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DEPARTMENT OF LEGAL STUDIES
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**FOREIGN DIRECT INVESTMENT –
A COMPARATIVE STUDY OF
THE KYRGYZ REPUBLIC AND
THE PEOPLE’S REPUBLIC OF CHINA**

By

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EXECUTIVE SUMMARY

Nowadays, the Peoples' Republic of China is a leading recipient of Foreign Direct Investment. The average growth of China's GDP since adoption of open-door policy has been estimated to 9.8% per annum.¹ The great success of China's investment policy calls interest for legal research. The present Thesis is devoted to a comparative study of the Foreign Direct Investment in the Kyrgyz Republic and Peoples' Republic of China. The research paper targets to test the Foreign Direct Investment regulation of the Kyrgyz Republic in comparison to the investment policy of the Peoples' Republic of China. The central question that is posed is whether the Kyrgyz Republic may replicate the success of the Peoples' Republic of China provided that necessary measures are taken. The study demonstrates that in general the legislation of the Kyrgyz Republic can be considered satisfactory. Since its independence a great step forward has been made through the adoption of a number of laws devoted to Foreign Direct Investment.

Nevertheless, there are several drawbacks that discourage foreign investors to enter the Kyrgyz market. Namely, the Kyrgyz Republic lacks efficient registration system. The system is far from being one-shop system as it involves a requirement of registration with 3 different state authorities. The procedure is even more complicated due to the additional licensing requirement, which can be characterized as rather burdensome for foreign investors. Almost all activities are subject to licensing which is performed by different state authorities. As a result, in order to start operation foreign investors shall obtain a business certificate and license. The paper proposes to abolish the system of licensing and adopt one-shop system of registration.

¹ Renwald, Jessica Zoe. Foreign Investment Law in the People's Republic of China: What to Expect form Enterprise Establishment to Dispute Resolution, (2006) 16 Ind. Int'l & Comp. L. Rev. 453, p.454.

Another shortcoming of the Foreign Direct Investment regulation of the Kyrgyz Republic exists in the area of intellectual property. The study has revealed that there is a necessity to introduce a concept of exhaustion of trademark rights. The enforcement system has to be strengthened via introduction of efficient civil and criminal sanctions. The customs control has to be properly ensured in order to prevent counterfeit production entering the market.

ABBREVIATIONS

AIC - Administration for Industry and Commerce

ALC – Additional Liability Company

AoA – Articles of Association

Art – Article

Arts – Articles

BIT – Bilateral Investment Treaty

BoD – Board of Directors

CJV – Contractual Joint Venture

EJV – Equity Joint Venture

FDI - Foreign Direct Investment

FIE - Foreign Invested Enterprise

GMoS – General Meeting of Shareholders

GDP – Gross Domestic Product

ICSID - International Convention on the Settlement of Investment Disputes between States and

Nationals of other Countries

JSC – Joint Stock Company

JV – Joint Venture

LLC – Limited Liability Company

M&A – Mergers and Acquisitions

MIGA – Multilateral Investment Guarantee Agency

MOFCOM – Ministry of Commerce of the People’s Republic of China

NBKR - National Bank of the Kyrgyz Republic

NY Convention – New York Convention on the Recognition and Enforcement of Foreign
Arbitral Awards

OECD - Organization for Economic Co-operation and Development

RO - Representative Office

UNCTAD – United Nations Conference on Trade and Development

USSR – Union of Soviet Socialist Republics

WFOE – Wholly Foreign Owned Enterprise

WTO – World Trade Organization

INTRODUCTION

*“Invest in Anhui”*² - that is the slogan that one can find on some of the Chinese websites today. A number of provinces like Anhui are now being advertised by the People’s Republic of China (hereinafter “PRC”) for the admission of Foreign Direct Investment (hereinafter “FDI”)³. A similar picture can be seen in the Kyrgyz Republic (hereinafter “KR”).⁴

The Thesis is devoted to a comparative study of FDI in KR and PRC. The topic calls interest as KR shares many similarities with PRC, who is currently a leading country in terms of annual FDI inflow.⁵ Both have close historical background, being now are on the path of development with a huge low-cost labor force. It is important to research what makes PRC attractive for foreign investors in order to apply the findings to KR and test whether they are applicable at all.

There are many scholarly writings that are devoted to through study of Investment laws of PRC. The investment climate of KR has been analyzed in the World Bank’s, United Nations Conference on Trade and Development’s (hereinafter “UNCTAD”) reports and studies of other institutions and organizations. Yet, a comprehensive legal research is lacking in this area. Needless to say that there is no comparative study made on the FDI legal framework of KR and PRC, although there was an attempt to make an

² Available at <http://www.ahinvest.gov.cn/English/Index.Asp>,
<http://apps.ah.gov.cn/ahrise/mainmenu.asp>.

³ There are many Chinese regions where promotion of FDI is sought. For instance, Fujian - China available at <http://www.fjfdi.com/en/index.asp> (last visited on January 6, 2009).

⁴ Available at <http://www.oecexhibitions.com/kyrgyzstan.htm>,
<http://www.pangaeapartners.com/kyrgyz1.htm>.

⁵ Graham, Edward M. and Erika Wada. *Foreign Direct Investment in China: Effects on Growth and Economic Performance*, Oxford University Press, 2001, available at <http://www.iie.com/publications/wp/01-3.pdf> (last visited on January 6, 2009).

economic comparative analysis of the FDI admission in the given countries.⁶ Certain general notions have been discussed. However, the shortcomings in the legislation were not identified yet. The Thesis is aimed at thorough study the investment legislation of KR and PRC, addressing the advantages and disadvantages in legal frameworks.

Literature review

In the course of the research the legislations of KR and PRC were thoroughly examined. All legislative acts of KR used in this research were taken from the Legal Information System “Toktom”. PRC’s laws are taken from online sources and analyzed in light of experts’ views. The Thesis is based on, but not limited to, the following PRC’s laws: 1982 Constitution of the People’s Republic of China, 1979 Law of the People’s Republic of China “on Sino-Foreign Equity Joint Ventures”, 1988 Law of the People’s Republic of China “on Chinese-Foreign Contractual Joint Ventures”, 1986 Law of the People’s Republic of China “on Wholly Foreign Owned Enterprises”, 2002 Provisions on Guiding Direction of Foreign Investment, 2007 Catalog for the Guidance of Foreign Investment Industries, Patent Law of the People’s Republic of China, March 12, 1984 (amended September 4, 1992, August 25, 2000). The framework of KR was studied in light of such laws as: 1993 Constitution of the Kyrgyz Republic, 1996 Civil Code of the Kyrgyz Republic, 2003 Law of the Kyrgyz Republic “on Investments in the Kyrgyz Republic”, 1992 Law of the Kyrgyz Republic “on Free Economic Zones (FEZ) in the Kyrgyz Republic”, 1996 Law of the Kyrgyz Republic “on Business Partnerships and Companies”, 2003 Law of the Kyrgyz Republic “on Joint Stock Companies”, 1998 Patent Law of the Kyrgyz Republic. The scholarly writings of Mark E. Schaub, Guanghua Yu

⁶ Jason Z. Yin , FDI Diversion to China and Policy Options for Kyrgyzstan, SHU/ UNITAR, February 28-March 2, 2005, available at <http://www2.unitar.org/hiroshima/programmes/ief05-kr/speaker> (last visited on March 11, 2009).

and Minkang Gu, Alfred Escher, Kubat Umurzakov and a number of other distinguished scholars' books, monographs and legal articles were taken as doctrinal sources.

The Law of KR on the Investment in KR (hereinafter “KR Investment Law”)⁷ is a main legal normative act, under which investment issues are regulated. The law contains legal guarantees and state support for investors. In addition, the KR Investment Law outlines labor law specifics for investors. A number of PRC's laws are devoted to FDI regulation. Each provides specific protection to foreign investors, ensuring the efficient inflow of capital into the economy.

Research Question

There are two questions that are going to be addressed. The thesis aims to answer the questions as follows:

- What makes PRC attractive for investors?
- Whether the success of PRC can be replicated?

Summarizing the questions, current paper seeks to examine whether under the same circumstances as present in PRC KR can become equally investment-friendly country.

Research methods used

In the course of the research a combination of methods was used. The paper employed historical, empirical and logical methods. In addition, induction, deduction and analogy were used. Moreover, comparative analysis of provisions of KR and PRC regulating FDI was conducted. Case study methodology was applied in order to analyze the efficiency of investment protection in KR.

⁷ Adopted on March 27, 2003, N66.

The Significance of the research

The research of the FDI issues has importance due to the role and the functions that FDI serves in the economy of every country. “*FDI brings not only additional financial resources, but also advanced production and management techniques into the economy*”,⁸ thus, giving more opportunities for further development of a country. “*Since the beginning of the 1990s FDI has become the most important source of foreign capital for emerging market economies*”.⁹ For KR as a country with emerging market economy FDI has even a greater importance.

The research is dedicated to thorough study and analysis of efficiency of FDI regulation in KR, determining pluses and minuses of KR legislation, existing problems and possible solutions to them. The whole analysis is based on the comparative study of the legislation of PRC. The research of FDI in KR and PRC carries practical significance as the outcome and proposals to be made may become a ground for introduction of changes into the existing laws and thereby, attract more FDI into the KR economy.

Thus, the tasks and objectives of the present research are:

- to provide a comparative analysis of the legal regulation of FDI in KR and PRC via examining the legal frameworks in given countries;
- to determine the drawbacks and advantages of each system; and
- to advance certain proposals on the on the possible revision of the laws.

⁸ Reasons to Invest in Kyrgyzstan, available at http://www.investment.kg/en/index.php?option=com_content&task=blogcategory&id=19&Itemid=52 (last visited on January 8, 2009).

⁹ Deutsche Bundesbank, The role of FDI in emerging market economies compared to other forms of financing: Past developments and implications for financial stability, available at <http://www.bis.org/publ/cgfs22buba1.pdf> (last visited on January 5, 2009).

It is admitted that non-legal factors such as market size, potential growth, low-cost labor force, infrastructure, political and economic stability should necessarily be taken into account while assessing the investment climate in a particular country.¹⁰ Yet, the Thesis is limited to analysis of the legal factors only. Thus, legal environment is a decisive aspect in considering the FDI attractiveness of a country in the present study. The scope of the Thesis, therefore, is limited to followings aspects. The study aims:

- to cover only major laws and regulations governing or related to FDI;
- to analyze Greenfield investment only;¹¹
- to give precise analysis of mostly preferred investment vehicles and legal forms;
and
- to determine state guarantee and incentives granted to foreign investors.

The Thesis is structured as follows. The paper consists of Introduction, two Chapters and Conclusion. Chapter I defines significant concepts of FDI and discusses the development phase of FDI framework, reflecting general understanding of FDI and its theoretical background. Chapter II is devoted to the core issue of FDI as investment vehicles, legal forms, states guarantees and incentives as well as intellectual property protection.

¹⁰ The Annex I gives a short overview on non-legal factors of FDI attractiveness of a country.

¹¹ Definition is given in Chapter 1 of the Thesis.

I. OVERVIEW ON FOREIGN DIRECT INVESTMENT

Before analyzing the legal environment in KR and PRC it is significant to determine the concept of FDI as such, since definition of FDI outlines the scope of investment law, providing for eligibility of foreign activities in the host country for protection and privileges granted under the law. This Chapter discusses the general understanding of FDI, focusing on the legal sources of FDI regulation. In addition, the development of FDI Law in KR and PRC is addressed.

1. GENERAL UNDERSTANDING OF FOREIGN DIRECT INVESTMENT

Determination of FDI necessarily implies understanding of the notion of “investment” as FDI is one type of investment. Generally, investment is understood as “[...] *money put into use for profit, or the property or business interest purchased for profit*”.¹² Agreement between the Government of PRC and the Government of KR on the Promotion and Reciprocal Protection of Investments¹³ (hereinafter “PRC-KR BIT”) specifies the scope of the term investment as [author’s translation]:¹⁴

- [...] every kind of asset and in particular, though not exclusively, [including]:
- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
 - (ii) shares in and stock and debentures of a company and any other form of participation in a company;
 - (iii) claims to money or to any performance under contract having a financial value;
 - (iv) copy rights, industrial property rights, rights on technology and know-how;
 - (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

¹² <http://definitions.uslegal.com/i/investment/> (last visited on January 29, 2009).

¹³ Concluded on May 14, 1992.

¹⁴ Art.1.1, PRC-KR BIT.

The definition given by the PRC-KR BIT will be taken as a model definition for this study as it represents the understanding of the term “foreign investment”¹⁵ common for KR and PRC. Art.1.1 of KR Investment Law defines “investment” as contribution by tangibles or intangibles owned or controlled directly or indirectly by investor into objects of economic activities for the purpose of gaining profit or other useful result [author’s translation]. This definition is consistent with PRC-KR BIT.

In general there are two main types of investment: portfolio investment and FDI. Alfred Escher identifies debt finance¹⁶ as another type of investment. It is important to consider how FDI differs from portfolio and debt finance. Organization for Economic Co-operation and Development (hereinafter “OECD”) defines FDI as:¹⁷

[...] a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship. [...]

Furthermore it adds that:¹⁸

Direct investment involves both the initial transaction between the two entities and all subsequent capital transactions between them and among affiliated enterprises, both incorporated and unincorporated.

The KR Investment Law refrains from giving FDI definition but defines “direct investment” as follows:¹⁹

¹⁵ Although not specifically named as such, since the PRC-KR BIT applies to investment made by KR and PRC citizens in each others jurisdiction, this investment is considered as foreign. The very purpose of any BIT is to grant protection to foreign investment made by investors originating in contracting state.

¹⁶ Alfred Escher, Current Developments, Legal Challenges and Definition of FDI in Bradlow D., Legal Aspects of Foreign Direct Investment (1999), p.20.

¹⁷ OECD Glossary of Foreign Direct Investment Terms and Definitions, available at www.oecd.org/dataoecd/56/1/2487495.pdf (last visited on January 29, 2009).

¹⁸ OECD & IMF, 2004, Glossary of Foreign Direct Investment Terms and Definitions, Paris and Washington DC, available at www.oecd.org/dataoecd/10/16/2090148.pdf (last visited on January 29, 2009).

[...] holding, acquisition by an investor of not less than one third percent of stock or stockholders votes in joint stock companies registered or newly created on the territory of the Kyrgyz Republic, or any equivalent of such participation in business entities of other types and all further operations between an investor and a company which is invested to, investment of capital to the fixed assets of branches, representative offices of a legal entity created on the territory of the Kyrgyz Republic.

There is no FDI definition given under the PRC's legislation. Apart from not characterizing foreign element, definition given by the KR Investment Law is in compliance with the definition of the OECD. Although OECD definition stipulates 10% threshold, KR Investment law definition provides for 33,3%, which is not in contradiction with OECD model as 10% is a minimal participation required under OECD definition. A bottom line of FDI definition is that it is a cross border investment, under which control is acquired in order to gain high profit.

In contrast to FDI, investor making portfolio investment is not interested in management of a company.²⁰ *“Foreign direct and portfolio investments are distinguished by the criterion of control [...]”*.²¹ While foreign direct investor targets to have effective control in the management of a company and gain profit from company's activities, portfolio investor aims to get stable profit through its ownership of shares, which usually amount to less than 10%. Escher gives the following examples of institutions interested in portfolio investment: “insurance companies, mutual and pension funds”.²²

Debt finance is recognized as a tool of raising capital through selling bonds, debenture and notes of a company.²³ Purchase of these securities gives the holder fixed interest rate, thus, profit but not control over the company, hence, the key element of FDI

¹⁹ Art.1.2, KR Investment Law.

²⁰ Portfolio investment, available at <http://moneyterms.co.uk/portfolio-investment/> (last visited on January 30, 2009).

²¹ Alfred Escher, Current Developments, Legal Challenges and Definition of FDI in Bradlow D., Legal Aspects of Foreign Direct Investment (1999), pp.20-21.

²² *Ibid.*, p.21.

²³ Debt financing, available at <http://www.businessfinance.com/debt-financing.htm> (last visited on January 20, 2009).

a criterion of “control” is lacking in the debt finance. International Monetary Fund (hereinafter “IMF”) as well as OECD consider debt finance as portfolio investment.²⁴

In addition to FDI definition, it is significant to identify who qualifies for foreign direct investor under certain regulations. According to OECD:²⁵

A foreign direct investor is an entity (an institutional unit) resident in one economy that has acquired, either directly or indirectly, at least 10% of the voting power of a corporation (enterprise), or equivalent for an unincorporated enterprise, resident in another economy. A direct investor could be classified to any sector of the economy and could be any of the following:

- (i) an individual;
- (ii) a group of related individuals;
- (iii) an incorporated or unincorporated enterprise;
- (iv) a public or private enterprise;
- (v) a group of related enterprises;
- (vi) a government body;
- (vii) an estate, trust or other societal organization; or
- (viii) any combination of the above.

Under the PRC-KR BIT “investor” means [author’s translation]:

- (a) any natural person who is a national of that Contracting Party in accordance with its legislation; and
- (b) any legal person or other organization established in accordance with the legislation of the Contracting Party provided that natural or legal persons are authorized under the legislation of the Contracting State to make investments on the territory of the other Contracting State.

The KR investment Law although omitting the term “direct” specifies that:²⁶

Foreign investor means any natural person or legal entity which is not a domestic investor making contributions to the economy of the Kyrgyz Republic, including:

- 1) a natural person who is a foreign citizen or person without citizenship, permanently living outside the Kyrgyz Republic;
 - 2) a legal entity which is either:
 - founded and registered in accordance with the legislation of a foreign State; or
 - founded with foreign participation but established in compliance with the legislation of the Kyrgyz Republic:
- entirely belonged to one or more foreign natural, legal persons; or
 controlled and managed by one or more foreign natural, legal persons on the basis of a written contract, the right to exercise the majority of shares, the right to appoint the majority of members to its executive or supervisory bodies, or

²⁴ §385, IMF Balance Payment Manual, available at imf.org/external/pubs/ft/bopman/bopman.pdf (last visited on April 10, 2009).

Portfolio investment, available at <http://stats.oecd.org/glossary/detail.asp?ID=2092> (last visited on April 10, 2009).

²⁵ OECD Benchmark Definition of Foreign Direct Investment, available at www.oecd.org/dataoecd/10/16/2090148.pdf (last visited on January 29, 2009).

²⁶ Art.1.3, KR Investment Law.

not less than one third percent of stock and stockholders voices of which are held by foreign citizens, people without citizenship permanently living outside the Kyrgyz Republic or legal entities as referred to in this Article.

- 3) a legal entity created by inter-governmental treaty of the Kyrgyz Republic;
- 4) foreign organization which is not a legal entity;
- 5) international organization.

Domestic investor is defined under the KR Investment Law as follows:²⁷

[...] a legal entity or natural person of the Kyrgyz Republic, a foreign citizen and person without citizenship having status of resident in Kyrgyz Republic and engaged in investment activity on the territory of the Kyrgyz Republic.

OECD, PRC-KR BIT and KR definitions stipulate that foreign direct investor is a non-resident in the host country that makes contributions no less than the threshold. PRC's legislation is silent on the term "foreign direct investor". However, PRC-KR BIT definition can be considered as the one that PRC accepts.

Definition of scope of FDI framework also presupposes understanding the types and forms of FDI, through which foreign investor is covered by FDI law and is entitled to enjoy the rights and privileges granted thereby. As has been presented above, there is no commonly accepted uniform definition of FDI, but there is commonly accepted understanding thereof. At first glance, one might have difficulties in determining what are the types and forms of FDI. In deed, the literature as well as national and international legal instruments have not yet come into consensus on these notions. Some even lack such concepts. However, for the purposes of the present study the following understanding is to be given. The term "type" is generally understood as "*a subdivision of a particular kind of thing*" whereas, "form" refers to "*a perceptual structure, shape of a thing*". Hence, type means subdivision, while form is the way a thing is expressed. Based on this, in accordance with Art.1.1 of the KR Investment Law, the following forms of FDI are recognized in KR:

²⁷Art.1.3, KR Investment Law.

- money;
- movable and immovable property;
- property rights (mortgages, liens, pledges and others);
- stock and other forms of participation in a legal entity;
- bonds and other debenture liabilities;
- non-property rights (intellectual property rights including goodwill, copyrights, patents, trademarks, industrial designs, technological processes, trade names and know-how);
- any right to activity based on a license or in other form given by State agencies;
- concessions based on Law including concessions for search, development, mining or exploitation of natural resources;
- profit and revenue received from investment and re-invested on the territory of the Kyrgyz Republic;
- other forms of investments that are not forbidden by the legislation of the Kyrgyz Republic.

The available forms of FDI under KR Investment Law are in line with Art.1.1 of the PRC-KR BIT which outlines the following forms [author's translation]:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other form of participation in a company;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) copy rights, industrial property rights, rights on technology and know-how;
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

Both the KR Investment Law and the PRC-KR BIT contain non-exhaustive list of FDI forms. While the KR Investment Law has an open-ended list, the PRC-KR BIT lists the forms as an example using the term “*including in particular*”. Thus, any other FDI form can be recognized both pursuant to the KR Investment Law and the PRC-KR BIT.

Turning to the types of FDI, in accordance with Art.1.3 of the KR Investment Law the following FDI types are recognized in KR:

- legal entity founded and registered in accordance with the legislation of a foreign State; or
- legal entity founded with foreign participation but established in compliance with the legislation of the Kyrgyz Republic:
 - entirely belonged to one or more foreign natural, legal persons; or
 - controlled and managed by one or more foreign natural, legal persons on the basis of a written contract, the right to exercise the majority of shares, the right to appoint the majority of members to its executive or supervisory bodies, or

- not less than one third percent of stock and stockholders voices of which are held by foreign citizens, people without citizenship permanently living outside the Kyrgyz Republic or legal entities.²⁸

The list given in Art.1.3 of the KR Investment falls under one of the main FDI types distinguished in theory based on the set targets as Greenfield investment and Merger and Acquisition (hereinafter “M&A”).²⁹ Greenfield investment is recognized as “*FDI in new facilities or the expansion of existing facilities*”³⁰ by the foreign investor in the host country. In contrast, M&A takes place upon the “[...] *transfer of existing assets from local firms to foreign firms*”.³¹ Thus, the major difference between Greenfield FDI and M&A form according to the definitions given above is that Greenfield FDI presupposes mainly creation of new enterprises, whereas, M&A FDI involves shift of assets from one enterprise to the other.

Having determined the concept of FDI, it is now important to identify the sources of FDI regulation. Of course, the main source of FDI regulation is National Law of a particular host country. This aspect will be analyzed in Chapter II of the Thesis in light of the KR and PRC investment legislation. Besides, there are International Treaties including Multilateral and Bilateral Investment Treaties that provide for FDI regulation.

Multilateral Investment Treaties (hereinafter “MITs”) “*serve to broaden global economic security and development*”.³² Since the main policy making power is retained by states and exercised through national legislation, Multilateral Treaties lack effective regulatory nature. Convention Establishing the Multilateral Investment Guarantee

²⁸ Foreign investors may also participate in state programs of privatization.

²⁹ Foreign Direct Investment (FDI) Definition available at <http://www.economywatch.com/foreign-direct-investment/definition.html> (last visited on April 4, 2009).

³⁰ Foreign direct investment (FDI) - History, Types of FDI available at <http://encyclopedia.stateuniversity.com/pages/7638/foreign-direct-investment-FDI.html> (last visited on April 4, 2009).

³¹ *Ibid.*

³² Neil Sorensen, Bilateral Investment Treaties and Disputes, IATP, 2001, available at http://www.bilaterals.org/article.php3?id_article=122 (last visited on May 12, 2009).

Agency (hereinafter “MIGA Convention”) creates a body whose “*mission is to promote foreign direct investment (FDI) into developing countries to help support economic growth, reduce poverty, and improve people's lives*”.³³ In total, there are 173 member-states to MIGA Convention, out of which 25 industrialized and 148 developing countries.³⁴ Both KR and PRC are MIGA members. In general, MIGA provides guarantee against non-commercial risks³⁵ to investors incorporated in MIGA member-states in their investment activities in the host country upon the joint application between the host country and foreign investor.

Under the International Convention on the Settlement of Investment Disputes (hereinafter “ICSID Convention”) ICSID, a dispute settlement body, was established, the main objective of which is “*to provide facilities for conciliation and arbitration of international investment disputes*”.³⁶ The ICSID Convention is aimed “*to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement*”.³⁷ In total, there 155 members to ICSID Convention, out of which 143 has ratified the Convention, thus, Convention has most probably entered into force for those members. Both KR and PRC are ICSID members.

New York Convention on the Recognition and Enforcement of Arbitral Awards as of 1957 (hereinafter “NY Convention”) is another Multilateral Treaty which indirectly

³³ MIGA, available at http://www.miga.org/about/index_sv.cfm?stid=1588 (last visited on January 13, 2009).

³⁴ MIGA Member Countries available at http://www.miga.org/quickref/index_sv.cfm?stid=1577 (last visited on January 15, 2009).

³⁵ According to Art.11(a) non-commercial risks include currency transfer risk, risk of expropriation and similar measures, breach of contract risk, war and civil disturbance risk and other non-commercial risks.

³⁶ ICSID, available at <http://icsid.worldbank.org/ICSID/Index.jsp> (last visited on January 15, 2009).

³⁷ http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (last visited on March 11, 2009).

relates to FDI. Foreign investors prefer international arbitration to litigation for reasons of impartiality and speediness. NY Convention ensures enforceability of the foreign arbitral awards in the host country – a member-state to NY Convention.

Unlike Multilateral Treaties, Bilateral Investment Treaties (hereinafter “BITs”) concluded between two states have greater influence on FDI regulation in the host country. “*BITs set out rules according to which the investments made by the nationals of the contracting states would be treated and protected in each other’s state*”.³⁸ The BITs are dedicated to mutual support, encouragement and protection of investment. As of today KR has BITs with 27 countries.³⁹ PRC has about 137 BITs which show the high cooperation of PRC with almost the entire world. The PRC-KR BIT has been signed in May 14, 1992, within the first year of KR’s independence, which entered into force for KR in September 8, 1995. This early network without any doubt reveals intention of KR to attract investors from PRC.

³⁸ Sherif H.Seid, *Global Regulation of Foreign Direct Investment*, Ashgate, p.52, available at http://www.bilaterals.org/article.php?id_article=122 (last visited on January 15, 2009).

³⁹ Armenia (1995), Austria (2001- has not yet entered into force), Azerbaijan (1997), Belarus (2001), China (1995), Denmark (2001 - has not yet entered into force), Finland (2004), France (1997), Germany (1998), Georgia (1997), India (2000), Indonesia (1997), Iran (2005), Kazakhstan (2005), Lithuania (2008), Malaysia (1995 - has not yet entered into force), Moldova (2004), Mongolia (2007), Pakistan (1995 - has not yet entered into force), Switzerland (2003), Sweden (2003), Tajikistan (2001), Turkey (1996), Ukraine (1993 - has not yet entered into force), the United Kingdom (1998), the United States (1992) and Uzbekistan (1997).

