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SETTELMENT OF INVESTMENT DISPUTES WITH KYRGYZ REPUBLIC: EXPROPRIATION OF INVESTMENTS ON THE EXAMPLE OF KYRGYZ COMMERCIAL BANKS

SENIOR THESIS

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Abstract

On April 7, 2010, the Kyrgyz Republic experienced an unconstitutional change of authority. The interim government that came to power, replacing the ruling regime of Kurmanbek Bakiev, in the circumstances of chaos and confusion, adopted 37 decrees that nationalized 47 objects of private property. Among the objects that fell under the nationalization, there was one bank with 100% of foreign ownership of shares – OJSC "Asia-Universal-Bank" that belonged to a citizen of the Russian Federation – Mikhail Nadel. The analysis of the nationalization carried out by the author of this paper, will demonstrate its full legal invalidity.

First of all nationalization was carried out not on the basis of the laws as it required by the legislation but on the basis of the decrees that did not have any legal force. Secondly, investors who lost their property did not get the opportunity to defend their rights before the national courts of the Kyrgyz Republic, in this way the Interim Government violated the principle of access to justice that is enshrined in the Constitution. Thirdly, the nationalization of such commercial legal entities such as OJCS "Asia-Universal-Bank" was not possible without the consent of the owners of securities to transfer the property rights, from the special registry to bank.

The second case that will also be analyzed by the author, is the case of indirect expropriation (nationalization) of "Manas bank." Under the leadership of the provisional government, CJSC "Manas Bank," was also indirectly expropriated. Prior to the expropriation, Manas bank was owned by Latvian businessman Valery Belokon. The bank was indirectly expropriated under the measures taken by the public authorities of the Kyrgyz Republic such as the National bank of KR, the General Prosecution Office, the Interim Government and national courts. First, the National Bank introduced a temporary administration into the bank, on the basis of the action that was brought against Valery Belokon, because he was suspected in participation of crimes committed by Maxim Bakiev – the son of the former president of the republic. Second, the General Prosecution Office took part in inspecting the bank's assets. The audits

revealed significant violations of banking laws, and criminal proceedings were instituted against the chairman of the board of the bank - Valery Belokon. Third, judicial authorities of the KR, played a key role in this process because they legalized all decisions of the National Bank of the Kyrgyz Republic and the General Prosecutor's Office. Forth, the Interim Government tried to interfere with the judicial competence and tried to exclude the possibility of courts to issue any decisions in favor of investors, who tried to defend their violated rights.

The third case that is also directly associated with expropriation of assets of bank is the case of subsidiary CJSC “BTA bank”(Kyrgyzstan) the 71% of shares in which are belonged JSC "BTA Bank" (Kazakhstan). A distinctive feature of this case is the fact that the bank was legally attacked before the interim government came to power. The expropriation was carried out by a planned scheme of raider seizure. The Ministry of Justice of the Kyrgyz Republic registered two companies (parent and subsidiary) in one day. On the same day the parent company allocated a subsidiary company a loan for the special purposes. This loan was supposed to be used in order to purchase reliable securities on the stock exchange. However, in violation of the terms of the agreement, a subsidiary company bought a Eurobonds of "BTA Bank"(Kyrgyzstan) and thus drew it into a dispute. All three instances of the judicial authorities of the Kyrgyz Republic ruled the case in favor of national companies and ordered "BTA Bank" to return the amount of money paid to it. The paradox of this case is that the national courts, in attempting to resolve the dispute, incorrectly applied the rule of law. Instead of applying a bilateral restitution, they applied a unilateral restitution, thus in fact expropriating the assets of “BTA bank”.

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"Ubi jus incertum, ibi nullum"[1]

Introduction

The twenty first century which has been coming under the aegis of the globalization process has established a new world order. This process has changed universal moral standards and humanistic values of civilization. The essence of the globalization process was successfully defined by American researcher Thomas Friedman who said that: "…Globalization is enabling individuals, corporations and nation-state to reach around the world father, faster, deeper and cheaper than ever before…"[2]

The era of globalization that is characterized by the unification of economic zones and their multidimensional integration and complex development has a tremendous affect on political, cultural and legal unification. Generally this affect could be summarized as follows:

First: it influences the sharp increase of total amount of investments, that are exported from developed countries to less developed;

Second: it influences the interests of legal entities such as credit and insurance agencies and banks, which in the current environment become active agents between businessmen who played on the global services market level. Such agents in today's global market, partnering with shareholders of banks of neighboring states in fact built a global network of capital transactions and thus provide foreign investors with stability of their business' capital worldwide.

Third: in the era of globalization countries with less developed economies, got the chance to achieve the level of development of more advanced states, because businessmen intensifying the competition on the unified markets ultimately influence on the level of good's quality and personal skill's requirements.

All of these three processes lead to complex and universal development of companies all around the world that in turn lead humanity to development and progressively qualitative jump in manufacture, science, engineering, culture and education. However equally with commerce

[1] John Bouvier, "A Law Dictionary, Adapted to the Constitution and Laws of the United States", 1856
[2] Thomas L. Friedman, "The Lexus and the Olive Tree", Published by Farrar, Straus & Giroux April 1999, p. 43

that oriented to the external, global market the developing counties also interested in development of internal market, thus trying to saturate it with competitively able subjects of undertaking. For realization of that strategy, they use different methods such as for example backing of national companies at the expense of republican budget, assignment of special tax treatment regimes, dept forgiveness and payment of interest-free credits. All above mentioned method have both negative and positive sides and practiced widely, however they are just a part of major complex approach for national economy development. One of such processes that will be described in the senior thesis is investment and the major problem that investors fear of – expropriation.

The question of foreign investment attraction, has been relevant for Kyrgyz Republic (further KR) since the collapse of Soviet Union and gaining of independence by KR on 31 august 1999. From the point of view of public international law, 31 August of 1991 is the birthday of the sovereign Kyrgyz Republic, because on that day the republic was officially recognized as having a certain territory, permanent civilian population, sovereignty, self-government. From that day, Kyrgyzstan became an independent sovereign democratic state, committed to the principles of international law.

After Kyrgyz Republic gained independent it faced sharp budgetary. In those times Republican budget deficit amounted to 275 million of rubles, and within the context of the globalization process seriously influence the economical potential of the country, because republic become uncompetitive.[3] In addition in the era of broken economical links, irreparable blow was caused to industrial and commercial state companies, which in accordance to the date collected by National Statistics Committee of KR were not able to maintain the capacity of state enterprise that leaded to their sharp diminishing because of the bankruptcy in 50%.

The government being aware of the whole spectrum of problems and understanding that the volume of foreign investment directly influence on the economical growth of the country and

[3] Law «On republican budget on the year of 1991" on January 31, 1991, N 354-XII, Bishkek

social well-being of citizens and as well be aware that in the context of the globalization countries are competing for attraction of investment and saturation of internal market with competitively able foreign companies five major events occurred in KR that triggered a wide-range campaign to attract foreign investments.

Firstly in June 28, 1991, the Supreme Soviet of the KR has adopted the law N 536-XII "On Foreign Investments in the Republic of Kyrgyzstan" - which laid the foundations of the legislation on investments. Second throughout December 7-18 of 1992 concepts of decentralization and privatization of state property were adopted.[4] Third, in April 1993 Kyrgyzstan has received the status of a developing country, which enabled it to attract subsidies in unlimited amounts.[5] Fourth, in 10 May of 1993 the Kyrgyz Republic introduced the national currency "som", which gave rise to an independent economic policy.[6] Fifth, in 5 May of 1993 Kyrgyzstan adopted the Constitution of the Kyrgyz Republic that defined key provisions of the legislative, executive and judicial power and their competencies.[7] Above-mentioned factors allowed Kyrgyzstan become a full-fledged member of the global investment atmosphere. Nevertheless as it can be seen from the below-listed table # 1, those measures did not allow eliminate the problems with the budget deficit.[8]

The creation of legislation for attraction of foreign investment has been started, however still not sufficiently has changed the situation with the deficit of state budged as well those measures has not sufficiently reflected upon the increase in the total quantity of foreign companies.

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[4] The concept of privatization of state and municipal property in the Kyrgyz Republic for the year of 1993, approved by the Supreme Council of the Republic of Kyrgyzstan on December 16, 1992

[5] The decision of UNEP, XII/11, "Request of Kyrgyzstan for providing it with developing country status under the Montreal Protocol"

[6] Resolution of the Supreme Council of the Kyrgyz Republic N 1182-XII "On the proposal of the Government of the Kyrgyz Republic about the introduction of the national currency", on May 3, 1993, Bishkek

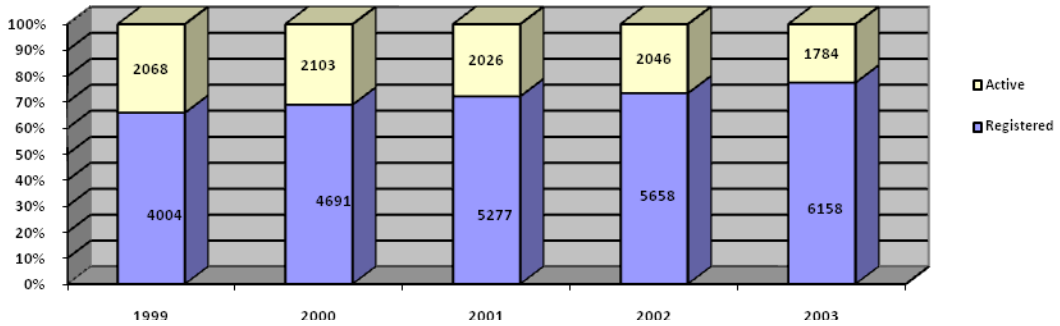
[7] The Constitution of the KR on May 5, 1993, introduced by the Law of the Kyrgyz Republic N 1185-XII on May 5, 1993

[8] National Statistical Committee of the Kyrgyz Republic, "20 years of independence of the Kyrgyz Republic: facts and figures," 2011, page 89, Bishkek

Table # 1 (State budget – 20 years of independence)

State budget (in millions of soms)					
	1991	1995	2000	2005	2010
Income	17,7	2745,9	10029,1	20367,3	58013,2
Expense	24,4	4620,5	11308,2	20143,2	68781,2
Deficit(-),surplus	-6,7	-1864,6	-1279,1	224,1	-10768,0
in % to GDP	-7,1	-11,5	-2,0	0,2	-5,1

Chart # 1 (Companies with foreign interest[9])



Above mentioned tendencies of the investment climate development were triggered with:

1) instability of political system of KR that finally played a big role on decreasing in the rating of investment attractiveness.

Thus since independence the KR faced two revolutions. The first occurred in 2005, when the first President of the Kyrgyz Republic, was forced to resign as a result of capturing the White House and the coming to power of new president - Kurmanbek Bakiev. The second revolution occurred in April 7 of 2010, when the state was governed by the "Provisional Government" (hereinafter referred to as "PG"), which in extremely difficult conditions adopted a new Constitution of the Kyrgyz Republic and literally immediately began to issue decrees on nationalization of those privatized enterprises and companies that were suspected of being owned by the former government. So for example during the reign of "PG" they adopted 37 decrees, which nationalized 47 objects.[10] For the purposes of this work, special attentions will be

[9] Ibid

[10] The nationalization was carried out on the basis of following decrees of the Provisional Government of the Kyrgyz Republic, on May 20, 2010, № 42-51; on May 27, 2010 № 54-55, on June 3, 2010 № 56-61; on June 19, 2010 № 74, 21 June 2010 № 78, on July 19, 2010 № 95, 96, 98-101, 104-106, on August 12, 2010 № 119, 121, on November 3, 2010 № 141-146

paid to: a) the decree from June 7, 2010 № 56 that expropriated OJSC "AUB" main shareholder of which was citizen of Russian Rederation – Mikhail Nadel; b) the decree from June 20, 2010 № 48 that expropriated “Vityaz hotel” LLC, that was the security for three borrower's obligations of the credits issued by CJSC “Manas bank” who’s owner was solely the citizen of the Republic of Latvia Valery Belokon. Over the rule of the provisional government the process about CJSC “BTA” bank(Kyrgyzstan) shareholder of 71% of which was OJSC “BTA” bank (Kazakhstan) was also intensified. The attacks of the provisional government on the banking sector were primarily associated with the suspicion of authorities toward foreign investors that were suspected in the transference of national budget assets to offshore zones in order to use them in personal gain.[11]

2) The laws are short-lived and do not meet the conditions of the present, therefore, they are ineffective and do not provide any protection to investments. Thus for example the constitution has been changed 9 times and the law on investment 3 times[12]

3) Tight fiscal policy and high inflation, which is projected by National Bank of the Kyrgyz Republic experts to be 9% for 2012.[13]

4) High level of corruption illustrated by the international non-profit organization «Transparency International» where in newly created index of corruption, Kyrgyzstan was ranked 164 out of 182 countries in 2011.[14]

5) Usurpation of power, that is proven by an independent international non-profit organization the World Justice Project. In the rule of law index, composed by that organization Kyrgyzstan was ranked 76th out of 96 countries.[15]

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[11] Management of the European Council for International Cooperation of Asian Development in the Kyrgyz Republic, "Note on transparency and accountability in the Kyrgyz Republic", November 2011, p. 7

[12] Zhusupbekova, A., "Law and Entrepreneurship», N 1, 2000

[13] The National Bank of the Kyrgyz Republic, "Inflation Report for the first quarter of 2012," April 2012, p 29, Bishkek

[14] Corruption Perceptions Index 2011, the global civil society organization “Transparency international”, official web-site: http://www.transparency.org/cpi2011/results/, access: April 26,2013

[15] This index is an integral part of the overall scale of "Rule of Law" and is a multi-faceted index, calculated on the basis of data obtained from expert sources and surveys of public opinion in the countries participating in the study, official web-site: http://worldjusticeproject.org/publication/rule-law-index-reports/rule-law-index-2011-report, access: April 26,2013

6) Republic is negatively viewed in the index of expropriation(subscale of the rule of law index). In that rating the Kyrgyzstan take 63 places out of 96 countries on the frequency of expropriation measures' adoption[16]

7) Republic is among countries that are the last competitive economies of the world and it has one of the most worse correlation index about shares of investment among GDP. Thus republic takes 127 place out of 144 countries on the level of state competitiveness[17]

8) Mean value of economical growth of KR over the last decade set on the level of 4% that is the lowest in the Asian region. Weight-average share of total volume of investment was on the level of 17,5 % to GDP, that is lower than in CIS countries(22,4%) and that is closer to the level of the least developed countries(15,7%).[18]

9) Up-to-date secretariat of international arbitrations has already registered 10 lawsuits filed by foreign investors against the Republic.[19]

Oppressing position that is taken by the republic in above-mentioned ratings one more time witness about unfavorable investment climate that has been set up over the last years. In light of current investment climate secretary of international arbitration tribunals' already registered 8 lawsuits that were filed by foreign investors against the KR. Three of those claims are associated with expropriation of commercial banks. The total amount of compensation that the KR will be obliged to pay off on these claims is evaluated in 700 millions of US dollars.

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[16] Ibid

[17] Kalikova & Associates law firm, "Situation Analysis of the investment climate of the Kyrgyz Republic on the basis of the sustainable development strategy of the Kyrgyz Republic for 2013-2017", February 12, 2013, page 2, Bishkek

[18] Ibid

[19] Today the author knows about following lawsuits filed against the Kyrgyz Republic at different times: Rayffeyzen Investment AG (Austria) vs. KR (an international arbitration tribunal Stokgolm), FINREP against the Department of Civil Aviation of the Kyrgyz Republic (the London Court of International Arbitration), Petrobart Ltd (Gibraltar) vs KR (SCC - Stockholm arbitration); Sistem Muhendislic Insaat (Turkey) against the Kyrgyz Republic (ICSID, Washington, DC); Oxus Gold plc against the Kyrgyz Republic (by the rules of UNCITRAL); Centerra Gold Inc (Canada) and Kumtor Gold Company (Kyrgyzstan) vs. KR (American Arbitration Association); Centerra Gold Inc. (Canada) and Kumtor Gold Company (Kyrgyzstan) vs KR (Permanent Court of Arbitration, The Netherlands); ENTES Industrial Plants Constraction (Turkey) vs KR (The Hague (Netherlands), CJSC "Manas Bank" (Latvia) against the Kyrgyz Republic (Arbitration court of Paris (UNCITRAL); JSC "BTA Bank" (Kazakhstan) vs KR, dispute is suspended (investors planned to appeal to the International court of Arbitration at the Chamber by the rules of UNCITRAL); Ilya Levitis (United States) against the Kyrgyz Republic (permanent Court of Arbitration, The Netherlands)

In that context is necessary to analyze the theoretical and legal foundations of future investment disputes. Thus within the framework of current work, the author will analyze the most recent investment disputes that are connected with expropriation of assets of:

a) CJSC “Manas bank”

b) OJSC “Asia-Universal-Bank”

c) CJSC «BTA bank»(Kyrgyzstan) – subsidiary branch of OJSC “BTA” bank(Kazakhstan)

All above mentioned arbitral investment disputes, that are potentially will be initiated in international arbitration tribunals against KR, has their own peculiarities, different background and character of the conditions, within the scope of which they appeared. Thus for example, if the background for first two cases arose in the time of April revolution, then the last dispute was initiated during the peace time. If OJSC “AUB” was expropriated on the basis of the provisional government decree, then CJSC “Manas bank” was expropriated indirectly on the basis of resolution of the National Bank of KR, that revoke the bank’s license and thus allowed to appoint the special administrator in the face of – Debt reorganization and reconstructing agency(DEBRA). CJSC “BTA” bank on the contrary was indirectly expropriated on the basis of well designed scheme of raider’s capture. Along with the scale of that disputes the major interest is provoked by the fact, that still up-to-date there is no universal approach toward treatment of expropriation as measure of the sovereign state that help to cope with dishonest investment activity. It’s necessary to define the sovereignty of the state and its competence to apply legal field toward foreign investment. Thus, the subject of senior thesis will be stated as follows:

Does the State have an exclusive right to exercise its sovereignty to expropriate foreign investments basing solely on the national legislation, or (this right has abstract and relative character) and the order of attraction, establishment and withdrawal of foreign investment is subject to the rules of international law?

In order to give definite answer to that question, the author posted several sub-questions:

a) Whether there is a concept of investment and investment activity concerning the banking sector of economy?

b) Whether the national identity and international status of “foreign investor” shall be defined on the basis of investment treaties?

c) Whether there is a universal concept of investment disputes?

d) Whether there are no differences between concepts of “expropriation”, “nationalization” and “confiscation”

e) Whether the concept of state-recipient protection against dishonest activity of investors is effectively developed?

f) Whether the concept of foreign-investors’ protection against expropriation is adequate?
The author of this work also intended to examine the indirect problems associated with the above concepts. For that purposes the following methods were used: Historical approach - used for linking and analyzing the sequence of events associated with the establishment, harmonization and implementation of law to relations that are emerging on the importation, establishment and liquidation of foreign investments. Survey method - was used to collect information from relevant experts in investment legislation, the representatives of the parties to the arbitration. Logistic method was used to establish relationships and analysis of current legislation and subsequent conclusions. The method of synthesis - for combining previously connected events, rules and concepts for a more complete analysis.

