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A Comparison of the Legal Regimes for Foreign Investment in Russia, Kazakhstan, and Kyrgyzstan

Keith Molkner†

With the demise of the Soviet Union in the fall of 1991, the newly emerging republics of the Commonwealth of Independent States (CIS) have embarked upon the reconstruction of their national economies. One step in this process is the creation of legal regimes that will facilitate foreign investment in their respective republics. Russia, Kazakhstan, and Kyrgyzstan have emerged as the most aggressive of the republics in implementing foreign investment reforms.

This article surveys the legal regimes for foreign investment in Russia, Kazakhstan, and Kyrgyzstan, highlighting the unique character of the foreign investment law reform processes in each of these newly independent states. The author focuses on issues of relevance to foreign investors, such as the types of foreign investments allowed in each republic, the provisions for foreign participation in privatization of state-owned enterprises, and dispute resolution mechanisms.

I.

INTRODUCTION

At the close of 1991 the world's largest country, the Soviet Union, died with a whimper. The Presidents of Russia, Ukraine, and Belarus, meeting in the city of Minsk, declared the Moscow-based central government to be legally nullified.¹ Fifteen disparate republics were thrust simultaneously upon the world stage as independent sovereign states. Flags were changed. Religious and nationalist sentiments reestablished themselves with vigor. People began to search for the secrets of their past in order to discover the direction of their future.

These new countries are struggling to consolidate their newfound independence while working to overcome the legacy of economic failure left by

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1. Fred Hiatt, *Minsk is No Moscow, and That's the Point for New Grouping*, WASH. POST, Dec. 9, 1991, at A16.

the Soviet system and the strains caused by separation from the larger union. Faced with this Herculean challenge, several of the republics hope to enlist outside assistance in reconstructing their national economies. Once virtually closed to the participation of international business, some of the republics now seek infusions of outside capital, technology, and expertise, both to develop their internal economies and to participate in the world economic community. Nevertheless, foreign investment in the former Soviet republics has been limited by a lack of confidence in the legal protections provided to foreign investors.

At their inception, these newly independent republics inherited the Soviet legal regime for foreign investment. This regime provided relatively weak guarantees against expropriation, severely limited the nature and scope of foreign investment and the ability of foreign investors to repatriate earnings in convertible currency, and allowed little opportunity for international resolution of investment disputes. Consequently, aggressive reform of the legal regimes regulating foreign investment in the republics will be a necessary prerequisite to widespread foreign investment in the newly independent republics.

II. BACKGROUND

Russia, Kazakhstan, and Kyrgyzstan have emerged as the most aggressive of the republics in implementing foreign investment reforms. As the Soviet Union unravelled, these republics drafted ambitious new foreign investment laws. These laws replace the restrictive Soviet regime of heavily-regulated, government-dominated joint ventures with new structures that will be more attractive to foreign investors. To this end, the drafters sought to widen substantially the types of foreign investment activity permitted and to reduce bureaucratic impediments to foreign capital. The final drafts of these laws were each fiercely debated in their respective republican legislatures, and were adopted in early and mid 1991.

Although the untested legal infrastructures of these newly independent republics make the manner of interpretation and enforcement of the new foreign investment laws impossible to predict, the dramatic reforms manifested in these legislative enactments portend a new era for western business in Russia, Kazakhstan, and Kyrgyzstan. While economic and social disarray and persistent *nomenklatura* bureaucracies in all three countries create numerous hurdles to foreign investment, each republic has certain attributes and resources which foreign investors may find attractive.

Businesspersons who are considering investing in the Commonwealth of Independent States (CIS), a loose economic association made up of a large majority of the former Soviet republics, are most likely to begin their search with Russia. Russia is both the largest and the most populous republic in the CIS, having a citizenry of nearly 150 million and covering the vast bulk of the

territory of the former USSR.² Occupying land in both Europe and Asia, bordering on the Gulf of Finland, the Black Sea, and the Pacific Ocean, Russia has numerous outlets to the outside world. The Russian Federation is also the quasi-inheritor of Soviet superpower status, having assumed possession of the diplomatic assets and the permanent United Nations Security Council seat of the defunct USSR.³ Although Russia exercises dominion over much of the former Soviet Union's oil, gas, and precious metal deposits and has higher industrial and grain output than the CIS average, it needs to convert its industrial base from military to consumer production.⁴ Foreign businesses of all types are already present in Russia, seeking ways to profit through participation in the restructuring of the Russian economy. The difficulties involved in such undertakings are illustrated by a noted historian's comment that efforts to transform Russia industrially have always had to take account of both "the wealth of Russia and the geographic and climactic obstacles to a utilization of this wealth."⁵

Since the collapse of Soviet power, the Republic of Kazakhstan has emerged as a leading player in Central Asia. By emphasizing his country's natural resources and strategic location, President Nursultan Nazarbayev has succeeded in putting this once peripheral Soviet province onto the world map. Kazakhstan has managed to generate a good deal of interest among Western executives, particularly those in oil-related industries. Some of these executives have voiced a perception that the Kazakh government is more hospitable to foreign investment than that of Russia.⁶ In any case, foreign interest in Kazakhstan is justified by the republic's resources alone. Kazakhstan is home to 16.2 million people, nearly half of whom are relatively highly skilled ethnic Russians. Its immense but largely arid 2.8 million square kilometers contain major oil fields, coal, gas, and fantastic mineral wealth.⁷ For example, Kazakhstan produces ninety percent of the chrome of the former Soviet republics, fifty to sixty percent of the silver, half the tungsten and lead, forty percent of the zinc and copper, twenty-five percent of the bauxite, ten percent of the iron ore, and seven percent of the gold, ranking it as the third largest gold producer in the CIS.⁸ Chief agricultural products include grain, to-

2. LEONID D. SOBOLEV, *USSR CENSUS 1989* 9 (1989).

3. *Yeltsin's Challenge: Forging Linkages*, *TORONTO STAR*, Dec. 29, 1991, at B2.

4. John Lloyd, *Soviet Empire's Republics Set Sail into the Unknown*, *FIN. POST*, Dec. 30, 1991, at 17.

5. NICHOLAS V. RIASANOVSKY, *A HISTORY OF RUSSIA* 9 (4th ed. 1984).

6. Corporate officials in the U.S. oil industry have expressed the opinion that Kazakhstan's commercial laws will be more stable and predictable than those of Russia, and that lines of authority are more clearly drawn in Kazakhstan. *Kazakhstan Rises, While Russia Slides: DOE Guests See Republic as Better Opportunity*, *PLATT'S OILGRAM NEWS*, Nov. 12, 1992, at 1.

7. *How Republics Make the Grade*, *USA TODAY*, Sept. 30, 1991, at 6B.

8. Leyla Boulton, *Kazakhstan Leader the Sultan of Soviet Reform*, *FIN. POST*, Oct. 23, 1991, at 43; Steven Erlanger, *Treasure House Lost by Soviets Opens to the West*, *N.Y. TIMES*, Mar. 2, 1993, at A3.

bacco, fruit, cotton, and meat while the primary industries are iron, steel, chemicals, and electricity.⁹

In spite of its relative obscurity on the world scene, Kyrgyzstan's President, Askar Akayev, aggressively bills this small mountainous republic as "the Switzerland of Central Asia."¹⁰ Kyrgyzstan has received extensive world attention for its efforts to create a western-style democracy in a region that lacks such a tradition.¹¹ Kyrgyzstan's 4.3 million people live in a largely pastoral country with a dry climate and a relatively undeveloped industrial sector.¹² The agricultural sector produces a variety of basic foodstuffs, cotton, silk, and possibly the world's highest quality wool.¹³ Other industries that have attracted the attention of foreign investors include metallurgy; coal, oil, and gas production; and natural mineral spas.¹⁴

While Russia, Kazakhstan, and Kyrgyzstan are not alone among the former Soviet republics in possessing economic resources that may attract foreign investors, the dynamism of the legal reform process taking place in these three countries sets them apart. By engaging in comprehensive legislative reform efforts and negotiating international treaties, these countries have fundamentally reshaped their legal climates for foreign investment. The reform programs in Russia, Kazakhstan, and Kyrgyzstan reveal numerous similarities, but each country has followed its own path. This article will highlight the unique character of the foreign investment law reform processes in each of these newly independent states.

III.

FOREIGN INVESTMENT IN RUSSIA

A. *Russian Legislation on Foreign Investment*

The principle source of current Russian foreign investment law is the 1991 law entitled "On Foreign Investments in the Russian Federation."¹⁵ The stated purpose of this law is to fix "the legal and economic bases for foreign investments" throughout the territory of Russia and to advance the Russian economy by attracting foreign investors.¹⁶ A presidential decree on the liberalization of foreign economic activity was issued later the same year, clarifying and expanding certain technical points without altering the funda-

9. *How Republics Make the Grade*, *supra* note 7.

10. Stephen Handelman, *Kyrgyzstan Looks to Ottawa for Advice, As Well As Aid*, TORONTO STAR, Mar. 8, 1992, at F1.

11. Igor Rotar, *Will Ethnic Strife Sink Kirgiz Experiment*, NEZAVISIMAYA GAZETA, Mar. 10, 1992, at 1, in THE CURRENT DIGEST OF THE POST-SOVIET PRESS No. 10, at 4 (1992).

12. *How Republics Make the Grade*, *supra* note 7.

13. *Kyrgyzstan Opening Door to Roc*, CENTRAL NEWS AGENCY, Feb. 18, 1992.

14. *How Republics Make the Grade*, *supra* note 7.

15. On Foreign Investments in the RSFSR, SOVetskaya Rossiya, July 25, 1991, at 1-4 [hereinafter Russian Law on Foreign Investments].