2. OVERALL DEVELOPMENT OF INVESTMENT LAW

“To understand the present, one must know the past”.⁴⁰ Before starting analyzing the investment policies of KR and PRC it is important to see how the FDI framework in these countries has been developing over the years. In this Part historical overview on changes in FDI regulation is addressed starting from communist era until the modern times. The comparison is quite feasible as both countries have communist background. PRC still tends to keep communist approaches, although shifting to capitalist market economy.

2.1. The Kyrgyz Republic

Prior to 1991 when KR gained independence, KR's history was part of the USSR. Being one of the 15 republics of the former USSR, KR was a communist country, where laws of USSR were in force. Introduction of Joint Venture Law and Law on Foreign Investment was a super concession offered by USSR to the western world.⁴¹ Foreign investors were even given an opportunity to make 100% greenfield investment⁴². Concessions granted under the laws comprise the following:⁴³

- For the first time, direct foreign and particularly Western investment in the Soviet Union was permitted;
- Joint ventures were exempted from the planned economy system;
- Joint ventures (though not the soviet partners) were no longer subject to any higher jurisdictional authority;
- The Soviet State did not assume any responsibility for the activity of the joint venture [...].

⁴⁰ Vai Io Lo and Xiaowen Tian, *Law and investment in China: the legal and business environments after WTO accession*, Routledge, 2005, p.2.

⁴¹ Daniela Iachini, *Joint ventures and the law on foreign investments in the USSR*, Springer Netherlands, Volume 1, Number 2 / June, 1991, pp.111 available at <http://www.springerlink.com/content/m1464343302u232m/> (last visited on March 11, 2009).

⁴² *Ibid.*

⁴³ *Ibid.*

Nevertheless, “investment in the USSR has been minimal to date in terms of foreign capital actually invested [...]”.⁴⁴ It is explained by “inadequacy of regulatory framework for foreign investment, overall political and legal uncertainty, economic risk, and the lack of functioning input markets and basis infrastructure in such areas as finance and telecommunications”.⁴⁵

The situation completely changed after 1991. Many laws were drafted and later adopted under the guidance of IMF, World Bank, Asian Development Bank (hereinafter “ADB”), European Bank of Reconstruction (hereinafter “EBRD”) and OECD. Since its independence, KR went through various legal reforms. Everything started with privatization of state property.⁴⁶ For the first time the notion of “private property” was introduced in new Civil Code.⁴⁷ The reforms led to de-collectivization and creation of private ownership of land. With introduction of legal reforms FDI became an important mechanism of economic growth and transition from planned to market economy. Accession to World Trade Organization (hereinafter “WTO”) in 1998 was a significant achievement for KR. Trade liberalization process was speeded up under accession to WTO as obligations should have fulfilled. Relying on “transitional safeguard” KR has kept Free Economic Zones⁴⁸ (hereinafter “FEZs”) created in 1992 for attraction of FDI, where investment, tax and import-export privileges were granted to foreign investors.⁴⁹ Under the WTO TRIPS Agreement Intellectual Property Rights (hereinafter “IPR”)

⁴⁴ Study of the Soviet Economy, International Monetary Fund, World Bank, Organization for Cooperation and Development, European Bank for Reconstruction and Development; OECD, Paris, 1991, Volume 2, pp.75-80 in Adolf H. Enthoven., Jaroslav V. Sokolov, Alexander M. Petrachkov, Doing Business in Russia and the Other Former Soviet Republics: Accounting and Joint Venture Issues. Montvale, New Jersey: Institute Management Accountants, 1992, p.79

⁴⁵ *Ibid.*

⁴⁶ Law of the KR “on Privatization of State Property in KR” of March 2, 2002, N31.

⁴⁷ Dated May 8, 1996, N 16.

⁴⁸ There are four FEZs in KR: Bishkek, Karakol, Maimak and Naryn.

⁴⁹ The Law of the KR “on Free Economic Zones in the KR” of December 16, 1992, N 1076-XII.

received legal protection in KR through introduction of relevant laws devoted to patent, trademark and copyright regulation and protection. The Correlation between IPR and FDI is to be addressed in Part 4 of this Chapter.

Today KR has quite liberal and adequate foreign investment legislation. In 1997 there was the first attempt to create specific law on foreign investment⁵⁰, which was later repealed. In 2003 KR Parliament adopted new KR investment law, under which previous law was substantially modified, which was a significant step forward in FDI regulation. Moreover, the legal gap was filled with adoption of Land Code⁵¹, Customs Code⁵², Labor Code⁵³, Law “On Licensing”⁵⁴, Law “On Simplified System of Taxation of Small-Business Entities”. Recently new Tax Code⁵⁵ was enacted which is effective since January 1, 2009. As it is evident the legislation of KR is quite young and is constantly being modified. The Laws are revised and amended thereby adjusted to the developing progress of a market and business.

The GDP of KR today amounts to \$9.4⁵⁶ billion with 3.1% annual growth in comparison to last year’s GDP which is 3.3% 5-year compound annual growth. The GDP per capita⁵⁷ comprises \$1813.⁵⁸ Inflation is estimated as 10.2% with unemployment of

⁵⁰ The Law of the KR “on Foreign Investments in the KR” of September 14, 1997.

⁵¹ Dated June 2, 1999, N 45.

⁵² Dated July 12, 2004, N 87.

⁵³ Dated August 4, 2004, N 106.

⁵⁴ Dated March 3, 1997, N 12.

⁵⁵ Dated October 17, 2008, N 230.

⁵⁶ The values are presented in US dollars.

⁵⁷ KR as of today has a population of 5.2 million.

⁵⁸ 2009 Index of Economic Freedom available at <http://www.heritage.org/Index/country/KyrgyzRepublic> (last visited on June 5, 2009).

18.0%. FDI inflow for 2008 totaled over \$481 million⁵⁹ (for the comparison see the Table 1 for KR FDI inflow during previous years).

Table 1. Total FDI inflow into KR within 1997 – 2007.

Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
mln \$	86,3	136,3	108,6	89,6	90,1	115,7	147,0	176	210.3	335.6	436.8

Source: Data from Kyrgyz National Statistical Committee, 1997-2007.⁶⁰

Nowadays under open door policy economical and political stability,⁶¹ “liberal trade and currency regimes, stable foreign exchange rate and full convertibility of local currency, the som,”⁶² abundance of natural resources such as gold, coal, uranium, energy, as well as low-cost but well-educated labor force⁶³ are what attracts foreign investors to enter the KR market. However, there are still drawbacks both of legal and non-legal character that of course has to be taken into consideration in evaluation of FDI attractiveness of a country.

2.2. The People’s Republic of China

PRC was created in 1949 when Communist Party acquired power overturning the regime of Kuomintang. Since that PRC became a socialist-communist country that took

⁵⁹ Asian Development Outlook 2008 for the Kyrgyz Republic available at www.adb.org/Documents/Books/ADO/2008/kgz.pdf (last visited on June 5, 2009).

⁶⁰ Reproduced in: Shestakova I.V., Foreign Direct Investment in development of county’s economy, “Bankovskiy vestnik Kyrgyzskoi Respubliki” (Банковский вестник Кыргызской Республики), N 9 (117), September 2004.

2009 Investment Climate Statement - Kyrgyz Republic, Bureau of Economic, Energy and Business Affairs, February 2009.

⁶¹ One should bear in mind that in 2005 the Tulip revolution took place in KR which resulted to turnover of the first president Mr. Akaev’s regime. Small and middle-size businesses suffered because of the looting that occurred the night of March 24, 2005, which is now celebrated as the Day of National Revolution. New president and Government promised victims a compensation for their losses as well as offered tax and financial assistance, which is still pending now, although some assistance has been shown.

⁶² Investment Guide for the KR, OECD Center for Cooperation with Non-Members, OECD Publishing, 1998.p.10.

⁶³ Today KR “is the largest service provider of the Central Asian region” (Joomart Otorbaev, Challenges for Economic Development of the Kyrgyz Republic and Central Asia, October 5, 2004. available at <http://www.carnegieendowment.org/events/?fa=eventDetail&id=742> (last visited on March 11, 2009)).

after USSR's centrally planned economy. Massive nationalizations and collectivization led to a creation of state-owned enterprises and collectives.⁶⁴

Significant economic and legal reforms took place in 1970s and 1980s when PRC declared its open door policy. New party leader, Deng Xiaoping, took measures in order to “*modernize the country's industry, agriculture, national defense, and science and technology*”.⁶⁵ The legal reforms in China directly concerning the FDI started from joint venture law. For the purpose of FDI attraction in 1979 the Law on Sino-Foreign Equity Joint Ventures was adopted,⁶⁶ which has become the first foreign investment law in PRC. In 1980 the first approval by PRC authority has been given in establishing an enterprise to the foreign investors.⁶⁷ After 1980, to absorb FDI, PRC has created Special Economic Zones (hereinafter “SEZs”) in such cities as Shantou, Xiamen, Zhuhai, Shenzhen, and in province of Hainan. These SEZs just like FEZ in KR provided special investment, tax and import-export regime.

FDI admission by PRC can obviously be considered as one of the most successful stories both in terms of switch from centrally-planned economy to market economy and creation of adequate legal framework for FDI admission. Accession to WTO in 2001 positively influenced FDI inflow as China has started to take measures in order to meet WTO obligations.

⁶⁴ Vai Io Lo and Xiaowen Tian, *Law and investment in China: the legal and business environments after WTO accession*, Routledge, 2005, p.2.

⁶⁵ *Ibid.*, p.3.

⁶⁶ This Law is still in force, and remains as significant as it was initially. Amends date April 4, 1990, March 15, 2001.

⁶⁷ Vice President of China Association for the Promotion of Investment, *The Investment Environment in China and the Opportunities for Italian Enterprises*, Italy, November, 1999 available at <http://english.mofcom.gov.cn/aarticle/translators-garden/famous-speech/200803/20080305441012.html> (last visited on March 1, 2009).

Unlike in KR, where the primary investment policy is specified under the single law⁶⁸, the FDI regulation of PRC is scattered. A number of specific laws are devoted to Joint Ventures (hereinafter “JV”) including both Equity Joint Ventures (hereinafter “EJV”) and contractual Joint Ventures (hereinafter “CJV”), Wholly Foreign Owned Enterprises (hereinafter “WFOE”), and other Foreign-Investment Enterprises. In addition, PRC has enacted comprehensive laws such as Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises,⁶⁹ Patent Law,⁷⁰ Trademark Law,⁷¹ Provisions on Guiding Direction of Foreign Investment⁷² and Catalog for the Guidance of Foreign Investment Industries.⁷³

Under the open door policy in 1993 with rapid growth of FDI, being only behind US, PRC has become “*the second largest FDI recipient country in the world and the largest recipient among developing countries*”.⁷⁴ In early years of open door policy FDI were coming from overseas China, while the FDI from Western Europe and North America increased since 1990s⁷⁵. FDI inflow in PRC totaled \$92.4⁷⁶ billion in 2008 which is an increase by 23.6 over FDI in 2007 (for the comparison with previous years, please see the Table 2).

⁶⁸Law of the Kyrgyz Republic “on Investments in the Kyrgyz Republic” of March 27, 2003, N 66 (last amendment dated June 23, 2008, N 127).

⁶⁹ Dated April 9, 1991.

⁷⁰ Dated March 12, 1984 (amended September 4, 1992, August 25, 2000).

⁷¹ Dated August 23, 1982 (amended February 22, 1993, October 27, 2001).

⁷² Dated April 1, 2002.

⁷³ Dated November 30, 2004.

⁷⁴ Fung K.C., Hitomi Iizaka, Sara Tong, Foreign Direct Investment in China: Policy, Trend and Impact, International conference on China’s Economy in the 21st Century, June 2002, p.5.

⁷⁵ Fung K.C., Hitomi Iizaka, Sara Tong, Foreign Direct Investment in China: Policy, Trend and Impact, International conference on China’s Economy in the 21st Century, June 2002, p.7.

⁷⁶ The values, including those in the table, are presented in US dollars.

Table 2. FDI report on PRC for a period of 1984 – 2007.

Year	Contracted (\$)	Utilized (\$)
1984	2.7	1.3
1985	5.9	1.7
1986	2.8	1.9
1987	3.7	2.3
1988	5.3	3.2
1989	5.6	3.4
1990	6.6	3.5
1991	12.0	4.4
1992	58.1	11.0
1993	111.4	27.5
1994	82.7	33.8
1995	91.3	37.5
1996	73.3	41.7
1997	51.0	45.3
1998	52.1	45.5
1999	41.2	40.4
2000	64.2	42.1
2001	71.1	48.8
2002	84.8	55.0
2003	115.1	53.5
2004	153.5	60.6
2005		60.3
2006		63.0
2007		74.8

Source: 2009 Index of Economic Freedom: China⁷⁷

The GDP of PRC today amounts to \$6.1 trillion with annual growth of 11.1%, which is 10.1% 5-year compound annual growth. The GDP per capita⁷⁸ totaled to \$4644. Inflation rate is 4.8%, while unemployment rate is 4.0%.⁷⁹

Today foreign business community favors most PRC due to political and economical stability, huge economic potential in terms of market size, liberal foreign

⁷⁷ The data are available at <http://www.chinability.com/FDI.htm> (last visited on June 2, 2009)

⁷⁸ Being the most populous country in the world PRC has a population of 1.3 billion.

⁷⁹ The data are available at <http://www.heritage.org/Index/Country/China> (last visited on June 4, 2009).

exchange policy as well as convertibility of Chinese local currency, the renminbi (hereinafter “RMB”), and low-cost labor force.

II. LEGAL REGULATION OF FOREIGN DIRECT INVESTMENT

This Chapter is devoted to the core issue of the Thesis, FDI legislation of KR and PRC. The Chapter discusses such important for foreign investor ASPECTS as investment vehicles available under the laws and provided state guarantees and incentives. Moreover, as a specific issue, protection of IPR in FDI is analyzed.

1. GENERAL OVERVIEW ON THE FOREIGN DIRECT INVESTMENT LEGAL FRAMEWORK

1.1. The Kyrgyz Republic

According to Art.4.1 of the KR investment Law *“legislation regulating the investment regime is comprised of the Constitution of Kyrgyz Republic, this Law and other laws and regulatory legal acts of the Kyrgyz Republic”*. The Constitution of the Kyrgyz Republic (hereinafter “KR Constitution”), being a supreme law, stipulates a general principle of economic and entrepreneurial freedom for any person within the territory KR. Art.14.3 of the KR Constitution outlines that *“Each person has a right to economic freedom, freedom on use of its capacity and property in any economic activity which is not prohibited by the Law”* [author’s translation]

As it is clear from the language of the provision KR Constitution does not distinguish between citizen and non-citizen. It equally applies to both citizens and non-citizens of KR. Thus, KR Constitution grants national treatment to non-citizens of KR economic and entrepreneurial freedom, within the territory on KR.

The constitutional principle of economic freedom in light of FDI has been implemented through the following legal Acts, a list of which is non-exhaustive:

- KR Investment Law;
- KR Civil Code;
- KR Customs Code;
- KR Tax Code and Laws;
- KR Land Code and Laws;
- KR Company Law;
- KR Patent Law;
- KR Trademark Law;
- KR Anti-monopoly Law;
- KR FEZ Law ;
- KR Licensing Law.

An overview on each of these legal acts is to be given in the context of each issues covered by this Thesis in relevant Chapters and Parts. It has to be mentioned that there is no foreign investment law per se in KR. KR Investment Law, which is a major Act that establishes KR's general investment policy, equally applies to domestic and foreign investors. Subject to certain exceptions listed above legal acts in the same manner do not distinguish between foreign and domestic individuals and legal entities. This has been intentionally done to effectively implement the principle of national treatment.

The KR Investment Law expressly stipulates that the Law applies to FDI. Art.3.1 of the KR Investment Law states that “*direct investment relationships in the Kyrgyz Republic shall be regulated by this Law and other regulatory legal acts of the Kyrgyz*

Republic adopted in accordance with this Law".⁸⁰ The investment regime established under the KR Investment law grants protection to foreign investors in terms of state guarantees,⁸¹ at the same time it stipulates investment incentives for future foreign investors. The law outlines the state body called for providing state support and protection for investors and promotion of investments.⁸² It is important to note that KR has no restrictions on industries, which means that all industries are open for FDI. This however, may be subject to certain exceptions, for instance, defense sector: armament industry.⁸³

1.2. The People's Republic of China

The Constitution of the People's Republic of China (hereinafter "PRC Constitution"), in contrast with the KR Constitution, explicitly addresses the issue of FDI. Art.18 of the PRC Constitution outlines as follows:⁸⁴

The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China. All foreign enterprises and other foreign economic organizations in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China.

The constitutional provision, first of all, allows business activities of foreign individuals and legal entities within the territory of PRC. Secondly, it requires observance of the

⁸⁰ Investments to credit or insurance organizations are excluded from the scope of the KR Investment Law in accordance with Art.3.2, thus, this kind of FDI is subject to special regulation in KR.

⁸¹ Art.4, KR Investment Law.

⁸² *Ibid.*, Art.14.

⁸³ It is widely practiced all over the world that FDI is prohibited in such important state sector as defense, which is justified on the grounds of national defense.

⁸⁴ The text of the PRC Constitution is available at <http://english.peopledaily.com.cn/constitution/constitution.html> (last visited on February 13, 2009).

PRC's laws by the foreign investors. And, thirdly, PRC Constitution ensures legal protection of foreign investors' rights.

Unlike KR, PRC has adopted laws that specifically regulate FDI in PRC. PRC's FDI legislation can be characterized as comprising of a number of laws and regulations as follows:

- PRC Joint Ventures Laws;
- PRC Wholly Foreign Owned Enterprises Law;
- PRC Company Law;
- PRC Tax Law;
- PRC Foreign Economic Contract Law;
- Provisions on Guiding Direction of Foreign Investment ;
- Catalog for the Guidance of Foreign Investment Industries;

In great contrast to KR, PRC has not opened the doors for FDI in all industries. There are three groups of foreign invested industries: encouraged, restricted and prohibited. The Catalog for the Guidance of Foreign Investment Industries of October 31, 2007 (hereinafter "Catalog 2007")⁸⁵ provides for the list of industries classified as encouraged, restricted and prohibited. The Catalog 2007 gives enumeration of activities in certain industries that are considered as encouraged, restricted or prohibited. A list of Encouraged Foreign Invested Industries (hereinafter "Encouraged List") encompasses:

- Farming, Forestry, Animal Husbandry and Fishery Industries;
- Mining and Quarrying Industries;
- Manufacturing Industries;
- Production and Supply of Power, Gas and Water;
- Communication and Transportation, Storage,
- Wholesale and Retail Trade Industry;

⁸⁵ The Catalog 2007 annuls previous Catalog of March 30, 2004, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/P020071121358108121219.pdf (last visited on February 25, 2009).

- Rent and Business Service;
- Scientific research, technology service and geological exploration;
- Water, environment, and public facility management industry;
- Education;
- Public health, social security and social welfare;
- Culture Sports and entertainment.

A list of Restricted Foreign Invested Industries (hereinafter “Restricted List”) includes the same industries enumerated in the Encouraged List with four additional industries as follows:

- Banking and Insurance Industries;
- Real Estate Industry;
- Leasing and Commercial Service Industry;
- Irrigation, environment and public utilities management.

Moreover, unlike the Encouraged List the Restricted List is an open-ended list of industries. It is expressly states that “*other industries restricted by the State or international treaties that China has concluded or taken part in also fall under Restricted List*”.⁸⁶ Thus, there is always need before investing into PRC to double check whether there are other restricted industries for FDI.

A list of Prohibited Foreign Invested Industries (hereinafter “Prohibited List”) contains almost all industries enumerated in Encouraged and Restricted Lists, except for:

- Wholesale and Retail Trade Industry;
- Banking and Insurance Industries;
- Real Estate Industry.

The Prohibited List is even broader in its scope than the Restricted List, as it expressly articulates that “*other industries*”⁸⁷ can be considered as prohibited. In addition, like in Restricted List it explicitly states that “*other industries restricted by the State or*

⁸⁶ XV, Restricted List, Catalog 2007, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/P020071121358108121219.pdf (last visited on January 5, 2009).

⁸⁷ *Ibid.*, XI, Prohibited List.

international treaties that China has concluded or taken part in”⁸⁸ also fall under its scope.

One can fairly conclude that PRC has no purely Encouraged List of Foreign Invested Industries. There are activities in certain industries that are encouraged by the state for FDI. Nevertheless, the Catalog 2007 has enormous restrictions and even prohibitions in the same fields. Therefore, it is highly suggested to make sure that the field FDI is intended to be directed does not fall under the Restricted List, and *a fortiori* under the Prohibited List, taking into consideration that both has non-exhaustive enumerations of industries. Moreover it is advised to take into consideration local legislation of a particular province, where FDI is intended. Since local authorities have project approval power up to US\$ 30 million local legislation may also differ from Catalog 2007 and Guiding Provisions.⁸⁹

In order to have a full picture of the FDI-friendly industries in PRC the Catalog 2007 has to be read together with Provisions on Guiding Direction of Foreign Investment⁹⁰ (hereinafter “Guiding Provisions”).⁹¹ In fact, the Catalog 2007 can be considered as *lex specialis*, while Guiding Provisions as *lex generalis*, since they establish more general policy, giving the characteristics of the encouraged, restricted and prohibited projects with foreign investment. The Guiding Provisions outline four categories of projects with foreign investments: encouraged, permitted, restricted and

⁸⁸ XII, Prohibited List, Catalog 2007, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/P020071121358108121219.pdf (last visited on January 5, 2009).

⁸⁹ Guanghua Yu and Minkang Gu. *Laws Affecting Business Transactions in the PRC*. Hague, London, Boston: Kluwer Law International, 2001.

⁹⁰ Adopted by the State Council’s Decree [2002] No.346 on February 11, 2002, entered into force on April 1, 2002, available at http://www.bmi-virtualoffice.com/pdf/L&R_05.pdf.

⁹¹ The provisions were revised in order to comply with WTO obligations.

prohibited.⁹² The encouraged, restricted and prohibited projects are covered by the Catalog 2007, namely three Lists mentioned above.⁹³ It is explicitly stated in Art.4 of the Guiding Provisions that the projects that do not fall under the Catalog 2007 are considered to be permitted.

In accordance with Art.5 of the Guiding Provisions the encouraged projects with foreign investment are as follows:

- 1) [...] new agriculture technologies, agriculture comprehensive development, or energy, transportation and important raw material industries;
- 2) [...] high and new technologies or advanced application technologies that can improve the product performance and increase the technology economic efficiency of the enterprises or those that can produce the new equipments and new materials which the domestic production capacity fails to produce;
- 3) [...] meeting the market needs and being able to improve the product level, develop new markets or increase the international competitive capacity of the products;
- 4) [...] being of new technologies and new equipments that can save energy and raw material, comprehensively utilize resources and regenerate resources, and prevent environment pollutions;
- 5) [...] being capable of bring into the advantages of human power and resources of the mid-west region into full play and being in conformity to the industrial policies of the State;
- 6) [...] other situations as provided for by laws and administrative regulations.

Art.6 of the Guiding Provisions outlines restricted to foreign investment projects as:

- 1) being of technology lagged behind;
- 2) being adverse to saving resources and improving environment;
- 3) engaged in the prospecting and exploitation of the specific type of mineral resources to which the State applies protective exploitation;
- 4) falling into the industries that the State opens step by step;
- 5) other situations as provided by laws and administrative regulations.

In accordance with Art.7 of the Guiding Provisions projects are recognized as prohibited if they are:

- 1) harming the State safety or impairing the public interests;
- 2) polluting the environment, damaging natural resources or harming human health;
- 3) occupying too much farmland and being adverse to the protection and development of land resources;
- 4) harming the safety and usage of military facilities;
- 5) using the particular techniques or technologies of China to produce products;

⁹² Art.4, Guiding Provisions.

⁹³ *Ibid.*

6) other situations as provided for by laws and administrative regulations.

The provisions of the Catalog 2007 and Guiding Provisions clearly indicated that PRC has promulgated open door policy with at same time imposing a number of restrictions on industries and nature of the FDI projects that might be carried out by the investors. This certainly reveals that PRC's FDI regime has not been fully liberalized.

2. FOREIGN DIRECT INVESTMENT VEHICLES

2.1. The Kyrgyz Republic

KR Investment Law recognizes two FDI vehicles: Joint Ventures (hereinafter “JVs”) and Wholly Foreign Owned Enterprises.⁹⁴ (hereinafter “WFOEs”). As has been mentioned earlier there is no special laws devoted to regulation of JVs or WFOEs in KR. The KR Investment Law provides total flexibility, granting full freedom and discretion to foreign investors in their dealing with JVs and WFOEs. There is no special regulation of JV contracts in KR. JV contracts are governed by general contract law provisions of the KR Civil Code. No state approval is required. There is no minimum and maximum foreign participation requirement for JVs. There is no restriction on in-kind contribution neither for domestic partner nor for a foreign partner. Technology can be transferred without obstacles.⁹⁵ All these comprise the policy of KR in order to attract as much foreign investors as possible.

⁹⁴ Art.1.2, KR Investment Law.

⁹⁵ *Ibid.*, Art.1.1.

The following table represents the gradual growth of Foreign Invested Enterprises (“FIEs”),⁹⁶ which include both JVs and WFOEs.

Table 3. Registered and Operating FIEs in KR.

Year	Registered FIEs	Operating FIEs
1993	125	43
1994	627	128
1995	1288	363
1996	2191	908
1997	3272	1396
1998	4004	2068
1999	4130	1470
2000	5277	2026

Source: Data from Kamalov, Zalkar. The Investment Sector and TNC Activities in the Kyrgyz Republic, CA&CC Publishing House Press.⁹⁷

In KR Foreign investors prefer to create JVs with local partners rather than to set up WFOEs⁹⁸. This can be justified by the fact that JVs are more suitable for studying the unknown market because it minimizes the risks. JVs have local partners that are well-skilled in business rules in the market. As of today there are number of prosperous JVs operating in KR:

- Kumtor Operating Company (gold mining).

⁹⁶ Except for year 1999, where there is seen decrease in operating companies.

⁹⁷ Available at http://www.ca-c.org/online/2006/journal_eng/cac-04/08.kamaloven.shtml (last visited on May 14, 2009).

⁹⁸ US Bureau of Economic, Energy and Business Affairs, 2009 Investment Climate Statement - Kyrgyz Republic, available at <http://www.state.gov/e/eeb/rls/othr/ics/2009/117381.htm> (last visited on May 14, 2009).

- Kyrgyz Petroleum Company (crude oil);
- Reemtsma Kyrgyzstan Company (cigarettes);
- Plaskap Bishkek Company (packaging/bottling);
- Central Asian Group (entertainment/garments);
- Hyatt Regency Bishkek;
- Coca-Cola franchise (soft drinks);
- Bakai Company (sugar).