Chapter I. Theoretical and legal background of investment disputes

§ 1. Legal regulation of investment disputes

As it was learned from the brief excursion into the post-history of Kyrgyz Republic, after the collapse of the Soviet Union, the state as a successor in terms of public international law was faced with the absence of legislation that shall regulate the transfer of capital between countries. That is turn demand from the member states to collaborate on creation of various international communities where each step of a party will be regulated in detail by uniformed and harmonious

legislation. The row of measures directed on creation of legislations in the sphere of investment also was triggered by the necessity to restore the broke economical connections between countries of the Former Soviet Union. However the adoption of just national legislation was not quite a good idea. That is why in order to avoid problems with the unification and conflicts between countries, a number of measures were attempted. All of them were aimed at creating a single uniform legislation in the various inter-regional organizations such as Commonwealth of Independent States, the Economic Cooperation Organization, the Eurasian Economic Community, the International Bank for Reconstruction and Development, the International Monetary Fund and many others. In connection with such intentions, governments acting on behalf of the states have developed many conventions and agreements to govern the investment relationship.

From the author's point of view, while considering the sources of legal regulation it's justified to group them by the field of territorial' action into three groups:

1) International treaties and agreements in the field of investments made between the participating countries, supra-national organizations as well as within the United Nations (hereinafter referred to as the UN)

2) International agreements on investment, adopted within the framework of participation in regional organizations

3) The provisions of the national legislation in the field of investment

Up-to-date the Kyrgyz Republic is a party to 84 international and regional organizations. As part of these organizations the Republic, has signed a number of international agreements and conventions, norms which are valid only between the parties. Along with this, the Kyrgyz Republic being independently subject to international public law, has the capacity to conclude on their own behalf, any bilateral investment treaties, and to engage in multilateral conventions and agreements concluded in the world among countries. As an independent state, and having the fullness of sovereignty, the country is entitled to the internal legislative process aimed at the

creation of the domestic legal system. Thus the regulation of investment relations at this stage takes place at three levels.

Legal sources of the first level consist of the Seoul Convention Establishing the Multilateral Investment Guarantee Agency (hereinafter - Seoul Convention)[20]. The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other of 1965 (hereinafter - the Washington Convention)[21], New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter - the New York Convention)[22], UNCITRAL Arbitration Rules of 1977, developed in the framework of the UN,[23] CIS agreement on cooperation in the field of investment activity from December 24, 1993 (hereinafter - Ashgabat agreement)[24]; the bilateral investment treaties on the promotion and protection of investments (hereinafter - BIT)

The Seoul Convention, which established the Multilateral Investment Guarantee Agency (MIGA), which provides the investor who is investing in a country with a developing economy, the possibility of non-commercial risk insurance.[25] However, it appears that at this stage for the Kyrgyz Republic this Convention was never used, because the republic is not an active exporter of investment and thus does not need to insure risks. It also appears that the convention has not been ratified and entered into force for KR.[26] The Seoul Conventions, still have some importance for investors from Russian, Latvia and Kazakhstan, because these countries are parties to that convention, and could use it.

The Washington Convention was the first multilateral agreement that drew public attention to the need to consolidate efforts by states to simplify the system for the resolution of

[20] The Convention is not in force for the KR
[21] The Kyrgyz Republic ratified convention by the Law dated July 5, 1997 N 47, but do not deposited instrument of ratification to IBRD (Convention is not in force)
[22] The Kyrgyz Republic joined the convention by the provisions of the SC of the Parliament of the Kyrgyz Republic on May 17, 1995, NW N 79-1 and SCR of the Parliament of the Kyrgyz Republic on May 31, 1995 P N 62-1, the convention entered into force on March 18, 1997
[23] Approved by the UN General Assembly on December 15, 1976, automatically entered into force for Kyrgyzstan in connection with participation in the United Nations
[24] The parliament ratified agreement by the regulation on April 13, 1993 N 1469-XII, entered into force on 19 January 1996
[25] Convention establishing Multilateral Investment Guarantee Agency, on November 11, 1985, Seoul
[26] Convention is not in force for KR

disputes arising from investment activities. Parties to the Convention must recognize the increasing need of investors for cooperation between investors and states. Participants also recognized the fact that the resolution of investment disputes should not be based solely on the national legislation of the country-recipient and the donor country and thus established a specialized body - the International Centre for Settlement of Investment Disputes (hereinafter - ICSID), which is competent to permit disputes through conciliation or arbitration. At the moment according to the publicly available information gathered from the official website of ICSID, that body has examined 250 cases.[27] Among those cases there is a reviewed dispute Sistem Muhendislik Insaat Sanayi ve Ticaret AS v. Kyrgyz Republic registered in April 12, 2006 with the decision issued in Sept. 9, 2009.[28]

To date, it should be noticed that the major portion of activity of ICSID was during the period after 1990. Over the next 12 years of work, ICSID issued 20 decisions out of 32. It can be explained by the fact, that from the beginning of the establishment of ICSID, countries tried to overrule the jurisdiction of that body, referring more and more to the national court's jurisdiction, however with the increase of BIT conclusion practice, ICSIDE become strong and authoritative court. All these facts demonstrate the gradual establishment of ICSID as an arbitral court.

This gradual establishment also can be explained that reference to this court is not an obligation for the countries. This is connected with the fact, that according to the Article 68 of the Washington Convention, in order for the Convention to enter into force the State party should express its consent to be bound by the provisions of ratification, acceptance, approval and deposit the act is the central depository - IBRD.[29] The Kyrgyz Republic has ratified the Washington Convention by the Law of the Kyrgyz Republic from July 5, 1997 N 47. However, up to now, our country still has not deposited the ratification act to the depositary.

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[27] International center for settlement of investment Disputes(Washington, USA), autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, official web-site: https://icsid.worldbank.org/ICSID/ access: April 26,2013

[28] Ibid

[29] Ibid

In such case, in accordance with Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969, country can not violate main purpose and object of that convention. In other words, it must comply with them, and for this purpose use optional protocol to the Washington Convention that provides for the resolution of investment disputes in any ad hoc Arbitration court that is established on the basis of "additional facilities rules" and could be located only in the countries that ratify the New-York convention[30]. While countries are used additional protocol for dispute resolutions, that practice doesn't consider on behalf of ICSID. The main issue here is that ICSID is a peculiar arbitrational court. Decision delivered by ICSID could be reconsidered only by the ICSID, and those decisions that are delivered by ad hoc tribunal acting on the basis of "additional facility rules" could be reconsidered by any arbitrational tribunal of the world.

Regardless of that, the history of ICSID already knows a precedent in which ICSID recognized its competence citing BIT of KR with the Turkish Republic, nevertheless the KR is not a party to the Washington Convention. Thus, there is a tendency of the parties to give binding force in BIT's to address disputes in ICSID. This was also pointed out by Doronina N.G, in the article "Multilateral treaties and the Russian legislation on investment."[31]

As concerning the precedent, the author thinks that this situation is quite explainable. Despite this situation, according to the official site of ICSID, "appeal to the ICSID made on a voluntary basis, but by agreeing to arbitration, either party can not abandon it unilaterally"[32] Thus it can be concluded that ratification of the Convention, without written notification to the depositary, is an essential factor for it to enter into force. In addition it should be noticed that the KR is a permanent member of the International Bank for Reconstruction and Development that is as it was mentioned is the depositary of the Washington Convention. However parties also

[30] The ICSID Additional Facility Rules, as amended and in effect from April 10, 2006, official web-site: https://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp , access: April 26, 2013

[31] Doronina N.G., "Multilateral agreements and the Russian legislation on investment", Journal of Russian law, № 11, November 2002

[32] The United Nations is the world's largest, foremost, and most prominent international organization, official web-site: http://www.un.org/ru/ecosoc/icsid/, access: April 26, 2013

could refer to Article 25 of the Washington Convention which states that the jurisdiction of the Centre is the resolution of legal disputes arising directly out of the relationship, related to investment, between a Contracting State (or any competent authority of the Contracting State of which communicated by a Contracting State to the Centre) and the person the other Contracting State, provided that the written consent of the parties to the dispute on the transfer of the dispute for resolution to the Centre. The parties have reached such an agreement is not entitled to withdraw it unilaterally.

Thus, the court, in considering the applications received, has the right to decide the question of acceptance of the application, taking into account the true intention of the parties reached through negotiations.

Another question that shall be discussed within the frameworks of forthcoming investment disputes is an execution of foreign arbitral awards. KR signed up the New-York convention in…. The New-York convention is an integral part of international investment law and binding on our state however according to the author of this work; in the framework of upcoming dispute it can play a negative role for foreign investors. Thus for example, it was directly mentioned in the article 1 of the convention, that:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal…"[34]

The norms of the Convention oblige States to consider as binding any requirements of stakeholders in the arbitration.[35] All awards made in favor and against the interests of the state must be unconditionally executed as required. However, the State may refuse enforcement of the decision, in the case where the opposing party is not able to provide evidence that: the parties at the time were incapable, or the agreement on which they based their claim is invalid or the party

[34] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards on the, on June 7, 1959
[35] Ibid

against whom the arbitration process was initiated was not properly notified, or the nature of the dispute in which the decision was rendered by the court is not subject to the provision stipulated condition or arbitrary process did not meet the regulations or the law of the country in which it took place, or the decision was not binding on the parties or has been set aside or suspended the competent authority of the country. (Article 5, paragraph 1, of the Convention) In addition to the above, the decision of the arbitral tribunal may be non-executable when:

"a) the dispute is not capable of settlement by arbitration under the law of that country, or

b) Recognition and enforcement of the award would be contrary to the public policy of that country "[36](Article 5, paragraph 2, of the Convention) – public order clause

Thus, here it is evidence that parties tried to smooth over the affect of the convention. For example, if one of the parties is the State against whom a proceeding, it is logical to assume that in the case of treatment prevailing party in the state, for the purpose of execution of the judgment, the latter will take all measures in order to refute the arbitration decision for non-performance. This dishonesty of the party however could be neutralized. Thus if the party in favor of which decision was delivered will unable to assure the execution of the decision on the territory of the country that losses the dispute, than winner party could request such execution in any country where the KR, has any governmental property or other material assets.

UNCITRAL Arbitration Rules, adopted by General Assembly resolution 31/98 of the General Assembly December 15, 1978, contains the procedural rules aimed at regulating the process of ad hoc arbitration.[37] The use of these regulations is recommended by United Nation to resolve disputes arising in the context of international trade, in particular by reference to the Arbitration Rules of UNCITRAL in the text of the investment agreements, such as the BIT. These rules for example will be applied to the resolution of the dispute with CJSC "BTA" bank and CJSC "Manas bank" in so far, as its known parties didn't agreed to use another arbitration

[36] Ibid

[37] UNCITRAL Arbitration Rules, adopted by General Assembly resolution 31/98 of the General Assembly December 15, 1978

rules. The analysis conducted by the author in respect of that arbitration rules, shows the following picture. Up to the moment there are two versions of that rules. The first one adopted in 1976, the second one – in 2010. Comparative analysis of those versions shows sufficient difference between them. The use of new version is possible in respect to contracts concluded after the august 15, 2010, if parties do not agreed to use old version of the rules. The use of old version is possible when parties give their consent in written to use it. In absence of such consent arbitrators will refer to the presumption of new version. The new version of the rules also contains provision about possibility of the parties to introduce amendments and changes in the procedure of arbitration. The old version does not contain such provision. New version also allows parties to notify the court in written that the award must be final and must not preclude possibility to reconsider it in any another arbitration tribunal. Such innovation may have its negative effect upon the party that has weak legal background to win the trial. New version also has some innovation concerning the notification of the claim and criteria that shall be considered by the arbitrators in respect to initiation of the trial. Now it's obligatory for the party that initiates the trial to have a written contract, provisions of which were violated. That contract shall contain an arbitration clause.

Among the multilateral treaties that were concluded by the KR attention will also be focused on the Ashgabat agreement, in which all the states in the CIS, except for the Russian Federation take part. For the Kyrgyz Republic the agreement entered into force on 19 November 1996, when it deposited its instrument of ratification. This agreement is also aimed at the unification of the investment laws of the member states, and to provide investors with additional safeguards such as protection from expropriation, free transfer of investment income, non-interference of state employees in the affairs of the foreign companies etc. While this agreement will not be discussed in detail the author will reference to it, in terms of compensation of damages that will be claimed by Mikhail Nadel during the arbitral hearing concerning expropriation of OJSC "AUB"

Another large part of investment law composed of bilateral investment treaties (BIT). To date, the Kyrgyz Republic is a party to 20 BITs concluded with states such as Azerbaijan (1997); Republic of Armenia (1994); Republic of Belarus (1999); Germany (1997), Republic of Georgia (1997); Republic of India (1997); the Islamic Republic of Iran (1996); Kazakhstan (1996); China (1992); South Korea (2007), Latvia (2008); Lithuania (2008); Moldova (2002); Mongolia (1999); Pakistan (1995); UK and North Ireland (1994); USA (1993); Tajikistan (2000); Turkey (1992), Uzbekistan (1996); Ukraine (1993); Finland (2003); France (1994); Switzerland (2003) and Sweden (2002).

Overall, the analysis of BITs suggests that these agreements have the following objectives:

1) "create a favorable investment and related activities;
2) to ensure adequate protection of foreign property;
3) to provide investors with free transfer of income from investments;
4) ensure the consideration of disputes in international arbitration"[39]

Such agreements are usually directed toward improving trade between the countries. Investors of the countries receive additional guarantees of investment protection, preferential tax and customs regime of free warranty, repair capital and currency exchange. Within the framework of current senior thesis project, BIT's are the most prioritized source of the law that will be directly applicable toward resolution of potential investment disputes, because of the specificity and direct link that they establish between foreign investor and state-recipient. For that reason further the author, will explore BIT that was concluded by the KR with the republic of Kazakhstan[40]. That treaty will be used in terms of analysis of the dispute with CJSC "BTA" bank (Kyrgyzstan). The BIT of KR with the republic of Latvia will be used for the dispute with

[39] Farkhutdinov I.Z, "International investment law, theory and practice", Wolters Kluwer, 2005, paragraph 6.2, p.134

[40] Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Kazakhstan on the Promotion and Reciprocal Protection of Investments of 8 April 1997, Almaty (According to the Ministry of Foreign Affairs of the Kyrgyz Republic Agreement entered into force on 1 June 2005)

CJSC “Manas bank”.[41]

Another group of agreements are those that concluded within the framework of multilateral organizations. For the purposes of this paper the author will consider agreements concluded within the framework of the Commonwealth of Independent States, the Eurasian Economic Community and the International Bank for Reconstruction and Development.

Since the establishment of the Commonwealth of Independent States(CIS), December 8, 1991 in the Bialowieza Forest (Belarus), was officially recognized by the collapse of the USSR, which has now ceased to exist as a subject of international law.[42] Within the framework of CIS, in 1997 parties concluded the only multilateral investment treaty – the convention on the Rights of the investor. This convention was signed by the Republic of Belarus, the Republic of Tajikistan, Republic of Armenia, the Republic of Kazakhstan, Kyrgyz Republic, and Republic of Moldova[43]. Under Article 22, the Convention provides the basis for the conclusion in the future BITs between Member States and, that in fact will specify general provisions.

The next stage of the integration process in the field of investment in the post-Soviet territory was the formation of the Eurasian Economic Community (EEC).[44] The treaty under which EEC was created has entered into force for the KR in May 30, 2001, following its ratification by the Law of the KR dated May 30, 2001 N 45. The creation of the EEC allows parties to develop specific conditions for implementing a deep level of economical integration. That treaty in fact gives rise to freedom of: movement of goods, services, labor and investment. Implementation of the latter category of "freedom" was enforced by the creation of the Common Economic Space with a special internal investment regime, aimed at creating an effective environment for investors to invest in the national economy in the absence of restrictions on transfer of income and other payments received from investing activities. The first important

[41] Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Latvia for the Promotion and Protection of Investments of 22 May 2008, Riga (entered into force on 4 March 2009)
[42] Gavlo. Y.N, "The collapse of the Soviet Union and the international legal status of the Russian Federation", 2000, p. 1
[43] Ratified by the Law of the KR on March 3, 2000 N 48
[44] The agreement on the establishment of the Eurasian Economic Community, on 10 October 2000

document harmonizing the legal framework for investment activities is an interstate agreement on the Single Economic Space on February 26, 1999.[45] Article 3 of the Treaty, one of the objectives defined by the formation of the effective functioning of the EES internal market for goods, services, capital and labor. In accordance with the first paragraph of Article 51 of the Treaty, "The Parties shall seek to increase the degree of liberalization of capital movements for the improvement of the economic situation of the participants." To achieve this goal, on December 12, 2008, parties of EES signed the Agreement on encouragement and reciprocal protection of investments in the states - members of the Eurasian Economic Community, which came into force for the KR on 24 July 2009. This agreement is important for our country, in light of the investment dispute connected with expropriation of OJSC “AUB”. This treaty, will be applied because the KR still did not conclude BIT with Russian Federation, and Russian Federation in turn does not a member state to all other investment treaties, that signed up on the territory of CIS. For that reason this multilateral treaty is the only connector of two countries[46].

Another important international organization which Kyrgyzstan is involved in is the International Bank for Reconstruction and Development. In a market economy, the bank has developed specific guidelines of advisory nature for the member states. Guidance on the management of foreign direct investment from 1992 requires parties enshrine in national legislation such provisions that touch upon: the admission of foreign investments; regulation about their legal regime for compensation in case of expropriation; the resolution of investment disputes. According to some authors, those requirements are successfully implemented in the legislation of the CIS’s countries[47].

Up to the moment, it should also be noted that those treaties that were mentioned above and which were grouped in three levels of investment management, do not operate in isolation from each other. Their rates are gradually unified and integrated. For example, the integration of

[45] Ratified the Law of the Kyrgyz Republic on January 14, 2000 N 12, entered into force on 10 April 2000
[46] Yegiazarov V.A., "Law on Foreign Investment in the member states of EurAsEC", "Law and Economics", N 11, 12, November, December 2003
[47] See, for example, Guliamov S.S., The legislative base of investment activity in the Republic of Uzbekistan, legislation, Number 12, December 2001

general principles and fundamental rules of law in the area of investment in the national legislation to date has been made possible thanks to Part 3, Article 6 of the Constitution of the Kyrgyz Republic on June 27, 2010 This provision expressly points out that: "…international treaties ratified by the Kyrgyz Republic, and the generally recognized principles and norms of international law are an integral part of the legal system of the Kyrgyz Republic."[48] Based on that provision, the logical question shall be asked: "How shall we differentiate now, the legal force of the constitution, norms of national legislation and international treaties?"

The current version of the Law "On normative legal acts" of 20 July 2009 N 241 contains no provisions on the priority of international treaties over national law, which may result in a conflict. However, the Civil Code on May 8, 1996 N 15 (Article 6) and the Law on Foreign Investments in the Kyrgyz Republic on September 24, 1997 N 66 (v. 2) maintains the rules of priority of international treaties over the provisions of the Civil Code and the Law.[49] Despite the provisions of Civil code and Law on investment in KR, BIT and as well EES agreement, do not have such provisions. However, up to that point, the author could conclude, that constitutional collision concerning the differentiation of norm of national legislation and international treaties, was inclined in favor of constitutional norms. Norms of the constitution have the supreme legal force on the whole territory of Kyrgyz Republic.[50]

On the basis of this, the author has concluded, that international treaties in the sphere of investment that ratified by the Jogorky Kenesh(the parliament) have less legal force then the constitution of the KR, but bigger force then Civil Code and Laws of the KR.

