

COMMENTS

LATEST AMENDMENTS IN THE FOREIGN INVESTMENT LAWS OF UZBEKISTAN: MANIFESTATION OF SERIOUS AMBITIONS FOR CHANGE?

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Attracting Foreign Direct Investment (FDI) has been priority issue for the Government of Uzbekistan (GOU) since the proclamation of the country's independence from the Soviet Union in the early 1990^s. Today the operating legal regulations provide adequate state guarantees of protection, tax incentives and other privileges for foreign investors, and the GOU has been introducing legal adjustments to honour its commitments in securing a more favorable investment climate. However, foreign investors in practice are facing serious legal problems in doing business in the country. Frequent modification of laws and their arbitrary application, erroneous interpretation of legal terms, ambiguous rules and procedures, lack of protection of property rights and an independent dispute resolution mechanism are the legal concerns that usually keep foreign investors from entering the market.

In this paper I will analyze some of the measures and changes recently adopted by the GOU that aim to make the country's investment climate more attractive and I will try to find answers for the following questions. How sincere can these efforts be considered by prospective investors? What novelties do those changes provide for the investors? Will such attempts emanate actual and immediate constructive results in the near future?

Keywords: foreign investment laws and regulations; Uzbekistan; state guarantees and incentives; comparative law.

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1. Key Statutory Guarantees to Foreign Investors and Limitations

The foreign investment laws in Uzbekistan¹ provide a framework, which appears to be open for foreign investment in all forms and in all areas available to a national investor. The entry requirements appear to be straightforward, the performance requirements are minimal, and investors are guaranteed the right of exit and fund repatriation, with some common exceptions.² In addition, foreign investors enjoy a 10 year guarantee against adverse legislative change,^{3,4} the right to address the dispute

¹ The main laws regulating foreign investment relationships are as follows:

1) Law of the Republic of Uzbekistan No. 609-I of April 30, 1998, 'On Foreign Investments' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 1998, No. 5-6, item 91) [hereinafter Law on Foreign Investments];

2) Law of the Republic of Uzbekistan No. ZRU-380 of December 9, 2014, 'On Investment Activity' (New edition) (Collection of the Legislation of the Republic of Uzbekistan, 2014, No. 50, item 587) [hereinafter Law on Investment Activity];

3) Law of the Republic of Uzbekistan No. 611-I of April 30, 1998, 'On Guarantees and Means of Protection of Foreign Investors' Rights' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 1998, No. 5-6, item 93) [hereinafter Law on Guarantees].

² The government may stop, in a non-discriminatory manner, the repatriation of a foreign investor's funds in cases of insolvency or bankruptcy of an enterprise with foreign investments or the protection of creditors' rights, criminal act or administrative infringement of a law by a foreign investor (natural persons), or when it is necessary according to an arbitral or a court decision (Art. 3(5)(2) of the Law on Guarantees).

³ Article 3(4) of the Law on Guarantees provides that in case the subsequent legislation worsens the investment conditions compared to those that were in place at the moment of the conclusion of the investment agreement, the legislation that guarantees better conditions will be applicable. However, from the wording of Art. 3(5) it is presumable that such guarantee is not all-inclusive, and it shall extend only to particular predetermined conditions, deterioration of which will incite the realization of the stabilization clause. The following are the exceptional situations the occurrence of which will be qualified as worsening the investment conditions:

- increase in the rate of tax on incomes, received as dividends, paid to the foreign investor;
- introduction of additional requirements that complicate procedure of repatriation or reduce the size of foreign investor's income (profit), being transferred abroad, except for the cases when the state stops repatriation of cash of foreign investor on conditions of non-discriminative implementation of legislation acts in case of insolvency and bankruptcy of the enterprise with foreign investments or protection of the rights of creditors, criminal acts or the administrative offences accomplished by the foreign investor – the physical person, or other cases demanding necessity of stoppage of such repatriation according to judicial or the arbitral decision;
- introduction of quantitative restrictions to volumes of investments and other additional requirements to the size of investments, including in the form of an increase in the minimal volume of foreign investments in the enterprises with foreign investments;
- introduction of restrictions on the share of the foreign investor in the authorized capitals of the enterprises of the country;
- introduction of additional procedures of registration and prolongation of visas of foreign investors, as well as other additional requirements on making foreign investments.

