

# DEFINING INVESTMENT DISPUTES HEARD BY KAZAKHSTAN'S NEW INVESTMENT DISPUTE PANELS

International Council of the Supreme Court  
of the Republic of Kazakhstan

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Astana

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# Kazakhstani Legal Framework

Kazakhstan's New Investment Dispute Panels, under the Code On Civil Procedure (effective 1 January 2016 ("CP Code"))

(1) Astana City Court

*jurisdiction:* court of first instance for "civil cases relating to investment disputes ... and other disputes between investors and state authorities relating to the investor's investment activity." (Art. 27(4) of CP Code)

(2) Supreme Court of Kazakhstan

*jurisdiction:*

- appellate and cassation courts for appeals of the Astana City Court decisions on "investment disputes" involving ordinary "investors" (Arts. 402 and 434(1) of CP Code)
- court of first instances for "investment disputes" to which a "major investor" is a party. (Art. 28(2) of CP Code);
- cassation court for appeals of the Supreme Court decisions on "investment disputes" involving "major investors" (Art. 434(1) of CP Code)

## Key Definitions under the Entrepreneurship Code of RK (effective 1 January 2016) ("Entrepreneurship Code")

- An **investment activity** shall mean participation of individuals and legal entities in the charter capital of commercial organizations or the creation of or increase in fixed assets used for business activities and for the implementation of the public/private partnership project, including a concession project. (Art. 274(3) of Entrepreneurship Code)
- **Investors** shall mean individuals and legal entities who are investing in the Republic of Kazakhstan. (Art. 274(2) of Entrepreneurship Code)
- A **major investor** shall mean an individual or a legal entity making investments in the Republic of Kazakhstan in an amount of at least two million times the monthly calculation index. (Art. 274(4) of Entrepreneurship Code)
- An **investment dispute** shall mean a dispute arising out of contractual obligations of investors, including major ones, and state agencies in connection with investor's investment activities. (Art. 296(1) of Entrepreneurship Code)

## Objective of New Investment Dispute Panels

The principal objective of the new Investment Dispute Panels is to improve Kazakhstan's investment climate, by

- (1) having investment disputes heard by panels having expertise, training and experience in such disputes,
- (2) giving investors a realistic local alternative to international investment arbitration.

## Key Risks in Achieving the Objective

- (1) the Investment Dispute Panels may be perceived as not independent from the state
  - disproportionate number of decisions in favor of the state
  - reluctance to award legal expenses to investors
- (2) inadequate training of judges and lack of sensitivity to investor concerns
- (3) potential investors may prefer the panels to hear any disputes to which they are a party, rather than only certain types of disputes to which investors happen to be a party (i.e., *ratione personae* jurisdiction, not *ratione materiae* jurisdiction). In other words, potential investors may prefer the panels to hear disputes involving investors rather than investment disputes with the state.
  - *Note: the Astana International Financial Center Court and the Dubai International Financial Center Court mostly have jurisdiction based on the participants of the dispute.*
- (4) definition of "investor" may be too narrow
  - excludes affiliated entities who may not be the party to the contract with the state (e.g., foreign parent may be the investor while the local subsidiary is the party to the contract with the state)
- (5) definition of "investment disputes" may be too narrow, by being limited to disputes involving signed contracts with the state
  - excludes disputes between investors and the state arising out of investment activity which is not based on the contract between investors and the state (e.g., tax, customs and environmental disputes).



## Concern of the Supreme Court

The Supreme Court is concerned that the definition of "investment disputes" may be too broad, by including disputes involving routine commercial transactions.

