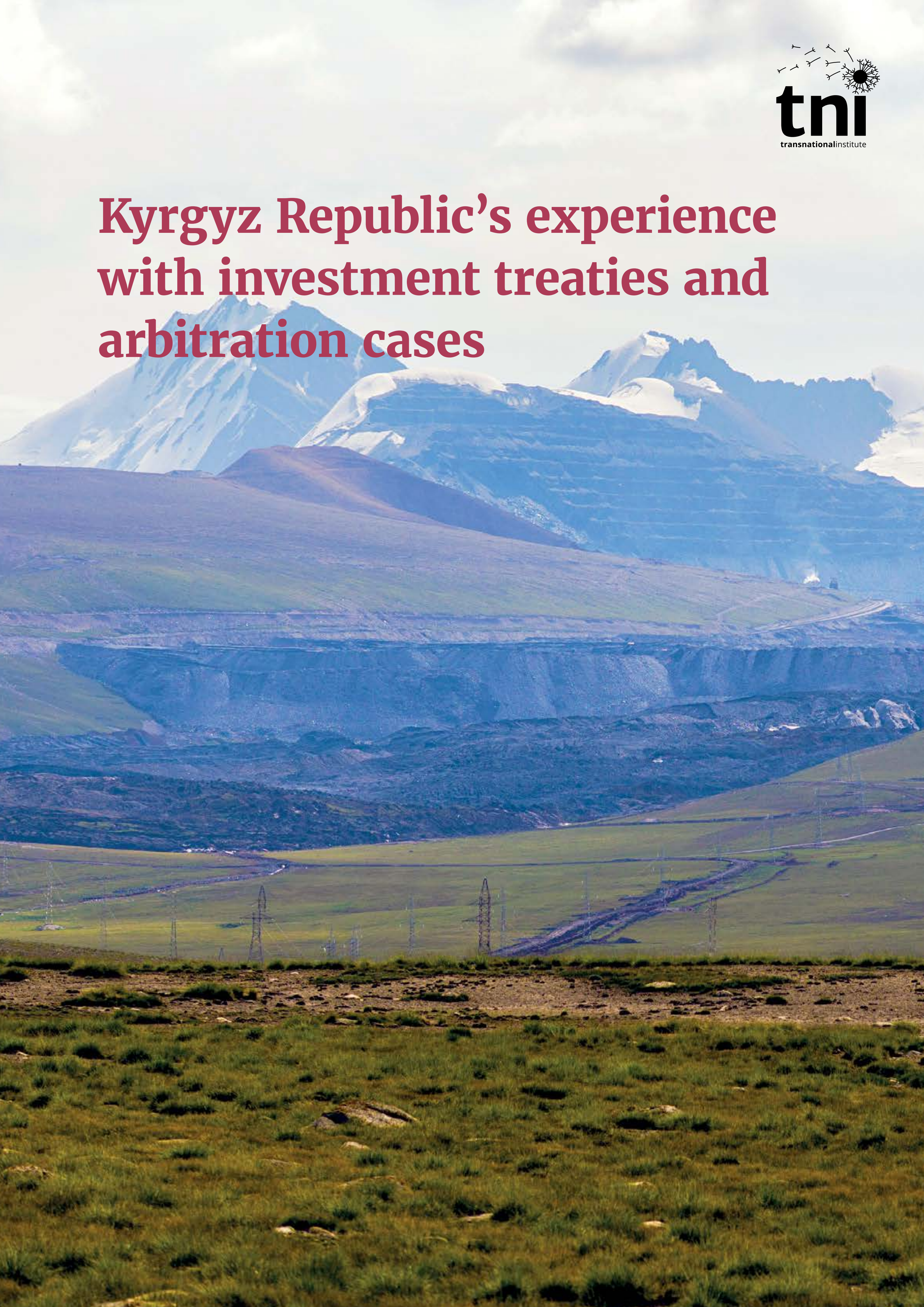
Kyrgyz Republic's experience with investment treaties and arbitration cases



tni
transnationalinstitute

This publication has been made possible with support of CEE Bankwatch Network.

This report has been produced with the financial assistance of the European Union. The content of this report is the sole responsibility of its authors and can under no circumstances be regarded as reflecting the position of the European Union.

AUTHORS: Roeline Knottnerus and Ryskeldi Satke

DESIGN: Brigitte Vos

COVER PICTURE: Horst Machguth, Kumtor mine

Published by Transnational Institute Amsterdam – www.tni.org

July 2017

ACKNOWLEDGEMENTS

We would like to thank Fidanka McGrath and Pietje Vervest for their valuable contributions.

Introduction

The Kyrgyz Republic currently faces investment claims in the proximity of 1 billion USD, arising out of investment dispute settlement cases. If these have to be paid out, this will have a serious impact on the public budget of a country where 32% of the population lives below the poverty line.

Big cases have arisen out of the mining sector. Worldwide, investors in the mining and extractives industry are among the most frequent users of the investor-to-state dispute settlement system (ISDS). As such, the Kyrgyz Republic's reliance on foreign capital in its strategically important mining sector comes with a risk. The ISDS system enables foreign investors to claim compensation for any government intervention that stands to impact negatively on their investments. It is not only this Central Asian country's systemic corruption and its weak rule of law that makes the mountainous nation vulnerable to investment claims. The Kyrgyz state also risks more investment claims should the implementation of its plans to better harness the country's mineral wealth in order to promote economic diversification and environmentally and socially sustainable development require more strict regulation of foreign investments.

IIAs and the promise of development

Signing international investment treaties (IIAs), in the hope of attracting foreign investment, has been a central strategy for governments looking to improve economic development. IIAs have been around since 1959, when the first Bilateral Investment Treaty (BIT) between Germany and Pakistan was signed. Currently, there are 3,322 investment agreements (2,955 BITs and 367 "other IIAs").[1] "Other IIAs" refer to economic agreements other than BITs that include investment-related provisions, such as investment chapters in free trade agreements (FTAs).

The bulk of these treaties were signed during the 1990s and early 2000s when most governments believed that economic liberalism would bring development. During that period, most developing countries were sold a myth. The idea was that signing investment agreements would help countries attract foreign investment. At the time, there was no awareness of risks involved and what governments were giving up in terms of sovereignty.

Today, more than 20 years later, the evidence that International Investment Agreements do in fact deliver on their stated purpose is at best inconclusive. Most research studies carried out by the academic community fail to find a direct correlation between IIAs and attraction of FDI.[2] The experience of many other countries, like South Africa,[3] Ecuador,[4] Hungary[5] and Brazil,[6] shows that the promise of increased foreign investment when signing IIAs has not been fulfilled. Even the European Trade Commissioner, Cecilia Malmström, recently admitted that most studies showed no "direct and exclusive causal relationship" between international investment agreements and foreign direct investment.[7]

This also holds out for the Kyrgyz Republic, where - despite the country's problems with corruption - domestic investment opportunities, combined with tax incentives and domestic reforms, are cited as key drivers behind foreign investment decisions, rather than access to investment protection.[8]

The underestimated risks of investment agreements

While the benefits of signing investment agreements were highly overstated, the risks were underestimated. In signing these treaties, governments gave away their sovereign right to regulate in the interest of people and the environment, and have exposed themselves to expensive lawsuits. The incentives offered to foreign investors come at a high price, depriving countries like the Kyrgyz Republic of the necessary policy space to harness investment to serve sustainable development. Under the provisions of the investment protection agreements, foreign investors can challenge almost any government intervention if they consider that it has or will affect their current or future profits. The investor-to-state dispute settlement clauses (ISDS) that form a standard part of investment agreements enable foreign investors to circumvent national courts and take a complaint straight to an ad hoc international tribunal consisting of three commercial investment lawyers, who will decide on whether government measures are legitimate or proportionate to their objective.

Whether an investor's rights under an investment treaty have been breached is determined on the basis of vaguely worded protections – such as the right to fair and equitable treatment, a stable investment climate and observance of the legitimate expectations of investors - that are open to very broad interpretation. The expropriation clauses in international investment agreements make it possible to construe almost any government intervention that could potentially negatively affect the value of a foreign investment as an indirect expropriation.

Investment tribunals can issue multi-million compensation awards for affected investors. Awards can sometimes run into hundreds of millions of dollars, not least because they can include compensation for loss of future profits, e.g. profits that the foreign investor could have expected to make if his investment had not been impacted by government measures.

Meanwhile, the independence of arbitrators is not guaranteed: They are paid commercial fees on a case-by-case basis, in a one-sided system where only foreign investors can bring cases and where there is thus an incentive to rule in their favour.[9]

Arbitration awards are payable out of public money, reducing the funds available for wider public policies. They are internationally enforceable under the New York Convention, which allows investors to lay claims against assets owned by the convicted state or its state-owned enterprises.

The Kyrgyz Republic: vulnerable to investment arbitration

Kyrgyzstan, a landlocked Central Asian nation, has a GDP of 6.5 billion USD (World Bank, 2015).[10] In 2014, the county's tax revenues amounted to 17, 7% of GDP.[11] The Kyrgyz Republic currently faces investment claims in the proximity of 1 billion arising out of investment dispute settlement cases. This makes the Kyrgyz state an example of how the investment protection system, through its treaty-based ISDS mechanism, has the potential to deplete public budgets. It demonstrates how investment dispute settlement provides transnational corporations with a powerful tool to wield political influence and 'persuade' states to water down or shelve proposed public interest legislation that goes against their corporate interest.

As such, the investment protection system can constitute a real threat to sustainable and inclusive growth as outlined in National Sustainable Development Strategy of the Kyrgyz Republic, 2013–17[12] and the attainment of the Sustainable Development Goals aimed at ending poverty, protecting the planet, and ensuring prosperity for all.[13]

The Kyrgyz economy relies heavily on the export of gold and other minerals. The country boasts a large gold reserve as well as rare-earth, ferrous and non-ferrous mineral deposits, such as antimony, bauxite, copper, coal, fluorspar, gypsum, iron ore, lead, natural gas, petroleum, sulphur, sand and gravel, silver tin, tungsten and zinc. In 2013, gold accounted for 36% of the nation's total exports, significantly adding to GDP growth.[14] Tourism too is an important growth sector: the World travel and Tourism Council expects the contribution of travel & tourism to the Kyrgyz Republic's GDP to grow by 8.2% between 2016-2026.[15] Foreign investment in these two sectors of the country's economy is expected to grow substantially.[16]

The Kyrgyz government has identified foreign direct investment as a key component to boost economic growth in the coming years.[17] In order to attract more incoming investment, the Kyrgyz Republic, a country plagued by corruption, is making efforts to make the investment climate more attractive to foreign investors.

The country's investment legislation contains numerous investment-friendly provisions resulting from preparation for the Kyrgyz Republic's accession to the WTO and subsequent legislative revisions. The Kyrgyz Foreign Investment Law of 2003, which provides for an open investment regime for foreign investment, stipulates national treatment for foreign investors, i.e. a guarantee that foreign investors will be treated no less favourably than domestic investors. It also grants foreign investors full freedom to repatriate profits.[18] Equally, the Kyrgyz Republic places no limits on foreign ownership or control.[19]

At the same time, foreign investors stress that "there is concern among private stakeholders with the de facto stability and security of existing investments. The Government [of the Kyrgyz Republic] is deemed to have failed to effectively protect property from expropriations or illegal seizing by private groups during times of social upheaval or after government changes."[20]

The Central Asian country's judiciary is another area of concern as confidence in the judicial system among foreign investors is low. Proposed amendments to the Kyrgyz Constitution in 2016, rather than improving the situation, have raised concerns with regard to key democratic principles, in particular the rule of law, the separation of powers and the independence of the judiciary.[21]

A senior foreign diplomat based in Bishkek told the authors of this paper that "the democratic process and political stability remain a question mark in the run-up to the presidential election in 2017. The legal framework and the rule of law are also still an issue. Companies will base their investment decisions on these elements, which is why a consistent and coherent (communication) strategy is needed from the Kyrgyz government".[22]

Although the Kyrgyz authorities may technically maintain an investment-friendly legal framework, implementation is highly problematic.[23] In its 2015 assessment of the commercial law of the Kyrgyz Republic, the European Bank for Reconstruction and Development concluded that 'major barriers to foreign investment derive from a lack of adequate implementation rather than gaps in existing laws'.[24]

Weak enforcement of domestic rule of law heightens country's exposure to international investor-state arbitration claims. The Kyrgyz state maintains an extensive network of international investment agreements (IIAs – see Annex 1 for a full list).[25] Political instability and corruption in the Kyrgyz Republic make international arbitration a preferred route for foreign investors in case of conflicts.