16. *Id.*, pmb1.

mental scheme erected by the new legislation.¹⁷ Another law, titled "On the Basic Provisions of the Program for the Privatization of State and Municipal Enterprises in the Russian Federation in 1992," will be discussed in connection with the specific problems of foreign investor participation in privatization.¹⁸

B. Definitions of Foreign Investors and Foreign Investment

Persons and entities permitted to be foreign investors in Russia are broadly defined to include foreign legal entities permitted to make investments by the laws of their country of origin; foreign citizens; stateless persons; Soviet citizens residing abroad; foreign states; and international organizations.¹⁹ Foreign investments encompass "all kinds of property and intellectual values invested by foreign investors into entrepreneurial projects and other kinds of activity in order to derive profit."²⁰

C. Permitted Forms of Foreign Investment Activity

Recognized forms of foreign investment include shared participation in enterprises "set up jointly" with Russian and other Soviet Republics' citizens and entities; creation of enterprises wholly owned by foreign investors, including branches of foreign legal entities; acquisition of enterprises and property that is permitted under Russian law to be owned by foreign investors; acquisition of rights to use land and other natural resources; and other investment activity not prohibited by law,²¹ including the granting of loans, credits, property rights, etc. . . .²² Additionally, foreign investment can be made in any type of investment not prohibited by law, including fixed and circulating

17. See generally Boris Khersonski & Andrea Freedman, *Russian Decrees on Foreign Economic Activity*, 2 PARKER SCH. SURV. ON SOVIET & E. EUR. L. NO. 10, at 7 (1992).

18. On the Basic Provisions of the Program for the Privatization of State and Municipal Enterprises in the Russian Federation in 1992, ROSSISKAYA GAZETA, Jan. 10, 1992, at 3-4 [hereinafter Russian Privatization Law].

19. Law on Foreign Investments, *supra* note 15, art. 1. The fall of the former government has made the term "Soviet citizens residing abroad" archaic, along with similar language found throughout the foreign investment laws of Russia, Kazakhstan, and Kyrgyzstan. How these countries will interpret these outdated terms is yet to be established.

20. *Id.* art. 2.

21. The "types of investment not prohibited by law" may refer to economic activity which is prohibited to foreign investors in the absence of an investment license. See *infra* text accompanying notes 25-26. This language also applies to restrictions on foreign investment imposed by other laws. The legal confusion currently existing in the Russian Federation, which recently waged a "war of laws" against the Soviet regime, has made it difficult for the government itself to know what other enactments are impacted, displaced, or inconsistent with the new foreign investment law. The decree enacting the foreign investment law therefore directs the Russian Federation Council of Ministers to pinpoint and repeal those decrees, regulations, and other official rules promulgated by various agencies of the Russian government that conflict with the foreign investment law. Decree of the RSFSR Supreme Soviet "On Enacting the RSFSR Law 'On Foreign Investments in the RSFSR,'" § 4, SOVETSKAYA ROSSIYA, July 25, 1991, at 4. There are no indications that this process has yet been completed.

22. Russian Law on Foreign Investments, *supra* note 15, art. 3.

capital, securities, monetary investments made for a specific purpose, scientific and technical products, rights to "intellectual values," and certain real property rights.²³

D. Licensing and Registration Procedures

The Russian Law on Foreign Investments provides a two-track system of licensing and registration procedures for foreign investments. Foreign investment licenses, representing official approval of an investment proposal, are required for some, but not all, foreign investment projects. The requirement of registration, however, extends to all "enterprise[s] with foreign investments."²⁴

The Russian Law on Foreign Investments empowers the Russian Federation Council of Ministers to determine which forms of foreign investment activity will require a license.²⁵ Additionally, foreign investment in financial services such as insurance activity, banking, and securities brokering, explicitly requires a license.²⁶ Banking licenses are to be issued by the Russian Central Bank while licenses for other financial activities are to be issued by the Russian Ministry of Finance.²⁷

Primary responsibility for registering enterprises with foreign investments is given to the Ministry of Finance, although the statute provides that other agencies may be similarly empowered by law.²⁸ The general scheme of the Russian Law on Foreign Investments implies that registration, unlike licensing, is generally intended to be a means of notifying the Russian government of the investment rather than an application for permission to invest. Nevertheless, in the case of large scale foreign investments the mandatory registration takes on a quasi-licensing function. Large scale investment, defined as foreign investment exceeding 100 million rubles, may not be registered without the permission of the Council of Ministers.²⁹ In this case, the Council of Ministers is obliged either to grant or deny such permission within two months of the date of submission of the registration materials to the Ministry of Finance.³⁰

Registration procedures generally require the preparation of certain documentary submissions that vary in content depending on whether the enter-

23. *Id.* art. 4; see *infra* note 39 for discussion of ambiguity surrounding foreign investors' rights to real property. "Intellectual values" probably means intellectual property, but differences may emerge in future Russian law.

24. Russian Law on Foreign Investments, *supra* note 15, art. 16. Enterprises with foreign investments are defined under the terms of this article to include joint ventures (including their subsidiaries and branches), wholly owned foreign enterprises (also including subsidiaries and branches), and branches of foreign legal entities. *Id.* art. 12.

25. *Id.* art. 20.

26. *Id.*

27. *Id.*

28. *Id.* art. 16.

29. *Id.*

30. *Id.*

prise is a joint enterprise, a wholly foreign owned enterprise, or a branch of a foreign enterprise.³¹ The proposals for planned investment contained in registration documents are particularly important because the law provides that an enterprise with foreign investments will be automatically liquidated one year after registration, in the absence of documentary confirmation that at least fifty percent of the start-up capital specified in the registration has been raised by that time.³² In addition, registration of certain types of enterprises with foreign investments, including construction projects and other projects raising ecological or sanitation concerns, requires submission of an examination report by an appropriate expert.³³

E. Guarantees of Nondiscriminatory Treatment

The Russian Law on Foreign Investments provides that foreign investors shall enjoy full and complete protection of Russian law.³⁴ In addition, the legal treatment of foreign investors "may not be less favorable" than the treatment accorded Russian persons and entities, except as provided for by the foreign investment law itself.³⁵ One Russian commentator stated that the underlying principle of this provision is the establishment of "complete equality of investors, and that means also those investing capital, regardless of its source."³⁶

The principal exception to treating foreign investors in the same manner as Russian nationals is the reservation of the right of the Russian Federation Council of Ministers to determine what forms of foreign investment activity require special authorization.³⁷ As stated earlier, a license will be explicitly required for foreign investors who engage in insurance and banking activity, and brokerage activity associated with the movement of securities.³⁸ Furthermore, although the law provides for foreign acquisition of land-use rights, the law is silent on the essential question of foreign ownership of land.³⁹

The Russian Law on Foreign Investments provides no guidelines regarding the prerequisites for issuance of a foreign investment license. It also fails to set forth regulations governing the screening procedure to be employed

31. *Id.*

32. *Id.* art. 19.

33. *Id.* art. 14.

34. *Id.* art. 6.

35. *Id.*

36. Mikhail Grigoryev, *The Russian Law on Investment Activity: All That Remains is to Say the Magic Words*, 26 *KOMMERSANT* 10 (1991).

37. Russian Law on Foreign Investments, *supra* note 15, art. 20.

38. *Id.*

39. *Id.* arts. 2, 38, 39. Article 38 provides that foreign investor rights to use and lease land are regulated by the RSFSR Land Code. The code permits private ownership of land while simultaneously mandating that land be owned by the state or the "people living on the land." The establishment of clear private ownership rights in land is often viewed by western critics as the "ultimate test" of Russian commitment to a free market system. See generally Kaj Hober, *The Russian Law on Foreign Investments*, 2 *PARKER SCH. SURV. ON SOVIET & E. EUR. L.* No. 7, at 5 (1991).

when a potential foreign investor applies for an investment license. The absence of defined criteria regarding these matters suggests a grant of a significant amount of discretion to state officials to license, or refuse to license, foreign investments. Additionally, foreign investor participation in privatization programs is governed by separate Russian privatization laws. These laws clearly discriminate against foreign investors. The privatization laws are discussed later in this article.

F. Right to Transfer Profits and Other Payments

Following the payment of applicable taxes, the Russian Law on Foreign Investments guarantees foreign investors unhindered transfer abroad of investment earnings and payments that are already in hard currency.⁴⁰ Hard currency earnings and payments to which this guarantee applies include profits and shares of profits; dividends; interest; licensing, commission, and other fees; payments for technical services or technical assistance; sums paid on rights of claims for money and claims for meeting contractual obligations; sums obtained by investors in connection with partial or complete liquidation, or in connection with the sale of investments; and compensation for expropriation.⁴¹

The liberties provided by the 1991 law are severely compromised by more recent edicts dealing with foreign exchange control. The Presidential Decree on the Formation of a Hard Currency Reserve of December 30, 1991 requires sale to the Central Bank of ten percent of the total hard currency earnings of any firm registered in Russia at a relatively realistic "market rate."⁴² It further requires an exchange at an artificially low "commercial rate" of forty percent of hard currency revenue earned from the export of mineral, chemical, forestry, food and animal products, as well as other raw materials.⁴³ The mandated exchanges were relaxed, however, by the Central Bank Instruction of January 22, 1992, which specifies that wholly foreign-owned enterprises and joint ventures in which foreign investors hold more than a thirty percent stake are exempt from the forty percent mandatory exchange requirement.⁴⁴

The first conversion requirement results in a fairly moderate disincentive to all foreign investors aiming to earn profits in the form of hard currency, although a ten percent exchange at market rates would probably be necessary in any case to meet costs. The second conversion requirement makes it imperative for those foreigners choosing to invest in joint enterprises specializing in the export of raw materials, chemical, forestry, and food and animal

40. Russian Law on Foreign Investments, *supra* note 15, art. 10.

41. *Id.*

42. See generally Jonathan Hines & Dmitri N. Nikiforov, *Russian Decrees on Foreign Economic Activity*, 2 PARKER SCH. SURV. ON SOVIET & EUR. L. No. 10, at 8 (1992).