In addition to the constitution of the KR, regulation of investment in Kyrgyz republic is based upon: the Civil Code of the Kyrgyz Republic on May 8, 1996 N 15, the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" dated March 27, 2003 N 66, the Law "On Concessions and Concession Enterprises in Kyrgyz Republic "dated March 6, 1992 N 850-XII;

[48] Constitutions of the KR
[49] Law "On Foreign Investments in the Kyrgyz Republic" on September 24, 1997 N 66
[50] Constitutions of the KR

Law" On Production Sharing Agreements in Subsoil Use "dated April 10, 2002 N 49, the Law" On public-private partnership in the Kyrgyz Republic "dated February 22, 2012 N 7. This code is intended to form the sources of law regulating the activities of foreign enterprises and individuals, as well as enterprises with foreign interests on the basis of national legislation.

Thus for example Article 12 of the constitution recognizes diversity of ownership and ensures legal protection of private, state, municipal and other forms of property. Although property is inviolable, paragraph 2 of this Article provides for cases where the property can be forcibly removed from the owner. According to the cases this include situations where removal can be done in order to protect national security, public order, health or morals, the protection of the rights and freedoms of others. However, the final word on these types of exemptions is reserved for the court, which should settle the question without delay at the request of interested parties. In addition to that, paragraph 3 of this Article contains some exclusion from that right. Thus for example the state organs have a right to nationalize the property owned by citizens and legal persons. Nationalization shall be made by the law that prescribes adequate compensation for the value of this property and other losses. The subject of concern is that the possibility to adopt the laws in KR, delegated only to the Jogorku Kenesh that is the supreme, representative and collegiate legislative body of the Kyrgyz Republic. Nationalization that happened in republic during June 2010, in the result of which the provisional government (PG) nationalized two foreign banks(CJSC “Manas bank” and OJSC “AUB”) demonstrate its complete legal groundlessness, because the PG violated of the major principle of nationalization – nationalization on the basis of the law, but not the decree. Such position could be supported by paragraph 2 of Article 223 of the Civil Code:

> "Features of the acquisition and termination of the right to property, the possession, use and disposal, depending on whether the property is owned by a citizen, legal person, municipal or state property, should only be prescribed by law."[51]

[51] The Civil Code of the Kyrgyz Republic, on May 8, 1996 N 15

Thus, the property owner receives a guarantee from the illegal seizure, which cannot be implemented without statutory basis and without final decision of the court. However, after the events of April 2010, the Parliament of the Kyrgyz Republic, tried to pass a bill "On the nationalized facilities in the Kyrgyz Republic." Basing on the provisions of this draft law, the PG tried to legalize the results of the expropriation that was exercised on the basis of decrees. Accordingly that draft law the PG, also tried to exclude the possibility of citizens challenging the results of nationalization in the state courts. Thus there is evidence of a desire of the PG to smooth over the consequences of nationalization.

Another important law of KR in the sphere of investment is the law “On investment in the Kyrgyz Republic”. It sets the basic principles of public investment policies aimed at improving the investment climate in the country and encouraging the attraction of domestic and foreign investment, by providing a fair, equal legal status to investors and guarantees of protection of their investment from expropriation/nationalization. However, so far the primary purpose of current work is to explore the investment disputes concerning the commercial banks application and analysis of that law will be limited. It is because of the paragraph 2 of article 3 of the law “On investment in KR” where legislator directly pointed out that: “…investments in credit and insurance organizations are governed by separate regulations of the Kyrgyz Republic…”. The analysis of legislation of KR, shows that such “separate regulations” still were not developed. Such huge gap in the legislation could play a negative role in the lights of the potential investment disputes, when the court will define that disputes will be resolved on the basis of the KR legislation. When it happened, the court will raise a logical question whether there is a special law that regulates investment in banking sector of economy in the KR?

For the purpose of current work, it should be noticed, that along with international mechanism of investment dispute resolution, such disputes also could be resolved in the framework of national legislation. Settlement of Investment Disputes under national law could be made if a clear consent between the parties was set in the international agreement. Such rights

of the parties could be enforced in interregional economic courts of the KR, judicial board on economic and administrative disputes in regional and equivalent court in Bishkek and in the Supreme Court of the Kyrgyz Republic [52]. (article 23. part 3 of Civil-procedural code of KR)

As an alternative means to protect the rights of investor, the Jogorku Kenesh of the KR, on July 30, 2002 passed the "Law on Arbitration Courts in the Kyrgyz Republic." Under Article 1 of this law, the arbitration court has the jurisdiction over all cases arising from civil-law relations, including investment disputes. In order to take advantage of the arbitration tribunal parties should stipulate an arbitration clause in the agreement that they conclude. The Arbitration clause is a specific provision of either a separate agreement or consistent part of factual agreement that preclude a reference to the arbitrational tribunal, which will be used for settlement of the dispute between the parties. However, foreign investors have additional guaranties for protection of their rights, and could refer to the arbitrational tribunal without such clause. Thus Article 46 of that law indicates that, "…in the absence of the clause in the investment agreement, the foreign investor has the right to initiate arbitration to resolve the dispute, and consent of the Kyrgyz Republic will be presumed." In this case, the foreign investor may elect to consider the dispute in:

1) The International Centre for Settlement of Investment Disputes

2) An arbitration or provisional international arbitration tribunal (Commercial Court), established in accordance with the arbitration rules of the United Nations Commission on International Trade Law.

Summing up this paragraph, the author could conclude that up to that moment, legislation on the investment quite adequately developed, and thus each investment dispute will find a proper legal background.

[52] The Civil Procedure Code of the Kyrgyz Republic on December 29, 1999 N 146

§ 2. Problematic aspects of the conceptual-categorical instruments

As it was demonstrated previously, the legislation concerning the regulation of foreign investment is largely developed and it reflects the urgent trends emerging in the field of investment. However, out of this practice it is also evident that binding rules de jure are not enough to ensure the process of their implementation de facto.

As recent events in Kyrgyzstan, have demonstrated expropriation/nationalization became urgent measure to combat unscrupulous investors. However, apart from the expropriation, the legitimacy of which still is in question, a number of questions surround the interpretation of key concepts of the investment relations such as: investment, investment entities, and methods of investing. National identity of the investor as well shall be addressed. These issues will be explored below.

1.2.1. Investment

The first issues that should be addressed, within the exploration of current investment disputes shall be the category of investment and investment activity. These concepts are the key to understanding the process of investment and nature of investment disputes. In addition to that it is important to give relevant definition to tangible and intangible assets that fall under the concept of investment, because the investment is subject to a certain parameters of access, legal regime and legal protection. However, the legal definition of investment as pointed out by the leading professor of "International law department" of "Russian academy of justice - A.G Bogatyrev - no easy task.[53] The difficulty in determining the definition of investment is because there are by several kinds and forms of capital and investment.

The French researcher, M. Sornaradzha talked about investment in this way: "From a formal point of view of investment can be defined as the ownership of the property purchased by foreigners in order to monitor the use of the property"[54]. In Russian theory of investment law, the concept of investment was well-defined by L. Voronov. He was the first, scientist who grouped

[53] See: Grishakin D.A., "Legal maintenance of foreign investment" Investment Law, EurAsEC No 1, 2007 p.1-3.
[54] See the work of: Schwarzenberger G., Foreign Investments and International Law. L., 1969, p. 40.

investment (on the basis of how national assets become foreign investment) in three categories that are in closed link with each others. "…First category includes government loans that are either issued for special individual-purposes or to meet the requirements of the state. The second category includes the long-term loans of common and private agencies issued in foreign currency markets. The third category includes short-term transactions for accounting of bills and loans that are performed by the means of local banking institutions…[55]".

Another Russian researcher that tends to differentiate investment into different categories was S.A. Chekunova – a leading specialist of the Department of Legislative Activities of the Ministry of Justice of Russian Federation. She differentiates investment in the following way:

"a) foreign investment - any kind of investment of foreign persons not within the State recipient directed to gain profit

b) financial investment - long-term and short-term investment of companies in the securities of other companies

c) direct investment - investments made by legal entities and individuals, for full or partial control of joint stock companies, which constitutes at least 10% of shares

d) portfolio investment - acquisition of shares, bills and other securities of less than 10% of the total share capital

f) other investments - do not fall under the definition of direct and portfolio "[56]

Among other definitions of investment the author also notes the definition by N.N Voznesenskaya: "Under the investment we should understand such provision of funds to foreign investors that on mandatory ground will force them to be involved in economic activity. Such activity of foreign investor shall be directed not only on satisfaction of self-interest but as well on the development of the economy of the young state and enhancement the economic potential[57]".

[55] See: Grishakin D.A., "Legal maintenance of foreign investment" Investment Law, EurAsEC No 1, 2007 p.1
[56] Chekunova S.A., Legal status of foreign investment in Russia, "Law and Economics", N 5, May 2003
[57] Ibid

Among other theoretician who gave specific definitions of investment, is the definition proposed by A.G. Bogatyrev who objected N.N Voznesenskaya argued that "the question of ownership and acquisition is not essential." Property - this is one of the main elements of the legal definition of "foreign investment" – he stated. From a legal point of view, says A.G Bogatyrev – "foreign investment - is foreign capital, property that is set in a variety of shapes and forms that is taken off the economy of one state and invested in the economy of another state[58]."

According to another Russian theoretician in the field of investment law, S.S Zhilinsky "..by comparing the civil and investment law, we can come to the conclusion that not all objects of civil rights is an investment." [59] For example, he said that: "…the investment could not grasp the category of intangible benefits, such as life, health, dignity, personal integrity, honor and good name, privacy, personal and family privacy, the right to freedom of movement and choice of residence, the right to name etc…"[60]. In principle these are those benefits that cannot be evaluated in monetary terms. Proceeding from this principle, the author has concluded that investment should have a clearly defined monetary value. Direct or indirect ways of evaluation of investment in cash shall be stipulated by the agreement.

At the moment, it appears that there are at least three agreements that will help investors to invest their funds on the territory of another state. The first agreement as it logically could be assumed is an investment agreement. The second one is the contract of sale and purchase. The third one is the contract of finance lease. In all three above-listed agreements parties are able to preclude that investment will fall under protection of international and national legislation in the field of investment. It is interesting however that article 1 of BIT that the KR concluded with the republic of Latvia, in Article 1 for example states that "Any change in the form in which the property is invested or reinvested shall not affect the nature of the investment, if such changes

[58]Kulagin M.I., Legal nature of the investment agreements concluded by the developing countries, Political and legal systems of the countries of Asia, Africa and Latin America. Moscow, 1975, p 40
[59] Zhilinsky S.S., The term "investment" in modern Russian legislation, Legislation, N 3, March 2005
[60] Ibid.

are consistent with the national law of the Contracting Party on whose territory the investment.[61]" Thus the Kyrgyz Republic, while concluding this agreement decided to secure oneself and got the exclusive right in defining the concept of investment. Regarding the potential investment disputes it would be beneficial to our country, in case if national legislation would give clear answer what is investment in banking sector of economy and whether passing of the property from national citizen to foreign shall be regarded as the investment of the last one?

This issue as it was explored, remains controversial in the theory of investment law. According to the Western economical doctrine investment shall include "…only newly created or acquired benefits' costs[62]". Senior researcher at the Institute of State and Law under Russian Academy of Sciences, N.L. Platonova also comes to this view. She argues that the legislation of CIS' countries, though confined to the fact that single transfer of the property from nationals to foreign citizen must be seen as an investment in cases when government is unable to find among citizens those people who are able to adequately manage the object[63]. This conclusion also supported by the fact that national companies have a priority put in the bid for a contract.

On the level of legislation the concept of investment was defined in many investment agreements, acts of national legislation as well as in multilateral investment treaties. However the author is concerned about the specific definition of investment that connected with banking activity. Analysis of legal normative acts of the KR and international treaties remains this question without a clear answer. Thus for example the definition of investment that is stipulated in point 1 of article 1 of the law of the KR "On investment in the KR" on 2003, allows to make a conclusion that concept of investment is used as a general term that include: "... tangible and intangible assets of all types, that is owned or controlled directly or indirectly by an investor and invested in the objects of economic activity for profit and (or) achieving another useful effect..." In addition to that, the provision of the article is not limited by the definition, but as well provide

[61] Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Latvia on the promotion and protection of investments, from May 22, 2008, Riga
[62] Dolan EJ, Domnenkov B., Economy. M. Lazur, 1994, p 184.
[63] Platonov N.L., "Legislative regulation of foreign investment in the Russian economy" N.D.

not exhausted list of methods to invest. Since the provisions of that law do not apply to credit and insurance organizations, for the purposes of these provisions this act can be used as a base and reference points.

In an attempt to answer the above-mentioned question about the investment in banking the author analyzed banking legislation of the KR. This analysis has shows that banking legislation has no legal norms that contain any definition, principles, subjects, forms and methods of foreign investment. This legislation also does not contain any principles about equality of foreign investors, equality of guarantees, protection of the property and their rights, regulations about legal regimes of foreign investment. All these witness about underdevelopment of banking legislation.

Thus the author has no choice but to compare the definition provided by the law "On investment in the KR" with general definition provided by the BIT of the KR with Latvia and Kazakhstan, and definition stipulated in the EES agreement.

In article 1 of BIT with Latvia, the concept of investment implies: «…any types of assets, invested by the investor of one contracting state on the territory of another contracting state, in accordance with the legislation of the state-recipient…»[64]

In article 1 of BIT with Kazakhstan, the concept of investment implies: «…any types of assets, invested by the investor of one contracting state on the territory of another contracting state»[65].

In EES agreement, under investment parties understand: «…tangible and intangible values, invested by the investor of one state on the territory of another state, in accordance with the legislation of the state-recipient»

[64]Agreement between the Government of the Kyrgyz Republic and the Government
The Republic of Latvia for the Promotion and Protection of Investments of 22 May 2008, Riga (ratified by the Law of the KR dated March 4, 2009 N 74)

[65] Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Kazakhstan on the Promotion and Reciprocal Protection of Investments of 8 April 1997, Almaty (ratified by the Law of the Kyrgyz Republic on August 17, 2004 N 151

Thus in international treaties, under the investment parties understand investment of assets. The definition of assets shall be defined by the national legislation. In terms of current work, the only way to acquire property in Joint Stock Company is a purchase of its shares. That's why investment in banks is a purchase of its shares. However the term investment grasps also the benefits that are earned during investment activity. It seems to be that under the benefits from the banking activity, we should count the assets of the bank. Classification of such assets are listed in the "Regulation about classification of assets and relevant assessment to provision for loss", that approved by the resolution of the National bank of the №18/3 on July 21, 2004. Among those assets are:

«- credits

- assets acquired in the result of leasing;

- debt instruments, acquired in the result of factoring;

- investment in securities or in capital of the companies(expressed in the form of shares, financial participation in the capital on invested company);

- interbank credits

- overdrafts, regardless the cause of their appearing

- off-balance obligations (letter of credit, guaranties etc)

- issue of loans under the condition of buyback

- other property that ensure the repayment of credit

- any others assets that are not listed above, but has risk not repayment»

In order to define investment in nature, the author also used guidance on management of direct foreign investment that was developed under the auspices of the World Bank. Analysis of that guidance demonstrates that, the general criteria that shall be taken into account while assessing the assets as the investment are:

- The criteria of deposit - that is, the focus should be on the embedding of certain values in any business

- Criteria of form in the form of capital - this investment should be limited to a form of certain capital

- The criteria for communication - invested capital should produce long-term relationship with the object of attachments, and do not be a short-term

- The criteria for the relationship with the investor - this link should be individually defined, that is there should be no doubt that the person invested the assets on the basis of long-term investment

- Criteria for Investment Management - an investor who put their assets should have a clear control over investments and the ability to influence or to exercise full control over the economic activity of assets

- Criteria of the risk - means typical of business risk of losing the contribution in full or deriving a profit from it

On the basis of the above-mentioned analysis, the author conclude that, under investment in banking we should imply: long-term investment of assets, exercised on one's head by the method of purchasing the shares of bank with aim of exercising control over the bank and its activity, that is limited to the portion of purchased shares and that activity directed on gaining the profit.

Another question that should be discussed, concerns that subject of investment activity. According to the analysis of BITs and EES agreement subject of investment activity could be:

a) physical person

b) legal entity

c) the state

d) state's bodies or legal entities exercising state functions

f) international organization

Thus for instance, in dispute of CJSC "Manas bank" vs. Kyrgyz Republic, Valery Belokon is a physical person, citizen of the republic of Latvia, will be recognized as a foreign

investor; citizen of Russian Federation Mikhail Nadel, former owner of OJSC "AUB" also is a foreign citizen and will be recognized as a foreign investor. Headquarter of CJSC "BTA" bank is located in Kazakhstan, and headquarter (OJSC "BTA" (Kazakhstan)) owned 71% CJSC "BTA" bank will be recognized as a foreign investor, because OJSC "BTA bank" owned a control package of assets.

Nevertheless the legislation define the status of foreign investor in terms of his/her citizenship and place of headquarter residence, up to the moment there are several precedence that witness about assessment of national identity of foreign investor from the position of so called "theory of control". In other words, national identity could be established not by the ownership of the shares of bank de-jure, but control over them de-facto. As it was noticed by I.Z. Farhutdinov «…under theory of control arbitrators take into account whether a physical or legal entity has a sufficient interest in investment and what was their shares or another form of financial participation; whether they have a real possibility to influence on the management of the management of investment or whether they have real control over the board of directors…"[66]. This position was supported by the arbitrators from ICSID during the hearing of the dispute of Compania de Aguas del Aconquija, S.A. & Compagnie Generale des Eaux vs. Argentine, where state-recipient questioned the jurisdiction of the court, because legal entity(plaintiff) did not have a status of foreign investor. The arbitration defined the control over investment, not from the ownership of shares de-jure, but from the control over them de-facto[67]. In the history of arbitration disputes with the Kyrgyz republic, we could meet quite similar case, concerning the Petrobad Ltd Company that was registered in Gibraltar but controlled by citizen of Kazakhstan and Russian Federation. Representatives of the KR, tried to prove that fact but fail to do so and lose the case.

The above mentioned examples, where theory of control was applied, are urgent, in terms of potential arbitration processes initiated against the KR. Thus for example, while hearing the

[66] Farkhutdinov I.Z., "International Investment Law: Theory and Practice" M.: Wolters Kluwer, 2005, p. 145
[67] Farkhutdinov I.Z., "International Investment Law: Theory and Practice" M.: Wolters Kluwer, 2005, p. 157

cases, arbitrators could analyze the potential link between Maxim Bakiev (the son of the former president of the KR, and who has a serious affect on the business community of the country) with Valery Belokon and Mikhail Nadel and recognize the last one to be actors on behalf of the Maxim Bakiev, but not as an independent investors. The arbitrator also could analyze the affect and role of Mukhtar Ablyazov (citizen of Kazakhstan, and former owner of OJSC “BTA” bank, that has a sufficient interest to return the bank) in indirect expropriation of assets of CJSC “BTA” bank (Kyrgyzstan).