Endemic corruption hampers the investment climate

The Kyrgyz Republic is plagued by widespread corruption. On Transparency International's Corruption Perception Index 2016, the country ranks 136 out of 176 countries. Its 2016 ranking was 28, on a scale of 0 – 100, with 0 counting as 'highly corrupt' and 100 as 'very clean'.[26] Its score was 28, 27, 24 and 24 for the years 2015, 2014, 2013 and 2012 respectively. According to the UNDP, the estimated damage from corruption in the Kyrgyz Republic reaches 700 million USD annually.[27]

Corruption continues to be listed as the second worst obstacle for doing business out of sixteen systemic issues in the country.[28] 20% of foreign investors in the Kyrgyz Republic admit to paying bribes, according to research by the International Finance Corporation (IFC).[29] An IFC representative indicated that the actual figure may be even higher, as investors are reluctant to confess to making unofficial payments.

Network of international investment agreements

The Kyrgyz Republic has 34 bilateral investment agreements (BITs), of which 9 have been signed, but are not in force and one – with Korea – has been terminated.[30] 12 of these BITs are with EU Member States: Austria (signed, not in force), Belgium, Denmark (signed, not in force), Finland, France, Germany, Latvia, Lithuania, Luxembourg, Spain, Sweden, and the United Kingdom. The Kyrgyz Republic also holds BITs with the US and China.

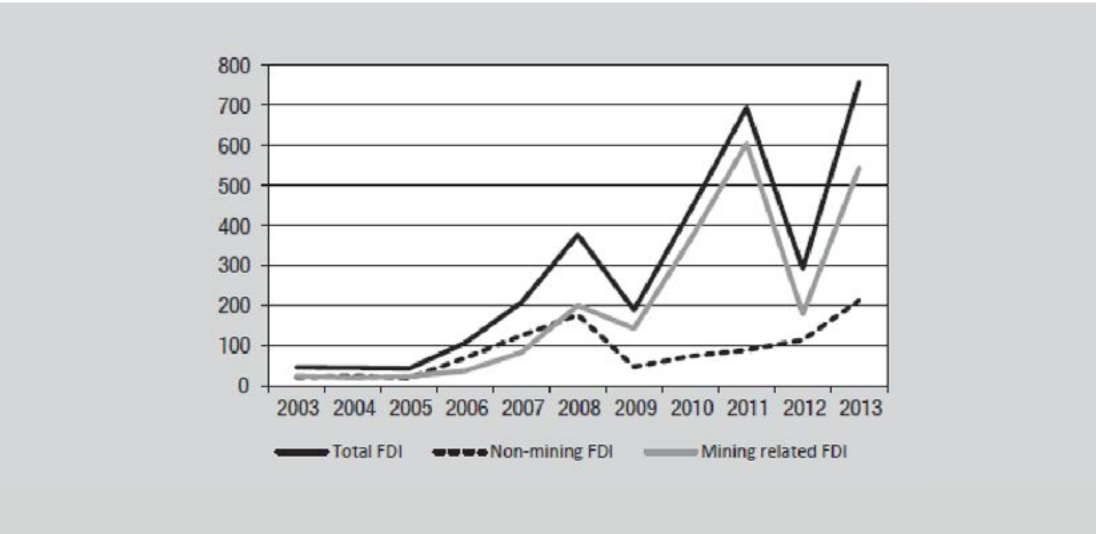
In addition, the Kyrgyz Republic is party to 9 wider treaties containing investment protection, of which 7 are in force. One of these is the Energy Charter Treaty (ECT),[31] which the Central Asian nation signed in 1994, and which entered into force in 1998. The ECT is a multilateral agreement that offers investors in the energy sector similar protections to those encountered in other investment agreements, including the possibility to resort to international investment arbitration. The ECT is frequently used by mining and other energy corporations to bring investment claims against states. In 2015, European Member State Italy announced its withdrawal from the ECT,[32] out of concern that future energy policy changes might spark a spate of investment disputes.[33]

Attracting foreign direct investment as a key component for growth

The government of the Kyrgyz Republic is actively engaged in attracting more incoming foreign investment to boost economic growth.

World Bank data on net FDI inflows to the Kyrgyz Republic shows a slow increase in the mid 2000s, from 175 million USD in 2004 to 1.1 billion USD in 2015.[34] In 2003-2007, average FDI inflows were recorded at less than 100 million USD per year. However, upward from 2005, the inflow of FDI improved significantly after the 'surge in global prices for commodities [gold] that raised the profile of Kyrgyzstan's mining potential'.[35] In 2014, the export of gold accounted for 41% of total Kyrgyz exports.[36] According to the Kyrgyz Investment Promotion Agency, between 2010-2013, the country saw an influx of foreign direct investment into the mining sector of 217.6 million USD.[37]

Chart 1 Foreign Direct investment inflows in the Kyrgyz Republic 2003 - 2013



Source: UNCTAD

Foreign direct investment (FDI) in the Kyrgyz Republic averaged 206.96 million USD from 2010 until 2016, reaching an all-time high of 693.60 million USD in the fourth quarter of 2011 and a record low of -38.70 million USD in the first quarter of 2014.[38] In the third quarter of 2016, FDI in the Kyrgyz Republic increased by 61.90 million USD. Net FDI inflows between 2014-2016 are depicted in the graph below. FDI is projected to reach 5% of GDP between 2016-2019.[39]

Kyrgyzstan Foreign direct investment - Net inflows

Source: www.tradingeconomics.com | National Bank of the Kyrgyz Republic

Mining: Exposure to investment arbitration risks

Investors in the mining and extractives industry are among the most frequent users of the investor-to-state dispute settlement system. So the reliance on foreign capital in the mining sector comes with a risk. Any future endeavours by the Kyrgyz state to (re-)regulate its natural resources to ensure that the country's mineral commodities are not exported in raw form, but that value is added domestically; to set up regulatory frameworks to ensure that foreign operators contribute to domestic (industrial) development; and to harness its mineral wealth to promote economic diversification and environmentally and socially sustainable development could be challenged by foreign investors through ISDS. Investment protection can constrain the Kyrgyz Republic government in amending laws or initiating the renegotiation of contracts with mining companies to, for example, tighten environmental protection or bind foreign investors to local content requirements, including technology transfers or the hiring of local staff.[40]

Kyrgyz Republic's experience with ISDS lawsuits brought by foreign investors

UNCTAD's investment policy hub lists 13 treaty-based investment arbitration cases against the Kyrgyz Republic (see Annex II for a schematic overview of cases, the applicable arbitration rules and administering institutions, the amounts claimed and awarded, the IIA breaches alleged and found and the follow-on proceedings).

Six out of these cases have been decided in favour of the investor; two were discontinued; two were settled; and three are still pending.[41] Four cases arose from the mining sector; four are related to banking/financial services, three are tourism-related; and one deals with the supply of gas (see Annex III for detailed case descriptions).

On its website, UNCTAD lists all known treaty-based investment claims. The actual number of investment disputes – treaty or contract-based - may be much higher: disputes are generally treated confidentially and behind closed doors. Information on cases is only released by mutual consent of the litigating parties. The World Bank's International Centre for Settlement of Investment (ICSID) is the only investment arbitration forum that requires notification of cases brought.[42]

In addition, it is impossible to track the number of times investors pressurize states by threatening to bring an investment claim. States have a strong incentive to settle emerging disputes before they get to the arbitration stage, to avoid reputational damage. Settlements can also involve substantial compensations – in monetary terms or in exemptions from contested measures, as investors are unlikely to settle unless they have something to gain.

A boom in arbitration cases

In recent years, the number of investment claims world-wide has burgeoned from. From a total of six known treaty cases by 1997 to total of a 696 publicly known cases by June 2016.[43] Until 1999, there is registry of only 43 cases, which means that 653 cases were filed during the last 15 years. In 2015, 70 new investment cases were initiated – a record high.[44]

Claims surpass annual inflow of FDI

Outstanding claims against the Kyrgyz Republic amount to an estimated 925 million USD.[45] Providing some perspective: this amount surpasses the annual inflow of foreign direct investment into the Kyrgyz Republic in any given year.

Between 2010-2015, the mining sector, which is promoted by the Kyrgyz government as a key sector for the country's long-term sustainable development,[46] attracted around 218 million USD in foreign investments.[47]

Contract-based investor-state dispute settlement: Centerra Gold

The right to international investor-state dispute settlement is not only enshrined in investment treaties, but can also be included in contracts between the state and individual foreign investors. In the absence of an investment protection treaty between the home state of the investor and the state hosting the investment, many foreign investors insist on the inclusion of international arbitration in an investment contract. For the host state, contracts have the benefit that they allow for tailor-made provisions that do not automatically extend to all incoming investments, as is the case under IIAs. Contracts also have a set duration and can be revised when they come to term. Often, entry into certain crucial sectors of the economy is only possible through such investor-state contracts.[48]

However, even if contracts do not include the right to international arbitration, international investment treaties often contain so-called 'umbrella clauses', which can elevate all purely contractual disputes to the international treaty level.[49]

Combine this with the fact that foreign investors from countries that do not have an IIA with the Kyrgyz Republic can easily establish a mailbox company or use a subsidiary in a country that does have an IIA with this Central Asian country in order to bring a claim, and you end up with a situation which can expose the Kyrgyz state to an unpredictable number of international arbitration cases.

Centerra's claims

The most infamous investment dispute in the Kyrgyz Republic is a claim which was not brought under an international investment treaty, but which arose out of an individual contract between the Kyrgyz State and a large foreign mining operator: Canadian-based Centerra Gold Inc.

Centerra manages the Kumtor gold mine, one of the largest open-pit mining operations in Central Asia, through its subsidiary, the Kumtor Gold Company. Kumtor is the Kyrgyz Republic's most important gold mining project, accounting for 10% of GDP.[50]

The Kyrgyz state is a large shareholder in the operation: the state gold company Kyrgyzaltyn JSC holds around 33% of Centerra's shares. Centerra operates the Kumtor mining site via the Kumtor Operating Company (KOC).

Centerra Gold Inc. has brought two consecutive investment cases against the Kyrgyz Republic.

Centerra I was initiated in 2006, and conducted under the auspices of the Permanent Court of Arbitration, under UNCITRAL Arbitration Rules, and pursuant to the Investment Agreement between the Kyrgyz Republic, Centerra and its subsidiary, the Kumtor Gold Company (KGC), of 2003 and Law No. 66 'On Investments in the Kyrgyz Republic' (2003).[51]

In May 2016, Centerra issued a second notice of arbitration against the Kyrgyz Republic in connection with a number of disputes regarding the Kumtor mining project. This dispute will also be conducted under UNCITRAL rules, this time at the Stockholm Chamber of Commerce (SCC). The case, which is to be held under the law of the State of New York, will be decided by a single arbitrator, in accordance with the 2009 Restated Investment Agreement between Centerra and the Kyrgyz Republic.[52]

Details of the 2006 dispute relating to Centerra's exploration and development of mining sites in the Kyrgyz Republic are sparse. The Investment Arbitration Reporter writes that ' Centerra's financial reports from the period make reference to a domestic court decision ordering KGC to pay 1.2 million USD in tax on land leased by the company, 'as well as proposed legislation challenging the lawfulness of agreements between it and the government'.[53] The case was settled in 2009, with Centerra and the Kyrgyz Republic sharing the arbitration costs of 200,000 USD,[54] and a new investment agreement between the company and the Kyrgyz government was negotiated.