43. *Id.*

44. *Id.*

products, to ensure that more than thirty percent of the venture remains foreign owned.

The Russian Law on Foreign Investments also requires that investment earnings in rubles remain on Russian territory to be reinvested or otherwise used in Russia.⁴⁵ Foreign investors may keep ruble accounts in Russian banks but they do not have the right to transfer these assets abroad.⁴⁶ In this manner, the law and the basic convertibility problems that underlay it, generally require foreign investors whose earnings are in rubles, rather than hard currency, to arrange highly creative means of making profitable investments in Russia.⁴⁷

Foreign investors may also find exceptions to the exchange requirements. To encourage import substitution, exceptions to these restrictions are made for foreign investment enterprises which produce goods certified by various state agencies to be of importance to the Russian economy. Foreign investors in these key industries may, through certain procedures, transfer profit in rubles into hard currency at a mutually agreed rate of exchange.⁴⁸

G. Protection against Expropriation

The Russian Law on Foreign Investments provides that nationalization, requisition, and confiscation of foreign investments in Russia are only permitted in exceptional cases where provided for by legislative action.⁴⁹ In such cases, the foreign investor must be paid prompt, adequate, and effective compensation.⁵⁰ Furthermore, the Russian Law on Foreign Investments declares that foreign investors have the right to compensation for damages, including lost profits, resulting from compliance with instructions from Russian state management bodies that are at variance with Russian law. Foreign investors also have the right to compensation for losses that result from "improper discharge by such organs and their officials of obligations provided for by law with respect to a foreign investor."⁵¹

45. Russian Law on Foreign Investments, *supra* note 15, art. 11.

46. *Id.*

47. For instance, McDonald's restaurants, which are vaunted for their success in the Russian market, rely on the use of ruble profits to purchase commodities that are then exported for sale to their franchises in Western Europe. Katsuro Kitamatsu, *Soviet Expansionism, McDonald's Style*, NIKKEI WKLY., Oct. 19, 1991, at 7.

48. Russian Law on Foreign Investments, *supra* note 15, art. 11.

49. *Id.* art. 7. The meaning of the terms "nationalization," "requisition," and "confiscation" in the Russian law is not entirely clear. Under Soviet law, requisition usually meant government seizure of property during emergencies and confiscation denoted a criminal sanction. See Hober, *supra* note 39, at 6.

50. *Id.* The adoption of the "prompt, adequate and effective" formulation indicates welcome Russian adherence to the fair compensation standard used in international law and in United States bilateral investment treaties.

51. Russian Law on Foreign Investments, *supra* note 15, art. 7. A hypothetical example of this type of compensation is suggested by a Russian commentator who posits that "if in carrying out any state order [zakaz], the state organs fail to make the deliveries contracted, or violate the conditions of financing or the advantages offered, including tax advantages, they shall be obligated to compensate the investor for all damages, including profits not received." Grigoryev,

The Russian foreign investment statute provides that compensation for expropriation paid to foreign investors should be commensurate with the "actual value" of the investment immediately before it becomes officially known that nationalization will occur.⁵² This compensation should be paid "without undue delay" and in the currency of the original investment, or in any other currency suitable to the investor, and Russian interest rates should be applied to compensation payments.⁵³

H. Dispute Settlement and Arbitration

The Russian Law on Foreign Investments mandates that disputes regarding foreign investments, including disputes pertaining to compensation, be resolved at the Russian Supreme Court or the Russian Supreme Arbitration Court,⁵⁴ unless other procedures are established by treaty.⁵⁵ Other disputes between foreign investors and Russian state bodies, enterprises, or other legal entities are heard in Russian courts, or, by consent of the parties, in Russian courts of arbitration.⁵⁶ Furthermore, when an international treaty provides for appeal to an international authority for dispute-settlement, the treaty controls.⁵⁷

I. Special Incentives

1. Tax Privileges

The Russian Law on Foreign Investments does not provide for any general tax incentives for foreign investors. Nonetheless, the law does state that preferential taxation may be established for enterprises with foreign investors if they operate in particular regions or in industries subsequently identified by the government as "priority sectors" of the national economy.⁵⁸

supra note 36. A real life application of this principle involved a decree by the RSFSR Council of Ministers that forbade the operation of casinos without a special license, which was to be issued by the RSFSR Ministry of Finance. The Ministry of Finance failed to organize procedures for accepting and reviewing applications for such licenses. Consequently, foreign investors in joint venture-operated casinos suffered significant losses when police closed their operations for lack of licenses. Hober, *supra* note 39, at 6.

52. Russian Law on Foreign Investments, *supra* note 15, art. 8.

53. *Id.*

54. The Russian Supreme Arbitration Court was formerly the Supreme Arbitration [Arbitrazh] Court of the USSR. For a detailed explanation of the history and procedures of the Soviet arbitration system, including the Supreme Arbitration Court, see Christopher Osakwe, 2 SOVIET BUSINESS LAW §§ 17.01-06 (1991).

55. Russian Law on Foreign Investments, *supra* note 15, art. 9.

56. *Id.*

57. *Id.* The availability of international arbitration, where established by treaty, is significant because investors, wary of biased tribunals, generally prefer not to have disputes with foreign governments or their nationals resolved in the foreign state's own forum. U.S. investment treaties with foreign countries generally provide mechanisms for international arbitration of disputes.

58. *Id.* art. 28.

2. *Free Economic Zones*

The Russian Law on Foreign Investments further states that free economic zones will be established in Russia, and provides preferential regimes for foreign investment in order to attract foreign capital, technology, and managerial expertise, and to develop Russian exports.⁵⁹ Special privileges offered in Russian free economic zones include simplified registration procedures that can be carried out at the local level; a preferential tax regime (expressly including preferential taxes on profits transferred abroad) that may be less than half the standard rate of taxation; lower rates of payment for the use of land and other natural resources; extended rights to lease land (up to seventy years and a right to sublease); a special customs regime including lower duties on imported and exported goods; and a simplified regime for the entry and exit of foreign citizens, including an elimination of the need for a visa.⁶⁰

J. The Special Case of Privatization

The issue of foreign investor participation in privatization is governed by Article 9 of the Russian Privatization Law.⁶¹ Barring special authorization from the Russian Federation State Committee for the Management of State Property, participation of foreign investors in the privatization of areas such as trade, transport, and small scale industrial and construction enterprises and facilities is restricted to cases where the foreign investor provides significant new capital.⁶² Although foreigners are restricted in some privatization efforts, incentives are provided to foreign investors in other types of privatized enterprises, such as enterprises specializing in the manufacture of building materials, agricultural processing and other food industries, as well as economically troubled operations (including loss-making enterprises, mothballed facilities, and unfinished construction projects).⁶³ These incentives include automatic permission for foreign investors to purchase a controlling block of shares and to acquire additional shares at market prices following the sale of ten percent of the shares at auction.⁶⁴

The participation of foreign investors in the privatization of certain industries is only possible with the permission of the Russian government. These industries include major economic enterprises, all enterprises in a dominant market position, enterprises that produce or repair armaments, and ex-

59. *Id.* art. 41. The best known region to have been declared a free economic zone is Russia's second largest city, St. Petersburg. See Peter Fuhrman, *The Road from Serfdom*, FORBES, Dec. 23, 1991, at 126.

60. Russian Law on Foreign Investments, *supra* note 15, art. 42.

61. Russian Privatization Law, *supra* note 18, art. 9. For a wider discussion of Russian privatization efforts, see Vladimir K. Andreev, *The Privatization of State Enterprises in Russia*, 18 REV. SOCIALIST L. 265 (1992); William E. Holland, *The Russian Republic Law on Privatization*, 1 E. EUR. REP. 88-90 (1991).

62. Russian Privatization Law, *supra* note 18, art. 9, § 1.

63. *Id.* art. 9, § 2.

64. *Id.*

tractive industry enterprises.⁶⁵ The Russian government also reserves the right to impose several additional restrictions on foreign investor participation in privatization, including a total ban on participation, an upper limit on the share of corporation capital held by foreign investors, retention by the government of a right of veto or decision on certain matters defined by the Russian government or in the corporate documents, and licensing of foreign investors' participation in privatization.⁶⁶

Lastly, foreign investor participation in privatization of high technology enterprises, enterprises undergoing conversion, and fuel and energy enterprises is subject to mandatory licensing.⁶⁷ Foreign acquisition of shares in a privatized enterprise with a value of more than ten million dollars,⁶⁸ or of shares of such an enterprise guaranteeing more than half the votes, requires the prior agreement of the Foreign Investment Committee of the Russian Ministry of the Economy and Finance.⁶⁹

IV. FOREIGN INVESTMENT IN KAZAKHSTAN

A. *Kazakh Legislation on Foreign Investment*

In 1991, Kazakhstan simultaneously enacted two laws that govern foreign investment. These are the law "On Foreign Investments in the Kazakh SSR" and the law "On Basic Principles of Kazakh SSR Foreign Economic Activities."⁷⁰ As these two laws predate the Russian Law On Foreign Investments by six months, they are the first legislation in the former Soviet Union, at either the republican or the federal level, specifically dedicated to attracting foreign investment.⁷¹ Whereas the Kazakh Law on Foreign Investments pertains strictly to the rights and duties of foreign investors, the Kazakh Law on Foreign Economic Activity applies more broadly to all legal and natural persons involved with the movement of goods, services, and capital across the borders of Kazakhstan. Furthermore, the law "On Free Economic Zones in the Kazakh SSR"⁷² is discussed briefly later in this article in the section deal-

65. *Id.* Note that major economic enterprises are defined as having fixed capital in excess of 200 million rubles or more than 10,000 employees, on January 1, 1992. *Id.*

66. *Id.* art. 9, § 3.

