As for the repatriation of investments, the new Tax Code introduced substantial novelties in the tax system. According to the general rule, paying of Ukraine-sourced income to non-resident is charged with the 15% withholding tax with the exception or the reduced tax rate under a relevant treaty on avoidance of double taxation. However, the new rule introduced in the Tax Code, allows the “beneficial owner” of income to be exempted from the withholding tax.⁹² This rule applies to dividends, interest, royalty and other payments to non-residents determined by the provisions of Tax Code. Ukraine also is a party to 67 income tax treaties⁹³ some of which introduce the lower withholding tax rates comparing to the national rate⁹⁴.

Among general problems that are of relevance in the Ukrainian tax system is a time-consuming procedure of paying taxes that amounts to impressive 657 hours per year according to the estimation of Doing Business Report.⁹⁵ The provisions of a new Tax Code try to solve this problem by introducing obligatory mechanism of filing tax returns solely in electronic form for large and medium enterprises.⁹⁶ General problems with number of taxes that must be paid,

⁹⁰ Bureau of Economic, Energy and Business Affairs, *supra* note 71.

⁹¹ Pres-Sluzhba Derzhavnoi Podatkovoï Administratsii [Press-Service of the State Tax Authority], *Vyznachenno Pershi 24 Pidpriemstva, iakym Avtomatychno Vidshkoduïut' PDV* [First 24 Enterprises Determined to Whom VAT Would Be Automatically Reimbursed], STA.GOV.UA (MAR. 15, 2011), http://www.sta.gov.ua/control/uk/publish/article?art_id=317637&cat_id=90622.

⁹² Podatkovi kodeks Ukrainy [Tax Code], *supra* note 82, part III, art. 160, paragraph 160.2.

⁹³ Mykhailo Razuvaiev & Bate C. Toms, *Corporate Tax 2011: Ukraine*, MARTINDALE.COM (Dec. 1, 2010), http://www.martindale.com/taxation-law/article_BC-Toms-Co_1195358.htm

⁹⁴ Treaty on the Avoidance of double taxation of profits and property, USSR-Cyprus, Oct. 29, 1982, Collection of International Treaties of Russian Federation on elimination of Double Taxation 1995 (currently in force in Ukraine providing for a general zero withholding tax rate for dividends).

⁹⁵ *Ease of Doing Business in Ukraine: Paying Taxes*, DOINGBUSINESS.ORG, <http://www.doingbusiness.org/data/exploreeconomies/ukraine/#paying-taxes> (last visited Mar. 27, 2011).

⁹⁶ Podatkovi kodeks Ukrainy [Tax Code], *supra* note 82, part II, chapter II, art. 49, paragraph 49.4.

amount of time that it requires and general excessive tax burden led Ukraine to one of the worst position in the rating of the ease of doing business with respect to paying taxes.⁹⁷

Tax incentives have not been introduced in Ukraine in recent years. Since the Law “On the Regime of Foreign Investments” had been adopted in 1996 to all enterprises disregarding their origin the same tax rates apply.⁹⁸ Further abolishment of tax concessions in free economic zones⁹⁹ in 2005 led to the elimination of all tax incentives up to 2011. The new Tax code, however, introduced several tax incentives that are available both for national and foreign investors. The first incentive is oriented on specific industries, development of which is the priority for the country (5-,4- and 3-stars hotels, light industry, shipbuilding industry etc.), and exempts their profits from the corporate profit tax for the period of 10 years.¹⁰⁰ The second incentive establishes tax holidays till the end of 2015 for small businesses whose annual income does not exceed UAH3,000,000 (approximately EUR265,000) and who meet a number of criteria (type of business, number of employees, date of registration etc.)¹⁰¹ The problem with tax incentives is the same as with the incentives in the sphere of the transfer of technology: incentives cannot eliminate the problems in the whole system and therefore do not become a serious argument to invest in the country.

The problem that the field of tax law faces with respect to attracting foreign investment is not peculiar and as other analysed fields of law concerns the application of general laws to foreign investors. Tax law does not introduce special treatment of foreign direct investments and does not address tax incentives specifically to foreign investors. Such situation does not imply

⁹⁷ Ukraine is in the 181 position among 183 analysed countries. *Ease of Doing Business in Ukraine: Paying Taxes*, *supra* note 95.

⁹⁸ Zakon Ukrainy Pro Rezhym Inozemnoho Investuvannia [Law of Ukraine On the Regime of Foreign Investments], *supra* note 47.

⁹⁹ Kononov, *supra* note 64, at 27.

¹⁰⁰ Podatkovyi kodeks Ukrainy [Tax Code], *supra* note 82, part XX, section 4, art. 17.

¹⁰¹ Podatkovyi kodeks Ukrainy [Tax Code], *supra* note 82, part III, art. 154, paragraph 154.6.

per se unattractiveness of Ukrainian economy to them. However, the content of the tax rules that affect both local and foreign investors has significant impact on the investment climate in the country. As far as the general conditions of the tax system are assessed by the foreign investors, Ukraine has very little chance to show a competitive advantage and to force the investor to choose Ukraine as a host state for their investments.