⁴ The recent amendments (Jan. 20, 2014) introduced to the Law on Foreign Investments extended the scope of the application of stabilization clause prescribed in Arts. 3(4)–(5) of the Law on Guarantees to the legislative changes on tax and other mandatory payments. According to Art. 12(3) of the Law on Foreign Investments, guarantee against changes in tax laws for 10 years from the moment of official registration of the company will cover newly-established foreign companies with a minimum investment in cash in the amount of US\$5,000,000 provided that the list of those taxes and mandatory payments is approved by the decree of the President of Uzbekistan.

against the Government to the international arbitration institutions,⁵ guarantee against nationalization, tax and other preferences for marginalized group of investors. However, most of the benefits and guarantees provided by the law cannot be implemented in practice, since 'attempts by foreign investors to apply this protection against adverse changes such as tax increases or changes in the foreign currency regime have proven fruitless.'⁶ Lack of operative interpretation of vague and dubious provisions of investment by legislative or judicial bodies and lack of procedures by state executive institutions to implement them seriously affect the investors' decisions.⁷

Counteracting the incentives, privileges and guarantees, the Government has set a number of restraints and restrictions. There are 47 state bodies at distinctive administrative levels that fulfill regulatory functions in Uzbekistan. Foreign companies have no or limited access to ownership in spheres such as airline and railway services,⁸ mass media,⁹ banking, insurance¹⁰ and tourism. Licensing is considered as one of

⁵ Uzbekistan has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archiv/ICSID_English.pdf> (accessed Mar. 12, 2016)) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> (accessed Mar. 12, 2016)). However, the legislation implementing the latter has not been adopted, and enforcement of a foreign arbitral decision against an Uzbek party may be problematic (see *Doing Business in Uzbekistan* 56 (Baker & McKenzie 2009), available at <<http://www.ihk-krefeld.de/de/media/pdf/international/doing-business/usbekistan-doing-business-in-uzbekistan-2009.pdf>> (accessed Mar. 12, 2016)). Article 10 of the Law on Guarantees provides that investment disputes can be settled at international arbitral tribunals. This provision was challenged as a state consent to arbitrate by a claimant in a recent case (*Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), at <<http://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf>> (accessed Mar. 12, 2016)). However, the tribunal found that Uzbekistan didn't consent to ICSID jurisdiction through Art. 10 (*Id.* ¶ 386). In 2006, the Constitutional Court of the Republic of Uzbekistan released an official interpretation in regards to the right of an investor to submit investment dispute to international arbitration based on this provision of the Law on Guarantees. The Court held that the latter couldn't be interpreted as a general responsibility of the state before foreign investors, and such consent must be evidently indicated in the investment contract (see Collection of the Legislation of the Republic of Uzbekistan, 2006, No. 46-47, item 462).

⁶ Mukhsinkhuja Abdurakhmonov, *FDI Scenario in Uzbekistan-Glancing at the First Decade after Independence*, 32 *Econ. J. Hokkaido Univ.* 183, 193 (2003), available at <http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/5386/3/EJHU_v32_p183-200.pdf> (accessed Mar. 12, 2016).

⁷ Michael T. Paterson, *Evolutionary Uzbekistan, Revolutionary Kazakhstan: An Explanation for the Differences in FDI Policy during the First Years of Economic Transition* 68 (1997) (unpublished M.A. thesis, University of Guelph), at <<http://www.nlc-bnc.ca/obj/s4/f2/dsk2/ftp03/MQ27535.pdf>> (accessed Mar. 12, 2016).