67. *Id.* art. 9, § 4.

68. All dollar amounts in this article refer to U.S. dollars.

69. *Id.* art. 9, § 5.

70. On Foreign Investments in the Kazakh SSR, KAZAKHSTANSKAYA PRAVDA, Jan. 17, 1992, at 2 [hereinafter Kazakh Law on Foreign Investments]; On Basic Principles of Kazakh SSR Foreign Economic Activities, KAZAKHSTANSKAYA PRAVDA, Jan. 17, 1992, at 2 [hereinafter Kazakh Law on Foreign Economic Activity].

71. William B. Simons, *Foreign Investment Laws of Kazakhstan*, 17 REV. SOCIALIST L. NO. 1, 81, 84 (1991). For a brief summary of the political and legal background to the laws, see *Kazakhstan Creates Broad Commercial Regime for Foreign Investments*, 2 SOV. BUS. L. REP. NO. 1, 7 (1991).

72. On Free Economic Zones in the Kazakh SSR, KAZAKHSTANSKAYA PRAVDA, Jan. 23, 1991, at 3 [hereinafter Kazakh Law on Free Economic Zones].

ing with special incentives for foreign investors, and the law "On Denationalization and Privatization"⁷³ is examined in the section dealing with privatization.

B. Definitions of Foreign Investor, Foreign Investment, and Foreign Economic Activity

Foreign investors in Kazakhstan may be foreign legal entities; foreign citizens; or Soviet legal persons, the controlling block of shares or majority investment interest of which belongs to foreign citizens or legal entities.⁷⁴ The Kazakh Law on Foreign Investments defines foreign investments as all property or currency assets imported into Kazakhstan by a foreign investor and designated for the production of goods or services.⁷⁵

The Kazakh Law on Foreign Investments further provides that credits made available by specialized financial institutions are not considered to be foreign investments and are therefore not governed by its terms.⁷⁶ It is unclear which lending institutions are contemplated by this provision of the Kazakh law. The intention of the law may be to determine that credits provided by international organizations specializing in development assistance, such as the International Monetary Fund, are not to be considered foreign investments. The vagueness of this language could conceivably discourage private lenders from investing in Kazakhstan for fear that they could be denied the protections of the Kazakh Law on Foreign Investments.

C. Permitted Forms of Foreign Investment Activity

The Kazakh Law on Foreign Economic Activity defines foreign economic activity as "activity by legal entities and citizens which encompasses economic, trade, currency, scientific-technical, cultural, and other relations with foreign legal entities and citizens."⁷⁷ The Law on Foreign Economic Activity also provides that Kazakh, Union,⁷⁸ and foreign legal entities and citizens, as well as stateless persons, who are registered in Kazakhstan as participating in foreign economic activities, may be subjects of foreign economic activities in Kazakhstan regardless of property forms.⁷⁹

The Kazakh Law on Foreign Investments declares that foreign investors may invest in any of the following: enterprises; shares in Soviet legal entities; stocks; other securities; and other forms of property or rights to property, including rights to use natural resources.⁸⁰ The Kazakh Law on Foreign In-

73. On Denationalization and Privatization, KAZAKHSTANSKAYA PRAVDA, Aug. 1, 1991, at 2 [hereinafter Kazakh Privatization Law].

74. Kazakh Law on Foreign Investments, *supra* note 70, art. 1.

75. *Id.* art. 2.

76. *Id.*

77. Kazakh Law on Foreign Economic Activity, *supra* note 70, art. 1.

78. *See supra* note 19.

79. *Id.* art. 2.

80. Kazakh Law on Foreign Investments, *supra* note 70, art. 3.

vestments also provides that legal persons with foreign participation may function in any manner that does not contravene Kazakh law.⁸¹

D. Licensing and Registration Procedures

The Kazakh Law on Foreign Investments requires foreign investors to apply to the Ministry of Foreign Economic Relations for a license prior to beginning investment.⁸² Applicants are entitled to notification of a decision within 30 days.⁸³ Nevertheless, the Kazakh Law on Foreign Investments, like its Russian counterpart, does not clarify the criteria to be used by state authorities in determining whether to issue a license. Once a license is issued, a foreign investor has one year to begin the investment activities listed in the application or lose the license.⁸⁴

In addition to the licensing of foreign investments, the two Kazakh laws also require their registration. The Kazakh Law on Foreign Investments provides for the registration of all legal persons with foreign participation, and grants responsibility for such registration to local Soviets of People's Deputies, the Ministry of Finance, and the Ministry of Foreign Economic Relations.⁸⁵ This provision is tracked by a parallel clause of the Kazakh Law on Foreign Economic Activities which requires registration of all participants in foreign economic activity.⁸⁶ A foreign investor or group of investors operating without legal personality might escape the registration requirement of the Kazakh Law on Foreign Investments, but would presumably still be required to register individually under the Kazakh Law on Foreign Economic Activity. This latter statute does not designate a government agency to handle its registration requirements. More general provisions of the Kazakh Law on Foreign Economic Activity grant primary responsibility for the regulation of foreign economic activity to the Ministry of Foreign Economic Relations, the Ministry of Finance, the State Bank, and various local organs.⁸⁷ In any case, registration of foreign investments within the Kazakh legal scheme appears to be secondary to the licensing requirement. Registration is more of a bureaucratic formality required to inform the government of what has been done, than an application for permission to invest.

E. Guarantees for Nondiscriminatory Treatment

The Kazakh Law on Foreign Investments provides that legal persons with foreign participation are permitted to engage in any form of economic

81. *Id.* art. 4.

82. *Id.* art. 7.

83. *Id.* This represents a significant advance. A writer contrasting this provision with Soviet law noted that the Soviet government never published such time limits. Simons, *supra* note 71, at 83.

84. Kazakh Law on Foreign Investments, *supra* note 70, art. 7.

85. *Id.*

86. Kazakh Law on Foreign Economic Activity, *supra* note 70, art. 5.

87. *Id.* art. 6.

association.⁸⁸ The Kazakh Law on Foreign Investments also declares that foreign investment is permitted in any sphere of economic or other activity except for the manufacture of products of a "direct military nature."⁸⁹ Furthermore, the Kazakh Law on Foreign Economic Activity states that participants in foreign economic activity, regardless of forms of property ownership and types of activity, have equal rights in carrying out these activities.⁹⁰ Despite these guarantees, however, the absence of reliable guidelines respecting the procedures and considerations applied in administrative review of applications for foreign investment licenses remains a problem.

F. Right to Transfer Profits and Other Payments

The Kazakh Law on Foreign Investments provides that profits of foreign investors obtained in Kazakhstan may be freely reinvested in Kazakhstan.⁹¹ This law further declares that legal persons with foreign participation shall have equal access with domestic legal persons to the foreign currency market and to the securities market in Kazakhstan.⁹² Foreign investors are also guaranteed the right to remit abroad income from investment activities, or from the liquidation of legal persons, as well as from the sale of their shares in an enterprise.⁹³ In any event, this right exists only insofar as the import or export of domestic and foreign currency, negotiable instruments, or securities is in compliance with Kazakh currency regulations.⁹⁴

G. Protection against Expropriation

The Kazakh Law on Foreign Economic Activity declares that Kazakhstan "does not permit nationalization of the property of participants in foreign economic activities."⁹⁵ The Kazakh Law on Foreign Investments similarly states that the nationalization of the property of enterprises with foreign participation will not be permitted in Kazakhstan.⁹⁶ The law further provides that in exceptional circumstances the property of enterprises with foreign participation may be subject to "confiscation" in accordance with procedures to be established by law.⁹⁷ In such a case, or in case of damages caused to an investor by unfounded interference by state agencies or officials, the Kazakh government will be required to compensate the foreign investor

88. Kazakh Law on Foreign Investments, *supra* note 70, art. 8.

89. *Id.* art. 9.

90. Kazakh Law on Foreign Economic Activity, *supra* note 70, art. 7.

91. Kazakh Law on Foreign Investments, *supra* note 70, art. 10.

92. *Id.* art. 1.

93. *Id.* art. 26.

94. *Id.* art. 27.

95. Kazakh Law on Foreign Economic Activity, *supra* note 70, art. 9.

96. Kazakh Law on Foreign Investments, *supra* note 70, art. 25.

97. *Id.* The term "confiscation" appears simply to indicate lawful expropriation by the Kazakh government, which should be accomplished only in rare cases, as opposed to the alternative of "nationalization." See *supra* note 49.

for damages sustained.⁹⁸ Yet, these two Kazakh laws fail to establish a legal framework for determining the standard of compensation to be employed or a timetable for such compensation.

