

ANALYSIS¹

OF THE APPLICABILITY OF BILATERAL INVESTMENT TREATIES OF THE KYRGYZ REPUBLIC FOR THE PROTECTION OF THE RIGHTS AND INTERESTS OF FOREIGN NONCOMMERCIAL ORGANIZATIONS CONDUCTING ACTIVITIES IN THE KYRGYZ REPUBLIC

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List of Abbreviations

BIT	Bilateral Investment Treaty (Agreement)
BIT between the KR and Germany	Treaty between the Federal Republic of Germany and the Kyrgyz Republic on the Promotion and Mutual Protection of Investments of August 28, 1997
BIT between the KR and the USA	Treaty between the United States of America and the Republic of Kyrgyzstan Concerning the Encouragement and Reciprocal Protection of Investment of January 19, 1993
BIT between the KR and France	Agreement between the Government of the Kyrgyz Republic and the Government of the French Republic on Mutual Investment Promotion and Protection of June 2, 1994
BIT between the KR and Switzerland	Agreement between the Swiss Federal Council and the Government of the Kyrgyz Republic on the Promotion and Reciprocal Protection of Investments of January 29, 1999
Draft Law on Foreign Representatives	Draft Law of the Kyrgyz Republic on Making Amendments to Certain Legislative Acts of the Kyrgyz Republic (The Law of the Kyrgyz Republic on Noncommercial Organizations and the Criminal Code of the Kyrgyz Republic)
FNCO	Foreign Noncommercial Organization
ICNL	International Center for Not-for-Profit Law
ICSID Convention, the Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID	International Center for the Settlement of Investment Disputes
KR	Kyrgyz Republic
NCO	Noncommercial Organization
NGO	Nongovernmental Organization
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law

Introduction

As they conduct activity abroad, nongovernmental organizations (NGO)² often face a barrage of restrictions, violations, and hostility from their host country, says investment law specialist Luke Eric Peterson. The existing system of international human rights and charity law is rather powerless against such abuses.³

Against this background, the possibility for NGOs to apply for investment arbitration, which can issue binding decisions on the state that has accepted relevant obligations under investment agreements,⁴ looks appealing even if it is insufficiently studied. There are very few publications devoted to this issue. Even in those publications, however, the possibility for NGOs to seek recourse through arbitration is largely hypothetical due to the lack of successful cases. This is understandable, as the whole architecture of bilateral investment treaties (BITs) and investment protection was built to support international business. That said, the NGO sector has had more success in providing *amicus curiae* opinions in investment arbitration on matters of public interest, such as environmental issues.⁵

The main barrier to investment claims from foreign noncommercial organizations (FNCOs) is competence requirements contained in bilateral and multilateral investment treaties (investor status, the concept of investment, the limitation period, etc.).⁶ In some cases, the country's law expressly limits the applicability of its investment legislation to investing in noncommercial organizations (NCOs).⁷ At the

² The term "nongovernmental organization" (NGO) includes noncommercial organizations (NCOs) and foreign noncommercial organizations (FNCOs).

³ Luke Eric Peterson, Is It Practical for Not-for-Profits to Rely on BITs? Kluwer Arbitration Blog, September 10, 2010.

⁴ According to UNCTAD and the International Investment Agreement Navigator, 2,827 bilateral investment treaties have been concluded in the world as of today. (<https://investmentpolicy.unctad.org/international-investment-agreements>), and 165 countries have signed the Convention on the Settlement of Investment Disputes (<https://icsid.worldbank.org/about/member-states/database-of-member-states>).

⁵ See, e.g., Amokura Kawharu, 'Part III Chapter 11: Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae' in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration*, Kluwer Law International 2010), pp. 280-281.

⁶ Sabine Konrad, Protection for Non-Profit Organizations, in *International Investment Law*, Bungenberg, Griebel, Hobe, Reinisch, p.555-565.

⁷ The Draft Law of the KR on Investments, posted on the website of the Cabinet of Ministers, expressly restricts the applicability of the law on relations relating to making investments in noncommercial organizations (part 2, Article 3): <https://www.gov.kg/wp-content/uploads/2017/10/Proekt-Zakona-Ob-investitsiyah.docx>. The current status of the draft law is unknown. If adopted, it will not apply to investments from countries with which BITs have been concluded that provide for a different investment regime.

The earlier Law #66 of the KR on Foreign Investments in the KR of September 24, 1997 used the criterion of profit making as a defining attribute of foreign investments (part 2, Article 1). In *Petrobart Limited v. Kyrgyz Republic*, the KR objected to the jurisdiction of the UNCITRAL Tribunal on the grounds that Petrobart made no "foreign investments" in the KR and therefore could not benefit from the substantive provisions of the Foreign Investments

same time, there are questions about the practicability of such FNCO claims to arbitration courts, considering the alleged disproportion of investments to the claimant's potential expenses on arbitration, as well as the FNCOs' possible reluctance to spoil relations with the government of the host country.⁸ Moreover, the FNCO's desire to maintain its status in the host country to sustain its humanitarian mission may be a constraining factor, as initiating arbitration could damage the FNCO's relationship with the host government before the arbitrators have even assessed the admissibility of the claim.

This analysis examines the problem of FNCO investment protection through the prism of the Kyrgyz Republic (KR)'s BITs with Switzerland, France, Germany, and the United States of America (USA) – each of which support FNCOs making significant contributions to development projects in the KR.

Since the BITs selected for analysis provide for either *ad hoc* arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL) or arbitration under the rules of the International Center for the Settlement of Investment Disputes (ICSID) as grounds for dispute resolution, individual requirements of the Convention on the Settlement of Investment Disputes (the ICSID Convention)⁹ regarding competence will be considered in addition to the relevant BITs. Where FNCOs as claimants choose arbitration under UNCITRAL rules, our jurisdictional analysis will be limited to the provisions of the relevant BIT (paragraphs 1 and 2).

The analysis provides an overview of the substantive requirements for arbitration contained in the BITs (paragraphs 3 and 5) and assesses whether these instruments can be used to defend FNCOs that have been subjected to violations by the host country government and what potential objections the latter may put forth (Paragraph 4).

Although it is difficult today to give optimistic forecasts regarding any widespread use of investment arbitration for FNCO claims, the legal obligations contained in international investment treaties and the possibility in principle for FNCOs to avail themselves of BIT remedies may well be used as useful tools in some of the cases where FNCOs face government interference in their activities.

Law. The Tribunal upheld that objection and did not accept jurisdiction. *Douglas Z. Investment*. In: *The International Law of Investment Claims*. Cambridge: Cambridge University Press; 2009, p.230.

⁸ Cm.: *Lisa Bench Nieuwveld*, *Bilateral Investment Treaty Protections And Not-For-Profits: Practically, Is It Worth It?*, Kluwer Arbitration Blog, August 26, 2010.

⁹ Hereinafter, the ICSID Convention.

1. Qualifying an FNCO as an “Investor”

There is no universal understanding in international investment law of how an “investor” is defined. As a rule, international treaties contain an open (non-exhaustive) definition of the “investor” concept, ensuring that new types of entities, unknown at the time of the drafting of the treaty but recognized by the law of the contracting parties, will have international protection.¹⁰ The concept of “investor” also varies depending on the content of the BITs, which represent the result of consensus between two states that cannot be ignored by an arbitral tribunal.

This approach allows various parties, among them FNCOs, to benefit from the protection guaranteed them under certain BITs. Below we will look at this issue in more detail using the example of individual BITs and the ICSID Convention.

A. BITS

BIT BETWEEN THE KR AND THE USA

The Treaty between the KR and the USA on the Promotion and Reciprocal Protection of Investments (BIT between the KR and the USA)¹¹ provides protection to citizens and legal entities of the other party. The Treaty defines a legal entity as follows:

“‘company’ of a Party means any kind of corporation, company, association, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled.”¹²

Therefore, this BIT stresses that a legal entity (a company) must possess several attributes:

- it is an organization;
- constituted under the laws and regulations of a Party to the BIT;
- for purposes of receiving income or otherwise; and
- privately or governmentally owned and controlled.

¹⁰ Article 1(7) of the Energy Charter Treaty (ECT) refers to companies or other organizations organized in accordance with the law of a Contracting Party. (41) This means that any organization established in accordance with the laws of a Contracting Party can be, at least in theory, covered by the provisions of the ECT. The open-ended definition of ‘Investor’ ensures that new types of organizations, unknown at the time of the drafting of the ECT, but now recognized by the laws of the Contracting Parties, are protected by the ECT. (pp. 95-96).