International Practice



## International Experience in Defining "Investment Disputes"

- (1) ICSID Convention
- (2) Bilateral Investment Treaties ("**BITs**")
- (3) Energy Charter Treaty ("**ECT**")
- (4) Eurasian Economic Union Treaty ("**EAUT**")
- (5) *Salini* Criteria for interpreting "investments"

## ICSID Investment Disputes

- (1) The *International Center for the Settlement of Investment Disputes Convention*, 14 October 1966 (“**ICSID Convention**”) was ratified by Kazakhstan on 9 July 2004. Kazakhstan consents to ICSID arbitration in various BITs and in the ECT.
- (2) **Investor**: This term is not defined in the ICSID Convention. The Convention relies on the definition contained in national law, BITs and other investment protection treaties, as applicable.
- (3) **Investment**: This term is not defined in the ICSID Convention. The Convention relies on the definition contained in national law, BITs and other Investment protection treaties, as applicable.
- (4) **Investment dispute**:  
*“any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Center by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Center” (Art. 25(1) of the ICSID Convention).*

## BIT Investment Disputes (1)

- (1) Kazakhstan has ratified almost 50 BITs. See Attachment A (slide 20).
- (2) There is no standard BIT. Most major "investor countries" have their own standard form of agreement and negotiate based on it.
- (3) The Kazakhstan - Japan BIT (ratified by Kazakhstan on 22 July 2015) contains the following definitions:
  - Investor means the following person or enterprise that seeks to make, is making or has made investments in the Area of the other Contracting Party:
    - (a) a natural person having the nationality of that Contracting Party in accordance with its applicable laws and regulations; or
    - (b) an enterprise of that Contracting Party.
  - Disputing investor means the investor who is a party to an investment dispute.

## BIT Investment Disputes (2)

- **Investment** means every kind of asset owned or controlled, directly or indirectly, by an investor, including:
  - (a) an enterprise and a branch of an enterprise;
  - (b) shares, stocks or other forms of equity participation in an enterprise...;
  - (c) bonds, debentures, loans and other forms of debt...;
  - (d) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
  - (e) claims to money and to any performance under contract having a financial value;
  - (f) intellectual property rights...;
  - (g) rights conferred pursuant to laws and regulations of a host State or contracts such as concessions, licences, authorisations and permits, including those for the exploration and exploitation of natural resources; and
  - (h) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges....

Investments include the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investments.

- **Investment dispute** means a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Contracting Party under this Agreement with respect to the investor of that other Contracting Party or its investments in the Area of the former Contracting Party.

## Energy Charter Treaty Investment Disputes (1)

- (1) Kazakhstan ratified the ECT on 18 October 1995.
- (2) The Energy Charter Treaty establishes a framework for cooperation between European countries and other industrialized countries with the aim of developing the energy potential of central and Eastern European countries and of ensuring security of energy supply for the European Union.
- (3) Investment disputes under the ECT may be resolved in state courts or in arbitration under the rules of ICSID, United Nations Commission on International Trade Law ("**UNCITRAL**") or the Stockholm Chamber of Commerce.

## Energy Charter Treaty Investment Disputes (2)

(4) The ECT contains the following definitions:

- **Investor** means:
  - (a) with respect to a Contracting Party:
    - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
    - (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party ... (Art. 1(7))
- **Investment** means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
  - (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
  - (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
  - (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
  - (d) Intellectual property;
  - (e) Returns;
  - (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.... (Art. 1(6))
- **Investment** refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat. (Art. 1(6))
- **Investment Dispute:** This term is not defined.

## Eurasian Economic Union Treaty Investment Disputes

- (1) Under the EAUT, "investment disputes" can be heard in state courts or in arbitration under the rules of ICSID, UNCITRAL or a chamber of commerce and industry agreed by parties.
- (2) Annex 16 to the Treaty contains the following definitions:
  - **Investments** means tangible and intangible assets invested by an investor of a Member State into subjects of entrepreneurial activity on the territory of another Member State in accordance with the legislation of the latter, including:
    - funds (cash), securities and other property;
    - rights to engage in entrepreneurial activities granted under the legislation of the Member States or under a contract, including, in particular, the right to exploration, development, production and exploitation of natural resources;
    - property rights and other rights having monetary value (Article 6(7))
  - **Investor of a Member State** means any person of a Member State making investments on the territory of another Member State in accordance with the legislation of the latter (Article 6(8)).
  - **Investment dispute**: This term is not defined, but it can be interpreted to mean all disputes between a recipient state and an investor of another Member State arising from or in connection with an investment of that investor on the territory of the recipient state.