Centerra II was initiated in 2016. Key to the dispute are the Kyrgyz Republic's decision to withhold certain environmental approvals of Kumtor's 2016 annual mine plan, as well as the withholding of certain key operating and environmental permits required for Kumtor's operations. Another issue is the attempt of the Kyrgyz state to roll back dividends paid by the Kumtor Gold Company to Centerra.

The case follows on a number of cases against the Kumtor Operating Company in the Kyrgyz domestic courts over environmental charges in relation to mine waste disposal, unpaid water use and pollution fees and alleged land damage.[55] In one of these cases, the Bishkek Courts ruled in favour of the Office for Environmental and Technical Safety (SIETS), awarding damages of over 98 million USD.[56] In an earlier ruling, the Kumtor Operating Company was ordered pay 10,000 USD to in relation to unrecorded wastes from Kumtor's effluent and sewage treatment plants. Two outstanding cases relating to the charges of land damage charges and failure to pay for water use, and KOC owing outstanding environmental pollution fees, involve 5 million USD and 220 million USD respectively.[57]

In bringing the environmental charges, the Kyrgyz government seems to be lending an ear to public concerns about the Kumtor mining operation. Centerra's exploitation of the mine has long been surrounded by controversy.

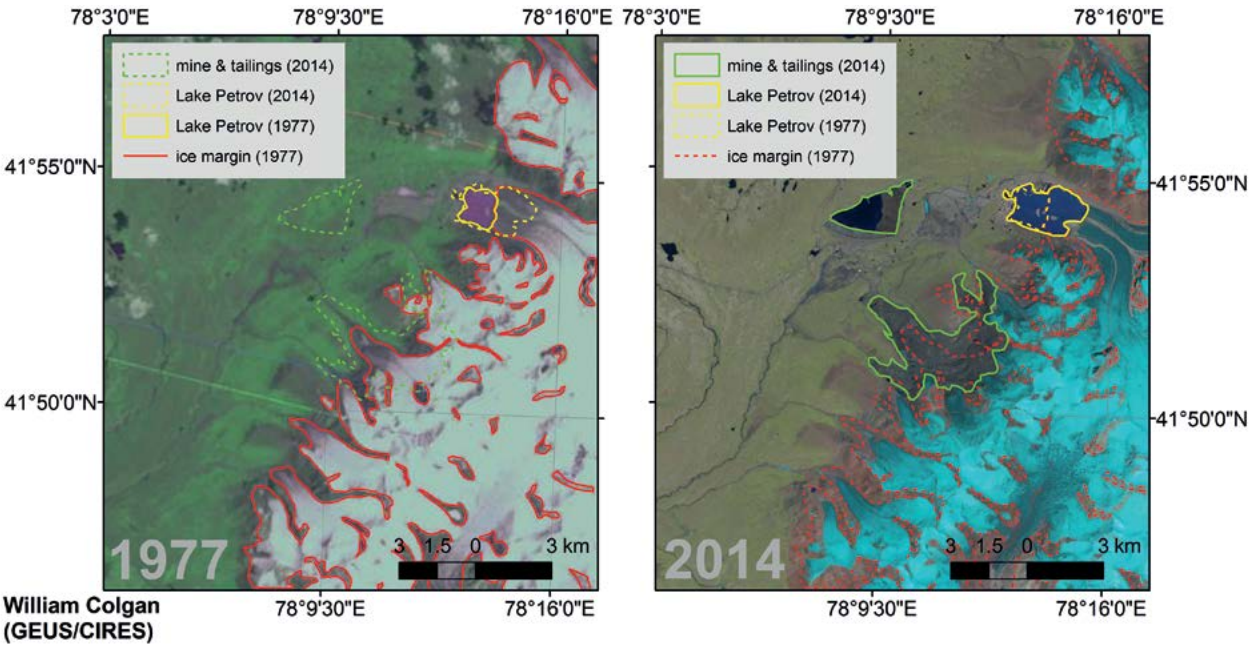
Kumtor at the centre of public protests over corruption, human rights violations and environmental destruction

The Kumtor gold mine has been a flashpoint for unrest and political controversy which has dominated country's politics in the last two decades. In 1992, Centerra's predecessor, Canadian mining and energy giant Cameco, was the initial foreign corporation that struck a deal with the Kyrgyz government, when both sides signed the Kumtor Master Agreement. Since then, the gold project was restructured twice, in 2003 and 2009.

Throughout its history, Kumtor project has been named in public scandals over massive corruption that rose up to the highest echelons of the government, including presidents and their family members.[58] Cameco and Centerra have been accused of complicity in the corruption schemes, but both Canadian companies have denied these allegations on many occasions.[59]

The controversy surrounding Kumtor dates back to the second restructuring agreement in 2003, when state-owned Kyrgyzaltyn swapped its majority ownership (67%) in the Kumtor project for a 33% share in the newly established company Centerra Gold. This particular transaction triggered highly politicized debates in the following years of instability. Massive protests against the gold mine took place in 2013, which were brutally suppressed by the Kyrgyz government. Local rights and environmental groups, including the former ombudsman of the country, reported on documented facts of torture of community activists and human rights violations that were committed by the security services of the Kyrgyz Republic.[60]

The Kumtor gold mine was also criticized by local and international environmental organisations after a catastrophic spill of up to 2 tons of sodium cyanide into the local river near a number of Kyrgyz villages in May 1998. Water from the river was being used by the local population for drinking and irrigation purposes. The National Institute of Public Health and the Environment from the Netherlands reported more than 2,000 people seeking medical care because of suspected cyanide poisoning, with 400-500 people being admitted to hospital.[61] Routes of poisoning as described by the physicians were by air and/or through working in the irrigated fields or gardens.



Study of conditions at Kumtor, comparing 1977 to present. The image from 2014 shows the giant tailings pond and the large mining site to the north east, and Lake Petrov to the north above the tailing pond having doubled in size. The dotted red line shows glacial retreat-melting since 1977 © William Colgan; Source: Radio Canada International

For the local communities living in the vicinity of Kumtor, poisoning by cyanide, arsenic and other toxins remains an imminent threat: Centerra's flagship mine in the Kyrgyz Republic is known worldwide as the only mining operation on an active glacier that is situated above 4000 meters. Professor William Colgan, a geologist and research climatologist at Toronto's York University, specialises in the study of glaciers and their response to global warming. He identifies the Kumtor mine as an accident waiting to happen: with increasing temperatures "the glaciers are melting quickly, not only causing continuing concern at the site, but also creating a natural lake that has formed above the [Kumtor] mine. Because of glacial melt that lake is growing rapidly. It's not a question of "If" but rather "when" the lake will burst through and quickly overflow the mine's tailings pond sending vast amounts of water laced with arsenic and other toxins into the nearby river used by residents for irrigation and drinking."[62]

Investment arbitration and human rights

The Centerra case shows how disputes between foreign investors and states are often highly interlinked with the public interest. When investors challenge states, this not only impacts on public budgets, but often also on human rights. In the Centerra case, there is obvious tension between the company's operations and the right to water and the right to health.

Under their international human rights obligations, states have a duty not to conclude trade and investment agreements that have the potential to adversely affect human rights.[63]

Under the Ten Principles of the UN Global Compact, deriving from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption, businesses have a duty to ensure they are not complicit in human rights abuses. The volatile domestic political situation in the Kyrgyz Republic shows how easy it is for foreign business operators to become embroiled in human rights violations.

Foreign investors should be accountable for their actions, and implication in human rights violations should be a ground to exclude foreign investors from investment arbitration.

IIAs and investor-state dispute settlement: a risk to the Kyrgyz Republic's sustainable development transition

The system for investment protection with its strong enforcement mechanism can hamper the Kyrgyz Republic's transition to sustainable and inclusive socio-economic development, as outlined in its 2013-2017 National Sustainable Development Strategy.

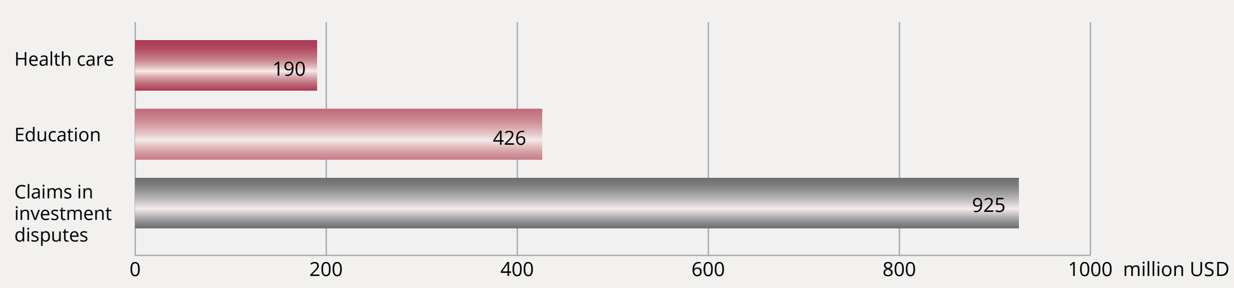
This strategy includes ambitions to promote human development and inclusive growth, including by sustainable local community development; a transition to organic agriculture and low carbon energy development; restoring natural ecosystems, saving biodiversity and reducing disaster risks in a changing climate context.[64] Investment protection can be at odds with such policy objectives.

As a rule, international investment treaties and investment protection chapters in trade agreements contain no binding obligations and responsibilities for investors. If a wider trade agreement has language on sustainability and social and environmental protection, this is generally in non-binding terms. Such chapters, which tend to be excluded from the general dispute settlement mechanisms of the wider treaty, mostly also lack concrete commitments. This set-up makes it hard to hold both states and investors to account when it comes to their human rights and social and environmental responsibilities.

Meanwhile, foreign investors have already used the investment dispute settlement system to challenge environmental protections, energy policies, financial regulation, public health, land use, taxation measures, etc. Even the threat of claims can cause governments to reconsider or shelve public interest regulation. Sensitive policy areas such as the provision of essential public services are not excluded from investor-state dispute settlement, nor is there a carve-out for pressing matters such as policy measures to address climate change.

Funds the Kyrgyz state cannot afford to waste: impacts of IIA claims on social spending

The Kyrgyz Republic's Ministry of Finance reports that in 2015, 3.1% of the state budget, over 190 million USD, was spent on health care. 7% of the budget went to education, totaling some 426 million USD.[65] If the aggregate claim amount in investment disputes is estimated to involve 925 million USD, that equals well over two times the entire annual budget available for education, or nearly five times the annual health budget.



Even the amount involved in defending investment cases is substantial. In the 2011 Belokon case – in addition the 15 million USD award in favour of the investor – the Kyrgyz Republic was ordered to cover the cost of the arbitration plus half of the claimant's legal costs (1.958 million USD). If we estimate the arbitration cost (i.e. the cost of the tribunal, excluding the fees for legal representation) at roughly 350,000 USD,[66] then the total cost of the case payable by the Kyrgyz Republic comes to some 1.31 million USD. That is, excluding the Kyrgyz Republic's own legal fees for defending the case. All in all, that means that the legal costs of a case alone can rise up to 1% or more of the health care budget.

In a country where per capita GDP is no more than 970 USD,[67] 80 per cent of the population has to get by on less than 5 USD a day,[68] and there is a serious need to increase public spending to provide affordable, high-quality health care and education for all,[69] this is money that the Kyrgyz Republic can ill afford to waste.