(Crina Baltag, Chapter 4: The Notion of ‘Investor’ in Central Asian Investment Treaties and Arbitration Practice, in Kiran N. Gore, Elijah Putilin, et al. (eds), *International Investment Law and Investor-State Disputes in Central Asia: Emerging Issues*, Kluwer Law International 2022), pp. 85-100).

¹¹ BIT between the KR and the USA.

¹² Article I (1 (b) of the BIT between the KR and the USA.

Considering that the BIT, following a general rule, does not attach critical importance to the purpose and ownership of an organization, it can be concluded that it extends its scope to NCOs as well. Based on that premise, it is logical to assume the possibility of qualifying an FNCO as an “investor” under this BIT and, accordingly, to consider the prospect of FNCOs applying it to protect their rights and interests.¹³

Alongside that, this BIT contains the proviso that “(e)ach Party reserves the right to deny to any company the advantages of this Treaty if ... that company [of the other Party] **has no substantial business activities** in the territory of the other Party.”¹⁴

Since all large US-based FNCOs are focused on the social, humanitarian, educational and other similar spheres and none of them conducts business activities in the KR, there is a risk that advantages to such FNCOs may be denied on a case-by-case basis under the provisions of the BIT between the KR and the USA.

BIT BETWEEN THE KR AND FRANCE

The Agreement between the KR and the French Republic on Mutual Investment Promotion and Protection (BIT between the KR and France)¹⁵ defines a company as follows:

“The term ‘company’ means any legal entity established in the territory of either Contracting Party in accordance with the legislation of that Party and located in the territory of that Party, or directly or indirectly controlled either by nationals of either Contracting Party or by legal entities located in the territory of either Contracting Party and established in accordance with the legislation of that Party.”¹⁶

Based on the literal meaning of this definition, any legal entity may be qualified as a “company” if it possesses the following attributes in the aggregate:

- it is established in the territory of either Contracting Party in accordance with the legislation of that Party and located in the territory of that Party; or
- it is directly or indirectly controlled either by nationals of either Contracting Party or by legal entities located in the territory of either Contracting Party and established in accordance with the legislation of that Party.

¹³ It is appropriate to mention a reference in Luke Eric Peterson and Nick Gallus’ publication to the cover letters submitted by the White House to the US Senate that make clear that these treaties are designed to cover “charitable and nonprofit organizations.” / *Luke Eric Peterson u Nick Gallus*. Ibid., footnote 1.

¹⁴ Article I (2) of the BIT between the KR and the USA.

¹⁵ BIT between the KR and France.

¹⁶ Article I (3) of the BIT between the KR and France.

Therefore, this BIT establishes a cumulative requirement for an FNCO to qualify as an investor: the location attribute and the registration or control attribute.

E.g., if an NCO with French participation is established in the KR in accordance with the laws of the KR and is located in the KR, such as the public charitable foundation Agency for Technical Cooperation and Development (ACTED), such organization will qualify as a company under the above BIT.

Similarly, if a French national or a legal entity established under French law controls an NCO in the KR, the latter will also qualify as a company and enjoy the protection afforded by the BIT.

BIT BETWEEN THE KR AND GERMANY

The definition of “investor” in the Treaty between the KR and the Federal Republic of Germany on the Promotion and Mutual Protection of Investments (BIT between the KR and Germany)¹⁷ differs from those in BITs discussed above. In it,

“The term ‘company’ means:

(a) with respect to the Kyrgyz Republic:

any legal entity registered or established under the applicable laws of the Kyrgyz Republic;

b) with respect to the Federal Republic of Germany:

any legal entity or trading company, and other companies or associations with or without legal personality, with its seat in the territory of the Federal Republic of Germany, irrespective of whether its activities are profit-oriented or not.”¹⁸

As a result, there are two separate definitions of “investor” for parties to the Treaty, each definition taking its own approach.

In both cases, an FNCO may qualify as a “company.” In relation to the KR, a broad concept of “company” is established, covering any commercial or noncommercial organization if it is created or registered under the laws of the KR.

In the case of Germany, the treaty expressly extends its scope to NCOs by specifying in the final part of the definition that the profit orientation of such an organization is not decisive.

Therefore, an FNCO located in Germany is subject to the BIT with Germany.

¹⁷ BIT between the KR and Germany.

¹⁸ Article I (4) BIT between the KR and Germany.

Registration as a legal entity and the purpose of the organization are not determinative in this case. Consequently, German NCOs operating in the KR such as Hanns Seidel Foundation, Friedrich-Ebert-Stiftung, DVV International, Konrad-Adenauer-Stiftung and Sparkassenstiftung, as well as and other organizations which are not registered in the KR as independent legal entities, are subject to the BIT between the KR and Germany.¹⁹

BIT BETWEEN THE KR AND SWITZERLAND

The Agreement between the Swiss Federal Council and the Government of the KR on the Promotion and Reciprocal Protection of Investments (BIT between the KR and Switzerland)²⁰ defines the term “investor” as follows:

“(a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;

(b) companies, including corporations, partnerships, business associations and other organizations, established in accordance with the law of that Contracting Party and actually conducting economic activities in the territory of the same Contracting Party; and

(c) companies not established in accordance with the law of that Contracting Party but actually controlled by natural persons or companies as provided for by (a) and (b) of this paragraph, respectively”.

This definition is similar to the one used in the BIT between the KR and France. However, it is supplemented by an essential criterion such as “actual conduct of economic activities.” The meaning of this concept is not elucidated in the BIT itself. This criterion will be analyzed in more detail below when we consider the concept of “investment.”

Consequently, only an FNCO that meets the established or controlled organization and economic activity criteria may be subject to the BIT between the KR and Switzerland.

If the BIT with Switzerland establishes the intention of the parties to create and maintain favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party, it means that the KR shall provide investment protection to FNCOs:

¹⁹ According to the Electronic Database of Legal Entities of the Ministry of Justice of the KR, the Representative Office of the Friedrich Ebert Foundation in the KR, the Representative Office of the Hanns Seidel Foundation in the KR and the Branch Office of the Sparkass Foundation for International Cooperation (Sparkassenstiftung) in the KR are registered as structural units of foreign foundations in the KR.

²⁰ BIT between the KR and Switzerland.

- established under Swiss law and which are conducting economic activity in the territory of Switzerland; or
- are established under Kyrgyz law but controlled by organizations established in Switzerland or Swiss nationals.

SUMMARY OF THE ANALYSIS OF BITS

Summarizing the approaches of various BITS to the definition of “investor” and their applicability to FNCOs, we can conclude that all the BITS under discussion define the investor in their own way through such categories as “company,” “legal entity,” or “investor.” FNCOs may fall under the definition of “investor” directly²¹ or indirectly.²² In the former case, the BITS explicitly state that a company may carry out noncommercial activities; in the latter case, they are silent on that issue. Which does not mean, however, that FNCOs fall outside the scope of those BITS. On the contrary, FNCOs are covered by the “investor” concept provided they meet established criteria such as place of registration, location, control, and conduct of economic activities.

B. ICSID

Since all the BITS refer to the ICSID as the subject of dispute resolution,²³ it is essential to further examine how Article 25 of the Convention defines the concept of “investor”:

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

It can be inferred from this Article that the competence of the ICSID covers legal disputes:

- related to investments;
- between the Contracting States and a national of another Contracting State; and
- where the parties have an agreement to transfer the dispute to the ICSID.

The Convention does not define “a national of another Contracting State.” What is clear is that the State of the party applying to ICSID for dispute resolution must be

²¹ BITS with the USA and Germany.

²² BITS with France and Switzerland.

²³ Article 8 of the BIT with France, Article 11 of the BIT with Germany, Article VI of the BIT with the USA, Article 8 of the BIT with Switzerland.

different from the one where the investment was made and both those States must be Contracting States under the ICSID Convention, i.e., there must be a BIT between them.

Whether a party to the dispute is a national of a Contracting State is determined by the place of establishment or principal place of business of the legal entity.²⁴ E.g., a German organization established in Germany and investing in the KR would fall within the scope of Article 25 of the ICSID Convention, since both Germany and the KR are parties to the Convention and have entered into a BIT, which, among other provisions, stipulates that disputes shall be adjudicated by the ICSID.

The issue of the status of a subsidiary of a foreign company established in the territory of the KR is resolved differently. According to Article 25(2)(b) of the ICSID Convention,

“any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

Consequently, the key factor is the parties' agreement that the subsidiary established in the relevant country should be deemed to be foreign. This agreement may be set out, for example, in the relevant BIT.