Such a situation could in fact be urgent, if we will act on the premise that Kyrgyz republic is corrupted state. In connection with that, we could reasonably set up the question about legality of reinvestment. Thus for example in so far the provisions of the BITs and EES agreement spread their rules not only on first-hand investment but as well on the income that was reached and reinvestment of that income and attracted loans, we should not lose the point that attracting interest-free loans from physical persons and investing them from the face of investor, this loans in fact become protected on international level. Frequently these loans are money that just was stolen from the state budget of the county by state official. Thus in case of expropriation of that assets and ruling the decision in favor of investor, the arbitration in fact will legalize money that was got in the criminal way. The state in turn, becomes responsible for expropriation of means, which was state budget deficient.

1.2.2. Investment disputes
The concept of investment disputes

By defining the law applicable to disputes related to the expropriation of foreign investment, it is necessary to stop on the problem of definition of investment disputes.

In order to answer the question (what is the investment dispute) and do this work get into the sphere of this category, the author turned to the educational textbook "International investment law and processes", which was developed by Academician of Russian Academy of

Science, Farkhutdinov I.Z.. In the classification of investment disputes, by words of Farkhutdinov I.Z., judges of arbitration courts take into account:

1) Criteria of requirements' character

2) Criteria of base of appearing dispute

3) Criteria of subject of the dispute[68]

Criteria for the classification of investment disputes by nature of demands, by the writings of Farkhutdinov, can be divided into private law, public law and mixed, depending on which side, and in regard to whom, the proceedings were initiated. [69] Based on the appearance of investment disputes, disputes can be divided by:

Disputes related to the unilateral acts of the sovereign state, which are intervening in investment activity - changing of conditions for realization of investment activity through changes in the law of receiving State, the expropriation of investments or measures similar to it; other acts of state bodies and officials that infringe upon the rights of investors; provision fiscal incentives and privileges. In this category of disputes State's first role is a sovereign, and in such way it dominates the atittude between receiving state and foreign investor. This observed category of disputes will be characterized by two types of requirements. This is the requirement of the establishment of legal fact (for example, the confirmation of deteriorating conditions of realizations of investment activities) and the requirements for compensation.

"Disputes related with the investment agreement (pre-contractual disputes, the interpretation of conditions of the investment agreement, non-performance or improper performance of party under the investment agreement, the change of the investment agreement, the termination of the investment agreement). In this category of disputes private legal relationships of the host State and the foreign investor, and, therefore, the role of State as the one party of contract is on the front line." [70]

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[68] Farkhutdinov I.Z., International Investment Law and Process: a textbook, "Prospect", 2010, p. 235
[69] Ibid
[70] Krupko S.I., Investment Disputes between States and foreign investors, Moscow, 2002, pp. 19-29

Investment disputes can be divided into three categories, by the subject matter namely:

- Disputes connected with the admission of the investor to implementation of investment activity;

- Disputes connected with implementation of the investment project, i.e. arising directly at implementation of investment activity;

- Disputes connected with the termination of investment activity. [71]

Such distinction of investment disputes, though clarifies the theoretical part of the picture still does not give a precise answer to the question – "What is investment dispute?" To solve this situation, the author also asked the national legislation.

For example, Part 6 of Article 1 of the Law "On investments in Kyrgyz Republic" dated March 27, 2003 N 66 gives the following definition of investment dispute:

"The investment dispute - is a dispute between the investor and the state bodies, officials of Kyrgyz Republic, and other members of the investment activity, appearing during realization of investments."

Such interpretation of the concept of an investment dispute has been used in Article 7 of the investment agreement on the terms of the investment realization in the couple of Kyrgyz-Kazakh LLC "KyrKazGas" JSC "Kyrgyzgaz (nd)", which was approved by the order of the Kyrgyz Republic's government from October 27, 2004 by the order # 691, where it was said that:

"The debate that arose in the implementation of investments on the territory of Kyrgyz Republic by the parties to this Agreement is an" investment dispute ", according the definition of Kyrgyz Republic Law " On Investments in Kyrgyz Republic ".

Analogical definition exists in Article 7 of the investment agreement between Government of Kyrgyz Republic and the oil and gas company JSC "Anbang", approved by the order of government of Kyrgyz Republic from October 23, 2002 by the order # 580, which states that:

[71] Krupko S.I., Investment Disputes between States and foreign investors, Moscow, 2002, p 27

"Any dispute arising between Government and Foreign Investors about this Treaty is called "investment dispute", as it is defined by Law" On Foreign Investments in the Kyrgyz Republic."

Thus, based on the examples mentioned above, it can be concluded that the concept of investment disputes is viewed through several prisms of categories: investment, entities involved in the dispute, and the nature of dispute. This conclusion is also confirmed by the decision of Arbitration Court of Kyrgyz Republic about the case of Petrobart ldt (Gibraltar) against Kyrgyzgazmunyzat. Thus, Parliament deliberately adopted the law in order to exclude the possibility of Petrobart to use the remedies provided by the investment legislation. Despite the position of the Arbitration Court of Kyrgyz Republic, Pertrobart still referred to ICSID, whose arbitrators found that a dispute, arising out of legal relationships of Kyrgyzgazmunyzat and Petrobart belongs to investment sphere. They did it, because the definition given in the Energy Charter Treaty of European Union touches the cases of Petrobart.

The Court also concluded that the application of the law "On the interpretation of the term foreign investment " in the Law of KR "On Foreign Investments in Kyrgyz Republic "violates paragraph 1 of Article 3 of the Civil Code of Kyrgyz Republic, which states that:" ... acts of civil law are not retroactive and apply to relations arising after their realization. "

As for the subjects of investment disputes, it became apparent from the above examples, they can be as State, legal and physical subjects and bodies of the state (executive, legislative and judicial branches), as well as bodies performing governmental functions. This argument is confirmed by the provisions of paragraph 8 of the free economic zone "Bishkek":

"Trade disputes between foreign investors and the general management by the two side agreement can be solved in the city of Washington (USA), in accordance with the International Convention on investment disputes." [72]

Despite this, as it was mentioned earlier, it should be borne in mind that the law of

[72] Approved by the Government of the Kyrgyz Republic on November 11, 1995 N 474

Kyrgyz Republic "On Investments in Kyrgyz Republic", does not apply to investments related to banking, insurance, credit agencies. Thus, it seems that the concept of investment disputes used in the examples above, will not be applicable to disputes involving foreign banks. In this connection, the concept of investment disputes should be found in international law.

To determine the nature and character of the investment dispute, it is appropriate to refer to the norms of international law, defining this concept. For example, considering the ICSID going over its jurisdiction should take into account and assume that in accordance with Article 25 of the Washington Convention several definitions are understood as:

"Disputes arising in connection with foreign direct investments between a Contracting State and those of the other contracting States, meaning:

a) investment disputes arising from relations connected with foreign investments;

b) disputes between Contracting States and foreign private investors;

c) the legal disputes, concerning the nature and volume of legal rights and obligations of the parties, the conditions and the amount of compensation for the breach of obligations under the investment contract. "

For example, analysis of BIT of the KR with Latvia and Kazakhstant, as well as EES agreement shows that in these international treaties there is no direct direction of criteria according to which a dispute can be considered an investment dispute, but, in general, it can be concluded that the dispute may be considered an investment in the case where:

1. Investor is a natural or legal person of a foreign state
2. The above investor makes investment (regardless of form) a certain capital in the KR for profit gaining
3. The controversy associated with a specific capital invested by the investor

After analyzing the nature of the dispute, the author came to the following conclusions:

The controversy of "AUB" with Kyrgyz Republic will be considered an investment, if it is proven that Mikhail Nadel is a independent foreign investor, acting on his own, was not bound

by the principle of authority and subordination with Maksim Bakiyev and really could not control the adoption and enforcement of investment. If the answer to this question is yes then the dispute of "AUB" vs. the KR, can be classified as:

a) mixed, because action is brought against Kyrgyz Republic on the basis of Article 9 of the "Draft Articles on the International Responsibility of States for internationally wrongful acts" of 2011

b) related to the unilateral act of a sovereign state – based on the decree of the PG from June 7, 2010 № 56

c) associated with the termination of investment activity on the basis of a complete dismissal of Mikhail Nadel of his post as chairman of the bank, and the transfer of the bank under the control of a special administrator - DEBRA.

The dispute of CJSC "Manas Bank" against KR can be recognized as an investment dispute, if it is proved the lack of control from the part of Maxim Bakiyev. The dispute can be classified on the following grounds:

a) the nature of the requirements of the dispute is mixed

b) by the criteria of subject the dispute related to discontinued investing activities

c) on the basis of a dispute related to the unilateral act of the state - the decree of June 20, 2010, № 48 which was nationalized recreation center Vityaz, which marked the beginning of the process for indirect expropriation of the bank, through the deliberate bringing it to bankruptcy or revocation of the license and appointment of a special administrator - DEBRA. In this case, in determining the nature of the dispute, the court is expected to focus on the final result, which was achieved by a number of measures taken by the National Bank of Kyrgyz Republic in respect of CJSC "Manas Bank". The first thing you should pay attention to is the fact that 100% of the shares of "Manas Bank" owned Valery Belokon, Latvian investor. Second, the decree of the interim government of June 20, 2010 № 48, which concerned the nationalization of recreation center Vityaz, although it was not directly aimed at the expropriation of the bank, yet

spawned a series of events associated with the loss Valery Belokon control over the bank. So for example, a recreation center Vityaz was a mean of securing the obligations of three borrowers. In terms of the banking law, as will be seen further it is acceptable. However, all three borrowers were prosecuted on the basis of their relationship with Maxim Bakiyev. The solution in these cases were made and sentences took effect. Once this has been proven during the trial, the National Bank has filed a lawsuit to revoke the license of CJSC "Manas Bank" and the appointment of a special administrator, on the grounds that the bank did not comply with the standards for minimum size acceptable risk on loans to affiliators. All three were recognized borrower affiliation, based on their mutual friend - Maxim Bakiyev. Based on the above, National Bank of Kyrgyz Republic organized a comprehensive review of the bank in which the bank has not set many standards complying with National Bank of Kyrgyz Republic and in particularly the law on the financing of terrorism and money laundering of criminals. The paradox of this situation is that the early testing of the bank, never confirmed this information. For Valery Belokon case was brought by a number of economic crimes and issued default judgment to imprisonment. Thus, there is a situation in which Valery Belokon - foreign investor, lost his investment basing on the decision of National Bank of Kyrgyz Republic, speaking on behalf of the state and to representing it. Thus, the loss of control over the investments originated by the actions of the National Bank of Kyrgyzstan - the state's body of power.

The controversy of "BTA" Bank (Kazakhstan) against KR can be considered as an investment dispute because:

The dispute arose over the foreclosure of the amount paid for the purchase of Eurobonds and the payment of interest on them. As noted earlier bank securities are its assets and get set for the category of investment in BIT of the KR with Kazakhstan. Eurobonds of OJCS "BTA" Bank (Kazakhstan) issued by Dutch company TuranAlem Finance BV (« TAF BV ») posted on behalf of OJCS" BTA "Bank (Kyrgyzstan) and acquired by subsidiary " Investment Central Asia

Company llc"(Kyrgyzstan) in order to execute orders of JSC «Investment Holding company» (Kyrgyzstan) are investments of "BTA" bank.

a) Dispute relating to the foreclosure of securities of a foreign bank is an investment. This dispute was resolved in national courts.

b) the matter has to be completed within the walls of the International Arbitration Court at the Chamber of Commerce, connected with the violation of the legislation of the Kyrgyz Republic and the unlawful actions of state bodies of KR's courts as well as subjects of business entities. The actions of the judiciary (state judiciary) unanimously satisfy claims CJSC «Investment Holding company» and has considered the statement of claim filed in the Bishkek City Court, in the absence of the defendant in the face, CJSC "BTA" bank, and does not allow him to challenge the decision Court indicates the indirect expropriation and deliberate policy aimed at bringing to the bankruptcy of CJSC "BTA" Bank (Kazakhstan).

Thus, in relation to the results achieved, the dispute related to the violation of the legislation of the Kyrgyz Republic by the judicial authorities of Kyrgyz Republic, as well as business entities, can be considered an investment dispute.

1.2.3 Expropriation

The central concept, discussed in this paper is the concept of expropriation. As it was previously stated opposition of the investors to the state and its authorized employees in truth, could be considered as the greatest battles in terms of private international law. Possibility of adoption of not quite adequate measures by the state in different situation in relation to the investors in majority cases are considered to be the main and most painful risk of foreign investors. The expropriation of private property by foreign investors is a now standing problems in several countries with market economies. Changing managers in private companies through expropriation, without payment of adequate compensation to investors of course, has a negative impact on the conduct of a successful investment policy.

Measures of forced alienation of property in favor of the state in the theory of civil rights called differently. Depending on individual exceptions or additions such measures could be called: expropriation, nationalization, requisition, confiscation or disposal. [73] The legal term "expropriation" is not found in the national legislation with the exception of the Law "On Foreign Investments in the Kyrgyz Republic", where it is used as a general term to refer to the term "nationalization". The term nationalization comes from the Latin natio - meaning - the people. Economic theory defines the term as the transfer of private property to the state when the state believes that it has the ability to manage the private property more effectively than the investor. However, in case of nationalization this transition is justified when the state declares that it will use this property for public benefits. [74]

As about the institute of public benefits, the author could state that in the frameworks of current thesis in relation to Manas and AUB banks the general prosecution office of KR laid an accusation, that Valery Belokon and Mikhail Nadel being a chairman of their banks used the money from the republican budget for their personal gains. As it's commonly knows the main purpose of the state is to develop the major institutes of social democratic states such as: culture, health, wealth, education, medicine, pensions etc. All above mentioned goals are of high priority for the state, however in order to develop them, the state used money that are paid by the taxpayers. As it's publicly known, a lot of state money was deposited in Manas and AUB banks. The chairman of those banks has a real possibility to transfer that state money to offshore zones, in order to use them further in personal aims, thus preventing the state to exercise its functions effectively.

In article 288 of Civil Code of Kyrgyz Republic, the term "nationalization" defined as follows: "Handling of property belonging to individuals and legal entities in public ownership through its nationalization is allowed only on the basis adopted in accordance with Constitution, the law on the nationalization of the property and with the compensation to the person whose

[73] Farkhutdinov I.Z., International investment law, theory and practice, Wolters Kluwer, 2005, pp. 175
[74] Rayzberg B, Lozovskiy L., Starodubtseva E, Modern Dictionary of Economics, M., 2001

property has been expropriated, compensation includes the value this property and other damages caused by its removal. [75] "Paragraph 2, Article 12 of the Constitution of Kyrgyz Republic also points out that" the appeal to the state ownership of property owned by citizens and legal persons (nationalization) is based on the law with the compensation value of the property and other losses"

Generally in western literature the term “expropriation” is translated as confiscation or seizure. The term of “expropriation” derived from two Latin words: “ex” means – to take away, and “proprius” – means the property. It is necessary to clarify that the expropriation is a paid or unpaid forced alienation of certain property individually produced by the administrative authorities. Nationalisation - a form of expropriation, that exercised by the legislative bodies. In order to nationalize the property the legislative bodies shall adopt the special law about nationalization. In the provision of that law they shall indicate that nationalization is conducted for the public purposes and point out what are they.[76] However, PG while issuing a decree on July 19, 2010 № 103 tried to modify this well-established definition of “nationalization” term. In the above mentioned decree the term “nationalization” was defined as: "... the forced seizure of property without payment of compensation to the previous owner" (paragraph 3 of the decree). According to that decree, PG also tried to establish that all provisions about nationalization in all legal normative acts of the KR shall correspond to the definition of nationalization that is given in that decree.

In so far the term “expropriation” is mentioned in the title of this paper, the author tends to use this definition further. Such tendency also characterized by the fact that "nationalization" conducted by the Provisional Government in June 2010, has nothing to do with nationalization because it was done in violation of the law. First of all nationalization was carried out by not legitimate authority, which does not have the legislative power (as required by paragraph 3 of

[75] The Civil Code of the Kyrgyz Republic, on May 8, 1996 N 15
[76] Ayupov A.Z., thesis on international law and the domestic regulation of foreign investment," in 2007, the Order of Friendship of Peoples of the National Academy of Foreign Trade

Article 12 of the Constitution, as well as by Article 288 of the Civil Code of Kyrgyz Republic) to adopt the laws about nationalization. Secondly, nationalization was carried out on the basis of the decrees that are considered not to be legal normative acts, and that are in accordance with the Law "On normative legal acts" of 20 July 2009 N 241 not entail any legal consequences. Thirdly, decrees of the PG, in violation of paragraph 6, subparagraph "a" of the regulation "on the Ministry of Justice of the Kyrgyz Republic" dated December 15, 2009 № 746 were registered in the state register of legal normative acts of the Kyrgyz Republic, regardless the fact the they do not have any legal force. This is a direct violation of the norms stipulated in that regulation.

However, in order to make the picture of the “institution of seizure” to be more complete the author shall also describe the concept of confiscation that from the first sight could be seen as similar to the concepts of nationalization and expropriation. The exact definition of confiscation is stipulated in article 52 of the Criminal Code of the KR. Confiscation concept is defined as forceful unpaid alienation of property of a convicted person in favor of the state. The prosecutor shall prove that confiscated property was either used as a tool for a commission of a crime or was received in the result of its commission. However confiscation of property shall be limited by the exact list of property that could not be alienated in any circumstances. The exhausted list of property that could not be alienated is adopted by the parliament. The peculiarity of confiscation is characterized by the fact, the in accordance with the Criminal Code only the court is authorized to adopt the decision about confiscation. Confiscation is this situation is seen as an additional measure of punishment for grave or gravest profit-motivated crimes committed by the convict. However, up to date, the idea that confiscation could be conducted exclusively on the basis of the court decision is arguable. According to the part 2 of article 287 of the Civil Code of the KR, confiscation also can be exercised in the result of administrative procedure. The author of the thesis, still have no any information about constitutionality of that provision in the KR. However in the experience that Russian Federation has, such question already has been raised for several times. Thus for instance, while evaluating the article 276 of the Customs Code of the

Russian Federation, provision of which also stipulates the possibility to alienate the property of perpetrator without court decision, the constitutional court of the RF stated that confiscation can be conducted exclusively on the basis of the court decision, regardless of that provision of the Customs Code allows custom's bodies to confiscate such property without any court decision. Thus for instance the constitutional court by the reference to the part 3 of article 35 and part 1 of article 46 of the constitution of the RF, stated that: all governmental bodies of the RF while evaluating the basis for confiscation must refer to the court. Thus the constitutional court, recognize all articles that allow such practice, as unconstitutional.[77] Nevertheless these is a clear position of constitutional court of the RF in respect to that issue, we should remember that decision of that court have no any legal force on the territory of the Kyrgyz Republic. In the KR, we have no such practice, that why it seems to be that the question of legality of confiscation of property in the absence of court decision is unresolved and stay disputable. This question is urgent in the framework of current thesis, because majorly representative of the KR in investment disputes will try to prove that alienation of foreign investments form their legal owner, was not a measure of expropriation but rather is was a measure of administrative confiscation. Such position if it will be proved will deprive investors to request compensation for such alienation. This question however will be discussed in detail in chapter II of the thesis.