H. Dispute Settlement and Arbitration

The Kazakh Law on Foreign Investments provides that disputes involving legal persons with foreign participation will be subject to resolution in state arbitration;⁹⁹ in Kazakh courts; or, upon agreement of the parties, in *ad hoc* arbitration under Kazakh law.¹⁰⁰ Another provision states that if an international agreement to which Kazakhstan is a party establishes other rules for settlement of disputes, the rules of the international agreement control.¹⁰¹

I. Special Incentives

1. Tax Privileges

The Kazakh Law on Foreign Investments makes extensive provisions for special tax privileges for foreign investors. Enterprises with foreign participation in excess of thirty percent that engage in the processing and storage of agricultural products or the manufacture of consumer goods, electronics, biotechnological products, medical equipment, pharmaceuticals, construction materials, or other products which use Soviet inventions or discoveries in their manufacturing process, will be exempt from income tax for five years following the first declaration of profit, and will pay income taxes at a fifty percent reduced rate for the next five years.¹⁰² Other tax advantages granted by the Kazakh Law on Foreign Investments that apply to all foreign investors include a general deduction for charitable expenditures and the possibility of accelerated depreciation in accordance with standards set by the Ministry of Finance.¹⁰³

2. Free Economic Zones

The basic protections and guarantees extended by the Kazakh Law on Free Economic Zones to foreign investors parallel the provisions of the Kazakh Law on Foreign Investments. All forms of economic, financial, and

98. Kazakh Law on Foreign Investments, *supra* note 70, art. 25.

99. As drafted, this law referred to the Soviet arbitration system, in which the USSR Chamber of Commerce and Industry's Court of Arbitration was responsible for international commercial arbitration. Kazakhstan is likely to establish eventually its own arbitration tribunal, which may use procedures similar to that of the Soviet court. For more information about the Soviet Court of Arbitration and its procedures, see Christopher Osakwe, 1 *SOVIET BUSINESS LAW* § 6.06 (1991). For more general information about the history and procedures of the Soviet arbitration system as a whole, see 2 *Id.* §§ 17.01-06.

100. Kazakh Law on Foreign Investments, *supra* note 70, art. 28.

101. *Id.* art. 29. See *supra* note 57 regarding the importance of international arbitration.

102. Kazakh Law on Foreign Investments, *supra* note 70, art. 20. Whether this first declaration of profit refers to a quarter, annum, or other period of time is unclear.

103. *Id.* arts. 20-21.

other activity are to be permitted within the free economic zone, except for production of items for direct military use and other forms of activity prohibited by Kazakh laws.¹⁰⁴ If an international agreement makes stipulations other than those contained in the Kazakh Law on Free Economic Zones, the provisions of the international agreement will apply.¹⁰⁵ Moreover, nationalization of property held in the economic zone will not be permitted.¹⁰⁶

In addition, foreign investors who wish to launch economic projects within the zone must apply to the zone administrative council for a license.¹⁰⁷ It is unclear whether this provision eliminates the need for other licensing and registration procedures provided for in the Kazakh Law on Foreign Investments. Nonetheless, foreign and joint enterprises operating within the zone are given special tax privileges including exemption from income tax for two to five years following declaration of profit; exemption from taxation on income reinvested within Kazakhstan in the production of consumer goods, high-technology items, medical equipment, or medicine; and exemption from taxation on income derived from the production within the zone of goods sold in Kazakhstan.¹⁰⁸

Moreover, no customs duties will be imposed on products exported from the zone or on imports of equipment, materials, crude resources, and other articles required for manufacture or processing of products inside the free economic zone.¹⁰⁹ Lastly, "consumer goods imported for sale within the zone will be wholly or partially exempt from customs duties."¹¹⁰

J. The Special Case of Privatization

The regime for foreign investor participation in privatization of state-owned property established by Kazakh law is far simpler than that established in Russia. The Kazakh Privatization Law expressly allows Kazakh citizens, foreign citizens, stateless persons, and legal entities existing on the territory of Kazakhstan to participate in privatization of state property as "buyers."¹¹¹ To favor Kazakh citizens, however, the law requires that a "buyer" have lived on the territory of Kazakhstan for five years before being permitted to purchase state property through privatization programs.¹¹² Confusingly, the right to hold shares in newly privatized industries is expressly granted to foreign citizens, stateless persons, foreign legal entities, Kazakh citizens, and labor unions.¹¹³

104. Kazakh Law on Free Economic Zones, *supra* note 72, art. 1.

105. *Id.* art. 3.

106. *Id.* art. 4.

107. *Id.* art. 8.

108. *Id.* art. 13.

109. *Id.* art. 15.

110. *Id.*

111. Kazakh Law on Privatization, *supra* note 73, art. 10.

112. *Id.*

113. *Id.* art. 19.

The Kazakh Privatization Law leaves open some major questions regarding the extent to which foreign investors will be permitted to participate in Kazakhstan's privatization programs. On its face, the five-year residency requirement appears effectively to preclude significant participation by individual foreign investors as "buyers"; however, the effect of the residency requirement on participation by wholly or partially foreign-owned legal persons existing on Kazakh territory is obscure, because although legal persons can exist on the national territory of Kazakhstan, they cannot *live* on Kazakh territory.

One possibility is that initial participation in privatization will be limited to foreign-owned legal persons that are able to demonstrate a presence on Kazakh territory, perhaps through conducting business operations, or simply being registered with the government, for five years. The possibility also exists that foreign-owned legal persons could only satisfy the residency requirement if some or all of the entity's principals satisfy the residency requirement as individuals. Such an interpretation would be highly restrictive, but would be consistent with the treatment of natural persons under the law. Alternatively, the residency requirement may not apply to legal persons at all. Should the requirement apply to legal persons, serious questions still exist concerning the treatment of entities such as joint ventures in which some, but not all, of the principals meet the five-year residency requirement.

The extent to which the Kazakh Privatization Law manifests a legislative intent to create a distinction between buyers and shareholders is also unclear.¹¹⁴ Such a distinction would substantially lessen the severity of the residency requirement. In other words, although the law will probably prevent most foreign investors from direct participation in the initial purchase of state enterprises (particularly if the residency requirement is construed to apply to foreign legal persons as well as foreign natural persons), it is apparently possible for foreign investors to buy into the newly privatized industries once the government has sold them to a domestic purchaser. The possibility of buying into newly privatized industries could conceivably open a loophole whereby Kazakh nationals, fronting for foreign capital, could make the initial purchase and quickly sell controlling shares to the foreign investor, thus defeating the residency requirement. In such a case, the Kazakh national would have to be careful to avoid being classified as an intermediary rather than as a buyer.¹¹⁵

114. *Id.*

115. *Id.* art. 10. Classification of the Kazakh national as an intermediary would, of course, mean that the foreign investor was the true buyer. If the foreign investor were not entitled to function as a buyer under the residency requirement, such a transaction through an intermediary would still contravene the Kazakh Law on Privatization.

V.
FOREIGN INVESTMENT IN KYRGYZSTAN

A. *Kyrgyz Legislation on Foreign Investment*

Kyrgyzstan, like its larger Central Asian neighbor, has also enacted two laws governing foreign investment. These laws are entitled "On Foreign Investment in the Republic of Kyrgyzstan" and "General Principles of Foreign Economic Activity of the Republic of Kyrgyzstan."¹¹⁶ The organizational logic behind the two laws is the same as that employed by Kazakhstan; the former Kyrgyz statute applies strictly to foreign investors, whereas the latter statute applies to all economic actors, foreign and domestic, that are involved in international economic activity. The Kyrgyz Law on Destatization, Privatization and Entrepreneurship will be discussed in the section addressing the special case of privatization.¹¹⁷

B. *Definitions of Foreign Investor, Foreign Investment, and Foreign Economic Activity*

The Kyrgyz Law on Foreign Investments defines foreign investments as currency and material contributions in economic or other spheres of activity, as well as the transfer of intellectual property rights by foreign states, legal persons, and citizens.¹¹⁸ Foreign investors are defined as "foreign states, legal persons, and citizens involved in investments on the territory of the Republic of Kyrgyzstan."¹¹⁹ The law defines participants in investment activity as other republics, legal persons, foreign legal persons, and citizens carrying out investments as executors of a contract or by performing other foreign investment actions.¹²⁰

The Kyrgyz Law on Foreign Economic Activity defines foreign economic activity as the activity of bodies corporate and citizens encompassing economic, commercial, currency, cultural, and other relations with foreign bodies corporate and citizens.¹²¹ This law additionally provides that enterprises, organizations and associations, cooperatives and other bodies corporate, and citizens have the right, following appropriate registration as participants in foreign economic activity, to engage in foreign economic activity.¹²²

116. On Foreign Investments in the Republic of Kyrgyzstan, SLOVO KYRGYZSTANA, May 17, 1991, at 3 [hereinafter Kyrgyz Law on Foreign Investments]; General Principles of Foreign Economic Activity of the Republic of Kyrgyzstan, SLOVO KYRGYZSTANA, May 17, 1991, at 3 [hereinafter Kyrgyz Law on Foreign Economic Activity].

117. On Destatization, Privatization, and Entrepreneurship, SLOVO KYRGYZSTANA, Jan. 17, 1992, at 3-4 [hereinafter Kyrgyz Privatization Law].

118. Kyrgyz Law on Foreign Investments, *supra* note 116, art. 1.

119. *Id.* art. 2.

120. *Id.* art. 3.

121. Kyrgyz Law on Foreign Economic Activity, *supra* note 116, art. 1.

122. *Id.* art. 7.