There is a contradictory practice regarding how a company incorporated abroad and founded by a national or a legal entity of the host country may be recognized as an investor. For example, in *Tokios Tokelés v. Ukraine*, the majority of the arbitral tribunal members recognized competence in respect of the claim by a Lithuanian company established by Ukrainian nationals, since those individuals did not establish the company for the sole purpose of gaining access to ICSID arbitration.²⁵

Therefore, the matter of a party's status under the ICSID Convention will be governed by the provisions of the BITs and national legislation, based on the concepts of registration, conduct of activities, and control.

2. Recognizing an FNCO's Activity as “Investment” under International Law

A number of authoritative scholars posit that the criterion for assessing the admissibility of a claim should not be whether a particular party qualifies as an

²⁴ C. Schreuer et al., *The ICSID Convention: A Commentary* 283-89 (2nd ed. 2009).

²⁵ Гэри Борн, *Международный арбитраж: право и практика*, М., 2020, стр. 727 (*Gary Born. International Arbitration: Law and Practice*).

“investor” under the BIT, but rather whether their activity qualifies as “investment.”²⁶ Indeed, the existence of an investment is one of the basic requirements for gaining access to investment arbitration.²⁷

The BITs of the KR do not contain a definition of investments. They contain only a list of assets that may constitute investments. In order to meet the jurisdictional requirements of the arbitral tribunal, the assets must be the result of an act of investment; they must be “invested” or “allocated.” Then they acquire the attributes of investments.²⁸ Each of the BITs under discussion affords protection for investments made (or being made).²⁹

FNCOs holding foreign assets designed to bring profit enjoy the benefits of an “investor” under most investment treaties. In analyzing the definitions of investment treaties, the UN Conference on Trade and Development (UNCTAD) notes that:

“...non-profit entities often acquire portfolio investment in commercial enterprises in order to earn revenue to support their charitable or educational activities. In that capacity, non-profit entities are likely to act in the same way as any other portfolio investor and their distinct status as non-profit entities would seem of little significance.”³⁰

For example, in *Victor Pey Casado and President Allende Foundation v. Republic of Chile* a foundation acted as claimant in a dispute about investments that had a commercial purpose.³¹

²⁶ Whether noncommercial organizations may be regarded as investors is less clear and will depend on the nature of their activities. *Rudolph Dolzer and Christoph Schreuer*, *Principles of International Investment Law*. Second edition. Oxford University Press, p.44.

²⁷ *Berk Demirkol*, ‘Chapter 5: Material Scope of Application: Definition of Investment with Reference to Cases Involving Central Asian States,’ in Kiran N. Gore, Elijah Putilin, et al. (eds), *International Investment Law and Investor-State Disputes in Central Asia: Emerging Issues*, Kluwer Law International 2022), p.101.

²⁸ *Ibid.*, p.102.

²⁹ Article 2 of the BIT between the KR and France, Article 2 of the BIT between the KR and Switzerland.

³⁰ UNCTAD, *Issues in International Investment Agreements: Scope and Definition* (United Nations, New York and Geneva, 1999), p. 34.

³¹ The longest-running case in the history of ICSID, this dispute arose from the expropriation of the assets (the newspaper *El Clarín*) of two Chilean companies following the 1973 coup d’état led by General Pinochet. In May 2008, the tribunal dismissed the expropriation claim because the act of expropriation (1975) was not covered by the time frame of the BIT between Chile and Spain (1991). Nonetheless, the First Tribunal awarded the Claimants \$10 million in compensation for the breach of the fair and equitable treatment as a result of long delays and discrimination in the proceedings brought by the Claimants for the purpose of returning the newspaper. The compensation award was annulled on Chile’s application in December 2012. After re-filing the lawsuit (2016), the Claimants sought to annul the second judgment, which was not in their favor. In a decision dated January 8, 2020, the ad hoc committee in the case ruled in favor of the Respondent, refusing to annul the 2016 decision. *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case #ARB 98/2.

There is much less certainty when it comes to an NGO using its assets for humanitarian goals and activity in public interest rather than profit.

Based on the provisions of the BITs of the KR and the ICSID Convention, let us analyze and assess to what extent NCO activities can be qualified as “investment” under those agreements.

A. BITS

BIT BETWEEN THE KR AND THE USA

Under the Treaty between the KR and the USA on the Promotion and Reciprocal Protection of Investments:

(a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including movable and immovable property, as well as rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, inter alia, rights relating to:

literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law.”³²

The approach taken in the BIT between the KR and the USA with its so-called circular definition, where “investment” is defined through the category of investment itself,³³ protects everything that may be called an investment. Under this approach, assets not

³² Article 1.1 of the BIT between the KR and the USA.

³³ “investment” means every kind of investment...”

held for commercial use or profit-generating activity may still constitute an investment within the scope of that BIT.³⁴

Based on the above, an FNCO's activities can be deemed an investment because this definition does not limit capital investment to commercial activity. Therefore, if an FNCO's activities involve financial investment in intellectual property, a block of stock, or other assets listed in the definition as part of its noncommercial interests, such activities may be considered a "capital investment" under this BIT.

In defining investment-related activities, however, the BIT points out that, among other things, " 'associated activities' include the organization, control, operation, maintenance and disposition of... facilities for the conduct of business"³⁵. Consequently, the establishment of companies in the KR without the purpose of carrying out business activities does not have the attributes of investment activity and is not afforded investment protection under the BIT.

BIT BETWEEN THE KR AND FRANCE

Unlike the BIT between the KR and the USA, the agreement between the KR and the France does not limit the list of possible activities that qualify as "investment":

The term "investment" means all assets, such as property, rights and interests of any kind, including but not limited to:

- a) movable and immovable property, as well as other rights in rem, such as mortgages, collaterals, the rights to use, guarantees, and similar rights;*
- b) shares, premium on an issue and other types of either direct participation or participation by a minority of votes in companies established in the territory of either Contracting Party;*
- c) bonds, claims to money and services of economic value;*
- d) intellectual property rights, commercial and industrial such as copyrights, patents, licenses, trademarks, industrial designs or models, technical processes, know-how, trade names, and goodwill; and*
- e) business concessions provided under the law or contract, including concessions for the exploration, development, extraction and use of the natural resources, including those located in the maritime zone of the Contracting Party.*³⁶

³⁴ Luke Eric Peterson, Nick Gallus, The Shifting Landscape for American Noncommercial Organizations International Investment Treaty Protection of Noncommercial Organizations / The International Journal of Noncommercial Law, Volume 10, Issue 1, December 2007.

³⁵ Article 1 (1) (e) of the BIT between the KR and the USA.

³⁶ Article 1.1 of the BIT between the KR and France.

Similarly, let us imagine a hypothetical situation in which an FNCO's activities are considered an investment. Suppose that the FNCO is engaged in providing financial literacy services. As part of its activities, the FNCO equips resource centers with all necessary tools (books, scientific journals, computers, database access, etc.) and later provides access to those resources at no cost. Since the FNCO has invested financially in equipment, property, and intellectual resources (which qualify as "assets" in the above definition) as part of its noncommercial activities and in accordance with its purpose, those actions can, in theory, be deemed investments under this agreement.

At the same time, it is difficult to determine whether an FNCO's activities in the form of technical assistance, grants, information campaigns, experts' consultations to working groups, trainings, roundtables, advocacy campaigns, public discussions and other similar activities can be considered investments. In favor of an affirmative answer to that question, one can refer to the language in the BIT that covers property, rights, and interests of "*any kind*," which is an unconditional contribution of FNCOs to the development of local communities, regions, and the country as a whole. On the other hand, the nature of this investment is clearly different. It does not presuppose any equivalent in return for the investment of property.

BIT BETWEEN THE KR AND GERMANY

Like the two previous BITs, the treaty between the KR and the Federal Republic of Germany gives a similar definition of "capital investment" without limiting the list presented:

- 1. The term "capital investments" includes all kinds of assets, including but not limited to:*
 - a) movable and immovable property as well as other rights in rem such as mortgages and liens;*
 - b) share rights and other forms of participation in companies;*
 - c) claims to money used to generate economic value or to services of economic value;*
 - d) intellectual property rights, in particular copyrights, patents, utility models, industrial designs, trade names, trade and commercial secrets, technologies, know-how and goodwill; and*
 - e) public-law concessions, including concessions to prospecting and extraction of natural resources;*

f) change in the form in which assets are invested shall not affect their being an investment.³⁷

BIT BETWEEN THE KR AND SWITZERLAND

The definition of “investments” under the KR’s BIT with Switzerland is also set out broadly – by providing a non-exhaustive list of them.