## Salini Criteria

- (1) All investments are commercial transactions, but not all commercial transactions are investments.
- (2) The absence of a definition of “investment” in the ICSID Convention makes it difficult to determine whether a particular transaction is an “investment” (and therefore is subject to investment dispute arbitration) or is a purely commercial transaction (and therefore is not subject to investment dispute arbitration). BITs usually contain lists of what may qualify as an “investment,” but they are very broad and have the potential of covering commercial transactions which would not ordinarily be considered an “investment.”
- (3) This has resulted in the need for a workable test to determine whether a particular transaction is an “investment” and not a purely commercial transaction. In the 2001 ICSID arbitration, *Salini Costruttori SpA. & Italstrade SpA. vs. Kingdom of Morocco*, the arbitrators set forth 4 criteria, all of which should be met to qualify as an “investment” (the “**Salini Criteria**”). These criteria have been modified over the years and are now generally considered to be the following:
  - a) The investor’s activity should have certain duration.
  - b) There is typically an element of risk for both investor and the state authorities.
  - c) The commitment involved would have to be substantial.
  - d) The investor’s contribution should be made for the purpose of the host State’s development.
- (4) While these Salini Criteria are sometimes challenged, they are the criteria most widely used by international investment arbitration tribunals for determining whether a particular transaction is an “investment” or is a purely commercial transaction.



Proposal

## Proposed Interpretation of "Investment Disputes" (1)

### *(1) Issue*

The definition of "investment disputes" in the Entrepreneurship Code is ambiguous and it contradicts Kazakhstan's obligations under the investment protection treaties to which it is a party. This leads to substantial uncertainty as to how that term will be interpreted and applied by the new Investment Dispute Panels. This uncertainty will hinder rather than help the Investment Dispute Panels achieve the objective of improving Kazakhstan's investment climate.

### *(2) Proposal for Interpretation of "Investment Disputes" by the New Investment Dispute Panels*

It is proposed that the Supreme Court of Kazakhstan adopt a normative resolution instructing judges on the Investment Dispute Panels how to interpret the term "investment disputes" under Art. 296(1) of the Entrepreneurship Code.

A draft of the proposed normative resolution is contained in **Attachment B** (slides 21-23).

Under this proposed interpretation, "investment dispute" would be interpreted to mean any dispute between an investor and a state body involving an "investment." The definition of "investment" would be taken from Kazakhstan's 2015 BIT with Japan. However, to qualify for an "investment dispute" the investment involved in a particular dispute would need to satisfy the Salini Criteria.

## Proposed Interpretation of "Investment Disputes" (2)

### *(3) Analysis of Proposed Interpretation*

By adopting a normative resolution on the interpretation of the term "investment disputes", the Supreme Court will end any uncertainty over that term and it will be interpreted uniformly by all judges on the Investment Dispute Panels.

The proposed interpretation will have the following additional advantages for the Republic of Kazakhstan and for the Investment Dispute Panels:

- It will not cover disputes about ordinary commercial transactions.
- It will be consistent with Kazakhstan's obligations under the investment protection treaties to which it is a party. It will neither expand nor decrease those obligations.

The proposed interpretation will have the following additional advantages for investors:

- It will not require the dispute to involve a contract with the state.
- It will not require investors to forego rights which they would have had under international investment arbitration.

The proposed resolution is a reasonable compromise between the interests of the Republic of Kazakhstan and its courts and the interests of investors. It will help the new Investment Dispute Panels achieve the objective of improving Kazakhstan's investment climate.