The crippling costs of investment arbitration

The amounts claimed by foreign investors in investment arbitration can be very high. In Europe, energy giant Vattenfall is claiming 4.4 billion USD, including for future lost profits, over Germany' decision to phase out nuclear energy.[70] In Romania, Gabriel Mining used the threat of a 4 billion USD arbitration claim (2% of Romania's GDP) to try and bully the Romanian government to give the go-ahead on a highly controversial mining project (for more details, see box on experiences with mining cases in other countries, p. 16).

Awards in investment cases can easily amount to the entire annual public budget a country has available to provide for public health services, as in the case of Occidental Petroleum versus the state of Ecuador, where the initial award amounted to 1,7 billion USD, plus interest – roughly the equivalent of the country's annual health budget for 7 million people.[71]

Equally, there is a strong tendency in IIAs to ban the use of performance requirements for foreign investors. Like many other countries, the Kyrgyz Republic uses performance requirements to ensure that incoming investments create spillovers into the local economy and benefit the Kyrgyz people. For example, in 2012, the Kyrgyz government enacted the new "Law on Subsoil" (for the gold mining industry only), which includes establishing a 'social package' agreed upon with investors in the sector. This social package 'is intended to include investment in social and living conditions in the mining communities. Specifically, the investors should provide employment to local residents and invest in the construction of infrastructure'.[72]

The investment protection regime may also hinder diversification away from the reliance on the export of unprocessed raw metals and minerals, which makes the Kyrgyz Republic vulnerable to external shocks. Indonesia's experience with investment arbitration (see box page 16) is a case in point.

Lastly, enabling foreign investors to simply bypass the domestic legal system by giving them an avenue to take their disputes directly to international arbitration removes a potentially potent incentive to strengthen domestic institutions and the general rule of law, which would benefit society as a whole by breaking the vicious cycle between corruption, unequal distribution of power and unequal distribution of wealth. Breaking that cycle would certainly help the attainability of the goal of poverty reduction through inclusive growth put forward in National Sustainable Development Strategy of the Kyrgyz Republic, 2013–17.[73]

False solutions[74]: The European Union replaces ISDS with an Investment Court System

In response to public outrage over the corporate privileges enshrined in ISDS, the European Union in November 2016 published a proposal for an Investment Court System (ICS). The EU has already included this mechanism in its free trade and investment agreements with Vietnam (2015) and Canada (2016) and has launched a proposal to expand ICS into a full-blown global Multilateral Investment Court[75] for the settlement of investment disputes arising out of the 2332 bilateral investment treaties and 297 treaties with investment provisions in force across the world.[76]

The European Commission claims that with this proposal they are preserving governments' right to regulate and solving all the conflicts of interest of arbitrators. However, the proposed reforms leave intact the fundamental flaws in the investment protection regime. The principle of a one-sided system, where only foreign investors can bring a claim and cases are weighed on the basis of investment protections only, without any reference to wider public interests underpinning regulatory interventions by the state or to corporate social and environmental responsibilities, remains largely untouched. ICS is also a missed opportunity to counterbalance the extensive protections for foreign investors with corresponding actionable responsibilities in the fields of labour, environmental, consumer, or other standards.

The ICS and MIC proposals deal exclusively with amending the arbitration process and improving transparency around investment cases. They do not touch the substantive clauses on the basis of which investors can bring claims. Research by the Transnational Institute and others shows that some of the most controversial investment claims would still be possible under the ICS/MIC system.[77]

Experiences with mining cases in other countries: Lessons to be learned

The case of Newmont Mining v. Indonesia

In 2009, Indonesia enacted a new mining law, requiring mining companies to downstream production by developing mineral processing facilities in the country and refining and processing minerals domestically prior to export. The law also aims to limit foreign ownership of mining companies to 49%. The law forms part of a broader strategy by the Indonesian government to reduce dependence on the export of raw materials and create more added value to benefit local and national development.

However, the extractives industry strongly opposed the new policy. After intensive lobbying and pressure from large mining companies, the Indonesian government agreed to amend the regulations for foreign mining corporations Freeport and Newmont and postpone obligations to build mineral refinery plants in Indonesia. However, these concessions did not satisfy Newmont. The company decided to file an international arbitration case against Indonesia at the World Bank's International Centre for the Settlement of Investment Disputes – only to withdraw the case a month later when Indonesia agreed to settle the case, granting the company further exemptions from the new mining law.[78] The case of Newmont Mining vs Indonesia is a powerful example of how investment agreements are used by companies to get exemptions from government regulations and legislation, undermining democracy and development. The case contributed to Indonesia's subsequent decision to cancel all of its bilateral investment treaties and to renegotiate them along the lines of a new model treaty that includes limiting the substantive clauses on the basis of which investment claims can be brought, ensuring regulatory flexibility and binding investors to specific obligations to make sure incoming foreign investment benefits domestic development objectives (see box on 'Key elements in the new model BIT approach of India and Indonesia').

Before the Newmont case, Indonesia had already indicated that, under the threat of claims from some of the world's largest mining companies, it felt compelled to refrain from measures to protect its vulnerable rainforests from the effects of open-pit mining.[79]

The case of Gabriel Mining against Romania and other examples of regulatory chill

The case of Newmont against Indonesia shows the consequences that arise from a mere threat of a billion dollar claim in response to a (proposed) new policy. There is evidence that international investment arbitration can have a wider 'chilling effect' on regulation as multinational corporations use the threat of multi-million dollar investment claims to try and 'persuade' states to backtrack on contested measures.

In 2015, Canadian investor Gabriel Mining launched an arbitration case at ICSID relating to the operation of a gold and silver mining project in Romania's Carpathian mountains.[80] Gabriel Mining's gold winning operations threatened to create a lake of cyanide-polluted waste water and destroy a number of local villages as well as a historic heritage site. This triggered massive public opposition, and caused the Romanian government to withhold the necessary environmental permits. Gabriel Mining's CEO then openly threatened to sue the government for 4 billion USD to blackmail Romania into granting it an exploitation permit.[81] The company is not just claiming compensation for real investments made, but also seeks compensation for loss of future profits. The amount claimed amounts to 2 percent of Romania's GDP, which makes it a real threat to public budgets.[82] Nonetheless, in this particular case, Romania has continued to block implementation of the project.[83] The ICSID decision in the case is still pending.

In Europe, an investment claim from energy company Vattenfall resulted in the watering down of environmental regulations by the city of Hamburg.[84]

World-wide, countries like New Zealand and Malaysia have postponed anti-smoking laws to await the outcomes of a two billion-dollar investment claim by Philip Morris against the introduction of anti-smoking measures by Uruguay and Australia.[85]

Reform of the international investment protection regime to generate positive spillovers from FDI

A growing number of countries around the world is revising and/or cancelling their investment agreements out of dissatisfaction with transnational investors challenging the legitimacy of their policy decisions and the threat to public budgets.[86] Countries like India and Indonesia have taken a lead in developing model investment agreements that seek to better describe and limit the grounds on which investment disputes can be brought. They also include obligations for public investors, with the aim to ensure more sustainable investment, which generates positive spillovers into the host economy.

Key elements in the new model BIT approach of India and Indonesia

Both India and Indonesia aim to restrict investment protections; to preserve the flexibility of the state to regulate in the public interest and to tie investment to development objectives and social responsibilities. Their model BITs only qualify investments that contribute to the economic development of the host state qualify for protection under the treaty.[87 88] Both India and Indonesia reserve the right to regulate, including to protect the environment, public health, labour and human rights. Foreign investors must comply with domestic laws and refrain from any engagement in corrupt practice on the penalty of denial of the protections offered by the investment protection agreement.

Indonesia also reserves the right to pursue development goals, including by extending preferential treatment to domestic entrepreneurs, by taking measures to strengthen domestic production capacity, to promote employment, and to support marginalised groups in society.

Indonesia also includes an obligation for investors to comply with domestic and international standards on labour and the environment, as well as an obligation to abide by the UN Guiding Principles on Business and Human Rights, and/or any future binding instruments that may yet be developed. In all of these areas, Indonesia stipulates that the highest standard counts, which should stimulate a race to the top.

Indonesia has also included language stating that any measure taken to comply with Indonesia's international obligations under other treaties or conventions do not imply a breach of the investment treaty and consequently also do not entitle foreign investors to seek compensation. This leaves regulatory flexibility to comply with, for example, the Paris climate agreement, or the country's obligations under international human rights law.

As for the settlement of disputes, in India's model BIT, access to ISDS mechanisms has been made conditional on the exhaustion of local remedies. Investors can only take their complaint before an investment tribunal, if their case not satisfactorily resolved in the domestic courts within 5 years, or if the investor can prove that (timely) legal remedies are not available in the domestic system.

India also aims for a periodic review of investment treaties every five years and the opportunity to amend a treaty's provisions at any time at the request of either party. These amendments would be binding on investment tribunals. BITs would be in force for ten years, and would not be automatically renewed.

Ecuador

On May 17, as one of his last acts as president of Ecuador, Rafael Correa formally terminated the county's bilateral investment treaties (BITs) with China, Netherlands, Germany, Great Britain, France, Spain, Italy, Sweden Switzerland, Canada, United States, Argentina, Bolivia, Peru, Venezuela, and Chile. Correa's decision was based on the recommendations of the official government appointed Citizens' Commission to audit the Ecuadorian BITs, the CAITISA Commission. Members of the Commission were former judges, academics and other experts, and the Commission was led by researcher Cecilia Olivet from the Transnational Institute (TNI). In the report, CAITISA says the country's BITs in their current form were biased towards the interests of investors and posed a threat to the Ecuadorian government's capacity to regulate its corporate activities to protect its citizens.[89] CAITISA finds that the BITs signed by Ecuador have failed to deliver the foreign direct investment (FDI) that had been expected. Ecuador's principal sources of FDI are Brazil, Mexico and Panama – none of which have a BIT with Ecuador. The report reveals that these investment agreements have not only failed to deliver promised investment, they have cost the people of Ecuador billions of dollars and posed a serious threat to Ecuador's capacity to regulate corporate activities in order to protect its citizens.

Ecuador is not alone in withdrawing from its investment treaties, South Africa, Bolivia, India and Indonesia have all terminated some of their BITs or signaled an intent to do so. Ecuador is joining a wave of countries around the world calling for a new international legal framework for investment which prioritises public interest over corporate profits.

The Ecuadorian state has had to defend 26 arbitrations brought under BITs, with a total of US$21.2 billion claimed.

CAITISA states that investors have "disproportionately" benefited in these arbitrations. Investors won 13 of the 15 cases against Ecuador in which the tribunal has reached a decision. To date, Ecuador has paid out US$1.5 billion to investors including Occidental, Chevron and IBM after adverse rulings in BIT claims. The commission says there are still US$13.4 billion of pending claims against the state – equivalent to 52% of Ecuador's general budget for 2017.

Conclusion

The Kyrgyz Republic has already been on the receiving end of a large number of treaty-based and contract-based investment disputes. With a continued reliance on the influx of foreign direct investments as part of the country's long-term development strategy, this exposes the country to the risk of more claims in the future. The Kyrgyz Republic has yet to transition into a functioning democracy, and the country is still grappling with many social, economic and environmental challenges that are likely to require policy changes and enactment of new regulations that may impact on the profitability of foreign investments, thus potentially giving rise to further investment claims.

Because of these risks, the Kyrgyz state might consider terminating and revising its international investment agreements. Most bilateral investment agreements contain a window of opportunity for the signatory parties to express their intent to terminate and/or renegotiate. The Kyrgyz Republic would be advised to check its network of bilateral investment agreements for their termination dates and to notify partners of their wish to future-proof these agreements by limiting the grounds for international arbitration and including binding and enforceable responsibilities for investors.