⁸ All the property of railway companies belongs to state. Individuals and legal entities can privatize only the part of the property which is not directly involved in the transportation process (Art. 3 of the Law of the Republic of Uzbekistan No. 766-I of April 15, 1999, 'On Railway Transport' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 1999, No. 5, item 118)).

⁹ Companies with more than 30 percent of foreign investment participation in charter capital are not eligible to own mass media organizations according to Art. 8(4) of the Law of the Republic of Uzbekistan No. ZRU-78 of January 15, 2007, 'On Mass Media' (New edition) (Collection of the Legislation of the Republic of Uzbekistan, 2007, No. 3, item 20).

¹⁰ With recent (Apr. 11, 2012) amendments introduced to the Law of the Republic of Uzbekistan of April 5, 2002, 'On Insurance Activity' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 2002, No. 4-5, item 68), foreign insurance companies are confined from providing any insurance services in the territory of Uzbekistan (Art. 27(2)).

the central restrictive measures over the activities of local and foreign businesses.¹¹ Mandatory surrender of foreign exchange proceeds obtained from export transactions at the Central Bank fix rate,¹² draconian foreign exchange and other prohibitive regulations hold foreign enterprises back from leading full-scale undertakings.

2. Additional Guarantees and Measures of Protection (privileges and preferences)

In addition to the underlying guarantees, foreign investors can claim for additional guarantees and measures of protection in the form of: an assurance for absolute fulfillment by the partners of their obligations taken with respect to foreign investors; state guarantee; state support to finance investment projects; procurement of exclusive tax and payment regimes; state monitoring over the realization of an investment project; provision of external engineering and communication networks and other measures prescribed by existing laws.¹³ However, the provisions of Order No. 180¹⁴ set additional guarantees and measures of protection, which are not prescribed by the Law on Guarantees, like creation of special customs regime and admittance to the investment program.¹⁵ These additional guarantees and measures of protection can be obtained on the basis of an exclusive decree of the President or order of the Government.¹⁶ To be eligible for such guarantees and measures of protection, foreign investors have to satisfy a set of requirements:

- 1) requirements to the candidate foreign company;
- 2) requirements to the investment project; and
- 3) requirements for tax holidays.

¹¹ The Law No. 71-II of May 25, 2000, 'On Licensing of Certain Types of Activity' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 2000, No. 5-6, item 142) enumerates an extensive list of activities contingent to obtaining permission.

¹² According to the Procedure for the Implementation of Mandatory Sale of Foreign Exchange Earnings by Economic Entities (approved by the Order of the Cabinet of Ministers of the Republic of Uzbekistan No. 245 of June 29, 2000 (Collection of the Orders of the Government of the Republic of Uzbekistan, 2000, No. 6, item 33)), all companies regardless of ownership form are compelled to sell 50 percent of the proceeds gained from export of goods or services to the state. The Procedure enumerates the list of proceeds that are exempted from obligatory sale, like the proceeds of companies with foreign capital (with a minimum 50 percent participation in charter capital) specialized in manufacturing consumer goods, donations and grants, credits and others. Proceeds received from export of cotton fibre are subject to 100 percent mandatory sale.

¹³ Articles 4(1) and (3) of the Law on Guarantees.

¹⁴ Order of the Cabinet of Ministers of the Republic of Uzbekistan No. 180 of August 2, 2005, 'On Measures of Implementation of the Presidential Decree "On Additional Measures to Stimulate Attraction of Direct Private Foreign Investments"' (Collection of the Legislation of the Republic of Uzbekistan, 2005, No. 30-31, item 232) [hereinafter Order No. 180].

¹⁵ Section 6(2) of the Regulations on Conclusion and Realization of Investment Contracts (Attachment No. 2 to Order No. 180) [hereinafter Regulations].

¹⁶ Article 4(4) of the Law on Guarantees.