Thus basing on the above mentioned facts, the author assumes that the term "expropriation" appears in the title of the thesis, is more accurately determine the nature of the state measures aimed at the removal of foreign investment.

Expropriation conducted by the Provisional Government, clearly demonstrates that expropriation can be classified on direct and indirect. Direct expropriation involves a one-time withdrawal of all property from a foreign investor (for example as a result of corporate raid or adoption of a special law about expropriation by the parliament), preventing him from making any kind of economic activity in general. Indirect expropriation, however, implies a coherent,

[77] Determination of the Constitutional Court of January 13, 2000, N 21-O - NW, N 13, p. 1427

meaningful and effective blocking of investors for individual functions which should ultimately lead to a complete paralysis of his business. In the opinion of the judge of the Supreme Arbitration Court of the Russian Federation - T. N. Neshataeva, indirect expropriation is exercised in three forms:

a) by virtue of the tax authorities;

b) by virtue of the actions of public officials;

c) by the legalization of arbitration tribunal's decisions that violate the rights of foreign investors[78] .

The author thinks that this opinion shall be supplemented with another two examples. The first one is indirect expropriation exercised by virtue of illegal state court's decision (BTA bank case). The second one is indirect expropriation exercised by virtue of the National Bank's regulation without possibility to argue its decision (Manas bank case)

In international law there are also some criteria that allow distinguishing direct and indirect form of expropriation. So as an example, the author analyzed the North American Free Trade Agreement (NAFTA) and the Agreement of the Association of Southeast Asian Nations (ASEAN) [79]. These agreements are not binding on the KR, as it is not their member-state, yet these agreements can be used to analyze the criteria for indirect expropriation. Thus when arbiters of the international arbitration tribunal analyze indirect expropriation they evaluate:

a) economic damages, made by government regulation, which in itself does not prove the fact of expropriation. So in a case of Manas Bank, expropriation of recreation center Vityaz, was the essential fact to undermine the activities of the bank

b) the extent to which the measure affects the specific reasonable expectations as related to investments. For example, in the case of OJCS "BTA" Bank of Kazakh investors have not

[78] Transcript of the conference given by the Institute of Legislation and Comparative Law under the Government of the Russian Federation on the theme of "Private International Law and investments" on October 31, 2007

[79] Alexei Z., "Indirect Expropriation and uncompensated measures of state regulation: the problem of qualification", Journal of International Law and International Relations, 2012 - № 3

been able to refute the claim of CJSC «Investment Holding company» in the national courts of Kyrgyz Republic, and therefore had to turn to international arbitration

c) the nature of the ongoing governmental regulations. Here arbitrators should analyze the investment policy of the republic where expropriation happened. Thus for example, it was proved that provisional government while exercising expropriation of foreign investment, tried to prohibit the national courts of the KR to issue any decision concerning expropriation in favor of foreign investors.

Expropriation can also be differentiated by the nature of its legitimacy on the basis of whether compensation for alienated property was paid or unpaid to investors. The answer on the central question posed in this paper was given by the author based on two main theories established in the theory of investment law.

The first theory that was analyzed is called the theory of "international minimum standard" ("Hall doctrine"). This theory also called as a position of developed countries.[80] The doctrine contained in the letter that was send by the General Secretary of the USA – K. Hall to the government of Mexico. The letter stated the need to introduce rules which allow an expropriation only in "the public interest of the state", "without discrimination" and with payment of compensation that shall be "prompt, adequate and express actual value of compensated property" for investors. According to this doctrine, the nationalization in State should be based on international law minimum standards, therefore this doctrine limiting sovereignty of developing countries. In addition, foreign investors could take advantage of the right of diplomatic protection in the event of a serious violation of their rights by the recipient-state. Regardless the last point in 1924 during the discussion within the walls of Permanent chamber of the International Court of Justice that hear the case of Mavrommatis (Greek V. The

[80] Kunz J. Mexican expropriations//New York University Law Quarterly Review. Vol. 17. 1990.P. 327-345.

United Kingdom), it was stated that from the point of international law, diplomatic protection - is exclusively the right of the state, rather than an individual or a company.[81]

The second theory that was analyzed is called a theory of the "national standard" (or "Calvo doctrine"). This doctrine is more adequately express the demands of developing countries. In "Calvo doctrine" it was emphasized that the standards of expropriation is not denied, but the expropriation shall be carried out exclusively on the basis of national legislation. Compensation to investors is paid only when this compensation stipulated by national law.

At the heart, Calvo doctrine based on the principles of national sovereignty, which are based on:

1. The principle of equality of foreign investors and domestic legal entities and individuals as well as regulation of their activities by domestic law - providing fair and equitable treatment of investment (national treatment). Such provisions provided for example in Article 1 of the BIT of the KR with Kazakhstan, Article 4 of EES agreement, Article 2 of the BIT of the KR with Latvia Republic

2. Basically, there is no obligation to pay compensation to foreign investors as a result of nationalization committed during the civil war or during any other event beyond the governmental control. Outline of the provision stipulated in Clause 2, Article 12 of the Constitution, which says: "An involuntary taking of property without a court order is allowed in cases provided for by law in order to protect national security, public order, health or morals, or the rights and freedoms others. The legitimacy of such withdrawal is subject to mandatory review by the court."

3. Basically, disputes arising from investment activities shall be resolved exclusively in the national courts.[82] Such position is not supported by those investment treaties that the KR concluded with different countries. It could be explained by the desire of the investors to exclude

[81] Farkhutdinov I.Z., International investment law, theory and practice, Wolters Kluwer, 2005, § 3.1.2
[82] Ibid

the dispute settlement from the jurisdiction of state-recipient. This will grant them a guarantee for fair and objective dispute resolution.

Basic points of Calvo Doctrine were supported by the United Nations. Thus, for example in accordance with paragraph "e" part 4 of the UN Declaration on the Establishment of a New International Economic Order adopted by resolution # 3201 (S-VI) of the General Assembly on May 1, 1974, developing countries have the right to exercise their sovereignty over its natural resources and all economic activities in full extend "... In order to protect national resources, each state has the right to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the state. No state can be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right ...".

However, in paragraph "c", Part 2, of article 2 of the Charter of Economic Rights and Duties of States adopted by the resolution # 3281 (XXIX) of the General Assembly on December 12, 1974, we still can found provisions that provides for certain exceptions to this right. Such exceptions first of all touch upon such concept as confiscation during expropriation. This confiscation shall be paid in accordance with all laws adopted within a given country. However, in the continuation of this, provision states that: "... In any case where the question of compensation gives rise to a dispute, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless all States concerned voluntarily and by mutual agreement is not reached agreement on the other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means. ".

Thus, on the basis of the analysis above mentioned doctrines and their comparison with the international agreements that concluded by the KR with different countries the author conclude that up to date none of the doctrines are applied exclusively in a separate form. On the contrary there was a unification of their basic ideas. However, because the basic principle that

State is free to determine the procedure for attraction, management and alienation of foreign investment remained in force, the author came to the conclusion that Kyrgyz Republic has the right to exercise its imperative powers to expropriate foreign investment.

As it was previously stated in so far the concept of compensation is closely connected with the concept of expropriation it should be analyzed in detail in respect to the current investment disputes. As established by the author, since the implementation of expropriation is the sole prerogative of the state-recipient, the question of whether the compensation should be paid or unpaid shall also be based on the national legislation. This position was confirmed by the decision of International Court of Justice, which does not recognize its jurisdiction to determine the dispute related to the nationalization of Iran Anglo-Iranian Oil Company in 1951, defended by the United Kingdom[83].

Section 2, Article 12 of the Constitution of the KR says that:

"Alienation of the property for public purposes specified in the law, can be made by the court with a fair and first ensuring reimbursement of the property and other damages caused as a result of alienation."

"Nationalization of property of individuals and legal entities, shall be based on the law, that shall prescribe compensation for that alienation or other damages."

Thus, based on the provisions of Constitution, it can be concluded that nationalization should be made on the basis of the law, which required a preliminary compensation of value of alienated property. This value shall correspond at least to the minimum market value of the property, that shall be fixed on the moment when decision about expropriation was adopted. This compensation shall be paid without any delay. Such conclusion also supported by the Article 6 of the Law "On Foreign Investments in the Kyrgyz Republic" dated February 7, 2003. Thus, in particular this law states that in cases of the ongoing expropriation in the public interest,

[83] Walde T.V., International investments in accordance with the Energy Charter Treaty, 1994, The Energy Charter Treaty: the path to investment and trade in the East and the West, p. 234

compensation shall be based on non discrimination principle in accordance with existed legal order. Compensations shall be paid:

a) timely

b) properly, in other words equivalent to fair market price at the date of the decision on the expropriation and shall not reflect any change in price, which fell due to leakage of information to the mass media

c) real, and include loss of profit, that is, compensation should be made in the terms agreed by the parties, payable in freely convertible currency. In case of violation of the payment of compensation, the investor has the right to state the requirements for payment of interest on the value of the expropriated property to the London Interbank Offered Rate (LIBOR) in U.S. dollars, the relevant period for which compensation is calculated. If you exceed the time required for payment of compensation for one year, than investors have right to use twelve-month rate of LIBOR, that as the rule greater than for example six-month rate. On July 1, 2011, the rate of LIBOR (12) was set at 0.7295%, and July 1, 2012 is was equal to - 1.0707. [84]

According to the article 288 of the Civil Code of the Kyrgyz Republic, the reimbursement should include:

a) the cost of nationalized property

b) losses caused by alienation

Based on the analysis of above mentioned provisions and taking into account the previous findings, regarding that international treaties ratified by the Parliament have less legal force than the Constitution but more than CC of the KR as well as laws relating to investment relations, and given that the provisions of Law of Kyrgyz Republic "On Investments in Kyrgyz Republic" does not apply to investments in the insurance, banking, credit institutions the author believes

[84] LIBOR is the average interbank interest rate at which a selection of banks on the London money market are prepared to lend to one another. LIBOR comes in 15 maturities (from overnight to 12 months) and in 10 different currencies. The official LIBOR interest rates are announced once per working day at around 11:45 a.m. (London time) by the British Bankers' Association (BBA). Official web-site: http://www.global-rates.com/interest-rates/libor/libor.aspx access: April 26,2013

that while calculating the compensation that shall be paid to investors the following treaties will be used:

a) in dispute of KR with CJSC «Manas Bank" – BIT of the KR with the Republic of Latvia

b) in dispute of KR with OJSC "BTA" Bank (Kazakhstan) – BIT of the KR with Kazakhstan

c) in dispute of KR with OJCS "AUB" bank – EES agreement

Analysis of Article 5 of the BIT KR with Latvia shows that expropriation should be conducted on the same basis as provided for in BIT of KR with Kazakhstan.

Compensation must:

a) be paid without delay. In case of delay, the costs due to changes in the exchange rate, resulting in delays, bears the Contracting Party on the territory of which the investment was carried out. It is assumed that the date of payment of compensation should be the date of the decree of June 20, 2010, № 48, under which the nationalization of recreation center Vityaz happened. This recreation center was used as security for repayment of loans that Manas Bank granted to three borrowers. Later on these three borrowers were recognized as affiliated people, which resulted in a violation of the regulations of the NBKR by the Manas bank in terms of the sum of money that potentially can be given to one borrower. In so far all three borrower were recognized as affiliated people, the Manas Bank violate this provision, because when people are recognized as affiliated all money that were borrowed to them shall be summed up. The NBKR then in turn withdraw the banking license from the Manas bank and appointed a special administrator without possibility for investor to overrule its decision in the national court. Thus NB RK indirectly expropriated foreign investment of Valery Belokon

b) be equivalent to the current market value of the expropriated investment from the time before the expropriation took place. The changes occurring in the cost should not affect the current market value as the expropriation became publicly known earlier;

c) be fully realizable and freely transferable;

d) include interest on the commercial rate established on a market basis for the currency in which the compensation will be paid from the date of expropriation until the date of actual payment.

Analysis of articles 4 and 6, with the BIT of the KR with Kazakhstan, shows that in general, an expropriation is allowed in cases when:

a) it is in public interest

b) is based on the domestic law of the procedures

c) is carried out without discrimination and with adequate compensation

Compensation should:

a) correspond to the market value of the investment on the date preceding the date of the adoption or promulgation of the decision on expropriation. Such day as may be considered to be the day when supervisory collegiums of the Supreme Court of the KR issued a final verdict on the BTA bank from 11.09.2009

b) including interest relevant to current interest rate investments and calculated for the period between the date of expropriation and the date of actual payment of compensation.

c) to be paid in the currency in which investments were exercised by the investor. This compensation shall be paid by the dominant exchange rate at the time when the decision to expropriate were adopted

Analysis of Article 6 of EES agreement suggests that the compensation that shall be paid to a citizen of the Russian Federation - Mikhail Nadel, should be:

a) carried out on the principle of non-discrimination

b) paid immediately after the adoption of the decree from June 7, 2010 № 56, which did not include any provision about amount of money that supposed to be paid to him as an investor

c) adequate, that is to correspond to the market value of the expropriated investment and the investor's income on the date immediately preceding the date of their actual expropriation. According to the latest information provided by the AUB bank , up to the end of the April 7,

2010, the assets of the bank amounted in 24.1 billion soms, and on April 8, 2010 when the National Bank of Kyrgyz Republic has introduced a temporary administration the assets were evaluated in 13.6 billion soms[85].

d) compensation was to be paid immediately in a period not exceeding 3 months in a freely convertible currency. In case of delay, sum of compensation will be increased on the amount of percentages that will be calculated from the date when compensation was supposed to be paid until the day when it officially was paid. These percentages will be equal to the rate of the national inter-bank market on the actual provision of loans in U.S. dollars for up to 6 months or in the manner determined by agreement between the investor and the State of the recipient. Thus, compensation for the expropriation of "AUB" was to be paid to the September 7, 2010. The interest rate at which interest is payable on February 7, 2010 was 0.15. [86]

An interesting feature of the EES agreement is that among its provisions there are no any norms that allows investors from Russian to request the compensation of a lost profit. The author of the thesis assumes that this gap will be filled by the reference to the Paragraph 2 of Article 4 of the EES agreement, which states that: "The treatment specified in paragraph 1 of this article (fair and equitable treatment), shall be no less favorable than any other treatments that are provided by the Party(KR) in respect of investments and activities in connection with such investments to domestic investors or investors of any other State, including a non-party to this Agreement, and shall be provided at the option of the investor, depending on which of these features, in his opinion , is the most favorable. "So specifically, this provision allows a Russian investor, to use the model for compensation that is provided by any agreement concluded by our country to any other investor. In order to claim lost profits, it is assumed that the investor referred to paragraph 2 of Article 4 of the EES agreement, will take advantage of Part 2 of Article 7 of Ashgabat Agreement concluded on December 24, 1993, which states that: «…the

[85] Transcript of the agenda of the meeting of the parliamentary faction "Ata Meken" on March 2, 2011 held in the Oval Hall of the Parliament

[86] The Bank of Kyrgyzstan shall regulate the banks' interest rates level in the Kyrgyz Republic by means of monetary policy instruments. Information about that rates can be find on the official web-site of the NB: http://www.nbkr.kg/index1.jsp , access: April 26, 2013

investors of the parties, have right to request compensation in respect to the lost profit, that happened in the result of the actions committed by the public official, that contradict to the legislation of the state-recipient"

The authors, therefore, concluded that, in considering the question of compensation arbitrators will be guided by bilateral investment treaties and EES agreement concluded by the KR.

§ 3. Foreign-investment treatments

Having investigated what is investment in banking and as well having defined the applicable legislation toward its regulation, defining the category of expropriation and investment disputes, here is time to explore the concept of state-recipient and investor protection.

As it was demonstrated, the degree of legislative development in terms of protection of foreign investment depends on the treatment that is distributed over them. The theory of investment law divides all regimes of foreign investment on two beg groups:

1) those that are based on absolute protection and security, non discrimination, fair and equal regime principles – absolute regimes;

2) those where investor protection is treated in terms of most favorite nations treatment or national treatment[87].

Traditional investment law allocates three treatment for foreign investors: national treatment, most favored nations treatment, fair and equitable treatment. The first two treatments have strong historical roots and their actual existence is virtually uncontested. The third treatment – the fair and equitable is a novelty, associated with the multilateral Investment Agreement in the Organization for Economic Cooperation and Development in Europe[88].

This treatment for now become a well-known and well-established phenomenon in practice, specifically it is used in the vast majority of BITs concluded by the Kyrgyz Republic and is associated generally with the principle of the due diligence participants in investment

[87] Yevteeva M.S, International bilateral investment agreement, Moscow, 2002, p. 31
[88] Farkhutdinov I.Z., «The latest in international investment law," "Law and Economics", N 8, August 2005.

activity. The principle of due diligence, has no precise definition, but officially it's accepted that while evaluating this principle it's necessary to refer to the article 1 of the draft convention on the protection of the foreign property, which states: "fair and equal treatment means the minimum international standard, which forms part of customary international law."[89]

Thus, this principle suggests that foreign investors fall under fair and equitable treatment and have rights to use all accessible rules and principles of international law for protection of their property rights.

The second treatment that could be spread over the foreign investment is national treatment. This treatment as a rule is based on a principle of reciprocity that could be extracted from the name of the BIT – "Bilateral agreement on promotion and reciprocal protection of investment[90]". Up to date the principle of reciprocity, in the theory of investment law is divided into two forms: material and formal. The first one implies that physical and legal entities that exercised economical activity on the territory of the state-recipient have the same bulk of rights and bear the same bulk of obligations that are stipulated by the legislation of the state-recipient for its citizens. The second form implies in fact the same, but with slight reservation, that is foreign citizens are not allowed to request those rights that are prescribed by the legislation of the country of their origin and that are not stipulated by the legislation of the state-recipient.[91] Thus the national treatment this is a special regime according to which the rights and obligations of the investors defined by the legislation of the state-recipient, but it does not exclude the possibility to enjoy and take advantages of the international investment law.

National treatment could also be characterized by the exclusions. Such exclusions as a rule have three dimensions:

1) they prescribe limitation of the rights for foreign investors;

2) they could enjoy special benefits;

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[89] Farkhutdinov I.Z., International Investment Law and Process: a textbook. - "Prospect", 2010, page 139 (the text of the draft convention is in the closed access)
[90] Farkhutdinov I.Z., International Investment Law and Process: a textbook. - "Prospect", 2010, page 143
[91] Boguslavsky M.M., Private international law, book, M. Yurist, 2004, p. 84

3) there are additional conditions to enjoy separate rights. In any cases legal force of any exclusion from national treatment shall be prescribed by the laws or by international treaties.[92]

National treatment also implies a regime of the most favorite nations, although these treatments shall be described separately. The definition of the most favorite nation's treatment is given in the article 1 of the General Agreement on Tariffs and Trade on 1994 signed in the framework of the WTO. This principle means that parties by introducing a special clause into the agreement that they conclude are obliged to provide the other party, its natural and legal persons, no less favorable conditions in the economic, trade and other relations, that they are going to provide or will provide in the future to any other third country to its natural or legal entities[93].

According to the opinion of Ya. D. Makovsky who is currently a leading theoretician in the RF in the field of international law: "…the essence of the most favorite nation's treatment is characterized by proposition of two types of conditions for physical and legal entities of the foreign state[94].