As has been stated earlier, mining is one of the most attracted and at the same time encouraged industries in KR.⁹⁹ “Kyrgyzstan is the third-largest gold producer in the former Soviet Union with gold production exceeding 21 tons in 1998”¹⁰⁰. Kumtor Gold Company contributes 6% of KR’s GDP.¹⁰¹ It also represents “40% of total export earnings and 30% of total industrial production”.¹⁰² Kumtor Gold Company is a JV created in 1997 between Canadian Centerra Gold Company, which holds 1/3 of the shares, and state enterprise Kyrgyzaltyn, which owns 2/3 of the shares.¹⁰³

“Kyrgyz Petroleum Company is involved in oil refining; production of gasoline, diesel fuel and fuel oil. It is a JV set up in 1997 between Kyrgyzneftegaz Joint Stock Company (state owned enterprise) and Canadian Kyrgoil Company. JV operates in Dzhalsalat region located in the south of KR.”¹⁰⁴

⁹⁹ In addition, JVs have a significant role in hotel and food processing sectors. Hyatt Regency Bishkek, Coca-Cola franchise, Bakai, Bakai-Suu, Eridan-Sut.

¹⁰⁰ Institute for intercultural Management and Political consulting, Why invest today in the Kyrgyz Republic, available at www.kyrgyzmission.net/why%20invest%20in%20Kyrgyzstan.pdf.

¹⁰¹ Eric G. Postel, Yuri Nevenchanny, Kyrgyzstan -- A Jewel of Central Asia, available at <http://www.pangaeapartners.com/kyrgyz1.htm> (last visited on May 14, 2009).

¹⁰² World Bank, Kyrgyz Republic - Update on the Mining Sector, available at <http://www.natural-resources.org/minerals/CD/docs/twb/Kyrgyz.pdf> (last visited on May 10, 2009).

¹⁰³ *Ibid.*

¹⁰⁴ Eric G. Postel, Yuri Nevenchanny, Kyrgyzstan - A Jewel of Central Asia, available at <http://www.pangaeapartners.com/kyrgyz1.htm> (last visited on May 14, 2009).

Reemtsma Kyrgyzstan Company is another successful JV between a state owned enterprise Kyrgyztamekysi and German Reemtsma Cigarreten GmbH. Reemtsma Kyrgyzstan Company dealt with “reconstruction of the old factory with change of cigarette and tobacco workshop and ancillary equipment”¹⁰⁵ Between 1998-1999 the production of cigarettes by the company increased from 0.8 billion cigarette sticks to 2.1 billion, with a rise in taxes paid from 110 million soms to 300 million soms.¹⁰⁶

In 2005 Russian Gazprom intended to set up JV in KR for the purposes of “geological exploration, securing investment for the republic's oil and gas sector and repairing the sector's facilities”. Nevertheless, this JV as of today was not established yet. Recently it has been announced that Turkish Airlines, a leading passenger airliner, officially has expressed its intention to set up a JV with Kyrgyzstan Airlines, majority shareholder of which is KR Government.¹⁰⁷ In 2007 Turkey's outflow totaled 3.79% and PRC's - 6.66%.¹⁰⁸

According to the National Statistical Committee, the following countries were the largest sources of FDI in first nine months of 2008: the FDI inflow into KR was mainly coming from:¹⁰⁹

- Kazakhstan 50.76%;
- Germany 8.17%;
- Great Britain 6.34%;

¹⁰⁵ Eduard Rausch, Reemtsma, available at <http://www.winne.com/kyrgyzstan/to17.html> (last visited on May 14, 2009).

¹⁰⁶ *Ibid.*

¹⁰⁷ Available at <http://en.timeturk.com/thy-to-set-up-joint-venture-with-kyrgyzstan-airlines-20347-haberi.html> (last visited on May 14, 2009).

¹⁰⁸ US Bureau of Economic, Energy and Business Affairs, 2009 Investment Climate Statement - Kyrgyz Republic, available at <http://www.state.gov/e/eeb/rls/othr/ics/2009/117381.htm> (last visited on May 14, 2009).

¹⁰⁹ *Ibid.*

- Russia 4.8%;
- Cyprus 4.59%.

These inflows of FDI and attempts to invest by the foreign investors reveal that Kyrgyz market is attractive enough. FDI may prosper provided that adequate conditions for investors are created, which include both legal and non-legal aspects.

2.2. The People's Republic of China

PRC Investment Law recognizes three major FDI vehicles: Equity Joint Ventures (hereinafter "EJVs"), Contractual Joint Ventures (hereinafter "CJVs") and WFOEs. *"Since the late 1980s, EJVs and WFOEs have predominated over all other types of FDI, accounting for approximately 80 percent of the total foreign capital inflows into China".*¹¹⁰ Initially EJVs were taking the leading role, however, since 1996, especially in 1999 when WFOEs constituted more than half of the total FDI for that year.¹¹¹ The drop in EJVs is explained, on one hand, by the familiarization of the PRC's market, and, on the other hand, by objective difficulties comprising of the "shared operational control management", resulting from "joint ownership", and partners' uncommon "strategic objectives".¹¹²

EJVs, CJVs and WFOEs are regulated by the special laws as follows:

- Law of the People's Republic of China "on Sino-Foreign Equity Joint Ventures" (hereinafter "EJVs Law");¹¹³

¹¹⁰ Deng Ping, WFOEs: The Most Popular Entry Mode into China, Business Horizons, July 1, 2001, available at http://www.accessmylibrary.com/coms2/summary_0286-27044329_ITM (last visited on May 14, 2009).

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Adopted on July 1, 1979 (amended April 4, 1990, March 15, 2001).

- Regulation for the Implementation of the Law “on Sino-Foreign Equity Joint Ventures” (hereinafter “EJVs Implementation Regulation”);¹¹⁴
- Certain Regulations on the Subscription of Capital by the Parties to Sino-Foreign Equity Joint Ventures (hereinafter “EJVs Subscription Regulation”);¹¹⁵
- Law of the People’s Republic of China “on Chinese-Foreign Contractual Joint Ventures” (hereinafter “CJVs Law”);¹¹⁶
- Detailed Rules for the Implementation of the Law of the PRC on Sino-Foreign Contractual Joint Ventures (hereinafter “CJVs Implementation Rules”);¹¹⁷
- Law of the People’s Republic of China “on Wholly Foreign Owned Enterprises” (hereinafter “WFOEs Law”);¹¹⁸
- Detailed Rules for the Implementation of Law of the People’s Republic of China “on Wholly Foreign Owned Enterprises” (hereinafter “WFOEs Implementation Rules”).¹¹⁹

In accordance with Art.1 of the EJV Law incorporation of foreign companies, enterprises, other economic entities or individuals within the territory of the PRC with Chinese companies, enterprises or other economic entities on the principles of equality and mutual benefit is considered as EJV. As has been illustrated in the Table 4 EJV has a juridical person status. Thus, EJV is a joint undertaking of business between foreign and Chinese parties with acquiring legal personality within the territory of PRC. Art.1 of the

¹¹⁴ Adopted on September 20, 1983 by the State Council (last amendment dated July 22, 2001), available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51062 (last visited on May 14, 2009).

¹¹⁵ Adopted on December 30, 1987.

¹¹⁶ Adopted on April 13, 1988 (amended October 31, 2000).

¹¹⁷ Adopted on August 7, 1995.

¹¹⁸ Adopted on April 12, 1986 (amended October 31, 2000).

¹¹⁹ Adopted on October 28, 1990 (last revised April 12, 2001).

EJV Law expressly stipulates that EJVs are subject to authorization by the Chinese Government.

Art.3 of the EJV Implementation Regulation outlines that EJVs “*must be able to promote the development of China's economy and the improvement of the science and technology for the benefit of socialist modernization*”. According to Art.4 Applications to establish joint ventures projects are refused if they involve:

1. detriment to China's sovereignty
2. violation of the Chinese law
3. nonconformity with the requirements of the development of China's national economy
4. environmental pollution
5. obvious inequity in the agreements, contracts and articles of association signed impairing the rights and interests of one party.

Pursuant to Art.1 of the CJV Law CJV is defined as the joint establishment on the principles of equality and mutual benefit by foreign enterprises and other economic organizations or individuals and Chinese enterprises or other economic organizations within the territory of PRC.¹²⁰ Unlike EJVs, CJVs lack legal personality.

WFOEs are defined as “*enterprises established in China by foreign investors, exclusively with their own capital, in accordance with relevant Chinese laws*”.¹²¹ Art.3 of the WFOE Law establishes the following requirements, WFOEs shall:¹²²

- *help the development of China's national economy;*
- *use advanced technology and equipment or market all or most of their products outside China.*

Pursuant to Art.6 of the WFOE Law WFOEs are subject to approval by the department of State Council. WFOEs possess legal personality.

¹²⁰ Pursuant to Art.4 of the CJVs Law PRC encourages CJVs that are “*export-oriented or technologically advanced*”.

¹²¹ Art.2, WFOE Law.

¹²² *Ibid.*, Art.3.

In accordance with the 2007 Catalog the following industries are limited to EJV¹²³ or CJVs (non-exhaustive list):

- Encouraged:
 - Cultivation of traditional Chinese medicines;
 - Prospecting, exploitation and utilization of coal-bed gas;
 - Venture prospecting and exploitation of petroleum, natural gas;
 - Production of natural additive for foodstuff and food ingredients;
 - Production of automobile electronic technology (for EJVs only)
 - Equipment for railway transportation;
 - Design and manufacture of general civil planes;
 - Manufacture of equipment of over 1 million kilowatt Nuclear-power plant
 - Construction and management of feeder railways;
 - Accounting and auditing services;
 - Advanced educational institution;
- Restricted:
 - Processing of the logs of precious varieties of trees;
 - Exploring and mining of barite;
 - Tally for foreign vessels;
 - Development of pieces of land;
 - Market research;
 - Photography service (for EJVs only)
 - Medical treatment establishments;
 - Productions and publication of broadcasting and TV programs and film-making (for CJVs only);

WFOEs are disallowed, and Chinese partner shall have majority of shares in EJVs or CJVs in such industries as (non-exhaustive list):

- Encouraged:
 - Production of ethylene with an annual production capacity of 600 thousand tons or over;
 - Production of mass coal chemical industrial products(relative majority);
 - Manufacture of complete automobiles (foreign investment shall not exceed 50%);
 - Design and manufacture of civil planes: trunk and branch lines;
 - Design and manufacture of civil satellites;
 - Construction and management of Nuclear-power plants;
 - Construction and management of civil airports (relative majority);
 - Operation of the performance site(relative majority);
- Restricted:
 - Exploring and mining of special and scarce coal exploration;
 - Telecommunication companies (foreign investment shall be less than 50%);
 - Wholesale, retail, logistic of grain, cotton, etc.;
 - Ship agent;

¹²³ Art.3 of the EJV Implementation Regulation expressly states that businesses and industries for EJVs are stipulated in the Guiding provisions and the 2007 Catalog.

- Security investment fund and management companies (foreign investment shall be less than 49%);
- Futures companies;
- Mapping companies;
- Construction and operation of cinemas;

Based on these it can be fairly concluded that WFOEs are much restricted in terms of industries, while JVs have wider a business scope, subject to some restrictions on foreign capital.

The advantages and disadvantages of JVs and WFOEs in PRC can be summarized as follows (*see also Table 4.*). JVs provide less capital expenditures, marketing networks, land ownership right, shared costs and risks. Yet, JVs involve co-decision making, mandatory creation of trade unions and greater risk of intellectual property infringements. WFOEs, in contrast, allow total independence in decision making, full autonomy in management and profit distribution. Nevertheless, disadvantages of running a business as WFOE compose of higher capital expenditures, limited land ownership and lack of marketing networks.

Table 4. Comparison - contrast between EJVs, CJVs and WFOEs in PRC.

Criteria	EJVs	CJVs	WFOEs
Legal personality	Yes	No	Yes
Legal form ¹²⁴	LLC	Partnership	LLC, JSC
Approval required	Yes		
Contribution by foreign investor	25% - 95%	Total freedom	100%
Organs ¹²⁵	Flexibility: BoD	BoD	LLC: BoD

¹²⁴ Will be addressed in Part 3 of this Chapter.

¹²⁵ *Ibid.*

	+		+
	SB (optional)		SB (optional) JSC: BoD + SB
Liability ¹²⁶	Limited	Full	Limited
Industries restricted	Almost everywhere		Automobiles Telecommunication Newspaper
Chairman of the BoD ¹²⁷	Freedom ¹²⁸	Freedom	Freedom
Incentives ¹²⁹	Yes		
Contribution in-kind	Up to 20%	No limitations	
Export/Import restrictions ¹³⁰	Foreign exchange account balanced		
Duration of operation	Up to 50 years ¹³¹		

Every FDI vehicle as has been demonstrated above has its strong and weak sides. Therefore, foreign investor has to define its goals and needs, and weigh all the aspects before selecting a mode of entering the PRC's market.

¹²⁶ Will be addressed in Part 3 of this Chapter.

¹²⁷ *Ibid.*

¹²⁸ *De jure* there is a freedom in this issue; everything is on the discretion of the partners. However, in practice the office of chairman is assumed by Chinese partner.

¹²⁹ Will be addressed in Part 4 of this Chapter.

¹³⁰ *Ibid.*

¹³¹ Although neither of the listed above laws stipulate fixed duration, WFOEs and JVs customarily exist for 50 years, with a possibility of prolongation.

3. FOREIGN DIRECT INVESTMENT AND COMPANY LAW

The correlation between FDI and Company Laws is enormous. The Company Law provides for legal forms in which FDI vehicles can be carried out. Legal forms just like FDI vehicles play important role in decision of an investor to invest in a particular country, as depending on legal forms such crucial aspects as liability of investor as founder-stockholder and corporate governance are determined.

3.1. The Kyrgyz Republic

The KR Company Law consists of:¹³²

- KR Civil Code;
- Law of KR “on Business Partnerships and Companies” (hereinafter “KR Partnerships and Companies Law”);¹³³
- Law of KR “on Joint Stock Companies” (hereinafter “KR JSCs Law”).¹³⁴

Art.3.6 of KR Partnerships and Companies Law expressly stipulates that foreign legal persons and individuals may set up Partnerships and Companies within the territory of KR.

JVs can be established in various legal forms under the KR legislation. Although there is no legislative definition of JV and express regulation of forms in which JV can be carried out, JVs in KR may be created in the form of:

- Business Partnerships;
- Limited Liability Company;

¹³² Since the study is limited to the most widespread legal forms, Cooperatives regulated under the Law of KR on “Cooperatives” (hereinafter “KR Cooperative Law”) of June 2, 1999, N42 are not covered.

¹³³ Adopted on November 15, 1996, N60.

¹³⁴ Adopted on March 27, 2003, N64.

- Joint Stock Company.¹³⁵

WFOEs may be either in the form of Limited Liability Company or Joint Stock Company. As there is no difference between JVs and WFOEs with juridical person status in the form of Limited Liability Company or Joint Stock Company under the KR legislation, the detailed analysis of these legal forms is to be given one for both.

3.1.1. Partnerships

JV as a Business Partnership can be either General Partnership or Limited Partnership. JV in the form of General Partnership is a business partnership, “*the founders¹³⁶ of which bear joint and several liability for all its obligations with all their property*”.¹³⁷ Pursuant to Art.3.1 Both legal persons and individuals can be founders of General Partnership. There should be at least 2 partners¹³⁸. An individual “[...] *may be the founder of only one general partnership [...]*”.¹³⁹ Founders Agreement¹⁴⁰ signed by

¹³⁵ In addition, the form of Additional Liability Company (hereinafter “ALC”) or Cooperative is also available under the KR legislation. Cooperative according to Art.1 of the KR Cooperative Law is defined as “*voluntary amalgamation of individuals and/or legal entities formed on the basis of membership to satisfy financial and other needs by arrangement of joint activity set forth in its charter on democratic basis and by pooling of share contributions by its members*”. In accordance with Art.138 of KR civil Code ALC is recognized as an enterprise founded by one or more persons, the capital of which is divided into shares with the amount determined by the founding documents. The participants of ALC in regard to the obligations of ALC jointly bear complementary liability with their own property in proportion to the value of their contributions as determined by the founding documents of ALC. In case of bankruptcy of any participant, his/ her liability on the ALC’s obligations shall be distributed among the other participants proportionally to their contributions, unless another procedure for apportionment of liability is provided by the company’s founding documents. Due to the high additional liability that participants expose to this form is never voluntary chosen. There is a legislative requirement for pawn-shops to be registered in the form of ALC.

¹³⁶ The law uses the term “founders” for both partners and partners-founders.

¹³⁷ Art.10, KR Partnerships and Companies Law.

¹³⁸ *Ibid.*, Art.3.3.

¹³⁹ *Ibid.*, Art.3.1.

¹⁴⁰ Worldwide it is known as Partnership Agreement. In the founders agreement, the founders obligate themselves to establish a business partnership or company, to establish a procedure of activity for its creation and to determine: terms of transfer of the founders’ property to the property of the partnership or company; participation in its activities; distribution of profits and losses among founders; management of its activities; withdrawal from it; amount of parts (shares) of each founder; amount, form, timing and procedure of making contributions; liability of founders for violation of obligations to make contributions; and amount and composition of charter capital.

the founders is what is necessary to establish a General Partnership. The shares of founders in the property of a General Partnership are determined in percentage. However, founders of a business partnership or company may establish a different method to determine their shares in the property of the partnership.

According to Art.1.1 of the KR Partnerships and Companies Law the founders of a General Partnership have the right to:¹⁴¹

1. participate in the management of the general partnership pursuant to the procedures set forth in this Law and in the partnership's foundation documents, and which include the right to participate in the distribution of profits earned by the partnership;
2. receive full information on the activities of the general partnership, including the right to review accounting and other documents of the partnership;
3. receive profit from the activities of the general partnership according to the size of the founder's share in the property of the partnership if otherwise not provided by the foundation documents;
4. withdraw from the general partnership in accordance with established procedures;
5. in case of liquidation of the general partnership, to receive a part of its property or the value of the same corresponding to the founder's share of the property of the partnership remaining after satisfaction of creditors' claims.

The founders of a General Partnership have obligation to:¹⁴²

1. fulfill the provisions of the foundation documents of the general partnership;
2. participate in the activities of the general partnership in accordance with the procedure set forth in the foundation documents, including to conduct business on behalf of the partnership or to assist it in carrying out its activities;
3. make contributions in accordance with the procedure, form and amount set forth in the foundation documents of the general partnership;
4. refrain from conducting transactions on their own behalf and in their own interests which are similar to those which are areas of the partnership's activities;
5. not disclose information which the partnership considers a commercial secret.

Each founder of a General Partnership has the right to act on behalf of the partnership, if the founders agreement does not state that all its founders shall implement business activities jointly, or that conducting business affairs is delegated to specified

¹⁴¹ In accordance with Art.11.3 of KR Partnerships and Companies Law denial or restriction on the rights provided to founders of a General Partnership by this Law or other legislation, including by an agreement between the founders of the partnership, is invalid.

¹⁴² The list is deemed to be non-exhaustive as there might be other responsibilities provided by this Law, other legislative acts, and the foundation documents. Nevertheless, according to Art.11.6 of the KR Partnerships and Companies Law agreements among the founders of a General Partnership mandating them to undertake actions which are beyond the duties provided by this Law, other legislation and by the foundation documents, are invalid.

founders. The management in the General Partnership is as follows. General meeting of partners is a supreme body in the General Partnership.¹⁴³ A decision is made upon the consent of all partners, unless otherwise, for instance, decision by majority¹⁴⁴ provided in foundation documents.¹⁴⁵ Day-to-day management is carried out by the executive body¹⁴⁶, which may consist of one or more persons.¹⁴⁷ General Partnership may adopt either one tier or two tier governance structure. In case of two tier system Supervisory Board which is called “audit committee” monitors the activities of executive body.¹⁴⁸ The term of office of directors is to be agreed by the partners and stipulated in the founders agreement of the General Partnership.¹⁴⁹ Profits of General Partnership are distributed among the partners in proportion to the value of their contributions, unless otherwise provided by the founders agreement or by other agreement among founders.¹⁵⁰ In practice this form of joint venture is used for short-term projects. However, due to the liability regime investors tend not to set up JVs in the form of General Partnership.

Limited Partnership is another available legal form which lacks legal personality. A Limited Partnership is a business partnership which consists of one or more partners bearing joint and several liability for the obligations of the partnership with all their property (general partners), and of one or more partners whose liability is limited to the amount of contribution made to the capital of the partnership and who do not participate in conducting the partnership’s activities.¹⁵¹ From this definition it is clear that Limited

¹⁴³ Art.8.1, KR Partnerships and Companies Law.

¹⁴⁴ Each partner has one unless otherwise stipulated in founders agreement.

¹⁴⁵ Art.13.1, KR Partnerships and Companies Law.

¹⁴⁶ Worldwide known as sole director or board of directors.

¹⁴⁷ Art.8.2, KR Partnerships and Companies Law

¹⁴⁸ *Ibid.*, Art.8.4.

¹⁴⁹ *Ibid.*, Art.13.2.

¹⁵⁰ *Ibid.*, Art.22.1

¹⁵¹ *Ibid.*, Art.25.

Partnership is differentiated from General Partnership on the ground that it consists of not only general partners¹⁵² but also limited partners, the legal status of which is substantially different. According to Art.27.2 of the KR Partnerships and Companies Law limited partners may not have more than 50% of the capital.

Governance structure and management is the same as it is in General Partnership. Management is conducted by general partners. Since general partners retain the power and control over the partnership, the liability regime is much higher than the liability of limited partners, who are in fact making portfolio investment, pursuing to get only profit, not being involved in the management of the partnership. Therefore, the profits of a partnership are distributed among the participants proportionally to their contribution to the capital. Thus, the difference in the legal status between general and limited partners has no significance in this regard.

This form of Partnership, although being deemed as FDI, might be more suitable for investors who are interested in earning high profits only, limiting its liability, not intending to conduct management of the Partnership. It might be desirable in case investor is not familiar with peculiarities of the local legislation. However, no foreign investor will entrust the local partner with exclusive management right, as the JV in the form of Limited Partnership is totally based on trust-worthy relationships.

3.1.2. Limited Liability Company

A LLC is defined as *“a business company, the founders of which are not liable for its obligations and whose risk of losses connected with the activity of the company is*

¹⁵² The legal status of general partners in Limited Partnership and their liability for the obligations of the partnership is the same as in case with partners in General Partnership.

limited to the value of their investment".¹⁵³ The Founders Agreement and Charter¹⁵⁴ are the incorporation documents necessary for registration of LLC.¹⁵⁵ The Charter of LLC shall contain object clause - the scope of activities to be carried out by LLC. Anything beyond the scope is considered to be ultra virus. The same is true for JSC.

According to Art.128.2 of the KR Civil Code LLC shall have up to 30 shareholders.¹⁵⁶ The law expressly prohibits a single member legal person¹⁵⁷ being as a sole shareholder of LLC.¹⁵⁸ Shareholders have a right to participate in the management, receive all information and dividends, withdraw from the company and receive in case of liquidation of a company "*a part of its property or its value corresponding to their share of the property of the partnership remaining after satisfaction of creditors' claims*".¹⁵⁹

LLC is the most selected legal form for both JVs and WFOEs. Investors prefer LLCs for limited liability regime as well as low requirement of minimum registered capital which is 100 soms (about \$2) according to Art.38.1 of the KR Partnerships and Companies Law. Upon the registration at least half of the registered capital should be paid.¹⁶⁰ The remaining half has to be paid within a year after the registration.¹⁶¹ LLC is required to reduce its registered capital or file liquidation request if at the end of the second and subsequent fiscal years, the value of net assets of LLC is less than its registered capital.¹⁶² Upon the decision of the General Meeting of Shareholders

¹⁵³ Art.36, KR Partnerships and Companies Law.

¹⁵⁴ It is an equivalent of Articles of Association known in other jurisdictions.

¹⁵⁵ Art.4.1, KR Partnerships and Companies Law.

¹⁵⁶ In case the number of shareholders exceeds 30, then LLC has to be within a year re-organized into JSC, or upon expiry of such a term is subject to liquidation.

¹⁵⁷ It follows that an individual can be sole shareholder of LLC.

¹⁵⁸ Art.128.2, KR Civil Code.

¹⁵⁹ Art.37.1, KR Partnerships and Companies Law.

¹⁶⁰ *Ibid.*, Art.38.2.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*, Art.38.4.

(hereinafter “GMoS”) taken by two-thirds of votes, unless a unanimous decision is needed according to the Charter, additional contribution may be required.¹⁶³

Flexibility in corporate governance is another important reason why LLCs attract investors. There is no requirement for nationality of the directors. The KR legislation has provided total freedom in this regard. Just like in Business Partnerships LLC may adopt either one-tier or two-tier system, having either Board of Directors or Board of Directors (hereinafter “BoD”) and Supervisory Board (hereinafter “SB”).¹⁶⁴ GMoS is the supreme body, exclusive jurisdiction of which consists of:¹⁶⁵

1. amendments to the company's charter, including changes of the size of its charter capital;
2. establishment and recall of the company's executive bodies;
3. approval of a company's annual reports and balance sheets and distribution of its profits and losses;
4. adoption of decisions on reorganization or liquidation of the company;
5. election of an audit committee (auditor)¹⁶⁶ of the company.¹⁶⁷

The decision on these issues is taken by two-thirds of the total number of votes, while on other issues simple majority suffices, unless otherwise stipulated in the LLC’s Charter.¹⁶⁸

Art.40.7 of the KR Partnerships and Companies Law allows voting by proxies, provided that proxy is one of the LLC’s shareholders. LLC is entitled to issue bonds.¹⁶⁹

3.1.3. Joint Stock Company

JSCs in KR are regulated by Partnerships and Companies Law and KR JSCs Law, the latter being *lex specialis*. A JSC is recognized as a company, the capital of which is

¹⁶³ Art.50, KR Partnerships and Companies Law.

¹⁶⁴ *Ibid.*, Art.8.4.

¹⁶⁵ *Ibid.*, Art.40.4.

¹⁶⁶ Audit committee as has been stated above is a SB, members of which cannot be at the same time members of BoD. Pursuant to Art.41.2 SB may consist of persons, who are authorized to provide auditing services, of independent experts in the field of finance and accounting, and of other persons. SB has a right to inquire all necessary information.

¹⁶⁷ The Charter of LLC may also provide that other decisions have also to be taken by General Meeting of shareholders.

¹⁶⁸ Art.40.6, KR Partnerships and Companies Law.

¹⁶⁹ *Ibid.*, Art.39.

divided into certain number of shares of equal par value. *“Shareholders of JSC do not bear liability for the obligations of the company and bear risk for any losses connected with the company’s activity only to the extent of the value of their shares”*.¹⁷⁰ There is no pre-incorporation liability of JSC, founders *“have joint responsibility for liabilities related to its creation and arising before the state registration of the given company”*.¹⁷¹ A JSC can be formed by and consist of a single individual, but not a single-member legal person as a sole shareholder.¹⁷² The same founding documents as in case of LLC are required for JSC: notarized Founders Agreement signed by shareholders and ratified Charter.