2.1. Requirements to the Candidate Foreign Company

To be eligible for additional guarantees and benefits, the foreign company first has to be acknowledged as an enterprise with foreign investment. For that, according to the Law on Foreign Investments, the foreign investor's contribution must be a purchase of at least 30 percent of the company shares or an equivalent investment in the charter capital and one of the participants of the company must be a foreign investor.¹⁷ Decree No. UP-1652¹⁸ places two more preconditions, one concerning the size of a charter capital, which must be equivalent to US\$150,000,^{19, 20} and the other related to the proportion of its own production in the total revenue from its business activities, which should be more than 60 percent²¹ in case of manufacture involved enterprises. At first glance, this set of requirements does not seem overwhelming for most foreign investors, though this is only the beginning.

2.2. Requirements to the Investment Project

Until recent times, there were three main categories of projects investment to which could yield additional benefits, *i.e.*:

1) priority sectors that ensure sustainable economic growth, progressive structural changes in the economy;

2) priority projects that ensure the strengthening and expansion of production and export potential of the country and its integration into the world economy;

3) projects in the field of small entrepreneurship, the implementation of which is aimed at processing of raw materials, production of consumer goods and services, and procuring employment.²²

With the 2014 amendments, foreign investors advancing their investment in projects involving modern high technologies and aimed at development of high-tech industries can be considered as potential candidates for additional benefits.²³

The Government publishes an exhaustive list of priority economic sectors where foreign investors have to make their investment to qualify for government

¹⁷ Article 6(2) of the Law on Foreign Investments.

¹⁸ Decree of the President of the Republic of Uzbekistan No. UP-1652 of November 30, 1996, 'On Additional Incentives and Benefits Granted to Enterprises with Foreign Investment' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 1997, No. 1, item 2) [hereinafter Decree No. 1652].

¹⁹ Section 1(1) of Decree No. UP-1652.

²⁰ Exception exists for investment projects realized in the Karakalpakstan Autonomous Republic and the Khorezm region, where the amount of charter capital can be equivalent to US\$75,000 (Sec. 1 of the Decree of the President of the Republic of Uzbekistan No. UP-3090 of June 11, 2002, 'On Additional Measures to Stimulate Development of Small Enterprises in the Republic of Karakalpakstan and Khorezm Region' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 2002, No. 6-7, item 107).

²¹ Section 2 of Decree No. UP-1652.

²² Article 4 of the Law on Guarantees.

²³ Article 4(2)(2) of the Law on Guarantees.

privileges and benefits. Priority areas for foreign investment have not gone through significant transformation since the early times, with the exception of some recent minor amendments. In 2012, the number of sectors was extended from eight to 20,²⁴ including the petrochemical industry, medical industry, construction of power stations based on alternative sources of energy, coal industry, mechanical engineering, etc. Yet, this development has not produced any significant revolution in the volume of foreign investment inflow.

2.3. Requirements for Tax Exemptions and Recent Developments

Decree No. UP-3594²⁵ is one of the important practical regulations governing the issue of tax exemption. If the government grants such right, the foreign company will be exempted from corporate income tax, property tax, tax on the improvement and development of social infrastructure, unified tax payment for micro-firms and small enterprises, as well as mandatory contributions to the Republican Road Fund.²⁶

3. Procedure of Consideration and Approval of Investment Projects

As it was described in the previous chapter, the state provides assorted combinations of benefits and preferences to foreign investors. However, requirements for obtaining these benefits are often ambiguous, the processes and procedures cumbersome, and the regulatory environment unpredictable.²⁷ There is no single instrument that encompasses all possible procedures related to obtaining benefits and privileges. Instead, we have distinct perplex mechanisms dealing with peculiar types of benefits and preferences. Abundance of referential clauses in and frequent modifications of provisions complicates the situation to an even greater extent.

3.1. Procedure for Conclusion of Investment Agreement

Distinct from many other jurisdictions, in Uzbekistan, investment agreement related issues are regulated by the Government order²⁸ rather by the investment laws. It is worthwhile mentioning that the purpose of entering into an investment agreement is to *ensure appropriate fulfillment of investment obligations taken by*

²⁴ Decree of the President of the Republic of Uzbekistan No. UP-4434 of April 10, 2012, 'On Additional Measures to Stimulate the Attraction of Foreign Direct Investment' (Collection of the Legislation of the Republic of Uzbekistan, 2012, No. 15, item 167).

