

## THE PROTECTION OF INVESTORS' RIGHTS IN KAZAKHSTAN

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**Abstract:** Since obtaining independence, the Republic of Kazakhstan has developed an 'open-door' policy for foreign investors ready to invest in the country's economy. Over time, approaches and mechanisms that have created favorable conditions for investors have changed, along with appropriate amendments to the legislation. Currently, Kazakhstan is a rapidly developing country with great potential. According to the World Bank, out of 189 countries, Kazakhstan rated 50th in 2014 for 'Doing Business'. Nonetheless, many foreign investors may rightly query about the guarantees for protecting investors' rights in this country, under the conditions they find here. This article aims to cover the mechanisms for protecting the investors' rights in the Republic of Kazakhstan, taking into account the recent changes in investment law, and based on a several case reviews.

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### Introduction

The protection of investor's rights is an important indicator of the investment climate of the recipient state of the investment. That is why the legislation of the Republic of Kazakhstan (RoK) sets out regulations that are directly related to guarantees in respect of investments.

The second chapter of the Law of the Republic of Kazakhstan (2003) "On investments" currently includes a number of safeguards for investors in Kazakhstan. Thus, in accordance with Article 4 of the Law "On investments", investors have a full and unconditional protection of rights and interests. This is provided by the Constitution of the Republic of Kazakhstan, the aforementioned law, other normative legal acts of the Republic (e.g. Law "On Subsoil and Subsoil Use"), and international treaties ratified by the RoK (The Law of the RoK, 2003). The latter is almost identical to the provisions of Article 8 of the Convention on the Rights of the Investor 1997 (The Law of the RoK, 2000)..

Paragraph 3 of Article 4 of the Law "On investments" contains a "grandfather clause": "The RoK guarantees the stability of contracts between investors and state bodies of Kazakhstan, except for cases when changes in contracts are made by agreement between the parties" (The Law of the RoK, 2003). However, this rule is declaratively formulated and unfortunately, the Law "On investments" does not give an answer to what is exactly meant by these guarantees and stability conditions of the contract.

General provisions on the grandfather clause contained in the Civil Code of Kazakhstan (CC). As stated in paragraph 2, Article 383 of the CC: "If, after conclusion of the contract, legislation establishes rules binding on the parties other than those who acted in the contract, the terms of the signed contract shall remain in force, unless the legislation is established that it applies to relations arising from previously concluded contracts" Civil Code of the RoK. (1994).

Although this provision of the CC is controversial, both in theory and in practice, and not always applicable, the importance of its consolidating role for sector-specific legislation is undeniable.

Different views on the concept of stability of the legislation are expressed in Kazakhstan. Didenko & Nesterova (2007) believe that the priority of the contract before the law, established by paragraph 2, Article 383 of the CC, applies only to the terms of the contract, which could be agreed by the parties under mandatory rules established by the legislation in force at the time.

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Our point of view is that such an interpretation is contrary to the meaning of a grandfather clause, according to which, the legislation that worsens the position of the foreign investor (under mandatory rules) shall not apply to previously signed contracts for the period of the contract.

These statements are contradictory to the interpretation of paragraph 2, Article 383 of the CC, which states: "if, after conclusion of the contract, legislation establishes rules binding on the parties other than those that were in effect at the conclusion of the contract, the terms of the signed contract shall remain in force" Civil Code of the RoK (1994). This text does not imply that this is a discretionary condition that the parties may include in the contract. We are talking about legal rights other than those that were in effect at the conclusion of the contract. In our opinion, these provisions are interpreted unambiguously, in that they do not apply all the rules that establish other rules (whether discretionary or mandatory).

This position has legislative confirmation in Kazakhstan. In particular, the Normative Resolution of the Supreme Court of Kazakhstan, No. 5, dated June 23, 2006, states: "On judicial practice of tax legislation", says "subject to the provisions of the stability of the tax regime, not only to taxes and other payments that could be agreed in contracts for the prevailing at the time of their detention legislation, but also to those taxes (mandatory payments), which were duplicated parties to the contract of the peremptory norms of the law in force at the time of conclusion of the contract" (Normative decree of the Supreme court of the RoK, 2014).

The guarantee on income use, which is provided by Article 5 of the Law "On Investments", provides investors with free use of income derived from their own activities, after taxes and other obligatory payments are paid to the budget, in accordance with the laws of Kazakhstan. Hence, investors may open bank accounts in national and (or) in foreign currency in accordance with banking and currency legislation of Kazakhstan.