1) do not apply any discriminatory measures toward investors or if applying then apply them toward all investors without any exclusion, preference or distinction

2) provide investors with any benefits that the state is going or will provide any other third state in the future

According to the above-mentioned treatments, the author concluded that they can be subdivided on the norms that protect either foreign-investors or the state-recipient. These norms will be described below.

1.3.1. The concept of investor's protection

In so far, at the national level, there are no special mechanisms for protection of the foreign-investment regarding the banking sector of economic, the author concluded, that protective norms shall be seen from the position of international investment treaties.

For example if we will address to the BIT that concluded by the KR with the republic of

[92] Farkhutdinov I.Z., International Investment Law and Process: textbook, "Prospect", 2010, p. 154
[93] Diplomatic Dictionary, Prentice. "Science", 1985
[94] Makovsky Y.D., Most-Favorite-Nation, State and law, 1982. N 3, p. 79-80

Latvia and republic of Kazakhstan, as well as to the EES agreement, then we could highlight and summarize the following main guaranties that the KR obliged to provide foreign investors:

1) fair and equitable treatment for investment and income associated with them .

The peculiarities of that treatment were described by the author before, and this treatment is prescribed by all international treaties that the KR has concluded.

2) Encourage and create favorable conditions for the investors. This provision is used in all bilateral agreements and as a rule based on the historical tradition, that is the government is obliged at least do not interfere in the activity of the investors.

3) Not prevent the attraction of the investment to the territory of Kyrgyz Republic. Here mainly we should talk about regime of non-discrimination, that is government shall not give any preference, make any distinction and exclusion in admitting the investment from one country and do not allow to admit investment from another.

4) Create and provide full and constant protection of investments. Here again, under this provision we should imply the ability of the state officials to protect investment from the groundless attack not just from the civilian population forces but as well from the governmental force bodies.

5) Do not make any attempts to expropriate investments, except expropriations that are exercised:

a) for socially-useful purposes

b) on non-discriminatory basis

c) in according with the procedure stipulated by legislation

d) with payment of accurate, effective and adequate compensation

In case of exercising of expropriation, compensations shall be:

a) paid without delay. In case of delay, the costs due to changes in the exchange rate, resulting in delays, bears the Contracting Party on the territory of which the investment was carried out.

b) equivalent to the current market value of the expropriated investment from the time before the expropriation took place. The changes occurring in the cost should not affect the current market value as the expropriation became publicly known earlier;

c) fully realizable and freely transferable;

d) include interest on the commercial rate established on a market basis for the currency in which the compensation will be paid from the date of expropriation until the date of actual payment.

6) In case when investor bear looses in the result of war or another state of emergency then he is provided with compensation and restitution. Compensation in that case shall be accurate, effective and adequate.

7) Provide the free transfer of investment and income that is collected in the result of such activity either in the county of residence or in any other country. This transfer shall be made in any freely convertible exchange.

8) Provide right to protect investors right in:

a) National courts of the KR

b) ICSID, in case if both parties are member of the Washington Convention

c) Arbitration court under the additional center of ICSID, if only one party is a member of the Washington Convention

d) Ad hoc arbitration tribunal that is established on the basis of UNCITRAL

1.3.2 The concept of state-recipient protection

Due to the fact that the Kyrgyz Republic, according to the decision XII/11 UNEP, refers to developing countries, in the country there is a lack of adequate measures promoting the generation of good behavior on the part of foreign investors, and the inability to eliminate the negative effects of the ban and their activities. So for example, at the national level, the KR, the developed the following guarantees:

1) KR is not liable for the obligations of residents and non-residents of the Kyrgyz

Republic, which has attracted foreign investment except in cases when these obligations are guaranteed by the state in accordance with the legislation of the Kyrgyz Republic. (Article 19 of the Law "On Foreign Investments in the Kyrgyz Republic")

2) Requiring investors to comply with the legislation of the Kyrgyz Republic and in the case its infringement liable to attract investors

3) The KR is not liable for the obligations of insurance companies at the level of international legislation of the Republic granted the following guarantees from the unscrupulous behavior of investors:

a) BIT with Latvia: the impossibility of applying the provisions of the agreement or convention to Disputes concerning investments which have arisen or submitted prior to the entry into force of this Convention and agreements

b) The interpretation of the agreement as an obstacle to the implementation of the action to protect the interests and security in time of war or armed conflict or state of emergency in international relations

It should be noted that most of the above provisions apply to the law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic", the provisions of which have been mentioned earlier do not apply to the banking sector. International agreements, do not install the proper and effective protection against unfair practices investor, yet it should be noted that the KR, as a sovereign state has the full authority to monitor compliance with the legislation of the Kyrgyz Republic and may exercise expropriation within the previously described.

In order to understand how the expropriation of investments was made the author for now will familiarize the reader with the chronology of events in detail.

Chapter II. Settlement of investment disputes with the Kyrgyz Republic

As it was observed before, at the moment, there is a current risk for the KR to be involved in the role of a defendant in investment disputes related to the expropriation of assets of

OJCS “BTA bank”, CJSC “Manas bank” and OJSC “AUB” Overall claims of these investors evaluated in 700 millions of US dollars.

The litigation concerning OJSC “BTA bank” currently is frozen, because parties involved into mediation processes, however the situation concerning OJCS “Manas bank” has already developing within the framework of the international arbitration tribunal located in the city of Paris. This process started on December 18-21 of 2012[95]. Mikhail Nadel also has an intention to deliver a claim to International Arbitration tribunal, but currently there is no information in which particular. In connection with mounting threat of arbitration trials, the Ministry of Finance of the KR, has announced bidding for procurement of consulting and legal services for representing the KR before the trials.

The government has choose the international legal company "Michael Wilson & Partners, Ltd.." to protect the interests of the Kyrgyz Republic in a dispute against the JSC "BTA" bank. The «Lorenz» company will represent and protect Kyrgyzstan against the suit of the Latvian businessmen – Valery Belokon. The Winston & Strawn LLP company will protects the KR against the claim of Michael Nadel.

In connection with potential disputes, in the current chapter the author, will describe and analyze the chronology of the consequences that leads to expropriation of banks, and as well will try to give prognosis for potential resolution of those disputes.

§ 1. Chronology and analysis of events related to the expropriation of assets:

2.1.1 CJSC "Manas Bank"

In accordance with article 2, point 2 of BIT of the KR with the republic of Latvia on May 22, 2008, the Kyrgyz republic, has obliged to spread over the investment of Latvian investor fair and equitable treatment. As it was noticed before, the essence of fair and equitable treatment is expressed in that the content of rights and obligations of the foreign investor shall be defined generally by the national legislation of the state-recipient, but it does not exclude the usage of

[95] Excerpt from an interview with the managing partner of Lorenz, a representative of the Kyrgyz Republic in a dispute with the JSC "Manas Bank", Mr. Stephan Wagner, November, 23, 2012

international legislation. Thus, the author could conclude, that regulation of banking activity of CJSC “Manas bank” shall be guided by the banking legislation of the KR. In accordance with points 5,6 and 7 of article 4 of the law of KR “On National Bank of the KR” on July 29 1997, № 59, the National Bank exercised the following functions:

«…set rules for banking operations…give license for banking operations…exercised regulation and supervision of banking activity and activity of financial-credit institutions, that are licensed by it…»

In this case on September 1, 2007 Valery Belokon won the tender for the purchase and rehabilitation of the Bank "Insan" conducted by the State Agency for Bank Reorganization and Debt Restructuring (DEBRA) of Kyrgyzstan. By paying the debts of the bank to DEBRA Valery Belokon, obtained the right to restore banking license, which he received on January 11, 2008, № 038. JSCB "Insan" was transformed into CJSC "Manas Bank"[96].

The BIT that KR concludes with Latvia on 22 May 2008 was made specifically for the protection of investments of Valery Belokon. Banking activities of Mr. Valery Belokon developed quite steadily up to the events of April 2010 revolution. On April 7, 2010 the Chairman of the Board of the bank left the country. On April 8, 2010 the remaining leadership of the bank, due to the perceived threat of looting the bank, contacted the local bank for protect. The National Bank introduced a temporary administration in CJSC "Manas Bank" and, together with the State National Security Service guarded the bank. After the April revolution and the coming to power of the interim government, they issued a decree of 20.05.2010 № 48. Under the provision of that decree hotel resort called “Vityaz” located in the Issyk-Kul must be nationalized. This hotel was a common pledge for three borrower of CJSC "Manas Bank":

a) Manger of LLC "Vityaz" who took a loan in the amount of 3.12 million of US dollars;

b) Manager of CJSC "Ala-Archa PMK" - credited in the amount of 3.1 million of US dollars. Money was taken for the purpose to construct new resort house "Aurora Plus";

[96] Independent Latvian Nespaper “Delfi”, article “Valery Belokon will become a Kyrgyz Banker”, August 30, 2007, article is available on the web-site: http://www.delfi.lv/biznes/bnews , access: April 26, 2013

c) Manger of Ltd "Spetsenergostroy" - who took a loan of $ 1.5 million as a circulating assets[97]

When the NB of KR enter a temporal administrator into JSC "Manas Bank" the National Bank's new administration initiated a comprehensive audits of the bank, which revealed that CJSC "Manas Bank" issued loans to different people for different purposes but under the same pledge. From the point of the law such actions of CJSC "Manas bank" is quite adequate policy, because these actions are fully consistent with Article 329 of the Civil Code of the Kyrgyz Republic, as well as Article 11 of the law "On pledge" on March 12, 2005 № 49, which states: "... Subsequent pledge is permitted if it is not prohibited by the previous agreements on pledge of the same property, the effect of which was not terminated at the time of the conclusion of the subsequent pledge agreement. If the prior pledge agreement provides the special terms on which the subsequent pledge agreement shall be concluded, it must be concluded with respect to these terms."[98]

The managers of the above mentioned companies (borrowers) were in close contact with Maxim Bakiev who at that time was the head of the Central Agency for Development of Investment and Innovation (CADII)[99]. In accordance with the Decree № 1 dated April 7, 2010 Maxim Bakiev was dismissed from his post. In connection with that fact and being suspected of committing economic crimes, in particular the crime prescribed by the Article 231 of the Criminal Code (organization of criminal community). Maxim Bakiev, the chairman of "Manas Bank" Valery Belokon, chairman of the "AUB" Mikhail Nadel, and 29 people involved in the community were announced by the Criminal Investigation Department as wanted persons.

Along with pursuit of Maxim Bakiev, criminal cases were initiated in respect of those who support his illegal activity. Among those people, we should point out those three borrowers

[97] Maslova D. "Manas in the cans", Evening Bishkek, newspaper №25, February 11, 2011, article is available on the official web-site: http://members.vb.kg/2011/02/11/rejim/1_print.html, access: April 26, 2013
[98] Law ""On pledge", No. 49, March 12, 2005
[99] Rashidova D., Interview with political scientist Toktogul Kakchekeev on the appointment of Maxim Bakien on the post of the head of CADII, text is available on the official web site of the internet newspaper "inoSMI": http://inosmi.ru/middle_asia/20091109/156505054.html, access: April 26, 2013

of the "Manas Bank" and the chairman of the National Bank of Kyrgyzstan - Marat Alapaev, who was accused of harboring and aiding illegal activities of Maxim Bakiev[100].

In fact, later on decision of the court delivered not in favor of accused, recognized all three borrower to be affiliated, based on their participation in the economical crimes committed by the Maxim Bakiev. Based on that fact the NB KR seemingly had the opportunity to argue for revoking the license of JSC "Manas Bank", referring to its failure to correspond to the standards for the maximum allowable amount of risk on operations with insiders and affiliate.

In accordance with the instruction "On requirements for banks' operations with insiders and affiliates," as amended on November 11, 2009:

"2.1. the bank has no right to give credits to its insiders or affiliates, if this violates the requirement of impartiality and any of the following requirements are met:

a) The amount of the maximum risk per one borrower for a bank (Standard K1.2), exceeds 15% of net total capital (NTC) of the bank;

b) The bank does not meet the requirements for capital adequacy and internal funds, established by National Bank;

c) The bank has announced about current losses on the last reporting date."[101]

Another instruction of the National bank of the KR that called "On the credit restriction" (approved by the NB's executive board under the № 26/3 on October 10, 2004) provides requirements when borrowers of the commercial banks shall be considered to be affiliated:

a) "...One borrower controls the other;

b) There is a substantial financial interdependence between several borrowers. (Significant financial interdependence (including agreement on mutual cooperation) exist when there is 50 or more percent of annual gross income / expense and other income or charges of one borrower resulted from transactions with the other borrower;)

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[100] Article "Kyrgyz Bummer of Mikhail Nadel", Kyrgyz Newspaper "Delo", April 4, 2011, official web-site: http://www.delo.kg, access: April 26, 2013

[101] Instruction of the National Bank of the KR "On requirements for banks' operations with insiders and affiliates," as amended on November 11, 2009

c) The same source is used either for the repayment of the credit, including the situation where borrowers use the credit for participation in the common legal entity (or business activity), or when both are using the same secondary source of payment (pledge)..."[102]

All commercial banks of the KR, must comply with all above mentioned regulations and instructions of the National Bank. In accordance with Article 7 of the Law "On the National Bank of the Kyrgyz Republic" the National Bank, within its competence is entitled to issue legal normative acts that are binding for all banks that exercised their banking activity on the territory of the KR, on the basis of licenses that granted by the NB. In accordance with Article 30, the National Bank is a body of banking supervision and regulation of banks. The NB constantly monitors banking activities in order to maintain a stable financial system, support and protect the interests of depositors and other creditors, request them to comply with the legislation of the Kyrgyz Republic and regulations of the NB. [103]

However, up to now all measures taken by the NB regarding CJSC “Manas Bank” seems to be reasonable and legitimate, we should take into account the fact that till the April Revolution, the National Bank has also repeatedly inspected the "Manas Bank". No any infringements were revealed in those times. It seems to be that previously the NB just ignored and did not pay attention to those infringements. Such fact could witness either that there is a connection of former chairman of the NB (Marat Alapaev) with “Manas bank” board of directors or that PG intentionally falsified the factual state of affairs in the bank.

In respect to the official version of the PG, the General Prosecutor’s Office of the KR initiated criminal proceedings against the majority of shareholder of CSC "Manas Bank". Among those shareholders the general ones are the following: V. Belokon, S.Kostyrin, A. Kachnova, A. Lase, E.Verbitsky. In this connection, on the basis of Article 8 of the Law of the Kyrgyz Republic "On preservation, liquidation and bankruptcy of banks," the National Bank has enough

[102] Instruction of the National bank of the KR "On the credit restriction", approved by the NB’s executive board under the decree № 26/3 on October 10, 2004 (The author has selected cases relevant to current situation)
[103] Law " On the National Bank of the Kyrgyz Republic”, No.59 of July 29, 1997

legal background to introduce a regime of conservation in the “Manas bank”. After the introduction of temporary administration (Decree № 5/6 of the Board of the NB on January 31, 2011), the NB repeatedly tried to establish a contact with Valery Belokon. Valery Belokon didn’t respond, no he tried to challenge the decision of the National Bank about the appointment of the conservator. In accordance with article 12 of the law of the KR "On conservation, liquidation and bankruptcy of banks" on February 15, 2004 № 14, he has 10 days to overrule the decision.[104] In so far Valery Belokon, didn’t use that chance, the NB actions seems to be quite well grounded and legitimate. However Valery Belokon, thinks otherwise. He said he has never been involved in the money laundering process; no he has ever been connected with Maxim Bakiev. Thus by his claim all criminal cases against him are fabricated[105].

According to the latest information, the author got from the interview with Stephan Wagner (CEO of “Lorenz” company), to protect his rights, Valery Belokon hired lawyers of the Clifford Chance law company[106]. On August 3, 2011 the Government of the Kyrgyz Republic was officially notified about international arbitration process concerning Manas Bank. This process has been started on December 18-21, 2012 in Paris. At this point, it’s known that in accordance with UNCITRAL Arbitration Rules of 1977, the KR side appointed Swedish arbitrator; Valery Belokon’s side appointed the Danish ones. These two arbitrators in turn appointed the arbitrator of the UK as a chairman[107].

According to the rules of that arbitration tribunal, it has jurisdiction over the investment disputes. However, in order to establish its jurisdiction arbitrators shall determine whether a dispute arising from the relationship between parties can be categorized as investment dispute. To do this, it will be necessary to define the concept of investment, the definition of which will be taken primarily from the BIT with Latvia. Article 1 of the BIT with Latvia defines investment

[104] Law of the KR "On conservation, liquidation and bankruptcy of banks", No. 14, February 15, 2004
[105] Karimdjanov I., “Valery Belokon denies the charges of the General Prosecution Office”, independent newspaper “Kloop”, February 23, 2011, official web-site: http://kloop.kg, access: April 26, 2013
[106] “International arbitration: Valery Belokon against Kyrgyzstan”, August 3, 2011, text of the article available on the web-site: http://www.ves.lv , access: April 26, 2013
[107] See an appendix 1

as".. any kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the national laws of the last"[108]

In so far, arbitrators will refer to the national legislation, eventually for them, it will be discovered the law of KR has no any legal definition of investment into banks. In order to fill this gap, arbitrators can use Guidelines on the Treatment of Foreign Direct Investment that was developed under the auspices of the World Bank.[109]

Based on the previous analysis of that document, arbitrators can stay that investment in CJSC "Manas Bank" shall be: long-term investment of assets, exercised on one's head, by the means of purchasing a certain number of shares in order to exercise control over the bank and gain the profit. This definition however will be extended by the arbitrator in so far BIT with Latvia, contains provision according to which investment shall include not only assets that were primarily invested in the beginning but also income derived from investment activity. Such income as a rule concluded in bank's assets. Classification of these assets are listed in the regulation of the NB "About classification of assets and deduction of certain assets for the banking fund for covering of potential loss"[110]

The dispute of CJSC "Manas Bank" against KR can be recognized as an investment dispute, if it is proved the lack of control from the part of Maxim Bakiyev. The dispute can be classified on the following grounds:

a) the nature of the requirements of the dispute is mixed

b) by the criteria of subject the dispute related to discontinued investing activities

c) on the basis of a dispute related to the unilateral act of the state - the decree of June 20, 2010, № 48 which was nationalized recreation center Vityaz, which marked the beginning of the process for indirect expropriation of the bank, through the deliberate bringing it to bankruptcy or

[108]Agreement between the Government of the Kyrgyz Republic and the Government The Republic of Latvia for the Promotion and Protection of Investments of 22 May 2008, Riga (ratified by the Law of the KR dated March 4, 2009 N 74)

[109] World Bank Guidelines on the Treatment of Foreign Direct Investment, reprinted in Shihata, Legal Treatment of Foreign Investment: "The World Bank Guidelines", Dordrecht, Boston, London 1993

[110] Approved by the resolution №18/3 of the National bank, on July 21, 2004

revocation of the license and appointment of a special administrator - DEBRA. In this case, in determining the nature of the dispute, the court is expected to focus on the final result, which was achieved by a number of measures taken by the National Bank of Kyrgyz Republic in respect of CJSC "Manas Bank". The first thing you should pay attention to is the fact that 100% of the shares of "Manas Bank" owned Valery Belokon, Latvian investor. Second, the decree of the interim government of June 20, 2010 № 48, which concerned the nationalization of recreation center Vityaz, although it was not directly aimed at the expropriation of the bank, yet spawned a series of events associated with the loss Valery Belokon control over the bank. So for example, a recreation center Vityaz was a mean of securing the obligations of three borrowers. In terms of the banking law, as will be seen further it is acceptable. However, all three borrowers were prosecuted on the basis of their relationship with Maxim Bakiyev. The solution in these cases were made and sentences took effect. Once this has been proven during the trial, the National Bank has filed a lawsuit to revoke the license of CJSC "Manas Bank" and the appointment of a special administrator, on the grounds that the bank did not comply with the standards for minimum size acceptable risk on loans to affiliators. All three were recognized borrower affiliation, based on their mutual friend - Maxim Bakiyev. Based on the above, National Bank of Kyrgyz Republic organized a comprehensive review of the bank in which the bank has not set many standards complying with National Bank of Kyrgyz Republic and in particularly the law on the financing of terrorism and money laundering of criminals. The paradox of this situation is that the early testing of the bank, never confirmed this information. For Valery Belokon case was brought by a number of economic crimes and issued default judgment to imprisonment. Thus, there is a situation in which Valery Belokon - foreign investor, lost his investment basing on the decision of the National Bank of Kyrgyz Republic. Thus, the loss of control over the investments originated by the actions of the National Bank of Kyrgyzstan - the state's body of power

Having established these facts, the court will recognize its jurisdiction and proceed further to hear the parties' positions. Lawyer representing Valery Belokon will try to prove the fact of

expropriation committed on behalf of the interim government in respect to CJSC "Manas bank". As it was stated earlier there is no legal definition of expropriation in the national legislation of the KR, however there is quite stable position in theory of investment law, about its content. The author investigated the theory in deep concluded that expropriation is a forceful unpaid or paid alienation of property, based on the administrative act of the bodies of power. In respect to the above mentioned facts of the case, expropriation was defined as indirect, in so far it was committed not solely on the basis of particular act, but on the basis of consequential actions of the National Bank of the KR, the General Prosecution of KR and of course by the omission of the national courts. Under the Constitution of the Kyrgyz Republic National Bank of the Kyrgyz Republic is not an executive body of power. However taking into account the character of the banking system of the KR, that is consist from two levels (The National Bank and commercial banks), the court can characterize the relationships between two levels as having administrative character. Such conclusion will fit the above mentioned definition of expropriation. However this is not enough for expropriation to be proved. The fact of expropriation will be proved only in the case when court will be presented with evidence that actions of the General Prosecutor(GP) against Valery Belokon and actions of the National Bank in relations to Manas Bank, and omission of the court in respect to Valery Belokon will be proved. Here the court is supposed to analyze the reports of the GP and the NB.[111] In order to check and properly evaluate the evidence of the reports arbitrator can hire on behalf of the parties independent certified public accountant.

