Differentiation of International Agreements: Treaties vs. Contracts in the Practice of the Kyrgyz Republic

by

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Abstract

In the era of globalization international agreements have changed. In the past, the term "international agreements" was mostly used to refer to treaties, but that is no longer the case. There is a growing trend to use this term when referring to contracts. Today States and international governmental organizations enter into international agreements not only with each other, but also with private entities, such as private companies, international non-governmental organizations, public unions and foundations. The number of such agreements has been growing constantly, as States enter into contractual relations on a variety of different matters. However, the status of such agreements remains unclear.

The issue of whether the term "international agreements" refers to treaties or to both treaties and contracts is important because not all of the international agreements are regulated by Public International Law. While treaties are regulated by the provisions of Public International Law, contracts are regulated by the provisions of national laws of States.

This paper is devoted to determine whether international agreements must be differentiated into treaties and contracts. To answer this question, the author has defined the term "international agreements" and discussed their nature and history. Moreover, this paper will analyze the place of international agreements in Contemporary International Law.

As a result, it will be established that due to the different nature and place, treaties and contracts hold in Contemporary International Law, they shall be differentiated. In order to accomplish this, the features of international agreements for such differentiation of international agreements into treaties and contracts were determined. Based on those differentiating features, the current practice of legal regulation of international agreements in the Kyrgyz Republic was analyzed. Finally, the paper concludes that Kyrgyz Republic must recognize the differentiation of international agreements into treaties and contracts and, thus, provide separate legal regulation for treaties and contracts in their national legislation in order to provide a proper legal regulation of international agreements and avoid problems, such as the current problem with Agreement on Kumtor Project.

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Introduction

Subject Matter

The topic of my senior honors paper is "Differentiation of International Agreements: Treaties vs. Contracts in the Practice of the Kyrgyz Republic." The issue of whether international agreements shall be differentiated into treaties and contracts has arisen only recently. The term "international agreements" has been used to refer to treaties for a long time. However, due to an increasing internationalization of private legal relations, which are regulated by contracts, the term "international agreements" now is also used to name the contracts, which are concluded among States and nationals of different States. As a result, when one runs into a document with a title of "international agreement," sometimes it is difficult to determine whether this international agreement is a treaty or a contract.

It is crucial to differentiate international agreements into treaties and contracts because they are different in nature, they provide for different legal consequences and thus shall be differently regulated. Treaties are the international agreements, which regulate public international relations and thus can be concluded only by States and international intergovernmental organizations. In contrast to treaties, contracts are the agreements, which regulate private legal relations of parties, and are complicated with the presence of subjects either represented by different States or by nations of different States. Moreover, treaties are concluded based on the public interests of their parties, therefore treaties create international obligations (obligations under the provisions of Public International Law), which have an impact on the relations of States with each other. Contracts carry purely private interests of their parties, therefore create obligations of private character, which do not directly affect the international community. Hence, being very different in nature and legal consequences, treaties and contracts require different legal regulation. Treaties are regulated by Public International Law, but contracts are

regulated by the national laws of States. Therefore, States shall provide for the separate legal regulation of contracts in their national legislations.

For the purpose of this research the practice of the legal regulation of international agreements of the Kyrgyz Republic was examined. Since its independence in 1991, as a subject of Public International Law, Kyrgyz Republic has entered into 7, 110 international agreements, among which there are both treaties and contracts. However, the national legislation of the Kyrgyz Republic does not provide for the differentiation of international agreements into treaties and contracts, which results in the non-differentiated legal regulation of treaties and contracts concluded by the Kyrgyz Republic. Due to such legal regulation of international agreements, Kyrgyz Republic has come across a practical problem, such as the determination of legal status of some international agreements. This problem is being observed in the Agreement on New Terms for the Kumtor Project among Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kyrgyzaltyn JSC and Centerra Gold Inc. and Kumtor Gold Company CJSC and Kumtor Operating Company CJSC and Cameco Corporation concluded on April 24, 2009. This agreement has a number of problematic aspects, but this paper focuses on the problem of determining the legal status of this agreement, which is being widely discussed in Kyrgyzstan.

Purpose of the Research

The goal of this honors paper is to analyze the history and nature of international agreements in order to determine whether international agreements shall be differentiated into treaties and contracts. Based on the analysis of history and nature of international agreements, it was established that international agreements shall be differentiated into treaties and contracts. It was found that several features of international agreements allow distinguishing treaties from contracts. Moreover, it was also determined that it is highly important to differentiate

international agreements, because they require different legal regulation due to their different nature and legal consequences. Further analysis of the practice of legal regulation of international agreements in the Kyrgyz Republic proved the necessity of differentiation of international agreements and their further separate legal regulation by the national legislation.

Method and Structure

In this honors paper the following methodology is used: historical approach, scientific analysis, case study research and synthesis. Historical analysis is used for revealing the historical background of international agreements, which helps to understand the nature of treaties and contracts. Scientific analysis was applied for determining the place of international agreements in Contemporary International Law, the differences between treaties and contracts and importance of differentiating international agreements into treaties and contracts. Case study research used in the work illustrates the non-differentiated legal regulation of international agreements and related practical problems on the example of the Kyrgyz Republic. Synthesis is used for the development of recommendations on current national legislation on international agreements and further legal regulation of international agreements of the Kyrgyz Republic.

The work consists from three chapters. The first chapter presents the concept of international agreements, where it discusses historical background of international agreements and defines the terms “international agreements,” “treaties,” and “contracts.” This chapter also determines the place of international agreements in contemporary international law.

Second chapter identifies features of international agreements, which allow differentiation of international agreements into treaties and contracts. While defining differentiating features of international agreements, this chapter also emphasizes the necessity and importance of such differentiation.

Third chapter is dedicated to the analysis of the current practice of legal regulation of international agreements in the Kyrgyz Republic. Moreover, it explores that national legislation of the Kyrgyz Republic on international agreements contradicts to provisions of international treaties, to which Kyrgyz Republic is a party. In addition the paper reveals the practical problems arising from the legal regulation of international agreements in the Kyrgyz Republic.

Delimitation of the Research

This senior honors thesis is limited in four dimensions. First dimension of delimitation of the present paper is that this work covers international agreements. Second dimension of research delimitation is that this work focuses on differentiation of international agreements into treaties and contracts. Third dimension is that this paper analyzes the differentiation of international agreements in the practice of the Kyrgyz Republic. Last dimension of research delimitation is the focus of this senior paper on legal consequences of non-differentiated legal regulation of treaties and contracts.

Chapter I. THE CONCEPT OF INTERNATIONAL AGREEMENT

An international agreement is an agreement governed by international law, the concept of which is closely related to the history of its development and to its modern interpretation. International agreements have been often taken to mean simply treaties. However, this paper will explore how the definition is in fact much broader. Today, international agreements cannot be interpreted in a single-sided way - they can be referred to as treaties and as contracts with an international element, which in fact constitutes a completely different definition and corresponding conditions. The importance of defining the term "international agreement" is crucial, because the definition indicates both the purpose and the method of future performance of such an international agreement.

§1. The Definition of International Agreement

The general understanding as the meaning of an agreement means the "harmony of opinion, action, or character; the act or fact of agreeing" of the people or groups of people with regard to any relationship, that they want to be regulated.[1] An agreement is usually embodied in a certain contractual form. A contract is "a legally binding agreement involving two or more people or businesses (called parties) that sets forth what the parties will or will not do. [It is an] agreement creating obligations enforceable by law."[2] In jurisprudence, agreements can be divided into two basic types: the first kind of agreement is the contract, which is regulated by national law, and the second kind of agreements is the treaty, which regulated by Public International Law. The issue is that today both kinds of agreements are often called as international agreements.

[1] Merriam-Webster Online Dictionary. S.v. "treaty." Retrieved October 5, 2012, http://www.merriam-webster.com/.

[2] The Legal Information Institute, Cornell Law School. S.v. "treaty." Retrieved October 5, 2012, http://www.law.cornell.edu/.

Traditionally, an international agreement is an agreement concluded under Public International Law, an instrument by which States and other subjects of international law, such as international organizations, regulate matters of concern to them. International agreements are usually referred to as treaties.[3] A treaty is defined as an agreement establishing a relationship governed by international law, which is concluded in a written form between States.[4] Treaties have been referred to by various terms such as an agreement, convention, protocol, declaration, charter, covenant, pact, act, statute, exchange of notes, modus vivendi, and understanding. Some scholars point out that "the word "treaty" covers a broad range of concepts, including contract or compact, a covenant, an agreement, a settlement, or international arrangements between nation States."[5] The word "treaty" has also been used in the domestic context for the agreements between individuals, for instance, in relations with regard to sale and purchase of property.[6] That is why it shall be emphasized that the particular name of the international agreement does not affect the legal character of that agreement.

In addition to the general definition of international agreement, the Statute of the International Court of Justice adds that "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States" must be applied by the courts, which decide disputes that are submitted to it.[7] From this definition it can be concluded that international agreements serve not only as concrete and clear definitions of reciprocal rights and duties of the parties, but they also serve as sources of international law governing the

[3] Vienna Convention on the Law of Treaties, art. 2 May 23, 1969, 1155 UNTS 331.

[4] West's Encyclopedia of American Law, edition 2., s.v. "treaty," retrieved November 21, 2012, http://legal-dictionary.thefreedictionary.com/treaty.

[5] Michael J. Dodson, "An Australian Indigenous Treaty: Issues of Concern," An Australian Indigenous Treaty Seminar, accessed January 3, 2012, http://www.aiatsis.gov.au/research/docs/pdfs2001/Dodson.pdf.

[6] *ibid*.

[7] Statute of the International Court of Justice, art. 38, Oct. 24, 1945, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215.

international community.[8] Traditionally, it has been established that international agreements provide the legal basis of international relations, being the means of maintaining world peace and security, development of international cooperation and constant order on the international arena. As a source of international law, international agreements play a crucial role in the establishment and development of every branch of international law.

Considering the fundamental role of international agreements among States and recognizing their importance as a source of international law, the Vienna Convention on the Law of Treaties was adopted in 1969 in order to codify the law on international agreements. The Vienna Convention refers to the international agreement as a treaty and explains it as "an international agreement governed by international law and concluded in written form, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation."[9] The Vienna Convention on the Law of Treaties regulates the conclusion and entry into force of international agreements, the application and interpretation of international agreements as well as the amendment, invalidity and termination of international agreements.

Traditionally, as indicated above, the term "international agreement" was used only for the treaties (agreements concluded among States and governed by the Public International Law); but more recently "international agreement" has also been used to refer to contracts (agreements regulating private matters and concluded not only among States, but also between States and private parties, mostly subject to national law). Agreement making "is not a tool reserved only for use between nation-States," conclusion of different international agreements

[8] Statute of the International Court of Justice, art. 38, Oct. 24, 1945, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215.

art. 38(1) lists the sources of international law and States that international law has its basis in international customs, international agreements, and general principles of law. To be considered an international law any applicable rule must derive from one of these three sources.

[9] Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, U.N.T.S. 1155.

is also carried out by other subjects, such as individuals, private companies, nongovernmental organizations and etc.[10]

Today we can hear of different international agreements that are in reality international business agreements, transactions or contracts on sale and purchase of goods or services with a foreign element. An example of an international agreement, which is not a treaty, is the purchase of a building or a land plot for a an embassy of a foreign State, when this international agreement is subject to the national law of one of the parties or to the national law of a third State.[11] Another example of a contract involving a State and an international organization would be "a loan or a guarantee agreement between the World Bank and a State...which is made a subject to the laws of the State of New York."[12] Through these examples it is clear that one of the main requirements for the definition of an international agreement as a treaty is that such an agreement must be "governed by international law," as it is set by the Vienna Convention.[13] However, agreements concluded among States and between States and private parties are not regulated by the Public International Law despite being often named as international agreements.

Such practice, when many agreements are often referred as to international agreements, creates a number of questions. First, whether the relationship between the States and private entities and the relationship of the same nature among the States are the same? Second, whether the principle pacta sunt servanda[14] is equally applicable to such relationships? The answer is rather

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[10] David Llewellyn and Maureen Tehran, "'Treaties', 'Agreements', 'Contracts' and Commitments' - What's in a Name? The Legal Force and Meaning of Different Forms of Agreement Maning," Social Science Research Network Electronic Library, accessed November 12, 2012, http://ssrn.com/abstract=815324.

[11] Malcolm N. Shaw, International Law, 6th ed. (New York: Cambridge University Press, 2008), 137.

[12] Shaw, International Law, 137

[13] Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, U.N.T.S. 1155.

[14] *pacta sunt servanda* is an expression signifying that the agreements and stipulations of the parties to a contract must be observed.

West's Encyclopedia of American Law, ed. 2. S.v. "Pacta Sunt Servanda." Retrieved March 10 2013 from http://legal-dictionary.thefreedictionary.com/Pacta+Sunt+Servanda

uncertain, because in such contracts the rights of the parties are defined by the national law of that State, but the right to use those rights arises under the international customary law and treaty law as well as under the national law.[15] The answers to these questions will be described in the second chapter of this work.

When we come across a document with the title "international agreement" we need to determine whether it is a treaty or a contract. International agreements can be differentiated as treaties and as contracts based on a number of specific characteristic. The most important difference between them is that treaties are concluded by States and are governed by the Public International Law, and contracts are concluded not only among States, but also between States and private entities, such as public unions, foreign companies, banks, etc. and are governed by the national law.[16] In order to understand those differences and reasons why it is important to distinguish treaties from contracts, one must understand the nature and history of international agreements in general.

§2. The History of International Agreements

The history of international agreements is inseparable from the general history of international law. It was the development of mankind as an international community, which recognized certain subjects, their rights and duties, and caused the advent and functioning of the international law as a regulatory tool for the relationship of such subjects. The development of international law and international agreements has always moved together through the historical development of tribes, feudal States, and modern States.

[15] Khaled M. Al-Jumah, "Arab State Contract Disputes from the Past", Arab Law Quarterly 17, no. 3, (2002): 216, accessed October 5, 2012, http://www.jstor.org/discover/10.2307/3382023uid=2129&uid=2&uid=70&uid=4&sid= 21101591376857.

[16] Yurii M. Kolosov and Emiliya S. Krivchikova, ed., International Law. (Moscow: International Relations, 2000), 178-179.

There were international agreements in every historical period of international law. These agreements differed significantly from each other throughout history: the ancient times; the Middle Ages; the transitional period from classical to contemporary international law; and the contemporary international law.[17]

2.1. Early Origins

One of the oldest treaties concluded among tribes was an agreement signed between the city States of Lagash and Umma in Mesopotamia. This agreement was inscribed on a stone and indicated the gods as the guarantors of its execution.[18] In that period most agreements were not made in the name of tribe, but in the name of its leader, because tribes had no political or social organization. It was also very common for the tribes and their leaders to breach the agreements on peace or alliance for defensive purposes made with other tribe leaders because they were liable only before their own tribe and leader.

The most famous international agreement of ancient times is the agreement concluded between Ramses II, the pharaoh of Egypt, and the king of the Hitties "for the establishment of eternal peace and brotherhood." [19] It was one of the first international agreements that included provisions for respecting the territorial integrity of each other, termination of aggression towards each other and the creation of a military alliance.[20] It is known that the largest States of that period, among them Egypt, Mesopotamia, Persia, Assyria, and Chaldea, concluded agreements among each other based on the equality of parties, the principle of pacta sunt servanda (agreements are to be kept) and the principle of good faith.[21] Unfortunately, not much is known about the history of intertribal and interstate agreements in ancient China and India,

[17] Ilya Lukashuk, International Law. The general part (Moscow: BEK Publishing house, 1997), 41.
[18] Kolosov and Krivchikova, ed., International Law, 27.
[19] Shaw, International Law, 14.
[20] *ibid*.
[21] Alina Kaczorowska, Public International Law, 4th ed. (New York: Routledge, 2010), 8.

history of which is recognized to be longer and most probably had experience on international agreements and international law. Agreements during those periods were not really international agreements in today's understanding because at that time there simply was no enforcement tool and legally binding character in international agreements.[22]

2.2. The Middle Ages

During the Middle Ages the newly established sovereign States were gaining experience in regulating their relations through agreements. By the end of the Middle Ages, States began to understand the need to create and enforce common norms. In this historical period, States also formed an idea of sense of justice in international relations and its realization through norms established by international agreements.

The subject matter of the international agreements in that period had changed. Closer to 13th century international agreements were concluded not only with regard to war and peace conditions, but also to establish political and trade relations and dynasty connections. An interesting characteristic of the international agreements in that period was that the main guarantee of the agreement's execution remained the religious ceremonial oath, the violator of which would be excommunicated from the church.[23]

The developments in sailing and new geographical discoveries of that historical period had a huge impact not only on the development of international relations, but also on the development of international agreements. During the medieval period States started expressing their desires to obtain the water territories along their coastlines. For instance, in 1493 the

[22] Lukashuk, International Law, 44.
[23] Kolosov and Krivchikova, International Law, 22-23.

Roman Pope Alexander the 4th announced a division of Atlantic Ocean between Spain and Portugal in order to stop wars.[24]

2.3. The Classical International Law

The Treaty of Westphalia, "often referred as the constitutional treaty of Europe" was the one of the most successful agreements in the history up to 1648.[25] States concluded this agreement after the bloody religious war that lasted for 30 years in Europe (from 1618 to 1848).[26] The Treaty of Westphalia denotes two peace agreements in Latin - Osnabrück and Münster, signed on May 15 and October 24, 1648, respectively.[27] This agreement recognized "the principle of sovereignty, territorial integrity and equality of States."[28] It also provided that the State defeated in war could be deprived of a part of its territory, but was allowed to continue existing as an independent State.

The 1648 Treaty of Westphalia not only established rules, but it became the first system of balance of powers to prevent wars, which existed until the French Revolution and Napoleonic wars. This agreement was truly the first international agreement as the term is understood today, because it established certain rules for the behavior of all parties with regard to different issues, regulated several branches of international law, such as the Public International Law, international humanitarian law, and international diplomatic law. The Westphalia Peace Agreement led to the first codification of the international law, which was a true revolutionary breakthrough.

[24] Kolosov and Krivchikova, International Law, 22-23.
[25] Kaczorowska, Public International Law, 11.
[26] *ibid*.
[27] Kolosov and Krivchikova, International Law, 27.
[28] *ibid*.

International agreements were a key element of the rapid development of international law over the 18-19th centuries, when the basics of future civilization and culture were established. The most progressive views of that historical period belong to the ideas proposed in the French Revolution of 1789, after which the new Constitution of France (1795) contained that international agreements are recognized to be legal acts. The Constitution of United States of America adopted in 1787 also recognized the legal force of international agreements in its national law and put it on one level with federal laws, which means that international agreements had to be not only signed but also ratified.[29]

Many international agreements were reached within this period leading to the regulation of most spheres of international relations. A huge step forward was made by the Congress of Vienna in 1815, which ended the 25 years of Napoleonic War in Europe and adopted the Final Act, an international agreement that codified new provisions in international law such as the law on diplomatic agents and missions, prohibited slave trading and laid foundations for the free navigation of international rivers, that flow through two or more States.[30] All of these were the part of one of the first serious attempts to maintain peace.

A number of other international agreements indicating the interest of States to cooperate and have universal regulation of certain relations were adopted subsequently: the Paris Declaration of 1856 defining the regime of trade navigation in time of war, the Act of establishment of Universal Postal Union of 1874, the Convention on Telegraph Union of 1875, the Multilateral Railroad Convention of 1890.[31] There were also attempts of States to avoid war in the end of 19th century, when in 1899 and 1907 States gathered for the First and Second Hague

[29] Lukashuk, International Law, 50-51.
[30] Kaczorowska, Public International Law, 13.
[31] Lukashuk, International Law, 52-53.

conferences.[32] As a result the Hague Conventions which codified the rules and customs of war were concluded.