Article 6 of the Law "On Investments" provides a guarantee of Kazakhstani public authorities transparency in relation to investors. Investors, including the minority investors, have free access to information about the registration of legal entities, their charters, registration of real estate transactions, issued licenses, as well as any matter stipulated by legislative acts of Kazakhstan information that is related to implementing investment and does not contain either commercial or other secrets protected by law.

The guarantee of the investor's rights at nationalization and requisition is enshrined in Article 8 of the Law "On Investments", according to which, if there is to be a nationalization, the investor shall be reimbursed by the RoK, in full, the damages caused to him as a result of the enactment of the legislative acts of the Republic of Kazakhstan on nationalization (The Law of the RoK, 2003). The Article 253 of the CC determines that the requisition can be withdrawn in case of natural disasters, accidents, epidemics, and epizootics, during the period of martial law or in time of war. In other circumstances bearing extraordinary circumstances, the owner of the property, for the public's interest, is to address the public authorities under the terms and conditions established by the laws of Kazakhstan Civil Code of the RoK, (1994).

Article 8 of the Convention on the Protection of the Rights of the Investor prescribes that:

investments will not be nationalized, and cannot be subject to requisition, except in exceptional circumstances (natural disasters, accidents, epidemics, epizootics and other cases of extraordinary character), the domestic law of the Parties when these measures taken in the public interest, provided the Basic Law (Constitution) of the recipient country. Nationalization and requisitioning cannot be implemented without adequate compensation payments to the investor. Decisions on nationalization or requisition of investments made in the manner prescribed by national legislation of the recipient country, can be appealed in the manner

prescribed by national legislation of the recipient country. The investor has the right to compensation for damage caused by the decisions and actions (inaction) of state bodies or officials, contrary to the laws of the recipient country and international law (The Law of the RoK, 2000, Article 8).

The next guarantee that is provided by the Law "On Investments" is the guarantee enshrined in Article 9:

if there is situation of the impossibility of resolving investment disputes by negotiation dispute resolution shall be in accordance with international treaties and laws of the Republic of Kazakhstan in the courts of the Republic of Kazakhstan or in international arbitration agreed by the parties (The Law of the RoK, 2003, Article 9).

However, according to Zhazykbayeva (2001), the investors' right to appeal to arbitration is limited, due to the influence of Article 417 of the Code of Civil Procedure of RoK (CCP), which established the exclusive competence of the Kazakhstan courts in disputes relating to the determination of rights to immovable property. We should note that the exclusive jurisdiction in this case means "in comparison" with the judicial jurisdiction of the dispute, as Kazakh courts have jurisdiction and cannot be transferred to foreign courts regarding disputes over immovable property situated in the territory of Kazakhstan. Similarly, the issue of jurisdiction disputes on property, in the light of alternative (including arbitration) forms of dispute resolution, is solved by Article 33 CCP, which establishes the grounds of exclusive jurisdiction (a kind of territorial jurisdiction which rules out the possibility for certain categories of cases and applies different rules of jurisdiction to those established under the CCP, specifically for these types of cases). In addition it applies to a number of disputes, in particular those related to real estate, claims to carriers, claims for damages caused by violation of a foreign state, and immunity from jurisdiction of the RoK and its property (Code of Civil Procedure of the RoK, 1999).

As an exclusive jurisdiction, it is a type of territorial jurisdiction, where these rules should apply, in our opinion, in cases where the disputes are subordinate to the court, rather than an international commercial arbitration or arbitral tribunal.

Suleimenov & Osipov (2008) say the guarantees were reduced with the Law "On foreign investments", and writes that in this law, the use of foreign investment was enshrined as both a national and a most favored national treatment, and suggested a provision to use only one; the most favorable. To his regret, this provision was never included in the new Law "On Investment", though other legislation applies, such as the "National treatment of foreign persons enshrined in the Constitution of Kazakhstan in 1995" (p. 4, Article 12), and the "Civil Code of RoK" (p. 7, Article 3). Application of the most favored national treatment is enshrined in many international instruments, in particular, the Energy Charter Treaty (Article 10, paragraph 7), which sets exactly the same rate as the one that has been repealed in the Law "On Foreign Investment" (Suleimenov & Osipov, (2008).