Future-proofing would involve designing investment treaties, investment chapters in trade agreements and investment contracts between the state and individual investors in such a way that they attract investment that genuinely contributes to inclusive and sustainable socioeconomic development, promotes human rights, and ensures environmental protection.

Preferably, treaty-based investor-state dispute settlement should be avoided altogether. Characteristic of national legal systems in a democracy is the so-called regulatory feedback loop, where the parliament can amend laws if the judiciary interprets them in ways that are inconsistent with their original intent. This regulatory feedback loop is absent in treaty-based investment protection and arbitration. However, if the Kyrgyz Republic wants foreign investors to be able to rely on domestic legal system, it is vital to tackle its corruption problem and ensure stable and reliable rule of law.

If the Kyrgyz Republic decides to continue with treaty-based investment protection, it is crucial to not only guarantee investor rights, but to ensure foreign investors are also accountable for their actions. The following elements constitute important preconditions to promote sustainable investment:

The state's duty to regulate in the public interest must not be undermined by investment protection provisions and investment dispute settlement. To ensure inclusive and sustainable growth, states must maintain full regulatory scope and flexibility to adopt and adapt regulatory frameworks to changing conditions and respond to public demands. Investment agreements must contain strong language to expressly safeguard the state's duty to regulate. Excluding crucial, sensitive policy areas such as the provision of essential public services or policy measures to address climate change from investor-state dispute settlement is advisable.

Investment treaties and contracts should include, not limit, performance requirements for foreign investors to promote spillovers and wider social benefits, – including, for example, obligations to reinvest part of their profits in the host economy, hire local workers or assume responsibility for remediation of the environmental pollution resulting from their business activities.

Foreign investors must be fully accountable for their business activities and investment protection must be balanced with binding and enforceable investor obligations. Treaty-based investment protection should be made conditional on foreign investors observing specific social, environmental and human rights obligations, based on domestic laws and international standards and principles. The highest standard should always count in order to stimulate a race to the top. Investment agreements should also include a stipulation that binds foreign investors to comply with any higher future social, environmental and human rights laws and instruments, as and when they are adopted.

The grounds for launching an investment arbitration case should be narrowed down and closely circumscribed. The substantive provisions, particularly but not only in older bilateral investment agreements, offer far-reaching investment protections, that leave arbitrators too much room for interpretation. This exposes states to an unforeseeable number of claims with associated risks for public budgets and policy space.

Transnational corporations should bear their own business risks, including from policy change. Investment arbitration should be the exception to the rule and be tied to a narrow set of circumstances. As a general principle, investors should not be allowed to avert their business risk onto public budgets. There is a market-based alternative open to foreign investors: as the Kyrgyz Republic is a member of the Multilateral Investment Guarantee Agency (MIGA) of the World Bank Group, there is nothing preventing foreign investors from availing themselves of the political risk insurance schemes MIGA offers. In addition to MIGA, there are other insurers that offer political risk insurance. For transnational investors, privatising their gains, but socializing their losses should not be an option.

Full transparency in relation to the initiation, process, and adjudication of investment disputes is required, because investment disputes relate to human rights, social standards, environmental protection and other public interests, impact on public budgets and carry a risk of 'regulatory chill'. Transparency should include notification of cases, disclosure of case documents and publication of awards.

ANNEX I

Kyrgyz Republic – International Investment Agreements

Kyrgyz Republic – Bilateral Investment Agreements (BITs)[90]

No.	Partners	Status	Date of signature	Date of entry into force	Tekst
1	Armenia	In force	04/07/1994	27/10/1995	Full text: ru
2	Austria	Signed (not in force)	22/04/2016		Full text: ru
3	Azerbaijan	In force	28/08/1997	28/08/1997	Full text: ru
4	Belarus	In force	30/03/1999	11/11/2001	Full text: en
5	Belgium	In force	09/02/1989	18/08/1991	Full text: fr | ru
6	China	In force	14/05/1992	08/09/1995	Full text: ru
7	Denmark	Signed (not in force)	01/01/2001		Full text: en
8	Finland	In force	03/04/2003	08/12/2004	Full text: en
9	France	In force	02/06/1994	10/08/1997	Full text: fr
10	Georgia	In force	22/04/1997	28/10/1997	Full text: ru
11	Germany	In force	28/08/1997	16/04/2006	Full text: de | ru
12	India	In force	16/05/1997	12/05/2000	Full text: en
13	Indonesia	In force	19/07/1995	23/04/1997	Full text: en
14	Iran, Islamic Republic of	In force	31/07/1996	27/06/2005	Full text: ru
15	Kazakhstan	Signed (not in force)	08/04/1999		Full text: ru
16	Korea, Republic of	Terminated	20/03/1996	26/12/1996	Full text: ru
17	Korea, Republic of	In force	19/11/2007	08/06/2008	Full text: en
18	Kuwait	Signed (not in force)	13/12/2015		Full text: en | ru
19	Latvia	In force	22/05/2008	11/02/2009	Full text: en
20	Lithuania	In force	15/05/2008	20/02/2009	Full text: ru
21	Luxembourg	In force	09/02/1989	18/08/1991	Full text: fr | ru
22	Malaysia	Signed (not in force)	20/07/1995		Full text: en
23	Moldova, Republic of	In force	07/11/2002	16/01/2004	Full text: ru
24	Mongolia	Signed (not in force)	05/12/1999		Full text: ky | mn | ru
25	Pakistan	Signed (not in force)	26/08/1995		Full text: en
26	Qatar	Signed (not in force)	08/12/2014		Full text: ru
27	Sweden	In force	08/03/2002	01/04/2003	Full text: en
28	Switzerland	In force	29/01/1999	17/04/2003	Full text: fr | en
29	Tajikistan	Signed (not in force)	19/01/2000		Full text: ru
30	Turkey	In force	28/04/1992	31/10/1996	Full text: en
31	Ukraine	Signed (not in force)	23/02/1993		Full text: ru

No.	Partners	Status	Date of signature	Date of entry into force	Tekst
32	United Arab Emirates	Signed (not in force)	07/12/2014		Full text: en | ru
33	United Kingdom	In force	08/12/1994	18/06/1998	Full text: en
34	United States of America	In force	19/01/1993	12/01/1994	Full text: en
35	Uzbekistan	In force	24/12/1996	06/02/1997	Full text: ru

Kyrgyz Republic – Treaties with Investment Provisions[91]

No.	Short title	Parties	Date of signature	Date of entry into force	Tekst
1	Eurasian Economic Union - Viet Nam FTA	Viet Nam	29/05/2015	05/10/2016	Full text: en Investment ch.: en
2	Treaty on Eurasian Economic Union (2014)		29/05/2014	01/01/2015	Full text: ru Investment ch.: ru
3	Eurasian Investment Agreement	Belarus, Kazakhstan, Russian Federation, Tajikistan	12/12/2008		Full text: ru
4	ECO Investment Agreement		07/07/2005		Full text: en
5	US-Central Asia TIFA	Kazakhstan, Tajikistan, Turkmenistan, United States of America, Uzbekistan	01/06/2004	01/06/2004	Full text: en
6	CIS Investor Rights Convention (1997)	Armenia, Belarus, Kazakhstan, Moldova, Republic of, Tajikistan	28/03/1997	21/01/1999	Full text: ru
7	EC-Kyrgyzstan Cooperation Agreement	EU (European Union)	09/02/1995	01/07/1999	Full text: en
8	The Energy Charter Treaty		17/12/1994	16/04/1998	Full text: en Investment ch.: en
9	OIC Investment Agreement (1981)		05/06/1981	02/1988	Full text: en

ANNEX II

Overview of known treaty-based ISDS cases against Kyrgyz Republic[92]

Case & year of initiation	Summary	Outcome of original proceedings	Home state of investor	Applicable IIA/Arbitration rules/ Administering institution	Amount claimed/amount awarded	IIA breaches alleged/found	Follow-on proceedings
JSC Tashkent and others v. Kyrgyz Republic[93] 2016	Investment: Management and operation of resorts and recreational facilities. Summary: Claims arising out of the government's alleged expropriation of tourist resorts managed and operated by the claimants.	Pending	Uzbekistan	Kyrgyz Republic - Uzbekistan BIT (1996) ICSID AF (ICSID Additional Facility) ICSID (International Centre for Settlement of Investment Disputes)	Data not available	Data not available	None
Stans Energy v. Kyrgyz Republic (II)[94] 2015	Investment: Indirect ownership by Stans Energy Corp. of Kutisay Mining LLC that held a licence for mining rare earth, bismuth, molybdenum and silver at the "Kutessay II" deposit. Summary: Claims arising out of a series of measures by the Government which allegedly resulted in the impossibility to carry out activities on the mineral deposit "Kutessay II" in accordance with the mining license previously granted to Kutisay Mining LLC.	Pending	Canada	CIS Investor Rights Convention (1997) UNCITRAL PCA (Permanent Court of Arbitration)	Data not available	IIA breaches alleged: indirect expropriation IIA breeches found: pending	None
Beck v. Kyrgyz Republic[95] 2013	Investment: Rights under certain lease agreements. Summary: Claims arising out of the alleged expropriation of claimant's investment by terminating certain lease agreements with respect to various land plots to develop a theme park in Bishkek.	Decided in favour of investor	Republic of Korea	CIS Investor Rights Convention (1997) MCCI (Moscow Chamber of Commerce and Industry) MCCI (Moscow Chamber of Commerce and Industry)	Claimed by investor: data not available Awarded by tribunal: 23.00 million USD	IIA breaches alleged: indirect expropriation IIA breaches found: indirect expropriation	Judicial review by national courts Award/decision set aside in its entirety
Consolidated Exploration v. Kyrgyz Republic[96] 2013	Investment: Majority shareholding (60 per cent) in Jerooyaltyn, a Kyrgyz company that entered into a joint venture with a State-owned company to develop the Jerooy gold deposit. Summary: Claims arising out of a series of measures undertaken by the Government that allegedly expropriated claimant's investment in a gold deposit, such as annulling the licence to develop the deposit and terminating the underlying joint venture agreement.	Settled	Kazakhstan Seychelles Denmark	Kazakhstan - Kyrgyz Republic BIT (1999); CIS Investor Rights Convention (1997) ICSID AF (ICSID Additional Facility) ICSID	Claimed by investor: 500.00 million USD Awarded through settlement; data not available	IIA breaches alleged: data not available IIA breaches found: not applicable - settled or discontinued before decision on liability	None
OKKV v. Kyrgyz Republic[97] 2013	Investment: Indirect ownership by Stans Energy Corp. of Kutisay Mining LLC that held a licence for mining rare earth, bismuth, molybdenum and silver at the "Kutessay II" deposit. Summary: Claims arising out of a series of measures by the Government which allegedly resulted in the impossibility to carry out activities on the mineral deposit "Kutessay II" in accordance with the mining license previously granted to Kutisay Mining LLC.	Decided in favour of investor	Canada	CIS Investor Rights Convention (1997) MCCI (Moscow Chamber of Commerce and Industry) MCCI (Moscow Chamber of Commerce and Industry)	Claimed by investor: 117.80 million USD Awarded by tribunal: 117.80 million USD	IIA breaches alleged: indirect expropriation IIA breaches found: indirect expropriation	Judicial review by national courts Award/decision set aside in its entirety
Stans Energy v. Kyrgyz Republic (I)[98] 2013	Investment: Indirect ownership by Stans Energy Corp. of Kutisay Mining LLC that held a licence for mining rare earth, bismuth, molybdenum and silver at the "Kutessay II" deposit. Summary: Claims arising out of a series of measures by the Government which allegedly resulted in the impossibility to carry out activities on the mineral deposit "Kutessay II" in accordance with the mining license previously granted to Kutisay Mining LLC.	Decided in favour of investor	Canada	CIS Investor Rights Convention (1997) MCCI (Moscow Chamber of Commerce and Industry) MCCI (Moscow Chamber of Commerce and Industry)	Claimed by investor: 117.80 million USD Awarded by tribunal: 117.80 million USD	IIA breaches alleged: indirect expropriation IIA breaches found: indirect expropriation	Judicial review by national courts Award/decision set aside in its entirety
Levitis v. Kyrgyz Republic[99] 2012	Investment: Shareholding in Asia Universal Bank, a Kyrgyzstan-based commercial bank. Summary: Claims arising out of alleged losses relating to claimant's shareholding in a commercial bank nationalized by the Kyrgyz state.	Discontinued	United States of America	Kyrgyz Republic - United States of America BIT (1993) UNCITRAL PCA (Permanent Court of Arbitration)	Claimed by investor: data not available Awarded by tribunal: data not available Award on costs	IIIA breaches alleged: data not available IIA breaches found: not applicable - settled or discontinued before decision on liability	None
Nadel/Ithaca v. Kyrgyz Republic[100] 2012	Investment: Minority shareholding in Asia Universal Bank, a Bishkek-based commercial bank. Summary: Claims arising out of alleged losses relating to claimant's shareholding in a commercial bank nationalized by Kyrgyzstan.	Discontinued	Russian Federation United States of America	Kyrgyz Republic - United States of America BIT (1993) UNCITRAL Data not available	Claimed by investor: 400.00 million USD Awarded by tribunal: data not available Award on costs	IIA breaches alleged: data not available IIA breaches found: not applicable - settled or discontinued before decision on liability	None