2.4. The Transitional Period and Contemporary International Law

The internationalization of societies demanded new rules for international governance of relations among nations, which were adopted through conclusion of international agreements. This need became especially pronounced as a result of the First World War, when most of the Europe was destroyed, Germany surrendered and several Empires collapsed being replaced with democratic regimes. The direct cause of the First World War was the diplomatic crisis that resulted from the assassination of Archduke Franz Ferdinand, heir to the Austro-Hungarian throne, by a Serbian nationalist.[33]

At the beginning of 20th century, during the transitional period in the history of international agreements, States concluded an important and inevitable agreement that was the Statute of League of Nations in attempt to provide peace and cooperation among the States. Unfortunately, this Statute failed to achieve its purpose and it terminated its existence because of the Second World War. As a result of this war, States concluded another agreement – the Charter of the Organization of United Nations, which became a revolutionary international agreement that defined the common aims and principles of international law. From the set of rules defined in this agreement, international law became a system on the basis of common aims and principles. In the past most of the principles were not written in agreements, therefore were weak. When the UN Charter was concluded, it became the first international agreement, which provided the highest legal power to the principles embodied in its text. UN Charter has defined the common objectives and principles of international law, which are the backbone

[32] Lukashuk, International Law, 52-53.

[33] The Causes of First World War, *A Multimedia History of First World War*, accessed March 10, 2013, http://www.firstworldwar.com/origins/causes.htm.

factors. From the aggregate of norms, international law has become a system based on common objectives and principles.[34] In this way the history of contemporary international law started at the moment when the necessary material, spiritual and political conditions were met. Legal scholars define the adoption of the UN Charter as a starting point of Contemporary International Law.[35]

As was described above, international agreements were originally created with the aim of regulating purely public legal relations among States. Moreover, historically international agreements were usually referred as treaties, but with time that has changed. Within the last 70 years, international agreements have changed and expanded their list of objects and subjects. Today international agreements regulate a variety of objects and are concluded by a number of subjects, which now include not only States but also intergovernmental organizations and in some situations international nongovernmental organizations and other private entities.

§2. The Place of International Agreement in Contemporary International Law

2.1. Contemporary International Law

Today international law is so advanced that it covers all vital processes in the international community and serves as a foundation for all activities carried out by States and other subjects. International law developed through time and has reached the top of its development in our time. Contemporary International Law can be distinguished from the Classical International Law by several characteristics, which include the scope, enforcement, subjects, and the interconnectedness of public and private legal relations in today's international arena.

One of the first distinguishing characteristics of Contemporary International Law is the expanded scope of its application. Within the last century, due to the necessity of regulation of new spheres, a number of different branches of international law were established and

[34] Kolosov and Krivchikova, International Law, 35.
[35] *ibid*.

developed: space and air law, trade and investment law, environmental law, human rights law, international criminal law and others. International aviation law started its rapid development after the expansion of civil aviation and regulates international air navigation through the International Civil Aviation Organization, which was established under the Convention on International Civil Aviation.[36] Space law began its rapid development after the launch of artificial satellites into the space and from that time the legal regulation of outer-space activities has been carried out by the UN Committee on the Peaceful Uses of Outer Space.[37] Besides the launch of satellites, international space law also regulates the relations of States in the sphere of space exploration and use of space related resources. The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies established principles of "freedom of access to, and use of, outer space; prohibition against national claims to sovereignty in any part of outer space; and a ban on the placing of weapons of mass destruction anywhere in outer space."[38] International economic law also has become vital due to the fact that trade and investment relations have continually flourished among the States and needed regulation to avoid and resolve conflicts. The World Trade Organization was established to regulate international trade relations and maintain equality and justice.[39] International environmental law became necessary for the international community to reduce the impact of human activities, such as the sudden industrial development resulting in pollution. Today there are 1077 international

[36] The Canadian Encyclopedia. S.v. "Air Law and Space Law" Retrieved March 10, 2013, from http://www.thecanadianencyclopedia.com/articles/air-law-and-space-law.

[37] *ibid.*

[38] The Canadian Encyclopedia. S.v. "Air Law and Space Law" Retrieved March 10, 2013, from http://www.thecanadianencyclopedia.com/articles/air-law-and-space-law.

[39] Understanding the WTO, World Trade Organization, accessed December 11, 2012, http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm

agreements on environment regulations, which makes this branch of international law one of the largest.[40]

Contemporary international law is also distinguished from Classical International Law by the codification that took place over each of its branches. Codification means the "giving a written form to the unwritten rules/principles of international law" and represents "a systematic arrangement of the...existing diverse rules spread over...judicial decisions and juristic opinions," which does not constitute the creation of new norms, but might include the modification of existing rules so as to adopt a wider outlook and keep up with changed times.[41] Present day international law started its rapid development after the adoption of the UN Charter, which led to a number of other treaties codifying the norms of international law in a variety of spheres. Article 13(1)(a) of the UN Charter States that the General Assembly shall initiate studies and make recommendations for several purposes, including "encouraging the progressive development of international law and its codification."[42] Further codification of international law was carried out under the International Law Commission (ILC), which has for its object the progressive development of international law and its codification.[43] The ILC also considers proposals and drafts multilateral conventions submitted by the members of the UN, its principal organs and specialized agencies.[44]

The next distinguishing characteristic of contemporary international law is the wide range of subjects, which includes "States, international organizations, regional organizations, non-

[40] Ronald B. Mitchell, "Agreements List," International Environmental Agreements Database Project (Version 2012.1), accessed November 27, 2012, http://iea.uoregon.edu/.

[41] Tarun Jain, "Codification and Progressive Development of the International Law," Social Science Research Network, accessed November 27, 2012. http://ssrn.com/abstract=1120849. Pdf, 2-4.

[42] Charter of the United Nations, art. 13, Oct. 24, 1945, 1 U.N.T.S. 16.

[43] Statute of the International Law Commission, art.1, Nov 21, 1947, G.A. Res. 174 (II), U.N. GAOR, 2d Sess., U.N. Doc. A/519.

[44] *ibid*, art. 17(1).

governmental organizations, public companies, private companies and individuals."[45] This is not a list of traditional subjects covered by Classical International Law. Not all of these subjects will possess a legal personality, but they all have some influence on the international arena. "The participants shall not simply act in the international community, but also be recognized by this community."[46] For instance, initially only States were recognized to have an international legal personality and newly created States were required to receive the recognition of other States to obtain international legal personality. However, contemporary international law practice has shown that in some cases, even an NGO, such as the Red Cross, can also be recognized by the international community (States) and possess an international legal personality thus be a subject of international law.[47] Therefore, in its development, the international community is recognizing different subjects and their rights, which are not limited to traditional actors. For instance, according to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 private companies have some legal capacity under the international investment law.[48] Another example would be individuals that are recognized to be the subjects of international criminal law, because only they can bear the international criminal responsibility under the Rome Statute.[49] Contemporary international

[45] Shaw, International Law, 196-197.

[46] *ibid*., 269.

[47] Gabor Rona, "The ICRC privilege not to testify: Confidentiality in action," International Committee of Red Cross, accessed November 27, 2012. http://www.icrc.org/eng/resources/documents/misc/59kcr4.htm.

[48] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar 18, 1965, 575 U.N.T.S. 159.

[49] Adrian L. Jone, "Paradigm Shift and the Post-WWII Nuremberg Trials: The Emergence of the Individual as a Subject and Object of International Law," Globalization and Autonomy Online Compendium, accessed November 27, 2012. http://globalautonomy.ca.

Rome Statute of ICC recognizes only individuals to be subjects of the international criminal law. The Nuremberg Tribunal recognized individuals as direct "subjects" of international law: they are bound by the rules and consequences of international criminal justice. This responsibility applies regardless of individual citizenship or residency within States, and whether individuals are governmental officials, or have followed superior orders or national laws in committing such crimes.

agreements can also be concluded by the intergovernmental organizations, even though their legal capacity is very different from that of the States.[50]

Contemporary international law is also characterized by the intersection of the relations of Public International Law and the Private International Law.[51] Today many spheres of the international law are regulated by norms of both Public and Private International Law. Such intersection takes place because in some cases Public International Law covers those activities, which are also regulated by Private International Law. For example, an investor has a right to sue the host State for the unlawful expropriation of the investment under the international treaty (Convention on the Settlement of Investment Disputes between States and Nationals of other States), but the breach of right and following compensation is regulated by the national law of the host State, where the expropriation took place.

Very often this intersection leads to confusion when defining the status of international agreement under the international law. Sometimes States can take a wrong position when defining the status of the international agreement and its place in the international law, which means that States can treat contracts as if they were treaties. For example: The Kyrgyz Republic has signed and ratified an agreement on partnership with the Open Society Institution,

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[50] Kolosov and Krivchikova, International Law, 36.

[51] *The term Public International Law* refers to those laws, rules, and principles of general application that deal with the conduct of nation States and international organizations among themselves as well as the relationships between nation States and international organizations with natural and juridical persons. The Public International Law aims to monitor the behavior between States since where there exists a community of States, the maintaining of law and order becomes essential.

US Legal Dictionary, s.v. "Public International Law," retrieved March 10, 2013, http://definitions.uslegal.com/p/public-international-law/.

The term Private International Law is rules which regulate disputes where the choice of applicable law could influence the outcome of a particular case. In the United States, the term conflict of laws is more commonly used. "Private International Law is administered between private citizens of different countries or is concerned with the definition, regulation, and enforcement of rights in situations where both the person in whom the right inheres and the person upon whom the obligation rests are private citizens of different nations. It is a set of rules and regulations that are established or agreed upon by citizens of different nations who privately enter into a transaction and that will govern in the event of a dispute."

US Legal Dictionary, s.v. "Private International Law," retrieved March 10, 2013, from http://definitions.uslegal.com/p/private-international-law/.

which is a private foundation.[52] The issue is that according to the law of the Kyrgyz Republic this agreement is an international agreement that needs to be ratified by the Parliament, which provides the agreement with a status of international agreement.[53] For the purpose of this work, the author tries to analyze the place of the international agreement in light of intersection of the Public International Law and the Private International Law.

In this way, the law of the Kyrgyz Republic creates a tangled approach towards the international agreements. There are classical treaties that regulate only interstate public legal relations, but there are also other international agreements regulating private matters, moreover concluded by the subjects participating in the international arena, such as the transnational corporations, private foundations and companies from one side and by States from the other side. It is crucial to define the status of each such agreement in the international law, taking into attention that in contemporary international law the international agreements can refer to both treaties and contracts.

2.2. The Place of International Agreements in the Contemporary International Law

International agreements constitute the main tool for regulation of almost all kinds of relations among the subjects of contemporary international law. Upon conclusion some of these agreements become a source of both Public International Law and Private International Law.[54] Traditionally, international law has been regulated by international customs and international

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[52] Zakon Kyrgyzskoi Respubliki o ratifikatsii Soglasheniia o sotrudnichestve mezhdu Pravitel'stvom Kyrgyzskoi Respubliki i Fondom "Soros-Kyrgyzstan", filialom Instituta Otkrytogo Obschestva (g. N'yu Iork) [Law of the Kyrgyz Republic on Ratification of the Agreement on Cooperation between the Government of the Kyrgyz Republic and the Soros-Kyrgyzstan Foundation, a branch of the Open Society Institute (New York)]. January 31, 1997. No. 99.

[53] Zakon Kyrgyzskoi Respubliki o mezhdunarodnyh dogovorah Kyrgyzskoi Respubliki [Law of the Kyrgyz Republic on International Agreements]. July 21, 1999. No. 89, art.11.

[54] Statute of the International Court of Justice, art. 38, Oct. 24, 1945, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215.

In accordance with the order of the sources of international law established by the Statute of the International Court of Justice the international agreements are on the first place, and the rest, including international customs, general principles of the international law, judicial decisions and teachings of scholars come next.

agreements, but today international agreements are being used more than ever before, thus, constituting the largest source of the international law.

The UN Charter is a classic model of an international agreement and it now serves as a foundation of almost all international agreements. This international agreement established certain imperative norms and rules that cannot be avoided by States, even if they unite in their opinion against the UN.[55] Since the UN Charter was adopted, content of the whole international law has changed so much that today it does not resemble itself in past in any way.[56] Due to this international agreement the contemporary international law became a special legal system, based on the single purpose and principles, which maintains a global scheme of international relations - one of the most important interests of all nations.

The main purpose of contemporary international community is maintaining international peace and security; the main tool for doing so is international agreements. Today, relations between States are built on the basis of international agreements that have been previously adopted. For instance, the Kyoto Protocol is an international agreement that required its parties to reduce emission of green house gases.[57] It entered into force in 2005 and regulated the first commitment period from 2008 and to 2012.[58] With the last amendment Kyoto Protocol is now in its second commitment period from 1 January 2013 to 31 December 2020, in which the participants are committed to reduce their green house gas emissions.[59] This example clearly illustrates how States are trying to regulate their future relations, while in past most of the international agreements consisted of norms of the international customary law. First, States

[55] Charter of the United Nations, art. 2(6), Oct. 24, 1945, 1 U.N.T.S. 16. "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

[56] Lukashuk, International Law, 64.

[57] United Nations Framework Convention on Climate Change, Jun 9, 1992, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

[58] *ibid.*

[59] *ibid.*

gained practice and created customs; second, States codified these customs through international agreements. At the present time this process works in reverse: States create norms for certain relations that would satisfy everyone and then States build their relations with each other based on the concluded agreements. Nowadays international agreements are the core source to regulate relations in international community.

Some of the modern international agreements establish international organizations, which regulate relations in a variety of spheres and establish certain standards through the adoption of other international agreements. In order to perform their central role in the establishment and regulation of relations between States, international agreements have developed internationally recognized regulatory standards. For example, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) have established the Codex Alimentarius Commission, which develops "harmonized international food standards, guidelines and codes of practice to protect the health of the consumers and ensure fair trade practices in the food trade."[60]

Present day international agreements provide for the incorporation of the agreements' norms into the legislation of the signatory States, which basically forms national mechanisms for implementation of the norms of international law.[61] More and more frequently, States themselves realize the importance of international agreements and their obligations, so they incorporate norms from international agreements into their national legislation. In the 21st century nations try to balance their actions and interests using the international agreements and by becoming interdependent with each other.

[60] About Codex, Codex Alimentarius International Food Standards, accessed October 4, 2012. http://www.codexalimentarius.org/about-codex/en.

[61] Lukashuk, International Law, 66.

2.3. Modern Approaches of Defining the International Agreement

The international agreement as the main instrument of contemporary international law is undergoing a constant process of development and change. Today there are many different views and approaches expressed regarding the definition of the international agreement. There are increasing numbers of legal scholars who provide definitions of the international agreement, which are broader than the classical definition.

As discussed previously, the Vienna Convention of 1969 represents a classical approach to the definition of international agreement, according to which an international agreement can be concluded only by the States because only they have the legal capacity to enter into international agreements.[62] Other entities shall not have a legal capacity to enter into such agreements, since their activities carry a purely private character and cannot be regulated by international law. Later on, the Vienna Convention of 1986 amended this definition by adding another subject of international law, international intergovernmental organizations, which can also conclude international agreements.[63] From the definition of both Vienna conventions it can be understood that that the object of international agreements is only the relations between States and interstate organizations.

It is important to mention that there are also scholars, who refer to international agreements as to international contracts, thus, in their view international agreements should include not only classical subjects, such as the States, but also modern subjects, such as the transnational corporations (TNCs), nongovernmental organizations (NGOs), noncommercial organizations (NCOs), etc.[64] The impact of these entities is no less than the impact of some sovereign States.

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[62] Vienna Convention on the Law of Treaties, art. 2 May 23, 1969, 1155 UNTS 331.

[63] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 2, Mar 21, 1986. 25 ILM 543.

[64] Natalia Yu. Erpyleva, "International Commercial Contracts in the Private International Law," Legislation and Economics, no.3, 2000: 24-49, accessed November 23, 2012, YuristLib Electronic Legal Library, http://www.juristlib.ru/book_2312.html.

For instance, in terms of resources (money and assets), the largest TNCs cover the aggregate monetary supply and Gross Domestic Product (GDP) of 182 countries out of 191 countries. For example, in terms of its annual sales, Wal-Mart is larger than 161 countries including Israel, Poland and Greece.[65] Such private entities and States may enter into agreements regulating some private matters, for example the public-private partnership agreements, bilateral investment treaties and so on.

According to the definition provided by the official web-site of the United Nations Treaty Collection, "the term "agreement" can have a generic and a specific meaning."[66] Agreements with a generic meaning are those international agreements which regulate the most general public legal relations between states. An example of such agreement could be the Charter of United Nations. A specific meaning stands for those kinds of agreements that are usually bilateral or restricted and which "deal with matters of economic, cultural, scientific and technical cooperation."[67] Looking at these two types of international agreements we can already see differences between them. One regulates relations between only States and interstate organizations. The second one regulates not only public but also private matters and can have as subjects not only States, but also private companies, banks, charity organizations and so forth.

It is crucial to mention that international agreements, which are not treaties and therefore not necessarily covered by the Vienna Conventions, also play an important role in international legal relations. These include those kinds of international agreements that in fact regulate contractual relations on private matters that are not regulated by the Public International Law.

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[65] Ira Hobson, Jr., "The Unseen World of Transnational Corporations' Powers," Neumann University, accessed February 12, 2013, http://www.neumann.edu/academics/divisions/business/journal/Review_SP06/pdf/transnational_corporations.pdf p.23.

[66] Definition of key terms used in the UN Treaty Collection, United Nations Treaty Collection, accessed December 20, 2012, http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#agreements.

[67] *ibid*.

For instance, an agreement between the Kyrgyz Republic and GazProm, concluded between the State and a private company. Such agreement can be defined as an international agreement, which has a State and a private company as it subjects and the investment relations as its object. However, this agreement is subject to national law.

There are many such agreements concluded by other States, but from the modern approach to the definition of international agreement, if an agreement regulates contractual relations, as in the above-mentioned agreement, the subjects of such agreement do not have a full legal capacity to enter into international agreements. The objects of such agreements are regulated by national law. Even when an investor approaches to the international arbitration bodies, they still apply the national law of one of the States.

Chapter II. LEGAL REGULATION OF TREATIES AND CONTRACTS IN INTERNATIONAL LAW

The international agreement not only regulates relations between States, but also strengthens the commitments which States have towards each other. Upon necessity States enter into treaties and contracts. Depending on the activities and relations of States with each other, some of their agreements are regulated by Public International Law and some by Private International Law. Sometimes States enter into agreements, which at first are presumed to be international agreements (treaties), however, in fact those international agreements are contracts, as they pursue the private interests of States and other subjects or due to other reasons that will be discussed later this chapter. However, as it has been mentioned in the previous chapter, both kinds of agreements are often named "international agreement." Despite the same term, they do not have the same nature. This issue is going to be further analyzed in this chapter, revealing that international agreements can be differentiated as treaties and as contracts, based on a number of differences in the components of agreement, such as subjects, scope of regulation, applicable law, enforcement and dispute resolution mechanisms of the international agreement.

§1. Background of the problem: Differentiation of International Agreements

Both Soviet and Post-Soviet literature contains the notion of differentiating treaties and contracts. When using the term "international agreement" in legal literature, Soviet and Post-Soviet scholars refer to treaties and emphasize that agreements concluded between transnational companies and States are not treaties.[68] In USSR legal scholarship did not recognize separation of law into public and private due to the ideology of that period.[69]

[68] Kolosov and Krivchikova, 179.

[69] Erzat Z. Bekbaev, "Private and Public Legal Relations," Theory and Practice of Social Development 3, (2011): 1, accessed February 1, 2013, http://teoria-practica.ru/en/.