2.5 Foreign Exchange Regulations

One of the major problems that developing states face is the problem of balance of payments and, consequently, the problem of the stability of the national currency. As far as international law recognizes the right of control by the states of their currency,¹⁰² they pay high attention to limiting foreign exchange for their transactions with other states.¹⁰³ This section will deal with the regulations of foreign exchange in Ukraine and the influence of these regulations on the foreign investors.

National legislation imposes some limits on the freedom of foreign investors to invest in Ukraine. The first limit is the currency in which the investments can be made. According to the Regulation of the National Bank of Ukraine On Procedure of Foreign Investment in Ukraine only limited number of currencies is allowed to be invested in Ukraine.¹⁰⁴ That does not include, for example, currencies of such potential investors like Russia, Poland or Czech Republic.¹⁰⁵ Another restriction that concerns foreign exchange imposes time limit on repatriation of export

¹⁰² F.A. MANN, *THE LEGAL ASPECTS OF MONEY* 419 (2 ed. 1953) cited in E. I. NWOGUGU, *supra* note 79, at 18.

¹⁰³ E. I. NWOGUGU, *supra* note 79, at 18.

¹⁰⁴ Regulation On Procedure of Foreign Investment in Ukraine, Resolution No. 280 approved by the Board of the National Bank of Ukraine, Aug. 10, 2008, registered by the Ministry of Justice, Aug. 29, 2005, No. 947/11227 (Ukr.) available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z0947-05>.

¹⁰⁵ Classifier of foreign currency and precious metals, Resolution No. 34 approved by the Board of the National Bank of Ukraine, Feb. 04, 1998, registered by the Legal Department of the National Bank of Ukraine, Feb. 10, 1998, No. 521 available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v0521500-98>.

proceeds into Ukraine.¹⁰⁶ Currently, this time limit constitutes 180 days, however during recent economic crisis it was decreased to only 90 days that confirms the volatility of the national legislation of Ukraine. With regard to foreign trade, the limit on use of Ukrainian national currency exists: for the purposes of foreign trade the licence of National Bank of Ukraine is needed for payments in the national currency of Ukraine.¹⁰⁷ In addition, in case of payment for services rendered by the non-residents that exceeds EUR100,000 the resolution of the Foreign Market Monitoring Centre that the payment does not exceed the market price is needed.¹⁰⁸ Such limits on the foreign trade increase the time and costs of transactions and at the same time make the businesses less flexible.

As far as the issue of repatriation of investments is involved, Ukrainian legislation also imposes certain regulations. Generally, with a number of exceptions such as import payments and foreign investment repatriations the individual licences are required for transfer of currency abroad¹⁰⁹. However, even without the requirement to obtain a license, the foreign investors have to submit a number of documents to commercial bank in order to purchase currency for further repatriation of his investments¹¹⁰. What is more, general custom rules are also applied to transfer

¹⁰⁶ Zakon Ukrainy Pro Poriadok Zdiisnennia Rozrakhunkiv v Inozemnii Valuti [Law of Ukraine On the Procedure of Payment in Foreign Currency], art. 1, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 1994, No 40, Item 364, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=185%2F94-%E2%F0>.

¹⁰⁷ Decret Pro Systemy Valutnoho Rehuliuвання I Valiutnogo Kontroliu [Decree On the System of Currency Regulation and Currency Control], art. 5(4) b, VIDOMOSTI VERKHOVNOI RADY [VVR] [Bulletin of Supreme Council] 1993, No 17, Item 184, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=15-93>.

¹⁰⁸ Regulations On Issuance Approval of the National Bank of Ukraine for Resident on Certain Operations, Resolution No. 597 approved by the Board of the National Bank of Ukraine, Dec. 30, 2003, registered by the Ministry of Justice, Feb. 5, 2004, No. 159/8758 (Ukr.) *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z0159-04>.

¹⁰⁹ Decret Pro Systemy Valutnoho Rehuliuвання I Valiutnogo Kontroliu [Decree On the System of Currency Regulation and Currency Control], *supra* note 107, at art. 5(4) a

¹¹⁰ Kononov, *supra* note 64, at 35-36.

of cash through the border by individuals. Maximum amount that is permitted to transfer is EUR10,000 per person (3,000 of which do not need declaration)¹¹¹.

Foreign exchange regulation is one of the fields of law that affect foreign direct investments most directly. As far as Ukrainian regulations of foreign exchange limit the freedom of foreign investors and extend the number of bureaucratic procedures that foreign investor shall comply with in Ukraine, it increases the transaction costs for investor. The result of such situation is that control of Ukraine over the stability of the national currency becomes another obstacle for attracting foreign investments.

¹¹¹ Instruction On Transfer of Cash and Precious Metals through the Customs Border of Ukraine, Resolution No. 148 approved by the Board of the National Bank of Ukraine, May 27, 2008, registered by the Ministry of Justice, Jun. 11, 2008, No. 520/15211 (Ukr.) *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z0520-08>.