If the validity of the reports will be proved, then the claim about expropriation and compensation will be refuted in so far, the measures of expropriation (that is in advance has illegal character) will be re-qualified into the category of confiscation in administrative order. This confiscation as it was described earlier is allowed in accordance with the national

[111] The author was unable to get access to those reports due to their confidential character, but it's supposed that reports shall contain evidence about participation of Valery Belokon in the economical crimes committed by the Maxim Bakiev, evidence about systematical violation of regulations of the National Bank and legislation about off-shores zones and finance of the terrorism

legislation of the KR. Such measures don't imply compensation to the investor. Here the author shall point out that there is no legal definition of confiscation in administrative order, how the possibility to conduct it prescribed by the civil code of the KR. The simple definition of confiscation is given in the article 52 of the Criminal Code of the KR. Under the confiscation the legislator implies: "... forced uncompensated alienation of property of the accused in favor of the state, in case if that property has served as a tool for committing a crime or has been obtained in the result of its commission. Criminal code allows confiscating any property except for the property that could not be alienated in any way. This property implies a standard minimum that support the person survival. One of the distinctive characteristic of confiscation is that according to the paragraph 2 of article 52 of the Criminal Code, confiscation may be imposed by the court only for grave or graves crimes committed out of greed, under the relevant articles of the Special Part of the Code. Such additional measure of punishment for example prescribed in article 183(legalization (money laundering) of illegal income).[112] This crime was incriminated to Valery Belokon by the General Prosecution office. However his property (investment in bank) was confiscated ex post facto, that is before the court deliver its decision. In that case we could also refer to the Code of Administrative liability of the KR. In that code there is a special chapter that devoted the violation of banking legislation, however there are no any articles that prescribe confiscation of property for its violation.

From the legal point of view such actions can be categorized as confiscation in administrative order or if KR will not be able to prove this it will be re-qualified into indirect expropriation. If this fact will be confirmed, Valery Belokon legally pretends to got compensation. Analysis of Article 5 of the BIT with Latvia state that compensation for expropriation shall:

a) be paid without delay. In case of delay, the costs due to changes in the exchange rate, resulting in delays, bears the Contracting Party in the territory of which the investment was

[112] The criminal code of the KR, No. 68, October 1, 1997

carried out. It is assumed that the date of payment should be the date when the NB signed a decree about appointment of special administrator to CJSC "Manas Bank"

b) be equivalent to the current market value of the expropriated investment from the time before the expropriation took place. The changes occurring in the cost should not affect the current market value as the expropriation became publicly known earlier;

c) be fully realizable and freely transferable

d) include interest on the commercial rate established on a market basis for the currency in which the compensation will be paid from the date of expropriation until the date of actual payment

As concerning the procedure itself and possible question from the parties to the dispute that author supposes that it could be of the following character. One of the potential question to Valery Belokon from the representatives of the KR, can be sound in the following way: "Why did you leave the KR on April 7,2010 if you were completely sure that you had never violated the banking and criminal laws of the Kyrgyz Republic, and therefore you had nothing to fear?". In that instance Valery Belokon can reasonable respond that: "I left the KR, because being the chairman of Manas Bank, I have reasonable evidence that the crowd were preliminary informed by the IG that I have connection with Maxim Bakiev and I automatically was perceived by them as a severe enemy of the country. Fearing for my life and safety, being unable to dissuade the aggressive crowd of falsity of that information, I decided to leave the country." Next question that can be potentially asked is about unwilling of Valery Belokon to collaborate with new administration of the NB, that tried to connect with him, while he was already in Latvia.

In his turn, Valery Belokon can reasonable argue that he was afraid of coming to the KR in order to protect his civil right in the court, because simultaneously the general prosecutor office initiated a criminal trial of him. In case if he tried to do that, he would be arrested and imprisoned. In respect of institution of legal representation he also could stay that he couldn't appoint any representative in order to defend his violated rights, because it was useless, in so far

the interim government strictly recommend all the courts do not deliver any decision in favor of investors due to the political atmosphere that reigned in that time. In that turn, the IG even tried to issue a special decree about impossibility to consider the disputes with investors. Thus, here we have a clear fact, that the judicial authorities of the Kyrgyz Republic and representatives of the National Bank in fact violated the principle of freedom of access to justice and the protection of violated rights and freedoms enshrined in article 40 of the Constitution of the Kyrgyz Republic.[113]

2.1.2 CJCS "BTA bank" (Kyrgyzstan)

In accordance with article 2, of the BIT of the KR with the republic of Kazakhstan, the Kyrgyz republic has obliged to spread over the investment of Kazakh investor fair and equitable treatment. Thus it means that banking activity of CJSC "BTA bank" heavily grounded on the banking legislation of the KR.

OJSC "BTA" bank is a Kazakh bank, registered in Zholdasbekov str. 97, Samal-2 district, Medeu region, Almaty.[114]

In 2010 the board of directors of the bank, announced a tender for the procurement of consulting and legal services to protect and represent the interests of "BTA Bank" in international arbitration bodies for arbitration rules of the United Nations Commission on International Trade Law and the Rules of additional bodies of the International Centre for Settlement of Investment Disputes. To represent and protect the interests of the bank, the bank administration has allocated 2.215 million British pounds sterling. According to the tender documents, the management of JSC "BTA Bank" tried to initiate arbitration against the Kyrgyz Republic for illegal actions of its state authorities, which led to the loss of control over the Bank of JSC "BTA Bank" (Kyrgyz Republic) and caused damage to the Bank in the amount of more than 80.0 million U.S. dollars

[113] The constitution of the KR, accepted during the referendum, on July 27, 2010, introduced into the force by the law of KR on July 27, 2010

[114] JCS "BTA bank" official web-site: < http://bta.kz/en/about/info/> access: April 26, 2013

It was directly indicated in the tender documents that: "…with the aim of implementation of raider scheme to seizure CJSC "BTA bank" registered in the KR, on July 26 of 2009 the ministry of justice of KR has registered two companies: CJSC "Investment Holding Company»(IHC) and its subsidiary company named "Investment company of Central Asia" Llc.(ICCA). In that day IHC gave to ICCA a loan for a special purpose in amount of 8.670.000 pound of sterling's. This loan was granted for purchase of a state securities of the KR. In violation of that purpose ICCA use this loan to purchase Eurobonds of «TuranAlem Finance B.V.» («TAF B.V.») that is a subsidiary company of OJCS "BTA bank"(Kazakhstan). These Eurobonds were floated from the face of CJSC "BTA bank"(Kyrgyzstan) with sufficient discount. Denomination value of Eurobonds was evaluated in 28.395.000 pound of sterling's and accrued interest was amounted in 2.023.144 pound of sterling's. On the next day, IHC filed a suit about the cancellation of the contract of sale and purchase of Eurobond, to inter-district court of Bishkek. This claim was addressed to ICCA, OJCS "BTA bank", CJSC "BTA bank"(Kyrgyzstan) and TAF B.V.. In its claim IHC requested to recover 30 418 143,75 pound of sterling's.

The first question that shall be addressed is legality of such claim. This claim is solely based on the article 731 of the civil code of the KR: "In case if the recipient of special purpose loan, does violate the condition of the special loan contract, money-lender has a right to request an early repayment of the loan and interest payment, if other is not stipulated by the law".[115] From that point of view this request has a legal ground. For violation of that right, point 2 of article 187 of the CC of KR, prescribe bilateral restitution.

The second question that should be addressed is the question about possibility to grant a specific purpose loan by main company to its subsidiary company. In accordance with article 150 of the CC of KR, subsidiary business company is a business company in which the main company has a sufficient share in the charter capital or on the basis of concluded contract is able

to influence on the decisions that is made by that company. Subsidiary Business Company is a separate legal entity. Joint stock companies can be the members of subsidiary business companies. This conclusion can be made on the basis of analysis of the article 6 of the law of KR "On joint stock companies" on March 23, 2003, № 64. Basing on that article, the author concluded that granting of special purposes loan to the subsidiary company by the main company is not prohibited.

Basing on the above mentioned norm of the law, on 13 July 2009 the inter-district court of Bishkek satisfied the claim of IHC in full extend. Finding of the Bishkek city court from 17 July 2009 was confirmed. On September 11, 2009, the Supreme Court of the Kyrgyz Republic was pronounced the final verdict on this trial:

"1. Terminate the investment agreement (contract of loan for a special purpose)

2. To recover jointly from the "BTA Bank" (Kazakhstan) and CJSC "BTA Bank" (Kyrgyzstan) worth in the amount of 30,418 143.75 GBP (price of the Eurobond + investment income). In part of levy execution on shares of CJSC "BTA bank" levy execution on the shares of JSC "BTA bank"(Kazakhstan)

3. To award JSC «Investment Holding Company» Eurobonds issued by the «TuranAlem Finance BV» Company in the amount of 28,395 shares

4. Stop procedure in regard the «TuranAlem Finance BV» company"[116]

Thus instead of bilateral restitution that is stipulated by the article 731 of the civil code of the KR, the court applied unilateral restitution, and thus violated the legislation of the KR.

On December 10, 2009 bailiff directed decision to initiate enforcement proceedings and offer a voluntary execution to the JSC "BTA Bank" and JSC "BTA Bank"

[116] Tender documents for the procurement of consulting and legal services to protect and represent the interests of "BTA Bank" in international arbitration tribunals on the Rules of Arbitration of the United Nations Commission on International Trade Law and the Additional Facilities Rules of the International Centre for Settlement of Investment Disputes (anonymously)

On December 16, 2009, without participation of JSC "BTA Bank" Bishkek inter-district court granted the bailiff to revise the manner of execution of a decision of the court, under which authorized him to levy execution on the property and shares of OJSC "BTA Bank"(Kazakhstan).

According to Article 209 of the Code of Civil Procedure of the Kyrgyz Republic, "... the Court hearing the case may, at request of the persons involved in the case, based on the financial status of the parties or other circumstances delay or installments execution, as well as change the way and the order of execution. These statements are considered in the hearing. Persons participating in the case shall be notified of the time and place of the meeting, but their absence does not preclude the resolution of question that put before the court "[117] At that time it was known that the JSC" BTA Bank "owns 71% of shares of JSC" BTA Bank "(Kyrgyzstan), which approximately equal to 25 million of US dollars.

In order to prevent the execution of the judgment and enforcement of property of "BTA Bank" its lawyers did the following work:

On December 17, 2009 lawyers bring a statement to the Bishkek Inter-District Court in order to invalidate the writ. At the same day, they bring a complaint to the actions of the bailiff in order to stop the enforcement proceeding and change the way of levy execution

On December 17, 2009 lawyers bring a claim to the Director of the Judicial Department of the Kyrgyz Republic in order to suspend the enforcement proceedings, because of their attempt to invalidate the actions of the bailiff

On the same day, lawyers bring a motion about recognition and referral of the decision issued by the Specialized Financial Court of Almaty, to the Bishkek inter-district court. This motion contains the requirement:

a) to ban the levy directed on the assets of OJCS “BTA bank”(Kazakhstan)

b) to cancel all interim measures in that regard

[117] Civil Procedural Code of the KR, No. 146, December 29, 1999(with amendments and changes on the date of: April 26, 2013)

On December 23, 2009, representatives of JSC "BTA" bank appealed to the Board of the Supreme Court of the Kyrgyz Republic, with request to conduct a judicial review of the final verdict on the basis of newly-discovered evidence. However, despite all the efforts made by the bank's management, all the complaints and motions were invalidated by the national courts, thus in that connection Kazakh investors exhausted all accessible means of judicial protection under the laws of the Kyrgyz Republic.

Basing on the above-mentioned circumstances, on November 5, 2009 the Government of the Kyrgyz Republic received a claim for recover of damages in the amount of 30,418,143 pounds of sterling (38,891,000 U.S. dollars). By the evaluation of “BTA bank” exactly this damages was caused to its subsidiary branch by unlawful actions of business entities of the Kyrgyz Republic and the government. This claim was readdressed to the National Bank of the KR with obligation to compose a respond to BTA bank. On December 3, 2009 BTA bank received an official answer of the NB of KR, which doesn’t contain an official position of the Kyrgyz side on the requested claim. On December 9, 2009 BTA bank tried again, but didn’t get an answer in the second time. On February 2, 2010, the Government of the KR, was officially notified that BTA bank (Kazakhstan) request to involve into negotiations process concerning the bank and to select an international organization for Settlement of Investment Disputes. Additional requirement was also directed to the Ministry of Finance of the Kyrgyz Republic. No response was made.

On may 13, 2010 the bank has received a memorandum White & Case LLP, that contain possibility to initiate an arbitration proceedings against the KR on the basis of the Agreement on the Promotion and Reciprocal Protection of Investments, signed between the Government of the Republic of Kazakhstan and the Government of the Kyrgyz Republic (Almaty, April 8, 1997) on the Rules of Arbitration of the United Nations Commission on International Trade Law.

On June 3, 2010 the Interim Government of the KR received an extra appeal with the requirement of the need to define the place of arbitration. The Interim Government didn't respond.

To date, the Government of Kyrgyzstan approved the international law firm, "Michael Wilson & Partners, Ltd.", Selected by the Tender Commission of the Ministry of Finance, for the protection of the Kyrgyz Republic in international litigation and dispute resolution with "BTA Bank"

Thus, we can conclude that at the moment the two countries try to negotiate in order to settle the dispute in peaceful manner. However parties don't exclude the possibility of arbitration process. Despite the efforts that made in order to conclude amicable agreement, for the purpose of that thesis, it's interesting how does the dispute would be resolved in the arbitration tribunal.

The first question that will be discussed in the arbitration is: "Whether the dispute between the parties can be classified as investment dispute?"The dispute related to the illegal actions of KR's courts that are incorrectly applied the law stipulated in the CC of the KR, causing foreign investors lost of their investments. In that case, under the investment the court will imply the shares of the subsidiary CJSC "BTA bank", that were belonged to the main company - JSC "BTA" Bank (Kazakhstan). Thus in relation to the achieved result, the subject of the dispute is not just a question of legality of the decisions made by the judicial authorities of the Kyrgyz Republic but rather a set of measures (indirect expropriation) taken by the entrepreneurs of the KR (CJSC "IHC" and LLC "ICCA") that entered into a criminal collusion with the judicial authorities of the Kyrgyz Republic in order impalement the scheme of indirect expropriation of JSC "BTA Bank". The fact of indirect expropriation can be proved basing on the following requirement explored by the author:

a) Whether the company (BTA bank) got economic damages by the measure of government regulation, which in itself does not prove the fact of expropriation? Yes it does. As it

was seen from the above-mentioned facts, the courts of the KR, improperly applied the legislation in respect to dispute of national companies and BTA bank(Kyrgyzstan). These wrong interpretation and implication of legislation resulting that JSC "BTA Bank" completely lost control over its investment

b) Whether this measure affects the specific reasonable expectations of investor about its investment? Yes it does. Thus, it was shown the investors have not been able to overrule the claim of CJSC «Investment Holding Company» in the national courts of the Kyrgyz Republic, and therefore had to turn to international arbitration

c) Where the nature of the ongoing governmental policy has features of expropriation? In this case, we can talk about such policy because it was deliberate, planned and improper set of measures taken by the judicial authorities of the Kyrgyz Republic as well as business entities of the KR in relation to BTA bank. It's evidential that the court of all instances could not just simply fail to apply the law of the Kyrgyz Republic incorrectly. This fail one more time demonstrates the illegality and particular interest of the government in the outcome of the dispute.