C. Permitted Forms of Foreign Investment Activity

The Kyrgyz Law on Foreign Investments permits the following forms of foreign investments: establishment of foreign-owned enterprises or joint ventures; foreign acquisition of shares and other securities in Kyrgyz enterprises; other goal-oriented investments of money, scientific and technological products, or intellectual values (essentially intellectual property); and other forms of economic activity not prohibited by Kyrgyz law.¹²³

The Kyrgyz Law on Foreign Economic Activity provides that joint ventures and international organizations with the participation of Soviet and foreign bodies corporate and citizens may be created on the territory of Kyrgyzstan in accordance with its laws.¹²⁴ The Kyrgyz Law on Foreign Economic Activity further provides, without additional clarification, that joint ventures and international organizations (presumably meaning foreign organizations) have unlimited liability.¹²⁵ Lastly, the Kyrgyz Law on Foreign Economic Activity mandates that joint ventures and international organizations have the right to transact foreign trade and other foreign economic dealings, including the right to transact in local currency so long as such currency is kept within the republic.¹²⁶

D. Licensing and Registration Procedures

As provided for by the Kyrgyz Law on Foreign Investments, the Cabinet of the Republic has the sole authority to review applications for mandatory foreign investment licenses and must grant or deny the license within thirty days of receipt of the application.¹²⁷ That the responsibility for approving foreign investment licenses is reserved to so powerful a body testifies both to the importance that the Kyrgyz government places on foreign investment and to the expected paucity of prospective investors. Like the Kazakh license, the Kyrgyz license will expire if the investment activity contemplated by the application does not commence within one year of the granting of the license.¹²⁸

In addition to the licensing requirement, the Kyrgyz Law on Foreign Investments provides for mandatory registration of foreign investors by the Ministry of Finance.¹²⁹ Registration of foreign investors under Kyrgyz law, like its Kazakh counterpart, is something of a bureaucratic formality that, unlike licensing, does not require an investor to file an application and await permission to begin the investment project. The Kyrgyz Law on Foreign Economic Activity also requires registration of participants in foreign economic activity, although it is unclear whether registration of an investor pur-

123. Kyrgyz Law on Foreign Investments, *supra* note 116, art. 4.

124. Kyrgyz Law on Foreign Economic Activity, *supra* note 116, art. 17; *see supra* note 19.

125. *Id.*

126. *Id.*

127. Kyrgyz Law on Foreign Investments, *supra* note 116, art. 13.

128. *Id.* art. 14.

129. *Id.* art. 13.

suant to the Kyrgyz Law on Foreign Investments would be sufficient to satisfy this requirement.¹³⁰

E. Guarantees for Nondiscriminatory Treatment

The Kyrgyz Law on Foreign Investments guarantees that the legal regime for foreign investors shall not be "less favorable than the legal regime for investment by juridical persons and citizens of the Republic of Kyrgyzstan."¹³¹ Nevertheless, the Kyrgyz Law on Foreign Investments contains mandatory licensing requirements for foreign investments.¹³² Furthermore, the Kyrgyz Law on Foreign Economic Activity emphasizes that no foreign firm, bank, or like organization may open an office in Kyrgyzstan without the special permission of the Cabinet.¹³³ The significance of these deviations from the principle of national treatment is heightened by the fact that the Kyrgyz law, like the Russian and Kazakh laws, provides no guidelines for the screening procedure to be used when potential foreign investors apply for investment licenses or special permission to open a branch office.

F. Right to Transfer Profits and Other Payments

The Kyrgyz Law on Foreign Investments provides that foreign investors have the right to own, use, and dispose of income from their investments as they see fit.¹³⁴ This includes the right to reinvest earnings in Kyrgyzstan or purchase goods and services on the Kyrgyz market.¹³⁵ The Kyrgyz Law on Foreign Investments also provides that foreign investors can remit income abroad by exporting their own goods and services produced in Kyrgyzstan as provided by the rules of the Kyrgyz export-import laws.¹³⁶ Lastly, remittance by foreign investors of profits in local and foreign currency is to be exercised according to the rules to be established by Kyrgyz currency regulations.¹³⁷

A separate provision of the Kyrgyz Law on Foreign Investments declares that remitted income is exempt from normal income taxation, but is taxed at a special rate of five percent.¹³⁸ The Kyrgyz Law on Foreign Economic Activity likewise provides that profit from foreign economic activity, including profits in foreign currency, remains wholly at the disposal of the respective investors or businesses, following the payment of taxes.¹³⁹ None-

130. Kyrgyz Law on Foreign Economic Activity, *supra* note 116, art. 7.

131. Kyrgyz Law on Foreign Investments, *supra* note 116, art. 7.

132. *Id.* art. 13. See *supra* text accompanying notes 127-130.

133. Kyrgyz Law on Foreign Economic Activity, *supra* note 116, art. 16.

134. Kyrgyz Law on Foreign Investments, *supra* note 116, art. 10.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* art. 22.

139. Kyrgyz Law on Foreign Economic Activity, *supra* note 116, art. 8.

theless, this provision would not appear directly to confer a right to transfer profits abroad.

G. *Protection against Expropriation*

The Kyrgyz Law on Foreign Investments guarantees the stability of the rights and other legal protections granted by law to foreign investors.¹⁴⁰ This law also guarantees that losses, including lost profits, caused to foreign investors in connection with the adoption of laws that restrict their rights are to be compensated by the state bodies that adopted these acts or by the state budget.¹⁴¹ The Kyrgyz Law on Foreign Economic Activity similarly guarantees the protection of the rights and legitimate interests of the subjects of foreign economic activity, prohibits nationalization of the property of participants in foreign economic activity, and provides that losses caused to participants in foreign economic activity by state authorities and officials are subject to compensation.¹⁴² The Kyrgyz laws are like the Kazakh laws in that they do not clarify the standards or procedures for compensation.

H. *Dispute Settlement and Arbitration*

The Kyrgyz Law on Foreign Investments provides that conflicts connected with foreign investment activity in Kyrgyzstan will be adjudicated under Kyrgyz law by Kyrgyz courts or state arbitration panels, or in the Court of Arbitration.¹⁴³ The Kyrgyz Law on Foreign Economic Activity provides that disputes between participants in foreign economic activity (Kyrgyz or foreign) and state authorities or foreign bodies corporate are to be examined by the state arbitration authorities, by Kyrgyz courts, or by arbitral tribunals if the parties so agree.¹⁴⁴

Neither of the two Kyrgyz statutes makes a specific reference to any form of international arbitration as a means of resolving disputes arising from it. More generally, the Kyrgyz Law on Foreign Investments does provide that in the event of a conflict between an international treaty to which Kyrgyzstan is a party and the various rules of Kyrgyz foreign investment legislation, the treaty will control.¹⁴⁵ This provision would seemingly allow international arbitration of disputes where provided for by an international agreement to which Kyrgyzstan subscribes.¹⁴⁶

140. Kyrgyz Law on Foreign Investments, *supra* note 116, art. 7.

141. *Id.*

142. Kyrgyz Law on Foreign Economic Activity, *supra* note 116, art. 10.

143. Kyrgyz Law on Foreign Investments, *supra* note 116, art. 25. In referring to the Court of Arbitration and arbitration panels, this provision relied on the Soviet arbitration system. Kyrgyzstan, like Kazakhstan, may establish its own court of arbitration at some point in the future. See *supra* note 99.

144. Kyrgyz Law on Foreign Economic Activity, *supra* note 116, art. 18.

145. Kyrgyz Law on Foreign Investments, *supra* note 116, art. 5.

146. As of this writing, Kyrgyzstan has not become party to any such treaty providing for international resolution of disputes, but the Bilateral Investment Treaty negotiated between

I. Special Incentives

1. Tax Privileges

The Kyrgyz Law on Foreign Investments provides the most generous tax incentives of any of the three countries discussed in this study. A foreign investor that invests hard currency in an enterprise, which constitutes twenty percent or more of the start-up capital or is in excess of three million dollars or an equivalent value in any other hard currency, is exempt from taxation of twenty-five percent of the investor's income for ten years.¹⁴⁷ Alternatively, an investor that contributes hard currency exceeding thirty percent of the start-up capital, or eight million dollars, will be exempt from all taxation for five years and fifty percent of the investor's income will be exempt for the next five years.

Foreign investors that invest capital in enterprises engaging in industries related to tourism, albumen production, electronics, packaging or manufacture of consumer goods, medical equipment, biotechnology, materials used for plant cultivation and cattle breeding, pharmaceuticals and related products, packing equipment, machinery, agricultural and food processing technology, automobile spare parts, and any other products that increase exports and reduce imports of food and agricultural products obtained for hard currency, are entirely exempt from income tax for five years and will be exempt from paying taxes on sixty percent of their income for the next five years.¹⁴⁸ As stated above, foreign investor income remitted abroad is exempt from general income tax, but will be taxed at a special rate of five percent.¹⁴⁹ Lastly, materials imported by foreign investors and contributed to the capital stock of an enterprise during the period of its establishment are exempted from customs duties.¹⁵⁰

2. Free Economic Zones

The Kyrgyz Law on Foreign Investments states that free economic zones will be established by the Cabinet in accordance with future legislation.¹⁵¹ At least two free economic zones have already been established along the Chinese border,¹⁵² although legislation regulating the economic regimes in such zones has not been as readily forthcoming. In late 1992, the President's Business Council in Kyrgyzstan submitted a report recommending

Kyrgyzstan and the United States (but not yet ratified by the legislature of either government) includes such a provision. For a discussion of Bilateral Investment Treaties, see *infra* part VII.

147. Kyrgyz Law on Foreign Investments, *supra* note 116, art. 20.

148. *Id.*

149. *Id.* art. 22.

150. *Id.* art. 23.

151. *Id.* art. 24.