“(2) The term “investments” shall include all kinds of assets, including but not limited to:

(a) movable and immovable property as well as any other property rights, such as mortgages, collaterals and usufructs;

(b) shares, share rights or any other kind of participation in companies;

(c) claims to money or any transactions having economic value;

(d) copyrights, industrial property rights (such as patents, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;

(e) any right conferred by law or contract or by virtue of any legally granted licenses and permits to undertake economic activity, including to prospect for, extract or exploit natural resources.”

Despite its broad definition of “investment,” the language of the agreement makes it clear that it does not seek to promote and protect *any* investment but rather those aimed at “*promoting economic prosperity of both States*” and “*economic cooperation for the mutual benefit of both States*.” Therefore, economic benefit to the host country is an additional criterion for defining investment. Narrow corporate interests behind an investment will place relevant assets outside the scope of BIT protection.

SUMMARY OF THE ANALYSIS OF BITS

An investor may receive income in cash or in kind.³⁸ This criterion of investment is called returnability. The receipt of certain gain on investment distinguishes investment from passive possession of property.

The emphasis on economic cooperation coupled with the definition of “investor” that also includes an “actual conduct of economic activities” component may make it difficult to qualify an FNCO as an investor, although, strictly speaking, “promoting economic development” is not the same as “pursuing a commercial purpose.”

³⁷ Article 1.1 of the BIT between the KR and Germany.

³⁸ Part 3 of Article 1 of the BIT between the KR and Switzerland.

According to specialized literature on the topic, FNCOs can also provide services or sell goods and thus meet the established criterion. For example, a hospital established by an FNCO would be protected under the appropriate BIT even if it is operationally managed by an FNCO because it “actually conducts economic activities” in the form of services to the community.³⁹

Noncommercial and development activities can result in tangible social and economic benefits to the community – construction and/or operation of clinics, schools, community centers, basic water supply and sewer infrastructure, and others.

In addition, FNCOs rent offices, purchase local goods and services, pay taxes, and hire local staff. As a study by Lester Salamon of Johns Hopkins University shows, civil society organizations “employ, on average, 4.4 percent of the economically active population.”⁴⁰ Economist Jeffrey Sachs has also noted that aid and development activities are seen as building blocks for future economic growth and attracting significant foreign direct investment.⁴¹ In *Stans Energy v. Kyrgyzstan*, the arbitral tribunal, in determining what constitutes investment, pointed to the achievement of social impact as an objective of investment.⁴²

As none of the BITs under discussion provides a definitive answer as to whether the term “investment” can cover assets used in noncommercial activities, arbitral tribunals will take different approaches in determining what constitutes a particular investment. In some cases, arbitrators have gone beyond the text of the relevant treaty to argue for objective characteristics of the investment. For example, in some cases arbitrators have considered the requirement that the investment be commercially oriented or intended to produce an economic return or profit.⁴³

³⁹ Sabine Konrad, Protection for Non-Profit Organizations – in International Investment Law, Bungenberg, Griebel, Hobe, Reinisch, p.559.

⁴⁰ Lester M. Salamon, S.Wojciech Sokolowski, Regina List, *Global Civil Society: An Overview*, the Johns Hopkins University Center for Civil Society Studies, 2003, p. 14, <https://wings.issuelab.org/resources/13784/13784.pdf>.

⁴¹ Luke Eric Peterson, Can evicted aid groups sue Sudan for breach of investment treaties?, Kluwer Arbitration Blog, March 27, 2009.

⁴² “Investments are financial and tangible assets invested by investor into different objects of activity as well as the transferred rights to material or intellectual property with a view of gaining profit (income) or achieving a social effect ...”. *Stans Energy Corp and Kutisay Mining LLC v. Kyrgyz Republic*, Moscow Chamber of Commerce and Industry Arbitration No A-2013/29, Award, 30 June 2014, p.86.

⁴³ One of the three objective criteria of investments should be “expenditure or transfer of funds for the precise purpose of obtaining a return”, *CME Czech Republic BV (The Netherlands) v. Czech Republic*, Ian Brownlie’s separate opinion, Final Award, 14 March 2003 at para. 34; “[i]t must be presupposed ... that investments are made within the frame of a commercial activity and that investments are, in principle, aiming at creating a further economic value’. By applying this criterion, the tribunal excluded the German businessman’s personal belongings and kitchen appliances from the list of investments protected by the BIT between Germany and Russia. *Franz Sedelmeyer v. Russian Federation*, Award, July 7, 1998, at 65, 113.

The investor should additionally consider the dispute resolution forum designated by the BIT and test the concept of “investment” as per the rules of the relevant institution.

B. ICSID

As noted above, each of the BITs under analysis lists the ICSID as a possible forum for dispute resolution. A claim to the ICSID is therefore likely to be subject to a doubled-barreled test for compliance with the relevant BIT and the ICSID convention.

Under Article 25 of the Convention, ICSID has jurisdiction only over investment-related disputes:

*“The jurisdiction of the Centre shall extend to **any legal dispute arising directly out of an investment...**”*

The Convention does not define investment, so some arbitral tribunals rely on the BITs in this matter: if the Convention itself gives the parties broad discretion, tribunals should rely on the terms of the agreement where the parties have exercised that discretion.

Meanwhile, another obvious trend in ICSID cases is the use of certain objective criteria. Although there is no consensus in law enforcement practice on an agreed list of criteria, the most common is the so-called *Salini test*,⁴⁴ which sets out four attributes of an investment: (1) contributions; (2) duration of the investment; (3) participation in the risks of the transaction; and (4) contribution to the economic development of the host state.

However, the test has since been supplemented by another criterion contained in the ICSID decision: regularity of profit and return. This approach has been repeatedly confirmed by practice: the arbitrators in *Fedax v. Venezuela* and *Joy Mining v. Egypt* included profit/return in their respective lists of investment characteristics.⁴⁵

Moreover, the classic commentary on the ICSID Convention by Christoph Schreuer mentions five criteria, including profit and income, based on ICSID arbitration practice. This criterion may pose a significant challenge for NCOs, which by their nature are not focused on profit generation or return on investment, if compared with for-profit organizations.⁴⁶ However, this fifth criterion (profit/profitability) remains quite controversial. As Schreuer himself later admitted, it was controversial indeed

⁴⁴ *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para.52.

⁴⁵ *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997 at para. 43; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction at para. 53.

⁴⁶ *Sabine Konrad*, Protection for Non-Profit Organizations, in *International Investment Law*, Bungenberg, Griebel, Hobe, Reinisch, p.560.

and he was not certain if he would insist on that particular criterion; since the tribunals had actually managed without that criterion, perhaps it should be abandoned.⁴⁷

Other authors also hold that the requirement that profits be paid to directors or shareholders is inconsistent, given that non-distribution of profit excludes otherwise similar private sector activities (such as the provision of water supply services or the administration of medical clinics) from being “investments” for the purposes of the treaty.⁴⁸ Given that contribution to the economic development of the host state has been identified by some tribunals as another important criterion, it seems illogical to include only those investments that are aimed at distributing profit (and indeed may result in some funds being withdrawn from the host country rather than in leaving more funds in it).⁴⁹

Of course, the argument can be made that noncommercial investments are consistent with the broader purpose of the ICSID system, especially where they are based on the long-term goals of the host state’s development. However, there may also be disputes over the definition of these very objectives.

As for the classic four investment criteria, FNCOs will in most cases meet the contributions and long investment period criteria, since projects implemented by FNCOs are long-term and their administration requires the purchase or lease of offices and other property.

FNCOs are also likely to meet the criterion of risk, which is defined as uncertainty about the successful outcome or, more broadly, the possibility that the state may terminate its contract; potential increases in labor and other costs over the life of the investment; and any unforeseen circumstances that may affect it. Experts believe it is undeniable that NCOs engaged in program activities or even producing goods or services on a nonprofit basis can be perceived as taking on similar risks.⁵⁰ NCOs meet the criterion of contributing to the *economic development of the host state* because many NCOs regard contributing to local economic development as the primary mission of their activities.

⁴⁷ Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd ed. 2009), footnote 218 p.129.

⁴⁸ Nick Gallus and Luke Eric Peterson, “International Investment Treaty Protection of NGOs,” 22(4) *Arbitration International* 527 (2006) *supra* n.2 at page 542.

⁴⁹ Luke Eric Peterson, Nick Gallus, *The Shifting Landscape for American Noncommercial Organizations International Investment Treaty Protection of Noncommercial Organizations / The International Journal of Noncommercial Law*, Volume 10, Issue 1, December 2007.

⁵⁰ Luke Eric Peterson, Nick Gallus, *The Shifting Landscape for American Noncommercial Organizations International Investment Treaty Protection of Noncommercial Organizations / The International Journal of Noncommercial Law*, Volume 10, Issue 1, December 2007.