²⁵ Decree of the President of the Republic of Uzbekistan No. UP-3594 of April 11, 2005, 'On Additional Measures to Stimulate Attraction of Foreign Direct Investments' (Collection of the Legislation of the Republic of Uzbekistan, 2005, No. 15-16, item 109) [hereinafter Decree No. UP-3594].

²⁶ Section 1(1) of Decree No. UP-3594.

²⁷ *2012 Investment Climate Statement – Uzbekistan*, U.S. Department of State (June 2012), <<http://www.state.gov/e/eb/rls/othr/ics/2012/191261.htm>> (accessed Mar. 13, 2016).

²⁸ Order No. 180.

the foreign investors, which is explicitly predetermined in the relevant regulation.²⁹ Another idiosyncrasy is that only foreign investors can be the parties to the investment agreement, while national investors are refrained from such a privilege. Though special regulation on conclusion and realization of investment agreements do stipulate the possibility of a state to enter into the investment agreement with a foreign company that will not yield additional guarantees and measures of protection (benefits and preferences),³⁰ the search for the document³¹ that regulates such types of investment agreements didn't give any successful result.

Thus, according to the Uzbek legislation, investment agreement is a contract signed between the Government of Uzbekistan (Ministry of Foreign Economic Relations, Investments and Trade) [hereinafter MFERIT] and a foreign investor, where the former provides some guarantees and measures of protection (benefits and preferences) to the investor and the latter takes investment obligations^{32, 33} noncompliance of which will lead to automatic annulment of the granted guarantees and measures of protection escorted with serious legal and financial consequences (*see infra*).

In order to prepare an investment agreement the concerned party must submit the following documents to the MFERIT:

- 1) project of the investment agreement;
- 2) basic economic indicators made on the basis of feasibility studies (technical and economic calculation) approved by the authorized bodies, if such requirement is stipulated by the law; and
- 3) conclusive resolutions of the Ministries of Justice, Finance, Economy and State Tax Committee.³⁴

The authorized bodies and ministries have a limited term of two weeks to consider and decide on the provisions of the investment agreement with reference to the issues of their competence.³⁵ In case the project is returned for revision,

²⁹ Section 3 of the Regulations.

³⁰ Section 1(2) of the Regulations prescribes that conclusion and realization of agreements with foreign investors, aimed at setting up investment commitments not inferring additional guarantees and measures of protection (benefits and preferences), are carried out in accordance with the set by the laws manner.

³¹ Free online database of legal documents is available at www.lex.uz.

³² The investor is obliged to comply with the requirements related to the investment and production volumes, guaranteed level of localization and of quality of products, export volume of the goods produced or services performed, procurement of return of credits extended under the State guarantee (Sec. 7(3) of the Regulations).

³³ Foreign investor is bound to submit regular reports to the MFERIT on the implementation of the commitments taken in the investment agreement and the MFERIT has a total authority to control over the realization of those commitments (Sec. 14 of the Regulations).

³⁴ Section 8 of the Regulations.

³⁵ Regulation is not distinct on whether the two-week term encompasses the consideration and approval of the project by all ministries or each ministry taken separately.

computation of the term will commence from the moment of the resubmission of the project. Following the decisive conclusions of the authorized bodies and the abovementioned ministries, MFERIT will have a two-week term to scrutinize the project. The last step will be the decision of the Government on the investment agreement, when the latter will come into force.