The Law "On investments" guarantees full protection of the rights of investors and the stability of contracts. In addition, it very strictly regulates the work of state bodies in relation to investors, and defines measures of state support for investments in priority sectors of the Kazakhstani economy.

Additional guarantees for protection of the investor's rights are provided by agreements on mutual protection and promotion of investments, which include protection from discrimination, requisition and nationalization, and the right to resolution of investment disputes relating to international arbitration in the absence of an arbitration agreement.

Bilateral agreements for the promotion and reciprocal protection of investments tend to provide assurances that ensure non-discrimination on the basis of the country of investment origin, and provide the most favored national provision for fair and equitable treatment. It fulfils all the commitments of

the host state to foreign investors, guarantees complete protection, and compensates for expropriation of investments caused by actions or omissions of the Government of the RoK, through its departments or any other governmental body.

As follows from the practice of international arbitration courts and tribunals, the obligation of the receiving State is to provide "fair and equitable treatment", which involves ensuring the foreign investor has a stable environment for investment. This includes the provision of a fair and impartial trial, execution of the promises made by the host state, assurances given to the foreign investor, and the fulfillment of contractual obligations made to foreign investors, and similar matters.

It should be also noted that the "fulfillment of the commitments made to foreign investors" refers to the obligation of the host state to fulfill the conditions of investment contracts and other agreements with the foreign investor. Hence, a breach of contract by the host state leads not only to the legal consequences arising from the contract, but it violates the agreement that gives foreign investors additional security mechanisms (Tukulov, 2013).

Therefore, in the case of "Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. vs Republic of Kazakhstan" (ICSID Case No. ARB / 05/16), which was considered by ICSID on June 28, 2008, the arbitral tribunal required Kazakhstan to pay compensation of 125 million US dollars with interest, for the expropriation of "Kar-Tel", one of the largest mobile operators in Kazakhstan, which belongs to Turkish investors.

In 1998, Rumeli ended an investment agreement established on the GSM-operator, Kar-Tel, with the Government of Kazakhstan. Originally Rumeli owned a 70% share of Kar-Tel, with the remainder owned by the Kazakh company, "Investel". This latter component was transferred to the Kazakh side of "Telecom Invest", whose share of Kar-Tel rose to 40%, while the remaining 60% was distributed among the Rumeli and Turkish mobile operator, Telsim. In 2002, the defendant unilaterally terminated the investment agreement, citing fraud on the part of the plaintiff, in that operators had been investing only 11% of the originally promised 130 million US dollars, the coverage was only 60% of that planned, and the supplied equipment had been previously used.

During the arbitration proceedings, it was confirmed that the defendant violated Article 3 of the Agreement between the Republic of Kazakhstan and the Republic of Turkey in relation to the mutual promotion and protection of investments. This stated that the investment should not be subject to alienation, nationalization, or direct or indirect measures of similar effect. Also, the plaintiff failed to pay compensation for the resulting expropriation, which should have been equivalent to the real value of expropriated investment before the action was excluded (Boyd, Lalonde, & Hanotiau, 2008).

Nevertheless, the rights and interests of the investors may have been violated even in court, for example, when the tax authorities and the Court of First Instance misinterpreted the tax legislation, resulting in illegal conclusions.

For example, the tax authorities noticed a redemption of debts and penalties from a tax audit carried out in respect of Limited Liability Partnership "F". They considered that the LLP "F" had a right to deduct the costs of depreciation and repair in terms of the corporate income tax (CIT) they were required to pay. In making this decision, the courts did not take into account the benefits relating to the CIT rates that are extended to all foreign investors. These do not include deprivation of the investor's rights, like costs of depreciation and repair, as assigned deductions.

During the trial, LLP "F" was recognized as operating under an investment project, although neither the activities of LLP "F" nor the project criteria met the characteristics of such a project type. Recognition of LLP "F" as participating in an investment project meant that the partnership could have exercised the right to preferential depreciation as actually required by law. However, the court

decided LLP “F” was disqualified from a preferential order, and was thus deprived of the right to any depreciation.

The courts failed to consider the remaining provisions of the Kazakh legislation on the stability of the law and international treaties. Thus, the courts by their decisions failed to protect the interests of investors, and supported a very controversial position of the tax authorities (Legal Policy Research Centre, 2011).