CONCLUSIONS

Summarizing the qualification of FNCOs' activities as investments, we can draw the following conclusions.

The ICSID and BITs do not include noncommercial activities in their definitions of "investment." However, BITs cover a fairly broad list of assets – property and interests – that may constitute investments, including those made by FNCOs alongside commercial organizations. None of the BITs explicitly defines noncommercial activities as investment activities. To the contrary, in several instances, arbitrators have inferred that an investment had a commercial aspect – or, at least, was expected to generate some "return" or "added value" – where the relevant investment treaty did not provide for these attributes as a criterion.⁵¹

Given the different approaches taken by arbitral tribunals in interpreting the concept of investment, there is great uncertainty as to how this issue will be resolved in each particular case.

Therefore, it is very likely that certain FNCO activities may be considered as an investment. In particular, the organization of a profit-generating enterprise or an FNCO's investment in tangible or other contractually defined (but in some cases unlimited) property may be considered an investment. But even in those cases, an FNCO's investment is a special kind of investment that does not necessarily result in commercial profit.⁵² More often than not, the effect of an FNCO investment is expressed in terms of participation in the economic development of the host state. In this regard, special protections apply to FNCO investments, as will be discussed below.

3. Legal Remedies Contained in BITs

Under the provisions of BITs, investors may assert a number of substantive claims against a host State in investment disputes based on the following:

- denial of minimum standards of fair treatment;
- failure to provide full protection and security for investments;
- expropriation;
- denial of national treatment;
- denial of most-favored-nation treatment; and
- limiting the free transfer of payments.

⁵¹ See Prof. Brownlie's separate opinion on the compensation of damages in *CME v. the Czech Republic* <https://www.italaw.com/sites/default/files/case-documents/ita0181.pdf>; see also the decision in *Franz Sedelmayer v. The Russian Federation* <https://www.italaw.com/cases/documents/983>.

⁵² Quite justifiably, NCOs/NGOs have been called policy entrepreneurs. Steve Charnovitz, *Opening the WTO to Non-governmental Interests*, 24 *Fordham International Law Journal* 173, 209–10 (2000–01).

It should be noted that protection is accorded only to persons falling within the scope of the BIT. In cases where the state interferes in the activities of an FNCO that meets the characteristics of an investor, but these violations do not affect the organization's investments, the state's actions will not result in a violation of the guarantees provided by the BIT.⁵³

In the field of investment law and investment arbitration, there is no so-called binding precedent doctrine that would oblige an arbitral tribunal to follow the interpretation made in earlier cases. This leads to a certain uncertainty as to the specific meaning of the obligations arising from the agreements for both parties.⁵⁴

Below we will briefly discuss each of the regimes in compliance with the terms of the BIT. While outwardly similar, the formulations in each of the BITs differ significantly, which, when examined in detail, may produce different outcomes in their application.

A. FAIR AND EQUITABLE TREATMENT

The requirement that the KR provide *fair and equitable treatment* to foreign investors is contained in each of the BITs analyzed:

*"Investments shall at all times be accorded **fair and equitable treatment**, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law...."*⁵⁵

*"Each State Party shall, as far as possible, promote investment of nationals or companies of the other Contracting State in its territory and allow such investments in accordance with its laws. It shall in each case treat the investment with all **fairness**."*⁵⁶

*"Each Contracting Party shall ensure, within its territory, **fair and equitable treatment** of investments by investors of the other Contracting Party".*⁵⁷

*"Each Contracting Party undertakes to ensure within its territory and in its maritime area fair and equitable treatment, in accordance with the principles of international law, to investments of nationals and companies of the other Party and ensure the enjoyment of the right thus recognized shall not be hampered in either in law or in fact."*⁵⁸

⁵³ Luke Eric Peterson, Nick Gallus, The Shifting Landscape for American Not-for-Profit Organizations International Investment Treaty Protection of Not-for-Profit Organizations / The International Journal of Not-for-Profit Law, Volume 10, Issue 1, December 2007.

⁵⁴ Ibid.

⁵⁵ Article 2 of the BITs between the KR and the USA.

⁵⁶ BIT between the KR and Germany.

⁵⁷ BIT between the KR and Switzerland.

⁵⁸ BIT between the KR and France.

This regime is linked to considerations of uniformity, transparency, fairness, and proportionality (commensuration) of State measures, and the prohibition of arbitrary or discriminatory conduct on the part of the State.⁵⁹ For example, a violation of *fair and equitable treatment* includes denial of justice (restricted access to court or an unfair judicial system).

Arbitral tribunals' approaches to the application of *fair and equitable treatment* may vary. While in some cases the tribunal has given weight to the legitimate expectations of the investor,⁶⁰ in others it has held that only gross and flagrant violations⁶¹ should fall under this standard. Where the tribunal has extended protection to legitimate expectations, it has understood them to mean "*foreign investors' expectation of a stable legal and business environment*". By failing to create such an environment, the State has failed to ensure *fair and equitable treatment*.⁶²

Today, there is no common position in the arbitration community as to whether there is some universal standard of fair and equitable treatment or whether the guarantees of such treatment depend on a country's level of development.

B. PROHIBITION OF EXPROPRIATION WITHOUT COMPENSATION

All BITs contain safeguards against *unlawful expropriation*. In exceptional cases, *expropriation* might be feasible subject to compliance with the following conditions:

- the existence of a public purpose: state or public interest;
- non-discrimination;
- compliance with legal procedures;
- compensation.⁶³

Arbitration practice distinguishes between *direct and indirect expropriation*. In the case of *direct expropriation*, the state deprives the investor of legal rights to the property.⁶⁴ *Indirect expropriation* consists of the State taking measures that reduce

⁵⁹ Gary Born, op.cit, p.739.

⁶⁰ See *Gold Reserve Inc v. Bolivarian Repub. Of Venezuela*, Award in ICSID Case No. ARB/AF/09/01 of 22 September 2014, 567-576.

⁶¹ See *Glamis Gold Ltd v. USA*, Award in ad hoc case of 8 June 2009 (NAFTA/UNCITRAL), 616.

⁶² See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 25 April 2005 at para. 274; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at para. 124; *Occidental Exploration and Production Company v The Republic of Ecuador*, Award, 1 July 2004 at para. 183; *Metalclad Corporation v Mexico*, Award, 30 August 2000 at para. 99. Luke Eric Peterson, Nick Gallus, The Shifting Landscape for American Not-for-Profit Organizations International Investment Treaty Protection of Not-for-Profit Organizations.

⁶³ Article 5 of the BIT between the KT and France, Article 6 of the BIT between the KR and Switzerland, Article III of the BIT between the KR and the USA, Article 4 of the BIT between the KR and Germany.

⁶⁴ After the 2010 revolution, the Provisional Government of KR adopted a number of decrees to nationalize the property of foreign investors.

the value or the ability to use the investor's asset (revocation of a license, imposition of unduly burdensome regulations).

Expropriation is not always expressed in a single act. It can be the result of a chain of decisions and actions by public authorities leading to the same consequences. However, there is still little certainty in distinguishing between the right of the state to resort to regulatory measures and actions amounting to *expropriation* for which compensation must be paid.

C. FULL PROTECTION AND SECURITY

Each of the BITs contains a guarantee of full protection and security for investors and investments:

*"Investments ... shall enjoy **full protection and security** ..."*⁶⁵

*"Investments of nationals or companies of one Contracting State in the territory of the other shall enjoy **full protection and security**."*⁶⁶

*"Investments made by nationals and companies of either Contracting Party shall be accorded full and comprehensive protection and security in the territory and maritime zone of the other Contracting Party."*⁶⁷

*"Each Contracting Party shall **protect** within its territory investments of investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments"*⁶⁸

The purpose of this regime is to take measures to prevent the physical destruction of investors' property. However, there are examples where arbitral tribunals have interpreted the content of the regime more broadly, extending it to ensure a safe environment and stability of investments, making it similar to the fair and equitable treatment standard.⁶⁹

D. NATIONAL TREATMENT

BITs also contain national treatment guarantees which, in general terms, require host States to accord foreign investments no less favorable treatment than investments made by their own nationals under similar circumstances:⁷⁰

⁶⁵ Article 2 of the BIT between the KR and the USA.

⁶⁶ Article 4 of the BIT between the KR and Germany.

⁶⁷ Article 5 of the BIT between the KR and France.

⁶⁸ Article 4 of the BIT between the KR and Switzerland.

⁶⁹ See Rudolph Dolzer and Christoph Schreuer. *Principles of International Investment Law*. Second edition. Oxford University Press. p.151-153.