Case & year of initiation	Summary	Outcome of original proceedings	Home state of investor	Applicable IIA/Arbitration rules/ Administering institution	Amount claimed/amount awarded	IIA breaches alleged/found	Follow-on proceedings
Belokon v. Kyrgyz Republic[101] 2011	Investment: Ownership of Manas Bank, a Kyrgyztani financial institution. Summary: Claims arising out of the alleged expropriation of a local bank owned by the claimant, following the long-term imposition of a special administrator during governmental investigations of the bank concerning financial fraud.	Decided in favour of investor	Latvia	Kyrgyzstan - Latvia BIT (2008) UNCITRAL None (no administering institution)	Claimed by investor: 100.00 million USD Awarded by tribunal: 15.00 million USD	IIA breaches alleged: Indirect expropriation Fair and equitable treatment/ Minimum standard of treatment, including denial of justice claims Arbitrary, unreasonable and/or discriminatory measures Full protection and security, or similar IIA breaches found: Indirect expropriation Fair and equitable treatment/ Minimum standard of treatment, including denial of justice claims Arbitrary, unreasonable and/or discriminatory measures	Judicial review by national courts Pending
BTA Bank v. Kyrgyz Republic[102] 2009	Investment: Majority shareholding (71%) in the local bank BTA Bank CJSC. Summary: Claims arising out of the alleged illegal acquisition of claimant's interests in a bank by a Kyrgyz court in May 2012.	Pending	Kazakhstan	Kazakhstan - Kyrgyz Republic BIT (1999) UNCITRAL None (no administering institution)	Claimed by investor: 89.00 million USD Awarded by tribunal: data not available	IIA breaches alleged: indirect expropriation IIA breaches found: pending	None Press reports suggest that claimant might halt arbitral proceedings against Kyrgyz Republic after transfer of 15.4% shares in BTA Bank[103]
Oxus Gold v. Kyrgyz Republic[104] 2006	Investment: Rights under a mining license; capital contributions of over USD 63 million to the mining project. Summary: Claims arising out of the Government's cancellation of a license for the development of a gold deposit in Kyrgyzstan (known as the Jerooy gold project) and the alleged government-sponsored occupation of premises owned by Talas Gold Mining Company, Oxus' joint venture company at Jerooy.	Settled	United Kingdom	Kyrgyzstan - United Kingdom BIT (1994) UNCITRAL LCIA (London Court of International Arbitration)	Claimed by investor: 600.00 million USD Awarded through settlement: data not available	IIA breaches alleged: indirect expropriation IIA breaches found: not applicable - settled or discontinued before decision on liability	None
Sistem v. Kyrgyz Republic[105] 2006	Investment: Ownership of a hotel in Kyrgyz Republic. Summary: Claims arising out of events following the investor's construction and operation of a hotel in Bishkek leading to the abrogation of its ownership rights in the hotel by local court decisions, after the overthrow of president Askar Akayev and his government during the Tulip Revolution	Decided in favour of investor	Turkey	Kyrgyz Republic - Turkey BIT (1992) ICSID AF (ICSID Additional Facility) ICSID	Claimed by investor: 24.70 million USD Awarded by tribunal: 8.50 million USD	IIA breaches alleged: Indirect expropriation Fair and equitable treatment/ Minimum standard of treatment, including denial of justice claims Full protection and security, or similar National treatment IIA breaches found Indirect expropriation	Judicial review by national courts Award/decision upheld
Petrobart v. Kyrgyz Republic[106] 2003	Investment: Gas supply contract entered into with the State gas company. Summary: Claims arising out of the non-payment of certain deliveries under the contract, followed by the stay of execution of a debt judgment in favor of the claimant, and a presidential decree pursuant to which the investor's contractual counterparty was restructured and subsequently declared bankrupt, precluding Petrobart to satisfy its debt judgment or obtain any proceeds from the sale of assets.	Decided in favour of investor	United Kingdom	The Energy Charter Treaty SCC (Stockholm Chamber of Commerce) SCC (Stockholm Chamber of Commerce)	Claimed by investor: 4.10 million USD Awarded by tribunal 1.10 million USD	IIA breaches alleged: Indirect expropriation Fair and equitable treatment/ Minimum standard of treatment, including denial of justice claims Full protection and security, or similar Umbrella clause Arbitrary, unreasonable and/or discriminatory measures Other IIA breaches found: Fair and equitable treatment/ Minimum standard of treatment, including denial of justice claims Other	Judicial review by national courts Award/decision upheld

ANNEX III

Treaty-based investment claims against the Kyrgyz Republic: Case descriptions

Stans Energy I (2013) & Stans Energy II (2015) - In 2013, Stans Energy, a rare-earth venture, launched a fast-track arbitration under the Moscow Convention over the cancellation of its 20 year mining licence for the Kutisay rare-earth mine. A Kyrgyz parliamentary position revoked the company's mining licence on the basis that the process by which Stans acquired this licence was flawed.[107] The case was handled by the Moscow Chamber of Commerce & Industry (MCCI) which awarded the investor 118 million USD. In September 2014, the CIS Economic Court ruled the Moscow Convention does not contain automatic advance consent to arbitration from the signatory states and set the MCCI award aside. Stans Energy appears to have opted for the MCCI because of its fast-track procedure. Also, the company apparently hoped that the choice for an arbitration forum geographically closer to the Kyrgyz Republic would lead to easier enforcement of an eventual award.[108]

Stans Energy continues to pursue enforcement of the original award and also launched a new claim in 2015.[109] This claim, brought jointly by Stans Energy Corporation and Kutisay Mining LLC, is conducted in the United Kingdom, under the 1976 UNCITRAL Arbitration Rules, pursuant to the 2003 Law of the Kyrgyz Republic on Investment in the Kyrgyz Republic.[110] The company's claim involves 210 million USD.[111]

Beck (2013) and OsOO OKKV (2013) - The awards of 23 million USD in favour of Korean investor Lee John Beck and his Central Asian Development Corporation and the 2.2 million USD award in favour of 17 CIS investors and their company OsOO OKKV – brought under the CIS Convention – both arose out of operations in a Bishkek free economic zone. Both awards were reviewed and set aside on the grounds that art. 11 of the 1997 Moscow Convention on the Protection of Investor Rights cannot be construed as an automatic right for claimants to bring cases before any arbitral forum of their choice. The authoritative interpretation of the Treaty by the CIS Economic Court, Art. 11 merely confirms that <u>international arbitration is available if the parties to a given dispute are so inclined</u> (emphasis added).[112]

Consolidated Exploration Holdings Ltd. (2013) and Oxus Gold (2006) - The case of Consolidated Exploration Holding Ltd., owned by Kazakh investment fund Visor Capital, deals with the alleged unlawful expropriation of the claimant's 60% interest in the Jerooy gold deposit. Jerooy, with estimated reserves of more than 97 tons of gold,[113] is the Kyrgyz Republic's second largest gold mining deposit. It is currently managed and developed by the Russian gold mining company Vostok-Geolodobycha, which secured the mining concession after a winning bid in May, 2015. The Russians appear to have been undeterred by the fact that Visor as the previous license holder is embroiled in an international investment dispute with the Kyrgyz state. Visor Holding lost its license to develop the Jerooy gold deposit in 2010, and is claiming 549 million USD dollar in compensation.[114] The case is pursued under the Kyrgyz domestic law for the protection of foreign investment, the Kazakhstan-Kyrgyz Republic bilateral investment treaty and the 1997 Moscow Convention for the protection of investor rights.[115] There is a relation with the Oxus Gold case, which was withdrawn in 2010. Visor says that in 2008, it paid for the settlement of the claim of Oxus Gold as the previous holder of the Jerooy license.

According to ICSID records, the Consolidated Exploration Holdings case was settled in 2015. There is no public account of the settlement agreement.

Nadel/Ithaca (2012) & Levitis (2012) - The Nadel/Ithaca and Levitis cases against the Kyrgyz Republic relate to the nationalisation of the Asia Universal Bank (AUB). The Kyrgyz government holds that it took over AUB because the bank was engaged in money-laundering activities that nearly caused its collapse; the claimants maintain that the bank was illegally expropriated after the government then in office was overthrown.[116] Both cases were discontinued in 2013, and cost awards against the investors were issued in both cases. In the Nadel/Ithaca case, former chairman of the bank and majority shareholder of the bank and a group of minority shareholders united in the Ithaca Holding were ordered to pay 280,000 USD to cover the Kyrgyz Republic's arbitration costs and some of its legal expenses. Levitis was ordered to pay 404,000 USD in costs. Immediately after he withdrew his claim, Nadel, the former chairman and majority shareholder in the AUB, initiated another UNCITRAL case as sole claimant under the Kyrgyz investment law.[117] This case, which is said to involve a claim in excess of 200 million USD,[118] appears to be still pending.[119]

Belokon (2011) - The Belokon case relates to the Kyrgyz Republic taking control of the Manas Bank. The bank was seized following riots and the subsequent disposal of President Bakiyev.