However, Western literature does not present an explicit separation between treaties and contracts being more focused on the separation between Public International Law and Private International Law.[70] Historically, Western scholars have viewed and treated Public International Law and Private International Law as two different legal systems.[71] According to Western approach, Public International Law and Private International Law function more or less independently.[72] Regarding the relationship between Public International Law and Private International Law, some legal scholars subsume Private International Law as an integral part of Public International Law, while others deny any connection between the two branches of International Law.[73]

§2. The Subjects of International Agreements: Treaty vs. Contracts

2.1. Subjects of Treaties

One of the indicators for differentiating treaties from contracts is the range of subjects which conclude them. That range is very limited and includes only States and intergovernmental organizations under the traditional approach represented by Public International Law.[74] The nature of the international community as a community of sovereign States has established this approach. States are the main subjects of international law and are also the main subjects of treaties. They possess the highest legal power, sovereignty, which allows them to provide a legally binding character to treaties, when they sign or ratify them.

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[70] Harold G. Maier, "Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and PrivateInternational Law," The American Journal of International Law 76, no. 2 (Apr., 1982): 280, accessed February 20, 2013, http://www.jstor.org/stable/2201454..

[71] *ibid.*

[72] *ibid.*

[73] John R. Stevenson, "The Relationship of Private International Law to Public International Law," Columbia Law Preview 52, no. 5 (May, 1952): 564, accessed February 20, 2013, http://www.jstor.org/stable/1118800.

[74] In accordance with the Vienna Convention on the Law of Treaties of 1969, only States were recognized as subjects, but later the Vienna Convention on the Law of Treaties of 1986 added that intergovernmental organizations can also enter into international agreements.

Vienna Convention on the Law of Treaties, art. 2 May 23, 1969, 1155 UNTS 331.

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 2, Mar 21, 1986. 25 ILM 543.

Taking into account the necessities of international cooperation, States also delegated the power to international organizations to enter into treaties. International organizations are entities created by States upon agreement, which participate in the interstate relations of public character in a way which is similar to the behavior of states. These intergovernmental organizations can enter into treaties with both States and other international organizations composed of States.[75] This definition of international organizations was provided by the Vienna Convention on the Law of Treaties of 1986.

In addition to the traditional subjects, which are States and intergovernmental organizations, there are other subjects which can enter into treaties. According to the official commentaries of the International Law Commission on the Vienna Convention on the Law of Treaties of 1986, the phrase "other subjects of international law" provides for not only intergovernmental organizations, but also three more subjects, the Holy See, the free city and other entities, such as insurgents, which may enter into treaties in certain specific circumstances.[76]

The Vatican is a city-State, officially named the "Holy See," and the seat of the Catholic Church. According to established custom, the Vatican participates in treaties under the name of Holy See.[77]

Another nontraditional subject of international law, which can enter into treaties, is the free city. In international law it is defined as "an independent, territorially and politically neutralized and demilitarized formal entity whose legal system is established by international

[75] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 2, Mar 21, 1986. 25 ILM 543.

[76] Report of the International Law Commission covering the work of its Fourteenth Session, 24 April - 29 June 1962, Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209), Yearbook of the International Law Commission. 1962 , vol. II Downloaded from the web site of the International Law Commission (http://www.un.org/law/ilc/index.htm)

[77] Lukashuk, International Law, 15.

treaties and guaranteed by States or international organizations."[78] A historical example of the free city is Kraków, which "was the first in international legal practice to be a 'free, independent, and completely neutralized city' under the protection of Russia, Austria, and Prussia" under the 1815 Treaty of Vienna.[79]

Different insurgent groups recognized by States as subjects of the international law are also provided with power to enter into treaties. Insurgent entities may appear before or after the national liberation movements or civil wars, when States go through the process of formation (or reformation). Insurgents are defined as "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of ...territory."[80] The Geneva Conventions of 1949, for instance, allow the conclusion of special agreements between parties in the non-international conflicts. Such agreements aim to fulfill urgent humanitarian needs and apply the norms of international humanitarian law.

There are many legal scholars and lawyers who support the idea of allowing the arbitrary definition of range of subjects that can enter into international agreements. Some scholars recognize that contemporary international law has been significantly changed and that, "International law is being transferred from the law among States into law, which covers international organizations, individuals, corporations and other non-State groups."[81] Other scholars have developed their views further and argue that today not only States and intergovernmental organizations are the subjects of international agreements. For instance, Oliver Lissitzyn, a professor at Columbia University, wrote: "It may, indeed, be doubted that

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[78] The Great Soviet Encyclopedia, 3rd edition, s.v. "Free City," retrieved January 17, 2013, http://encyclopedia2.thefreedictionary.com/Free+City.

[79] *ibid*.

[80] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. International Humanitarian Law - Treaties & Documents, accessed January 18, 2012, http://www.icrc.org/ihl.nsf/full/475?opendocument.

[81] John Quippy, "Law for a World Community," Syracuse Journal of International Law and Commerce 16, no.1 (fall, 1989): 5, accessed December 29, 2012, http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/sjilc16&div=3&id=&page=.

international law contains any objective criteria of international personality or treaty-making capacity. The very act or practice of entering into international agreements is sometimes the only test than can be applied to determine whether an entity has such…capacity."[82] It can be concluded from the above-mentioned that the ongoing transformation of international law also includes the introduction of new subjects of both international law and international agreement. The widened range of subjects offered by some scholars is basically a part of the concept of transnational law, which is the international legal system that unites all kinds of norms regulating international relations at all levels.[83]

However, the range of subjects of international agreements cannot be defined arbitrarily due to the nature of relations and law.[84] In 1949, the International Court of Justice considered a case about the reparation for injuries suffered in service to the UN. In that case they made a ground breaking decision stating that the range of subjects of international agreements shall not be selected arbitrarily. The ICJ decided that only States and certain international organizations, like the United Nations, can enter into international agreements and have the relevant rights and obligations under them.[85]

Nevertheless, there are some exceptional cases, when parties of treaties are represented by some other entities, which are not formal subjects of Public International Law. An example of such international agreements is the so-called "diagonal" agreement that became abundant within the last decade. Most of those "diagonal" agreements are of special technical character,

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[82] Oliver J. Lissitzyn, "Efforts to Codify or ReState the Law of Treaties," Columbia Law Review 62, no. 7 (Nov., 1962): 1183, accessed: January 17, 2013, http://www.jstor.org/stable/1120367.

[83] All the law—national, international, or mixed—that applies to all persons, businesses, and governments that perform or have influence across State lines.

West's Encyclopedia of American Law, ed. 2, s.v. "Transnational Law," retrieved January 17, 2013, http://legal-dictionary.thefreedictionary.com/Transnational+Law.

[84] Ilya I. Lukashuk, "The Sovereign Power of the State in the Mechanism of the International Legal Regulation," The Soviet Yearbook of International Law, (Moscow: 1977-1979), 211.

[85] Reparation of Injuries Suffered in Service of the U.N., Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) Retrieved January 17, 2013, http://www.worldcourts.com/icj/eng/decisions/1949.04.11_reparation_for_injuries.htm.

like an Agreement relating to the International Telecommunications Satellite Organization of 1971. This agreement States that, "Each State Party shall sign, or shall designate a telecommunications entity, public or private, to sign, the Operating Agreement which shall be concluded in conformity with the provisions of this Agreement."[86] According to this treaty, both State and private telecommunication companies are allowed to participate in the Operating agreement, which is a consistent part of the treaty regulating technical telecommunications matters. The agreement has a specific character: participating States are called "parties" and participating companies of the Operating agreement are called "signatories." Therefore, despite that under Public International Law only States and intergovernmental organizations can enter into treaties, sometimes private entities can enter into treaties under certain exceptional circumstances. The previous example of the Agreement relating to the International Telecommunications Satellite Organization of 1971 illustrates exceptional circumstances, when private entities can enter into treaties to assist the States in fulfilling the purpose of treaty. In that example private entities did not become the direct subjects of treaty, but they helped the subjects to be a party to the treaty.

In legal literature there is an often expressed view, according to which agreements between States and foreign companies (for example, the concession agreements) are viewed as treaties.[87] However, the International Law Commission affirmed, that such documents are not treaties since they are not regulated by the international law of treaties; therefore, they are considered to be contracts. The same opinion was expressed by the International Court of Justice in the consideration of the Anglo-Iranian Oil Company case. The Court qualified the

[86] Agreement relating to the International Telecommunications Satellite Organization (INTELSAT), art. II (b); with annexes, done Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532 [hereinafter cited as INTELSAT Agreement]; Operating Agreement Relating to the International Telecommunication Satellite Organization, with annexes, done Aug. 20, 1971, 23 U.S.T. 40091, T.I.A.S. No. 7532.

[87] Lukashuk, International Law, 16.

concession agreement between Iran and a British Company as a private contract, not a treaty.[88] But what if the British Company was owned by the UK government? Would it be considered that the British Company was expressing the will of the State and acting on its behalf? In cases when States and other subjects enter into contractual relationships, a number of such questions appear.

According to the official ILC commentaries on the term "other subjects," which was used in defining the subjects of treaties in the Vienna Conventions, other subjects do not include individuals or corporations because "they do not possess capacity to enter into treaties nor to enter into agreements governed by Public International Law."[89] Individuals and legal entities, which are subject to the national law of those States, cannot be subjects of the authoritative interstate relations. Nevertheless, it does not mean that States cannot create norms establishing some rights and obligations for the individuals and legal entities. The rights and obligations of individuals can come directly from certain international agreements, such as ICCPR, ICESCR, EUCHR and others.

By their nature, international agreements as treaties can be concluded only by States and intergovernmental organizations. There are some exceptions to this general rule represented by the Public International Law, such as free cities, insurgents, etc., but overall the range of subjects to treaties is strictly limited by States and intergovernmental organizations.

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[88] Anglo-Iranian Oil Co. (United Kingdom v. Iran), ICJ cases,accessed January 13, 2013, http://www.icj-cij.org/docket/index.php?sum=82&code=uki&p1=3&p2=3&case=16&k=ba&p3=5.

In the Anglo-Iranian case, ICJ had qualified the concession agreement between Iran and a foreign company as something fundamentally different from the international agreement; thus, ICJ decided that it lacks jurisdiction.

[89] Report of the International Law Commission covering the work of its Fourteenth Session, 24 April - 29 June 1962, Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209), Yearbook of the International Law Commission. 1962 , vol. II. Downloaded from the web site of the International Law Commission (http://www.un.org/law/ilc/index.htm).

2.2. Subjects of Contracts

In contrast to treaties, which are regulated by Public International Law, contracts are regulated by the national law of a certain State and has a wider range of subjects. International contracts can be concluded by a wide range of different subjects, including not only States, but also other entities (for example, TNCs, NGOs, etc.). In cases where an agreement is signed by a State and another entity (not a State and not an intergovernmental organization), then the agreement is an international contract.

The range of subjects of international contract covers both traditional subjects of international law, such as States and intergovernmental organizations, and other entities, such as corporations, international organizations, public and private foundations and other entities. In contrast to treaties, almost any kind of entity can participate in the international contractual relations.

Regarding the subjects of international agreements, international contract is not regulated by Public International Law, thus, it can be concluded between different entities regardless of their status under Public International Law. For instance, a contract can be concluded between a State and a foreign bank, between a State and a transnational corporation, between a State body and an international organization and so on. An international contract can even be concluded between two States, where they both have private interests and it will not be considered as a treaty. Such cases will be considered and analyzed in detail in the next part of this work. An example of international contract between States is an agreement between the Russian Federation and Finland on lease of the Russian part of Saimaa Canal and the surrounding area and on the navigation through this channel.[90]

[90] Russia Ratified the Agreement with Finland on Lease of the Saimaa Canal, Rossiyskaya Gazeta, accessed January 25, 2013, http://www.rg.ru/2011/11/20/kanal-anons.html.

Among all kinds of international contracts, the most controversial are agreements between States from one side and foreign legal entities from the other side. Such agreements are often referred as "State contracts."[91] State contracts have evolved into the strongest "safeguard instrument for the foreign entities' interests available both in public and Private International Law," which become "the sole law of the parties and even withstands the State's other international obligations, in the latter case obliging the State to indemnify the foreign entity."[92] Prominent examples of State contracts are investment, joint venture and other various projects agreements, such as Build-Transfer-Operate (BTO) or airport concession agreements.[93]

§3. Scope of Regulation in the International Agreements: Treaty vs. Contracts

Differentiation of international agreements can also be made based on the scope of their regulation, which is comprised of relations and interests of parties under the agreement. Relations regulated by an international agreement can be either public or private. An agreement is usually formed based on certain actions or refraining from actions (either public or private), which represents the object of that agreement. Interests of parties are often expressed through the stated purpose in the agreement and can be either public or private as well.

Treaties regulate public legal relations and represent public interests and contracts regulate private legal relations and represent private interests. That is how one can distinguish treaty from contract. The following subchapter is going to further explore the characteristics of State v. private legal relations and public v. private interests, which represent the scope of regulation discussed above.

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[91] Mekons Ivars, "Unparalleled Binding Force of State Contracts Under Public and Private International Law," Social Science Research Network, accessed October 5, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887724. Pdf, 1.

[92] *ibid*.

[93] *ibid*., 2.

3.1. Public vs. Private Legal Relations

Legal science has always distinguished not only the law, but also legal relations into public and private. Beginning from the times of Ancient Roma, lawyers recognized the separation of law into public and private.[94] Consequently, legal science also separated the legal relations into public and private.[95] Public and private legal relations are also differently regulated; public legal relations are regulated by public, administrative, financial, criminal, criminal process, civil process laws, while private legal relations are governed mainly by civil, family and employment laws. The Western world recognized such separation of legal relations; however, such classification of relations was not recognized by the Soviet legal science, since in the USSR the separation of law itself into the public and private was not recognized due to ideological reasons.[96] However, the differentiation of legal relations into public and private is significant because it influences the solution of many other issues in the theory of legal relations.[97]

The scope of regulation of the treaty is represented by public legal relations in certain spheres. A certain kind of public legal relations that is to be regulated by treaty is indicated in the title or in the context of treaty. For instance, the Charter of the United Nations indicates that it regulates international public legal relations regarding the establishment of international organization for the maintenance of international peace and security, which was indicated in the preamble of this treaty.[98]

However, public legal relations are not only the relations between and among States and international intergovernmental organizations, but also the relations between States and other

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[94] Bekbaev, "Private and Public Legal Relations", Theory and Practice of Social Development 3, (2011): 1, accessed February 1, 2013, http://teoria-practica.ru/en/.
[95] *ibid*.
[96] *ibid*.
[97] *ibid*.
[98] Charter of the United Nations, Oct. 24, 1945, 1 U.N.T.S. 16.

subjects. According to the approach of Russian legal scholars, all the relations "are recognized to be public…if one of the subjects is the State (through its bodies) with its specific nature of the carrier of coercive power; while in relations recognized as private the State was not a subject, or is acting at one of the sides of relations, but only as a carrier of property interests (treasury)."[99] Such definition of public legal relations, according to which public legal relations are those, in which one of the subjects is the State or its representative, provides, inter alia, a clear and formal selection criterion for the definition of legal relations.[100]

In some treaties the scope of regulation explicitly covers the relations between States and individuals, States and foreign investors, States and other private entities. When describing the status of individuals in international law, professor Jessup had Stated that by its very nature international law as the law of all nations "must be defined as law applicable to states in their mutual relations and to individuals in their relations with States… and to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern."[101] Very often treaties create certain rights for the individuals and legal entities against foreign States. For instance, some "treaties of friendship, commerce and navigation sometimes encompassed the right of a national of one contracting State doing business in the other to be free from discriminatory treatment and from having business property expropriated without compensation."[102] Another example of such public legal relations is the International Convention on the Settlement of Investment Disputes which allows investors to bring States to responsibility for the violation of their rights. This international agreement was signed by States to protect private investors and to establish a

[99] Fyodor V. Taranovsky, Encyclopedia of Law, St.Petersburg, 2001, 237.
[100] *ibid*.
[101] Phillip G. Jessup, A Modern Law of Nations, (New York: The Macmillan Company, 1948), accessed January 29, 2013, http://archive.org/stream/modernlawofnatio030358mbp/modernlawofnatio030358mbp_djvu.txt.
[102] Lori F. Damrosch, Louis Henkin and others, International Law Cases and Materials, 4 ed, West Group. St. Paul, Minn., 2001.

liability for the improper implementation of investors' rights and States' obligations. In such way, public legal relations are the relations not only between States, but also between States, individuals and other subjects, which can be characterized by public character, meaning that such relations are of great importance not only for society in a certain State, but for the legal order of the whole international community.

In contrast to treaties, the scope of regulation in contracts is strictly limited to certain private legal relations that have a mutual private interest. Private Legal Relations, regulated by contracts, are usually represented by a wide range of actions directed by private interests, such as the "material resources to be transferred, sold or moral rights relating to or constituting the essence of the contract."[103] Usually the contract itself indicates in its title or introductory paragraphs the type of relations that it will regulate. For instance, in the Alaska Treaty of Cessation of 1867, when Russia sold the Alaska to the US, the subject matter of contract was the land (the territory of current State of Alaska) and the relations regulated by this contract were the sale-purchase of that land.[104]

In legal literature there are several approaches in differentiating the public and private legal relations based on several essential characteristics. According to one of the approaches, public and private legal relations can be differentiated based on the subjects of relations. Usually the State participates in public legal relations, but sometimes it can also participate in private legal relations. Another approach of legal scholars affirms that the main characteristic of public legal relations is the direct participation of State, while in private legal relations usually the State participates indirectly or through its representative body.[105]

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[103] Business Terms Dictionary, Academic.ru, 2001, s.v. "Private interests," retrieved January 29, 2013, http://dic.academic.ru/dic.nsf/business/8833.

[104] Encyclopedia Britannica, s.v. "Alaska Purchase," retrieved March 1, 2013, http://www.britannica.com/EBchecked/topic/12326/Alaska-Purchase.

[105] Iosif A. Pokrovsky, *The Main Problems of Civil Law*, (Moscow: Statut, 2001), 38-40.

It is also argued that in public legal relations, the State is in a different position than other participants, while in private legal relations the State is in a sort of "equidistance" stance to the participants of private legal relations.[106] In contrast to public legal relations, private legal relations are viewed as cooperation between the parties (even though one party is a State) as between the independent managers. The most important characteristic of private legal relations that distinguishes it from public legal relations is that in private ones "State power essentially refrains from direct and powerful regulatory relations, here it does not put itself in a position of sole determining center, and, in contrast," provides a number of independent entities with certain rights.[107]

This view is also supported by revealing the nature of legal relations through contrasting of essential differences between the public and private laws: "If the public law is a system of legal centralization of relations, [private law], on the contrary, is a legal system of decentralization: in its very essence it implies its existence for many self-determining centers. If the public law is a system of subordination, [private law] is a system of coordination."[108] Moreover, the public law is viewed as the "domain of power and subordination", while the private law is viewed as "the domain of freedom and private initiative".[109] Illustrative examples of legal relations in a private contract are the sale, purchase, rent, employment contracts, in which a State can as well be a participant. This approach puts highest attention on the different position of participants in public legal relations and their equal position in private legal relations.

It can be concluded that the public and private legal relations shall be differentiated and consequently be differently regulated because they are fundamentally different in nature and are represented by completely different relations among its subjects. It is important to keep in

[106] Iosif A. Pokrovsky, *The Main Problems of Civil Law*, (Moscow: Statut, 2001), 38-40.
[107] *ibid*.
[108] *ibid*.
[109] *ibid*.

mind that both public and private legal relations derive from the interests of parties, which also constitute the scope of regulation, and that is going to be described further in the next part of this work.

3.2. Public vs. Private Interest

In any international agreement the parties have a certain interest in concluding the agreement. Interests can be divided into two main types: individual (personal), inherent to a specific individual or a group (collective), which expresses the common needs of their constituents, and the public, which represents a kind of averaging of individual and group interests inherent in the society.[110] The interests of companies (legal entities) also refer to individual interests, which will be referred to as private interests. In addition, it should be noted that the public interests being the interest of the whole community are represented by the activities of the State.[111]

The interests of subjects in the international agreement can either be public or private, which determines the type of the international agreement. Interests of the parties usually correspond to the mutual relations established by the international agreement between them. Treaties regulate public legal relations and reflect the public interests of its parties. In contrast to them, contracts, regulating purely private legal relations, express only the private interests of the parties. In such a manner the interests of parties in the international agreement also determine the scope of regulation of that agreement.