Based on the above mentioned analysis, the court may conclude that the series of measures taken by the judicial authorities of the Kyrgyz Republic and business entities in respect of the KR "BTA Bank" are measures of indirect expropriation of foreign investment. Analysis of articles 4 and 6, with the BIT of KR, shows that an expropriation in this case can be considered as illegitimate expropriation (imply obligation to pay compensation) because:

a) it was not conducted in respect of public interest

b) it was conducted with discrimination in respect to other investors. In case of expropriation without discrimination, no preference, no exclusion and no distinction shall be made in respect of all the foreign investor(holder of the banks in that case). All of their property shall be expropriated on the equal basis, but here we do not have such "negative" equality

The requirement that were not met by the government, raise the question about compensation to BTA bank. This compensation shall:

a) correspond to the market value of the investment on the date preceding the date of the adoption or promulgation of the decision on expropriation. Such day could be the date when supervisory collegiums of the Supreme Court issued the final verdict(September 11, 2009)

b) include interest relevant to current interest rate investments and calculated for the period between the date of expropriation and the date of actual payment of compensation.

c) be paid in the currency in which the investment were made and correspond to the dominant exchange rate at the time the decision to expropriate were made

Basing on the above mentioned possible outcome of the dispute, the author also could pay attention to the national judicial authority system and problems of bringing active judges to book. Up to the moment, it's evidential that development of democratic society in KR is impossible without enforcement of the judicial system in general and upbringing impartial and independent judges in particular. Up to the moment, judicial reform is an urgent problem that shall be resolved as soon as possible. This reform is needed in order to enforce the effectiveness and justice of delivered judicial decisions. Those decisions that are delivered sometimes (as in case with BTA bank) are considered as miscarriage of justice. However judges responsible for them do not bear any legal liability except disciplinary. Thus for example article 328 of the criminal code of the KR is applied very rarely. This article is applied, when the judge intentionally issues miscarriage of justice. The difficulty of application of that article is conditioned by the three level court system of the republic. As the author concludes, judicial decision can be considered as miscarriage of justice in case when the decision comes into effect, but was amended by the next judicial instance because of the newly-discovered evidence related to the mistake in application of procedural or substantive law. However it was evidential in case of BTA bank, that all three instances intentionally issued miscarriage of justice. Whether it should mean that the supreme court of the KR legalized that decision issued by the inter-district

court of Bishkek? Of course, the answer shall be negative, but this mistake was not corrected anyhow. In order to exclude this gap in legislation, the author proposes recommendation to amend article 328 of the criminal code. This article shall include provision about criminal complicity, preliminary criminal collusion, with acceptance of a bribe in order to issue the decision in favor of one of the parties). The law of KR "About status of judges" as well shall be amended. Thus the provision of the judicial immunity shall contain exclusion in respect to the article 328 of the CC of KR. Up to date due to the judicial immunity the process of bringing the judge to a book take unjustifiably long time. According to the law of KR "About the status of judges" in order to initiate a criminal process against the judge, the general prosecutor must give his authorization. This authorization must include enough evidence about illegality of judge's actions. The information about the possibility of brings a judge to a book, can be spread very quickly, thus giving him/her possibility to hide the evidence about his/her guilt.

2.1.3 OJSC "Asia-Universal-Bank"

The history of "Asia Universal Bank" goes far back in 1922, when it was formed on the basis of reorganization of Industrial and Commercial Bank. However, for the purposes of this work, the most interesting are the final stages of the transformation of the bank. So in 1991, Industrial and Construction Bank of the USSR was transformed into a joint-stock commercial ICB "Kyrgyzpromstroibank" (PRSB). In 1997, the subsidiary «International Business Bank of Bishkek" was registered as a subsidiary company of «International Business Bank Corporation Limited» (IBBC), Western Samoa. In 1999-2000, due to the replacement of owners in the International Business Bank of Bishkek, the bank was renamed in Asia-Universal-Bank. In 2008, AUB was merged with Kyrgyzpromstroibank forming OJSC "AUB".[118] From this moment the story of the newly created independent public company has started. The owner of the bank was a citizen of Russian Federation, a resident of Moscow city – Mikhail Nadel. The activity of the

[118] Text of the official reply of the "AUB" on the post of "The Commersant" newspaper related to bank, June, 9, 2009, available online: <http://bankir.ru/novosti/s/-rykovodstvo-oao-aziyayniversalbank-vistypilo-s-oficialnim-oproverjeniem-2222481/> , access: April 26, 2013

bank was quite successful until the April 7, 2010, when Mikhail Nadel was accused by the interim government of the Kyrgyz Republic, in violation of banking legislation and the Law "On the financing of terrorism and laundering of the proceeds of crime".

According to the information derived from the transcript of the agenda of the parliamentary faction "Ata Meken" held in the Oval Hall of the Parliament on March 2, 2011 the author summarize that following chronology of events related to the AUB:

Since April 8, 2010, the Board of the National Bank of the Kyrgyz Republic issued a regulation № 10/1. In accordance with that regulation, the NB in order to establish control over the assets of the AUB, introduce a temporary administration to it. In fact, inspection of AUB has shown that there were no stocks that could be witness that bank's capital is less than 50 percent of the bank's equity capital.[119] In accordance with the regulation № 12/6 "On the minimum capital (equity) banks" of the NB of the Kyrgyz Republic issued on March 11, 2009 the bank's equity capital should always be maintained at no less than 200 million soms and if doesn't then the NB has right to introduce a conservation regime. Thus the NB has attempted to build up reserves to cover potential losses of the bank and therefore issued a decree of the National Bank № 40/1 of June 4, 2010 by which it introduce a conservation regime into AUB.

However this plan was failed, due to the decree of the PG dated on June 7, 2010 about nationalization of AUB. On June 20, 2011 the PG issued a decree № 94 by which it approved a plan of rehabilitation of AUB. Under this plan PG want to make additional capitalization of the bank and to provide it with an emergency credit.

The initial plan to the rehabilitation of the AUB has failed, because of the emergency situation that happened in the southern Kyrgyzstan in June 2010. The PG for that moment through the NB tried to introduce the special administration to AUB and exercise the process of restructuring. At that time, the Agency for the reorganization and restructuring of debts of banks

[119] Part 3 of the Article 8 of the Law of KR "On conservation, liquidation and bankruptcy of banks"

under the National Bank (DEBRA) gain full control over the activities of the bank, but from the legal point of view would not considered to be its owner.

According to the procedure of restructuring the PG supposed to create one or more new banks on the basis of the AUB and after their creation to eliminate the AUB.[120] However in order to exercise such operations they needed to gain the property rights on the bank. In order to that they needed to exercise re-registration of bank's securities. These securities that belonged to Mikhail Nadel authorize his property right on the bank.

Registration of transfer of ownership of uncertificated securities to new shareholders of the bank as it's supposed has not still held de jure. This is due to the fact that the PG made some mistakes during the expropriation. First, the decree of the PG about expropriation of AUB is not a normative legal act (doesn't entails any legal force), and therefore cannot be registered at the Public Registry of legal-normative acts of the KR in the Ministry of Justice, but in fact it was registered there. Secondly, the actions of the PG violated paragraph 3 of the Article 38 of the Law "On the Securities Market", which states that:

"Except as otherwise provided by the legislation of the Kyrgyz Republic, the depositary or an independent registrar can make the transfer of securities from the account of one registered holder to the account of another on the basis of:

a) Assignment of the registered person;

b) A document confirming the transaction in the stock market - the documents confirming the succession;

c) The decision of the court"[121]

Thus, we can conclude that the expropriation of joint-stock companies (such as banks) cannot occur without the consent of the owner or court decision. The same conclusion also was made by the legal advisor of Central Asian Free Market Institute - Abdykerimov Ruslan.[122]

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[120] Article 14-1 of the Law "On conservation, liquidation and bankruptcy of banks" on February 15, 2004 N 14
[121] Law "On the securities Market", No. 251, July 24, 2009
[122] Abdykerimov R., "Problematical aspects of sale of the nationalized objects in the Kyrgyz Republic", Central Asian Institute of Free market, March 7, 2011, p.3

On August 5, 2010 the Government of the Kyrgyz Republic issued a decree under which the National Bank revoke the banking license of AUB. The same day, the Board of the National Bank issued decree № 59/4. Under it, the board decided to initiate bankruptcy proceedings against OJSC "AUB". However, this decree was not enough to officially recognize the insolvency. In order to legalize its decision, the board of the NB brought a claim to Inter-District Court of Bishkek with the request to recognize the insolvency of AUB.

On August 27, 2010, the court denied the claim. In accordance with the decision of the court the NB issued a decree and returns the license to the bank. The mode of conservation was ceased as well.

On October 27, 2010 the Judicial board on administrative and economic affairs of the Bishkek city court reversed the decision of the inter-district court in full extend and adopted a new decision under which AUB was recognized to be insolvent.

On October 28, 2010 the Board of the National Bank № accepted the decree № 82/2 and revoke the license of AUB. On November 1, 2010 the board issued decree № 83/1 and instead of the mode of conservation the NB started the special administration of AUB by the method of restructuring.[123]

In consistence with the decision of the court the special administrator of AUB create OJSC "Zalkar-Bank", with cumulative assets in the amount of 3 982, 2 million of soms and with obligations in the amount of 3498, 8 million of som.[124], which was transferred the assets and liabilities of "AUB". The assets of former OJCS “AUB” were amounted to 640, 0 million of soms and obligations were evaluated in 3144, 7 million of soms.[125]

Thus the case of "AUB" is the most complex and confusing. The dispute that was initiated by Mikhali Nadel is associated with expropriation of his investment. This dispute will take place in the Permanent chamber of International Court of Arbitration in Hague

[123] Anonymous source
[124] The licenses to conduct banking operations in national currency № 49, in foreign currency - № 49/1
[125] Transcript of the agenda of the meeting of the parliamentary faction "Ata Meken" on March 2, 2011 held in the Oval Hall of the Parliament

(Netherlands) on the basis of UNCITRAL rules[126] First of all, up to the moment it seems to be that representatives of the KR in that dispute have the game in one's hands. Thus for example the General Prosecution office and the National Bank argue that members of the AUB's board were involved in the suspicious financial machinations with the translation of the national budget money to the offshore zone all around the world. This claim also supported by the report "Grave Secrecy" composed by the international non-profit organization Global Witness in June 2012.[127] In that report, the company states that AUB has connection with many shell-companies registered in offshore zones.[128] Secondly on February 11, 2006, the Central Bank of Russia (the Central Bank) has announced that the Kyrgyz "AUB" suspected in money laundering. According to the Central Bank, from early 2003 to July 2005, 170 billion rubles were "laundered" through the accounts of AUB. In respect of that, the Central Bank recommended all the citizens of CIS countries do not do any business with AUB.[129]

Up to the moment due to the lack of information that is available in the internet sources, the author can summarize that in the current dispute the main arguments of the Kyrgyz side could be:

a) prove the dishonesty of Mikhail Nadel

b) get rid him with the status of "foreign investor" and claim that the court has no jurisdiction over the dispute

In general, up to date the General Prosecution Office and the National Bank have the following evidence that was established during evaluation of AUB:

a) AUB used banking system that called "Bank + +". This system was developed by Banking Software Solutions Vendor, Company "Temenos" and help AUB to make double-entry accounting, that allow it to submit the reports to the NB that did not reflect the actual state of

[126] These companied are considered to be shell because all of them have faked owners and contain a significant sum of money on the deposits of AUB
[127] Global Witness international organization, "Grave secrecy", June 17, 2012, pp. 13-14
[128] Ibid
[129] Independent newspaper "Compromat", "Financial seizure of the Kyrgyz Republic by the Maxim Bakiev and his friends from MGN group", September 1, 2009, text is available on the web-site: <http://www.compromat.ru/page_28215.htm>, access: April 26, 2013

affairs and thus disguise the true activity of the bank.[130]

b) Financial records contain a large number of transactions, which do not substantiate and confirmed by the NB. Such situation create atmosphere for money laundering.[131]

c) On April 7, 2010 the bank was made payments on 6 million U.S. dollars, and outgoing payments in the amount of 103 million U.S. dollars, dated in the balance sheet of the bank as transactions on April 7, 2010. This money was in fact sent throughout the December 10, 2009 – April 6 2010

d) There are reasonable grounds to believe about the existence of fictitious transactions of securities purchase, possibly resulted in the withdrawal of public funds from the Republic;

e) Financial, statistical, regulatory reporting provided to government bodies was false and fraudulent, in order to conceal the real financial picture. On April 7, 2010 the bank had falsified financial statements in the amount of more than 12 billion of soms

f) AUB served individuals and entities who conducted the transactions that categorized as "suspicious" and were associated with family-related people of the President Kurmanbek Bakiev

g) AUB ignored and violated the basic requirements of the law of the Kyrgyz Republic "On combating and financings of terrorism and laundering of proceeds of crime" (CFT / LPC), the National Bank of the Kyrgyz Republic and the state of the financial intelligence service of the KR "[132]

Above mentioned evidence is weighty but one-sided. The international arbitration court may require a comprehensive independent review of the status report of the National Bank and the validation of the results, which can be time consuming. At the moment, it appears that the dispute of "AUB" against the KR will be recognized as an investment; as was evident intent of

[130] Article «Zalkar vs. AUB: inadmissible comparison", Independent newspaper "Evening Bishkek" №66, April 19, 2011, available on:< http://members.vb.kg/2011/04/19/vabank/1_print.html > access: April 26,2013
[131] Ibid
[132] The law of Kyrgyz Republic "On combating and Financing of terrorism and laundering of proceed of crime", 2009

the PG, nationalize foreign investments - bank shares owned by foreign investors - Mikhail Nadel. To implement this plan, the EP even issued a special decree, which was issued earlier than the bank was accused of violating banking laws and the National Bank of the Kyrgyz Republic, using the procedure of special administration of the bank. So, taking this into account, the actions of the PG could be described as wanting to direct expropriation. Thus, the potential position of representatives regarding the confiscation of the bank, based on the verdict against Mikhail Nadel, accused as Valery Belokon on article 183 of the Criminal Code, it is a very poorly reasoned. When representatives of Mikhail Nadel will prove expropriation then the court will apply the Article 6 of EES agreement, that suggests the compensation should be:

a) carried out on the principle of non-discrimination

b) paid immediately after the adoption of the decree from June 7, 2010 № 56, which did not include any provision about amount of money that supposed to be paid to him as an investor

c) adequate, that is to correspond to the market value of the expropriated investment and the investor's income on the date immediately preceding the date of their actual expropriation. According to the latest information provided by the AUB bank , up to the end of the April 7, 2010, the assets of the bank amounted in 24.1 billion soms, and on April 8, 2010 when the National Bank of Kyrgyz Republic has introduced a temporary administration the assets were evaluated in 13.6 billion soms[133].

d) compensation was to be paid immediately in a period not exceeding 3 months in a freely convertible currency. In case of delay, sum of compensation will be increased on the amount of percentages that will be calculated from the date when compensation was supposed to be paid until the day when it officially was paid. These percentages will be equal to the rate of the national inter-bank market on the actual provision of loans in U.S. dollars for up to 6 months or in the manner determined by agreement between the investor and the State of the recipient. Thus,

[133] Transcript of the agenda of the meeting of the parliamentary faction "Ata Meken" on March 2, 2011 held in the Oval Hall of the Parliament

compensation for the expropriation of "AUB" was to be paid to the September 7, 2010. The interest rate at which interest is payable on February 7, 2010 was 0.15. [134]

An interesting feature of the EES agreement is that among its provisions there are no any norms that allows investors from Russian to request the compensation of a lost profit. The author of the thesis assumes that this gap will be filled by the reference to the Paragraph 2 of Article 4 of the EES agreement, which states that: "The treatment specified in paragraph 1 of this article (fair and equitable treatment), shall be no less favorable than any other treatments that are provided by the Party(KR) in respect of investments and activities in connection with such investments to domestic investors or investors of any other State, including a non-party to this Agreement, and shall be provided at the option of the investor, depending on which of these features, in his opinion , is the most favorable. "So specifically, this provision allows a Russian investor, to use the model for compensation that is provided by any agreement concluded by our country to any other investor. In order to claim lost profits, it is assumed that the investor referred to paragraph 2 of Article 4 of the EES agreement, will take advantage of Part 2 of Article 7 of Ashgabat Agreement concluded on December 24, 1993, which states that: «…the investors of the parties, have right to request compensation in respect to the lost profit, that happened in the result of the actions committed by the public official, that contradict to the legislation of the state-recipient"

The authors therefore concluded that, in considering the question of compensation referees will be guided by bilateral investment treaties and agreement EurAsEC. At the moment though, it appears that the analysis can not be completed as otherwise restrict the analysis provided and information found.The cases examined in the course of writing this paper coated stamped confidential and of particular importance, so can only speculate. In fact will develop remains to be seen, but at the moment we can confidently say that the nationalization of the

[134] The Bank of Kyrgyzstan shall regulate the banks' interest rates level in the Kyrgyz Republic by means of monetary policy instruments. Information about that rates can be find on the official web-site of the NB: http://www.nbkr.kg/index1.jsp , access: April 26, 2013

Interim Government in 2010, has nothing to do with the nationalization procedure and grounds for its conduct prescribed by the laws of the country. This drawback can now be considered a major threat not only to lose in the arbitration proceedings, but also a threat to the country's budget, the reputation and image in the face of present and future investors, which I hope will come to the Kyrgyz Republic.

Key findings

1) There is no both legal definition of confiscation in administrative order and the concept of expropriation and their legal differentiation. Without the inclusion of these terms in the legislation establishing the institution of expropriation may be considered incomplete and did not meet the challenges of the modern investment law. The introduction of this concept in the law due to:

a) The difference of expropriation, nationalization or confiscation of the administrative procedure on the grounds for their conduct

b) dividing the expropriation of indirect and direct

c) the obligation to pay compensation for expropriation and nationalization and the absence of such a duty under the administrative forfeiture

2) There is no special law on investment in insurance and credit organizations. There is no legally justified term of investments in commercial banks

The need to develop this law is due to:

a) the specificity of the banking relationship: 2-level banking system led by National Bank

b) the specificity of the concept of investment banks. Under the investment banks means: long-term investment assets carried at their own risk by purchasing a certain number of shares for the purpose of exercising control over the bank, a limited part of a shareholder for later profit.

c) the inability of expropriation of joint stock companies (banks) without the consent of the owner - the holder of the shares (which are necessary to re-register)

3) The absence of a BIT with Russia, not signing the Seoul Convention and the lack of entry into force of the Washington Convention.

The conclusion of BITs with Russia will:

a) further define the investment conditions in the two countries, depending on the specific area of investment: the real sector of the economy or the banking sector

b) impose additional conditions regarding expropriation, the conditions and the reasons for its conduct, order the payment of compensation, the possibility of settlement of the dispute to the International Court of Arbitration of the Chamber of Commerce and Industry of the Kyrgyz Republic.

The conclusion of the Seoul Convention will:

a) allow KR to have special borrowing facilities through which it will be possible to cover all the related claims of investors in respect of compensation for expropriation by the KG

b) reduce the risk of non-target embezzlement of state budget

c) improve the image of the KG, in the eyes of investors, giving them a guarantee of compensation in the event of unlawful action by the state and its employees

The conclusion of the Washington Convention will:

a) allow to implement the mechanisms for recourse to ICSID provided in the BITs

b) provide investors with the opportunity of a quick and fair hearing in the ICSID rules instead of using additional facility rules

4) KG authorities have sovereign and exclusive rights on expropriation of foreign investment. This conclusion is supported by comparisons of the main provisions of the doctrine of "Calvo" with the legislation in the sphere of investments:

a) Foreign investors have equal and equitable treatment of investment. This principle is enshrined in BITs with the Kazakhstan (Article 1), BIT with Latvia (Article 2), the agreement on the protection and promotion of investments in the countries of the EurAsEC member states (Article 4)

b) There is no obligation to pay compensation to foreign investors in cases where the nationalization (or whatever its equivalent measures) have been carried out during the war, riots, revolutions, and other developments coming out from under the control of the authorities. Part 2 of Article 14 of the Constitution of the Kyrgyz Republic, confirms this claim.

5) The concept of investment is interpreted through the prism of national identity and

status of the foreign investor.

a) In determining this status we should also take into account the practice of arbitration court on the application of the "theory of control"

b) The inclusion of the concept of "control of investor by a third party" in subsequent BITs of the KR will guarantee us to punish unfair practices of any investors

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