According to the state, the goal was to protect the bank from physical harm at a period of violent regime change. The state holds it subsequently kept control of the bank because of allegations of financial crimes (money-laundering) at the bank. The claimant was a close associate of the deposed president's son, Maxim Bakiyev, and both were under suspicion of misusing Manas Bank for money-laundering purposes during Bakiyev's administration. However, the arbitrators ruled that the state's measures were not rational and the allegations against the bank were unsubstantiated. According to the arbitrators, the Kyrgyz Republic was not acting in the public interest, but, as it couldn't acquire it by legal means, abused its powers to simply seize the bank.[120] The tribunal ordered the state to compensate the investor to the extent of 15.02 million US dollars, plus the costs of the arbitration, plus half of the claimants 1.958 million USD in legal bills.[121] The award was for the investor's real losses and did not include loss of future profits.[122] However, in 2017, the Paris Court of Appeal set aside this arbitral award, recognising that the Kyrgyz Republic's seizure of the bank should be deemed a public interest measure.[123]

BTA Bank (2009) - BTA Bank's claim against the Kyrgyz Republic relates to the alleged expropriation of a 71% shareholding in a Kyrgyz bank.[124] The bank maintains that it is the victim of an unlawful foreclosure of its share in the BTA Bank, founded on a series of sham verdicts by the Kyrgyz courts and condoned by the Republic's authorities.[125]

JSC Taskent (2016) - The JSC Tashkent case brought in 2016 relates to the expropriation of hotel properties.[126]

Sistem Muhendislik (2006) - Turkish investor Sistem Muhendislik was awarded 8.5 million USD plus interest in his 2012 treaty-based arbitration case as a monetary compensation for the expropriation of his hotel property.[127] Sistem took over the share in the hotel from a local contractor which was declared bankrupt by the Kyrgyz courts. However, after a regime change, the take-over was qualified as illegal and Sistem's property was seized.[128]

Petrobart (2003) - The Petrobart case relates to the non-payment of gas sales to the Kyrgyz state company. In 2003, the domestic courts ruled against Petrobart, stating that a sales contract does not qualify as foreign direct investment under the Kyrgyz foreign investment law. Petrobart then pursued its claim under the Energy Charter Treaty (ECT). At this forum, the arbitrators ruled that the contract could be considered a foreign investment entitled to protection under the ECT. The arbitrators found that the Kyrgyz Republic had breached its obligations under the ECT when it allowed a state-owned company to evade payment for fuels sold by Petrobart[129] and issued an award of 1.1 million USD in favour of the investor.[130]

Endnotes

1. Figures: http://investmentpolicyhub.unctad.org/IIA (accessed 7 April 2016).

2. Lauge Skovgaard Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence,' in: K. Sauvant, ed., Yearbook on International Investment Law & Policy 2009/2010, New York: Oxford University Press, 2010, http://works.bepress.com/lauge_poulsen/4/

3. Meena Raman, BITs 'not decisive in attracting investment', says South Africa, SUNS #7446 dated 27 September 2012 http://www.twn.my/title2/wto.info/2012/twninfo121001.htm

4. Ecuador's BITs auditing committee recently found that most of the FDI comes from countries with whom Ecuador has no BITs. In fact, investors from the two countries that invest the most in Ecuador are not covered by BITs. https://www.tni.org/en/article/ecuador-terminates-16-investment-treaties

5. Hungary and Slovenia are the only 2 Central and Eastern European Union countries that have no BITs with the US. Yet, during the last 10 years, Hungary has been the highest recipient of US FDI in the region. See details at Cecilia Olivet and Pietje Vervest, Central and Eastern European countries at the crossroads Why governments should reject investment arbitration in TTIP, TNI, 2015, https://www.tni.org/en/publication/central-and-eastern-european-countries-crossroads

6. Brazil is the only country in Latin America that has never ratified a BIT that includes ISDS and yet receives the largest amount of FDI in the region. UNCTAD, World Investment Report 2015, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

7. 'Positive effects of TTIP tribunals for investment unclear', Euractiv, 16 September 2015, http://www.euractiv.com/sections/trade-society/positive-effects-ttip-tribunals-investment-unclear-317665

8. http://www.ayu.edu.tr/static/aae_haftalik/aae_bulten_en_83.pdf

9. Cecilia Olivet and Pia Eberhardt, Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom, Transnational Institute and Corporate Europe Observatory, November 2012, https://www.tni.org/en/briefing/profiting-injustice

10. http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=KG

11. http://data.worldbank.org/topic/public-sector?locations=KG

12. https://www.imf.org/external/pubs/ft/scr/2016/cr16186.pdf

13. http://www.un.org/sustainabledevelopment/sustainable-development-goals/

14. https://minerals.usgs.gov/minerals/pubs/country/2013/myb3-2013-kg.pdf

15. https://www.wttc.org/-/media/files/reports/economic%20impact%20research/2016%20documents/newleaguetablesummary156.pdf

16. http://www.cisgbf.com/sites/default/files/Trade%20and%20Investment%20Opportunities%20in%20Kyrgyzstan.pdf

17. http://www.ecoi.net/local_link/332536/473961_de.html

18. http://www.ayu.edu.tr/static/aae_haftalik/aae_bulten_en_83.pdf

19. https://www.privacyshield.gov/article?id=Kyrgyzstan-Openness-to-Foreign-Investment

20. "Investment Policy Review"; UNCTAD, 2016; http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1436

21. Kyrgyz Republic Preliminary Joint Opinion On The Draft Law "On Introduction Of Amendments And Changes To The Constitution"; European Commission For Democracy Through Law (Venice Commission) Osce Office For Democratic Institutions And Human Rights (OSCE/ODIHR) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2016)009-e

22. Interview with foreign diplomat in Bishkek; April 2017.

23. Legal Reform in the Kyrgyz Republic; EBRD; http://www.ebrd.com/legal-reform/where-we-work/kyrgyz-republic.html

24. http://www.ebrd.com/documents/legal-reform/kyrgyz-republic-country-law-assessment.pdf, p. 3.

25. http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu

26. http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table

27. https://www.youtube.com/watch?v=hOaOuZCm1Dw

28. http://www.worldbank.org/en/news/press-release/2014/04/02/kyrgyz-republic-business-climate-improved-but-corruption-remains-key-problem-new-world-bank-ebrd-study

29. https://24.kg/archive/en/economics/179047-news24.html/

30. http://investmentpolicyhub.unctad.org/IIA/CountryBits/113

31. Energy Charter Treaty http://www.energycharter.org

32. Gaetano Iorio Fiorelli, 'Italy withdraws from Energy Charter Treaty', Global Arbitration News, 6 May 2016, https://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/

33. Ibid.

34. http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2015&locations=KG&start=1993&view=chart

35. http://unctad.org/en/PublicationsLibrary/diaepcb2015d3_en.pdf

36. http://atlas.media.mit.edu/en/profile/country/kgz/#Exports

37. http://www.cisgbf.com/sites/default/files/Trade%20and%20Investment%20Opportunities%20in%20Kyrgyzstan.pdf

38. http://www.tradingeconomics.com/kyrgyzstan/foreign-direct-investment

39. http://www.ayu.edu.tr/static/aae_haftalik/aae_bulten_en_83.pdf

40. Cecilia Olivet, Jaybee Garganera, Farah Sevilla and Joseph Purugganan, Signing away sovereignty: How investment agreements threaten regulation of the mining industry in the Philippines, published by Alyansa Tigil Mina, Focus on the Global South and Transnational Institute, May 2016, https://www.tni.org/en/publication/signing-away-sovereignty and Sarah Anderson and Manuel Perez-Rocha, Mining for Profits in International Tribunals: Lessons for the Trans-Pacific Partnership, Institute for Policy Studies, April 2013, http://www.ips-dc.org/wp-content/uploads/2013/05/Mining-for-Profits-2013-ENGLISH.pdf

41. http://investmentpolicyhub.unctad.org/ISDS/CountryCases/113?partyRole=2

42. Steps have been taken to improve transparency in the investor-state dispute settlement system. In 2014, the UNICITRAL transparency rules came into force. These include provisions on the publication of documents, open hearings, and the possibility for the public and non-disputing treaty parties to make submissions. States can incorporate the UNCITRAL rules in new investment treaties they negotiate. They can also apply them to pre-existing treaties, but only by mutual consent of the contracting state parties and/or the disputing parties in an arbitration case (see: http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/transparency-in-investment-treaty-arbitration-and-the-un-guiding-principles-on-business-and-human-rights-the-new-uncitral-rules-and-convention-on-transparency/). The EU's International Investment Court System – as included in the trade agreements concluded with Vietnam (2015) and Canada (2016) - also contains provisions for improved transparency.

43. UNCTAD Investment Hub, page on ISDS: http://investmentpolicyhub.unctad.org/ISDS/

44. Ibid.

45. http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dlid=254483

46. http://mineconom.gov.kg/Docs/nedropolzovanie/Medium_and_Long_Term_Mining_Strategy_Eng_02042014.pdf

47. http://www.ayu.edu.tr/static/aae_haftalik/aae_bulten_en_83.pdf

48. Zivkovic, Velimir, Contracts, Treaties and Umbrella Clauses: Some Jurisdictional Issues in International Investment Arbitration (December 15, 2011). Annals of the Faculty of Law in Belgrade - Belgrade Law Review, 4/2012. Available at SSRN: https://ssrn.com/abstract=2119861

49. Ibid.

50. http://www.worldbank.org/en/country/kyrgyzrepublic/overview

51. Centerra Gold Inc. (Canada) and 2. Kumtor Gold Company (Kyrgyz Republic) v. The Kyrgyz Republic, Permanent Court of Arbitration, https://pcacases.com/web/view/95

52. 'BRIEF-Centerra Gold says delivered notice of arbitration to Kyrgyz Republic government', Reuters, 31 May, 2016. http://uk.reuters.com/article/idUKFWN18R060

53. 'Centerra goes back to arbitration with Kyrgyzstan over contentious Kumtor gold project', Investment Arbitration Reporter, Jun 01, 2016. https://www.iareporter.com/articles/centerra-goes-back-to-arbitration-with-kyrgyzstan-over-troubled-kumtor-gold-project/

54. http://www.italaw.com/sites/default/files/case-documents/italaw7424.pdf

55. 'Kaufmann-Kohler to serve as sole arbitrator in contentious environmental dispute', Investment Arbitration Reporter, Feb 24, 2017. https://www.iareporter.com/articles/kaufmann-kohler-to-serve-as-sole-arbitrator-in-contentious-environmental-dispute/

56. 'Centerra goes back to arbitration with Kyrgyzstan over contentious Kumtor gold project', Investment Arbitration Reporter, Jun 01, 2016. https://www.iareporter.com/articles/centerra-goes-back-to-arbitration-with-kyrgyzstan-over-troubled-kumtor-gold-project/

57. Caroline Simson, 'Canadian Mining Co. Hauls Kyrgyz Republic Into Arbitration', Law360, New York, 31 May 2016, http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/transparency-in-investment-treaty-arbitration-and-the-un-guiding-principles-on-business-and-human-rights-the-new-uncitral-rules-and-convention-on-transparency/ .

58. http://www.rferl.org/a/kyrgyzstan-kumtor-gold-corruption/25153975.html

59. http://www.atimes.com/atimes/Central_Asia/CEN-01-100914.html

60. http://rus.ozodi.org/a/25286207.html

61. http://ec.europa.eu/health/ph_projects/2003/action3/docs/2003_3_09_cs4_en.pdf

62. http://www.rcinet.ca/en/2015/12/03/global-warming-mining-and-toxic-threats/

63. Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Heidelberg, 2013 http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23

64. https://www.imf.org/external/pubs/ft/scr/2014/cr14247.pdf

65. http://www.minfin.kg/novosti/godovoy-otchet-ob-ispolnenii-byudzheta/otchet-ob-ispolnenii-gosudarstvennogo-byudzheta-ky2875.html

66. This is the average of the two known arbitration cost awards in investment claims involving the Kyrgyz Republic, i.e. the Nadel/Ithaca and Levitis cases, which threw up amounts of 280,000 and 404,000 USD respectively.

67. http://pubdocs.worldbank.org/en/416151483041858948/kyrgyz.pdf

68. https://www.imf.org/external/pubs/ft/scr/2016/cr1656.pdf

69. The Kyrgyz Republic Poverty Reduction Strategy Paper, IMF Country Report No. 14/247, 2014, https://www.imf.org/external/pubs/ft/scr/2014/cr14247.pdf

70. For a case description, see: http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf

71. Lori Wallach and Ben Beachy, 'Occidental v. Ecuador award spotlights perils of investor-state system', Public Citizen, Memorandum, 21 November 2012.