The KR legislation distinguishes between Open JSC and Closed JSC.¹⁷³ Shares of Open JSC are distributed publicly,¹⁷⁴ whereas shares of Closed JSC are placed and circulated only among its participants or other preliminarily established group of persons.¹⁷⁵ The total number of shareholders in Closed JSC may not exceed 50,¹⁷⁶ otherwise within a year it has to be re-organized into Open JSC, or it is subject to mandatory liquidation if the number of shareholders has not decreased. Closed JSC might be desirable in case investors want to prevent acquisition of the control over the company, as distribution of shares among limited circle of persons means that BoD will not be overthrown and control will remain in the hands of investors.

¹⁷⁰ Art.52, KR Partnerships and Companies Law.

¹⁷¹ Art.10.3, KR JSCs Law. Art.143.2, KR Civil Code.

¹⁷² Art.142.5, KR Civil Code.

¹⁷³ This is the same as private and public corporations recognized in other countries, for instance in the US.

¹⁷⁴ In accordance with the Art.140 of the KR Civil Code a JSC in which participants can alienate their stocks without the consent of other shareholders is recognized as an open JSC.

¹⁷⁵ Art.2, KR JSCs Law.

¹⁷⁶ Pursuant to Art.7 of the KR JSCs Law the number of shareholders in Open JSC is not limited. The number of shareholders should not be considered as a decisive difference between Closed and Open JSC, as both may consist of a single individual shareholder.

Table 5. Comparison-contrast between Open and Closed JSCs in KR.

Criteria	LLC	JSC: open/ closed
Minimum registered capital	100 soms	1000 soms
Contribution before the registration	50%	100%
Min number of shareholders	1 individual, BUT not 1 single-member legal person	
Max number of shareholders	Up to 30	Closed : up to 50 Open: unlimited
Corporate governance	Either 1-tier or 2-tier system	2-tier system
Securitization	Only bonds	Any security

In accordance with Art.36 of the KR JSCs Law JSC has the following organs:¹⁷⁷

- GMoS;¹⁷⁸
- BoD;
- Executive body;¹⁷⁹
- SB.¹⁸⁰

From this it follows that JSC should necessarily adopt two-tier system, while LLC (*see the Table 5 above*) and Business Partnerships may chose either two-tier or one-tier system. There is a higher regulation of JSCs, hence, JSCs are less flexible than LLCs. Foreign investors prefer LLCs to JSCs, which is justified on several grounds. However, in some fields adoption of a form of JSCs is mandated under the KR legislation. For instance, banks in KR, may only be established in the form JSC.¹⁸¹

Another important aspect for foreign investors is requirement for minimum registered capital. According to Art.21 of the JSCs Law minimum registered capital of

¹⁷⁷ Art.36 of the KR JSCs Law is in line with Art.63 of the KR Partnerships and Companies Law, which stipulates the same bodies.

¹⁷⁸ It is the highest decision making body.

¹⁷⁹ It carries out day-to-day management.

¹⁸⁰ KR JSCs Law just like KR Partnerships and Companies Law uses the term “auditing committee” which is a SB known in other legislations.

¹⁸¹ Art.1.2 of the Law of KR “on Banks and Banking Activities in KR” (hereinafter “KR Banking Law”) of July 29, 1997, N 60 (last amendment dated April 27, 2009, N 136).

JSC cannot be less than 1000 soms (about \$20), which is ten times higher than for LLC LLC (*see the Table 5 above*). Despite the higher requirement, it is obviously not a problem for foreign investor aiming to enter the local market, who necessarily has much more capital for establishing a company in KR. Nevertheless, in general, setting up JSC can be considered more difficult. While only 50% of registered capital has to be paid at the moment of registration of LLC LLC (*see the Table 5 above*), in case of JSC registered capital should be fully paid,¹⁸² otherwise registration will be refused. In light of availability of capital, this might not cause obstacle for foreign investors. However, a requirement of registered capital should be taken into consideration when selecting between LLC and JSC legal forms for starting a business in KR.

More stringent regulation can also be seen from the Art.38.1 of the KR JSCs Law which contains long enumeration of exclusive jurisdiction of the GMoS in JSC:

1. Modification and additions to the charter of the Company or approval of the charter in the new wording;
2. Reorganization of the Company;
3. Liquidation of the Company, assignment of the liquidation commission and the approval of the liquidation balance;
4. Making decision to change (increase or reduce) the number of outstanding shares of the joint-stock company;
5. Making decision on the closed placement of shares additionally issued by the open company or the securities of the Company convertible into shares;
6. Making decision on non-use of the right of priority of the shareholder to purchase shares of the Company or the securities convertible into shares, as stipulated by this Law in Article 29;
7. Making decision on participation of the joint-stock company as the founder in the other legal person or purchase of securities or shares of participation of other companies costing 20 and more per cent of the balance cost of assets of the joint-stock company as of the date of making decision on fulfillment of such transaction;
8. Conversion of preference shares into simple ones;
9. Election of heads and members of a joint executive body of the Company or the person who is carrying out functions of an individual executive body of the Company (if the Company carries out activity without formation of a Board of Directors);
10. Making decision for the Company to place bonds and other securities;
11. Election of members of the auditing committee (auditor) of the Company and the prescheduled termination of their powers;
12. Making decision on the size and the order of payment of dividends;

¹⁸² Art.21, KR JSCs Law.

13. Approval of the amounts of paid compensation and indemnifications to members of Board of Directors;
14. Making decision on a cancellation of the decisions contradicting the legislation of the Kyrgyz Republic, adopted by previous general meetings of shareholders;
15. Use reserve and other funds of the Company;
16. Making decision on the prescheduled termination of powers of Board of Directors, an executive body of the Company if the Company carries out activity without formation of a Board of Directors;
17. Definition of quantitative membership of Board of Directors of the Company if the Charter does not determine the number of seats in Board of Directors;
18. Approval of the annual reports, accounting balances, accounts of profits and losses of the Company, distribution of its profits and losses;
19. Approval of the annual budget of the Company;
20. Approval of membership of the accounting commission;
21. Approval of the amounts of paid compensation and indemnifications to members of the auditing committee (auditor) of the Company;
22. Election of members of Board of Directors;
23. Solution of other issues referred to the competence of general meeting of shareholders by this Law, legislation of the Kyrgyz republic and the charter of the Company.

The Decision on the issues listed in 1-8 requires two-thirds of the total JSC's voting shares, while the decision on the issues listed in 9-18 two-thirds of the votes of shareholders participating in the GMoS is required.¹⁸³ For the remaining issues simple majority of votes of shareholders participating in the GMoS suffices.¹⁸⁴ GMoS is competent to hold decision provided that a quorum of more than 60% is satisfied.¹⁸⁵ In case of failure the second GMoS can be conducted under quorum of no less than 40%.¹⁸⁶ By default GMoS can consider issues listed in 2, 5-7, 10, 12, 15, 20 only upon the proposal of BoD, unless otherwise is provided in the JSC's Charter. Voting by proxies is permitted, as it is in the case with Business Partnerships and LLCs.

Despite the limited flexibility given to JSCs, investors may still prefer JSC in case of insufficient capital, thus, need for external investments through public offer of shares. The KR legislation entitles JSC, in contrast to LLC which has limited securitization

¹⁸³ Art.39.2, 4, KR JSCs Law.

¹⁸⁴ *Ibid.*, Art.39.5.

¹⁸⁵ *Ibid.*, Art.48.1.

¹⁸⁶ *Ibid.*, Art.48.3.

opportunities LLC (*see the Table 5 above*), to issue not only bonds but also other securities.¹⁸⁷

3.1.4. Registration of Limited Liability Company and Joint Stock Company

Registration of legal persons is regulated under the:

- Law of KR “on Registration of Legal Persons” (hereinafter “KR Law on Registration”);¹⁸⁸
- Decree of KR “on the Order of Registration of Legal Persons” (hereinafter “KR Decree on Registration”).¹⁸⁹

The registration system of legal persons in KR is far from being one-shop system. There are three bodies with which registration should be made:

- Ministry of Justice;¹⁹⁰
- Tax Authority;¹⁹¹
- National Statistical Committee.¹⁹²

A list of documents necessary for registration of legal persons with the Ministry of Justice is as follows:¹⁹³

1. Application for registration;
2. Charter and founding agreement of the newly established legal person approved by its founders’ meeting;
3. Minutes of the founders’ meeting on establishment of the legal person, approval of its charter and founding agreement, and appointment of managerial bodies;
4. Documents proving the location of the legal person (such as a lease agreement, an agreement on gratuitous use of premises, or an official letter);
5. Legalized¹⁹⁴ copies of founding documents of a foreign legal person that acts as a founder of the new legal person, with a notarized translation into the national or official language;

¹⁸⁷ Art.69, KR Partnerships and Companies Law.

¹⁸⁸ Adopted on July 12, 1996, N 39 (last amendment dated June 2, 2008, N 109).

¹⁸⁹ Adopted on December 3, 2003, N 180 (last amendment dated June 25, 2008, N 114).

¹⁹⁰ Registration is for the purpose of confirming the registration companies, recording the creation of companies and keeping registry thereof.

¹⁹¹ Registration is clearly for taxation purposes.

¹⁹² Registration is for the purpose of making annual statistics on existing companies.

¹⁹³ Art.13.1, KR Decree on Registration, Art.21, KR investment Law.

6. A legalized extract from a registry or another document proving that the foreign legal entity is an operating legal entity subject to legislation of its country, with a notarized translation into the national or official language.
7. A copy of passport or any other identification document foreign founder and notarized Kyrgyz or Russian translation thereof.

The registration should be completed within ten days from the time of submission of the pack of documents.¹⁹⁵ Although statutory it is ten days, in practice it takes up to fifteen days.¹⁹⁶ Upon the registration state registration certificate is issued.

Statistical registration is carried out within two days, upon which a statistical card is granted.¹⁹⁷ Registration with Tax authority is performed after the registration with the Ministry of Justice. The Tax authority registers legal persons and grants tax identification number (“ИНН” - INN).

The registration system can be characterized rather complicated, thus burdensome, serving for bureaucracy. However, the specified procedure is even more completed with the licensing procedure which is mandated for certain business activities under the Law of KR “on Licensing” (hereinafter “KR Licensing Law”).¹⁹⁸ According to some data it takes up to 225 days in order to get a license from relevant state agency¹⁹⁹ although in accordance with Art.15 of KR Licensing Law a license has to be issued within a month. A license gives the right to conduct certain business activities within the territory of KR.²⁰⁰ A fee for issuance of license is up to 300 soms (about \$6), re-issuance

¹⁹⁴ Legalization is made with the consular departments of embassy situated in KR. Legalization is not required for CIS countries.

¹⁹⁵ Art.10, KR Law on Registration.

¹⁹⁶ 2009 Index of Economic Freedom available at <http://www.heritage.org/Index/country/KyrgyzRepublic> (last visited on June 5, 2009).

¹⁹⁷ A legal person gets a unified identification code (“ОКПО” - OKPO).

¹⁹⁸ Adopted on March 3, 1997, N 12 (last revised April 28, 2007).

¹⁹⁹ 2009 Index of Economic Freedom available at <http://www.heritage.org/Index/country/KyrgyzRepublic> (last visited on June 5, 2009).

²⁰⁰ Art.2, KR Licensing Law.

of license cost 100 soms (about \$2)²⁰¹. Pursuant to Art.9 of the KR Licensing Law the following activities are subject to licensing:

- The search for, exploration and mining of mineral deposits;
- The design, construction (building) and use of hazardous production facilities;
- Construction of dams on rivers and water reservoirs;
- Hunting and capturing of birds included in the list approved by the government of the Kyrgyz Republic;
- Production and sale of drugs, vaccines and serums, medicines and medical equipment (with the exception of cases provided by legislation), perfumery, cosmetics, and chemicals (with the exception of trade companies selling soap, detergents, perfume and cosmetics on the basis of quality certificates of production companies);
- Production of beer, wine, champagne, liquors, vodka, cognac, and ethanol;
- Private medical and veterinary practice;
- The foundation and operation of gambling establishments, organization of gambling;
- All types of aviation work, acceptance and deployment of civil aircrafts, technical maintenance of aircrafts and their equipment within the territory of the Kyrgyz Republic;
- Urban planning, research and design of residential, public and production premises and structures;
- Construction and assembly jobs, with the exception of construction of individual residential houses;
- Private detective and security services;
- Banking operations, cash exchange transactions with foreign currency, services related to the execution of electronic payments, pawn shop activities, credit union activities, activities of legal entities raising money of individuals on conditions of repayment within an established term with interest;
- Professional activities with securities;
- Insurance activities;
- Activities of non-governmental pension funds;
- Activities in the field of postal and electric communication, data transfer, broadcast of television and radio programs, use of radio frequency spectrum, including the design, production, construction, and installation of required networks, lines, structures, systems, and facilities, with the exception of communications for use within a production facility;
- Trade in alcoholic beverages;
- The production, transfer, distribution, sale of electric power and heating energy and natural gas; oil and natural gas processing;
- Construction of electric power stations, substations and electric power lines;
- Auditing;
- Education, regardless of the level of education and form of ownership (with the exception of state education institutions offering pre-school, primary, basic, and secondary education programs);
- Import, development, production and sale of explosive and pyrotechnic materials and substances;
- Production, repair, and trade in weapons and ammunition;
- Mandatory certification works;
- The production and sale of virulent, poisonous, and radioactive substances;
- Utilization, placement, disposal and burial of toxic waste, including radioactive waste;
- Transportation (including trans-boundary transportation) of toxic waste;
- Administration of bankruptcy procedures;
- Legal practice (private notary services and advocacy);

²⁰¹ Art.16, Art.2, KR Licensing Law.

- Passenger transportation (with the exception of taxi cabs) and international cargo transportation by trucks, air, water, and railroad (with the exception of special, service and technology transportation, and transportation required for performance of activities for which a respective license has been issued); operation of bus stations;
- Collection and transportation of cash and valuables;
- Customs-related services (customs transporters, owner of temporary storage facilities, owner of a duty-free shop, customs broker).

According to Art.14 of KR Licensing Law in order to obtain a license, the following documents should be submitted:

1. Completed application form;
2. Documents proving the applicant's compliance with the respective legal requirements;²⁰²
3. Documents proving payment of state fee application review and license issuance;
4. A copy of the state registration certificate of the legal person;

Despite the equal treatment that has been granted to foreign investors in licensing issues,²⁰³ there substantial drawbacks of licensing procedure. First, there is no single licensing authority. Each activity is licensed with separate Ministries, Departments and State Agencies. For instances, banking activity is licensed with the National Bank of the Kyrgyz Republic (hereinafter “NBKR”), telecommunication – with the KR Ministry of Telecommunication, professional activities with securities – National Commission on Capital Market. Secondly, there is a number of separate laws²⁰⁴ that regulate business activities, under which state bodies have broad powers.²⁰⁵

3.1.5. Branch and Representative Office: Registration.

Before starting the business mapping the ground, i.e., studying and understanding the local market, might be significant for foreign company. This can be achieved through Branch or Representative Office (hereinafter “RO”). The KR legislation allows creation

²⁰² All necessary documents needed for conducting certain business activity which is subject to licensing.

²⁰³ Art.8, KR Licensing Law.

²⁰⁴ KR Banking Law, KR Law “on National Bank of KR”, KR Law “on Capital Markets”, KR Law “on Organization of Insurance”

²⁰⁵ American Chamber of Commerce in KR, Recommendations for Improving the Kyrgyz Business Climate in 2006, available at amcham.kg/files/downloads/AmChamBusinessAgenda.pdf (last visited on March 14, 2009).

of branch and representative office of foreign legal persons. Pursuant to Art.90 of the KR Civil Code RO is defined as a subdivision of legal person established for representation of a foreign legal person, protection of its interests, performance of transactions and other legal actions on its behalf. Branch is considered as a subdivision of legal person which performs all or part of the legal person's functions, including the function of representation. From the definition given above it is clear that RO is much limited in its scope of operation created for liaison purposes only. A branch or RO has a right to²⁰⁶:

- open bank accounts and execute payments in any currency;
- hire local employees;
- hire foreign employees and obtain relevant work permits for them;
- enter into any contractual relations with local and foreign companies and execute/assume liabilities under any agreements providing for payments in local or foreign currency;
- have permits for purchase or lease of immovable property.

Registration of RO or branch is much feasible than registration of LLC or JSC. The only purpose if registration is keeping record of ROs or branches created in KR. First, KR legislation provides for one shop-system. In accordance with Art.2.10 of the KR Decree on Registration representative office or branch registration is conducted with the KR Ministry of Justice. Secondly, it takes less time²⁰⁷ to register RO or branch, primarily because of the one-shop system. Pursuant to Art.9 of the KR Law on Registration the following documents are required for registration of RO or branch:

1. Application for registration;
2. Bylaws of the branch or representative office approved by the authorized body of the foreign legal entity;
3. Extract from the resolution of the authorized body of the foreign legal entity on establishment of the branch or representative office, approval of the bylaws of the branch or representative office, and appointment of the head of the branch or representative office;
4. Copy of the state registration (re-registration) certificate of the foreign legal entity;

²⁰⁶ Kalikova & Associates, Forms of Business in the Kyrgyz Republic, available at www.hg.org/article.asp?id=4897 (last visited on May 2, 2009).

²⁰⁷ It has to be noted that the duration of registration of branch or representative office is not specified in the KR Law on Registration, yet 10day period applies. However, due to the more simplified procedure it can be concluded that registration of branch or representative office takes much less time.

5. Documents proving location of the branch or representative office (such as a lease agreement, an agreement on gratuitous use of premises, or an official letter);
6. A power of attorney issued by the foreign legal entity to the head of its branch or representative office subject to the legislation of the Kyrgyz Republic, with a notarized translation into the national or official language;
7. Copies of notarized founding documents of the foreign legal entity that establishes a branch or representation office, with a notarized translation into the national or official language;
8. A legalized extract from a registry or another document proving that the entity opening the branch or representative office is an operating legal entity under the laws of its country, with a notarized translation into the national or official language;
9. A bank statement proving payment capacity of the legal entity that establishes a branch or representative office, with a notarized translation into the national or official language.²⁰⁸

Upon the examination of submitted documents, state registration certificate is granted.

3.1.6 Registration in FEZ

Any legal form mentioned above is available in FEZ. The simplified registration procedure adopted by the General Directorate of FEZ (hereinafter “FEZ Directorate”) governs registration of legal persons in FEZs. The registration has to be made with the FEZ Directorate. A company registered in FEZ obtains a special status.²⁰⁹ All the rules of KR Company Law on the corporate structure equally apply to FEZ enterprises.

3.2. The People’s Republic of China

The relationship between PRC Company Law²¹⁰ and FDI law is determined by Art.218 of the PRC Company Law, which states as follows: “*where there are otherwise different provisions in any law regarding foreign investment, such provisions shall prevail*”. This means that FDI law takes precedence over provisions of the PRC Company Law, and the PRC Company Law has complementary nature. Therefore, it is important

²⁰⁸ For registration of a branch or representative office of a foreign bank a permission issued by the National Bank of the Kyrgyz Republic is required.

²⁰⁹ This status grants certain privileges that are to be addressed in Part 4 of this Chapter.

²¹⁰ Adopted on December 29, 1993 (last revised October 27, 2005), available at <http://www.law-bridge.net/english/LAW/20064/0221042566163.html> (last visited on May 25, 2009).

for foreign investor setting up a company in PRC, first, to comply with the provisions of FDI Law. Although Partnerships under PRC are not part of the Company Law for comprehensive comparison of the Company Laws of KR and PRC the structure of CJVs being partnerships is addressed in this Part.

The PRC Company Law applies to LLCs, JSCs, branches and representative offices. As has been presented in Table 4 above, EJV and WFOEs possess legal personality. Pursuant to Art.8 of the WFOE Law a WFOE *“that meets the requirements regarding legal persons as stipulated by the laws of China shall obtain the status of a Chinese legal person according to law”*. Art.218 of the Company Law stipulates that *“Limited Liability Company and Joint Stock Companies invested by foreign investors shall be governed by the present Law”*. Thus, WFOEs can be either in the form of Limited Liability Company or Joint Stock Company.²¹¹ Yu and Gu suggest that WFOEs can *“adopt either legal person or non-legal person”*.²¹² Further they state that if a *“non-legal person form is adopted then WFOE can be in the form of partnership, sole proprietorship”* (Yu, Gu, p.273).²¹³ This statement is also doubtful, as WFOE without legal personality would not be attractive to foreign investors having full ownership in the company. From practical point of view, this form is not favored by foreign investors, although Art.8 of the PRC WFOEs Law provide for such an option.

In contrast to WFOEs Law, EJV Law has specifically stipulated that EJV *“shall take the form of a limited liability company”*.²¹⁴

²¹¹ Although according to Art.18 of the WFOE Implementation Rules, the form other than Limited Liability Company is subject to approval.

²¹² Yu, Guanghua and Minkang Gu. *Laws Affecting Business Transactions in the PRC*, Hague, London, Boston: Kluwer Law International, 2001, p.273.

²¹³ *Ibid.*

²¹⁴ Art.4, EJV Law.

According to Yu and Gu a CJV can be either a legal person or a non-legal person.

²¹⁵ This derives from Art.2 of the CJVs Law which reads as follows. “A *contractual joint venture which meets the conditions for being considered a legal person under Chinese law, shall acquire the status of a Chinese legal person in accordance with law*”. However, if CJV acquires legal personality it can no more be considered contractual, as it becomes EJV, Therefore, it is plausible to conclude that CVJ can only be without legal personality in the form of a partnership. Otherwise there is no need to have CJV as a specific type of JV.

The Table 6 presents available investment vehicles and legal forms know in KR and PRC. Yet, as has been stipulated in the Introduction the Thesis covers only most widespread vehicles and legal forms. The comparison between investment vehicles and legal forms known in KR and PRC can be characterized as follows.

Table 6. Investment vehicles and legal forms

Investment vehicles	KR	PRC
	Legal forms	
Joint venture [JV]	Limited Liability Company Additional Liability Company Joint Stock Company Partnership	EJV – Limited Liability Co CJV – Partnership
Wholly foreign owned company [WFOE]	Limited Liability Company Additional Liability Company Joint Stock Company	Limited Liability Company Joint Stock Company
Foreign Funded Holding company (FFHC)	<i>Specifically not addressed in the legislation</i>	Limited Liability Company Joint Stock Company
Foreign-Invested Commercial enterprise (FICE)	<i>Specifically not addressed in the legislation</i>	Limited Liability Company Joint Stock Company
BOT, BTO, BOO, BOOST,DBOT,DBOM,	<i>Not specified by the KR legislation</i>	No legal personality

²¹⁵ Yu, Guanghua and Minkang Gu. Laws Affecting Business Transactions in the PRC, Hague, London, Boston: Kluwer Law International, 2001, p.271

FBOOT, DOT, ROT, ROO, CAO ²¹⁶		
Branch office	No legal personality	No legal personality ²¹⁷
Representative office	No legal personality	No legal personality

3.2.1 Partnership

Since Partnership is the only available legal form for CJV in PRC, the structure of CJV-Partnership is to be examined. Unlike in KR, the procedure of establishment in PRC consists of two stages only: state approval and state registration. In order to set up a Partnership one must submit for the approval of PRC Ministry of Commerce (hereinafter “MOFCOM”):²¹⁸

- JV Agreement;²¹⁹
- The JV Contract;²²⁰ and
- The Articles of Association (hereinafter “AoA”)²²¹.

MOFCOM shall within 45 days from the day of submission of documents decide “*whether or not to grant approval*”,²²² and if approved MOFCOM issues approval certificate.²²³ After that within 30 days a registration of Partnership should be made with the Administration for Industry and Commerce (hereinafter “AIC”) in order to obtain a

²¹⁶ Project Companies that also fall under this group, nevertheless, have legal personality, unlike BOTs that do not.

²¹⁷ Branch office does not possess separate legal personality.

²¹⁸ Art.5, CJVs Law.

²¹⁹ It might seem to be confusing as PRC law mentions both JV Agreement and Contract. According to Art.10 of the CJVs Implementation Rules JV Agreement is defined as a “*written document whose principles and major points governing the JV establishment are agreed upon and concluded by all parties*”. JV Contract means a “*written document agreed upon and concluded by all parties on their rights and obligations for establishing the venture*”.

²²⁰ JV Contract becomes legally effective only after the approval.

²²¹ Pursuant to Art.10 of the CJVs Implementation Rules AoA is a “*written document drafted according to the joint venture contract and agreed upon by all parties on matters including the organizational principles, operation and management methods*”.

²²² Art.5, CJVs Law.

²²³ Schaub, Mark E. China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China. CCH Hong Kong Limited, 2006, p.210.

business license.²²⁴ Mark Schaub points that obtaining the business license is more difficult than the procedure of state approval.²²⁵ Yet, all the approval certificates are followed up by the business licenses.²²⁶

Furthermore, within 30 days after receiving the business license CJV-Partnership is required to carry out registration with the Tax agency.²²⁷ Partnership is also required to verify “*investments or conditions for cooperation provided by the Chinese and foreign parties [with] an accountant registered in China or the relevant authorities, who provide[s] a certificate after verification*”.²²⁸

Nevertheless, the system of PRC seems to be more business-friendly. While in KR there are three registration and one licensing bodies, PRC’s system, in general, requires two registrations and one licensing, subject to certain exceptions where separate operational license,²²⁹ in addition to business license, is required, for instance, transportation.²³⁰ This can be concluded even despite the time costly approval with MOFCOM which lasts for 1.5 months. In contrast, the registration in KR as has been stated earlier takes up to 10-15 days. A CJV “*shall conduct its operational and managerial activities in accordance with the approved contract*” and AoA.²³¹ In accordance with Art.12 the management is conducted through:

- a BoD; or
- a joint management body.

²²⁴ Art.6, CJVs Law.

²²⁵ Schaub, Mark E., China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China. CCH Hong Kong Limited, 2006, p.212.

²²⁶ *Ibid.*, p.212.

²²⁷ Art.6, CJVs Law.

²²⁸ *Ibid.*, Art.9.

²²⁹ Mark E Schaub also notes that for restricted projects extra approvals are required.

²³⁰ Schaub, Mark E., China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China. CCH Hong Kong Limited, 2006, p.213.

²³¹ Art.11, CJVs Law.

Day-to-day decisions can be taken by the general manager appointed or employed by the BoD upon the unanimous consent.²³² Art.12 stipulates that where the chairman of BoD is a Chinese party, foreign party shall take a position of deputy chairman. This is what is not present in KR, where there is total freedom.

The distribution of profits is a distinguishing feature of CJVs. Unlike in EJV where profits are distributed according to the value of contribution, the distribution of profits in CJV is unconnected to the contribution but is made in accordance with the contract. This is based on Art.21 which states that “*earnings or products, undertake risks and losses in accordance with the agreements prescribed in the contractual joint venture contract*”.

3.2.2. Limited Liability Company

PRC’s regulation of LLCs is to be analyzed in light of the EJVs Law, WFOEs Law and PRC Company Law. Art.3 of the PRC Company Law defines LLC as a company, shareholders of which are “*responsible for the company to the extent of the capital contributions they have paid*”.²³³ To set up a LLC the following conditions shall be met:²³⁴

1. The number of shareholders accords with the quorum;
2. The amount of capital contributions paid by the shareholders reaches the statutory minimum amount of the registered capital;
3. The articles of association are worked out jointly by shareholders;
4. The company has a name and its organizational structure complies with that of a limited liability company; and
5. The company has a domicile.