If an *investment agreement* is: a) financed by centralized sources (proceeds of budgetary, extra-budgetary and exclusively established funds, foreign credits attracted under governmental guarantee or on behalf of the Republic of Uzbekistan, and proceeds of the Fund of Reconstruction and Development); b) realized under product sharing agreement; c) realized by a company with more than 50 percent of state share in the charter capital where the amount of investment exceeds US\$10 million; or d) related to extraction and processing of strategic minerals with value of over US\$10 million regardless of the source of funding, or a *foreign investor* is e) granted exemptions from tax and other obligatory payments by special presidential resolution, there is a special mandatory screening mechanism.³⁶

3.2. Screening of Investment Projects

Order No. 110 specifies a step-by-step screening procedure of the examination and approval of potential foreign investment projects. According to a recent report of UNCTAD, 80 percent of green field investments realized in Uzbekistan in recent years belonged to extractive industries.³⁷ Besides, as it was mentioned above the investment agreements do accommodate tax and other financial preferences and incentives to foreign investors. Thus, an accurate scrutiny of the provisions of Order No. 110 is a prerequisite for every potential foreign investor.

Order No. 110 determines several stages any investment project has to endure: 1) prefeasibility study or prefeasibility calculation (PTEO or PTEP); 2) adjustment of sources and terms of funding / tender documentation; 3) detailed feasibility study or feasibility calculation (TEO or TEP); and 4) preparation of working documentation. Prefeasibility study or calculation is not required if the project is exempted from tax or compulsory payments under a special decree of the President.

Procedure of foreign investment project approval can be described as follows. The potential foreign investor independently prepares or employs the services of project designing or engineering companies to assemble the necessary documents in compliance with the set requirements and standards which should be approved

³⁶ Section 1 of the Regulations on Development, Examination and Approval of Investment Project Documentation (approved by the Order of the Cabinet of Ministers of the Republic of Uzbekistan No. 110 of June 7, 2007 (Collection of the Legislation of the Republic of Uzbekistan, 2007, No. 23, item 238) [hereinafter Order No. 110]).

³⁷ World Investment Report 2012: Towards a New Generation of Investment Policies 68 (United Nations 2012), available at <http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf> (accessed Mar. 13, 2016).

by the sectoral ministry or agency³⁸ with the consent of the State Committee of Architecture and the Ministry of Economy. The project has to be approved by *Uztyazhneftgazkhimproyekt* if the project is related to basic industries. Upon its approval by *Uztyazhneftgazkhimproyekt* or the sectoral ministry, the project goes to the State Committee of Architecture, which requires a two-week term for its consideration. Upon the Committee's blessing, the project advances to the expertise of the Ministries of Economy and Foreign Economic Relations, Investments and Trade, which will necessitate another two weeks. The Ministry of Finance and the Servicing Bank, subject to the affirmative resolutions of previous entities, will need additional two weeks for the project deliberation. All these terms are impressive, if the project submitted by the investor is not returned for reconsideration by any of the controlling officials, for Order No. 110 does not regulate this issue.

With the exception of the time essential for *Uztyazhneftgazkhimproyekt* and the sectoral ministries (committees or agencies) to approve the project, which are determined by their internal regulations, and excluding the time necessary for modifications to satisfy the proposals and suggestions of the controlling entities, the foreign investor is required to allocate at least six weeks just for the project to be ready to be submitted to the Information-Analytical Department of the Government of Uzbekistan, which within three days has to get a document ready for the approval of the project. That document, together with all approved papers, is then delivered to the Consolidated Information-Analytical Department of the Government. The head of the Complex (Department) of the Cabinet of Ministers (Government) on Macroeconomic Development, Structural Transformations of the Economy and Complex of Territorial Development has to deliver its decision within two days. Subject to an affirmative decision, the investor gets approved its prefeasibility study project, which automatically turns into a feasibility study project, which requires a separate two-week term for reexamination by all institutions indicated above, with the exception of *Uztyazhneftgazkhimproyekt*. If everything goes well, the Cabinet of Ministers arranges the draft resolution on the project.

According to the author's acquaintance, who has been involved in the Government and later in the oil and gas industry for many years, the screening procedure in some cases can take up to several months. Thus, without direct and strong support for the project from the beginning by an influential bureaucrat, no one is recommended to experience such encumbrance.

The following chapter of the article deals with the current problems foreign investors encounter during the operation of their businesses in the territory of Uzbekistan.