Chapter 3 – National Legislation Attracting Foreign Direct Investments in Singapore: Possible Application in Ukraine

The successful development of Singapore was based on the promotion of industries that were important for the economy of the state through attracting of foreign direct investments in these industries. As a result of this model, Singapore investment policy was based on a permissive model that used incentives and public investments rather than restrictions or limits to attract and benefit the most from foreign investments.¹¹²

Nowadays, in a situation where countries are more and more reliant on foreign direct investments in their development, the experience of Singapore with regard to their attracting is becoming of high importance for developing countries. As far as this thesis addresses the issue of impact of national legislation of flow of foreign direct investments, the chapter will analyse the major fields of national law that affect the inflow of foreign direct investments into the country and will define the most successful measures taken by Singapore in order to apply them in Ukraine.

3.1 Foreign Direct Investments Regulation

Singapore follows the approach adopted by developed countries.¹¹³ It does not distinguish the treatment of national and foreign investors. Singapore has no separate laws on foreign investments that would establish any specific regulations of this subject. The Singaporean

¹¹² LIM & PANG, *supra* note 1, at 177.

¹¹³ See e.g. Germany in Kononov, *supra* note 64, at 32

government in other words imposes the same regulations both on local and foreign investors and does not make a difference in their treatment.

However the general rule of absence of differences in treatment of local and foreign investors has its limited exceptions. First of all, investments that are seeking the Singaporean incentives are subject to some additional requirements. Among these requirements are amounts of capital investments, level of technology, establishment of research and development facilities.¹¹⁴ Second group of exceptions concerns the limits of foreign investments into some strategic areas: arms and ammunition industries, air transport and public utilities.¹¹⁵ The participation of foreigners is also restricted in the ownership and management of newspapers¹¹⁶ and broadcasting¹¹⁷. Financial sector also contains some restrictions on foreign investments: approval of the Finance Minister is required to acquire some threshold ownership in the local banks.¹¹⁸ Finally, foreigners are required to receive an approval from state authority to purchase certain types of residential property.¹¹⁹ Such limits are common in the host countries for protection of national interest and do not influence crucially the investment climate in the country. It may sound surprising, but comparing the measures, adopted in Singapore for limiting the presence of foreign investors, to Ukrainian ones it appears that in Ukrainian regulations in some cases are even less restrictive.

¹¹⁴ LIM & PANG, *supra* note 1, at 53.

¹¹⁵ Christoph Antons, *supra* note 5 at 229.

¹¹⁶ Newspaper and Printing Act limits the ownership to 5% per stockholder and requires that directors were citizens of Singapore. Newspaper and Printing Presses Act, STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow "Newspaper and Printing Presses Act" hyperlink) (last visited Mar. 27, 2011).

¹¹⁷ Broadcasting Act limits foreign ownership in broadcasting companies to 49% and restricts the ownership by the single stockholder to 5%. Broadcasting Act, STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow "Broadcasting Act" hyperlink) (last visited Mar. 27, 2011).

¹¹⁸ Banking Act, STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow "Banking Act" hyperlink) (last visited Mar. 27, 2011).

¹¹⁹ Residential Property Act, sec.3, STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow "Residential Property Act" hyperlink) (last visited Mar. 27, 2011).

The Singaporean approach according to which foreign and local investors are treated in the same way stresses the openness of the economy to foreign investments. Protection of the investments is based primarily on general legislation that regulates business activity without distinction of origin of the investors. The rights of foreign investors against expropriation and nationalisation are specifically protected in the numerous bilateral agreements signed with the countries that are major investors into the economy of Singapore.

The approach, chosen by Ukraine of differentiating foreign and local investors, as was shown *supra*, does not aim at limiting the activity of the foreigners in the country. On the contrary, it specifically articulates the guarantees, granted by the state to the foreign investors. Both approaches have the same direction – to benefit from foreign direct investments through incentives and national treatment of foreign investors, but not through restrictions and limits. Therefore, switching to the model chosen by Singapore will not improve the attractiveness of the country for foreign investments.

In the situation where the local and foreign investors are put in the same position, crucially important for foreign investors are the general conditions of doing business in the country. The competitive advantage of Singapore is that it eliminated substantial restrictions on business activity and created a business-friendly atmosphere in the country. Such attitude of the state to business activity created a competitive advantage to Singapore in the form of low transaction costs for businesses and therefore led to foreign investors arriving in the country. The measures taken by Singapore and their possible implication in Ukraine are to be analysed below.