²³² Art.12, CJVs Law.

²³³ It is a critical distinguishing point between LLCs and JSCs, which amounts to slight difference in liability regimes outlined by the PRC Company Law.

²³⁴ Art.23, PRC Company Law.

LLC may not have more than 50 shareholders.²³⁵ The minimum registered capital for LLC is estimated to 30,000 RMB (about \$4,394.57).²³⁶ Art.26 of the PRC Company Law requires initial contribution²³⁷ of at least 20% of the registered capital, while the remaining 80% has to be paid off within two years from the time of establishment. Art.26 expressly stipulates that an initial contribution of 20% cannot be less than the statutory minimum registered capital. In comparison with KR, where \$2 suffices to create LLC, setting up LLC in PRC is obviously more costly, mandating to contribute at least \$4,394.57.

The PRC Company Law can be considered more stringent in a sense that it strictly monitors the contributions shareholders make. Pursuant to Art.29 of the PRC Company Law “the capital contributions made by shareholders shall be checked by a lawfully established capital verification institution, which shall issue a certification”. This kind of regulation does not exist in KR.

Having satisfied all the above mentioned conditions the following documents are submitted for the registration with the AIC to obtain business license:²³⁸

- company registration application,
- AoA;
- capital verification certificate;
- MOFCOM’s approval certificate.²³⁹

²³⁵ Art.24, PRC Company Law.

²³⁶ *Ibid.*, Art.26.

²³⁷ According to Art.27 of the PRC Company Law contribution to the registered capital can be either in cash or in kind, which is subject to independent evaluation, or both, provided that total contribution in cash amounts to no less than 30% of the registered capital.

²³⁸ Art.30, PRC Company Law.

²³⁹ It is important to note that, unlike CJVs, EJV’s are not required to register with Tax authority. Art.3 of the EJV’s Law mandates only to get approval from MOFTEC and obtain business license. However, it does

The object clause is what is very important for LLC. Just like in KR, PRC recognizes the doctrine of ultra virus. The business scope has to be specified in the AoA of LLC. The same requirement exists for JSCs.

Upon the completion of registration the business license is issued. However, for WFOEs it does not mean green light for operation. WFOEs are required to deal with:²⁴⁰

- registration with state and local tax authorities;
- foreign exchange registration;
- obtaining company seals (chops);
- organization code registration;
- customs registration;
- financial registration;
- statistics registration.

These registrations are very similar to what exists in KR for LLCs and JSCs. However, one can fairly say that the PRC's system in regard to WFOEs is much more bureaucratic as it requires a number of registrations with different state bodies.

Having satisfied all the requirement for establishment LLC has to issue a capital contribution certificate to all shareholders.²⁴¹

The governance structure of LLC is one of the most significant issues one should be aware of. Pursuant to Arts.37, 45 LLC shall have:

- GMoS;²⁴² and
- BoD.
- Manager.²⁴³

not mean that registration is not needed as for the taxation purposes any legal person is subject to registration with Tax authority.

²⁴⁰ Schaub, Mark E., *China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China*. CCH Hong Kong Limited, 2006, p.75.

²⁴¹ Art.32, PRC Company Law.

²⁴² Although neither of the FDI laws outline the GMoS, this organ shall be created at least when there is more than 2 shareholders.

²⁴³ Art.50, PRC Company Law.

As in case with LLCs JSCs in KR, the GMoS is the supreme body in LLC. The GMoS has a competence²⁴⁴ in:²⁴⁵

1. determining the company's operation guidelines and investment plans;
2. electing and changing the director and supervisors assumed by non-representatives of the employees, and determining the matters concerning their remuneration;
3. deliberating and approving the reports of the board of directors;
4. deliberating and approving the reports of the board of supervisors or the supervisor;
5. deliberating and approving annual financial budget plans and final account plans of the company;
6. deliberating and approving profit distribution plans and loss recovery plans of the company;
7. making resolutions on the increase or decrease of the company's registered capital;
8. making resolutions on the issuance of corporate bonds;
9. adopting resolutions on the assignment, split-up, change of company form, dissolution, liquidation of the company;
10. revising the articles of association of the company;
11. other functions as specified in the [AoA].

Decisions regarding the amendment of AoA, increase or decrease of the registered capital, merger, split-up, dissolution or change of the company form shall be taken by the two-thirds of the total voting rights.²⁴⁶ Shareholders of LLC have a right to access AoA, financial reports, resolutions of the meetings of the BoD and SB.

A Manager is hired by the BoD who is responsible for the day-to-day management with an authority as follows:²⁴⁷

1. taking charge of the management of the production and business operations of the company, and organizing to implement the resolutions of the board of directors;
2. organizing the execution of the company's annual operational plans and investment plans;
3. drafting plans on the establishment of the company's internal management departments;
4. drafting the company's basic management system;
5. formulating the company's concrete bylaws;
6. proposing to hire or dismiss the company's vice manager(s) and person(s) in charge of finance;
7. deciding on the hiring or dismissing of the persons-in-charge other than those who shall be decided by the board of directors; and
8. other authorities conferred by the board of directors.

The BoD of LLC shall consist of at least 3 directors²⁴⁸ with a maximum of 13 directors,²⁴⁹ the term office of which shall be no more than 3 years with a right of re-

²⁴⁴ Although the Law does not operate with the term “exclusive”, it is plausible to conclude that anything which is referred to the competence of GMoS is its exclusive competence.

²⁴⁵ Art.38, PRC Company Law.

²⁴⁶ *Ibid.*, Art.44.,.

²⁴⁷ *Ibid.*, Art.50.

election.²⁵⁰ Yet, pursuant to Art.31 of the EJV's Law a term office of 4 years has been outlined. The position of chairman and deputy-chairman should be held by the EJV parties.²⁵¹ To convene a meeting of BoD a quorum of two-third is required.²⁵² A BoD has to meet at least once a year.²⁵³ It exercises authority over:²⁵⁴

1. convening shareholders' meetings and reporting the status on work thereto;
2. carrying out the resolutions made at the shareholders' meetings;
3. determining the operation plans and investment plans;
4. working out the company's annual financial budget plans and final account plans;
5. working out the company's profit distribution plans and loss recovery plans;
6. working out the company's plans on the increase or decrease of registered capital, as well as on the issuance of corporate bonds;
7. working out the company's plans on merger, split-up, change of the company form, dissolution, and etc.;
8. making decisions on the establishment of the company's internal management departments;
9. making decisions on hiring or dismissing the company's manager and his remuneration, and, according to the nomination of the manager, deciding on the hiring or dismissing of vice manager(s) and the person in charge of finance as well as their remuneration;
10. working out the company's basic management system;
11. other functions as prescribed in the articles of association.

The PRC Company Law allows both one-tier and two-tier system for LLCs, which is equally true for LLCs in KR, as in PRC LLC may also set up SB,²⁵⁵ consisting of at least 3 persons,²⁵⁶ the term office of which shall be no more than 3 years with a right of re-election.²⁵⁷ The meetings of SB shall be take place at least once a year.²⁵⁸ The powers of SB comprise of:²⁵⁹

1. checking the financial affairs of the company;
2. supervising the duty-related acts of the directors and senior managers, and bringing forward proposals on the removal of any director or senior manager who violates any law,

²⁴⁸ Subject to exception pursuant to Art.51 of the PRC Company Law in case LLC is a small-scale company.

²⁴⁹ Art.45, PRC Company Law.

²⁵⁰ *Ibid.*, Art.46.

²⁵¹ Art.6, EJV's Law.

²⁵² Art.32, PRC Company Law.

²⁵³ *Ibid.*

²⁵⁴ Art.47, PRC Company Law.

²⁵⁵ *Ibid.*, Art.52.

²⁵⁶ LLC with less number of shareholders may one or two supervisors, having no board.

²⁵⁷ Art.53, PRC Company Law.

²⁵⁸ *Ibid.*, Art.56.

²⁵⁹ *Ibid.*, Art.54.

administrative regulation, the articles of association or any resolution of the shareholders' meeting;

3. demanding any director or senior manager to make corrections if his act has injured the interests of the company;
4. proposing to convening temporary shareholders' meetings, and convening and presiding over shareholders' meetings when the board of directors does not exercise the functions of convening and presiding over the shareholders' meetings as prescribed in this Law;
5. bringing forward proposals at shareholders' meetings;
6. initiating actions against directors or senior managers according to Article 152 of this Law;
7. other duties as prescribed by the articles of association.

The distinct feature of LLCs in PRC is that the PRC Company law contains special provisions on the one-person LLC.²⁶⁰ While LLCs and JSCs in KR cannot have as a sole shareholder single-member legal person, the PRC Company law permits one-person LLC defining it as a “*company with only one natural person shareholder or a juridical person shareholder*”.²⁶¹ An individual is precluded from establishing more than one sole-member LLC.²⁶² This can be true for WFOEs only, as EJV necessarily involves at least two shareholders, one being Chinese and another one foreign. AoA is the only founding document needed to be drafted.²⁶³ The structure one-person LLC is rather simple, no BD is created.²⁶⁴ The huge risk is involved in bear joint liability for losses of the company with personal property where the personal property is not distinct from the property of the company.²⁶⁵ Considering that the minimum registered capital for one-person LLC is higher than for a regular LLC, comprising of 100, 000 RMB, one may draw a conclusion that it is more costly to set up a one-person LLC, thus, LLC with at least 2 shareholders is suggested.

²⁶⁰ Arts.58-64, PRC Company Law.

²⁶¹ *Ibid.*, Art.58.

²⁶² *Ibid.*, Art.59.

²⁶³ *Ibid.*, Art.61.

²⁶⁴ *Ibid.*, Art.62.

²⁶⁵ *Ibid.*, Art.64.

3.2.3. Joint Stock Company

PRC's regulation of JSCs is to be analyzed in light of the WFOEs Law and PRC Company Law. Art.3 of the PRC Company Law defines JSC as a company, shareholders of which are "*responsible for the company to the extent of the shares they have subscribed to*". Art.95 of the PRC Company Law specifically prescribes that founders of JSC have the following responsibilities:

1. In the case of failure to establish the company, bearing joint liabilities for the debts and expenses resulted from the pre-establishment activities;
2. In the case of failure to establish the company, bearing joint liabilities for refunding the paid-in capital as well as the interests thereof computed at the bank interest rate for the same period; and
3. If the company's interest is injured in the course of its establishment due to the negligence of the initiators, being liable for making compensations to the company.

A list of conditions necessary to set up a JSC is same as outlined for LLC.²⁶⁶

What differs is the content. JSC shall have at least 2 founders, while the maximum number of shareholders may not exceed 200.²⁶⁷ Higher statutory standards can be seen from the provision requiring Chinese domicile for half of the total shareholders of JSC.²⁶⁸

The PRC Company Law distinguishes between JSCs established by promotion and by floatation. Floatation means public offer of shares.²⁶⁹ While promotion implies subscription of shares by founders only. Thus, this classification is comparable with open and closed JSCs known in KR, which are public and private corporations. The minimum registered capital for JSC established by floatation is much higher than for LLC, which is estimated for 5 million RMB²⁷⁰ (about \$732,429).²⁷¹ There is no minimum registered

²⁶⁶ Art.77, PRC Company Law.

²⁶⁷ *Ibid.*, Art.79.

²⁶⁸ *Ibid.*

²⁶⁹ Zhejiang China, The establishment of foreign-funded joint stock companies limited available at www.zj.gov.cn/zjforeign/english/.../userobject1ai10172.html (last visited on May 21, 2009).

²⁷⁰ Pursuant to Art.81 of the PRC Company Law the statutory minimum can be higher if law or administrative regulation outlines so.

²⁷¹ Art.81, PRC Company Law.

capital for JSC established by promotion. However, there is a requirement of initial contribution, which is the same as for LLCs, consisting of at least 20% of the total registered capital with an obligation to contribute²⁷² the remaining 80% within two years. Undoubtedly, the establishment of JSC in PRC is much more costly than it is in KR, where the minimum registered capital is only \$20. PRC is on the way to reduce the requirement of minimum registered capital. Up to 2006 minimum registered capital for JSC established by flotation was 10 million RMB.²⁷³

Similar to LLC JSC shall have GMoS,²⁷⁴ BoD²⁷⁵ and a manager. GMoS in JSC has the same powers as GMoS in LLC.²⁷⁶ The same is true for manager's authority.²⁷⁷ The BoD shall consist of at least 5 and at most 19 directors. The requirements concerning the term of office and re-election are the same as for LLCs: three years with a right of re-election. A quorum for the Meeting of BoD is presence of more than half of the directors. Decisions by BoD shall be adopted by more than 50% of all the directors. Practically if BoD has 11 directors, it may hold a meeting with a presence of 6 directors, but in order to adopt a resolution all the 6 directors should vote for, otherwise, quorum is not met.

In contrast to LLC, JSC is required to adopt two-tier system. Creation of SB consisting of 3 directors is must for JSC.²⁷⁸ Art.118 of the PRC Company Law mandates that SB comprise of representatives of shareholders and employees, where employees percentage shall be no less than one-thirds of the total number of directors. The SB shall have one chairman, elected by more than half of the directors, and one deputy

²⁷² The same rules of contributions outlined for LLCs apply for JSC (Arts.83, 27).

²⁷³ ZhongYi, Lowering of Registered Capital Requirement, available at <http://www.lawcase.org/archives/node/31> (last visited on May 21, 2009).

²⁷⁴ Art.99, PRC Company Law.

²⁷⁵ *Ibid.*, Art. 109.

²⁷⁶ *Ibid.*, Arts.100, 38.

²⁷⁷ *Ibid.*, Arts.114, 50.

²⁷⁸ *Ibid.*, Art.118.

chairman.²⁷⁹ While SB of LLC shall meet once a year, SB of JSC shall conduct at least 2 meetings: one meeting every 6 months.²⁸⁰ The same powers of LLC's SB are confirmed upon SB of JSC.²⁸¹

Chairman of the BoD, acting director or manager registered according to PRC law are authorized to represent JSC.²⁸² Unlike the KR Company Law, Art.147 of the PRC Company Law makes a list conditions under which a person is prohibited from holding a position of senior manager or director in BoD and SB in JSC and LLC:

1. Being without or with limited capacity of civil conduct;
2. He has been sentenced to any criminal penalty due to an offence of corruption, bribery, encroachment of property, misappropriation of property or disrupting the economic order of the socialist market economy and 5 years have not passed since the completion date of the execution of the penalty; or he has ever been deprived of his political rights due to any crime and 3 years have not passed since the completion date of the execution of the penalty;
3. Where he was a former director, factory director or manager of a company or enterprise which was bankrupt and liquidated, and was personally liable for the bankruptcy of such company or enterprise, three years have not passed since the date of completion of the bankruptcy and liquidation of the company or enterprise;
4. Where he was the legal representative of a company or enterprise, and the business license of this company or enterprise was revoked and this company or enterprise was ordered to close due to violation of the law, and he is personally liable for the revocation, three years have not passed since the date of the revocation of the business license thereof;
5. He has a relatively large amount of debt which is due but uncleared.

Furthermore, in contrast to KR, where only JSC is entitled to issue any securities, both JSC and LLC have a right of issuance of any kind of securities available under PRC legislation.²⁸³

Considering the features of JSCs it can be concluded that JSC in PRC is much more costly and strictly regulated form. Unless there are specific reasons, adoption of JSC for EJs and WFOEs is not suggested.

²⁷⁹ Art.118, PRC Company Law.

²⁸⁰ *Ibid.*, Art.120.

²⁸¹ *Ibid.*, Art.119.

²⁸² The same is true for LLC pursuant to Art.13 of the PRC Company Law.

²⁸³ Art.154, PRC Company Law.

3.2.4. Branch and Representative Office: Registration.

A RO is recognized as “*an office for liaison purposes only [which] is not entitled to carry out direct business activities*”.²⁸⁴ In contrast, a branch is entitled to conduct business activities, therefore, it is required to obtain a business license.²⁸⁵ Neither RO nor a branch possesses legal personality. Pursuant to Art.196 the branch of a foreign company created within the territory of PRC “*does not have the status of a juridical person*”. The foreign company is deemed liable for the business operation of the branch. A parent company bears responsibility “*for the obligations of the representative office*”.²⁸⁶

Pursuant to Art.194 a Branch must have a “*representative or an agent within the territory of China to take charge of the branch*”.²⁸⁷ In order to set up a branch in PRC a foreign company in order to obtain approval certificate shall submit with MOFCOM:²⁸⁸

- an application;
- AoA;
- company registration certificate as issued by the country of establishment.

Furthermore, a branch has to be registered with AIC in order to obtain a business license, the procedure for which is similar as for LLCs and JSCs.

Setting up RO can be considered as the best and quickest way of entering PRC's market.²⁸⁹ Mainly, RO is established:²⁹⁰

²⁸⁴ Schaub, Mark E., China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China. CCH Hong Kong Limited, 2006, p.93.

²⁸⁵ Art.193, PRC Company Law.

²⁸⁶ Schaub, Mark E., China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China. CCH Hong Kong Limited, 2006, p.93.

²⁸⁷ According to Deloitte Touche Tohmatsu “*a branch must appoint a Chinese legal representative*” (Deloitte Touche Tohmatsu, Establishing an Enterprise in China, available at http://www.israeltrade.org.cn/english/doing_business_with_china/000397/ (last visited on May 5, 2009))

²⁸⁸ Art.193, PRC Company Law.

- To monitor the activities of exporting goods to China;
- To support the activities of exporting goods;
- To monitor and exercise quality control over Chinese suppliers;
- To establish a presence in China in a sector which is prohibited or highly restricted, such as the telecommunications, insurance and transport sector.

RO may engage in such activities as:²⁹¹

- providing a presence for the foreign company in China;
- providing the parent company with office infrastructure on China;
- supervising the activities of the distributors;
- developing and assisting in sales activities;
- liaising with customers, suppliers and governments authorities;
- providing product training and information to distributors; and
- organizing/ coordinating advertising and seminars for the product.

The ROs are regulated by:

- Measures for Administration and Registration of Resident Representative Offices of Foreign Enterprises” (hereinafter “RO Registration Measures”);²⁹²
- Interim Provisions of the State Council of PRC for Resident Representative Offices (RO Interim Provisions);²⁹³
- Detailed Rules of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC)²⁹⁴ on the Approval and Control of the Resident Representative Offices of Foreign Enterprises;²⁹⁵

Pursuant to Art.4 of the RO Registration Measures RO has to be registered with AIC. A foreign company has to submit:

1. An application form signed by the chairman of the board of directors or the general manager of the enterprise. The application form shall include such details as the name of the resident representative office to be established,

²⁸⁹ Schaub, Mark E., China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China. CCH Hong Kong Limited, 2006, p.93.

²⁹⁰ *Ibid.*, p.94-95.

²⁹¹ *Ibid.*, p.94

²⁹² Adopted on March 5, 1983, available at <http://www.asianlii.org/cn/legis/cen/laws/mfaororroofe990/> (last visited on May 5, 2009).

²⁹³ Adopted on October 30, 1980, available at <http://www.asianlii.org/cn/legis/cen/laws/ipotscotpro633/> (last visited on May 5, 2009).

²⁹⁴ Renamed to MOFCOM – Ministry of Commerce.

²⁹⁵ Adopted on February 13, 1995, available at www.jus.uio.no/.../china...control.of.resident.representative.officers.../doc.html (last visited on May 5, 2009).

the name(s) of the responsible staff member(s), the scope of activity, duration and site of the office;

2. The legal document sanctioning the operation of that enterprise issued by the authorities of the country or the region in which that enterprise operates;
3. The capital creditability document(s) issued by the financial institution(s) having business contacts with that enterprise; and
4. The credentials and resumes of the staff members of the resident representative office appointed by that enterprise.

According to Schaub the following documents should also be presented:²⁹⁶

- appointment letter of the chief representative;
- resumes of the chief representative;
- ID page of the chief representative;
- Photos of the chief representative;
- Lease contract.²⁹⁷

Having analyzed the LLC, JSC, RO and Branch possibilities in KR and PRC, it can be concluded that establishment of RO and Branch is much easier, however, their scope of business activities is restricted in comparison to JSC and LLC. Especially this is true for RO. However, before starting actual operation in PRC entering PRC's and KR's market in the mode of a RO or Branch might be the best solution for a foreign investor.

4. STATE GUARANTEES AND INCENTIVES FOR FOREIGN DIRECT INVESTMENT

State guarantees and incentives for FDI are the core issues of this Thesis. Relying on incentives and guarantees provided under the legal framework foreign investors seeking to make profit in a particular country enter the market. This Chapter gives an

²⁹⁶ Schaub, Mark E., *China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China*. CCH Hong Kong Limited, 2006, p.95.

²⁹⁷ According to Deloitte Touche Tohmatsu A complete list of the Board of Directors, an explanation of the foreign company's areas of business interest are required (Deloitte Touche Tohmatsu, *Establishing an Enterprise in China*, available at http://www.israeltrade.org.cn/english/doing_business_with_china/000397/ (last visited on May 5, 2009)).

overview on tax and customs incentives, guarantees of remittance of profit, non-expropriation and other existing incentives and guarantees in KR and PRC.

4.1. The Kyrgyz Republic

4.1.1 State Guarantees

The major guarantee under the KR Investment Law is national treatment granted to foreign investors.²⁹⁸ No discrimination is allowed on the basis of “*citizenship, nationality, language, sex, race, religion, place of their economic activity and country of origin of investors or investments*”.²⁹⁹ Foreign investors enjoy freedom of movement within the territory of KR.³⁰⁰

One of the important guarantee provided by the KR Investment Law is protection from adverse changes in KR legislation. Foreign investors have the right within ten years from the date of approval of amendments introduced to the law to select more favorable conditions.³⁰¹ This, however, does not apply to amendment of KR Constitution, “tax legislation and legislation regarding state security, public health and environmental protection”.³⁰² Foreign legal persons and individuals can invest in any form to the objects and types of activities not prohibited by Kyrgyz law, including into the licensable types of activities.³⁰³ Art.5 of the KR Investment Law grants Guarantees of export or repatriation of investments, property and information outside KR. It includes repatriation of:³⁰⁴

²⁹⁸ Art.4.1, KR Investment Law

²⁹⁹ *Ibid.*, Art.4.3.

³⁰⁰ *Ibid.*, Art.4.2.

³⁰¹ *Ibid.*, Art.2.2.

³⁰² *Ibid.*

³⁰³ *Ibid.*, Art.4.8.

³⁰⁴ *Ibid.*, Art.5.1.

- profit from investments received as dividends, interest and other forms of proceeds;
- resources received by investors upon partial or full termination of investment activity in Kyrgyz Republic or alienation of investments, property and property rights, without prejudice to the investor's obligations to Kyrgyz Republic or any other lenders”.

In addition, information imported to KR by foreign investor can be freely repatriated.³⁰⁵

KR guarantees non-expropriation and compensation for losses.³⁰⁶ Foreign investors are protected from any form of expropriation. Exception is when expropriation is made for “*public interests on the basis of nondiscrimination, in observance of a proper legal order and is carried out with timely, appropriate and real compensation of damages, including lost profit*”.³⁰⁷ Compensation shall be:³⁰⁸

- equivalent to the fair market price of the expropriated investment or its part, including lost profit, fixed on the date of decision on expropriation
- realizable, paid in a freely convertible currency within the terms agreed by parties

As of today there were no cases of expropriation. National treatment is provided to foreign investors where damages suffered by force majeure.³⁰⁹

Total freedom is granted in use and disposal of proceeds and profit received from investment activities.³¹⁰ For the purpose of disposal and use a right to open accounts in the national and foreign currency is recognized.³¹¹ Art.8 of the KR Investment Law outlines the freedom of currency transactions³¹², which includes free convertibility of local currency, “*unbound and unrestricted money transfers*”³¹³.

³⁰⁵ Art.5.2, KR Investment Law

³⁰⁶ *Ibid.*, Art.6.

³⁰⁷ *Ibid.*, Art.6.1.

³⁰⁸ *Ibid.*, Art.6.2, 6.3.

³⁰⁹ *Ibid.*, Art.6.4.

³¹⁰ *Ibid.*, Art.7.1

³¹¹ *Ibid.*, Art.7.2.

³¹² Currency exchange control was abolished upon the membership of KR to IMF in 1992

³¹³ Kalikova & Associates, Investment Climate in the Kyrgyz Republic: Legal Aspects, available at <http://www.hg.org/article.asp?id=4897> (last visited on April4, 2009).

Foreign investors enjoy a right to freely access open-source information. Freedom of establishment is guaranteed pursuant to Art.10 of the KR Investment Law³¹⁴. All forms and types of property rights including intellectual property rights are protected by the KR legislation.³¹⁵ A right to lease land, building is recognized. Concession agreements can be concluded with the KR Government in fields not prohibited by the KR legislation.³¹⁶

4.1.2. Authorized State Body

The support and protection of investors' rights as well as promotion of investments in KR is realized through the authorized state body, which is confirmed with the following functions:³¹⁷

- ensuring connection between state bodies and investors;
- preparing and distributing information about investment opportunities and conditions in the Kyrgyz Republic
- advising potential investors on legal, economic and other issues regarding a specific activity;
- providing investors with the necessary information related to the procedure of permissibility to implement activities and provides necessary assistance;
- providing assistance in resolving problems of the existing and potential investors, including assistance and protection if they become faced with illegal actions or hindrances caused by the state and other bodies;
- developing proposals for all agencies of the Kyrgyz Republic concerning improvement of the investment climate in the Kyrgyz Republic;
- within its competence, representing the Kyrgyz Republic or participating on behalf of the Kyrgyz Republic in international negotiations or consultations on foreign investments;
- taking measures aimed on liability fulfillment of the Kyrgyz Republic coming out from international contracts, conducting actions on international cooperation, organizing learning and use of international experience in these spheres;
- advising any agencies and officials on the existing policy or a policy being planned in the area of investments;
- organizing and conducting competition of investment projects and programs jointly with interested ministries and bodies;
- performing other functions directed to the promotion of investments, maintenance and protection of investors in the Kyrgyz Republic.

The following state bodies are confirmed with aforementioned functions:

- Advisory Council for Foreign Investments;³¹⁸

³¹⁴ This issue has been discussed in details in Part 3 of this Chapter.

³¹⁵ Arts.10.9, 10.10, 10.11, KR Investment Law.

³¹⁶ *Ibid.*, Art.11.2.

³¹⁷ *Ibid.*, Art.14.1.

- Special Representative of the President of the Kyrgyz Republic for attraction of foreign investments;³¹⁹
- State Committee of the Kyrgyz Republic for State Property Management and Attraction of Direct Investments;³²⁰
- Center for Attraction of Direct Investments.³²¹

4.1.3. Incentives

Privileges and preferential treatment may be granted to foreign investors investing in “*the priority economic and social sectors and in certain areas of the Republic*”.³²² In general, there is no requirement of export or import license. It exists only in regard to such objects as weaponry, explosives, drugs and virulent poisons, precious metals and works of art.³²³ Special incentives are available in FEZs.³²⁴ The FEZs in KR are regulated by the KR FEZ Law and Decree of KR of the Bishkek FEZ (hereinafter “Bishkek FEZ Decree”).³²⁵ For the first time FEZ introduced special currency regime,³²⁶ which is now implemented everywhere in KR. FEZ has special customs and tax regimes.