By law, public interest is defined as "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are

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[110] Aleksei Ya. Kurbatov, "Theoretical Basis of the Combination of Private and Public Interests in the Legal Regulation of Business," Black Holes in the Russian Legislation 1, (January 2001), accessed February 18, 2013, http://www.cfin.ru/press/black/2001-1/03_01_kurbatoff3.shtml.

[111] *ibid*.

affected."[112] Since public interest represents the interests of the whole community rather than the interests of certain individuals it is one of the characteristics of public legal relations. Public interests are often reflected in treaties as the purpose of treaty, which is usually defined in its preamble or in its first articles. For instance, the purpose of the Vienna Convention of 1969 is the codification and progressive development of the law on treaties.[113] In this example, it is clearly seen that the public interest here is putting in order and developing the law on treaties.

It is important to understand that if a State is one of the participants in certain relations, it does not imply that such relations carry public interest. States can also enter into relations with each other with no public interest, for example, when the subject matter of relations is "exclusively commercial, such as the purchase of commodities in bulk."[114] Thus, such agreement will carry private interests and be purely considered as contract.

In contracts interests of parties also determine the scope of regulation. Private interests can be defined as protected legal interests inherent in specific individuals and social groups.[115] From the individual's perspective, it is a purely private interest, for instance, the protection of his own property, while from the perspective of society it is also a public interest (the potential protection of all persons from the despotism of the current majority).[116] Similarly to treaties, the private interests in contracts are usually defined in the recitals or first articles of the contract. The private interests of parties in the contracts are usually represented by certain actions regarding the object of contract. For instance, in sale and purchase contracts the

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[112] Black's Law Dictionary, 6th Ed., s.v. "Public interest," retrieved January 29, 2013, http://thelawdictionary.org/public-interest/.

[113] Vienna Convention on the Law of Treaties. 1969. Preamble.

[114] Shaw, International Law, 55.

[115] Kurbatov A.Ya, "Theoretical Basis of a Combination of Private and Public Interests in the Legal Regulation of Business," Black holes in the Russian legislation, № 1, January, 2001, accessed January 30, 2013, http://www.cfin.ru/press/black/2001-1/03_01_kurbatoff3.shtml.

[116] Michal Bartoň and Pavel Mates, "Public Versus Private Interest – Can the Boundaries Be Legally Defined?", Czech Yearbook of International Law, (March 30, 2011): 172-189, Social Science Research Network, accessed January 29, 2013, http://ssrn.com/abstract=1799331.

purpose of contract for one party (the seller) is to get some profit by selling the goods and receiving money, and for the other party (the buyer) is to get some assets or resources by buying goods and paying money for it.

In this way, it is clearly established that treaties regulate public legal relations, in which the subjects carry certain public interests, and contracts regulate private legal relations, in which the subjects carry private interests. The distinction of legal relations into public and private allows to understand how jurisdiction and applicable law are chosen in the international agreements, which is discussed further in the next subchapter of this work.

§4. Enforcement in International Agreements: Treaty vs. Contract

Enforcement mechanisms of international agreement represent one of the most important distinguishing characteristics of treaties and contracts. Legal definition of the enforcement is "putting into effect" and is usually associated with such concepts as to enforce a contract, enforce provisions of the law, enforce sanctions, and etc.[117] In the context of this work, enforcement refers to the fulfillment of the international agreement, which consists of entry into force of international agreement, its implementation and dispute resolution in the international agreements.

4.1. Enforcement Mechanisms in Treaties

4.1.1. Entry into Force of Treaties

Enforcement of the treaty can be carried out after its entry into force, which means that its parties can exercise their rights and duties provided by the treaty. The order and date of the entrance into force of treaties is established by treaties themselves or as agreed by participants.[118] It can be observed from practice that agreements can enter into force from the

[117] Burton's Legal Thesaurus, 4 ed., s.v. "enforce," retrieved February 25, 2013, from http://legal-dictionary.thefreedictionary.com/enforce.

[118] Kolosov and Krivchikova, International Law, 189.

moment when its participants have expressed their consent to be bound by the treaty, which is traditionally done through signature, ratification, exchange of notes, approval, accession, or by any other means agreed by the parties.[119] For instance, the UN Convention of the Sea Law of 1982 provided that it enters into force after 12 months from the submission of 60th ratification certificate or document on accession.[120]

Signature may alone express the consent of State to be bound by the treaty obligations.[121] However, some treaties provide that signature alone is not enough to be bound by treaty obligations and further ratification of the treaty is necessary. Article 18 of the Vienna Convention on the Law of Treaties provides that signing a treaty creates the obligation to act in good faith, which is refraining from actions that go against the object and purpose of the treaty, but signature does not create an obligation to ratify.[122] Therefore, if the State signs a treaty, the treaty will still be in force for that State, since the State will have to refrain from acting against the purpose of the treaty. This issue can be observed in cases, when States do not ratify signed treaties and decide to "unsign" them as it happened with the US, which revoked its signature to the Rome Statute of the International Criminal Court (ICC). The US government, under the presidency of Bill Clinton signed the Rome Statute of the ICC but the US government under President George W. Bush decided that the US no longer had the intention of ratifying it. In order to ensure that the US would not be in breach of Article 18 of VCLT, when it decided to start the war in Iraq, which would frustrate the objectives of the Rome Statute, on 27 April 2002 the US Secretary General for Arms Control and International Security wrote to the Secretary General of the United Nations informing him that the US did not intend to become a

[119] Vienna Convention on the Law of Treaties, art. 11, May 23, 1969, 1155 UNTS 331.
[120] Kolosov and Krivchikova, International Law, 189.
[121] Kaczorowska, Public International Law, 95.
[122] Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 UNTS 331.

party to the Rome Statute and accordingly had no legal obligations arising from its signature.[123] Therefore, taking into consideration this example, one can conclude that if the State does not want the treaty to be enforced with regard to that State, it shall unsign it.

Consent to be bound by a treaty can also be expressed by an exchange of instruments. Those instruments are established by the treaty itself or are chosen by parties. VCLT provides that such instruments shall "provide that their exchange shall have that effect; or it [shall be] otherwise established that those States were agreed that the exchange of instruments should have that effect."[124] For example, the new START (Strategic Arms Reduction Treaty) officially entered into force through the exchange of instruments of ratification between the Minister of Foreign Affairs Lavrov, who represented Russian Federation, and Secretary of State Clinton, who represented the US.[125]

Ratification in the context of international law is a procedure which brings a treaty into force and constitutes a "definitive consent" of the State to be bound by treaty.[126] One needs to mention that acceptance and approval acts of States have the same meaning as ratification. Although, treaties may be ratified (accepted or approved) by only a signature of the State representative, upon ratification very often States take several formal procedures that are usually dictated by the national law of the States, such as receiving the consent of legislature to be bound by the treaty.[127]

Consent to be bound by a treaty expressed by ratification, acceptance or approval can be expressed by the parties if:

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[123] Kaczorowska, Public International Law, 96.

[124] Vienna Convention on the Law of Treaties, art. 13, May 23, 1969, 1155 UNTS 331.

[125] New START Treaty Entry Into Force, Press Releases of the U.S. Department of State, (February 5, 2011), accessed February 27, 2013, http://www.State.gov/r/pa/prs/ps/2011/02/156037.htm.

[126] Kaczorowska, Public International Law, 97.

[127] *ibid*.

- treaty provides for such consent to be expressed by ratification, acceptance or approval;
- negotiating States have agreed that ratification, acceptance or approval are required;
- a representative of the State has signed the treaty and it becomes subject to ratification, acceptance or approval required by national law.[128]

Accession is another way for States to express their consent to be bound by the treaty, which brings it into force. The State can access or adhere to the treaty, when it wants to formally accept its provisions without having participated in the negotiations, drafting and signing of the treaty.[129] Accession may take place before or after the treaty has been entered into force for the rest of its participants.[130] The State can enter a treaty by accession when:

- the treaty provides such requirement;
- the negotiating States were agreed to follow such means of consent to be bound;
- all the parties have subsequently agreed that such consent may be expressed by particular State.[131]

To conclude this section, it is necessary to state that enforcement of a treaty is initiated from its entry into force. Entry into force is carried out when the participants of treaty have expressed their consent to be bound by that treaty through signature, exchange of notes, ratification, approval, acceptance or accession. After the treaty is entered into force, its participants are required to carry out their obligations in a good faith (principle of pacta sunt servanda) as it is established by article 26 of the VCLT.[132] Once the parties start to fulfill their obligations under

[128] Vienna Convention on the Law of Treaties, art. 14, May 23, 1969, 1155 UNTS 331.

[129] Kaczorowska, Public International Law, 98.

[130] *ibid*.

[131] Vienna Convention on the Law of Treaties, art. 15, May 23, 1969, 1155 UNTS 331.

[132] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Mar 21, 1986. 25 ILM 543.

the concluded treaty, the question of implementation arises. Implementation of the treaties will be revealed in the following subchapter.

4.1.2. Implementation of Treaties

In legal terminology implementation refers to putting in practice, realizing; and the associated concepts are implementing the agreement or implementing the order of the court.[133] As it has been mentioned earlier, participants of the treaty are expected to act in a good faith while carrying out their obligations. Implementation of treaty can be carried out by its participants with the help of international guarantees, international control and execution of the interstate actions.[134]

International guarantees are understood as international legal acts, providing a suretyship or assurance of the State or a group of States to take necessary measures to motivate the participant to fulfill the concluded agreement.[135] An example of such international guarantee is the Pact of Locarno that consists of several treaties on mutual guarantee concluded between the Germany, Belgium, France, United Kingdom and Italy in 1925.[136] Pact of Locarno provided that borders between its parties were inviolable; that its parties would never attack each other except in "legitimate defense"; that its parties would settle all disputes by peaceful means; and that in case of an alleged breach of those undertakings, the parties would come to the defense of the attacked party.[137] These treaties also provided for the guarantee of mutual support between France and Poland or Czechoslovakia against unprovoked attack of other parties.[138]

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[133] Burton's Legal Thesaurus, 4 ed., s.v. "implement," retrieved March 13, 2013, http://legal-dictionary.thefreedictionary.com/implement.

[134] Kolosov and Krivchikova, International Law, 200.

[135] *ibid*.

[136] Encyclopedia Britannica, s.v. "Pact of Locarno," retrieved March 1, 2013, http://www.britannica.com/EBchecked/topic/345660/Pact-of-Locarno.

[137] *ibid*.

[138] *ibid*.

International control can be implemented in different forms. It can be carried out either by establishing special monitoring bodies or through delegating the control authorities to existing international organizations or their special bodies.[139] For instance, in accordance with the International Covenant on Civil and Political Rights (ICCPR) of 1966 there was established a special agency under the UN, the Human Rights Committee, that controls the observance of human rights protected by treaty. Such committees were created under many other treaties in different spheres of Public International Law such as the Committee of Child Rights, Committee on Liquidation of Race Discrimination, etc.[140] When it comes for enforcement to take place through an international organization, the treaties indicate existing international organization to be responsible for control. For instance, according to the Non-Proliferation Treaty on the Non-Proliferation of Nuclear Weapons of 1968, International Atomic Energy Agency (which is an international organization) controls the fulfillment of the treaty obligations on non-proliferation of nuclear weapons through special inspections.[141]

The implementation of treaties also presumes an execution of interstate actions to fulfill the treaty obligations. Treaties contain a number of actions that need to be taken by States. For example, the Vienna Convention for the Protection of Ozone Layer of 1985 provides that its participants shall take a number of legislative and administrative activities to fulfill its provisions.[142] Each State independently determines which measures shall be taken for execution of the concluded treaty.[143] According to the Constitution of the Kyrgyz Republic, international agreements of the Kyrgyz Republic are a compound part of its legal system.[144] The law of the Kyrgyz Republic on international agreements provides that international

[139] Kolosov and Krivchikova, International Law, 201.
[140] Kolosov and Krivchikova, International Law, 201.
[141] *ibid*.
[142] *ibid*., 202.
[143] *ibid*.
144 Konstitutsiia Kyrgyzskoi Respubliki [Konst. KR] [Constitution of the Kyrgyz Republic] art. 6(3), June 24, 2010.

agreement is subject to execution from the moment of its entrance into force for Kyrgyzstan.[145] This means that after Kyrgyzstan signs and ratifies a treaty, it starts to harmonize its legislation with the provisions of the signed treaty to make sure that they are not in contradiction with each other.

To sum up, the implementation of treaties is represented by a number of means, including international guarantees, international control, support of international organizations and interstate activities. Assumed that States enter into treaty with an intention to fulfill it, each of those means is aimed at a stronger enforcement of treaties and higher compliance of States with the provisions of treaty.

4.1.3. Dispute Resolution Mechanisms in Treaties

When the implementation of treaties fails to meet its objectives and the parties of treaty have a conflict, the next step is a dispute resolution process. Dispute resolution is the means to gain an outcome when a conflict between the parties arises under the agreement.[146] There are different dispute resolution mechanisms, such as negotiations, mediation, arbitration, adjudication and etc. The institutes of enforcement and dispute resolution are going to be explored further as another distinguishing characteristic of treaties from contracts.

International law imposes an obligation on all States to settle their disputes "by peaceful means in such a manner as not to endanger international peace, security and justice," which is a direct obligation indicated by article 2(3) of the United Nations Charter and is also imposed by the customary international law.[147] Such peaceful means include the following: international adjudication, international arbitration and a number of diplomatic means for the settlement of

[145] Zakon Kyrgyzskoi Respubliki o mezhdunarodnyh dogovorah Kyrgyzskoi Respubliki [Law of the Kyrgyz Republic on International Agreements], art. 28 (2), July 21, 1999. No. 89.

[146] Burton's Legal Thesaurus, 4 ed., s.v. "dispute resolution," retrieved February 25, 2013, http://legal-dictionary.thefreedictionary.com/Dispute+resolution.

[147] Charter of the United Nations, art. 33(1), Oct. 24, 1945, 1 U.N.T.S. 16.

international disputes, such as the negotiation, good offices, mediation, inquiry and conciliation.[148]

Diplomatic means of settlement of international disputes do not provide a binding decision, thus are often used by States before approaching to adjudication and arbitration, which provide a binding decision. Negotiation, being the simplest way to settle a dispute, is basically the discussions between the parties or their representatives with a view to settle the dispute.[149] Good offices is a method of dispute resolution, which involves a third party (a State, an individual or an entity) in the settlement of dispute, the main role of which is to provide a channel of communication and establish a dialogue between the parties to resolve the dispute.[150] Another dispute resolution method is mediation, which is similar to good offices, but is characterized by an active involvement of the third party, which makes proposals for the solution of dispute.[151] Inquiry is a dispute resolution method that is similar to mediation, but it involves an investigation of facts surrounding the dispute by the third party.[152] The last diplomatic method of dispute resolution is conciliation, which is a quasi-judicial procedure, where the third party is appointed to investigate the dispute and suggest the terms for settlement, but those terms are not obligatory to the parties of dispute.[153] It can be observed that non-binding character is the common disadvantage shared by all of the described diplomatic dispute resolution methods.

Another dispute resolution mechanism is the international adjudication, which is a settlement of dispute in the permanent international justice body, such as International Court of Justice

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[148] Charter of the United Nations, art. 33(1), Oct. 24, 1945, 1 U.N.T.S. 16.

[149] Kaczorowska, Public International Law, 616.

[150] *ibid*.

[151] Mackenzie Ruth, "Law and Policy of International Courts and Tribunals," University of London Press, 2005, accessed March 12, 2013, http://www.londoninternational.ac.uk/sites/default/files/law_policy_international_courts.pdf, 36.

[152] *ibid*., 37.

[153] Kaczorowska, Public International Law, 616.

(ICJ). Adjudication is the legal process of resolving a dispute in a court, the judgment or decision of which is binding upon the parties of dispute.[154] International justice bodies are created by States mostly to deal with noncommercial disputes that have a strong influence on future relations between States.[155] Hence, in such courts the jurisdiction, judges, rules are pre-determined. International courts that carry out international adjudication are the ICJ, the World Trade Organization Dispute Settlement Body (WTO DSB) and the International Tribunal for the Law of the Sea (ITLOS).[156] Besides permanent judicial bodies, there are also a number of special bodies that are formed under the United Nations, which engage in "judicial or quasi-judicial decision-making, standard-setting and monitoring with regard to the international obligations of States."[157] Examples of such bodies are the UN treaty bodies, which administer compliance of States with the principal treaties, UN agencies, such as the International Labor Organization, International Law Commission, Office of the UN High Commission for Human Rights, Economic and Social Council and etc. play important roles in promotion, protection, and standard-setting in international relations.[158]

International arbitration as means for dispute resolution is usually used with regard to commercial disputes between States. The 1899 Convention for the Pacific Settlement of International Disputes, from which the history of international arbitration starts, defines arbitration as following:

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[154] West's Encyclopedia of American Law, ed. 2, s.v. "adjudication," retrieved March 14, 2013, from http://legal-dictionary.thefreedictionary.com/adjudication.

[155] Anna T. Katselas, "International Arbitration vs. International Adjudication for the Settlement of Disputes Between States and International Organizations," University of Vienna Law School, accessed March 6, 2013, http://ils.univie.ac.at/fileadmin/user_upload/legal_studies/student_paper/Anna_T._Katselas__International_Arbitration_vs._International_Adjudication_for_the_Settlement_of_Disputes_Between_States_and_International_Organizations.pdf., 5.

[156] *ibid*.

[157] Universal System, International Justice Resource Center, accessed March 13, 2013, http://www.ijrcenter.org/ihr-reading-room/universal-tribunals-treaty-bodies-and-rapporteurs/.

[158] *ibid*.

> International arbitration has for its objects the settlement of disputes between States by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award.[159]

Arbitral tribunals are often created after the dispute arose; if States have decided to settle it by arbitration, they shall conclude a compromis, formal agreement that specifies the conditions under which the arbitration will function, including terms, composition, competences and applicable law.[160] Similarly to adjudication, arbitration requires the consent of parties to the binding character of decision given by the third-party.

Arbitration is mostly used to settle commercial disputes, and most often the decision of arbiters is monetary.[161] Usually each party chooses one arbiter and the two appointed arbiters choose the third neutral arbiter. Another common feature of arbitration is that proceedings are kept confidential by the desire of parties.[162]

In international disputes between States, arbitration is often used with regard to commercial disputes or financial disputes, which often arise under the bilateral treaties. Examples of tribunals that arbitrate such kind of international disputes are the Iran-United States Claims Tribunal[163] and the International Centre for Settlement of Investment Disputes (ICSID).[164]

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[159] Convention for the Pacific Settlement of International Disputes, art.15, Jul 29, 1899, 1 Bevans 230; 1 AJIL 103 (1907).

[160] Kaczorowska, Public International Law, 617.

[161] Katselas, "International Arbitration vs. International Adjudication for the Settlement of Disputes Between States and International Organizations," University of Vienna Law School, accessed March 6, 2013, http://ils.univie.ac.at/fileadmin/user_upload/legal_studies/student_paper/Anna_T._Katselas__International_Arbitration_vs._International_Adjudication_for_the_Settlement_of_Disputes_Between_States_and_International_Organizations.pdf., 5.

[162] *ibid*.

[163] The Iran-United States Claims Tribunal was created to resolve the crisis in relations between the Islamic Republic of Iran and the United States of America that was a result of the hostage crisis at the United States Embassy in Tehran in November 1979. See The Iran-United States Claims Tribunal, http://www.iusct.net/.

[164] International Centre for Settlement of Investment Disputes (ICSID) is a part of the World Bank Group and was created for the settlement of investment disputes between governments and foreign investors. ICSID functions

Both tribunals have an authority to resolve disputes not only between States, but also between States and individuals or corporations.