3.2 Company Law

The forms of business activity in Singapore include sole-proprietorship, partnership, limited liability partnership (LLP), limited partnership, company, branch and representative office.¹²⁰ In order to conduct business in Singapore an entity as a rule must be registered with the Accounting & Corporate Regulatory Authority (ACRA).¹²¹

The business structures differ with regard to their flexibility, costs of administration, numbers of regulations and the degree of liability. Sole-proprietorship and partnership are the basic business structures that are legal entities not separated from their owners. Business owners have unlimited and joint liability for all the debts and liabilities incurred by their firms and by their business partners.¹²² However, these forms of businesses have the easiest system of administration because they do not need to file annual returns with ACRA¹²³. Limited liability partnership and company separate the owners from the business entity's liability and limits the former to the amount of contribution of the owners into the statutory capital.¹²⁴ However, the regulation of their activity is much more detailed and will be discussed further. The mixture of both types of business forms that include limited and unlimited liability is limited partnership: the main feature of it is that it limits only liability of the partners that do not take part in the management of the partnership.

¹²⁰ Register Your Business: Choose a Business Structure, BUSINESS.GOV.SG, <http://www.business.gov.sg/EN/StartingUp/RegisterYourBusiness/index.htm> (last visited Mar. 27, 2011).

¹²¹ Accounting And Corporate Regulatory Authority Act, STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow "Accounting And Corporate Regulatory Authority Act" hyperlink) (last visited Mar. 27, 2011).

¹²² *Consultation Paper on Limited Liability Partnerships in Singapore*, ACRA.GOV.SG, <http://www.acra.gov.sg/NR/rdonlyres/D4CDED00-2F30-4772-AAAB-0D8C0CFDEB7D/9706/LimitedLiabilityPartnershipsReportsFirstConsultati.pdf> (last visited Mar. 27, 2011).

¹²³ Companies Act, sec. 197 (1), STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow "Companies Act" hyperlink) (last visited Mar. 27, 2011).

¹²⁴ PAMELA HANRAHAN ET AL., *COMMERCIAL APPLICATIONS OF COMPANY LAW IN SINGAPORE* 56-57,63 (2nd ed., 2004).

The interests of foreign investors are usually directed to limiting their liability in the host country. Therefore, just two major types of business activity, which allow an investor to avoid full liability, shall be analysed in more details: limited liability partnerships and companies.

The limited liability partnership was designed primarily to offer its members limited liability while allowing them to retain flexibility in operating the LLP as a traditional partnership.¹²⁵ It is not required, for example, to file annual returns with ACRA.¹²⁶ However, annual declaration must be submitted to ACRA stating whether the LLP is able to pay its debts as they become due in the normal course of business.¹²⁷ Substantial limit in the usage of LLP as a business entity is the limit on the number of partners: Companies Act requires all business entities that consist of more than 20 persons to be registered in a form of company¹²⁸.

According to the Companies Act, there are three types of companies in Singapore: companies limited by shares, companies limited by guarantee and unlimited companies¹²⁹. For the purposes of carrying on a business the first type of companies is usually used.¹³⁰ The company can be incorporated in two types: a private or a public company. Public companies have advantages compared to the private companies such as absence of share transfer restrictions and absence of limits on number of shareholders (limit of 50 members is established for private companies).¹³¹ However, additional requirements are also imposed on public companies. For instance, additional requirement of invitation to the public to subscribe for shares or debentures

¹²⁵ *Consultation Paper on Limited Liability Partnerships in Singapore*, supra note 122.

¹²⁶ Companies Act, supra note 123.

¹²⁷ Limited Liability Partnerships Act, sec.24(1), STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow "Limited Liability Partnerships Act" hyperlink) (last visited Mar. 27, 2011).

¹²⁸ Companies Act, supra note 123, sec. 13.

¹²⁹ *Id.*, sec. 17

¹³⁰ Christopher J. Murphy, *Singapore*, in *COMMERCIAL LAWS OF EAST ASIA* 405, 419 (Alan S. Gutterman & Robert Brown eds., 1997).

¹³¹ Companies Act, supra note 123, sec. 18 (1)b.

of the company exists.¹³² It is important to mention that neither LLP nor for private and public company has minimum capital requirements.¹³³

Establishing a branch or a representative office is also available in Singapore. A foreign company that does not wish to establish a local business entity but desires to carry on a business in Singapore may register a branch in Singapore. The registration requires the application through online filing system and submitting of a prescribed set of documents.¹³⁴ Two local agents must be appointed by a foreign company who act on the company's behalf. In case the foreign company is not going to conduct business on the territory of Singapore and just want to be represented in Singapore it has an option to open a representative office.¹³⁵ The permission from the Trade Development Board must be granted for this purpose.¹³⁶ Such variety of business forms with their own pros and cons gives wide choice foreign investors and therefore let them enough flexibility to satisfy their needs in a best way.

In terms of speed and cost the incorporation of the company or limited liability partnership in Singapore is very efficient. If there is no need to apply for additional approvals or reviews it takes 15 minutes to incorporate a business entity or register a branch of foreign company via an online service that is available from any place in the world with an internet connection.¹³⁷ Obtaining of company seal after registration does not require any special authorisation and is generally obtained from third-party stationers within one day¹³⁸. Moreover, submitting of a charter in the process of registration of a company is not necessary and the

¹³² *Id.*, sec. 61 (2).