152. *Visit Expected to Open New Page of Bilateral Relations*, XINHUA GENERAL NEWS SERVICE, May 14, 1992.

that this problem be rectified through the adoption of a law on free economic zones.¹⁵³

J. The Special Case of Privatization

The Kyrgyz Privatization Law provides that privatization of the Kyrgyz economy is to be carried out through gratuitous and nongratuitous transfers of state and municipal enterprises and state-owned shares in commercial firms to various private parties, including foreign citizens and legal entities.¹⁵⁴ The Kyrgyz Privatization Law also states that foreign citizens and legal entities have the right to participate in privatization of state and municipal property and in leasing, managing, and acquiring ownership of such property.¹⁵⁵ Although the Kyrgyz Privatization Law does not expressly exclude or significantly limit the participation of foreign investors in the privatization of any specific class of industries or other state property, the law severely restricts what is to be privatized. Land, mineral resources, forests, water, other natural resources, and objects of cultural and historic value are excluded from privatization.¹⁵⁶ Such exclusions constitute a serious obstacle to the development of the Kyrgyz economy and the attraction of foreign investment, but continuing reform may liberalize these restrictions.

The Kyrgyz Privatization Law establishes several ways in which privatization may occur.¹⁵⁷ Some of these legally-mandated forms of privatization are defined obscurely; but a preference for domestic investors, at least in some types of privatization, is clearly indicated.¹⁵⁸ Forms of privatization include acquisition of state-owned shares in commercial companies by Kyrgyz citizens or private entities created by Kyrgyz citizens; buyout of a leased state or municipal enterprise by the lessee; sale of an enterprise at an auction; and transfer of managerial responsibility for state or municipal enterprises to citizens and enterprises with the possibility of a right of subsequent buyout.¹⁵⁹ Thus, it appears that the Kyrgyz Privatization Law is more favorable to some form of interim foreign management of state enterprises, e.g., joint ventures or concessions, rather than outright acquisition. Furthermore, while the right to purchase state-owned shares in commercial firms is reserved for domestic buyers, it is unclear whether a foreign investor can acquire state enterprises through auctions or lessee buyouts.

153. *Briefs*, 3 RUSSIAN & COMMONW. BUS. L. REP. No. 12, at 3 (1992).

154. Kyrgyz Privatization Law, *supra* note 117, art. 2.

155. *Id.* art. 12.

156. *Id.* art. 10.

157. *Id.* art. 14.

158. The law also gives preference to certain types of domestic investors. Kyrgyz shepherds, peasants, and family farms are given preferential rights over others (including foreign investors) with respect to the acquisition of privatized enterprises for the processing of agricultural products. *Id.* Shepherds, peasants, and family farms are also given preferential rights with respect to enterprises for traditional ethnic industries and other types of ethnic entrepreneurial activity. *Id.*

159. *Id.*

VI. COMPARATIVE ASSESSMENT

Russia, Kazakhstan, and Kyrgyzstan have all made substantial strides towards eliminating the most obtuse and restrictive features of the legal regime for foreign investment that existed in the former Soviet Union. All three countries have widened the definitions of foreign investors and foreign investment so as to open their economies to far more types of investment projects than were allowed under Soviet law. All three countries have pursued similar tactics in creating and enumerating in their foreign investment laws a number of organizational forms that foreign investment can now take in their respective republics. Notwithstanding the above, the language and categories used in listing these definitions and organizational forms can be clumsy and confusing at times, betraying a basic lack of familiarity with capitalist business organizational logic and terminology.

The new laws adopted by each republic have strong and weak points with regard to substantive rights and guarantees conferred foreign investors. While the foreign investment laws of all three republics provide general promises of national treatment, they also require mandatory licensing of some if not all foreign investments.

All three republics declare in their legislation that confiscation of foreign investments will be strictly limited, and that compensation will be awarded when extreme cases make such confiscation necessary. The Russian law stands alone in providing a relatively detailed set of guidelines to ensure that compensation will be prompt, adequate, and effective, will reflect the actual value of the investment before impending nationalization becomes apparent, will be made in the proper currency, and will include interest. The Kazakh and Kyrgyz laws are far less precise with regard to the nature of compensation.

The Russian law explicitly allows foreign investors to repatriate hard currency profits and allows ruble profits to be converted and repatriated in special cases. Subsequent decrees on mandatory conversions, however, have reduced the liberality of Russian law in this regard. Kazakhstan and Kyrgyzstan both provide more general guarantees of a right to remit profits abroad, while not explicitly defining the impact of currency import and export regulations on this right. Kyrgyzstan is alone in specifying within its foreign investment law the precise rate of taxation to be levied on repatriated foreign investor income.

The regime established by Russian law does not require foreigners to apply for licenses prior to making investments unless the industry in which they are investing falls within a category specifically requiring such permission. Instead, Russian law merely insists that businesses with foreign capital participation be registered with the state. Kazakhstan and Kyrgyzstan, on the other hand, require approval by state authorities, in the form of a license, before any investment project can be undertaken by foreign parties. The law

of Kyrgyzstan, like that of Russia, also provides for mandatory registration of all foreign investment projects. Kazakh law, however, simply requires the registration of any legal person (as opposed to natural persons) that operates on Kazakh territory and has foreign investor participation.

One particularly interesting difference between the Russian mandatory registration procedure, and the Kazakh and Kyrgyz mandatory licensing procedures, is that a Kazakh or Kyrgyz investment license will become void if no investment activity is undertaken within one year of its issue. The considerably more severe Russian rule is that the enterprise will be automatically liquidated as a matter of law if half the capital contributions specified in the documents of incorporation are not raised within one year of licensing.

The Russian law is alone in making direct reference to the possibility of international arbitration of disputes regarding foreign investment. Kazakh law only provides that international treaties to which Kazakhstan adheres can establish dispute settlement procedures that will be applied in place of those established by the Kazakh foreign investment law. Kyrgyz law, in contrast, does not explicitly permit any international resolution of investment disputes, but recognition of the validity of international dispute resolution mechanisms can be inferred from more general statements about the controlling force of international treaty obligations.

All three republics provide for free economic zones to be created as an incentive to attract foreign investors. The Russian and Kazakh zones will provide tax incentives, loosened customs regulations, and simplified registration and/or licensing procedures that will enable investors to deal with the relevant officials locally. Kazakhstan and Kyrgyzstan offer generous tax advantages to foreign investors throughout the country. These tax advantages can be particularly significant in certain select industries. Kyrgyzstan has a particularly attractive system of tax incentives for foreign investors and its list of industries receiving special treatment is more extensive than Kazakhstan's. In fact, it includes nearly every economic activity conceivably found in Kyrgyzstan with the sole and noteworthy exception of natural resource extraction.

Russian law sharply restricts the ability of foreign investors to participate in privatization programs and requires special permission for foreign investors to acquire ownership in most privatized industries and concerns. Investment in industries that would tend to attract relatively substantial foreign interest, *e.g.*, energy and high technology, investment in any large concern (over ten million dollars) and fifty percent ownership of any privatized enterprise, are particularly limited. For Western investors, the apparent requirement of a five-year residency in Kazakhstan prior to participation in any privatization project amounts to a nearly absolute restriction. Nevertheless, the possibility that the law would allow a Kazakh national to make the initial purchase and then transfer control to a foreign investor may moderate the severity of the Kazakh Privatization Law.

Lastly, the Kyrgyz Privatization Law provides no explicit restrictions on foreign participation in privatization, but seemingly reserves the right to purchase shares in state-owned firms to Kyrgyz citizens and companies made up of Kyrgyz citizens. The Kyrgyz Privatization Law does not spell out the extent to which foreign investors can participate in privatization through actual acquisition of state enterprises but does provide for interim foreign management with a right of subsequent buyout. In any case, the nuances of the privatization laws of both Kazakhstan and Kyrgyzstan notwithstanding, the major legal issue confronting foreign investors who wish to participate in privatization in either Central Asian republic remains the requirement of mandatory licensing by the Kazakh Ministry of Foreign Economic Relations and the Kyrgyz Cabinet, respectively.

VII. BILATERAL INVESTMENT TREATIES

The United States recently negotiated bilateral investment treaties (BITs) with all three republics to safeguard the rights of American investors. As of this writing, none of the treaties has come into effect. The treaty with the Russian Federation was signed on June 17, 1992, and was later ratified by the U.S. Senate;¹⁶⁰ however, the treaty has not been ratified by the Russian Congress of People's Deputies, and is therefore not yet in force between the two countries. Similar treaties were signed with Kazakhstan on May 19, 1992,¹⁶¹ and Kyrgyzstan on January 19, 1993.¹⁶² The BITs with the two Central Asian republics are yet to be ratified both by the U.S. Senate and the respective legislative bodies of Kazakhstan and Kyrgyzstan.

These treaties govern all investment activity in one signatory country by nationals or companies of the other signatory country. The treaties have been drafted to reinforce the scheme of protections offered by extant national law in a manner that is consistent with the standards of international law. As the treaties have not yet come into force, this article will not discuss them in depth; however, it may be useful to briefly explore specific areas in which the treaties, once in force, will help flesh out guarantees provided to foreign investors by the national laws of Russia, Kazakhstan and Kyrgyzstan.

The treaty with the Russian Federation generally follows the model for U.S. BITs in that it endorses non-discriminatory treatment of investments,¹⁶³ but the accompanying annex and protocol also provide for certain exceptions to the principle of national treatment. The annex sets forth numerous eco-

160. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, June 17, 1992, U.S.-Russia, 31 I.L.M. 794 [hereinafter U.S.-Russia BIT]. The U.S.-Russia BIT was ratified by the U.S. Senate on August 6, 1992. SEN. EXECUTIVE REP. 102-48.

161. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, May 19, 1992, U.S.-Kazakhstan (not yet publicly available) [hereinafter U.S.-Kazakhstan BIT].

162. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Jan. 19, 1993, U.S.-Kyrgyzstan (not yet publicly available) [hereinafter U.S.-Kyrgyzstan BIT].