In this way, international arbitration is a method of dispute resolution which provides for a binding decision that is final and not subject to appeal. This dispute resolution method which is usually used after the application of peaceful dispute resolution mechanisms. In the international practice international arbitration has been mostly used for the settlement of commercial disputes between states.

To sum up, under Public International Law, participants of treaties are obliged to settle the disputes by diplomatic means, such as negotiation, good offices, mediation, inquiry and conciliation, but can also refer to means, such as adjudication and arbitration, which provide a binding decision. Described methods of dispute resolution allow settling disputes in the best interests of both parties without harming any of the sides to dispute.

4.2. Enforcement Mechanisms in Contracts

4.2.1. Entry into Force in Contracts

In contrast to treaties, contracts are concluded based on the fundamental principle of freedom of contract, which allows the parties to determine a variety of mechanisms of its entry into force, enforcement and dispute resolution. Freedom of contract is a concept which holds that contracts are concluded on mutual agreement and free choice of parties and, therefore, the contracts cannot be impeded by any external control such as governmental interference.[165] So, the first step is the entry into force of the contract.

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based on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar 18, 1965, 17 UST 1270, TIAS 6090, 575 UNTS 159, available at https://icsid.worldbank.org/ICSID/Index.jsp.

[165] US Legal Dictionary, s.v. "freedom of contract," retrieved March 10, 2013, http://definitions.uslegal.com/f/freedom-of-contract/.

Based on the freedom of contract, parties themselves chose when the contract enters into force: either from the moment of its conclusion or from other moment chosen by parties.[166] The order and date of the entrance into force of contract is established by contract itself as agreed by the parties.[167] As it can be observed from the practice, most contracts can enter into force from the moment when parties sign it. For instance, the European Commission Research projects' contracts enter into force "upon signature by the co-ordinator and the Commission only," while other contractors also have to sign the contract within a delay specified in the contract (usually 60 or 90 days).[168]

There are so-called conditional contracts, which indicate in their own provisions the date or specific conditions when the contract enters into force. An example of such conditional contracts is the Agreement on Procedure of Order Execution by Novosibirsk Service Orders LLC. This contract provides that it enters into force from the moment when Novosibirsk Service Orders LLC receives the payment for services on its banking account.[169]

In short, parties of the contract can indicate any time or any condition upon which the contract enters into force. This opportunity is given to the parties of contract by the principle of freedom of contract, which is fundamental for the conclusion and enforcement of contracts.

4.2.2. Implementation of Contracts

Contracts are very different from treaties in a way that their implementation fully depends on the parties of contract. Since contracts represent private legal relations with private interests, its implementation and control are also the interests and obligations of its parties. The principle of freedom of contracts allows the parties of contract to determine any method for the

[166] Grazhdanskii Kodeks Kyrgyzskoi Respubliki [GK KR] [Civil Code of Kyrgyz Republic]. art. 385.

[167] Kolosov and Krivchikova, International Law, 189.

[168] Signature, entry into force and start of the project, Community Research and Development Information Service, http://cordis.europa.eu/fp6/stepbystep/signature.htm.

[169] Agreement on Public Offer, Novosibirsk Service Orders LLC, accessed January 20, 2013, http://ispolneno.ru/clients/agreement/.

implementation of contract as long as it falls within the frames of law. Similarly to treaties, contracts provide that parties shall execute their obligations in a good faith.

The implementation of contracts is carried out by two implementation mechanisms: the "private order institutions," which are the enforcement mechanisms established by the contract itself, and the legal system of State, which provides an institution for contract enforcement through the legislation and State agencies of law enforcement.[170] Enforcement mechanisms chosen by the contracts are highly important because different enforcement mechanisms will produce different results.[171]

"Private order institutions" facilitate the contract enforcement without relying on the law enforcement mechanisms of State and are represented by non-legal means, such as commercial sanctions.[172] In most States, the national legislation provides certain remedies to ensure the fulfillment of obligations under the contract. These remedies are special legal means of property character that are stipulated by the national law or contract itself to encourage the party of contract for the proper performance of the obligations. These remedies establish additional guarantees for the satisfaction of the other party's requirements under the contract. For instance, when a contract between companies is characterized by non-verifiability, one company will retain its property rights over the assets used by its suppliers in the production process to reduce risks arising out of the contract.[173] In such a way, by owning assets throughout the whole production process company protects itself from possible non-execution

[170] Avner Greif and Eugene Kandel, "Contract Enforcement Institutions: Historical Perspective and Current Status in Russia," Center for Institutional Reform and the Informal Sector, University of Maryland at College Park (1993), accessed February 28, 2013, http://pdf.usaid.gov/pdf_docs/pnabr268.pdf, 7-8.

[171] Paul B. Stephan, "Privatizing International Law," Virginia Law Review 97, no. 7 (November 2011): 1593, accessed: March 1, 2013, http://www.jstor.org/stable/41307889.

[172] Grief and Kandel, "Contract Enforcement Institutions: Historical Perspective and Current Status in Russia," Center for Institutional Reform and the Informal Sector, University of Maryland at College Park (1993), accessed February 28, 2013, http://pdf.usaid.gov/pdf_docs/pnabr268.pdf, 7.

[173] Grief and Kandel, "Contract Enforcement Institutions: Historical Perspective and Current Status in Russia," Center for Institutional Reform and the Informal Sector, University of Maryland at College Park (1993), accessed February 28, 2013, http://pdf.usaid.gov/pdf_docs/pnabr268.pdf, 8.

of contract by the other company. This kind of commercial sanction seems to be most effective to many business entities and is highly popular. For instance, in the US legal scholars have come to conclusion that American businessmen do not rely on the legal system of the State to mitigate the disputes because of the high cost of legal proceedings, and prefer to use commercial sanctions.[174]

There are certain conditions, when remedies can be used to enforce the contract. First, such remedies for ensuring the fulfillment of the contract shall be provided by law or contract. Second, remedies are usually used only upon the initiative of both parties. In this way, contract basically serves as a legal fact to run those remedies. Third, such methods only carry material character. Fourth, they are aimed at encouraging each of the parties to perform its duties. Fifth, remedies are complementary to primary obligations that they provide for. This is manifested in the fact that they follow the fate of the principal obligation (they are transferred and terminated together with them).

Legislation of the Kyrgyz Republic, particularly the Civil Code, provides the following remedies to ensure the implementation of obligations under the contracts: penalty, pledge, lien, suretyship (guarantee), down payment and other means provided by law or contract.[175]

Forfeit (fine, penalty) is the amount of money recognized by law or contract which is paid by one party to another, if the first party is not able to fulfill its obligations or is not able to properly fulfill its obligations under the contract.[176] The difference between fine and penalty is slight. The fine is usually a sum, which is determined in advance and shall be collected once, while penalty is a certain percentage of the debt, resulting from the non-performance or

[174] *ibid*.

175 Grazhdanskii Kodeks Kyrgyzskoi Respubliki [GK KR] [Civil Code of Kyrgyz Republic]. art. 319.

176 ibid., art. 320.

improper performance of the contract, established in case of delay in execution, and subject to periodic payments (for example, 0.5% of the total delayed sum for each day).

The *pledge* is a type of remedy, according to which the mortgagee (creditor) keeps the pledged property of the mortgagor (debtor) until the debtor fulfills his obligations under the contract. However, in the event of non-performance or improper performance of the contract by the debtor, the mortgagee (creditor) does not become the owner of the mortgaged property.[177] The mortgagee is entitled to claim the realization of the pledged property (typically sale at the public auction) in order to satisfy his demands prior to other creditors from the proceeds after the sale.[178]

The *retention* is another type of remedy often used in contracts. Property of the debtor may be held by the creditor not only as a pledge, but for other reasons, for example, on the basis of contract for the performance of works or rendering of services.[179] For instance, the laundry can not possess the linen of its client, and it has to transfer the result of it work to the customer. In case if the customer fails to comply with the obligation to pay for his thing or refund the creditor costs and other damages associated with that thing, the laundry as a creditor has a right to hold that thing as long as the relevant obligation is not fulfilled. If the customer as a debtor still does not fulfill his obligation, the laundry as a creditor may be satisfied in the manner provided for claims secured by the pledge. These possibilities are indicated in the Civil Code of the Kyrgyz Republic.

The *suretyship* (guarantee) is a type of remedy, which is carried out through the conclusion of a contract of surethyship (guarantee). Under the guarantee agreement, guarantor takes the responsibility for the fulfillment of other person's obligations in full or part, in case if that

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[177] Grazhdanskii Kodeks Kyrgyzskoi Respubliki [GK KR] [Civil Code of Kyrgyz Republic], art. 324.

[178] *ibid*., art. 324.

[179] *ibid*., art. 342.

person does not fulfill his obligations.[180] In the case of non-performance or improper performance of the obligation, the creditor has an opportunity to present his claims both to the original debtor and the guarantor. Guarantor, who performed the obligations of the debtor, becomes the new creditor for the debtor and may require the debtor to repay the amount of money that the guarantor had to pay.

The *down payment* (also known as deposit in the national laws of other states) is the last type of remedy provided by the national legislation of the Kyrgyz Republic. Down payment is the amount of money issued by one of the contracting parties to the other party, which is a part of its contractual payments, as a proof of the contract and to ensure its implementation.[181] In accordance with the law of the Kyrgyz Republic down payments shall be made based on a separate written agreement regardless of the amount of down payment.[182] Subsequently, if the contract is breached by the party who made the down payment, that money will remain at the other party.[183] If the receiver of the down payment is liable for the breach of contract, then it will have to pay the double amount of the down payment to the other party.[184] As it can be seen, if the implementation of the contract is ensured by the down payment, the non-performance of that contract is equally disadvantageous to both parties of the contract.

It can be concluded that depending on the kind of contract, parties are able to choose any remedy provided by law or contract in order to secure the fulfillment of obligations under the contract. Those remedies encourage the debtor to properly perform his obligations under the threat of occurrence of certain adverse effects by providing the creditor additional rights to

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[180] Grazhdanskii Kodeks Kyrgyzskoi Respubliki [GK KR] [Civil Code of Kyrgyz Republic], art. 343.
[181] *ibid*., art. 354.
[182] *ibid*.
[183] *ibid*., art. 355.
[184] *ibid*.

prevent or eliminate the adverse consequences in the event of non-performance or improper performance of the obligation.

States greatly contribute to the enforcement of contracts through their legal systems, but this contribution is limited due to limited judicial power, incompleteness of contracts, wrong information, and litigation costs.[185] One of the main aims of each State is to secure the property rights of its nationals and its national legal entities. Constitution of the Kyrgyz Republic provides that the property is indefeasible and nobody can be arbitrarily deprived of his property.[186] Hence, the State carries out its obligation to fulfill the constitutional rights of its nationals through its agencies, such as national courts, police, prosecution offices and others, which implement and protect the property rights of nationals.

Contract enforcement is carried out by mechanisms, which are different from the ones used in treaties, and that is another characteristic for the differentiation of contracts and treaties. Contracts are enforced through negotiations, remedies established by the national laws, "private order institutions" and the legal system of State.[187] All of these contract enforcement mechanisms are often applied in combination with each other to ensure the contract enforcement. However, it should be noted that the enforcement of international contracts also depends on the dispute settlement mechanisms, which are revealed in the following subchapter.

4.2.3. Dispute Resolution Mechanisms in Contracts

In cases when one of the parties is not satisfied with the enforcement of contract, such situations are resolved by negotiations, arbitration and litigation. Usually most contracts

[185] Grief and Kandel, "Contract Enforcement Institutions: Historical Perspective and Current Status in Russia," Center for Institutional Reform and the Informal Sector, University of Maryland at College Park (1993), accessed February 28, 2013, http://pdf.usaid.gov/pdf_docs/pnabr268.pdf, 7.

[186] Konstitutsiia Kyrgyzskoi Respubliki (2010) [Konst. KR] [Constitution of the Kyrgyz Republic] art. 12.

[187] Grief and Kandel, "Contract Enforcement Institutions: Historical Perspective and Current Status in Russia," Center for Institutional Reform and the Informal Sector, University of Maryland at College Park (1993), accessed February 28, 2013, http://pdf.usaid.gov/pdf_docs/pnabr268.pdf.

provide for the negotiations as the first dispute settlement mechanisms. If parties do not reach the resolution of dispute through negotiations, then either litigation or arbitration take place.

Negotiation is the first stage in the dispute settlement of contracts. In contracts negotiations are the same as in treaties and represent the discussions between parties of the contract with a view to settle the dispute. When negotiations and other enforcement mechanisms did not bring results in enforcing the contract, parties have to start the dispute resolution process, which will allow them to enforce the contract. As it has been mentioned previously, contracts are different from treaties in their very nature, which allows the parties of contract to choose between the two dispute resolution mechanisms, which provide for a binding decision: either litigation or arbitration.

Litigation is an action brought in court to enforce a particular right; a judicial contest with regard to any dispute.[188] Arbitration is the "process by which the parties to a dispute submit their differences to the judgment of an impartial person or group appointed by mutual consent or statutory provision."[189]

Litigation in contracts refers to the resolution of dispute in the national courts of a certain State. In contrast to international justice bodies, decision of which is final and not subject to appeal, system of national courts in State is usually represented by courts of three instances. For example, in Kyrgyzstan there are district courts (1st instance courts), city or regional courts (2nd instance courts) and the Supreme Court of the Kyrgyz Republic (3rd and final instance court).[190]

[188] West's Encyclopedia of American Law, 2nd ed., s.v. "litigation," retrieved March 15, 2013, http://legal-dictionary.thefreedictionary.com/litigation.

[189] The American Heritage® Dictionary of the English Language, 4 ed., s.v. "arbitration," retrieved March 15, 2013, http://www.thefreedictionary.com/arbitration.

[190] Sudebnaia Sistema Kyrgyzskoi Respubliki [Judicial System of the Kyrgyz Republic], http://sudsystem.kg/.

If the contract provides for litigation as a dispute settlement mechanism, a number of procedures take place in the national courts of State to resolve conflicts arising from the contract:

- determination of jurisdiction regarding disputes arising out of civil, family and labor legal relations with a foreign or international element;
- procedural status of foreign citizens and foreign legal entities in the court;
- establishing the content of foreign law;
- recognition and enforcement of foreign judgments.[191]

In Private International Law, international jurisdiction is understood as the competence of courts of certain State to consider disputes with a foreign element. For instance, it shall be decided whether the court of one State has a right to consider claims to the defendants who do not reside in this State, whether the court can consider the case of divorce between foreigners or between a domestic and a foreign citizen and etc.[192] Such issues are solved by the norms of domestic legislation and norms of international agreements.[193] Determination of jurisdiction in contracts is discussed further in the next part named "5.2. Jurisdiction and Applicable Law in Contracts."

Another dispute settlement mechanism used in contracts is the arbitration, the most popular dispute resolution mechanism in contracts.[194] Similarly to international arbitration, in commercial arbitration the parties themselves choose arbiters who will resolve the dispute. In

[191] Boguslavskiy, Private International Law, 352.

[192] *ibid*., 353.

[193] *ibid*., 352.

[194] Arthur Mazirow, "The Advantages and Disadvantages of Arbitration As Compared to Litigation," April 13, 2008. Accessed March 15, 2013, http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf, 1-10.

contrast to state courts, recourse to arbitration is based only on the arbitration clause or arbitration agreement between parties.[195]

In contracts arbitration is often preferred over litigation for a number of advantages.[196] Those advantages include a short duration compared to the regular national courts, the term of consideration of cases, relative cheapness and the fact that arbitration award is not subject to appeal. Last and most important advantage of arbitration over the regular national courts is the competence of arbiters, who are chosen by the parties and can be represented not only by lawyers but also by a variety of different professionals who have an excellent knowledge of the subject of dispute among the parties. All of those advantages allow the parties to quickly resolve any conflicts that have arisen from their contractual relations.

In the international practice there are two main types of commercial arbitrations: the isolated and permanent arbitration courts.[197] The isolated arbitration courts often referred to as ad hoc are established by parties to dispute for the consideration of that particular dispute and functions only within the period of resolving the conflict. In contrast to them, permanent arbitration courts are established under different organizations, associations, trade and industry palaces. Permanent arbitration courts function on the basis of their own charter or regulations. They also have their own list of arbiters, from which the parties of dispute can select arbiters who will consider their case. There are over 100 permanent arbitration courts that exist today.[198] In Europe most authoritative are the arbitration courts in affiliation with the

[195] Course on Dispute Settlement, Module 5.2. International Commercial Arbitration**:** The Arbitration Agreement. Downloaded from http://unctad.org/SearchCenter/Pages/Results.aspx?k=the%20arbitration %20agreement'.

[196] Business-to-Business Mediation/Arbitration vs. Litigation. National Arbitration Forum, downloaded from (http://www.adrforum.com/users/naf/resources/GeneralCommercialWP.pdf) P.1-10.

[197] Boguslavskiy, Private International Law, 352.

[198] Boguslavskiy, Private International Law, 352.

International Trade Palace in Paris, Arbitration Institute of Trade Palace in Stockholm and arbitration courts in London and Zurich.[199]

Dispute resolution mechanism in contracts is established by the contract itself and is either a litigation or an arbitration. Litigation refers to the settlement of dispute in the national court of a certain state. Arbitration refers to the resolution of dispute by a team of arbiters, who are appointed by the parties. However, besides the dispute resolution mechanism, contracts as well as treaties also establish a jurisdiction and applicable law, which are crucial in the resolution of any dispute. The choice of jurisdiction and applicable law are covered in the next subchapter of this work.

§5. Jurisdiction and Applicable Law in International Agreements: Treaties vs. Contracts

Jurisdiction and applicable law is the next feature, which differentiates treaties from contracts. In international agreements, jurisdiction and applicable law are established by the nature of agreement and its provisions. So, if the agreement is a treaty, jurisdiction will belong to international justice bodies and sources of Public International Law will be applied to resolve the dispute. If the agreement is a contract, then jurisdiction will belong to national courts and national law will be applied. Jurisdiction and applicable law for the resolution of disputes arising out of the international agreement are usually indicated in the provisions of that agreement.

The term jurisdiction has several meanings, but in the present context it stands for the legal competence of a certain judicial body to make decisions, apply laws and enforce rules with regard to certain situations, events, property, persons and legal entities to the limits of that

[199] *ibid*.

competence.[200] The jurisdiction to consider conflicts under the international agreements is usually determined by the international agreement itself. Depending on the nature of international agreement the jurisdiction falls into several choices: international judicial bodies, national courts or arbitration bodies. The treaty itself indicates the jurisdiction of a certain judicial body that will resolve any future conflicts arising out of that treaty between its members.[201]

Applicable law is the law that will be applied by the judicial body, whose jurisdiction is established by the international agreement. International agreements contain norms that determine applicable law to any conflicts resulting from the agreement. If it is determined that the international agreement refers to a treaty, the applicable law is the norms of Public International Law, and if it is a contract - the applicable law is the norms of national law.

5.1. Jurisdiction and Applicable Law in Treaties

Depending on the dispute settlement mechanism chosen by treaty, the jurisdiction belongs to a certain international justice body, which will resolve any future conflicts resulting from relations regulated by the treaty. Most contemporary treaties contain a compromissory clause, a provision of treaty which stipulates dispute resolution by the ICJ (or other international or regional justice body) or for by international arbitration. The first treaty that conferred jurisdiction on the ICJ is the Convention concerning the rights of nationals and commercial and shipping matters of 1933, concluded between the Canada and France.[202] Other examples of such treaties are the Convention relating to the status of refugees[203] and The Convention on

[200] Kaczorowska, Public International Law, 309.

[201] West's Encyclopedia of American Law, 2 ed., s.v. "jurisdiction," retrieved February 25, 2013, http://legal-dictionary.thefreedictionary.com/jurisdiction.