Special customs regime includes customs exemption which applies to:³²⁷

- goods imported to FEZ regardless of the origin;³²⁸
- goods imported to FEZ for trans-shipment and re-export;³²⁹

³¹⁸ Decree of the KR President “on Additional Measures for Further Promoting of Attraction and Use of Foreign Investments” of August 22, 2001 N254.

³¹⁹ *Ibid.*

³²⁰ Created by the Resolution of the Government of the Kyrgyz Republic of March 23, 2001, N120.

³²¹ Decree of the KR President “on Additional Measures for Further Promoting of Attraction and Use of Foreign Investments” of August 22, 2001 N254.

³²² Art.4.7, KR Investment Law.

³²³ Embassy of KR to the Kingdom of Saudi Arabia, Business opportunities of the Kyrgyz Republic, available at www.kyrgyzembarabia.org/business.asp (last visited on April4, 2009).

³²⁴ Art.12, KR Investment Law. KR FEZ Law.

³²⁵ Adopted on November 11, 1995, N 474.

³²⁶ Art.7, KR FEZ Law.

³²⁷ *Ibid.*, Art.6.

³²⁸ Art.23, Bishkek FEZ Decree.

- export of goods abroad.

Export of goods outside of the FEZ within the territory of KR shall not be more than 30%.³³⁰ The production within the FEZ is primarily export-oriented. Thus, the FEZ companies are not suggested to export goods to KR as their levied with import duties, VAT of 12%³³¹ and excise tax (rate depends on the type of goods).³³²

Pursuant to Art.25 of the Bishkek FEZ Decree all Bishkek FEZ legal persons and entrepreneurs are exempted from taxes and duties.³³³ Nevertheless, social (33% of the salary fund) and personal income (10-20% of salary) taxes³³⁴ shall still be paid in accordance with the KR Tax Code.³³⁵ In addition there is also FEZ tax of 1-2% of turnover.³³⁶ Yet, in comparison to customs and tax regimes outside of the FEZ, FEZ special regimes can be considered as a great concession.

The other incentives can be characterized as:³³⁷

- exemption from quotation and licensing for exports of goods;
- direct access to utility suppliers;
- no duties on imported capital goods;
- no import duties on raw materials and components; and
- free export of equipment and supplies when no longer required.

It has to be noted that FEZ enterprises are disallowed:

- to produce and sell petroleum, liquor and tobacco products in FEZs;³³⁸

³²⁹ Except for a fee of 0,15% of the customs clearance in accordance with Art.25 of the Bishkek FEZ Decree.

³³⁰ Art.8, KR FEZ Law.

³³¹ Art.227, KR Tax Code.

³³² Art.23, Bishkek FEZ Decree.

³³³ Exemption does not apply to entities rendering services to the internal market of KR.

³³⁴ Embassy of KR to the Kingdom of Saudi Arabia, Business opportunities of the Kyrgyz Republic, available at www.kyrgyzembarabia.org/business.asp (ast visited April 4, 2009).

³³⁵ Art.23, Bishkek FEZ Decree.

³³⁶ Art.8, KR FEZ Law.

³³⁷ EBRD Annual Meeting, Kyrgyzstan Investment profile, Business Forum, April 2001, available at www.fifoost.org/kirgisist/kyrg.pdf (last visited on April 4, 2009).

³³⁸ Kyrgyzstan: Investments, available at http://eng.ibc.kg/kyrgyzstan/investment_in_kg/ (last visited on April 4, 2009).

- to sell goods to internal market of KR if value added to the cost of the goods is less than 30% (less than 15% for household appliances and electronics)³³⁹

While visa requirement exists in KR,³⁴⁰ the simplified FEZ entrance regime applies to foreign legal persons and individuals.³⁴¹ Labor issues are regulated by the collective labor agreement, however, it may not worsen the position of employees in comparison to regime established under KR Labor Code and Conventions of International Labor Organization to which KR is signatory.³⁴² The preferential treatment within the FEZs is valid for the entire duration of the FEZ enterprises.³⁴³

One may think that FEZ in KR is the only place where FDI incentives are present. Yet, incentives can be negotiated with the KR Government.³⁴⁴ The Kumtor Operating Company, for instance, obtained 5 years of tax holidays and “*indemnification of Cameco by Kyrgyzaltyn from taxation for an additional five years*”.³⁴⁵

4.1.4. Investment Dispute Settlement

Dispute settlement through arbitration is another major incentive that foreign investors may enjoy in KR. Parties may opt for ad hoc under the Arbitration Rules of United Nations Commission on International Trade Law³⁴⁶ (hereinafter “UNCITRAL

³³⁹ Art.17, KR FEZ Law.

³⁴⁰ Subject to international treaties, visa-free regime applies to nationals of certain countries.

³⁴¹ Art.11, KR FEZ Law.

³⁴² *Ibid.*, Art.9.

³⁴³ *Ibid.*, Art.12.

³⁴⁴ The tax holidays and other incentives for foreign investors were eliminated in accordance with IFI standards in order to join WTO (EBRD Annual Meeting, Kyrgyzstan Investment profile, Business Forum, April 2001, available at www.fifoost.org/kirgisist/kyrg.pdf (last visited on April 4, 2009)).

³⁴⁵ World Bank, Kyrgyz Republic: Update on the Mining Sector, Report No. 24709- KY, September 2002, available at <http://www.natural-resources.org/minerals/CD/twb.htm> (last visited on April 4, 2009).

³⁴⁶ Adopted by UNCITRAL on April 28, 1976.

Arbitration Rules”)³⁴⁷ or institutional arbitration selecting any Arbitral Institution. Upon accession to ICSID Convention, settlement of disputes by ICSID has become available.³⁴⁸ The disputes between foreign investors and physical and legal entities of KR can be resolved through domestic and international commercial arbitration.³⁴⁹ Mostly disputes are resolved under UNCITRAL rules either through ad hoc arbitration or by the arbitral tribunals under the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter “SCC”),³⁵⁰ London Court of International Arbitration, International Chamber of Commerce (hereinafter “ICC”) and International Court of Arbitration in Bishkek, Kyrgyz Republic³⁵¹ (ICA).³⁵²

It is important to note that KR is a member to NY Convention. Foreign arbitral awards are fully recognizable and enforceable unless grounds for non-recognition and non-enforcement under Art.V of the NY Convention are found.³⁵³

In the absence of any agreement on dispute settlement amicable resolution is encouraged where no agreement is reached. The dispute shall be resolved through the consultation between parties.³⁵⁴ Upon the failure of consultation the dispute is resolved through litigation in local courts.³⁵⁵

The arbitration practice of KR can be characterized by four cases, which represents use by investors of the arbitration opportunities given to them under the KR

³⁴⁷ Art.18.2, KR Investment Law.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*, 18.5.

³⁵⁰ Since USSR favored SCC, it has become a tradition to refer disputes to SCC for KR as well.

³⁵¹ ICA was created in 2003. Today many commercial disputes are referred to ICA, which composes of 141 experts from 20 countries (Kalikova & Associates, Investment Climate in the Kyrgyz Republic: Legal Aspects, available at <http://www.hg.org/article.asp?id=4897> (last visited on March 20, 2009)).

³⁵² Investment Guarantees and Privileges in the Kyrgyz Republic: Legal Aspects investmentcouncil.kg/.../investment_guaranteesLegal/eng'110209.ppt (last visited on April 4, 2009).

³⁵³ Art.342, KR Civil Procedural Code.

³⁵⁴ Art.18.5, KR Investment Law.

³⁵⁵ *Ibid.*

Investment Law. Within years of 2003 and 2008 KR as respondent was involved in the following arbitration proceedings:

- Petrobart Limited (UK) v. The Kyrgyz Republic;³⁵⁶
- Centerra Gold Inc. (Canada) and 2. Kumtor Gold Company (Kyrgyz Republic) v. The Kyrgyz Republic;³⁵⁷
- Oxus Gold (UK) v. Kyrgyz Republic;³⁵⁸
- Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. (US) v. Kyrgyz Republic³⁵⁹

A settlement by the parties has been reached in disputes Centerra Gold Inc. v. KR,³⁶⁰ and Oxus Gold v. KR³⁶¹. In Oxus Gold case UK company arbitrated a claim concerning the annulment of the mining license relying on the UK-KR BIT.³⁶² The information about the Centerra Gold dispute is not disclosed.

The dispute between Petrobart Limited and KR was resolved by arbitral tribunal consisting of 3 arbitrators under the Arbitration Institute of the SCC. The factual background of the case is as follows:³⁶³

Petrobart Ltd, registered in Gibraltar, contracted with KGM, the Kyrgyz state gas company, to supply and deliver 200,000 tons of gas condensate. Petrobart made five deliveries but was only paid for the first two as KGM was in severe financial difficulties. Petrobart sued KGM in the domestic Bishkek Court and obtained a debt judgment of the outstanding amount of US\$ 1.5 million. Following the request of the Vice Prime Minister of the Kyrgyz Republic, the Bishkek Court stayed the execution of that judgement for three months. During this period, pursuant to a Presidential decree, KGM was restructured, with the majority of its assets being transferred to other state-owned firms.

³⁵⁶ SCC, 2003.

³⁵⁷ Permanent Court of Arbitration, Netherlands, UNCITRAL, 2003.

³⁵⁸ UNCITRAL, 2006.

³⁵⁹ ICSID (still pending), 2006.

³⁶⁰ Some information can be found at www.kenesh.kg/zp/DocumentDownload.aspx?type=accompdoc...www.biicl.org/files/3912_2005_petrobart_v_kyrgyz_republic.pdf (last visited on April 4, 2009).

³⁶¹ Some information is available at http://www.dlapiper.com/files/upload/International_Arbitration_Newsletter_US.html (last visited on April 4, 2009).

³⁶² Mealey's International Arbitration Report, available at www.skadden.com/content/Publications/Publications1257_0.pdf (last visited on April 4, 2009).

³⁶³ Available at www.biicl.org/files/3912_2005_petrobart_v_kyrgyz_republic.pdf (last visited on April 4, 2009).

KGM was subsequently declared bankrupt, and Petrobart could not satisfy its debt judgment nor obtain any proceeds from the sale of assets. Petrobart initiated arbitral proceedings against the Kyrgyz Republic under the Energy Charter Treaty, claiming that the Republic, by means of its interventions in the judicial proceedings and the Presidential decree ordering KGM's reorganization, failed to provide it with stable, equitable, favorable and transparent conditions, as prescribed by Article 10(1) of the Treaty, and breached other articles of the Treaty. The parties agreed to an arbitration procedure on written submissions only.

The issue was whether KR has violated Art.10.1 of the Treaty that obliges to “*encourage and create stable, equitable, favorable and transparent conditions for Investors*”. The Arbitral Tribunal held that:

[...] the Kyrgyz Republic was under an obligation to carry out the KGM's reorganization in a way which would “respect” and protect the rights of Petrobart under the Treaty. The Tribunal held that the Vice Prime Minister's request to stay the execution of the judgment against KGM was an attempt to influence a judicial decision to Petrobart's detriment. The Tribunal concluded that the Kyrgyz Republic violated Article 10(1) and Article 10(12) of the Treaty.

The Tribunal awarded Petrobart Ltd. damages of US\$ 1.1 million plus simple interest according to UNIDROIT Principles (from the date of the debt judgment).³⁶⁴ The arbitral award was challenged in Swedish court but eventually it was not set aside. Yet, there is no information on the enforcement history of the award.³⁶⁵

Considering the arbitration precedents of KR, it can be concluded that foreign investors know their rights, and arbitration serves for effective mechanism for the dispute settlement.

4.2. The People's Republic of China

PRC is known with its preferential policies. It provides for a number of state guarantees and incentives. PRC is especially generous in tax incentives. The preferential

³⁶⁴ Available at www.biicl.org/files/3912_2005_petrobart_v_kyrgyz_republic.pdf (last visited on April 4, 2009).

³⁶⁵ Available at http://ita.law.uvic.ca/annulment_judicialreview_if_content.htm (last visited on April 4, 2009).

policy differs according to FDI vehicles, industries, provinces and zones. Therefore, state guarantees and incentives of PRC are to be analyzed accordingly.

4.2.1. State guarantees

State guarantees of PRC for foreign investors are specifically outlined in the WFOEs Law.³⁶⁶ PRC protects foreign investors against nationalization.³⁶⁷ The state guarantees protection of investments, profits and other lawful rights and interests of foreign investors.³⁶⁸ Art.5 of the WFOEs Law explicitly declares that WFOEs will not be nationalized, except for the need of social and public interests. WFOEs are granted with a right of remittance of profit and other lawful income earned through its activities in PRC.³⁶⁹

In accordance with Art.18 of the WFOEs Law WFOE's activities are subject to foreign exchange control. Despite liberalization of foreign exchange control, there are still some restrictions imposed on foreign exchange.

While China permits foreign investors liberal access to foreign exchange for current account transactions, like repatriating profits, capital account (financial investment) transactions are tightly restricted.³⁷⁰ To open and maintain foreign exchange accounts, foreign- invested enterprises apply to China's State Administration of Foreign Exchange (SAFE). SAFE determines the amount of foreign exchange the firm needs. Deposits above the limit SAFE sets must be converted to local currency. Enterprises authorized to conduct current account transactions can also retain foreign exchange equal to 50 percent of export earnings.

³⁶⁶ The same provisions cannot be found in EJV's and CJV's Laws, possibly because Chinese partner is involved in JVs. Whereas, there was high need to expressly confirm guarantees upon WFOEs in order to attract FDI in that mode.

³⁶⁷ Art.4, PRC-KR BIT.

2008 Investment Climate Statement – China, available at <http://www.state.gov/e/eeb/ifd/2008/103668.htm> (last visited on April 4, 2009)

³⁶⁸ Art.4, WFOEs Law.

³⁶⁹ *Ibid.*, Art.19.

Art.5, PRC-KR BIT.

³⁷⁰ 2008 Investment Climate Statement – China, available at <http://www.state.gov/e/eeb/ifd/2008/103668.htm> (last visited on April 4, 2009)

A right of establishment is recognized under the PRC Investment Laws and Company Law, according to which business license is required in order to operate in PRC. Nevertheless, as it has been analyzed in previous Part of this Chapter, every establishment with foreign participation requires MOFCOM's approval, which might be a barrier for foreign establishment in PRC. Yet, PRC's registration system is characterized relatively one-shop system.

PRC ensures protection of property rights. Land use based on lease is granted up to 70 years with a right of extension.³⁷¹ Protection of IPR has been given due regard.³⁷²

4.2.2. Authorized State Body

Investment issue and other related issues are under competence of three states bodies:

- MOFCOM;
- AIC;
- SAFE.

MOFCOM as has been mentioned earlier is a highest state authority in charge of foreign direct investment as any foreign project needs approval of MOFCOM. Next important authority is AIC, which carries out registration of entities and issues business licenses. Finally, foreign exchange control is performed by SAFE who is in charge of supervision and management of the foreign exchange market in PRC.

4.2.3. Incentives

Tax incentive was a major tool that fostered FDI in PRC. Since 1994, PRC has implemented uniform tax rates for foreign and domestic enterprise. Nevertheless, with a

³⁷¹ 2008 Investment Climate Statement – China, available at <http://www.state.gov/e/eeb/ifd/2008/103668.htm> (last visited on April 4, 2009)

³⁷² Will be discussed in next Part.

corporate income tax of 33% foreign enterprises enjoy, provided that they have a contract for at least 10 years, tax exemption for 2 years.³⁷³ Furthermore it is granted with 50% of tax reduction for another 3 years.³⁷⁴ If foreign investor is engaged in 70% of export, then it is eligible for another 5 years tax reduction of 50%.³⁷⁵

Every Investment Law of PRC granted special tax preferential treatment in the form of tax reduction, exemption and drawbacks. Pursuant to Art.20 of the CJVs Law CJVs may enjoy tax exemption or tax reduction. Chapter IX of the EJV's Law is specifically devoted to tax issues. Certain imports of capital goods for EJV are subject to exemption of reduction:³⁷⁶

1. machinery, equipment, parts and other materials ("other materials" here and hereinafter mean required materials for the joint venture's construction on the factory site and for the installation and reinforcement of machines,) which are part of the foreign party's share of investment according to the provisions of contract;
2. machinery, equipment, parts and other materials imported with funds which are part of the joint venture's total investment;
3. machinery, equipment, parts and other materials imported by the joint venture with additional capital under the approval of the examination and approval authority, and for which China cannot guarantee production and supply(4)raw materials, auxiliary materials, components, parts and packaging materials imported by the joint venture for production of export goods.

In addition, export of EJV's that do not fall under restricted industry enjoy tax exemption reduction or drawback.³⁷⁷

Normally, WFOEs are required to pay taxes. However, they are also granted preferential treatment in the form of tax reduction and exemption.³⁷⁸ Under the reinvestment of earned profits WFOEs may enjoy tax refund.³⁷⁹

³⁷³ Tseng, Wanda and Harm Zebregs, Foreign Direct Investment in China: Some Lessons for Other Countries, IMF Policy Discussion Paper, 2002, p.16, available at www.imf.org/external/pubs/ft/pdp/2002/pdp03.pdf (last visited on April 6, 2009).

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ Art.61, EJV's Law.

³⁷⁷ *Ibid.*

³⁷⁸ Art.17, WFOEs Law.

³⁷⁹ *Ibid.*

Special preferential policy can be seen in SEZs of PRC. A tax rate of 18% of income applies to both domestic and foreign enterprise.³⁸⁰ Preferential treatment comprises of 2-year exemption, 3-year reduction.³⁸¹ Foreign enterprises running advanced technology projects and those dealing primarily with exports enjoy five year of tax exemption followed by a tax reduction at a rate of 10%.³⁸² A province of Hainan has granted 5-year exemption and followed by 10% reduced tax preferential for infrastructure projects with a contract operation of at least 15 years.³⁸³ Similar preferential tax policy can be seen in Economic and Technology Development Zones, High Technology development Zones, Open Coastal Cities and so forth.³⁸⁴

4.2.4. Investment Dispute Settlement

Foreign investors in EJV may refer to arbitration based on Art.15 of the EJVs Law, which expressly states as follows:

Disputes arising between the parties to a joint venture that the board of directors cannot settle through consultation may be settled through mediation or arbitration by a Chinese arbitration agency or through arbitration by another arbitration agency agreed upon by the parties to the venture.

Art.25 of the CJV Law outlines the same principle. Moreover, arbitration is guaranteed under the PRC's BITs. Namely, Art.8 of the PRC-KR BIT outlines the Settlement of Disputes between an Investor and a Host State. In case of breach of any obligation arising under the BIT, an injured party may submit the dispute to international arbitration unless

³⁸⁰ Tseng, Wanda and Harm Zebregs, Foreign Direct Investment in China: Some Lessons for Other Countries, IMF Policy Discussion Paper, 2002, p.16, available at www.imf.org/external/pubs/ft/pdp/2002/pdp03.pdf (last visited on April 6, 2009).

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

amicable settlement is reached within 3 months.³⁸⁵ There are special procedures of nomination of arbitrators and decision making in the BIT.³⁸⁶ It has to be mentioned that Art.8.4 explicitly states that the Law of the country where investment is made is the governing law for disputes arising under the BIT.

Arbitration is an efficient alternative way of dispute resolution in PRC. Both ad hoc and institutional arbitration is available in PRC. Disputes may be resolved either by local or international arbitration institutions. Like in KR, SCC is the most widely referred arbitration institution in PRC, which is explained by the socialist history of the PRC, as all communist-socialist countries used to apply for the arbitration under the SCC. Settlement of disputes with ICSID became available upon PRC's accession to ICSID Convention in 1990.³⁸⁷

China International Economic and Trade Arbitration Commission (hereinafter "CIETAC") is a domestic arbitration institution created in 1956³⁸⁸ dealing with both foreign and domestic disputes.³⁸⁹ CIETAC is authorized to consider any commercial dispute, except for maritime issues, which is reserved for the China Maritime Arbitration Commission.³⁹⁰ CIETAC has become an important arbitration institution for foreign investors. Over 700 cases, which are mostly international, are filed with CIETAC.³⁹¹ However, there is a criticism that in disputes resolved by arbitral panel the presiding

³⁸⁵ Art.8.1, PRC-KR BIT.

³⁸⁶ *Ibid.*, Artr.8.2, 8.3.

³⁸⁷ As of today there is no ICSID case with participation China.

³⁸⁸ China International Economic and Trade Arbitration Commission, available at http://www.cietac.org.cn/english/introduction/intro_1.htm (last visited on May 17, 2009).

³⁸⁹ Mark A. Cymrot, Investment Disputes with China, *Dispute Resolution Journal*, Aug-Oct 2006, available at http://findarticles.com/p/articles/mi_qa3923/is_200608/ai_n16779631/?tag=content;coll (last visited on May 17, 2009).

³⁹⁰ *Ibid.*

³⁹¹ China International Economic and Trade Arbitration Commission, available at http://www.cietac.org.cn/english/introduction/intro_1.htm (last visited on May 17, 2009).

arbitrator appointed by CIETAC is usually Chinese. This situation may be considered as unfairness to foreign investor.³⁹²

Similarly to KR, PRC is also party NY Convention. Enforcement of foreign arbitral awards does not face any difficulties in PRC. Art.260 of the PRC Law of Civil Procedure contains the same grounds for refusal in recognition that are listed in Art.V of the NY Convention.³⁹³ Arts.70, 71 of the PRC Arbitration Law refer to the provisions of Art.260 of the PRC Law of Civil Procedure for setting aside and non-enforcement. “Only seven awards entered by the Hong Kong Judiciary between 1997 and September 2003 were set aside”,³⁹⁴ which constitutes 96% of successful enforcement of foreign arbitral awards in PRC. Hence, PRC provides arbitration opportunities to foreign investors and ensures the enforcement of the foreign arbitral awards in PRC.³⁹⁵

5. FOREIGN DIRECT INVESTMENT AND PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

Studying FDI necessarily requires analysis of legal regulation of Intellectual Property Rights (hereinafter “IPR”) in a particular country. Adequate protection of IPR given by national and international instruments is an important determinant of FDI attractiveness of a country as foreign investor may make contribution in-kind while

³⁹² Joseph Reynaud, *Playing Chinese Chess?: Fairness and Reform in CIETAC Arbitration Procedure*, 2-3 (Jan. 2006) in Mark A Cymrot, *Investment Disputes with China*, *Dispute Resolution Journal*, Aug-Oct 2006, available at http://findarticles.com/p/articles/mi_qa3923/is_200608/ai_n16779631/?tag=content;coll (last visited on May 17, 2009).

³⁹³ Before foreign “*arbitral awards rendered by a foreign affairs arbitration organ*” could have been refused in enforcement (José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?*, Oxford University Press, 2007.).

³⁹⁴ Dennis Unkovic, *Enforcing Arbitration Awards in China*, *Dispute Resolution Journal*, Nov 2004-Jan 2005, available at findarticles.com/p/articles/mi_qa3923/is.../ai_n9469143/ (last visited on May 17, 2009).

³⁹⁵ No investment cases were found with participation Chinese Government as respondent.

setting up a company. The contributions in-kind may involve transfer of patented technology or know-how. Moreover, foreign investor may establish a company under a pre-existed trademark that is registered and protected in its home country and in other countries. Thus, it is of importance for foreign investor to have IPR sufficiently protected in the host country.

5.1. The Kyrgyz Republic

Since its independence KR has acceded such international treaties as 1883 Paris Convention for the Protection of Industrial Property (hereinafter “Paris Convention”) ³⁹⁶, 1891 Madrid Agreement Concerning the International Registration of Marks (hereinafter “Madrid Agreement”), 1957 Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (hereinafter “Nice Agreement”), 1970 Patent Cooperation Treaty, 1994 Agreement on Trade-related Aspects of Intellectual Property Rights (hereinafter “TRIPS Agreement”) and 1994 Trademark law Treaty (hereinafter “TLT”) and 1994 Eurasian Patent Treaty. Furthermore, KR entered in bilateral agreements on protection of objects of industrial property with some countries of the Commonwealth of Independent States (hereinafter “CIS countries”). The correlation between the KR national legislation and International Agreement to which KR is signatory is resolved in favor of International Agreements where national rules deviate from International Agreements.³⁹⁷

5.1.1. Patents

³⁹⁶ A list of Conventions with dates of accession by the KR and PRC is presented in Annex II of the Thesis.

³⁹⁷ Art.40, KR Patent Law, Art.43, KR Trademark Law.

Patent issues in KR are regulated under the Patent Law of KR (hereinafter “KR Patent Law”)³⁹⁸, which was adopted soon after KR joined the WTO. The KR Patent Law protects:³⁹⁹

- inventions;
- utility models;
- industrial designs.

A patent for invention is valid for 20 years.⁴⁰⁰ An invention is subject to protection if it has:⁴⁰¹

- novelty;
- inventive level; and
- industrial applicability.

An invention is considered new “*if it is not known from the standard of technology*”,⁴⁰² which includes “*information [that] has become generally available in the world before the priority date of the invention*”. Inventive step is satisfied if does not obviously follow from the standard of technology.⁴⁰³ Patent meets industrial applicability condition if “*it may be used in industry, agriculture, public health service and in other branches of public economy*”.⁴⁰⁴

Invention has the highest criteria of patentability. In contrast, utility model is protected if it satisfies novelty and industrial applicability criteria.⁴⁰⁵ Utility model is recognized as “*new if the whole of its significant features is not known from the level of*

³⁹⁸ Adopted on July 25, 2002, N130.

³⁹⁹ Art.3, KR Patent Law.

⁴⁰⁰ *Ibid.*, Art.4. An invention patent related to pharmaceuticals can be extended for up to five years.

⁴⁰¹ *Ibid.*, Art.5.

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*, Art.6.

engineering".⁴⁰⁶ Industrial applicability is met if utility model can be "*practically used*". A utility model patent enjoys protection for 5 years with a possibility of prolongation up to 3 years.⁴⁰⁷

The least stringent criteria are established for industrial design. Industrial design has to be new or original. It can be characterized as "artistic and structural embodiments" of object.⁴⁰⁸ Industrial design possesses artistic, aesthetic features. Despite the lowest standards of patentability a patent for industrial design enjoys protection for 10 years with a possibility of extension up to 5 years.⁴⁰⁹

The ground for protection of patents in KR is national or international registration. The registration of patents in KR has to be made with KR State Patent Service (hereinafter the "Kyrgyzpatent").⁴¹⁰ Art. 39 expressly grants equal treatment to foreign legal persons and individuals. However, it is important to note that foreign legal persons can deal with patent registration only through patent agents registered at Kyrgyzpatent.⁴¹¹ The following documents shall be submitted:⁴¹²

- Completed application;
- The formula of the invention or utility model, the list of essential features of industrial design;
- Confirmation of payment of state fee.

An application for patent registration shall be in Kyrgyz or Russian language. The Kyrgyzpatent conducts preliminary review and substantive examination. Different time

⁴⁰⁶ Art.6, KR Patent Law.