Protection of the investor’s rights is one of the aims of the Council on Improving the Investment Climate (CIIC). The CIIC was created on March 12, 2013 by the Resolution of the Government of Kazakhstan. The objectives of the CIIC are to implement a unified investment policy for Kazakhstan; to meet the priorities of economic development for Kazakhstan, and to assist in attracting an efficient use of domestic and foreign investments. Within the framework of these objectives, which are assigned to CIIC, is defined the common development strategy for investment, that is based on the policies of the Organization of Economic Cooperation and Development. These relate to the investment policy and development priorities of Kazakhstan, which involve proposal development for creating a favorable investment climate in Kazakhstan. This includes protecting the rights and interests of foreign investors, and improving the legal framework of Kazakhstan pertaining to investment policy, taxation, and customs legislation (Decree of the Government of the RoK, 2013a).

A national plan on investment attraction, development of special economic zones and export promotion for the Republic of Kazakhstan in 2010 – 2014 provided the creation of an investment ombudsman function to perform a specially created Commission on Investment, as an advisory body under the Government of the RoK. This works to develop proposals for coordination and control of state bodies and national holdings in relation to attracting investments for the economy of Kazakhstan. The current activities in relation to investors is to protect their rights and interests, as well as to create favorable conditions for investment activity in the RoK (Decree of the Government of the Republic of Kazakhstan, 2013a).

However, the creation of another advisory body does not necessarily solve the problem of protecting the rights of investors, as the investment ombudsman would duplicate the tasks assigned to CIIC and the Foreign Investors Council under the President of the Republic of Kazakhstan.

An additional type of protection of investments involves signing of memorandum of understanding (MOU) with the state authorities whereby the local authority is obliged to assist in resolving issues that may arise in the implementation of the investment project. Usmanov (2012) notes that, despite being in accordance with the legislation of Kazakhstan, the MOU, as a rule, is not a binding instrument, but, nevertheless, can assist in some controversial situations.

For example, the “Abu Dhabi Plaza” building project in Astana actively supported Astana Administration and the Government of Kazakhstan. The Republic of Kazakhstan and the United Arab Emirates have signed and ratified the agreement on the project to establish a special legal regime that differs from that existing under the current laws of the RoK. Law of the Republic of Kazakhstan (2009) “On Ratification of the Agreement between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on the Abu Dhabi Plaza complex construction” states that the provisions of the Treaty are not subject to as Kazakhstan’s legislation and international agreements regulating customs issues, except in cases where such Kazakh law and/or international treaties are more favorable to ALDAR than regulations governing customs matters contemplated by this Agreement. The Government of the Republic of Kazakhstan guarantees absolute stability of the customs regime provided for in this Agreement, and agrees that this guarantee also applies to any changes in Kazakhstan legislation and/or international treaties to which the Republic of Kazakhstan is or will be signed by the parties and which define the procedure and conditions for the import excise

goods. Guarantee the stability of the customs regime will not be revoked by the Government of the Republic of Kazakhstan during the term of this Agreement, including, but not limited to, on the grounds of national security and environmental, health and morals, as well as on any other grounds provided in accordance with Kazakh legislation (Law of the Republic of Kazakhstan, 2009, paragraph 4.5.1).

The World Bank's Doing Business program ranked Kazakhstan as 50th out of 189 countries in 2014 (World Bank Group, n.d.). The overall index is an average performance of the country, based on 10 indicators, with each indicator equally weighted. In terms of the indicator "Protecting investors", Kazakhstan shared 22nd place with Norway and Denmark (World Bank Group, n.d.). This reflects the creation of favorable conditions for future investment in Kazakhstan's economy. Moreover, in terms of The 20 Fastest-Growing Economies, Kazakhstan rated 11th, based on an analysis that included 57 countries, with each having 10 or more responses in the surveys initiated by Bloomberg (Robinson, 2015, February, 26).

## Conclusion

It can be concluded that Kazakhstan has built a strong system of protection for investors' rights and this involves both national legislation, bilateral international agreements, and multilateral treaties ratified by Kazakhstan.

In addition, the current system includes objective and impartial examination of cases relating to foreign investment in international arbitration. Furthermore, it has the full support of investors in the territory of Kazakhstan.

Moreover, the current national legislation is dynamic, and meets all the requirements of investors, and this can be seen in the international rankings, in which Kazakhstan has a stable place.

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