[202] Convention concerning the rights of nationals and commercial and shipping matters, art. 20, May 12, 1933, E103068 - CTS 1936 No.18.

[203] Convention relating to the status of refugees, art. 38, Jul 28, 1951, 189 UNTS 150.

Biological Diversity of 1992[204], both of which indicate the jurisdiction of the ICJ to resolve any conflicts between the parties of those treaties. It should also be mentioned that only States have a capacity to appear before the ICJ, international governmental organizations do not have such capacity. However, ICJ can provide those organizations with its advisory opinion, which has no binding effect, except for certain cases established by several treaties, such as in the Convention on the Privileges and Immunities of the United Nations, in the Convention on the Privileges and Immunities of the specialized agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America.[205]

There are some treaties that establish their own judicial body that is represented by a tribunal or a panel, which will resolve all disputes arising from the treaty relations. An example of such treaties is the European Convention on Human Rights, which established a European Court of Human Rights for the claims brought under this convention. Another notable example is the World Trade Organization, in which a Dispute Settlement Body is responsible for establishing "panels" of experts to consider the cases, and to accept or reject the panels' findings or the results of an appeal.[206]

All of the judicial bodies or arbitration panels that resolve conflicts arising from the treaties apply the sources of Public International Law contained in treaties, customs, and general principles of international law.[207] In addition to them, judicial decisions and teachings may also be applied as supplementary means for determining the rules of law.[208] For example, the Statute of the International Criminal Tribunal for the Former Yugoslavia stated that "the

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[204] The Convention on Biological Diversity, art. 27, Jun 5, 1992, 1760 UNTS 79; 31 ILM 818.

[205] Statute of the International Court of Justice, art. 65, Oct. 24, 1945, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215; Charter of the United Nations, art. 96, Oct. 24, 1945, 1 U.N.T.S. 16.

[206] Understanding the WTO: Settling Disputes, *World Trade Organization*, accessed December 11, 2012, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

[207] Statute of the International Court of Justice, art. 38, Oct. 24, 1945, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215.

[208] *ibid*.

International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."[209] This treaty indicates in its very first article that it will resolve disputes based on the international humanitarian law, which is a part of Public International Law. Thus, the applicable law in treaties is always Public International Law.

5.2. Jurisdiction and Applicable Law in Contracts

In contrast to treaties, jurisdiction and applicable law in contracts are established explicitly by the contract itself. Depending on the method of dispute resolution chosen by parties, the contract also indicates the jurisdiction of a certain body (either national courts of a particular State or a certain arbitration body) to resolve all disputes arising from it. This choice depends on the factors described in detail in the previous subchapter of this work ("Enforcement and Dispute Resolution mechanisms in the International Agreements").

As it was described previously in the "Dispute Resolution Mechanisms in Treaties," the contracts can choose either national courts or arbitration to resolve the disputes. If the contract chose national courts to resolve conflicts arising out of it, there are three main systems of defining the judicial jurisdiction of national courts with regard to cases with foreign elements, which are based on:

1) citizenship of party to the dispute; for example, in France national courts can have a jurisdiction to consider a dispute, if this dispute arose from a transaction to which a citizen of France was a party;

[209] Statute of the International Criminal Tribunal for the Former Yugoslavia, art.1, May 25, 1993, SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159.

2) distribution of internal rules of territorial jurisdiction, especially of rules of jurisdiction by the place of residence of the defendant; for instance, such system is practiced in Germany to determine the jurisdiction in cases with a foreign element;

3) "presence" of defendant; this system of defining the judicial jurisdiction is very broadly used in the US and UK.[210] The presence of defendant refers to any act which "may be a single occurrence, such as driving a car through the territory of the State; it may be the continuous presence of the defendant in the State as a citizen or domiciliary; it may be (and frequently is) something in between. But any time a defendant is by choice physically present in a State," he has a right to benefit from its legal protections.[211]

In this way, above described three systems demonstrated how jurisdiction of national courts is determined by the national law of each State. However, it should be mentioned that in contracts it is also possible for parties to establish a jurisdiction of the national courts of a certain State.

When parties decided that they choose a jurisdiction of a national court of one State, although their case might fall under the jurisdiction of national court of another State, they sign special agreements called prorogation agreements.[212] Prorogation agreements allow the parties to choose the jurisdiction of national court of any desired State.[213] Prorogation agreements are allowed by legislation and practice of the majority of States. Such prorogation agreements are used by companies that carry out their business activities in a State A, but have their head office in s State B, where it is easier for them to go through litigation. So these companies sign a prorogation agreement with their partners, which establishes the jurisdiction of national

[210] Boguslavskiy, Private International Law, 352.
[211] An Overview of Personal (Adjudicatory) Jurisdiction: The United States Perspective, Chicago Kent College of Law, available at http://www.kentlaw.edu/cyberlaw/docs/views/usview.html#N_6_.
[212] Boguslavskiy, Private International Law, 352.
[213] *ibid*.

courts of State B to consider any disputes arising from contracts on activities carried out in State A. As a result, national courts of State B will have a jurisdiction to consider the disputes. Mostly such prorogation agreements are practiced in trade agreements, when, for instance, contracts concluded by Kyrgyz trade representatives abroad provide that any disputes arising from that contract are under the jurisdiction of Kyrgyzstan's national courts.

If the contract chose arbitration as a method of dispute resolution, then the jurisdiction is given to either a permanent arbitration court or an ad hoc, one-time arbitration tribunals. As it has been mentioned previously, the majority of contracts use arbitration to resolve disputes and that is reflected through the arbitration clause in contract. This arbitration clause concretely indicates which arbitration court or tribunal will be considering any disputes under this contract. Many microcredit organizations operating in Kyrgyzstan, for instance, provide for arbitration in their credit agreements and choose the International Arbitration Court in Affiliation with the Trade and Industry Palace of the Kyrgyz Republic to decide the outcome of dispute.

Besides defining the jurisdiction, contracts also indicate the applicable law of a certain State. It is important for parties to indicate the applicable law because national law of the State indicated as the applicable law will be used to interpret a contract and to resolve any disputes which arise under that contract. If contract indicates the jurisdiction of the national court, then the applicable law is also the law of that State since there is no supranational law governing international contracts. However, the jurisdiction and applicable law does not always match, it happens that they can be represented by different States.[214] For instance, so for example the English courts could hear a dispute arising from a contract and apply Italian law to determine

[214] Boguslavskiy, Private International Law, 352.

the outcome of the dispute.[215] Though it is often recommended to match them in order to avoid additional costs in case of litigation and to assure the uniformity of the proceedings and decisions made by the courts.

As to Kyrgyzstan the issue of applicable law in contracts is being defined as following. The Civil Code of the Kyrgyz Republic provides that norms of international commercial law and foreign law can be applied by national courts of Kyrgyzstan. Applicable law is determined based on the law of the Kyrgyz Republic, international agreements, international customs and agreement of the parties.[216] The norms of the foreign law are determined by the national courts in accordance with the official interpretation of the norms of foreign law, their practice of application and doctrine in that foreign State.[217] In this way, the legislation of each particular State establishes whether the applicable law in contracts can be the norms of international commercial law and foreign law, which will be applied by national courts of that State.

In contrast to a treaty, the contract itself establishes the jurisdiction and applicable law preferred by its participants. Contracts are concluded by its parties based on the principle of freedom of contract, which allows them to choose jurisdiction of either national or arbitration courts. If the parties decided to choose arbitration, they also have a freedom to choose the national law of any State. If parties choose national courts, the applicable law will depend upon the legislation of that State. So these particular features show us that treaties and contracts have completely different approaches. The conflicts under treaties are always resolved by international institutes. In addition, those international institutes have legal competence to apply only the norms of public international law. As for the contracts, the jurisdiction to consider disputes under the contract mainly belongs to national courts and applicable law will

[215] Emma Roake, "Governing law and jurisdiction: Getting it right is crucial," Fox Williams LLP, accessed March 14, 2013, http://www.agentlaw.co.uk/site/briefing_notes/Getting_it_right_is_crucial.html.
[216] Grazhdanskii Kodeks Kyrgyzskoi Respubliki [GK KR] [Civil Code of Kyrgyz Republic]. art. 1167.
[217] *ibid*., art. 1169.

be always the substantive law of either States. It was also mentioned, that both treaties and contracts sometimes refer to arbitration. However, those arbitration institutes have different legal competences. The international arbitration that considers conflicts under the treaties will resolve disputes by applying the norms of public international law. While arbitration that is chosen by contracts will always apply the norms of national law of either state. Therefore, based on the analysis mentioned above, jurisdiction and applicable law clearly differentiate treaties from contracts.

Conclusion

In concluding this chapter, it is necessary to state that features differentiating treaties from contracts are closely interconnected with each other. However, despite this fact, the author tried to examine each feature separately to see how treaties differ from contracts in each of their features.

International agreements can be differentiated as treaties and contracts based on a number of features, which include a range of subjects, scope of regulation, enforcement and dispute resolution mechanisms, jurisdiction and applicable law of the international agreement. All of these features of international agreements have common intersections but for the purposes of this paper the author tried to examine those features separately from each other.

Treaties are concluded by States and interstate organizations, while contracts can be concluded by a variety of different subjects, including States, international (nongovernmental) organizations and private entities, such as transnational corporations, private foundations and etc. In treaties the scope of regulation is limited to the regulation of public legal relations that are usually concerned by public interests of the States (and interstate organizations); while in contracts the scope of regulation is restricted to private legal relations with private interests of its subjects that include both States and private entities. Dispute settlement mechanisms in

treaties are the adjudication and alternative mechanisms such as arbitration and diplomatic means, such as good offices and others. Contracts use negotiations as the first mechanism of dispute settlement and usually establish either litigation or arbitration as the second and final mechanism of dispute settlement. Both in treaties and contracts chosen dispute settlement mechanisms determine the jurisdiction and applicable law for the resolution of conflicts arising under the agreement. In treaties the jurisdiction can belong to either an international justice body or an arbitration panel, but in both cases the applicable law is Public International Law. Contracts are very different from treaties in this regard and can establish a jurisdiction of either national court of a certain State or a certain arbitration body. Applicable law will be defined depending on what court has a jurisdiction.

Chapter III. PRACTICAL ASPECTS IN THE LEGAL REGULATION OF INTERNATIONAL AGREEMENTS IN THE KYRGYZ REPUBLIC

The question, what is the place and role of international agreements as sources of national law of Kyrgyzstan in the legal system of Kyrgyzstan, arose before the legal scholars and practitioners recently, from the early 90's, and still remains after the adoption of the 2010 Constitution of the Kyrgyz Republic. This chapter is dedicated to the practice of the Kyrgyz Republic in the legal regulation of international agreements. The Constitution of the Kyrgyz Republic, the Law of the Kyrgyz Republic on International Agreements, the Vienna Conventions of the Law of Treaties and a number of national laws of the Kyrgyz Republic will be used to analyze the current stage of legal regulation of international agreements in the Kyrgyz Republic. In order to depict some practical problems two examples of the international agreements of the Kyrgyz Republic will be considered.

§1. Legal Regulation of the International Agreements: Comparison of Definitions of International Agreements in the Legal System of the Kyrgyz Republic

The Kyrgyz Republic is a state, which as subject of Public International Law enters into international agreements, both treaties and contracts. Since its independence in 1991, Kyrgyzstan has entered into 7, 110 international agreements, among which there are both treaties and contracts.[218] As the State Secretary of Foreign Affairs of the Kyrgyz Republic, Asein Isayev, has announced, Kyrgyzstan is in active bilateral relations with 154 countries of the world.[219] The legal regulation of international agreements in Kyrgyzstan is carried out through its Constitution, the Vienna Conventions on the Law of Treaties (both of which were signed and ratified by the Kyrgyz Republic), and its national legislation on the international

[218] Askar Aktalov, "Kyrgyzstan signed over 7000 international agreements for 20 years", *Knews*, July 13, 2012, available at http://www.knews.kg/ru/politics/18971/.
[219] *ibid*.

agreements. This subchapter is going to reveal how Kyrgyzstan differentiates treaties from contracts in its legal system.

1.1. Hierarchy of Sources of Law in the Kyrgyz Republic

Before analyzing the sources of law that regulate international agreements in the Kyrgyz Republic, it is necessary to overview the hierarchy of those sources. In accordance with the Law of the Kyrgyz Republic on Normative Legal Acts, in the Kyrgyz Republic sources of law (the normative legal acts) are placed in the following hierarchy: Constitution, Constitutional Law, Codes, Laws and other secondary legislation acts, such as the decrees of the Presidents, resolutions of Jogorku Kenesh, ordinances of state bodies and etc.[220]

In the hierarchy of sources of law in the Kyrgyz Republic the first source of law is the Constitution of the Kyrgyz Republic, which is "the legal act, which has the highest legal force, embodies the fundamental principles and standards of the legal regulation of the most important public relations, and creates the legal basis for adoption of laws and other regulations."[221]

The second source of law that comes after the Constitution is the Constitutional law, which is "the legal act accepted by Jogorku Kenesh of the Kyrgyz Republic in order established by the Constitution of the Kyrgyz Republic and for the issues established by it."[222]

After the Constitution and Constitutional laws come the codes and laws of the Kyrgyz Republic. Code is the legal act which provides a system of uniform regulation of public

[220] Zakon Kyrgyzskoi Respubliki o Normativnyh Pravovyh Aktah [The Law of the Kyrgyz Republic on Normative Legal Acts], art.6, July 20, 2009, No. 241.
[221] *ibid*., art.4.
[222] *ibid*.

relations in certain fields.[223] Law is the legal act adopted by Jogorku Kenesh in the prescribed manner, which regulates the most important public relations in the relevant field. [224]

As it is observed, the Law of the Kyrgyz Republic on Normative Legal Acts does not indicate the place of international agreements in the hierarchy of national sources of law. However, the statutes (national laws) of the Kyrgyz Republic establish that international agreements are next in the hierarchy of sources of law in Kyrgyzstan after the Constitution and Constitutional Laws. In accordance with the Civil Code,[225] Criminal Code,[226] Labor Code[227] and other laws of the Kyrgyz Republic, in case of contradiction between the provisions of international agreements and provisions of national laws, the provisions of international agreements will always prevail over the provisions of national law of the Kyrgyz Republic. This fact gives a reason to believe that the legal system of the Kyrgyz Republic has presumed the primacy of international treaties over its national laws but not above the Constitution and the Constitutional Laws of the Kyrgyz Republic.

1.2. Comparison of Definitions of International Agreements in the Legal System of the Kyrgyz Republic

Definitions of international agreement under the Constitution of the Kyrgyz Republic, Vienna Conventions and the Law of the Kyrgyz Republic on International Agreements of the Kyrgyz Republic will be further compared and analyzed to define the notion of international agreements within the legal system of the Kyrgyz Republic. However, before starting to explore this issue, it is necessary to state that there are inconsistencies between the definitions that might lead to some practical problems.

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[223] Zakon Kyrgyzskoi Respubliki o Normativnyh Pravovyh Aktah [The Law of the Kyrgyz Republic on Normative Legal Acts], art.4, July 20, 2009, No. 241.

[224] *ibid*.

[225] Grazhdanskii Kodeks Kyrgyzskoi Respubliki [GK KR] [Civil Code of Kyrgyz Republic]. art. 6.

[226] Ugolovnyi Kodeks Kyrgyzskoi Respubliki [UK KR] [Criminal Code of the Kyrgyz Republic]. art. 1.

[227] Trudovoi Kodeks Kyrgyzskoi Respubliki [TK KT] [Labor Code of the Kyrgyz Republic]. art. 3.

Constitution of the Kyrgyz Republic states that "International agreements entered into force, to which the Kyrgyz Republic is a participant […] are an integral part of the legal system of the Kyrgyz Republic."[228] The term "international agreements" in the text of the Constitution refers to treaties. Constitution indicates that in the hierarchy of sources of law it has the supreme legal force and direct effect in the Kyrgyz Republic, while international agreements are an integral part of the legal system.[229]

The next source of law that regulates international agreements in Kyrgyzstan, after the Constitution, is the Vienna Convention on the Law of Treaties (1969), to which the Kyrgyz Republic accessed in 1997.[230] The Vienna Convention on the Law of Treaties of 1969 refers to international agreements as to the treaties and indicated that they are governed by the Public International Law and can be concluded only between states.[231] Later on, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 provided an amended definition of treaties, according to which treaty is "an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation."[232] Hence, under the Public International Law, a treaty is an agreement concluded only between states and/or interstate organizations, and is governed by Public International Law.

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[228] Konstitutsiia Kyrgyzskoi Respubliki (2010) [Konst. KR] [Constitution of the Kyrgyz Republic] art. 6(3).

[229] *ibid*., art. 6.(1).

[230] Zakon Kyrgyzskoi Resubliki o prisoedinenii Kyrgyzskoi Respubliki k Venskoi Konventsii o prave mezhdunarodnyh dogovorov 23 Maya 1969 g. [The Law of the Kyrgyz Republic on the accession of the Kyrgyz Republic to the Vienna Convention on the Law of Treaties of May 23, 1969], July 5, 1997, No. 49.

[231] Vienna Convention on the Law of Treaties, art. 2 May 23, 1969, 1155 UNTS 331.

[232] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 2, Mar 21, 1986. 25 ILM 543.

The next source of law within legal system of the Kyrgyz Republic that regulates international agreement is the Law of the Kyrgyz Republic on the International Agreements of the Kyrgyz Republic adopted on July 21, 1999.[233] This statute defines a treaty as "an equal and voluntary agreement of the Kyrgyz Republic with one or more states, international organizations or other subjects of international law concerning the rights and obligations in the field of international relations."[234] This definition corresponds to the definition provided in the Vienna Convention, however, one should note that this definition includes some "other subjects of international law" into the range of subjects of international agreements.

If to compare these two definitions a question arises: Which subjects are entitled to enter into treaties and which subjects can enter into contracts? According to the definition provided in the Vienna Convention, only states and intergovernmental organizations can enter into treaties. However, as it is observed from the definition of treaties provided in the law of Kyrgyzstan, the range of subjects that can enter into treaties is represented by some "other subjects of international law." This constitutes a legal controversy in the regulation of treaties and contracts in the Kyrgyz Republic, which is going to be analyzed further on the examples of two international agreements concluded by Kyrgyzstan.

§ 2. Practice of the Legal Regulation of International Agreements in the Kyrgyz Republic

In this subchapter the practice of the Kyrgyz Republic will be analyzed on the example of two international agreements concluded by Kyrgyzstan. These agreements are the Agreement on New Terms on Kumtor project between the Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kyrgyzaltyn OJSC, Centerra Gold Inc., Kumtor Gold Company CJSC, Kumtor Operating Company CSC and the Cameco Corporation (hereinafter the

[233] Zakon Kyrgyzskoi Respubliki o mezhdunarodnyh dogovorah Kyrgyzskoi Respubliki [Law of the Kyrgyz Republic on International Agreements], July 21, 1999. No. 89.
[234] *ibid*.

"Kumtor Agreement"); and the Agreement on Cooperation between the Government of the Kyrgyz Republic and the Soros-Kyrgyzstan Foundation, a branch of the Open Society Institute (New York) (hereinafter the "Soros Agreement"). Kumtor Agreement was signed on April 24, 2009 and ratified by Jogorku Kenesh which is the Parliament of the Kyrgyz Republic on April 30, 2009.[235] Soros Agreement was signed on January 31, 1997 and ratified by Jogorku Kenesh on April 19, 2002.[236]

Ratification is one of the ways to express consent of the Kyrgyz Republic to be bound by the international agreement, which is exercised by the legislative authority, Jogorku Kenosha, in accordance with the procedure established by the legislation of the Kyrgyz Republic. According to the Constitution of the Kyrgyz Republic the right to ratify international treaties belongs to Jogorku Kenesh in the manner determined by national law of Kyrgyzstan.[237] The law that determines ratification of international agreements is the law of the Kyrgyz Republic on International Agreements of the Kyrgyz Republic. This law establishes that the decision to ratify international agreements (including financial and loan agreements) shall be made by Jogorku Kenesh and signed by the President.[238] The same law defines the list of international agreements that are subject to ratification by Jogorku Kenesh, which include:

- The international agreements of the Kyrgyz Republic on friendship, cooperation, mutual assistance agreements and agreements on the principles of international relations;

[235] Zakon Kyrgyzskoi Respubliki o ratifikatsii Soglasheniia o novyh usloviiah po proektu Kumtor [The Law of the Kyrgyz Republic on Ratification of the Agreement on New Terms for the Kumtor Project], April 30, 2009, No. 142.