⁴⁰⁷ *Ibid.*, Art.4.

⁴⁰⁸ *Ibid.*, Art.7.

⁴⁰⁹ *Ibid.*, Art.4.

⁴¹⁰ More information about Kyrgyzpatent can be found at www.kyrgyzpatent.kg (last visited on February 25, 2009).

⁴¹¹ Art.17, KR Patent Law.

⁴¹² *Ibid.*, Art.17.

frames for examination are established, for instance, examination of the Application for an Invention is made within 30 months.⁴¹³ The patent protection is effective since the publication of the information concerning the patent issue in the Official Bulletin issued by Kyrgyzpatent.⁴¹⁴ During the term of the patent it may be considered invalid in full or in part, due to the objection against its granting in the following cases:⁴¹⁵

- the protected decision does not meet requirements of patentability as provided by this Law,
- the formula of the invention, utility model or the list of the essential features of the industrial design contain features missing in the initial documents of the application;
- author (authors) or their owners have been incorrectly indicated in the patent.
- A person who filed an objection must give his/her reasons for it and submit a document
- certifying payment of a fee.

State fee is levied on filing an application, performing examination, registration and issuance of certificate for patent, extension of terms and any other legal actions conducted for registration of patent. The list of actions, amount and terms for payment of state fee are established by the Regulation “On duty for patenting inventions, utility models, industrial design, registration of trademarks, service marks and appellations of place of origin of goods” (hereinafter “KR Regulation on Registration Duty”). Amounts of the duties envisaged by the KR Regulation on Duty for Trademark Registration are established in conditional units (one conditional unit equals one US dollar). Calculations are made:⁴¹⁶

- for individual persons and legal entities of KR, residing or locating in the territory of KR - in soms, in amounts equivalent to the established amounts of duties according to the rate effective on the date of transaction;
- for individual persons and legal entities, residing or locating outside KR - in hard currency, taking into account the exchange rate against one US dollar as of the moment of payment.

⁴¹³ *Ibid.* Art.23.

⁴¹⁴ *Ibid.*, Art.11.

⁴¹⁵ *Ibid.*, Art.31.

⁴¹⁶ Art.2, KR Regulation on Registration Duty.

All fees are generally paid before the performance of corresponding actions. The following fees for filing an application for issuance of patent are established under the KR Regulation on Registration Duty:

- invention – \$55;
- several inventions – +20\$
- utility model – 20\$
- several utility models – +10\$
- industrial design – \$40
- from 2 up to 10 industrial designs – +20\$
- more than 10 industrial designs – +25\$

Fees for performance of substantive examination on invention are estimated to \$200 and \$300 for more than one invention.

Patent holder has an exclusive right of use, and right to prohibit others to use the patent.⁴¹⁷ In case of patent infringement patent holder may ask for:⁴¹⁸

- discontinue violation of a patent;
- indemnification of losses caused, including lost profit and compensation of moral damage by a person guilty of violation of a patent;
- exaction of income received by the infringer of a patent instead of indemnification of losses;
- payment of compensation by an infringer in the amount of 100 000 to 500 000 soms established by the legislation of the Kyrgyz Republic, determined at the discretion of court instead of indemnification of losses or exaction of income;
- confiscation of products to ones own benefit introduced to an economic turnover or stored for this purpose and considered as infringing a patent as well as means specially directed for the infringement of a patent;
- publication of court decision in order to rehabilitate his\her business reputation.

5.1.2. Trademarks

The Law of KR “On Trademarks, Service Marks and Appellations of Places of Origin of Goods” (hereinafter “KR Trademark Law”)⁴¹⁹ is a major Act that grants protection to trademarks. It was adopted in 1998 in light of the accession of KR to the WTO. In addition to KR Trademark Law, Arts.1108 - 1113 of the KR Civil Code

⁴¹⁷ Art.31, KR Patent Law.

⁴¹⁸ *Ibid.*, Art.16.

⁴¹⁹ Adopted on January 14, 1998, N 7 (amended on February 27, 2003, N 46).

regulate trademark protection. There are also a number of sub-legal acts regulating trademark registration and use issues.

Under the KR Trademark Law trademark is defined as designation that can distinguish goods (services)⁴²⁰ of one legal entity or individual from similar or homogeneous goods (services) of another legal entity or individual⁴²¹. According to the form of expression trademarks can be verbal, graphical, dimensional and combinational⁴²². There are also “other” marks or combination of trademarks such as visually distinguishable holographic marks and indications⁴²³.

Pursuant to Art.3 of the Trademark Law a trademark may be registered in the name of a legal entity as well as individual conducting entrepreneurial activity. Individuals acquire the status of entrepreneur from the moment of state registration as an individual entrepreneur⁴²⁴. The KR Trademark Law does not specify the nature of legal entities, however, it is presumed that commercial legal entities are implied, since producing goods and providing services refer to economic activity directed to gain profit. Non-commercial legal entities by their essence do not fall therein.

A designation is recognized as trademark only by virtue of registration, which can be either national or international. Just like patent registration the registration of trademarks in KR has to be made with Kyrgyzpatent. At the international arena the key body in the area of intellectual property regulation and protection, including trademarks

⁴²⁰ Legal regime of trademarks and service marks is virtually identical. The only difference is in the fact that trademarks identify goods, whereas service marks identify works and services. Both designations shall be mentioned throughout this paper as trademarks.

⁴²¹ Art.2, KR Trademark Law.

⁴²² *Ibid.*, Art.2.3.

⁴²³ Art.2.2, KR Trademark Filling Rules.

⁴²⁴ Art. 58.1, KR Civil Code.

is WIPO⁴²⁵. The fact of registration carries out a right-establishing meaning, since legal entity or individual become trademark owner only after registration.

The national registration procedure is specified in the Trademark Law and the Rules “On filing, submission and reviewing application for registration of trademark and service mark” (hereinafter “KR Trademark Filing Rules”), under which application for registration is deemed to be a ground for registration. Pursuant to Art.6 of the Trademark Law application can be filed either by legal entity or individual, in the name of which trademark is to be registered, or by patent agent or representative. Although Art. 43 expressly grants equal treatment to foreign legal persons and individuals, foreign legal entities and individuals are required to conduct registration through patent attorneys registered in the Kyrgyzpatent.⁴²⁶

Besides properly filled out application form, the following documents shall be enclosed with the application for a trademark pursuant to the Trademark Filing Rules and Art.6.8 of the Trademark Law [author’s translation]:

1. the document confirming payment of the state fee in the established amount;
2. the description of claimed designation;
3. the charter of a collective mark if the application is filed for a collective mark;
4. the power of attorney provided to patent agent or other representative, if application is filed by them;
5. the list of goods and services for which registration of the designation is being requested, if it is provided in attachment.

The application shall be filed and documents be submitted either in Kyrgyz or Russian languages. For the documents that were provided in foreign language translation shall be enclosed. The date of submission of documents in foreign language is considered to be the date of receipt of the documents by Kyrgyzpatent if translation is submitted within

⁴²⁵ More information about activities of the WIPO can be found at www.wipo.int (last visited on on March 20, 2009).

⁴²⁶ Law of the KR “On Patent Attorneys” dated February 19, 2001, N 24.

two months from the date their submission, otherwise, it is considered that they are submitted on the date of submission of translation.⁴²⁷

In application the date of priority should be specified. In accordance with Art.7 of the Trademark Law priority of trademark is established upon:

1. the date of filing of an application with Kyrgyzpatent; or
2. the date of filing of the first application in a member-state of the Paris Convention (conventional priority); or
3. the date of the open display of the exhibit at the official or officially recognized international exhibitions organized in the territory of one of the member-state of the Paris Convention (exhibition priority); or
4. the date of priority of the international registration of a trademark in compliance with the international agreements of KR.

The applicant wishing to exploit the right to the conventional priority or exhibition priority, must indicate this while filing the application for a trademark or within two months from the date of the receipt of the application by Kyrgyzpatent and attach the required documents confirming the legitimacy of such a claim, or present these documents within three months from of the date of receipt of the application by Kyrgyzpatent.⁴²⁸

In accordance with Art.4 of the KR Trademark Law the followings are considered to be absolute grounds for refusal from registration the designation, which [author's translation]:

- 1) does not have distinguishable capacity;
- 2) represents state coats of arms, banners or flags, official names of countries, emblems, abbreviated or full names of international organizations, official, control, guarantee and assay marks, seals, awards and other marks of distinction or those similar to them to the extent likely to cause confusion;
- 3) came into general use as designations of goods of a certain kind;
- 4) is generally accepted terms and symbols for the goods regarding to which terms and symbols are suggested to be used as marks;
- 5) is pointing to the appearance, quality, quantity, properties, purpose, value of products as well as to the place and time of their manufacture or sale.

⁴²⁷ Art. 2.8 (1), KR Trademark Filling Rules.

⁴²⁸ Art. 7.4, KR Trademark Law.

In addition to absolute grounds for refusal, the following designations are not allowed to be registered as trademarks or elements thereof [author's translation].⁴²⁹

- 1) the ones which are false or misleading for the consumer with respect to the good or its manufacturer;
- 2) the ones that represent or contain indication of place of origin of wines and strong alcoholic beverages that are protected under the International Agreements of KR, if these designations are used with regards to wines and strong alcoholic beverages that are not originated thereof, giving mistaken representation of the place of origin;
- 3) the ones contradicting public interests, principles of humanity and morals.

Art.5 of the KR Trademark Law stipulates relative grounds for refusal from registration, dividing designations on three groups [author's translation]:

1. designations that are identical or similar to the extent likely to cause confusion with regards to homogeneous goods:
 - trademarks earlier registered or filed for registration in KR in the name of another person with respect to the similar goods which have an earlier priority;
 - registered or filed for registration trade names with regards to identical or similar types of activity or goods or services;
 - other persons' trademarks protected by virtue of International Agreements of KR;
2. designations that are identical or similar to the extent likely to cause confusion with regards to kind of goods:
 - marks recognized as well-known trademarks in a proper manner in KR. The well-known criteria for a trademark are established by the Government of KR;
 - appellations of places of origin of goods, protected by the Trademark Law, except for appellations that are included as non-protect elements, being registered in the name of person or legal entity, who is entitled of right to use those appellations.
3. designations reproducing:
 - trade names (or a part of them) known on the territory of KR with respect to homogeneous goods owned by other persons who obtained the right for these names before the date of priority of an application for a trademark with respect to homogeneous;
 - names of works of science, literature and art or fragments thereof known in KR, without the consent of copyright holder or his legal successors;
 - names, surnames, pseudonyms and derivatives thereof, portraits and facsimiles of famous persons without the consent of these persons, their heirs, or in the event if such designations are the property of history and culture of KR - without permission of the Government of KR;
 - industrial designs, rights to which belong to other persons in KR, if an industrial design has the earliest priority as compared to an application for the registration of a trademark.

⁴²⁹ Art.2, KR Trademark Law.

According to Art.15 of the KR Trademark Law the trademark registration shall be valid for ten years from the date of submission of the application to Kyrgyzpatent. The effective term may be extended at the applicant's request filed during the last year of its validity, each time for another ten years provided that the fee has been paid. The applicant may be given at his request a six-month term after expiration of the term of registration, provided that a supplementary fee has been paid.

Filing an application for registration of a trademark and performing the preliminary examination:⁴³⁰

- for one class of ICGS - \$100;
- for each class of ICGS over one - +50\$;
- for one class of ICGS of the collective mark - \$300 \$;
- for each class of ICGS of the collective mark over one - +100\$.

Performing the examination of the designation applied:⁴³¹

- for one class of ICGS - \$250;
- for each class of ICGS over one - +125 \$;
- for one class of ICGS of the collective mark - \$500;
- for each class of ICGS of the collective mark over one - +125 \$.

For extension of the term for providing response on request made during the examination - \$75, for appeal of the decision of Appellate Council of Kyrgyzpatent on refusal in registration \$500 are levied.

In accordance with Art.25 of the KR Trademark Law registration of a trademark may be considered invalid in full or partially during the whole period of its validity if it has been conducted in violation of the requirements established in Art.4 of the present Law.

⁴³⁰ Part III, KR Regulation on Registration Duty.

⁴³¹ *Ibid.*

Registration of a trademark in violation of Art.5 may be considered invalid in full or partially during five years from the date of publication of the information on registration of a trademark in the Official Bulletin. Registration or use trademark in bad faith may be considered invalid during the whole period of its validity. Registration of a trademark may be considered invalid in full within the whole effective term if such registration is made in violation of the requirements concerning the subjects of trademark right.

Any person is allowed to file an appeal with the Appellate Council against registration of a trademark within the established period. The appeal against registration of a trademark must be examined during four months from the date of its receipt.

Legal entities and individual persons acquire the right to use registered on their names trademark on the entire territory of KR. They are entitled to enjoy that right for a term of 10 years from the date of filing an application to the Kyrgyzpatent, with unlimited term of extension.⁴³²

The right of a trademark owner is considered to be an absolute and monopoly right to trademark with regards to goods indicated in certificate. The exclusive right for a trademark arises since the date of publication of the information related to registration of a trademark in the State Register of the Trademarks and in the Official Bulletin issued by Kyrgyzpatent⁴³³. Trademark owner is entitled to exclusively use trademark or dispose a trademark, as well as prohibit its exploitation by other persons⁴³⁴.

The registration of trademark not only does grant monopoly right of use, but also imposes obligation of use. In accordance with Art.20.5 of the Trademark Law validity of

⁴³² Art.15.1, KR Trademark Law.

⁴³³ *Ibid.*, Art. 3.3.

⁴³⁴ *Ibid.*, Art.3.5.

the registration of a trademark may be terminated in full or in part in advance on the basis of court decision issued at the request of any person under the Art.40.4 of the Trademark Law in connection with non-use of a trademark within any three years from the date of registration or during three years preceding the filing of such statement.

National protection of trademarks within KR is ensured through national legal means. Although the international protection is guaranteed by the Paris Convention the realization of protection always occurs on the basis of national means of each country where protection is required.

Pursuant to Art.7.4 of KR Trademark Law unauthorized manufacture, use, import, offer for sale, sale or other introduction into an economic turnover or storage of a trademark with the same purpose or goods marked with that trademark or designation similar to it to the extent likely to cause confusion with respect to similar goods is acknowledged as infringement of trademark rights, since only trademark holder or licensee upon the licensing agreement is entitled to monopoly rights over trademark.

Art.41 of the KR Trademark Law grants civil, administrative and criminal protection. Therefore, the use of a trademark or designation similar to a trademark regarding similar goods or well-known trademark or designation similar to thereof or name of appellation of place of origin of goods or designation similar to appellation of place of origin of goods regarding any goods conflicting with the KR Trademark Law entails civil, administrative or criminal responsibility in accordance with the legislation of KR.

Protection of the civil rights from illegal use of a trademark, along with the demand to discontinue infringement or recover the losses caused, is provided by means of [author's translation]:

- publication of the court's decision for the purpose of restoring business reputation of the victim;
- removal of illegally used trademark or a designation similar to it to the extent likely to cause confusion from the product or its packing, or destruction of the prepared depiction of a trademark or designation similar to it to the extent likely to cause confusion;
- arrest or destruction of the goods in relation to which a trademark was used illegally.

Since trademark rights are deemed to be civil rights of trademark owner the choice with regard to applicable civil remedies is made by trademark owner.

Administrative responsibility occurs under the Code of KR on Administrative Responsibility (hereinafter "KR Administrative Code").⁴³⁵ Art.341 of the KR Administrative Code stipulates that [author's translation]:

- illegal use of warning mark for unregistered trademark provides administrative penalty of from 500 to 2000 soms (for individuals population) and from 1500 to 5000 soms (for official bodies);
- illegal use of another's trademark provides a penalty of from 500 to 2000 soms (for individuals population) and from 2000 to 10000 soms (for official bodies) with a confiscation of counterfeit goods.

Confiscated goods are object to destruction, unless trademark owner wishes to keep them⁴³⁶.

The customs measures provided under Arts.28-31 of KR Customs Code are considered to be administrative means of trademark protection as well.

The criminal responsibility arises under the Criminal Code of KR (hereinafter "KR Criminal Code").⁴³⁷ Arts.191 and 192 of Criminal Code provide that [author's translation]:

⁴³⁵ Adopted on August 4, 1998, N 114.

⁴³⁶ Art. 341 (Note), KR Administrative Code.

- illegal use of warning mark that caused a large damage, which is deemed to 1 000 000 soms, is punished with a penalty of from 10 000 to 20 000 soms or with triple ayip⁴³⁸ or with public labor from 120 to 180 hours;
- illegal use of another's trademark that caused a large damage is punished with a penalty of from 20 000 to 40 000 soms or with triple ayip or with public labor from 180 to 240 hours;
- use of advertisement with certainly false information with regards to goods and its producers and sellers is punished with a penalty of up to 50 000 soms or with public labor up to 100 hours;
- use of advertisement with certainly false information with regards to goods and its producers and sellers via mass media or if such actions caused a damage of 20 000 soms (for individuals) and 50 000 soms (for legal entities) is punished with triple ayip or a penalty of from 5 000 to 10 000 soms or with public labor of from 100 to 200 hours.

Criminal Procedural Code of KR (hereinafter "KR Criminal Procedural Code")⁴³⁹ grants trademark owner a right to bring a civil suit on compensation of damage under criminal procedure⁴⁴⁰. This suit is exempted from state fee⁴⁴¹. In case the suit was not revisited by the court the same law suit may be brought under civil procedure⁴⁴².

Despite wide variety of legal means against trademark infringement, the enforcement of trademark rights is still problematic. First of all, it should be noted that civil remedies should necessarily be accompanied with destruction of goods on which unauthorized trademark was used.

Secondly, criminal remedies are also not adequate, hence do not meet proportionality test. Public labor is not seriously taken by the population. In addition, trademark owner does not get any compensation from that. As for penalties for illegal trademark use they are not proportional.

Thirdly, state budget, unfortunately, is unable to afford storage, where doubtful goods are kept. Therefore, customs bodies do not wait until trademark owner gives a

⁴³⁷ Adopted on October 1, 1997, N 68.

⁴³⁸ Triple ayip is a form of penalty under which charged person pays triple of losses the victim suffered, 2/3 of which is given to the victim and 1/3 is withhold by the state to the state budget.

⁴³⁹ Adopted on June 30, 1999, N 62.

⁴⁴⁰ Art. 134, KR Criminal Procedural Code.

⁴⁴¹ *Ibid.*, Art.134.4.

⁴⁴² *Ibid.*, Art.134.3.

response. And as a consequence, counterfeit goods enter KR market. As a result, trademark rights are infringed.

Fourthly, there is no electronic system, a register of trademarks that should exist in accordance with customs legislation. Customs bodies works on the basis of written documents, which makes customs examination inefficient. Ideally, the customs bodies shall have a direct access to the register of Kyrgyzpatent that contains all registered trademarks in KR. This provides opportunity for trademark owner to prevent import of goods with unauthorized trademark.

Finally, enforcement of trademark rights faces a serious problem of grey market⁴⁴³ due to the gap in current Trademark Law concerning the principle of exhaustion of trademark rights, under which trademark owner is not allowed to prohibit the use of trademark with respect to goods that were lawfully entered into civil turnover either by trademark owner or under his consent.

5.2. The People's Republic of China

Despite the massive counterfeit production for which PRC is known, there is a comprehensive Intellectual Property legislation. PRC's legislation⁴⁴⁴ consist of the Patent Law of PRC (hereinafter "PRC Patent Law")⁴⁴⁵ and the Trademark Law of PRC

⁴⁴³ "The gray market (or parallel import) refers to the goods that are legitimately imported from abroad, carry a recognizable trademark or brand name, and are sold at significant discounts outside of the manufacturer's normal channels of distribution" (Grey Market, available at <http://www.referenceforbusiness.com/encyclopedia/Gov-Inc/Gray-Market.html> (last visited on May 1, 2009)).

⁴⁴⁴ For the purpose of the Thesis only patent and trademark laws are reflected.

⁴⁴⁵ Adopted on March 12, 1984, available at <http://www.chinaiprlaw.com/english/laws/laws4.htm> (last visited on April 21, 2001).

(hereinafter “PRC Trademark Law”)⁴⁴⁶. In 1985 PRC has signed Paris Convention, in 1993 PRC ratified Patent Cooperation Treaty, upon joining the WTO in 2001 PRC has become signatory to TRIPs Agreement.

5.2.1. Patents

There is no substantial difference in Patent regulation of PRC. As it is the case in KR, PRC recognizes patents on invention, utility models and industrial designs. There is higher standard for utility model. In fact, utility model is equalized with invention. Art.22 of the PRC Patent Law grants patent for utility model if it is new, inventive and practically applicable. In contrast, under KR Patent Law inventiveness is not required for utility models. Industrial designs in PRC shall meet the same conditions that are outlined for industrial designs in KR.

PRC provides similar protection term of 20 years and 10 years respectively for inventions and industrial designs.⁴⁴⁷ Utility models enjoy longer protection in PRC, which is 10 years.⁴⁴⁸

Patent administrative organ under the State Council is the state body authorized for registration. In order to register invention or utility model patent a request, a description and its abstract, and claims have to be submitted.⁴⁴⁹ Registration of industrial designs requires submission of request, drawings or photographs of the design.⁴⁵⁰ Similarly to KR, a right of priority is recognized under the PRC Patent Law.⁴⁵¹ The

⁴⁴⁶ Adopted on August 23, 1982, available at <http://www.chinaiprlaw.com/english/laws/laws11.htm> (last visited on April 21, 2001).

⁴⁴⁷ Art.42, PRC Patent Law.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*, Art.26.

⁴⁵⁰ *Ibid.*, Art.27.

⁴⁵¹ *Ibid.*, Arts.29, 30.

patent holder is required to “pay an annual fee beginning with the year in which the patent right was granted”.⁴⁵²

Patent infringement may be settled through consultations, or upon failure of consultation through the PRC courts.⁴⁵³ The PRC Patent Law contains special provisions on the damages that can be granted in case of patent infringement.⁴⁵⁴

5.2.2. Trademarks

Regulation, administration and protection of trademarks is provided under the PRC Trademark Law. The PRC regulation of trademarks does not differ from KR regulation. The main concepts are common for PRC. Similarly to KR, PRC adopted first-to file system.⁴⁵⁵ Protection to trademarks is granted upon the state registration,⁴⁵⁶ which shall be made with the Trademark Office of the AIC under the State Council.⁴⁵⁷ In order to be registered trademark has to be “distinctive as to be distinguishable, and shall not conflict with any prior right acquired by another person”.⁴⁵⁸ Thus, a sign cannot be registered as trademark if it:

- [comprises] of generic names, designs or models of the goods in respect of which the trademarks are used; -
- [has] direct reference to the quality, main raw materials, function, use, weight, quantity or other features of the goods in respect of which the trademarks are used; and
- [lacks] distinctive features.

Registration is refused for the following signs:⁴⁵⁹

⁴⁵² Art.43, PRC Patent Law.

⁴⁵³ *Ibid.*, Art.57.

⁴⁵⁴ *Ibid.*, Arts.57-59.

⁴⁵⁵ *Ibid.*, Art.29.

Mark E. Schaub, China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China. CCH Hong Kong Limited, 2006, p.316.

⁴⁵⁶ Art.3, PRC Trademark Law.

⁴⁵⁷ *Ibid.*, Art.2.

⁴⁵⁸ *Ibid.*, Art.9.

⁴⁵⁹ *Ibid.*, Art.10.

1. those identical with or similar to the State name, national flag, national emblem, military flag, or decorations, of the People's Republic of China, with names of the places where the Central and State organs are located, or with the names and designs of landmark buildings;
2. those identical with or similar to the State names, national flags, national emblems or military flags of foreign countries, except that the foreign state government agrees otherwise on the use;
3. those identical with or similar to the names, flags or emblems or names, of international intergovernmental organizations, except that the organizations agree otherwise on the use or that it is not easy for the use to mislead the public;
4. those identical with or similar to official signs and hallmarks, showing official control or warranty by them, except that the use thereof is otherwise authorized;
5. those identical with or similar to the symbols, or names, of the Red Cross or the Red Crescent;
6. those having the nature of discrimination against any nationality;
7. those having the nature of exaggeration and fraud in advertising goods; and
8. those detrimental to socialist morals or customs, or having other unhealthy influences.

In addition, geographical names as the administrative divisions cannot be used as trademark. In contrast to KR that recognizes dimensional trademarks, PRC Trademark Law expressly states that three-dimensional signs cannot be registered as trademarks.⁴⁶⁰ Being a signatory to the Paris Convention, PRC grants protection to well-known trademarks, however, to minimize risk of trademark infringement it is suggested to register well-known trademark in PRC.⁴⁶¹

Pursuant to Art.17 of the PRC Trademark Law foreign individual or legal person is entitled to apply for registration of trademark in PRC. In average the registration fee is \$500.⁴⁶² Similarly to KR, a right of priority is recognized under the PRC Trademark Law.⁴⁶³ Trademarks enjoy a protection of 10 years with a possibility of extension.

Trademark owner is granted an exclusive right of trademark use.⁴⁶⁴ Violation of exclusive right of trademark owner occurs upon the:⁴⁶⁵

⁴⁶⁰ Art.12, PRC Trademark Law.

⁴⁶¹ Mark E. Schaub, *China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China*. CCH Hong Kong Limited, 2006, p.316.

⁴⁶² *Ibid.*, p.317.

⁴⁶³ Art.25, PRC Trademark Law.

⁴⁶⁴ *Ibid.*, Arts.1, 51.

⁴⁶⁵ *Ibid.*, Art.52.

- use a trademark that is identical with or similar to a registered trademark in respect of the identical or similar goods without the authorization from the trademark registrant;
- [selling] goods that he knows bear a counterfeited registered trademark;
- counterfeiting, or to making, without authorization, representations of a registered trademark of another person, or to sell such representations of a registered trademark as were counterfeited, or made without authorization;
- replacement, without the consent of the trademark registrant, its or his registered trademark and market again the goods bearing the replaced trademark; or
- [making], in other respects, prejudice to the exclusive right of another person to use a registered trademark.

In case of trademark infringement caused by unlawful trademark registration trademark owner may within five years from the date of the registration of the trademark ask Trademark Review and Adjudication Board for adjudication to cancel the registered trademark.⁴⁶⁶ Similarly to KR PRC adopts a concept of non-use. Registration can be canceled.⁴⁶⁷

- where a registered trademark is altered unilaterally (that is, without the required registration);
- where the name, address or other registered matters concerning the registrant of a registered trademark are changed unilaterally (that is, without the required application),
- where the registered trademark is assigned unilaterally (that is, without the required approval); or
- where the use of the registered trademark has ceased for three consecutive years.

Trademark owner may ask PRC court to order cessation of the relevant act and to take measures for property preservation where there is “*evidence that another person is committing or will commit an infringement of the right to use its or his registered trademark, and that failure to promptly stop the infringement will cause irreparable damages to [...] legitimate rights and interests [of trademark owner]*”.⁴⁶⁸ Art.59 and 62 of the PRC Trademark Law outline civil and criminal liability for trademark infringement. Criminal sanctions are introduced in PRC Criminal Code.⁴⁶⁹ In addition to

⁴⁶⁶ Art.41, PRC Trademark Law.