## List of countries which entered into Agreements on the promotion and mutual protection of investments with the Republic of Kazakhstan as of 01/01/2016\*

### The Americas

1. USA

### Europe

2.	Austria	10.	Great Britain	18.	Poland
3.	Belgium-Luxembourg Union	11.	Greece	19.	Romania
4.	Bulgaria	12.	Hungary	20.	Serbia
5.	Czech Republic	13.	Italy	21.	Slovakia
6.	Estonia	14.	Latvia	22.	Spain
7.	Finland	15.	Lithuania	23.	Sweden
8.	France	16.	Macedonia	24.	Switzerland
9.	Germany	17.	Netherlands		

### Former USSR States (Except Baltics)

25.	Azerbaijan	28.	Kyrgyzstan	31.	Uzbekistan
26.	Armenia	29.	Russia	32.	Ukraine
27.	Georgia	30.	Tajikistan		

### Asia, Africa and Middle East Countries

33.	Afghanistan	39.	Japan	45.	Pakistan
34.	China	40.	Jordan	46.	Qatar
35.	Egypt	41.	Korea	47.	Turkey
36.	India	42.	Kuwait	48.	Vietnam
37.	Iran	43.	Malaysia		
38.	Israel	44.	Mongolia		

### International Organizations

49. Member states of the Eurasian Economic Community (EurAsEC)

\* Please see Investor's Guide issued by the Ministry of Investment and Development

**Draft Resolution of the Supreme Court of the Republic of Kazakhstan (1)**

*"On Issues Relating to Interpretation of "Investment Dispute" under Article 296.1 of the Entrepreneurship Code of the Republic of Kazakhstan dated 29 October 2015 No 375-V"*

1. Under Article 296(1) of the Entrepreneurship Code of the Republic of Kazakhstan dated 29 October 2015 No 375-V ("**Entrepreneurship Code**") an "investment dispute" means a dispute arising out of contractual obligations of investors, including major ones, and state authorities in connection with an investor's investment activities.
2. In accordance with Article 296(2) of the Entrepreneurship Code "investment activity" means participation of individuals and legal entities in the charter capital of commercial organizations or the creation of or increase in fixed assets used for business activities and for the implementation of the public/private partnership project, including a concession project.
3. Based on these definitions disputes between an investor and state authorities arising out of or in connection with an investor's activities listed in Article 296(2) of the Entrepreneurship Code shall be viewed as investment disputes if the investor's activity is based on a contract between the investor and state authorities.
4. At the same time, international treaties on protection of investments ratified by the Republic of Kazakhstan expand the scope of the definition of investment disputes to disputes between state authorities and investors arising out of or in connection with investments even if such activity is not based on a contract between the investor and state authorities.

**Draft Resolution of the Supreme Court of the Republic of Kazakhstan (2)**

5. Under these international treaties the term “investments” means every kind of asset owned or controlled, directly or indirectly, by an investor, including:
- a) an enterprise and a branch of an enterprise;
  - b) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
  - c) bonds, debentures, loans and other forms of debt, including rights derived therefrom;
  - d) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
  - e) claims to money and to any performance under contract having a financial value;
  - f) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;
  - g) rights conferred pursuant to laws and regulations of Kazakhstan or contracts such as concessions, licences, authorisations and permits, including those for the exploration and exploitation of natural resources; and
  - h) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

Investments include the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investments.

**Draft Resolution of the Supreme Court of the Republic of Kazakhstan (3)**

6. Under universally acknowledged international principles developed by international investment arbitration practice, it is possible to identify certain typical criteria which allow treating the assets listed in Paragraph 5 as investments for purposes of settling investment disputes:
  - a) The investor's activity should have certain duration.
  - b) There is typically an element of risk for both investor and the state authorities.
  - c) The commitment involved would have to be substantial.
  - d) The investor's contribution should be made for the purpose of the host State's development.
7. Under Article 4(3) of the Constitution of the Republic of Kazakhstan, international treaties ratified by the Republic shall have priority over its laws and be directly implemented except in cases when the application of an international treaty requires the adoption of a special law.
8. In accordance with Article 1(1) of the Civil Procedure Code application of civil procedure rules is based, among other things, on universally acknowledged international principles.
9. Under the principal of equity of all investors set forth in Article 6 of the Entrepreneurship Code, all national investors are entitled to the same protections as foreign investors.
10. Therefore, the term "investment disputes" in Art. 296(1) of the Entrepreneurship Code shall be interpreted by courts as any disputes between investors and state authorities arising out or in connection with the investments listed in Paragraph 5 above taking into account the criteria listed in Paragraph 6 above.