⁷⁰ Rudolph Dolzer and Christoph Schreuer. *Ibid*, 406-408.

*“This treatment **shall not be less favorable** than that granted by each Contracting Party to investments made within their territory by **its own investors**, or than that granted by each Contracting Party to investments made within its territory by investors of the most favored nation, if the latter is more favorable.”⁷¹*

*“Each Contracting Party shall, in its territory and in its maritime zone, accord to nationals or companies of the other Contracting Party, with respect to investments and investment-related activities, treatment **no less favorable** than that accorded to its **own nationals and companies**, or that accorded to nationals or companies of the most favored nation, whichever is more favorable. In this respect, nationals who are authorized to work in the territory and in the maritime zone of one of the Contracting Parties shall be able to receive material benefits appropriate to the performance of their professional activities.”⁷²*

*“Each Party shall permit and treat investment and activities associated therewith, on a basis **no less favorable** than that accorded in like situations to investment or associated activities of **its own nationals or companies**, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain falling within one of the sectors or matters listed in the Annex.”⁷³*

*“(1) Each State Party shall treat investment on its territory which is owned or under the influence nationals or companies of the other Contracting State **no less favorably** than investments by **its own nationals or companies** or investments by nationals or companies of third States.*

*(2) Each State Party shall treat nationals or companies of the other Contracting State **no less favorably** than its own nationals and companies or to nationals or companies of third States in respect of its activities in connection with investments in its territory.”⁷⁴*

A key question that arises in the application of this regime by arbitral tribunals is whether the measures applied to a foreign investor should be compared with the treatment of domestic investors engaged in exactly the same activity or operating in the same economic sector. Although there has not been a uniform approach in the arbitration practice, arbitrators have been careful not to interpret the grounds for comparison too narrowly.⁷⁵

⁷¹ Article 4(2) of the BIT between the KR and Switzerland.

⁷² Article 4 of the BIT between the KR and France.

⁷³ Article 2 of the BIT between the KR and the USA.

⁷⁴ Article 3 of the BIT between the KR and Germany.

⁷⁵ Rudolph Dolzer and Christoph Schreuer. *Ibid*, 180.

Another evaluative category interpreted differently by arbitrators is “*no less favorable*.” For instance, cases of intentional discrimination against a foreign investor because of its nationality fall under this regime. Whether legitimate public interests can be justified in this case, however, is not entirely clear.⁷⁶

E. MOST-FAVORED-NATION TREATMENT

All of the BITs analyzed contain *most favored nation treatment* guarantees, which consist of granting foreign investors *no less favorable conditions* than those enjoyed by investors from other foreign countries.⁷⁷

Most favored nation treatment usually addresses substantive legal protections and does not include dispute settlement provisions. Although the opposite practice also exists.⁷⁸

At the same time, BITs may contain a clause stating that special advantages granted to investors of any third state as a result of regional economic integration (free trade area, customs union or common market agreement, or pursuant to an avoidance of double taxation agreement) may not be obligatory for the host state to grant to investors of the other party.⁷⁹

F. FREE TRANSFER OF FUNDS RELATED TO INVESTMENTS

Each BIT contains guarantees to investors that *payments relating to investments* can be *freely transferred* to and from the host country without undue interference. The list of such payments (income, amounts intended to repay a loan or to cover expenses, amounts from the sale of investments, etc.) differs between BITs, but the wording in most of them lacks specificity and are often too broad.⁸⁰

The BIT between the KR and France further specifies the content of the standard of free transfer of payments: transfers are made without delay and at the normal exchange rate officially applicable on the date of transfer.⁸¹ Similar guarantees are contained in the BIT between the KR and the USA.

⁷⁶ Luke Eric Peterson, Nick Gallus, The Shifting Landscape for American Not-for-Profit Organizations International Investment Treaty Protection of Not-for-Profit Organizations.

⁷⁷ Article 3, 4 (4) of the BIT between the KR and Germany, Article II of the BIT between the KR and the USA, Article 4 of the BIT between the KR and France, Article 2 of the BIT between the KR and Switzerland.

⁷⁸ *Emilio Agustin Maffezini v. Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction in ICSID Case No.ARB/97/7 of 25 January 2000.

⁷⁹ Article 4 of the BIT between the KR and Switzerland, Article 4 of the BIT between the KR and France, Article 3 of the BIT between the KR and Germany, Article II of the BIT between the KR and the USA.

⁸⁰ Article 5 of the BIT between the KR and Germany, Article IV of the BIT between the KR and the USA, Article 6 of the BIT between the KR and France, Article 5 of the BIT between the KR and Switzerland.

⁸¹ Article 6 of the BIT between the KR and France.

These guarantees do not affect investors' tax obligations,⁸² creditor protection measures and enforcement of judicial decisions,⁸³ which is specified in some BITs.

4. Application of investment protection remedies to FNCOs

Recently, at least two legislative initiatives have emerged in the KR - the Draft Law on Noncommercial Nongovernmental Organizations (hereinafter - the Draft Law on Noncommercial NGOs)⁸⁴ and the draft Law on Making Amendments to Certain Legislative Acts of the KR (the Law on Noncommercial Organizations, the Criminal Code of the KR)⁸⁵ (hereinafter - the Draft Law on Foreign Representatives), which, according to expert opinion, will significantly limit the activities of local and foreign NCOs in Kyrgyzstan, in the event of their adoption by the Government of Kyrgyzstan.⁸⁶

The following provisions of these draft laws may provide grounds for significant concern:

- Prohibition for foreign citizens to establish and become members of NCOs.
- Introduction of the status of "foreign representative"⁸⁷ and forcing NCOs that receive funding from foreign sources and participate in political activities⁸⁸ in the KR to register as "foreign representatives".

⁸² Article 5 of the BIT between the KR and Switzerland.

⁸³ Article IV of the BIT between the KR and the USA.

⁸⁴ The Draft Law was submitted for public discussion by the Administration of the President of the KR <https://www.gov.kg/ru/npa/s/4192>.

⁸⁵ Draft Law on Foreign Representatives, published for public discussion on November 21, 2022, and subsequently revised on May 19, 2023: <http://kenesh.kg/ru/draftlaw/634426/show>.

⁸⁶ See: Analysis of the Draft Law on Foreign Representatives, prepared by the ICNL, December 7, 2022

<https://www.icnl.org/wp-content/uploads/Analysis-of-the-KR-Draft-Law-on-Foreign-Representatives-Rus.pdf>;

Analysis of the Draft Law of the KR on Making Amendments to Certain Legislative Acts of the KR (Law of the KR on Noncommercial Organizations and the Criminal Code of the KR)" prepared by Adilet Legal Clinic

https://drive.google.com/file/d/1evAFfCvNm_sTdb3NuWYX4l2cfd1S-j5Q/view;

Analysis of the Draft Law on Foreign Agents, prepared by Civic Platform <https://platforma.kg/our-priorities/2022/analiz-k-proektu-zakona-ob-inostrannyh-agentah/>;

Conclusion of the UN Special Rapporteur in regard to the Draft Law <https://kyrgyzstan.un.org/ru/2484228>.

⁸⁷ Foreign representative – an organization established in the KR and receiving funds and other property from foreign states, their state bodies, international and foreign organizations, foreign citizens, stateless persons or persons authorized by them who receive funds and other property from these sources (except for open joint-stock companies with state participation and their subsidiaries), which participates, including in the interests of foreign sources, in political activities carried out on the territory of the KR.

⁸⁸ The Draft Law defines the concept of "political activity" broadly: "Political activity is participation (including through financing) in the organization and conduct of political actions in order to influence the adoption by state agencies of decisions aimed at changing the government policy carried out by said agencies, as well as in the formation of public opinion for these purposes. At the same time, political activity does not include "activities in the field of science, culture, art, health care, protection of citizens' health, social support and protection of citizens, social support for the disabled, protection of motherhood and childhood, promotion of healthy lifestyles, physical education and sports, protection of flora and fauna, and charitable activities."