⁴⁶⁷ *Ibid.*, Art.44.

⁴⁶⁸ *Ibid.*, Art.25.

⁴⁶⁹ Adopted on July 1, 1979, available at <http://www.com-law.net/findlaw/crime/criminallaw1.html> (last visited on March 14, 2009).

the protection provided under the PRC Trademark Law, trademarks are protected under Anti-Unfair Competition Law⁴⁷⁰ and Regulations on Customs Protection of Intellectual Property Rights of the PRC.⁴⁷¹

The major drawback of the trademark protection system is absence of the statutory definition of the concept of the “exhaustion of trademark rights”. It is identical situation that can be seen in KR. Both laws failed to introduce a concept that prevents parallel imports. Yet, in general, KR and PRC protection of patents and trademark can be considered as satisfactory. Legal framework of both KR and PRC is comprehensive. At least de jure, foreign investor enjoys full protection of its intellectual property rights when operating in KR and PRC. Nevertheless, de facto weakness of the enforcement of the legal provisions is great problem and is big concern for every foreign investor doing business in PRC and KR.

⁴⁷⁰ Adopted on September 2, 1993, available at www.eng.yn.gov.cn/yunnanEnglish/.../353269.html (last visited on March 14, 2009).

⁴⁷¹ Adopted on July 5, 1995 <http://www.asianlii.org/cn/legis/cen/laws/rotcpoipr756/> (last visited on March 14, 2009).

CONCLUSION

In light of the tremendous significance of FDI in economic development of a country the issue of FDI regulation is a venue for continues research and discussions. The study of FDI regulation helps in understanding the working mechanisms of the system, defining its advantages and shortcomings. The Thesis aimed to contribute in thorough analysis of KR investment policy in light of its legislation on the basis of a comparative systematic study of the PRC's legal framework.

The findings of the Thesis are as follows. PRC starting its open-door policy since 1979 has shown that adequate FDI regulation may bring the country enormous foreign capital contributing to the rapid economic progress. PRC's practice has also revealed that the legislation is a living organism, which has to be quickly adjusted to the needs of the market and economy. That is the way how PRC achieved its economic growth, that is why PRC's FDI regulation can be named as the most successful FDI story.

Although providing several incentives, PRC has significant restrictions on industries. Nevertheless, FDI is being constantly attracted by PRC. Investors do find favorable investment climate in PRC. Restrictions are not considered as obstacles either to enter the market or to operate in the market. This can be justified by non-legal factors such as market size and potential, geographical location and low-cost labor (*see Annex I*). Legal aspects play important role, but non-legal indicators do matter as well. The decision of investors is based upon the all aspects in totality.

In comparison to PRC, KR, as the study has revealed, has a satisfactory legal framework. It has to be admitted that *de jure*, out of FEZs investors receive no incentives. Yet, there is always possibility to get preferential tax and customs treatment under the

negotiation with the KR Government. In addition, KR ensures all the guarantees concerning the protection of investors' rights.

Despite the adequate legal instruments, the protection of IPR is a sensitive issue for both KR and PRC. The trademark laws have to be revised with introduction of clear cut concept of exhaustion of trademark rights. Moreover, KR needs to ensure enforcement of trademark right via strengthening the customs control and imposing higher civil and criminal sanctions in order to ensure effective IPR protection.

The major weakness of the KR FDI regulation, however, is its registration and licensing procedures. The registration of enterprises has to be made with three separate state authorities. On the top, a license is required to start a particular business activity, a list of which is rather broad. A foreign investor, thus, has to cope with obtaining of business certificate and licenses, which is obviously a huge obstacle for FDI admission. The thesis recommendation in this regard is simplification of the registration system with introduction of one-shop system and abolishment of license requirements.

Based on the study undertaken the answer to the two interlinked questions posed in the Introductory part is as follows. PRC is without any doubt managed to build investment-friendly climate primarily through the legislative tools. The national law of PRC satisfies the main needs of foreign investors. The success of PRC under the same conditions can be replicated by KR. However, the KR market, just like in case with Japan, will soon become saturated, i.e., the KR market has a limited potential. Nevertheless, there is some potential which should be properly employed by the country. Adequate regulation of FDI may bring KR enormous economic growth. It has to be emphasized that having a well build efficient FDI regulation KR will reach a new level of

economic progress. Good investment policy will always find a reaction from the side of investors. Hence, following the FDI regulation model of PRC KR will ensure high inflow of FDI, which will contribute to the development of the market and the entire economy.

ANNEX I

Indicators of FDI attractiveness of a country

Legal	Non-legal
Investment law <ul style="list-style-type: none"> - investment restricted industries - state guarantees - incentives - dispute resolution 	Size of a Market
Company law <ul style="list-style-type: none"> - legal form of doing business - registration procedure - requirements of minimum registered capital - flexibility of rules on corporate governance - nationality restrictions for directors 	Potential for Growth
Contract law <ul style="list-style-type: none"> - forms - enforcement - available remedies 	Geographic Location of a Country/ Export to other areas
Tax law <ul style="list-style-type: none"> - tax holidays - tax exemption - tax reduction 	Availability of Skilled Labor Force
Customs law <ul style="list-style-type: none"> - exemption from duties - drawbacks - lower duties 	Low-cost Labor
Labor law <ul style="list-style-type: none"> - age limit for workers - age limit for directors 	Lower material costs

- restriction on women/pregnant women employment	
Land law - recognition of foreigners' property rights on land - granting long-term lease on land	Infrastructure
Environmental law - max exhaustion of CO2 by cars - max exhaustion of CO2 by factories	Easy to develop products for local market
Intellectual Property Law - patents - know-how - trademarks	Political Stability
Anti-monopoly Law - M&A - Dominant position	Minimal Red Tape & Bureaucracy

ANNEX II

International organizations dealing directly or indirectly with FDI, to which KR and PRC are members (date of accession)

International organization	Kyrgyz Republic	People's Republic of China
WTO	December 20, 1998	December 11, 2001
MIGA	Sep 21, 1993	Apr 30, 1988
ICSID	June 5, 1995 ⁴⁷²	February 9, 1990
IBRD ⁴⁷³	September 18, 1992	December 27, 1945
IDA ⁴⁷⁴	September 24, 1992	September 24, 1960
IFC ⁴⁷⁵	February 11, 1993	January 15, 1969
IMF ⁴⁷⁶	May 8, 1992	December 27, 1945
NYC ⁴⁷⁷	18 December 1996	22 January 1987

⁴⁷² Signed by KR, yet not deposited since the Convention has not yet been ratified by the KR Parliament.

⁴⁷³ International Bank for Reconstruction and Development

⁴⁷⁴ International Development Association

⁴⁷⁵ International Finance Corporation

⁴⁷⁶ International Monetary Fund

⁴⁷⁷ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

BIBLIOGRAPHY

I. Normative Legal Acts

Kyrgyz Republic

Constitution of the Kyrgyz Republic of May 5, 1993 (in redaction of October 23, 2007, N 157).

Civil Code of the Kyrgyz Republic of May 8, 1996, N 16 (last amendment dated March 19, 2008, N 24).

Civil Procedural Code of the Kyrgyz Republic of November 24, 1999 N, 146 (last amendment dated July 25, 2008, N 168).

Criminal Code of the Kyrgyz Republic of September 1, 1997, N 68 (last amendment dated January 19, 2009, N 8).

Criminal Procedural Code of the Kyrgyz Republic of June 30, 1999, N 62 (last amendment dated October 17, 2008, N 220).

Land Code of the Kyrgyz Republic of June 2, 1999, N 45.

Customs Code of the Kyrgyz Republic of July 12, 2004, N 87.

Labor Code of the Kyrgyz Republic of August 4, 2004, N 106.

Tax Code of the Kyrgyz Republic of October 17, 2008, N 230 (as amended of January 10, 2009, N 5).

Law of the Kyrgyz Republic “on Investments in the Kyrgyz Republic” of March 27, 2003, N 66 (last amendment dated June 23, 2008, N 127).

Law of the Kyrgyz Republic “on Free Economic Zones (FEZ) in the Kyrgyz Republic” of December 16, 1992, N1076-XII.

Law of the Kyrgyz Republic “on Joint Stock Companies” of March 27, 2003, N 64 (last amendment dated January 19, 2009, N 7).

Law of the Kyrgyz Republic “on Business Partnerships and Companies” of November 15, 1996, N 60 (last amendment dated March 27, 2003, N 64).

Law of the Kyrgyz Republic “on Banks and Banking Activities in the Kyrgyz Republic” of July 29, 1997, N 60 (last amendment dated April 27, 2009, N 136).

Law of the Kyrgyz Republic “On Trademarks, Service Marks and Appellations of Places of Origin of Goods” dated January 14, 1998, N 7 (amendment dated February 27, 2003, N 46).

Patent Law of the Kyrgyz Republic of January 14, 1998 N 8 (last amendment dated February 27, 2003, N 46)

Law of the Kyrgyz Republic “on Employee's Inventions, Utility Models and Industrial Designs” of June 15, 1999, N 74.

Law of the Kyrgyz Republic “On Patent Attorney” of February 19, 2001, N 24 (last amendment dated March 31, 2005, N 58)

Law on Operations in Foreign Currency of July 5, 1995, N.6-I.

Law of the Kyrgyz Republic “on Licensing” of March 3, 1997, N 12 (last amendment dated April 28, 2007).

Law of the Kyrgyz Republic “on Registration of Legal Persons” of July 12, 1996, N 39 (last amendment dated June 2, 2008, N 109).

Law of the Kyrgyz Republic “on Restrictions of Monopolies, Development and Protection of Competition” of April 15, 1994, N 1487-XII (last amendment dated March 6, 2003, N 55).

Law of the KR “on Privatization of State Property in the Kyrgyz Republic” of March 2, 2002, N 31 (last amendment dated May 23, 2008, N 96).

Decree of the Kyrgyz Republic “on the Order of Registration of Legal Persons” of December 3, 2003, N 180 (last amendment dated June 25, 2008, N 114).

Decree of the Kyrgyz Republic “on “Bishkek” Free Economic Zone” of November 11, 1995, N 474.

People’s Republic of China

Constitution of the People’s Republic of China of December 4, 1982.

Law of the People’s Republic of China “on Sino-Foreign Equity Joint Ventures” of July 1, 1979 (amended April 4, 1990, March 15, 2001).

Law of the People’s Republic of China “on Chinese-Foreign Contractual Joint Ventures” April 13, 1988 (amended October 31, 2000).

Law of the People’s Republic of China “on Wholly Foreign Owned Enterprises” of April 12, 1986 (amended October 31, 2000).

Income Tax Law of the People’s Republic of China for Enterprises with Foreign Investment and Foreign Enterprises, of April 9, 1991.

Patent Law of the People’s Republic of China, March 12, 1984 (amended September 4, 1992, August 25, 2000).

Trademark Law of the People’s Republic of China of August 23, 1982 (amended February 22, 1993, October 27, 2001).

Arbitration Law of the People's Republic of China of August 31, 1994.

Law of Civil Procedure of the People’s Republic of China of April 9, 1991.

Provisions on Guiding Direction of Foreign Investment of February 11, 2002.

Catalog for the Guidance of Foreign Investment Industries of October 31, 2007.

Regulation for the Implementation of the Law “on Sino-Foreign Equity Joint Ventures” of September 20, 1983 by the State Council (last amended July 22, 2001).

Certain Regulations on the Subscription of Capital by the Parties to Sino-Foreign Equity Joint Ventures of December 30, 1987.

Detailed Rules for the Implementation of the Law of the PRC on Sino-Foreign Contractual Joint Ventures of August 7, 1995.

Detailed Rules for the Implementation of Law of the People’s Republic of China “on Wholly Foreign Owned Enterprises” of October 28, 1990 (last revised April 12, 2001).

II. International Conventions and Treaties

Convention Establishing the Multilateral Investment Guarantee Agency, 1985

International Convention on the Settlement of Investment Disputes, 1965

New York Convention on the Recognition and Enforcement of Arbitral Awards, 1958

Paris Convention for the Protection of Industrial Property, 1883

Madrid Agreement Concerning the International Registration of Marks, 1891

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957

Patent Cooperation Treaty, 1970

Agreement on Trade-related Aspects of Intellectual Property Rights, 1994

Trademark law Treaty (TLT,) 1994

Agreement between the Government of PRC and the Government of KR on the
Promotion and Reciprocal Protection of Investments, 1992

III. Monographs, Books and Collective Works

Enthoven, Adolf H., Jaroslav V. Sokolov, Valery V. Kovalev. Doing Business in Russia and the Other Former Soviet Republics: Accounting and Financial Management Issues. An Updated Study. Montvale, New Jersey: The Institute of Management Accounts. Texas: The Center for Accounting Development The University of Texas at Dallas Richardson, 1994.

Enthoven, Adolf H., Jaroslav V. Sokolov, Alexander M. Petrachkov. Doing Business in Russia and the Other Former Soviet Republics: Accounting and Joint Venture Issues. Montvale, New Jersey: Institute Management Accountants, 1992.

Goldsweig, David N., Rogers H. Cummings, eds. International Joint Ventures: A Practical Approach to Working with Foreign Investors in the U.S. and Abroad. Section of International Law and Practice, 1990.

Gottschalk, Jack A. The Global Trade & Investment Handbook. A Country-by-Country Reference to Business Practices, Regulations & Laws. Chicago Illinois, Cambridge England: Publishing Company, 1993.

Kronfol, Z.A., Protection of Foreign Investments, (1972).

Pollan, Thomas. Legal Framework for the Admission of FDI. Eleven International Publishing, 2006.

Schaub, Mark E. China the Art of Law: Chronicling Deals, Disasters, Greed, Stupidity and Occasional Success in the New China. CCH Hong Kong Limited, 2006.

Sherif, H. Seid. *Global Regulation of Foreign Direct Investment*. Ashgate Publishing Company, 2002.

Shihata, Ibrahim F.I. *Legal Treatment of Foreign Investment: "The World Bank Guidelines"*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1993.

Sun, Xiuping, Wen Chen, and Xiansheng Lei. *New Progress in China's Special Economic Zones*. Edited by Gao Shangquan and Chi Fulin. Beijing: Foreign Language Press, 1997.

Yu, Guanghua and Minkang Gu. *Laws Affecting Business Transactions in the PRC*. Hague, London, Boston: Kluwer Law International, 2001.

Vai Io Lo and Xiaowen Tian, *Law and investment in China: the legal and business environments after WTO accession*, Routledge, 2005.

IV. Scholarly Journals and Law Review Articles

Baker, James C. *Foreign Direct Investment in Less Developed Countries – The Role of ICSID and MIGA* (1999) Chapter 1-2, pp.3-28.

Bobukeeva M. *The Investment Climate in the Kyrgyz Republic*, available at www.basis.wisc.edu/live/institutions/Investment%20Eng.pdf (last visited on May 12, 2009).

Bruzynski A. *The Concept of Joint Venture and Legal Context for Joint Ventures in CMEA Countries*, 5 *Florida Int' L.J.* (1990), pp.183-192.

Cymrot, Mark A. *Investment Disputes with China*, *Dispute Resolution Journal*, Aug-Oct 2006, available at

http://findarticles.com/p/articles/mi_qa3923/is_200608/ai_n16779631/?tag=content;coll (last visited on May 17, 2009).

Djumaliev, Muktar. Capacity Building for Facilitation of trade and Investment: Experience of the Kyrgyz Republic, available at www.kyrgyzmission.net/Kyrgyz.doc (last visited on May 2, 2009)

EBRD Annual Meeting, Kyrgyzstan Investment profile, Business Forum, April 2001, available at www.fifoost.org/kirgisist/kyrg.pdf (last visited April 4, 2009).

Escher, Alfred. Current Developments, Legal Challenges and Definition of FDI in Bradlow D., Legal Aspects of Foreign Direct Investment (1999), pp.3-27, 51-67.

Fung K.C., Hitomi Iizaka, Sara Tong, Foreign Direct Investment in China: Policy, Trend and Impact, International conference on China's Economy in the 21st Century, June 2002, p.5

Graham, Edward M. and Erika Wada. Foreign Direct Investment in China: Effects on Growth and Economic Performance, Oxford University Press, 2001, available at <http://www.iie.com/publications/wp/01-3.pdf> (last visited on January 6, 2009).

Hooton, H.M. Structuring and Negotiating International Joint Ventures, Creighton Law Review (1994), pp.1013-1037.

Iachini, Daniela. Joint ventures and the law on foreign investments in the USSR, Springer Netherlands, Volume 1, Number 2 / June, 1991, pp.111 available at <http://www.springerlink.com/content/m1464343302u232m/> (last visited on March 11, 2009).

Isayev, U.T. Foreign Investment During the Transition: How to Attract It, and How to Make the Best Use of It, available at imf.org/external/np/eu2/kyrgyz/pdf/isayev.pdf (last visited on March 12, 2009).

Kalikova & Associates. Investment Climate in the Kyrgyz Republic: Legal Aspects, available at www.hg.org/article.asp?id=4897 (last visited on May 12, 2009).

Kalikova & Associates. Taxes and Duties in the Kyrgyz Republic, available at www.hg.org/article.asp?id=4920 (last visited on May 11, 2009).

Kamalov, Zalkar. The Investment Sector and TNC Activities in the Kyrgyz Republic, CA&CC Publishing House Press available at http://www.ca-c.org/online/2006/journal_eng/cac-04/08.kamaloven.shtml (last visited on May 10, 2009).

McGhie, Teresa. Bilateral and Multilateral Investment Treaties, in Bradlow D., Legal Aspects of Foreign Direct Investment (1999), pp.107-123.

Neil Sorensen, Bilateral Investment Treaties and Disputes, IATP, 2001, available at http://www.bilaterals.org/article.php3?id_article=122 (last visited on May 12, 2009).

Otorbaev, Joomart. Challenges for Economic Development of the Kyrgyz Republic and Central Asia, October 5, 2004. available at <http://www.carnegieendowment.org/events/?fa=eventDetail&id=742> (last visited on March 11, 2009).

Ping, Deng. WFOEs: The Most Popular Entry Mode into China, *Business Horizons*, July 1, 2001, available at http://www.accessmylibrary.com/coms2/summary_0286-27044329_ITM (last visited on May 14, 2009).

Postel, Eric G. and Yuri Nevenchanny, *Kyrgyzstan - A Jewel of Central Asia*, available at <http://www.pangaeapartners.com/kyrgyz1.htm> (last visited on May 14, 2009).

Renwald, Jessica Zoe. *Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, (2006) 16 *Ind. Int'l & Comp. L. Rev.* 453, pp.454-491.

Reynaud, Joseph. "Playing Chinese Chess?: Fairness and Reform in CIETAC Arbitration Procedure," 2-3 (Jan. 2006) in Cymrot, Mark A., *Investment Disputes with China*, *Dispute Resolution Journal*, Aug-Oct 2006, available at http://findarticles.com/p/articles/mi_qa3923/is_200608/ai_n16779631/?tag=content;col (last visited on May 17, 2009).

Seidle-Hohenveldern, Ignaz. *Hierarchy of Norms Applicable to International Investments*, in *Collected Essays on International Investments and International Organizations* (1999) Chapter 1, pp.189-202.

Shestakova I.V. *Foreign Direct Investment in development of county's economy*, "Bankovskiy vestnik Kyrgyzskoi Respubliki" (Банковский вестник Кыргызской Республики), N 9 (117), September 2004.

Secretary for Economic, Energy and Agricultural Affairs, *Bureau of Economic, Energy and Business Affairs*, 2008 *Investment Climate Statement – China*, available at <http://www.state.gov/e/eeb/ifd/2008/103668.htm> (last visited on April 4, 2009).

- Tseng, Wanda and Harm Zebregs. Foreign Direct Investment in China: Some Lessons for Other Countries, IMF Policy Discussion Paper, 2002, p.16, available at www.imf.org/external/pubs/ft/pdp/2002/pdp03.pdf (last visited on April 6, 2009).
- Umurzakov, Kubat. Country Report: Investment Climate in Kyrgyzstan, United Nations Economic and Social Commission for Asia and the Pacific. Regional Round Table on Foreign Direct Investment for Central Asia, April 3-4, 2003, available at www.unescap.org/tid/mtg/rrtpaper_kyrgyz.pdf. (last visited on May 17, 2009).
- Unkovic, Dennis. Enforcing Arbitration Awards in China, Dispute Resolution Journal, Nov 2004 - Jan 2005, available at findarticles.com/p/articles/mi_qa3923/is.../ai_n9469143/ (last visited on May 17, 2009).
- White III, George O. Enter the Dragon: Foreign Direct Investment Laws and Policies in the P.R.C., 2003 29 N.C. J. Int'l L. & Com. Reg. 35, pp.36-58.
- Yin, Jason Z. FDI Diversion to China and Policy Options for Kyrgyzstan, SHU/UNITAR, February 28-March 2, 2005, available at <http://www2.unitar.org/hiroshima/programmes/ief05-kr/speaker> (last visited on March 11, 2009).
- Zeng, Huaqun. Promoting a New Bilateral Legal Framework for China-EU Economic Relations. *Chinese Journal of International Law* 3, no.1 (2004): 189-225.
- Zhejiang China, The establishment of foreign-funded joint stock companies limited available at www.zj.gov.cn/zjforeign/english/.../userobject1ai10172.html.
- ZhongYi, Lowering of Registered Capital Requirement, available at <http://www.lawcase.org/archives/node/31> (last visited on May 21, 2009).

V. Reports and Publications

American Chamber of Commerce in KR, Recommendations for Improving the Kyrgyz Business Climate in 2006, available at amcham.kg/files/downloads/AmChamBusinessAgenda.pdf (last visited on March 14, 2009).

Asian Development Outlook 2008 for the Kyrgyz Republic available at www.adb.org/Documents/Books/ADO/2008/kgz.pdf (last visited on June 5, 2009).

British Embassy, Commercial Department. Setting up a Representative office in China, available at www.eastmids-china.co.uk/.../settinguoarepresentativeofficein.doc.

Deloitte Touche Tohmatsu, Establishing an Enterprise in China, available at http://www.israeltrade.org.cn/english/doing_business_with_china/000397/ (last visited on May 5, 2009).

Deutsche Bundesbank, The role of FDI in emerging market economies compared to other forms of financing: Past developments and implications for financial stability, available at <http://www.bis.org/publ/cgfs22buba1.pdf> (last visited on January 5, 2009).

Embassy of KR to the Kingdom of Saudi Arabia, Business opportunities of the Kyrgyz Republic, available at www.kyrgyzembarabia.org/business.asp (last visited April4, 2009).

Estandardsforum, Country Brief – Kyrgyz Republic, available at www.estandardsforum.org/secure_content/country_profiles/cp_99.pdf (last visited on April 10, 2009).

2009 Index of Economic Freedom available at <http://www.heritage.org/Index/country/KyrgyzRepublic> (last visited on June 5, 2009).

Investment Guide for the KR, OECD Center for Cooperation with Non-Members, OECD Publishing, 1998.

Legal Framework for the Treatment of Foreign Investment: Survey of Existing Instruments. Progress Report and Background Studies, 1992.

Ministry of Finance of the Kyrgyz Republic, The Law of the KR “Foreign investment Law of the Kyrgyz Republic”, available at <http://www.minfin.kg/eng>.

IMF Balance Payment Manual, available at imf.org/external/pubs/ft/bopman/bopman.pdf (last visited on April 10, 2009).

Investing in Kyrgyzstan, Trader’ Manual for Landlocked Countries: Kyrgyzstan, available at www.unescap.org/tid/publication/tipub2458_part5.pdf.

Eduard Rausch, Reemstma, available at <http://www.winne.com/kyrgyzstan/to17.html> (last visited on May 14, 2009).

Reasons to Invest in Kyrgyzstan, available at http://www.investment.kg/en/index.php?option=com_content&task=blogcategory&id=19&Itemid=52 (last visited on January 8, 2009).

OECD Benchmark Definition of Foreign Direct Investment, available at www.oecd.org/dataoecd/10/16/2090148.pdf (last visited on January 29, 2009).

OECD Glossary of Foreign Direct Investment Terms and Definitions, available at www.oecd.org/dataoecd/56/1/2487495.pdf (last visited on January 29, 2009).

OECD & IMF, 2004, Glossary of Foreign Direct Investment Terms and Definitions, Paris and Washington DC, available at www.oecd.org/dataoecd/10/16/2090148.pdf (last visited on January 29, 2009).

OECD Center for Cooperation with Non-Members. Investment Guide for the KR, OECD Publishing, 1998.

Organization for Economic Co-operation and Development Centre for Co-operation with the Economies in Transition, Organization for Economic Co-operation and Development, Investment guide for the Russian Federation. Paris: OECD Publications, 1996.

Study of the Soviet Economy, International Monetary Fund, World Bank, Organization for Cooperation and Development, European Bank for Reconstruction and Development; OECD, Paris, 1991, Volume 2, pp.75-80 in Adolf H. Enthoven,, Jaroslav V. Sokolov, Alexander M. Petrachkov, Doing Business in Russia and the Other Former Soviet Republics: Accounting and Joint Venture Issues. Montvale, New Jersey: Institute Management Accountants, 1992.

Vice President of China Association for the Promotion of Investment, The Investment Environment in China and the Opportunities for Italian Enterprises, Italy, November, 1999 available at <http://english.mofcom.gov.cn/aarticle/translators-garden/famous-speech/200803/20080305441012.html> (last visited on March 1, 2009).

UNCTAD, Country Profile (Kyrgyzstan), available at www.unctad.org/Templates/Download.asp?docID=4508&intItemID=3432&lang=en (last visited on May 14, 2009).

US Bureau of Economic, Energy and Business Affairs, 2009 Investment Climate Statement – Kyrgyz Republic, available at <http://www.state.gov/e/eeb/rls/othr/ics/2009/117381.htm> (last visited on May 14, 2009).

World Bank, KYRGYZ REPUBLIC - Update on the Mining Sector, available at <http://www.natural-resources.org/minerals/CD/docs/twb/Kyrgyz.pdf> (last visited on May 10, 2009).

VI. Cases

Petrobart Limited (UK) v. The Kyrgyz Republic, Case N 126/2003, Stockholm Chamber of Commerce, 2003, available at www.biicl.org/files/3912_2005_petrobart_v_kyrgyz_republic.pdf (last visited on April 4, 2009).

Centerra Gold Inc. (Canada) and 2. Kumtor Gold Company (Kyrgyz Republic) v. The Kyrgyz Republic, Permanent Court of Arbitration, Netherlands, UNCITRAL, 2003.

Oxus Gold (UK) v. Kyrgyz Republic, ad hoc arbitration panel, UNCITRAL, 2006.

Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. (US) v. Kyrgyz Republic, Case N ARB(AF)/06/1, International Centre for the Settlement of Investment Disputes.

VII. Internet Sources

Kyrgyz Republic Legal Database. “Toktom”, available at <http://online.toktom.kg/> (last visited on May 21, 2009).

Database of Normative Legal Acts of Kyrgyz Republic, available at <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwekyr.htm> (last visited on May 29, 2009.)