[236] Zakon Kyrgyzskoi Respubliki o ratifikatsii Soglasheniia o sotrudnichestve mezhdu Pravitel'stvom Kyrgyzskoi Respubliki i Fondom "Soros-Kyrgyzstan", filialom Instituta Otkrytogo Obschestva (g. N'yu Iork) [Law of the Kyrgyz Republic on Ratification of the Agreement on Cooperation between the Government of the Kyrgyz Republic and the Soros-Kyrgyzstan Foundation, a branch of the Open Society Institute (New York)]. January 31, 1997. No. 99.

[237] Konstitutsiia Kyrgyzskoi Respubliki (2010) [Konst. KR] [Constitution of the Kyrgyz Republic] art. 74.(3.2).

[238] Zakon Kyrgyzskoi Respubliki o mezhdunarodnyh dogovorah Kyrgyzskoi Respubliki [Law of the Kyrgyz Republic on International Agreements], art. 13, July 21, 1999. No. 89.

- Investment agreements;
- Agreement on the use of natural resources by other subjects of international law and foreign companies.[239]

The practice of Kyrgyzstan on differentiating treaties from contracts has been ambiguous, since Kyrgyzstan signed and ratified both treaties and contracts without differing one from another. By ratifying international contracts as well as treaties, Kyrgyzstan basically put them both on the same level, thus, recognizing contracts to be same as treaties. Within 22 years of its independence Kyrgyzstan has signed a number of international agreements, among which were Kumtor Agreement and Soros Agreement. In this subchapter of this work an attempt to determine whether these agreements are treaties or contracts will be made. The reason for such determination is that conclusion of treaties and contracts have completely different legal consequences.

2. 1. Agreement of the Kyrgyz Republic on Kumtor Project

Agreement on New Terms for the Kumtor Project among Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kyrgyzaltyn JSC and Centerra Gold Inc. and Kumtor Gold Company CJSC and Kumtor Operating Company CJSC and Cameco Corporation (hereinafter the "Kumtor Agreement"), will be considered as an example from the practice of Kyrgyzstan on international agreements because upon the signature this agreement was as well ratified. Kumtor Agreement is a framework agreement that establishes agreements reached between the parties with respect to exploration and development of reserves of gold and silver, as well as the production and sale of gold and silver produced at Kumtor.

Kumtor is the largest gold deposit in Kyrgyzstan, which is located 350 kilometers from the capital of the Kyrgyz Republic, Bishkek, in the Issukkul oblast.[240] In 1992, the Government of

[239] Zakon Kyrgyzskoi Respubliki o mezhdunarodnyh dogovorah Kyrgyzskoi Respubliki [Law of the Kyrgyz Republic on International Agreements], art. 11, July 21, 1999. No. 89.

the Kyrgyz Republic and a Canadian company, Cameco Gold International, entered into an agreement to evaluate and develop the Kumtor gold deposit.[241] Under that agreement, from the Government's side Kyrgyzaltyn (a joint-stock company wholly owned by the Kyrgyz Republic) acquired 67% interest, while Cameco held 33% interest in Kumtor Gold Company. Kumtor Operating Company is a subsidiary of Cameco Gold International, which operates Kumtor gold deposit. In 2004, Cameco Corporation transferred all of the Kumtor project and its operating companies to a new company, Centerra Gold Inc that was registered in Canada.[242]

On April 24, 2009 Agreement on New Terms for the Kumtor Project was signed between the government of the Kyrgyz Republic and Cameco Corporation. As a result of this agreement, Kyrgyzstan changed its 67% of shares in Kumtor Gold Company for 33% of shares in Centerra Gold Inc, which was constituted by 18, 232, 615 common shares of Centerra that were issued to the government of the Kyrgyz Republic.[243] Cameco Corporation and the Kyrgyz Republic are the largest shareholders of Centerra Gold Inc., a company that currently owns and operates Kumtor gold deposit.

Starting from the end of 2012, there were many discussions regarding the change of terms in the Agreement on Kumtor project.[244] These discussions were initiated by several state officials, in whose view Kyrgyzstan should reconsider the terms of Agreement on Kumtor and demand different conditions, under which Kyrgyzstan would receive more benefits from the gold extracted in Kumtor deposit. These state officials are dissatisfied by the fact that under Kumtor Agreement of 2009, Kyrgyzstan changed its 67% interest in Kumtor project for the 33% interest in Centerra Gold Inc., which owns and operates several gold deposits: Kumtor in

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[240] Deposit, Kumtor Operating Company, accessed April 25, 2013, http://www.kumtor.kg/en/deposit/.

[241] History, Kumtor Operating Company, accessed April 25, 2013, http://www.kumtor.kg/en/deposit/history/.

[242] History, Centerra Gold Inc., accessed April 24, 2013, http://www.centerragold.com/corporate/history.

[243] *ibid*.

[244] The Kyrgyz government should withdraw from Centerra Gold Inc. and independently manage Kumtor - public figure, K.Isabekov, *Tazabek*, accessed April 25, 2013, http://www.tazabek.kg/news:349582.

Kyrgyzstan, Boroo in Mongolia and other deposits in Turkey, China and Russia [245] However, later it was found out that in reality 90% of profit of Centerra Gold Inc. comes from Kumtor deposit, the rest 10% of profit comes from Boroo deposit (which is a lot smaller than Kumtor deposit), and other deposits are not being developed and thus, do not bring any profit to Centerra Gold Inc.[246] As a result, it turns out that by entering into the Agreement on New Terms for the Kumtor Project Kyrgyzstan lost a lot more than gained; it was more beneficial for Kyrgyzstan to own 67% of shares in Kumtor Gold Mining Company than 33% of shares in Centerra Gold Inc.

There are many legal issues in Kumtor Agreement, but this paper is exploring the legal status of this agreement (whether it is a treaty or a contract). It is important to determine the legal status of Kumtor Agreement, because the procedure of changing the terms of Kumtor Agreement depends on the legal status of this agreement. Representatives of government of the Kyrgyz Republic as well as representatives of Centerra Gold Inc. and representatives of civil society have expressed their views on the issue of the legal status of Kumtor Agreement. According to the view of president of Kumtor Operating Company, Michael Fisher, Kumtor Agreement is not subject to a change, since it was ratified by Jogorku Kenesh and thus, became a part of the legislation of the Kyrgyz Republic.[247]

In contrast, Minister of Justice of the Kyrgyz Republic, Almambet Shykmamatov, has claimed that Kumtor agreement is not an international agreement (treaty), since treaties are only those

[245] About Centerra Gold Inc., *Kumtor Gold Mining Company*, accessed April 25, 2013, http://www.kumtor.kg/ru/about/centerra-gold-inc/.

[246] Minister Sariev announced the appeal of state commission on Kumtor to the shareholders of Centerra Gold Inc., *Tazabek*, accessed April 25, 2013, http://www.tazabek.kg/news:345143/?from=rss.

[247] Dmitrii Denisenko, "Michael Fisher: Agreement of Kumtor is a part of legislation of Kyrgyzstan," Vechernii Bishkek, accessed April 25, 2013, http://www.vb.kg/doc/219519_maykl_fisher:_soglashenie_po_kymtory_chast_zakonodatelstva_kyrgyzstana.html.

agreements which are signed by two or more states.[248] A number of news agencies spread a statement of the Director of the State Agency for Geology and Mineral Resources, Ishimbai Chunuev, who said that "agreement of 2009 on Kumtor was improperly ratified."[249] Minister of Economy, Sariev, has expressed a view that ratification shall be taken only with regard to treaties but not to the agreement with a private company.[250]

In order to determine whether Kumtor Agreement is a treaty or a contract, this agreement will be examined based on the features differentiating treaties from contracts (which were revealed in the Chapter II of the present work). Examination of Kumtor Agreement on a compliance with each of the features will allow not only determining whether it is a treaty or a contract but will also understanding why the status of this agreement is being confused.

According to the range of subjects, Kumtor Agreement is a contract, not a treaty. The participants of this agreement are the Kyrgyz Republic (a state), Kyrgyzaltyn OJSC (a state enterprise), Centerra Gold Inc., Kumtor Gold Company CJSC, Kumtor Operating Company CSC and the Cameco Corporation (privately owned enterprises).[251] It can be observed that among all of the subjects of Kumtor Agreement there is only one State, the Kyrgyz Republic, while all of the rest are privately owned companies. In accordance with the official commentaries of the ILC on the subjects of treaties, neither individuals, nor any other private

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[248] Tolgonai Osmongazieva, "Almambet Shykmamatov: Agreement on Kumtor does not have a status of international agreement," Vechernii Bishkek, accessed April 25, 2013, http://www.vb.kg/doc/217576_almambet_shykmamatov:_soglashenie_po_kymtory_ne_imeet_statys_mejdynarodnogo.html.

[249] "Kumtor": Agreement of 2009 was ratified in accordance with the law of Kyrgyzstan, K-News, http://www.knews.kg/ru/econom/28015/.

[250] ibid.

251 Soglashenie o novyh usloviiah po proektu Kumtor mezhdu Pravitel'stvom Kyrgyzskoi Respubliki ot imeni Kyrgyzskoi Respubliki i ZAO Kyrgyzaltyn i Centerra Gold Inc. i ZAO Kumtor Gold Company i ZAO Kumtor Operating Company i Korporatsiei "Cameco" [Agreement on New Terms for the Kumtor Project among Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kyrgyzaltyn JSC and Centerra Gold Inc. and Kumtor Gold Company CJSC and Kumtor Operating Company CJSC and Cameco Corporation], April 24, 2009.

groups of individuals (in any organizational legal form) have a capacity to enter in treaties. Since among subjects of Kumtor Agreement there are private companies, this agreement cannot be considered as a treaty and shall be considered as a contract because private companies do not have a capacity to enter into treaties.

By its scope of regulation, Kumtor Agreement regulates purely private legal relations between its parties. This agreement is limited to the regulation of private legal relations between the parties with respect to exploration and development of golden and silver reserves of gold and silver, production and sale of gold and silver produced at Kumtor.[252] The relations between the government of the Kyrgyz Republic and Cameco Corporation are characterized as private because the subject matter of relations is private - the exploitation of resources and their sale, profits of which are allocated between the shareholders of Centerra Gold (the owner of all companies working on Kumtor Project). Private legal relations are regulated only by contracts and never by treaties, thus this agreement is a contract.

Besides that, as it was stated in Chapter II, private legal relations are characterized by the presence of private interests in both parties. This is clearly observed in Kumtor Agreement: both Kyrgyzstan and Centerra Gold Inc. are interested to gain profit from the Kumtor Project. The government of the Kyrgyz Republic allows Centerra Gold Inc. to extract gold and silver from Kumtor deposit for the dividends from 33% of shares, which were given to the government of the Kyrgyz Republic by Centerra Gold Inc. for the right to develop, produce and sell gold and silver produced at Kumtor. Both of the parties of Kumtor Agreement use the

[252] Soglashenie o novyh usloviiah po proektu Kumtor mezhdu Pravitel'stvom Kyrgyzskoi Respubliki ot imeni Kyrgyzskoi Respubliki i ZAO Kyrgyzaltyn i Centerra Gold Inc. i ZAO Kumtor Gold Company i ZAO Kumtor Operating Company i Korporatsiei "Cameco" [Agreement on New Terms for the Kumtor Project among Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kyrgyzaltyn JSC and Centerra Gold Inc. and Kumtor Gold Company CJSC and Kumtor Operating Company CJSC and Cameco Corporation], April 24, 2009.

profit received out of the cooperation for their own needs and such cooperation carries purely private interests of the parties.

Moreover, as it can be recalled from Chapter II, indirect participation of the state is present in private legal relations. Kyrgyzstan participates in Kumtor Agreement indirectly, through Kyrgyzaltyn CJSC, a state enterprise, which becomes a shareholder of Centerra Gold Inc. In this way, the scope of regulation in contracts consists from private legal relations and private interests of both parties. In cases, when one of the parties is the state, then the scope of regulation in contracts is also characterized with the indirect participation of the state. From the scope of regulation in Kumtor Agreement it is clearly seen how it regulates private legal relations of parties, both of which are following their private interests in Kumtor Project, where Kyrgyzstan participates indirectly through its state enterprise. In this way, by its scope of regulation Kumtor Agreement is recognized to be a contract.

As for the criteria of implementation mechanisms, Kumtor Agreement seems to be treated as a treaty rather than a contract. Kumtor Agreement provides that it enters into force and become a legally binding agreement upon a general condition that is the receipt of approvals of all parties.[253] One of such approvals required by the provision of Kumtor Agreement was the approval of legislature, which is the ratification of the agreement by Jogorku Kenesh of the Kyrgyz Republic. Besides that, this agreement provided for changing the legislation of the Kyrgyz Republic. For example, Kyrgyzstan had to amend its Tax Code to bring it in

[253] Soglashenie o novyh usloviiah po proektu Kumtor mezhdu Pravitel'stvom Kyrgyzskoi Respubliki ot imeni Kyrgyzskoi Respubliki i ZAO Kyrgyzaltyn i Centerra Gold Inc. i ZAO Kumtor Gold Company i ZAO Kumtor Operating Company i Korporatsiei "Cameco" [Agreement on New Terms for the Kumtor Project among Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kyrgyzaltyn JSC and Centerra Gold Inc. and Kumtor Gold Company CJSC and Kumtor Operating Company CJSC and Cameco Corporation], April 24, 2009.

compliance with the provisions of Kumtor Agreement.[254] However, this feature of Kumtor Agreement shall not confuse the legal status of Kumtor Agreement and make one think that it is a treaty. Kumtor agreement is clearly not a treaty because other features such as the range of subjects and the scope of regulations evidence that this agreement is a contract.

With regard to dispute settlement mechanisms, Kumtor Agreement provides for the dispute settlement mechanism most often used by contracts. In its provisions, Kumtor Agreement provides that any dispute arising out of the agreement shall be referred to and is subject to final settlement by the arbitration in accordance with UNCITRAL Arbitration Rules.[255] Dispute shall be resolved by the sole arbitrator selected by the mutual agreement of the parties. If no agreement is reached, the Permanent Court of Arbitration in Hague will serve as the authority which shall appoint an arbitrator in accordance with Article 6 (a) of the UNCITRAL Arbitration Rules.[256] Decision rendered by the Arbitrator shall be final and binding on the parties and not subject to appeal or review.[257] International commercial arbitration is a dispute resolution method that is widely used in contracts and is not used in treaties. Thus, this feature also indicates that Kumtor Agreement is a contract.

According to the criteria of jurisdiction, Kumtor Agreement established the jurisdiction of ad hoc arbitration carried out by a sole arbitrator, which is typical for contracts. Kumtor Agreement provided that all disputes arising between the parties shall be resolved by the sole arbitrator selected by parties or appointed by the Permanent Court of Arbitration in Hague.

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[254] Zakon Kyrgyzskoi Respubliki o vnesenii izmenenii v nekotorye zakonodatel'nye akty Kyrgyzskoi Respubliki [The Law of the Kyrgyz Republic on introduction of changes in some legislative acts of the Kyrgyz Republic], May 29, 2009, No. 175.

[255] Soglashenie o novyh usloviiah po proektu Kumtor mezhdu Pravitel'stvom Kyrgyzskoi Respubliki ot imeni Kyrgyzskoi Respubliki i ZAO Kyrgyzaltyn i Centerra Gold Inc. i ZAO Kumtor Gold Company i ZAO Kumtor Operating Company i Korporatsiei "Cameco" [Agreement on New Terms for the Kumtor Project among Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kyrgyzaltyn JSC and Centerra Gold Inc. and Kumtor Gold Company CJSC and Kumtor Operating Company CJSC and Cameco Corporation], art. 6 (7), April 24, 2009.

[256] *ibid*.

[257] *ibid*.

Typically, in contracts jurisdiction can belong either to national courts of a certain state or to a certain arbitration body by the choice of the parties. Besides establishing the jurisdiction of ad hoc arbitrator, Kumtor Agreement also indicated that the place of arbitration is Stockholm, Sweden and the language of the arbitration is English.[258]

When it comes to applicable law, it can be established that Kumtor Agreement is a contract because it provides for the national law of New York as the applicable law. Since contracts are always regulated by the national law of either state and treaties are always regulated by the Public International Law, it is clear that this feature of Kumtor Agreement indicates that it is a contract and certainly not a treaty.

To sum up, based on the above-written examination of Kumtor Agreement by each of the differentiating feature of international agreements it can be established that Kumtor Agreement is a contract. First, Kumtor Agreement is a contract since it was concluded between Kyrgyzstan (a state) and a private company. Second, this agreement is certainly a contract because it regulates purely private legal relations, such as the exploitation, operation of gold deposit and realization of exploited gold and silver. Moreover, these private legal relations under this agreement are also supported by the private interests of parties, which are represented by the dividends received by shareholders, among which Kyrgyzstan is also a shareholder. Third, Kumtor Agreement is a contract because it provides for international commercial arbitration, a dispute settlement mechanism that is traditionally used in contracts. Forth, this agreement indicates that any dispute arising under Kumtor Agreement is subject to national law, which

[258] Soglashenie o novyh usloviiah po proektu Kumtor mezhdu Pravitel'stvom Kyrgyzskoi Respubliki ot imeni Kyrgyzskoi Respubliki i ZAO Kyrgyzaltyn i Centerra Gold Inc. i ZAO Kumtor Gold Company i ZAO Kumtor Operating Company i Korporatsiei "Cameco" [Agreement on New Terms for the Kumtor Project among Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kyrgyzaltyn JSC and Centerra Gold Inc. and Kumtor Gold Company CJSC and Kumtor Operating Company CJSC and Cameco Corporation], art. 6 (7), April 24, 2009.

also indicates that it is a contract. All of those features evidence that this agreement shall be treated as a contract and not a treaty.

2. 2. Analysis of the Agreement on Kumtor Project

One of the current problems with Kumtor Agreement is the legal status of this agreement, which is under the question of whether this agreement is a treaty or a contract. Based on the above-mentioned analysis this agreement is a contract. Examination of Kumtor Agreement by differentiating features of international agreement illustrates that majority of features of Kumtor Agreement are attributable to contracts. These features are the range of subjects (state and a private enterprise), character of relations under the agreement (private legal relations), interests of parties (private interests in receipt of dividends from Kumtor project). Dispute resolution mechanism established in Kumtor Agreement (international commercial arbitration under the UNCITRAL rules) also indicates that it is a contract. Described features of Kumtor Agreement leave no doubt that this agreement is a contract.

However, there is one feature of Kumtor Agreement, which questions its legal status. Recently Kyrgyz state officials have announced that Kyrgyzstan needs to change the conditions of Kumtor Agreement. In response to such statements, the Administration of Kumtor Project argued that Kumtor Agreement is not subject to the change because it was ratified by Jogorku Kenesh of the Kyrgyz Republic. For the purpose of this research, positions of both the Government of Kyrgyzstan and Kumtor Administration with regard to the legal status of this agreement (a question whether Kumtor Agreement is a treaty or a contract) and its place in the legal system of Kyrgyzstan will be carefully considered.

Administration of Kumtor Project argued that Kumtor Agreement cannot be changed because by ratification Kyrgyzstan recognized this agreement as an international agreement and put it on the same level as treaties. This means that, in accordance with the Law of the Kyrgyz

Republic on International Agreements, Kumtor Agreement is an international agreement and therefore became a part of national legislation as well as the legal system of the Kyrgyz Republic.