- Introduction of new reporting requirements for NCOs⁸⁹ and branches and representative offices of FNCOs to government authorities and publication of the report in the media or on the NCO's website.
- Establishing a requirement for NCOs receiving funding from foreign sources, branches and representative offices of FNCOs to undergo an annual financial audit and publish the report in the media or on the NCO's website.⁹⁰
- Providing the Ministry of Justice with the right to request and inspect internal documents of NGOs, to send its representatives to participate in any internal activities of NGOs, and to determine at its discretion whether the activities of an NGO are consistent with its statutory goals.
- Authorizing the Ministry of Justice to conduct both routine and unscheduled inspections of NGOs receiving funding from foreign sources.
- Authorizing the Ministry of Justice to suspend the activities of NGOs receiving funding from foreign sources in the event of a failure to submit an application for inclusion in the Register of NGOs performing the functions of a foreign representative for a period of up to six months.
- Granting the Ministry of Justice the right to give instructions to branches and representative offices of FNCOs to stop funding certain local NCOs in order to protect the foundations of the constitutional order, the defense and security of the state, morality, health, rights and freedoms of individuals.
- Authorizing the Ministry of Justice to rule, without a court decision, on the exclusion of branches and representative offices of FNCOs from the Register of branches and representative offices in the event of their failure to submit reports or in the case of violation of provisions governing their statutory activities.
- Criminal liability of representatives of NGOs and FNCOs for establishing (participating in, managing) organizations whose activities involve violence against citizens or other harm to their health or inducing citizens to refuse to perform civil duties or to commit other unlawful acts. The proposed punishment may entail a fine and imprisonment.

A number of domestic and international organizations and experts have expressed the view that these measures constitute disproportionate interference in the exercise of the right to freedom of association and provide unlimited powers to state bodies to

⁸⁹ This is a general requirement; it is applicable to both local and foreign NCOs.

⁹⁰ The Draft Law contains the following provision: "NCOs are obliged to submit to the authorized body documents containing a report on their activities, on the personal composition of their governing bodies, documents specifying the purposes of spending money and utilizing other assets, including those acquired from foreign sources "..."

interfere in the activities of NGOs through extensive reporting mechanisms and control of their activities by government agencies.

The provisions of the draft laws are generally discriminatory against NGOs whose activities are regulated by the Law on Noncommercial Organizations, as opposed to other organizational and legal forms of NGOs and for-profit organizations, which will not be subject to the new regulation.

The draft laws contain broad definitions of concepts (“political activity”, “foreign representative”, etc.), which violate the principle of legal certainty, according to which vaguely formulated and/or overly broadly interpreted norms may lead to their arbitrary application and abuse.⁹¹

ASSESSMENT OF THE POSSIBILITY FOR FNCOS TO APPLY INVESTMENT REMEDIES PROVIDED FOR BY THE BITS OF THE KR

First, let us assume that the dispute passes the jurisdictional test and meets the requirements of the BIT and the ICSID Convention. Second, let us assume that the state action meets the intertemporal requirements. In other words, let us assume that the requirements of the draft laws, if adopted, are new to the organizations and did not exist at the time of their establishment or commencement of activities in the KR. Let us also assume that none of the measures, as well as the entire sphere of non-commercial activity, are exempted from the guarantees of protection under BITs or from a violation of the minimum standard of treatment of foreign persons.⁹²

For convenience, let us group the provisions of the draft laws that are most criticized into the following conceptual blocks:

A. OBSTACLES TO THE ESTABLISHMENT OF FOREIGN NONGOVERNMENTAL NONCOMMERCIAL ORGANIZATIONS

The Draft Law on NCOs establishes new and rather onerous requirements for setting up an NCOs: only citizens of the KR can become founders; the minimum number of founders – at least three; mandatory registration, and restrictions on the types of activities NCOs can engage in.⁹³

⁹¹ See: Analysis of the Draft Law on Foreign Representatives, prepared by the ICNL, December 7, 2022 <https://www.icnl.org/wp-content/uploads/Analysis-of-the-KR-Draft-Law-on-Foreign-Representatives-Rus.pdf>; Analysis of the Draft Law of the KR on Noncommercial Organizations and the Criminal Code of the KR, prepared by Adilet Legal Clinic https://drive.google.com/file/d/1evAFfCvNm_sTdb3NuWYX4I2cfd1S-j5Q/view; Analysis of the Draft Law on Foreign Agents, prepared by Civic Platform <https://platforma.kg/our-priorities/2022/analiz-k-proektu-zakona-ob-inostrannyh-agentah/>; Conclusion of the UN Special Rapporteur in regard to the Draft Law <https://kyrgyzstan.un.org/ru/2484228>.

⁹² For instance, in the BIT with the USA, the KR has not reserved the right to create or maintain exceptions to the national treatment and most-favored-nation treatment obligations of Article I, paragraph 1 (Annex 1), unlike the USA.

⁹³ Article 37(4) of the Draft Law on Nongovernmental Noncommercial Organizations.

These provisions of the Draft Law stipulate that the state, having once registered an organization, now in the process of re-registration, may deny such registration (legal personality), for example, due to the fact that there is a foreign citizen⁹⁴ among the NCO's founders. This constitutes a violation of the state's obligation to ensure fair and equitable treatment. It is important which exactly legal and factual grounds will be used to substantiate the refusal. Arbitral tribunals have ruled that States violate their obligation under BITs "*not to act arbitrarily*" by taking actions "*based on prejudice or preference rather than reason or fact.*"⁹⁵

B. FOREIGN FUNDING

The Draft Law on Foreign Representatives introduces the concept of an *NCO performing the functions of a foreign representative*. There are two key factors here:

- receipt of funds and other assets from foreign sources⁹⁶;
- participation in political activities carried out on the territory of the KR.

The special status of a foreign representative results in increased obligations for reporting and transparency of the activities of the organization that has been granted this status, unlike NCOs that do not receive foreign funding.

It should be clarified that the Draft Law does not explicitly prohibit or limit the financing of NCOs from foreign sources, so it cannot be argued that this innovation infringes on the *guarantees of freedom of movement of funds and property* or the *guarantees of protection from indirect expropriation*. Certainly, it can be predicted with a certain degree of conventionality that the status of foreign representative may become a stigmatizing factor and, as a consequence, limit access to foreign funds. Since restrictions and additional obligations accompanying the status of a foreign representative are imposed on both local NCOs and FNCOs, there appears to be no grounds to speak of *a violation of the national regime* either.

On the other hand, Article 17 of the draft Law on Foreign Representatives establishes the possibility of imposing a ban on the financing of individuals by a structural subdivision of an FNCO:

"In order to protect the foundations of the constitutional system, to ensure the defense and security of the state, morality, health, rights and freedoms of other persons, the authorized body has the right to issue a reasoned decision to a structural subdivision of a foreign noncommercial organization to prohibit the

⁹⁴ Under current legislation, there are no restrictions on the citizenship of the founders of an NCO. The Draft Law establishes that only a citizen of the KR may be a founder of an NGO.

⁹⁵ "...founded on prejudice or preference rather than on reason or fact." *Lauder v. Czech Republic*, *supra* n. 62 at paras. 221 and 232; *Occidental v. Ecuador*, *supra* n. 46 at paras. 162-163.

⁹⁶ Foreign sources shall mean foreign states, their government agencies, international and foreign organizations, foreign nationals, stateless persons or persons authorized by them.

allocation of funds and other property to certain recipients of such funds and property."

Justification of restrictions by reference to the need to *protect the interests of national security and public order* can be, in some circumstances, legitimate. In this situation, a tribunal will need to check a wide range of circumstances for compliance with the legitimate objectives with reference to the relevant BIT or develop its own criteria.

The expert community confidently regards state-imposed restrictions related to foreign funding of NCOs as a *violation of national treatment and even expropriation*. However, such a harsh assessment is usually reserved for a complete ban on foreign funding, government approval of foreign funding, transactions through state-owned banks with a greater degree of control over transfers, and onerous taxation of foreign funding.⁹⁷

C. REPORTING

The Draft Law on Foreign Representatives provides for new reporting requirements for branches and representative offices of FNCOs, NCOs with foreign representative status, and all other NCOs. In addition to the reports that all NCOs submit to the tax and statistics authorities, the Draft Law obliges them to:

- submit a report on their activities and executives to the authorized body - once every six months;
- conduct an annual audit;
- submit a quarterly report on the purposes of property utilization;
- publish a report on its activities including information about its founders, composition of assets, sources of funds and their disbursement - once a year / once every six months respectively.

Obviously, the new reporting requirements will become an additional burden on NCOs and FNCOs in the event when the draft laws are adopted. Their implementation may force any organization to start looking for additional financial and human resources. For some entities, they may turn out to be excessive and unreasonable due to the need to redirect resources from project implementation to compliance with new reporting requirements, thus leading to their inability to carry out their core socially useful activities.

The specialized literature, referring to similar changes in Russian legislation, suggests that states imposing onerous reporting requirements may violate BIT obligations, in particular the obligation *not to arbitrarily harm investments or the obligation to treat*

⁹⁷ Ibid.