¹³³ PAUL J DAVIDSON & FRANCA CIAMBELLA, INVESTMENT IN SOUTHEAST ASIA: POLICY AND LAWS 198 (1995).

¹³⁴ *Id.*, at 194.

¹³⁵ Murphy, *supra* note 130, at 422.

¹³⁶ *Id.*

¹³⁷ *Incorporating a Local Company*, ACRA.GOV.SG,

http://www.acra.gov.sg/Company/Starting_a_Company/Incorporating+a+Local+Company.htm (last visited Mar. 27, 2011)

¹³⁸ *Starting a Business in Singapore*, DOINGBUSINESS.ORG,

<http://www.doingbusiness.org/data/exploreconomies/singapore/starting-a-business> (last visited Mar. 27, 2011).

standard articles of association contained in the Annexes of Companies Act are applied, what increases the speed of preparation for registration.¹³⁹ Costs of establishing a business depend on the type of the business and differ from SGD150¹⁴⁰ (approximately EUR83) for registration of LLP to SGD300¹⁴¹ (approximately EUR166) for registration of a company. These costs are relatively high, comparing them to Ukrainian ones. However they are eliminated by the effectiveness and high speed of the whole procedure.

As was shown *supra*, starting from the point of establishing the business entity in Ukraine, foreign investors face the overregulation and complexity of Ukrainian legal system that increases the costs of operation there. The very first issue in attracting foreign investors is giving to them an opportunity to establish business entity in the host state with the minimum time and costs. The Ukrainian system does not allow that. For solving this problem the experience of Singapore shall be taken as a model.

First of all, measures to decrease the time and complexity of the business-registration procedure should be taken. The first step in this direction would be introducing an electronic filing system that allows the registration of a business entity from a distance. The rudimentary and time-consuming procedure of obtaining the approval of Ministry of Internal Affairs for preparation of a company seal has to be eliminated. Secondly, the mechanism of conducting the business by the foreign investor through a branch shall be established. It will give to the investors enough flexibility to choose the appropriate model for investing into Ukraine. Finally, the high requirements of minimal capital to the minimal statutory capital of stock companies shall be eliminate or at least decreased. Current minimum capital requirements in Ukraine de-facto oblige

¹³⁹ Companies Act, *supra* note 123, Fourth Schedule.

¹⁴⁰ *Fees: Limited Liability Partnership*, ACRA.GOV.SG, http://www.acra.gov.sg/NR/rdonlyres/BE1A0834-EE5D-475D-831C-4CF311E3F204/10270/FeesLLP_24Sep09.pdf (last visited Mar. 27, 2011).

¹⁴¹ Companies Act, *supra* note 123, Second Schedule

the founders of the company that has more than ten members to invest substantial amounts and therefore limit the freedom of business.

3.3 Intellectual Property and Technology Transfer Laws

Developing of the intellectual property protection was one of the priorities of Singapore in order to attract foreign research and development, technological skills.¹⁴² Presently, it is recognised that “Singapore has developed one of the strongest intellectual property regimes in Asia”.¹⁴³ Successful protection of intellectual property in Singapore is based both on appropriate legislation and efficiency of the enforcement procedures.

Singapore has signed major treaties in the sphere of intellectual property protection such as the Paris Convention, Berne Convention, Madrid Protocol, Nice Agreement, Singapore Treaty etc. Moreover, Singapore, as a member of WTO and a party to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), implemented their provisions into the national law and administrative regime.¹⁴⁴ A substantial step in the development of intellectual property laws was made by signing of Free Trade Agreement with the United States, in which Singapore undertook additional obligations on protection of intellectual property.¹⁴⁵

In the situation when the legislation of the country is brought into line with major international regulations, the regime of intellectual property protection is primarily dependant on the enforcement of the intellectual property laws. Enforcement mechanisms of intellectual

¹⁴² Soon & Stoever, *supra* note 8 at 329.

¹⁴³ Bureau of Economic, Energy and Business Affairs, U.S. Department of State, *2011 Investment Climate Statement – Singapore*, STATE.GOV, (Mar.2011), <http://www.state.gov/e/eeb/rls/othr/ics/2011/157355.htm>.

¹⁴⁴ Intellectual Property Office of Singapore: Overview, IPoS.GOV.SG, <http://www.ipos.gov.sg/topNav/abo/> (last visited Mar. 27, 2011).