72. https://minerals.usgs.gov/minerals/pubs/country/2013/myb3-2013-kg.pdf, p. 26.1

73. https://www.imf.org/external/pubs/ft/scr/2016/cr16186.pdf

74. Friends of the Earth Europe has identified 10 key problems with the new proposals, which reflect how the rights of corporate investors are still privileged over citizens, enhancing the power of foreign investors in relation to sovereign states: Investment Court system: 'ISDS in dIsguise: ten reasons why the EU's proposal doesn't fIx a fundamentally flawed system', FOEE, http://ttip2016.eu/files/content/docs/Full%20documents/investment_court_system_isds_in_disguise_10_reasons_why_the_eus_proposal_doesnt_fixed_a_flawed_system_english_version_0.pdf

75. http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608

76. http://investmentpolicyhub.unctad.org/IIA

77. Cecilia Olivet, Natacha Cingotti, Pia Eberhardt, Nelly Grotefendt, Scott Sinclair, Investment Court System Put to the Test, published by Transnational Institute, Canadian Centre for Policy Alternatives, Friends of the Earth Europe, Corporate Europe Observatory (CEO), German NGO Forum on Environment and Development, April 2016, https://www.tni.org/en/publication/investment-court-system-put-to-the-test; and Pia Eberhardt, The zombie ISDS, March 2016. Published by Published by Corporate Europe Observatory (CEO), Association Internationale de Techniciens, Experts et Chercheurs (AITEC), Attac Austria, Campact, ClientEarth, Ecologistas en acción, Forum Umwelt & Entwicklung, Instytut Globalnej Odpowiedzialnosci (IGO), PowerShift, Seattle to Brussels Network (S2B), Traidcraft, Transnational Institute (TNI), Umanotera, Védegylet, Vrijschrift, War on Want, 11.11.11. https://www.tni.org/files/publication-downloads/the_zombie_isds.pdf

78. For more details on the Newmont case, see: Hilde van der Pas & Riza Damanik The case of Newmont Mining vs Indonesia, TNI Policy Briefing, November 2014. Published by: Indonesia for Global Justice (IGJ), Transnational Institute (TNI), EU-ASEAN FTA Network. https://www.tni.org/en/briefing/netherlands-indonesia-bit-rolls-back-implementation-new-indonesian-mining-law

79. Nabiel Makarim Agrees with Mining in Protected Forests', Mining and Communities, 15 June 2002, http://www.minesandcommunities.org/article.php?a=7737

80. http://www.italaw.com/sites/default/files/case-documents/italaw7870.pdf

81. Eric Reguly, 'Gabriel may seek billions in arbitration over stalled Romanian mine', The Globe and Mail, 30 April 2014, https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/gabriel-may-seekbillions-in-arbitration-over-stalled-romanian-mine/article18341095/

82. See: 'Gabriel Resources threatens Romania with arbitration over murky mine', 21 January 2015, https://www.rosiamontana.org/content/gabriel-resources-threatens-romania-arbitration-over-murky-mine-0?language=en

83. http://www.gabrielresources.com/site/documents/Q32016.pdf

84. Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, The German Nuclear Phase-Out Put to the Test in International Investment Arbitration?, Policy Briefing, published by TNI, SOMO and Powershift, October 2013, https://www.tni.org/en/briefing/nuclear-phase-out-put-test

85. Tariana Turia, 'Government moves forward with plain packaging of tobacco products', 19 February 2013, http://www.scoop.co.nz/stories/PA1302/S00265/govt-moves-forward-with-plain-packaging-of-tobacco-products.htm
https://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products

86. Kavaljit Singh and Burghard Ilge, Introduction, Rethinking Bilateral Investment Treaties: critical Issues and policy choices, published by Both Ends, Madhyam, SOMO, 2016, https://www.somo.nl/rethinking-bilateral-investment-treaties/

87. The model text for the Indian investment agreements can be accessed here: https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf For a detailed analysis, see: Kavaljit Singh, 'An Analysis of India's New Model Bilateral Investment Treaty'. In: Kavaljit Singh and Burghard Ilge (eds.), Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices, BothEnds/Madhyam/SOMO, 2016. Pp. 81-100.

88. For an analysis of Indonesia's model BIT, see: Abdulkadir Jailani, Indonesia's Perspective on Review of International Investment Agreements. In: Kavaljit Singh and Burghard Ilge (eds.), Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices, BothEnds/Madhyam/SOMO, 2016. Pp. 81-100.

89. https://www.tni.org/en/article/audit-commission-president-praises-ecuadors-termination-of-treaties

90. http://investmentpolicyhub.unctad.org/IIA/CountryBits/113#iiaInnerMenu

91. http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/113#iiaInnerMenu

92. http://investmentpolicyhub.unctad.org/ISDS/CountryCases/113?partyRole=2

93. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/746

94. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/696

95. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/544

96. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/541

97. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/543

98. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/506

99. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/503

100. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/487

101. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/433

102. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/351

103. 'Kazakhstan might halt arbitral proceedings against Kyrgyzstan after transfer of 15.4% shares in BTA Bank', AKI Press, 08 June 2016, http://akipress.com/news:578328/ (behind pay-wall)

104. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/220

105. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/222

106. Case info: http://investmentpolicyhub.unctad.org/ISDS/Details/128

107. Cecilia Jamasmie, 'UN court won't dismiss Stans Energy claims against Kyrgyz Republic,. Mining.com., 27 January 2017, http://www.mining.com/un-court-wont-dismiss-stans-energy-claims-against-kyrgyz-republic/

108. Analysis: Does Moscow Chamber of Commerce offer effective alternative for arbitrating investment claims against Central Asian states?', Investment Arbitration Reporter, Jan 21, 2014. https://www.iareporter.com/articles/analysis-does-moscow-chamber-of-commerce-offer-effective-alternative-for-arbitrating-investment-claims-against-central-asian-states/

109. Arbitrators selected for Stans Energy's new claim vs. Kyrgyzstan, as battle over earlier award Continues', Investment Arbitration Reporter, Nov 11, 2015. https://www.iareporter.com/articles/arbitrators-selected-for-stans-energys-new-claim-vs-kyrgyzstan-as-battle-over-earlier-award-continues/

110. https://pcacases.com/web/view/126

111. Cecilia Jamasmie, 'UN court won't dismiss Stans Energy claims against Kyrgyz Republic,. Mining.com., 27 January 2017, http://www.mining.com/un-court-wont-dismiss-stans-energy-claims-against-kyrgyz-republic/

112. 'Kyrgyz Republic seeks authoritative interpretation of obscure C.I.S. treaty that multiple foreign investors are invoking', Investment Arbitration Reporter, Jun 06, 2014. https://www.iareporter.com/articles/kyrgyz-republic-seeks-authoritative-interpretation-of-obscure-c-i-s-treaty-that-multiple-foreign-investors-are-invoking/

113. http://af.reuters.com/article/metalsNews/idAFL5N0XV1M820150504

114. http://af.reuters.com/article/metalsNews/idAFL5N0XV1M820150504

115. 'Arbitrators selected to hear claims that Kyrgyzstan expropriated stake in Jerooy gold project; obscure multilateral treaty is one of several invoked by investor', Investment Arbitration Reporter, Nov 06, 2013. https://www.iareporter.com/articles/arbitrators-selected-to-hear-claims-that-kyrgyzstan-expropriated-stake-in-jerooy-gold-project-obscure-multilateral-treaty-is-one-of-several-invoked-by-investor/

116. L. Peterson, 'Tribunals named in three bank nationalization claims vs. Kyrgyz Republic; separate mining arbitration sheds light on Oxus settlement, IA Reporter, 16-04-2013

117. Leo Szolnoki, 'Global Arbitration Review reports on the trio of UNCITRAL arbitration cases against Kyrgyzstan re nationalisation of AsiaUniversalBank - Kyrgyzstan wins costs over withdrawn banking claim', 14 January 2014, http://en.sap.kg/in-the-press/in-the-press-arbitration-review-reports/.

118. 'Tribunals named in three bank nationalization claims vs. Kyrgyz Republic; separate mining arbitration sheds light on Oxus settlement', Investment Arbitration Reporter, Apr 16, 2013. https://www.iareporter.com/articles/tribunals-named-in-three-bank-nationalization-claims-vs-kyrgyz-republic-separate-mining-arbitration-sheds-light-on-oxus-settlement/

119. 'Central Asia round-up: updates on four UNCITRAL investment treaty arbitrations in the "Stans"', Investment Aribtration Reporter, Mar 11, 2014. https://www.iareporter.com/articles/central-asia-round-up-updates-on-four-uncitral-investment-treaty-arbitrations-in-the-stans/

120. 'After challenges to Paulsson and Hober fail, tribunal issues $15 million BIT award in UNCITRAL bank expropriation case', IAReporter, 28 October 2014

121. 'Damages news: price to book methodology used to value seized bank; arbitrators demur in face of demands for more unorthodox forms of relief', Investment Arbitration Reporter, Dec 07, 2015. https://www.iareporter.com/articles/damages-news-price-to-book-methodology-used-to-value-seized-bank-arbitrators-demur-in-face-of-demands-for-more-unorthodox-forms-of-relief/ and 'Tribunals selected for UNCITRAL claims against Kyrgyzstan and Ecuador', Investment Arbitration Reporter, Aug 19, 2012. https://www.iareporter.com/articles/tribunals-selected-for-uncitral-claims-against-kyrgyzstan-and-ecuador/

122. After challenges to Paulsson and Hober fail, tribunal issues $15 million BIT award in UNCITRAL bank expropriation case', IAReporter, 28 October 2014

123. D. Charlotin, 'BIT award against Kyrgyzstan is annulled in Paris, with Court giving weight to money-laundering allegations that had earlier failed to persuade arbitrators, IA Reporter, 23-02-2017

124. L. Peterson, 'Central Asia round-up: updates on four UNCITRAL investment treaty arbitrations in the "Stans"', Investment Arbitration Reporter, 11 March, 2014, https://www.iareporter.com/articles/central-asia-round-up-updates-on-four-uncitral-investment-treaty-arbitrations-in-the-stans/

125. Ibid.

126. 'Briefly noted: Uzbeks lodge bilateral investment treaty claim at ICSID against Kyrgyzstan', Investment Arbitration Reporter, Sep 14, 2016. https://www.iareporter.com/articles/briefly-noted-uzbeks-lodge-bilateral-investment-treaty-claim-at-icsid-against-kyrgyzstan/

127. 'Newly disclosed award in Kyrgyzstan arbitration saw finding of judicial expropriation, and a review of valuation approaches', Investment Arbitration Reporter, Jul 19, 2012. https://www.iareporter.com/articles/newly-disclosed-award-in-kyrgyzstan-arbitration-saw-finding-of-judicial-expropriation-and-a-review-of-valuation-approaches/

128. For the details of the case, see: J. Hepburn & L. Peterson, 'Arbitral tribunal finds that one-off refurbishment of President's guest residence is corporate sponsorship or goodwill gesture, not a bribe', IA Reporter, 19-07-2012

129. L. Peterson, 'Lengthy debt collection battle ends, as former Soviet state pays arbitral award; unusual form of diplomatic assistance seen', IA Reporter, 29-09-2011

130. 'BIT claim quietly pursued by Swiss claimant against Uzbekistan in long-running dispute over payment for grain shipment', Investment Arbitration Reporter, Oct 22, 2008. https://www.iareporter.com/articles/bit-claim-quietly-pursued-by-swiss-claimant-against-uzbekistan-in-long-running-dispute-over-payment-for-grain-shipment/

transnationalinstitute

The Transnational Institute (TNI) is an international research and advocacy institute committed to building a just, democratic and sustainable planet. For more than 40 years, TNI has served as a unique nexus between social movements, engaged scholars and policy makers.

www.tni.org

In June 2016 TNI published the report 'Mongolia's experience with investment treaties and arbitration cases', for the occasion of the Asia Europe People's Forum (AEPF) in Mongolia. A Kyrgyz team at the AEPF in Mongolia has requested TNI to collaborate on a similar report regarding the Kyrgyz Republic. Other TNI (co-)published reports on investment protection and arbitration can be found on TNI´s website.

www.tni.org/en/work-area/trade-investment