*investments fairly and equitably.*⁹⁸ According to the authors, it is conceivable that organizations whose operations will be hampered pursuant to the passage of the draft laws could bring claims for *indirect expropriation of their investments*.⁹⁹

The State, in turn, may deny that these measures constitute violations of investor rights, arguing that they are permissible because the circumstances required a regulatory response. States often invoke sovereign rights and regulatory prerogatives.¹⁰⁰ However, in such a case, the State must demonstrate evidence of the lawful exercise of its powers to the arbitration tribunal.

D. INTERFERENCE BY STATE AUTHORITIES IN THE ACTIVITIES OF ORGANIZATIONS

The Draft Law on Foreign Representatives grants a number of State bodies new powers to control and supervise the activities of FNCOs and NCOs performing the functions of a foreign representative. In particular:

- foreign representatives may be subject to unscheduled inspections;
- the Ministry of Justice has the right to request administrative documents and send its representatives to participate in events organized by NCOs; it can also conduct inspections of whether the activities of an NCO and the expenditure of its funds are in line with its statutory goals;
- The Ministry of Justice has the right to issue a written warning and set a deadline for eliminating shortcomings;
- The Ministry of Justice has the right to suspend for a period not exceeding six months the activities of an NCO performing the functions of a foreign representative which failed to submit an application for inclusion in the register of foreign representatives.

All decisions of government agencies may be appealed to a higher body of power or a court of law.

It is not entirely clear whether these provisions of the draft laws would in themselves violate any of the state's obligations under BITs, especially given the existence of an administrative and judicial procedure for appealing decisions and actions taken by a government agency. However, in the event when they manifest in harassment or intimidation, then there would be every reason to claim that the *guarantees of full protection and security of FNCOs* have been violated.

⁹⁸ Luke Eric Peterson, Nick Gallus, The Shifting Landscape for American Not-for-Profit Organizations International Investment Treaty Protection of Not-for-Profit Organizations / The International Journal of Not-for-Profit Law, Volume 10, Issue 1, December 2007.

⁹⁹ Ibid.

¹⁰⁰ Гэри Борн, Международный арбитраж: право и практика, М., 2020, стр.746 (Gary Born. International Arbitration: Law and Practice).

As in the previous case, a State may raise objections based, for example, on extraordinary circumstances when taking such measures was the only way for the State to protect an essential interest from a greater and imminent danger (e.g., security interests).¹⁰¹ The arbitral tribunal would then assess the wording of the particular BIT and the circumstances that made it necessary for the State to take such measures.

5. Consequences for the KR in Case of Violation of a BIT

The main demands of investors in the event of breach of BIT obligations tend to be the claims for restitution, compensation, and other reparation.¹⁰² In addition, the investor has the right to demand that the state cease the breach of obligations and, less frequently, to perform a certain action in fulfillment of its obligations under the BIT.

If the violation of investors' rights consists in *expropriation of NGO's property*, for instance, a resource center, greenhouses, hospitals, schools built by the organization, the damage is obvious and a claim for compensation of the investor's property at current market prices, which may be quite substantial, is quite feasible.

Meanwhile, it is not so easy to assess the damage to an NCO arising from the mere inability to carry on its operations (e.g., activities to develop plans of water management, train farmers to effectively use scarce water resources and increase crop yields, which are carried out by a Swiss NCO in Kyrgyzstan). As noted in the literature:

*"The organization could probably claim compensation for the amount it invested in the country, less the proceeds from the sale of any assets. Although BIT tribunals sometimes award future revenue to foreign investors affected by government intervention, most noncommercial organizations will not be awarded any future profits. However, an organization may claim lost profits from a unit that receives income to fund other activities of the organization. Such a claim must demonstrate that future profits are not speculative."*¹⁰³

Another deterrent, in addition to the difficulty of determining the amount of damages, is the high cost of investment arbitration. If the amount of damages is insignificant, NCOs will inevitably face the question of whether it is worthwhile to file a lawsuit. For

¹⁰¹ Article X of the BIT between the KR and the USA.

¹⁰² Article 6 of the BIT between the KR and Switzerland, Article 5 of the BIT between the KR and France, Article 4 of the BIT between the KR and Germany, Article III of the BIT between the KR and the USA.

¹⁰³ "The organization could likely claim for the amount it has invested in the country minus the proceeds from the sale of any assets. While BIT tribunals sometimes award future profits to foreign investors crippled by state interference, most not-for-profit organizations will, by definition, not earn any future profits. However, an organization could claim the loss of future profits of an arm earning profits to fund the organization's other activities. Such a claim would need to demonstrate that future profits are not speculative." *Luke Eric Peterson, Nick Gallus, The Shifting Landscape for American Not-for-Profit Organizations International Investment Treaty Protection of Not-for-Profit Organizations / The International Journal of Not-for-Profit Law, Volume 10, Issue 1, December 2007.*

instance, the ICSID's non-refundable fee for lodging requests amounts to USD 25,000.¹⁰⁴

At the same time, some experts express optimism that such remedies as a claim for moral damages, interim measures or some form of specific performance may well be justified.¹⁰⁵ However, to date, there is neither a convincing formula for calculating moral damages nor unanimity on the right of a tribunal to direct a sovereign state to suspend a particular regulation, or take other prescribed actions.

¹⁰⁴ See.: *Lisa Bench Nieuwveld*, *Bilateral Investment Treaty Protections and Not-For-Profits: Practically, Is It Worth It?* Kluwer Arbitration Blog, August 26, 2010.

¹⁰⁵ *Luke Eric Peterson*, *Is it Practical for Not-For-Profits to Rely on BITs?* Kluwer Arbitration Blog, September 10, 2010.

Conclusion

Although BITs were not originally designed to provide guarantees and protection to the nongovernmental sector, they nevertheless contain such potential. A number of BITs explicitly state that NCOs may be covered by the concept of “*investor*”, while others do not contain an explicit prohibition, and therefore there is no reason to exclude FNCOs from their scope.

The BITs provide a fairly extensive list of assets that may constitute investments and most often define them broadly through the category “*any type of assets (investments, property, etc.)*”, which can mean property (rights, interests) that has economic value, regardless of its commercial nature. By the same token, the BITs do not contain any restrictions on the purposes of investment, which do not necessarily only serve the purpose of profit-making, but may also set the goal of creating some beneficial impact.

The approaches of some arbitral tribunals under both the ICSID Convention and UNCITRAL rules, which use objective investment criteria, may present an obstacle in jurisdictional matters; among the latter, it is most difficult for a FNCO to meet the test of *commercial purpose of investment*. From this point of view, acquisitions by FNCOs of ownership of enterprises, purchase of securities, contributions to the authorized capital of joint ventures, loans, as well as bank deposits and acquisition of real estate should undoubtedly be deemed investments, while technical assistance, financing of socially beneficial noncommercial activities, grants provided to FNCOs may not be categorized as merely investments.

The analysis shows that, in the event when FNCOs manage to overcome jurisdictional barriers, certain violations of their legal status may well fall under the BIT's protection. In particular, investment protection could cover cases of *expropriation of FNCO assets, violation of national treatment and fair and equitable treatment, full protection and security*. A more precise assessment will be made by the arbitral tribunal based on the specific facts and circumstances.

Thus, none of the BITs unambiguously prohibits or critically impedes FNCO's protection. The arbitral jurisprudence on each of the claims is different and the tribunals' broad approach to the issues at stake entitles FNCOs to investment protection under the BITs. The cautious judgment is mainly due to the complete absence of precedents, the existence of which would provide factual material for analysis.

Certain limitations on the protection of the rights of noncommercial investors will be caused by the reservations that Contracting Parties have made in BITs (e.g., substantial business activities clause for investors, economic activities by organizations, etc.) and exemptions for certain areas. Based on the specific circumstances of the case, it is also

possible for the State to raise objections based on permissible regulation and on the necessity caused by the protection of important interests. Finally, for most activities of FNCOs aimed at participation in development projects, it deems difficult to determine the amount of damages, while other measures (moral damages, enforcement of performance in compliance with obligations) are insufficiently developed.

To summarize, we should note that the purpose of analyzing the potential for investment protection should not necessarily lead to filing a lawsuit. Sometimes, realizing the potential for investment arbitration may be enough to prompt the government to rethink policies that pose threats to FNCOs. We hope that the findings of the analysis will also be useful for developing advocacy campaigns or proper structuring of FNCO investments in the country.¹⁰⁶

¹⁰⁶ For instance, it is good practice for FNCOs to enter into special agreements with the government, such as investment agreements, that contain the full range of safeguards without having to build in a system of *assumptions and expansive interpretations* of certain terms under the BIT. See, for example: Agreement of October 31, 2002, on Economic Cooperation between the Government of the KR and the Aga Khan Foundation for Economic Development.

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