¹⁴⁵ Free trade Agreement, U.S.-Singapore, May 6, 2003, USTR.GOV, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf (last visited Mar. 27, 2011).

property rights in Singapore include both Civil and Criminal remedies.¹⁴⁶ The high efficiency of the protection of intellectual property rights in Singapore is achieved through severe sanctions. Infringing of trade mark rights, for example, may cause a fine up to SGD100,000 and/or imprisonment for a maximum term of 5 years.¹⁴⁷ Strong policy of imposing such deterrent sentences is a part of the “efforts to promote Singapore as a regional intellectual property centre and the concomitant need to clamp down on piracy of intellectual property”.¹⁴⁸

The government’s efforts to reduce violations of intellectual property laws led to including Singapore in the list of countries with the lowest rate of software piracy in 2007.¹⁴⁹ However, several problems in the sphere of intellectual property protection remain unsolved. Efforts on overcoming violations of intellectual property such as online piracy and corporate end-user piracy of business must be taken by the government according to the latest report of International Intellectual Property Alliance.¹⁵⁰

Singapore managed to solve the enforcement problem that is currently the prime concern in the protection of intellectual property rights in Ukraine. Therefore, Singaporean experience in solving this problem is of high importance for Ukraine. The increased amount of fines both in criminal and administrative procedures may become an effective way of prevention the infringements of intellectual property rights. However, chiefly the mechanism of solving the enforcement problem in Singapore lied not in legal measures but in the court practise that implied state policy oriented on imposing of severe sanctions. Ukraine is a continental law state and does not allow imposition of state policy through precedents. However, the summaries of court

¹⁴⁶ *Reference to Singapore Laws: Chapter 12: Intellectual Property Law*, SINGAPORELAW.SG, <http://www.singaporelaw.sg/content/iplaw2.html>.

¹⁴⁷ *Id.*, at sec. 12.5.29.

¹⁴⁸ *Ong Ah Tiong v Public Prosecutor* [2004] cited in *Reference to Singapore Laws: Chapter 12: Intellectual Property Law*, *supra* note 147.

¹⁴⁹ *Seventh Annual BSA and IDC Global Software Piracy Study*, *supra* note 73.

¹⁵⁰ International Intellectual Property Alliance, *Singapore: 2011 Special 301 Report on Copyright Enforcement and Protection*, IIPA.COM, <http://www.iipa.com/rbc/2011/2011SPEC301SINGAPORE.pdf> (last visited Mar. 27, 2011)

practise by the Supreme Court that has a quasi-obligatory character but usually followed by the lower courts can become guidance in imposing of more deterrent sanctions.

3.4 Tax Law

The tax burden that foreign investors face on Singapore is light. The corporates are taxed at a rate of 17%¹⁵¹. Moreover, the taxed income up to SGD300,000 (approximately EUR167,000) is taxed at 8,5% rate.¹⁵² The Value Added Tax (Goods & Services Tax in Singapore) rate is 7% and is compulsory only if the turnover exceeds SGD1,000,000 (approximately EUR557,000)¹⁵³. Such competitive tax rates are themselves quite attractive for foreign investors. However, the tax system of Singapore has more features that may be of high relevance for foreign investors. Among them are for example absence of capital gain tax¹⁵⁴, and absence of withholding tax on dividends¹⁵⁵ that allows foreign investors to repatriate their profit effectively.

As was argued before, the role of tax administration is of high importance for creating an investment-friendly climate in the country. Tax administration in Singapore is represented by the Inland Revenue Authority of Singapore (IRAS). IRAS acts as an agent of the government to assess, collect and enforce payment of taxes. In connection with such functions, IRAS is responsible for administering the Income Tax Act, Goods & Services Tax Act, Property Tax Act

¹⁵¹ Income Tax Act, sec. 43 (1) (a), STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow “Income Tax Act” hyperlink) (last visited Mar. 27, 2011).

¹⁵² *Id.*, at sec. 43 (6) (b)(ii)

¹⁵³ Goods And Services Tax Act, sec. 16 (c), STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow “Goods And Services Tax Act” hyperlink) (last visited Mar. 27, 2011).

¹⁵⁴ Marco Verweij & Riccardo Pelizzo, *Singapore: Does Authoritarianism Pay?*, 20 JOURNAL OF DEMOCRACY 18, 21 (2009) available at http://muse.jhu.edu/journals/journal_of_democracy/v020/20.2.verweij.html#f5-text.

¹⁵⁵ *Withholding tax: For what payment do I withhold tax: Dividend payments*, IRAS.GOV.SG, http://iras.gov.sg/irasHome/page04_ektid596.aspx (last visited Mar. 27, 2011).

and some other acts that regulate duties and taxes such as Stamp Duty, Property Tax etc.¹⁵⁶ The administrative head of the IRAS is acting as Comptroller of Income Tax and is responsible for the responsible for the assessment and collection of this tax¹⁵⁷. In order to perform his duties, Comptroller has sufficient authority that includes powers to search and seize books, documents or papers including records kept by in electronic or other format; to call for statements of bank accounts, assets and other sources of income etc.¹⁵⁸

The mechanism of paying taxes is extremely simplified in Singapore, which make it possible to spend minimum of time on performing of this procedure. The special Internet portal for taxpayers was introduced to interact with IRAS electronically.¹⁵⁹ It allows submitting Income Tax, Goods and Sales Tax returns, viewing the tax account details and make payments via Internet banking.¹⁶⁰ The system of paying taxes introduced in Singapore has brought it to one of the best position in the world rates with regard the time that must be spend on paying taxes.¹⁶¹