163. U.S.-Russia BIT, *supra* note 160, art. II, 31 I.L.M. at 801.

conomic sectors in which the Russian Federation reserves the right to make and maintain limited exceptions to national treatment. These sectors include electric power production; production of uranium and other fissionable materials; ownership of land and use of subsoil and natural resources; ownership and brokerage of real estate; mining and processing of precious ores and stones; air transport; shipping; financial services; mass media; security services; and construction, installation, and maintenance of communications lines.¹⁶⁴ The protocol allows an exception to national treatment for five years from the date of ratification for large scale foreign investments exceeding the quasi-licensing threshold set by the Russian Law on Foreign Investments.¹⁶⁵ The Russian BIT, however, mandates that where exceptions to national treatment apply, such as those in the annex and protocol, American-owned investments cannot be treated less favorably than investments of nationals or companies of third countries (e.g., most favored nation status).¹⁶⁶

In addition, the Russian BIT generally provides for treatment consistent with the norms and principles of international law.¹⁶⁷ Investments are not to be expropriated except for a public purpose and in a non-discriminatory manner upon payment of prompt, adequate, and effective compensation.¹⁶⁸ Furthermore, compensation must be equivalent to the fair market value of the investment immediately before the expropriation was taken or became known (whichever was earlier), must include interest from the date of expropriation at a commercial rate established on a market basis, and must be freely transferrable at the market rate of exchange existing on the date of the expropriation.¹⁶⁹

The Russian BIT also requires governments to permit free transfers abroad of monies representing returns, compensation payments, payments arising out of an investment dispute, payments made under a contract, proceeds from the sale or liquidation of all or part of an investment, and additional contributions to capital of an existing investment.¹⁷⁰ It is unclear exactly how these freedoms would be given effect in light of the restrictions imposed by the Presidential Decree on Currency Transfers and the State Bank Instruction of January 22, 1992.¹⁷¹ Investors are to be allowed to convert such transfers into the freely convertible currency of their choice. The governments may, however, require the reporting of currency transfers, may impose income tax through a withholding tax on transfers, or may restrict

164. *Id.* Annex, 31 I.L.M. at 809.

165. *Id.* Protocol, 31 I.L.M. at 810. This refers to the quasi-licensing requirement discussed in the licensing and registration section of the analysis of Russian foreign investment law. Investments over 100 million rubles require special approval from the Council of Ministers prior to being registered. See *supra* note 29 and accompanying text.

166. U.S.-Russia BIT, *supra* note 160, art. II, 31 I.L.M. at 801-02.

167. *Id.* art. II, 31 I.L.M. at 802.

168. *Id.* art. III, 31 I.L.M. at 803.

169. *Id.*

170. *Id.* art. IV, 31 I.L.M. at 804.

171. See *supra* notes 42-44 and accompanying text.

transfers to protect creditors and enforce judgements.¹⁷² Lastly, the Russian BIT provides that in the event of a dispute that goes unresolved for six months, a party may submit the dispute for arbitration to the International Centre for the Settlement of Investment Disputes (ICSID), to the Additional Facility of ICSID, to an arbitration tribunal established pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, or to any other mutually agreed upon arbitral tribunal.¹⁷³

The treaty with Kazakhstan goes one better than the national treatment principle by providing that each party will treat investment by nationals or companies of the other party no less favorably than it treats investment by its own nationals and companies, or those of a third country, whichever is better (e.g., most favored nation treatment).¹⁷⁴ The annex to the U.S.-Kazakhstan BIT allows for exceptions to national treatment in certain economic sectors, including air transportation; ownership or control of television and radio broadcasting; and ownership of land, subsoil, water, plant and animal life, and other natural resources.¹⁷⁵ The treaty also provides that investments may only be expropriated for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate, and effective compensation; and under conditions that are consistent with international law.¹⁷⁶ As in the Russian treaty, compensation must correspond to the pre-expropriation fair market value of the investment, must include interest calculated at a commercial rate, and must be freely transferrable.¹⁷⁷

The Kazakh treaty provides that all international transfers related to investments will be permitted to be made freely and without delay.¹⁷⁸ Transfers are to be made "in a freely usable currency calculated at the prevailing market rate of exchange on the date of the transfer." The U.S.-Kazakhstan BIT, however, explicitly preserves the government's power to require reporting of currency transfers and to levy withholding taxes. The treaty also provides for the use of good faith legal action to protect creditors or enforce judgements.¹⁷⁹ Options for resolving disputes under the treaty with Kazakhstan include national courts or administrative tribunals, previously agreed dispute settlement procedures, or international arbitration.¹⁸⁰ A party to a dispute may opt for international arbitration, after the dispute has existed for six months and has not been submitted for resolution in another forum, by submitting the dispute to ICSID, the Additional Facility of ICSID, an arbi-

172. *Id.*

173. *Id.* art. VI, 31 I.L.M. at 805.

174. U.S.-Kazakhstan BIT, *supra* note 161, art. II.

175. *Id.* Annex.

176. *Id.* art. III.

177. *Id.*

178. *Id.* art. IV.

179. *Id.*

180. *Id.* art. VI.

tration tribunal established in accord with the UNCITRAL Arbitration Rules, or any other tribunal as may be agreed between the parties.¹⁸¹

The treaty with Kyrgyzstan uses the same most favored nation formulation as does the Kazakh BIT, according American investments treatment no less favorable than treatment given to investments by nationals and companies of Kyrgyzstan or third countries, whichever is the most favorable.¹⁸² Although the annex to the treaty reserves to the United States the right to maintain exceptions to national treatment in several industries, no such reservations are made by Kyrgyzstan.¹⁸³ Expropriation is forbidden except when done for a public purpose; in a non-discriminatory manner; in accordance with international law; and upon payment of prompt, adequate, and effective compensation.¹⁸⁴ Compensation must be equivalent to the pre-expropriation fair market value of the investment, must be calculated in a freely usable currency at market rates of exchange, must include interest calculated at a commercial rate, and must be freely transferrable.¹⁸⁵

Each party to the U.S.-Kyrgyzstan treaty must permit transfers related to investments to be made freely and without delay into and out of its territory.¹⁸⁶ Transfers are to be made in freely usable currency calculated at the market exchange rate prevailing on the date of the transfer.¹⁸⁷ Notwithstanding the above, each government retains the right to require reports of currency transfer, impose withholding taxes on transfers, and use good faith legal action to protect creditors and judgements.¹⁸⁸ The Kyrgyz treaty provides for settlement of investment disputes by means of national courts or administrative tribunals, previously agreed dispute settlement procedures, or international arbitration.¹⁸⁹ The procedures and options for international arbitration mirror those found in the Kazakh BIT: a six-month waiting period to give informal attempts at resolution a chance, a requirement that the dispute not have been submitted to another forum, and options to choose ICSID, the Additional Facility of ICSID, an arbitration tribunal established in accord with the UNCITRAL Arbitration Rules or another mutually agreed-upon tribunal.¹⁹⁰

The BITs with Russia, Kazakhstan, and Kyrgyzstan were drafted to supplement, but not displace, the regimes created by the new laws currently

181. *Id.* It is worth noting that submission of a dispute to ICSID is only possible when all concerned countries are parties to the ICSID Convention. As of this writing, Kazakhstan has not yet become a party.

182. U.S.-Kyrgyzstan BIT, *supra* note 162, art. II.

183. *Id.* Annex.

184. *Id.* art. III.

185. *Id.*

186. *Id.* art. IV.

187. *Id.*

188. *Id.*

189. *Id.* art. VI.

190. *Id.* As of this writing, Kyrgyzstan has not yet become a party to the ICSID Convention. ICSID Arbitration of disputes involving Kyrgyz parties will not be possible until Kyrgyzstan becomes a party to the Convention.

in place. Ultimately, the treaties, should they be ratified by all concerned governments, will reinforce the protection of American investors provided by local law. Certain provisions of all three BITs, particularly those respecting arbitration and free transfers, give added substance to the vague guarantees of national foreign investment laws. Although the ways in which the BITs may be interpreted and enforced are impossible to predict, it can generally be said that once in force they will improve the predictability and reliability of the legal climates for American investment in the three republics.

VIII. CONCLUSION

Russia, Kazakhstan, and Kyrgyzstan are in the forefront of foreign investment law reform in the CIS. During the past two years new laws have been drafted, debated, redrafted, and eventually adopted by the national legislatures. These laws were written to replace the hostile Soviet system with a system that will be more attractive to foreign investors. Among the most important reforms are broad definitions of foreign investors and permitted investment forms, guarantees of nondiscriminatory treatment, guarantees of the right to transfer profits abroad, protection against expropriation, provisions for international arbitration of disputes where provided for by treaty, and special tax and other incentives for foreign investors.

Although these new laws represent substantial progress toward the reform of legal structures governing foreign investment in Russia, Kazakhstan, and Kyrgyzstan, grave difficulties remain. The laws are often vague, leaving too much discretion to the governmental authorities charged with interpreting and enforcing them. In addition, the regulatory scheme created by the laws has the potential to be burdensome and unnerving. Foreign investors must file applications with governmental agencies to establish investment projects, but they have no real means of predicting the result. Lastly, restrictions on foreign investment activity in certain sectors of the economy may sharply limit or exclude investments from various industries.

Because of the need to compete for foreign investment, however, the legal regimes for foreign investment in all three of these countries will probably continue to undergo significant change. As recent history has shown, the political and economic dynamics which drive societal change in the former Soviet Union are powerful and unpredictable. This article represents the belief that it is worthwhile to examine and to learn from what has been accomplished so far.