If to consider that Kumtor Agreement becomes a part of national legislation and legal system of Kyrgyzstan, it would mean that this agreement becomes a source of law in Kyrgyzstan just like the national laws of Kyrgyzstan. According to the hierarchy of sources of law in the Kyrgyz Republic, international agreements come second after the Constitution, which means that international agreements have a prevailing legal effect over the national laws of the Kyrgyz Republic. As it was discussed earlier in the beginning of this Chapter, the legal system of Kyrgyzstan has presumed the prevailing character of international treaties over the national laws of Kyrgyzstan.

Since, in accordance with the Law of the Kyrgyz Republic on International Agreements, Kumtor Agreement is recognized to be an international agreement, the provisions of Kumtor Agreement will prevail over the norms of national law in case of any conflict. Therefore, in accordance with the view of Kumtor Administration, Kumtor Agreement is not subject to the change. However, it is important to keep in mind that this does not mean that Kumtor Agreement is not subject to the change at all. This could only mean that Kumtor Agreement cannot be changed simply by the initiative of the Government of Kyrgyzstan. It should be noted that in such circumstances, the proper way to change the terms of Kumtor Agreement would be to do it the same way as laws are changed or amended in accordance with the national legislation of the Kyrgyz Republic. However, that is a completely different procedure for changing the terms of Kumtor Agreement and is not under the focus of present paper.

Nevertheless, the Government of the Kyrgyz Republic holds another opinion, according to which Kumtor Agreement is subject to the change because it is not an international agreement

(a treaty), therefore it is not a part of Kyrgyzstan's legislation. In its provisions, Kumtor Agreement required the receipt of approval of all contracting parties, including the receipt of approval of the legislature of the Kyrgyz Republic. Therefore this agreement was ratified by the Parliament of the Kyrgyz Republic. Kumtor Agreement required the approval of the legislature in order to provide the Kyrgyz side with necessary authorities to fulfill the agreement. For instance, as a result of this approval, Kyrgyzaltyn OJSC was authorized to hold the shares of the Kyrgyz Republic and to represent the Kyrgyz Republic in certain activities with regard to the operation of Kumtor Project.

According to the provisions of Kumtor Agreement, the Government of the Kyrgyz Republic also had an obligation to bring its national laws into compliance with Kumtor Agreement.[259] Following its obligation, Kyrgyzstan amended its Tax Code to bring it in compliance with the provisions of Kumtor Agreement on taxation. This implementation mechanism is usually used in treaties and not in contracts. However, it is important to understand that this was done in order to legitimize the provisions of Kumtor Agreement regarding taxation and not in order to provide Kumtor Agreement with the status of a treaty. Due to a high importance of Kumtor Agreement for Kyrgyzstan, since the financial revenues from Kumtor Project build up a significant part of the state budget, Kyrgyzstan had to amend its Tax Code in order to make the cooperation on Kumtor Project possible.

It shall be emphasized that in this research the main focus is put on what the Law of the Kyrgyz Republic on International Agreements allows rather than questioning the issue of ratification of Kumtor Agreement. It should be taken into attention, that this law was adopted by Kyrgyzstan

[259] Soglashenie o novyh usloviiah po proektu Kumtor mezhdu Pravitel'stvom Kyrgyzskoi Respubliki ot imeni Kyrgyzskoi Respubliki i ZAO Kyrgyzaltyn i Centerra Gold Inc. i ZAO Kumtor Gold Company i ZAO Kumtor Operating Company i Korporatsiei "Cameco" [Agreement on New Terms for the Kumtor Project among Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kyrgyzaltyn JSC and Centerra Gold Inc. and Kumtor Gold Company CJSC and Kumtor Operating Company CJSC and Cameco Corporation], art. 6 (1), April 24, 2009.

in 1999, in the period after the independence, when Kyrgyzstan just became a member of the international community and started entering into relations with other states through the conclusion of treaties. Thus, the main objective of the Law of the Kyrgyz Republic on International Agreements was to regulate the conclusion and implementation of international agreements, i.e. treaties because at that time international agreements of Kyrgyzstan were not regulated by its national law and urgently required legal regulation for the proper management of foreign affairs of Kyrgyzstan.

However, with time it turned out that the Law of the Kyrgyz Republic on International Agreements regulates not only treaties but also contracts. The definition of international agreements provided by this law covers both treaties and contracts. Besides the definitions, this law does not provide any differentiation of international agreements as treaties and contracts in its provisions. Moreover, this law does not indicate that international agreements require different legal regulation depending on whether it is a treaty or a contract.

Since the Law of the Kyrgyz Republic on International Agreements does not differentiate treaties from contracts, it happens that this law provides for the ratification of both treaties and contracts by Jogorku Kenesh of the Kyrgyz Republic. This is why Kumtor Agreement was ratified despite the fact that it is a contract. The main issue is that this law of the Kyrgyz Republic creates several practical problems with Kumtor Agreement, such as the determination of the legal status of Kumtor Agreement, its place within the legal system of the Kyrgyz Republic and possibility of changing the terms of Kumtor Agreement.

2. 3. Agreement of the Kyrgyz Republic on cooperation with the Soros Foundation

Another agreement that was taken into consideration for the purpose of this research was Soros Agreement concluded as mentioned earlier between the Government of the Kyrgyz Republic and Soros-Kyrgyzstan Foundation in the fields of education, science, culture, healthcare and

international cooperation. This agreement will be reviewed because, similarly to Kumtor Agreement, it was also ratified by the Kyrgyz Republic. Therefore, an issue is raised: whether Soros Agreement is a treaty that is subject to regulation by Public International Law or a contract that is subject to regulation by the national law. In order to determine whether Soros Agreement is a treaty or a contract, it will also be examined based on the differentiation features. Testing made upon Soros Agreement on a compliance with each of the features as mentioned above will allow determining whether this agreement is a treaty or a contract. Moreover, some features of this agreement will also allow the understanding why the status of this agreement is being confused.

Soros Agreement, the Agreement on Cooperation between the Government of the Kyrgyz Republic and the Soros-Kyrgyzstan Foundation, which is a branch of Open Society Institute, was concluded on January 31, 1997. This agreement was ratified by Jogorku Kenesh of the Kyrgyz Republic on June 13, 2002.[260] Soros Agreement provides for the assistance of state bodies in education of high school teachers, college professors and administration staff of educational institutes in accordance with contemporary world standards; in creation and publication of books; in supporting of innovation projects in the sphere of education and etc.

According to the range of subjects, Soros Agreement is not a treaty, it is a contract. This agreement was concluded between the Kyrgyz Republic (a state) and Soros-Kyrgyzstan Foundation, a branch of Open Society Institute on January 31, 1997. Open Society Institute is a private foundation founded and owned by George Soros, an American businessman.[261] This organization is not state or an intergovernmental organization, thus it does not possess a capacity enter into treaties, which means that Soros Agreement is a contract.

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[260] The Law of the Kyrgyz Republic on Ratification of the Agreement on Cooperation between the Government of the Kyrgyz Republic and Soros-Kyrgyzstan Foundation, a Branch of the Open Society Foundation (New York City) from January 31, 1997.

[261] About us, Open Society Foundation, accessed April 24, 2013, http://www.opensocietyfoundations.org/about.

When considering the scope of regulation, Soros Agreement creates certain relations of public character. This agreement establishes and regulates the relations of Kyrgyzstan and Soros-Kyrgyzstan Foundation with regard to renewal and development of the education system, science, culture, healthcare and international cooperation. As it can be observed, this agreement covers the relations of cooperation between the parties, which could be characterized to be public. Moreover, it can be argued that in Soros Agreement the interests of both parties are public rather than private. From the provisions of Soros Agreement it can be inferred that Kyrgyzstan and Soros-Kyrgyzstan Foundation are following the public interests, such as to develop education and healthcare systems, to promote international cooperation and etc. Hence, one could come to conclusion that the scope of regulation in Soros Agreement stands that this agreement is a treaty, since it regulates public legal relations with public interests.

However, even if by its scope of regulation Soros Agreement is a treaty, it is very hard to take this characteristic into consideration when determining the status of this agreement because Soros Agreement is not a treaty by its range of subjects. This agreement was concluded between a State (Kyrgyzstan) and a private entity (Soros-Kyrgyzstan Foundation), which is a branch of another private entity (Open Society Foundations). Thus, the fact that Soros Agreement is not a treaty according to the first differentiating feature does not allow to consider other features and come to conclusion that this agreement is a treaty.

Interestingly, Soros Agreement does not represent any enforcement and dispute resolution mechanisms. This agreement only provides that Soros-Kyrgyzstan foundation is responsible for the financial support of projects in the sphere of education, healthcare, science, culture and international cooperation, while Kyrgyzstan shall exempt the activities of Soros-Kyrgyzstan Foundation from taxes, customs tariffs and other payments established by the legislation of the Kyrgyz Republic.

It should be noted that, this agreement also does not provide for the jurisdiction and applicable law. This means that the jurisdiction belongs to the national courts of the Kyrgyz Republic and the applicable law is the law of the Kyrgyz Republic, thus, this agreement is not a treaty and not subject to regulation by the Public International Law. Hence, these differentiating features (enforcement, dispute resolution, jurisdiction and applicable law) are not considered in determination of the legal status of Soros Agreement.

Based on the testing of Soros Agreement by the differentiating features, it can be concluded that Soros Agreement is a contract. As it was illustrated by the very first and most important differentiating feature, the range of subjects (a state and a private entity), this agreement is a contract.

2. 4. Analysis of Soros Agreement

Soros Agreement is the second example of international agreement, which was examined for the purpose of this research. The legal status of this Agreement is not being questioned and discussed, as it is with Kumtor Agreement, because there is no practical problem with it yet. However, this example was provided in order to illustrate that there are many other international agreements besides Kumtor Agreement, the legal status of which can be questioned and hardly determined.

Based on the results of the examination of Soros Agreement by differentiating features, this agreement is a contract. As it was indicated earlier, the very first differentiating feature of Soros Agreement, which is the range of subjects, is attributable to contracts. Subjects of this agreement are Kyrgyzstan and Soros-Kyrgyzstan Foundation. As it was established in the Anglo-Iranian Oil Company case, treaties are concluded only between states and interstate

(intergovernmental) organizations.[262] Since the range of subjects of Soros Agreement includes not only states but also a private entity, this agreement is a contract and definitely not a treaty.

As it was explained in the previous part of this subchapter, other features of Soros Agreement could not be taken into consideration for determining the legal status of this agreement. Among those features the scope of regulation of Soros Agreement confuses the legal status of this agreement. Due to the fact that Soros Agreement regulates relations of public character, it could be argued that it regulates public legal relations and thus is a treaty. However, since Soros Agreement did not meet the very first criteria of treaties, the range of subjects, it is established that this agreement is a contract. But if Soros Agreement was concluded between two states or between a state and an intergovernmental organization on the same subject matter, then this agreement would certainly be a treaty.

§3. Consequences of the Non-Differentiated Legal Regulation of International Agreements in the Kyrgyz Republic

Since the adoption of the Law of the Kyrgyz Republic on International Agreements in 1999, Kyrgyzstan entered into many different international agreements, among which there are both treaties and contracts. As it has been illustrated on the examples of Kumtor and Soros Agreements, the law of the Kyrgyz Republic does not provide for the differentiation of international agreements as treaties and contracts. The absence of such differentiation in Kyrgyz law leads to a non-differentiated legal regulation of international agreements, which means that both treaties and contracts are regulated by the same law and in the same way. Such non-differentiated legal regulation of international agreements results in a number of practical problems which were illustrated in the current situation with Kumtor Agreement.

[262] Anglo-Iranian Oil Co., U.K. v. Iran, Order, Aug 22, 1951, I.C.J. 106.

Non-differentiated treatment of international agreements in Kyrgyzstan is represented by the general definition of international agreement (which includes both treaties and contracts), absence of differentiation of international agreements and absence of separate legal regulation of treaties and contracts in the provisions of national law. The Law of the Kyrgyz Republic on International Agreements regulates the conclusion and enforcement of international agreements in Kyrgyzstan. However, this law provides a definition of international agreements, which includes both treaties and contracts, and does not differentiate international agreements in any other way. Moreover, this law provides for the same legal regulation of treaties and contracts, including the ratification of both treaties and contracts, which results in the further non-differentiated treatment of international agreements in Kyrgyzstan.

As a result, it can be implied that since national law of Kyrgyzstan provides the same treatment for both treaties and contracts, it puts both of them on the same level. However, it is inadmissible because treaties and contacts have different natures and require different legal regulation as it was established in the Chapter II of this work. Contracts and treaties shall be provided different legal regulation for a number of reasons. Contracts shall be regulated by the national law of a certain state since the activities of non-state actors usually take place on the territory of certain state and thus, are subject to national law. Treaties are always regulated by the norms of public international law because they put international obligations upon its participants, all of which are represented by states (and interstate organizations), the only subjects of Public International Law which have a capacity to enter into treaties.

The non-differentiated legal regulation of international agreements in Kyrgyzstan leads to several problems. These problems include: difficulties in the determination of legal status of the international agreements, the place of international agreements within the legal system of

Kyrgyzstan, difficulties in the legal regulation of international agreements, which include issues related to changing the terms of concluded agreements.

Such practical problems occurred in the situation with Kumtor Agreement, which is now being widely debated in the Parliament and society.[263] There are several problems with Kumtor Agreement, but this work is focused on considering the problem of determining the legal status of Kumtor Agreement. The fact that Kumtor Agreement being a contract was ratified by Kyrgyzstan leads to the confusion of its legal status. From the examination of Kumtor Agreement in the previous subchapter it was established that this agreement is a contract. However, it is still difficult for the Government of Kyrgyzstan to explain that by ratifying this agreement Kyrgyzstan did not intend to put Kumtor Agreement on the same level as treaties. In fact, this ratification was an approval of legislature to provide the Kyrgyz side of the agreement with all the necessary authorities as it was discussed in the previous subchapter of this work. Nevertheless, the national law on international agreements does not allow Kyrgyzstan to justify the ratification of Kumtor Agreement, which created the problem with determining the legal status of this agreement.

It is highly important to acknowledge that at the current stage such problem, as with Kumtor Agreement, might also occur in future with Soros Agreement and other international agreements (especially contracts) concluded by Kyrgyzstan. After analyzing problems with the legal regulation of international agreements on the example of Kumtor Agreement, it becomes clear that it is crucial to differentiate international agreements into treaties and contracts and to provide them with different legal regulation.

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[263] Aiganysh Abdyraeva, "The deputies will hear Azimbek Beknazarov the draft law on denunciation of the agreement on Kumtor," K-News, accessed April 25, 2013, http://www.knews.kg/ru /parlament_chro/30977/; Nurzada Tynaeva, "Beknazarov: I will develop Kumtor by myself," K-News, accessed April 25, 2013, http://www.knews.kg/ru/society/30890/; "A peaceful demonstration in support of the bill on denunciation of the agreement on "Kumtor" took place on April 24 in Bishkek," K-News, accessed April 25, 2013, http://www.knews.kg/ru/society/30819/.

§ 4. Conclusion and Recommendations

Based on the review of practice of legal regulation of international agreements in the Kyrgyz Republic, it can be concluded that the current legislation regulating international agreements is outdated and does not meet the current needs of the Kyrgyz Republic for the regulation of international agreements. Present legislation of the Kyrgyz Republic does not provide for the differentiation and adequate legal regulation of international agreements. Therefore, Kyrgyz Republic needs to review and change its legislation on international agreements in a way that it would fully reflect the position of the Kyrgyz Republic on legal regulation of both treaties and contracts.

At the completion of this research several recommendations are made. These recommendations are made based on the current legislation of the Kyrgyz Republic on international agreements and practical problems arising out of the current legal regulation of international agreements in the Kyrgyz Republic.

Constitution of the Kyrgyz Republic, Vienna Conventions on the Law of Treaties, and the Law of the Kyrgyz Republic on International Agreements are the main sources of law that regulate international agreements in the Kyrgyz Republic. With regard to regulation of international agreements, the Constitution of the Kyrgyz Republic indicates that international treaties concluded by the Kyrgyz Republic are an integral part of the legal system of the Kyrgyz Republic, while the prevailing character of international treaties over the national laws of the Kyrgyz Republic is established in the national laws of Kyrgyzstan. Among all of those sources of law, the Law of the Kyrgyz Republic on International Agreements is the main law, which regulates the relations with regard to conclusion and legal regulation of international agreements in the Kyrgyz Republic. However, it was established that this law does not provide separated definitions for treaties and contracts and does not provide for any differentiation

between treaties and contracts. Absence of such differentiation results in same legal regulation of both treaties and contracts, which leads to difficulties in the proper regulation of international agreements. For example, a problem that occurred in the Agreement on Kumtor Project, one of the international agreements of the Kyrgyz Republic, was in the determination of legal status of the agreement (issue of whether this agreement is a treaty or a contract), depending on which the procedure for changing the terms of agreement or termination of agreement will be established. In order to avoid problems in the legal regulation of international agreements, it is crucial for the Kyrgyz Republic to consider the following recommendations and to take every effort for their implementation.

First, Kyrgyzstan must clearly state its position with regard to the differentiation of international agreements into treaties and contracts. This must be done through the amendment of existing law on international agreements. Kyrgyzstan must indicate that its law on international agreements regulates only treaties. It is crucial for Kyrgyzstan to reflect its position in its national legislation in order to avoid problems arising out of the current undifferentiated treatment of treaties and contracts (such as the problem with Kumtor Agreement). In connection with an increasing number of contracts concluded by Kyrgyzstan, this recommendation is especially important.

Second, after the introduction of differentiation of international agreements, Kyrgyzstan must bring its national law on international agreements in compliance with the Vienna Conventions on the Law of Treaties of 1969 and 1986. For example, at the moment there is a contradiction between the definitions of international agreements regarding the range of subjects that have a right to conclude international agreements. The law of Kyrgyzstan provides that international agreements can be concluded not only by the states and intergovernmental organizations, but also by "other subjects of international law," which is inadmissible, since the Vienna

Convention on the Law of Treaties of 1986 provides that only states and intergovernmental organizations can enter into international agreements (treaties). Kyrgyzstan, as a party to both Vienna Conventions, took the obligation to implement these treaties, that is why Kyrgyzstan must harmonize its national legislation with the norms of concluded conventions. Moreover, since the law of the Kyrgyz Republic on international agreements will be regulating only treaties, other provisions of this law related to contracts, such as the ratification of investment, loan and other contracts, must be removed to avoid any future contradictions. The law of the Kyrgyz Republic on international agreements must contain only those provisions, which are related to treaties and their legal regulation.

Third, after amending its law on international agreements and removing international contracts from the regulation by that law, Kyrgyzstan must provide a separate legal regulation for international contracts. This must be carried out by the adoption of a separate national law on the regulation of international contracts of the Kyrgyz Republic, while the existing law on international agreements will be devoted to the regulation of treaties. This will allow to provide a separate legal regulation for treaties and contracts, thus, decreasing the possibility of practical problems (such as those with Kumtor Agreement).

The fulfillment of these recommendations is crucial for Kyrgyzstan because it will add to the development of national legislation and result in positive impact on the investment attractiveness of Kyrgyzstan. The introduction of differentiation of international agreements into treaties and contracts and following harmonization of national legislation with concluded international treaties will result in the development of national legislation of the Kyrgyz Republic. Such development will allow the Kyrgyz Republic to properly regulate treaties and contracts. Meanwhile, the separate legal regulation of treaties and contracts will add to the better implementation of international agreements and protection of the rights of their parties,

which is especially important when it comes to the legal regulation of contracts concluded with foreign investors. The appropriate legal regulation of international contracts will allow the Kyrgyz Republic to properly fulfill its obligations and to make others meet their obligations as well. In this way, the implementation of the above-stated recommendations becomes vital and inevitable, remaining to be only a matter of time.

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