Furthermore, an important role in Singapore is played by numerous tax incentives that are nowadays provided through Economic Expansion incentives (Relief from Income Tax) Act¹⁶² and the Income Tax Act.¹⁶³ Tax incentives are regarded as an important mechanism of attracting investments in desirable fields. As can be seen from Table 3.4 the incentives are aimed at attracting foreign investments in manufacturing, financial services and intellectual property

¹⁵⁶ Overview: IRAS' Role in Nation-building and Economic Development, IRAS.GOV.SG, http://www.iras.gov.sg/irasHome/page_ektid1926.aspx (last visited Mar. 27, 2011).

¹⁵⁷ Income Tax Act, *supra* note 151, at sec. 4 (3).

¹⁵⁸ MAK OI LENG ET AL., SINGAPORE INCOME TAX SUBMISSIONS HANDBOOK 547 (2008).

¹⁵⁹ *Welcome to myTax Portal*, MYTAX.IRAS.GOV.SG, <https://mytax.iras.gov.sg/ESVWeb/default.aspx> (last visited Mar. 27, 2011).

¹⁶⁰ LENG, *supra* note 158, at 548.

¹⁶¹ *Ease of Doing Business in Singapore: Paying Taxes*, DOINGBUSINESS.ORG, <http://www.doingbusiness.org/data/exploreeconomies/singapore#paying-taxes> (last visited Mar. 27, 2011).

¹⁶² Economic Expansion Incentives (Relief From Income Tax) Act, STATUTES.AGS.GOV.SG, <http://statutes.agc.gov.sg/> (follow "Economic Expansion Incentives (Relief From Income Tax) Act" hyperlink) (last visited Mar. 27, 2011).

¹⁶³ Income Tax Act, *supra* note 151, at sec. 13 – 13Y.

development. What is more, the program of attracting multinational corporations to establish their headquarters in Singapore¹⁶⁴ is also reflected in tax incentives provided by the government.

Scheme	Benefits	Suitable for
Pioneer (Manufacturing)	Tax exemption on income from qualifying activities	Manufacturing
Pioneer (Services) (also available for International Headquarters Award)	Tax exemption on income from qualifying activities	Services, General Headquarters
Development and Expansion Incentive (also available for International Headquarters Award)	Reduced tax 5% or 10% on incremental income from qualifying activities	Manufacturing, Services, Regional Headquarters/ International Headquarters, IP Hub
Investment Allowance	Allowance of 30% or 50% of approved fixed capital expenditure on top of normal 100% capital allowance	Manufacturing
Finance & Treasury Centre Tax Incentive	Reduced tax 5% or 10% on fees, interest, dividends and gains from qualifying services/activities, WHT exemption on interest payments on loans from banks and network companies for FTC activities	Finance & Treasury Centre
Approved Royalties Incentive	Reduced WHT 0% or 5% on royalty payments to access advanced technology and know-how	Manufacturing, Finance & Treasury Centre
Approved Foreign Loan	Reduced WHT 0%, 5% or 10% on interest payments on loans taken to purchase productive equipment	Manufacturing
S19B writing-down allowances for IP acquisition	Automatic 5-year write-down if legal and econ IPR are acquired, EDB's approval is required if only econ IPR is acquired	IP Hub
S19C writing-down allowances for R&D cost-sharing	1-year write-down for R&D cost-sharing payments	Manufacturing, IP Hub

Table 3.4 – Tax Incentives in Singapore¹⁶⁵

¹⁶⁴ MARSHALL CAVENDISH, *WORLD AND ITS PEOPLES: EASTERN AND SOUTHERN ASIA* Vol. 9 1291 (2008).

¹⁶⁵ *Financial Assistance And Other Incentive Schemes: Tax Incentives*, EDB.GOV.SG, http://www.edb.gov.sg/edb/sg/en_uk/index/why_singapore/Guide_to_Investing_in_Singapore/financial_assistance.html (last visited Mar. 27, 2011).

Provision of incentives is very flexible because the decision about the incentive is made by the Minister of Finance who grants them “if he considers it expedient in the public interest to do so” and “subject to such conditions as he thinks fit”¹⁶⁶. However, details about the benefit and industries to be encouraged are decided by the Ministry of Trade and Industry and the Economic Development Board.¹⁶⁷

Besides the abovementioned characteristics of national tax system, Singapore has concluded a large volume of tax treaties that exclude the possibility of double taxation of income earned in one country by a resident of the other country, which is of high importance for Singapore which is oriented on foreign investors.¹⁶⁸ The overall assessment of the tax legislation in Singapore demonstrates that it has become one of the crucial factors that influenced the inflow of foreign direct investments into the economy of the country.