³⁸ There are 14 ministries, nine state committees and six state agencies.

4. The Current State of the Investors

Despite the extensive number of tax freedoms, preferences and state guarantees provided for successful business activities of foreign investors, the current situation leaves a lot to be desired for. Within the last 10 years, a significant number of foreign companies were compelled to discontinue their business activities in Uzbekistan. *Zarafshan Newmont JV, Amantaytau Goldfields JV, Wimm-Bill-Dann Tashkent, Spentex Tashkent Toytepa, Demir and Turkuaz, United Cement Group, Uzdurobita*³⁹ are the major companies that constitute only the tip of the iceberg. Foreign investors who owned or had substantial interests in the above companies initiated several dispute settlement procedures before international arbitral institutions (International Center for Settlement of Investment Disputes [hereinafter ICSID] and United Nations Commission on International Trade [hereinafter UNCITRAL]) based on various allegations: expropriation of 50 percent shares in joint venture;⁴⁰ revocation of telecommunication licenses, the imposition of fines, detention of employees, and seizure of the company's assets;⁴¹ expropriation of assets in a mining refinery;⁴² breach of exclusive agreement.⁴³ Some of the disputes have resulted in arbitration decision⁴⁴ or parties' settlement⁴⁵ and suspension,⁴⁶ while others are still pending.⁴⁷

³⁹ The case of *Uzdurobita*, a 100 percent subsidiary of Russian telecommunication company *Mobile TeleSystems (MTS)*, is unique. In fall 2012, *Uzdurobita* was declared bankrupt by a court decision and four of its top managers were accused of violating tax and currency laws, embezzlement and acting without a licence and were sentenced to fines and different terms of correctional works. After a series of unsuccessful attempts to sell the company assets through auctions, the assets were transferred to the state telecommunication company *Uztelekom*. Early 2013, the Government resolved to establish a new national mobile company on the basis of *Uzdurobita's* frequency resources. Eventually, upon the settlement of a dispute between *MTS* (claimant) and Uzbekistan (respondent) at the ICSID, *MTS* was given a second chance to reenter the Uzbek telecommunication market, purchasing 50.1 percent share in the newly established joint venture *Universal Mobile Systems (UMS)*.

⁴⁰ David Elwards, *Panels Announced for Claims against DRC and Uzbekistan*, *Global Arbitration Review* (Aug. 6, 2010), <<http://www.globalarbitrationreview.com/news/article/28633/panels-announced-claims-against-drc-uzbekistan/>> (accessed Mar. 13, 2016).

⁴¹ Clemmie Spalton, *Russian Phone Company Calls Uzbekistan to ICSID*, *Global Arbitration Review* (Nov. 20, 2012), <http://www.globalarbitrationreview.com/news/article/30990/russain-phone-company-calls-uzbekistan-icsid/> (accessed Mar. 13, 2016).

⁴² *Newmont USA Limited and Newmont (Uzbekistan) Limited v. Republic of Uzbekistan*, ICSID Case No. ARB/06/20.

⁴³ Matthew Pountney, *Gold Mining Arbitration Gets under Way in Geneva*, *Global Arbitration Review* (Feb. 8, 2012), <<http://www.globalarbitrationreview.com/news/article/30152/gold-mining-arbitration-gets-geneva>> (accessed Mar. 13, 2016).

⁴⁴ *Metal-Tech*, *supra* n. 5. Arbitral tribunal concluded that it didn't have jurisdiction over the dispute due to the illegality issue of the investments implemented within the framework of Israel-Uzbekistan BIT.

⁴⁵ *Newmont*, *supra* n. 42.

⁴⁶ *Mobile TeleSystems OJSC v. Republic of Uzbekistan*, ICSID Case No. ARB(AF)/12/7.

⁴⁷ *Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL; *Spentex Netherlands, B.V. v. Republic*

The underlying rationale for the state of Uzbekistan to deprive or restrict the ownership rights or interests of foreign investors in a particular enterprise might be varied, but in the majority of cases it is either the breach of investment obligations taken by the investor in the investment agreement⁴⁸ or breach of laws and regulations relevant to the operation of business activities.