The Ukrainian tax system can benefit from the Singaporean experience of attracting foreign investors through effective tax administration, low taxes and variable tax incentives that are oriented on foreign direct investments. As the research of Ukrainian tax system shows, the major problem remains a poor tax administration. The new tax code tries to solve this problem following the approached employed by Singapore: simplification of tax administration through filing of tax return in electronic form, introduction of tax incentives etc. However, the results of these attempts are not still clear. Such innovations in tax administration as granting additional powers to tax authorities in the conditions of high level of corruption in the country¹⁶⁹ may lead to worsening of the tax administration regime. Relatively low threshold for obligatory paying of

¹⁶⁶ Christoph Antons, *supra* note 5 at 229.

¹⁶⁷ MARGARET FORDHAM, DEVELOPING SINGAPORE-TAX INCENTIVES FOR INVESTMENT & EXPANSION UNDER THE ECONOMIC EXPANSION INCENTIVES (RELIEF FROM INCOME TAX) ACT 57 (1985) cited in Christoph Antons, *supra* note 5, at 229.

¹⁶⁸ By now Singapore is a party to more than seventy Avoidance of Double Taxation Agreements that covers all type of income. *Tax treaties*, IRAS.GOV.SG, <http://www.iras.gov.sg/irasHome/page.aspx?id=812#comprehensive> (last visited Mar. 27, 2011).

¹⁶⁹ TRANSPARENCY INTERNATIONAL, *supra* note 37.

value added tax in Ukraine (which is approximately twenty times lower than in Singapore) remains the problem, because it creates additional revenues for the budget at the expense of small enterprises.

3.5 Foreign Exchange Regulations

Singapore currently does not have any exchange control.¹⁷⁰ Although the Exchange Control Act remains in force there is no any control or restriction on transfer of funds since 1978.¹⁷¹ It means that no approval or permission on payment or other transfer of funds to any country in any currency is required. Although unlimited amounts of foreign currency may be brought and taken out from the country, the restrictions on transfer of gold are still in force.¹⁷² Such attitude to foreign currency in the economy of the state confirms the status of Singapore as an economy open to international investments.

The model that is applied in Singapore will be difficult to transplant in Ukraine due to the fact that it faces problems with the balance of payments. Despite the fact that such a policy will lead to substantial relief for foreign investors, it may cause the instability of Ukrainian national currency and consequently lead to worsening the investment climate in long-term perspective. However, such improvements as reduction of control over the purchasing currency for further repatriation of foreign investments, increasing the time-limit on repatriation of export proceeds into Ukraine or improvement of the control mechanism over the prices of exported services will significantly improve the investment attractiveness of Ukraine.

¹⁷⁰ LEE SHENG-YI, *THE MONETARY AND BANKING DEVELOPMENT OF SINGAPORE AND MALAYSIA* 203 (3rd ed., 1990).

¹⁷¹ DAVIDSON, *supra* note 132, at 199.

¹⁷² CLAUDIA CRAGG, *HUNTING WITH THE TIGERS: DOING BUSINESS WITH HONG KONG, INDONESIA, SOUTH KOREA, MALAYSIA, THE PHILIPPINES, SINGAPORE, TAIWAN, THAILAND, AND VIETNAM* 252 (1993) (stating that gold brought and taken out of Singapore must be declared).

Conclusion

The purpose of the thesis was to compare the national legal systems of Singapore and Ukraine focusing on the fields that are important for attracting foreign direct investments. The aim of the comparison was to evaluate the influence of national legislation on the inflow of foreign direct investments and to suggest possible improvements in Ukrainian laws on the basis of the Singaporean experience.

The Ukrainian approach to foreign investments was based on granting additional preferences to foreign investors. With this aim the Law “On Regime of Foreign Investments” provided foreign investors with additional guarantees. What is more, in the first stages of development Ukraine tried to base attracting foreign investments on granting tax preferences to foreign investors. However, as the data on the inflow of foreign direct investments shows, these measures were not efficient. The main obstacle to this, as was analysed in the thesis, were inconsistent regulations of general business activity that made the general environment of conducting business in Ukraine unattractive to foreigners. The model used by Singapore for attracting foreign investments was primarily based on the creation of business-friendly conditions disregarding the origins of the investor. Further attraction of investors in the industries important for the country was conducted through industries-specific incentives.

The research shows that the possible improvement of Ukrainian legislation lies primarily in the improvement of the general laws that regulate business activity in the country disregarding the origins of the investor. Analysis of the major fields of law that regulate business activity in Singapore revealed the ways of possible application of Singaporean models in Ukrainian legislation. As a result, concrete recommendations were made as to improvement of the laws of

Ukraine regulation business activity in the country with the differences in economic and historical background of both countries in mind. Implementation of the recommendations will simplify doing business in Ukraine, improve the investment climate in the country and, therefore, increase the flow of foreign investments into the country.

The analysis of the national legal systems confirmed the idea that national laws affect the inflow of foreign direct investments into the country. What is more, it emphasised that the use of foreign investment incentives in national legislation is not itself enough and the appropriate regulation of general business activity is required to attract foreign direct investments into the country.

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