In the first case, the Government attracts a foreign investor, guaranteeing a tax- and customs free environment, fiscal and export-import privileges, governmental support to push local executive authorities or contractual partners to fulfill the objectives settled in the Government resolution or contract obligations. Unless the newly established enterprise is specialized in an industry that is exceptionally strategic for the state, and thus is under the direct supervision of the President, it stays within an 'inviolability' program for several years. However, after the company's has been operating successfully for three-four years, the Uzbek authorities attempt to expel the investor in order to get hold of the nearly finished project.⁴⁹

In the second case, any suspicious act or financial operation, non-observance or incomplete performance of investment obligations, laws or regulations can serve as a justification for such investigation. The Law on Investment Activity enumerates a non-exhaustive list of conditions, when the activity of a company can be limited, suspended or terminated, *i.e.* if the company is found bankrupt, in force majeure circumstances, and if company breaches law provisions on sanitation and hygiene, radiation, environment, architecture and planning, and any *other* requirements, or contravenes the rights and lawful interests of individuals and legal entities.⁵⁰ The decision on the limitation, suspension and termination can be delivered either by the investor, the state authorities or the court. Thus, the foreign company's activity can be suspended or terminated for any insignificant reason with an initiative of state units with subsequent backing by the court decision. Sometimes there is no need for such carelessness. '[T]he authorities [themselves] create problems with sales, currency conversion, supplies, *etc.* so that the investor fails to meet its commitments

of Uzbekistan, ICSID Case No. ARB/13/26; *Güneş Tekstil Konfeksiyon Sanayi ve Ticaret Limited Şirketi and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/19; *Federal Elektrik Yatırım ve Ticaret A.Ş. and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/9; *Vladislav Kim and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/6).

⁴⁸ Lack of qualified experts in the government structures capable of analyzing and countenancing key business decisions of foreign investors that could be derived from the diverse developments in the relevant world markets (most of the enterprises with foreign capital have been established to export the majority of their products) generated a single solution in case of discrepancies in implementation of investment commitments, *i.e.* to organize an extensive investigation of investor activities and punish the trespassers.

⁴⁹ Evgeny Minchenko et al., *Assessment of Political Risks for Foreign Investors in Central Asian Countries: Comparative Analysis 6* (Minchenko Consulting 2013), available at <http://www.minchenko.ru/netcat_files/File/CA%20political%20risks%20comparative%20analysis.pdf> (accessed Mar. 13, 2016).

⁵⁰ Article 26(2) of the Law on Investment Activity.

in full. Next is the forced bankruptcy procedure, whereupon the government takes over the assets and sells off to another investor.⁵¹

In any country with economy based on free market principles and rule of law, it is believed that companies take risks and sometimes pay the prices for their oversights. However, this is not the case for the foreign companies operating in Uzbekistan. *Since foreign investors are provided with preferences and freedoms sufficient to profit, they must be severely punished in case of any minor omission.*⁵²

6. Conclusion

Uzbekistan has lagged far behind most former USSR countries in terms of economic reforms, liberalization, privatization of state enterprises, and protection of property (including intellectual) rights. However, it still has sufficient potentials to regain its leadership position in the region. The Government has to reconsider its strategic goals and get rid of the old style administrative tools of control and intervention into businesses. If the Government really desires to increase the FDI volume to a significant level it should carry out reforms in all spheres that have an impact to the overall investment climate in the country. Enactment of new laws or the amendment of existing ones in a system where the laws do not function properly will not generate the expected results.

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⁵¹ *Uzbekistan: Major Textile Company Goes Bankrupt*, Ferghana News (May 18, 2012), <<http://enews.fergananews.com/news.php?id=2268>> (accessed Mar. 13, 2016).

⁵² The bankruptcy procedures of almost all enterprises with foreign capital have been accompanied by criminal cases.

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