Reforming International Investment Agreements of Kazakhstan: Policy Options

Professor Yarik Kryvoi
British Institute of International and Comparative Law
y.kryvoi@biicl.org

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Kazakhstan and ISDS

Publicly available cases against Kazakhstan	
2017 Big Sky Energy v. Kazakhstan (pending)	2016 Alhambra v. Kazakhstan (pending)
2015 Aktau Petrol v. Kazakhstan (pending)	2016 Gold Pool v. Kazakhstan (pending)
2013 WWM v. Kazakhstan (pending)	2015 Hourani v. Kazakhstan (pending)
2010 AES v. Kazakhstan (neither party won)	2011 TPAO v. Kazakhstan (settled)
2009 GEM v. Kazakhstan (pending)	2010 Ascom and others v. Kazakhstan
2008 Caratube v. **Kazakhstan**	2009 KT Asia v. **Kazakhstan**
2005 Rumeli v. Kazakhstan	2007 Liman Caspian Oil v. **Kazakhstan**
2001 AIG v. **Kazakhstan**	1996 Biederman v. Kazakhstan

Why reform?

- The current system exposes Kazakhstan to an increasing number of investment claims
- The standards and treaty provisions often too broad and do not offer legal certainty to the State or investors
- Growing trend in the world to modernise international investment agreements
- Modern treaties reflect different approaches – the question is to be a rule-taker or a rule-maker?

Criteria for key terms related to investment

- No universal definition of the terms “investor”, “investment”, “investment activities” and “investment disputes” under international law
- Depends on a particular treaty, agreement or sometimes domestic law, depending on the source of consent to arbitration
- Tribunals offer different interpretations, sometimes difficult to predict
- In case of contradiction between international and national law, international law prevails

Revise the concepts of protected investments and investors

- Require investments to have specific characteristics such as a commitment of capital, an expectation of profit and an assumption of risk. Some IIAs include further criteria like duration (Canada–EU CETA, 2016) or the establishment of lasting economic relations (Nigeria–Turkey BIT 2011)
- Explicitly deny benefits to companies that are effectively controlled or owned by nationals of third States either through the definition of investment or investor
- Include denial of benefits clauses to counter restructuring linked to a dispute which has already arisen or is foreseeable.

Investment disputes related to public law issues and the right to regulate

- International administrative review of decisions taken by States that host foreign investments
- Diverse areas, including nuclear and renewable energy, tobacco regulation, economic crimes
- Jurisdiction depends on the wording of the consent document; important to see whether there are any safeguard provisions
- Difference between normal regulatory changes and breaches of legitimate expectations of investors

Taxation disputes as a special type of regulatory disputes

- Taxation is also seen as regulation, a sub-category of regulatory disputes
- But for various political and economic reasons, States are reluctant to submit their tax measures for consideration of arbitration tribunals, unlike other regulatory measures
- Normally international treaties are silent on the issue of what constitutes taxation and let the arbitral tribunal determine this.
- The USD 50 billion awards in Yukos v Russian Federation (the largest Investor–State arbitration), primarily concerned a criminal investigation of alleged tax evasion, fraud and embezzlement by Yukos the, then largest, Russian oil company

Provide for public policy and security exceptions

- Define the required relationship between a measure and the policy objective it pursues to constitute an exception
- Clarify that “exceptional” measures must be applied in a non-arbitrary manner and not be used as disguised investment protectionism
- Specifically list public policy objectives to which an exception will apply (e.g. protection of public health, public order and morals, the preservation of the environment)
- Specify situations or sectors covered by national security exceptions and the degree of specificity that is applied to this policy choice

Breaches of contractual obligations as breaches of international law

- Subject-matter jurisdiction of investment tribunals in this case is much wider when the treaty contains “umbrella clauses” that guarantee the host State’s observance of obligations or commitments vis-à-vis foreign investors
- A typical umbrella clause provides that ‘each party shall observe any obligation it may have entered into with regard to investments’
- The approaches of tribunals in evaluating breaches of contracts as breaches of international law remain inconsistent: in some cases jurisdiction asserted, in other denied

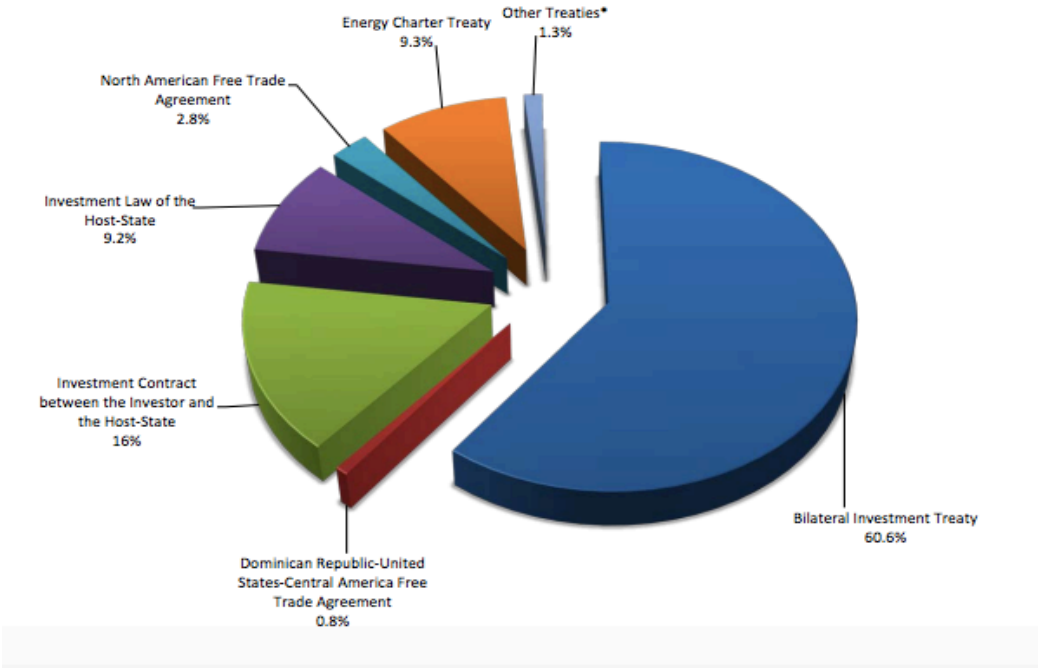
Limit the reach of umbrella clauses

- Important to avoid the far-reaching legal consequences of an umbrella clause to limit and clarify the scope of such clauses
- Indicate that the umbrella clause applies only to conduct constituting an exercise of sovereign powers by a government, and an ordinary breaches of contract by the State
- Exclude claims arising out of the umbrella clause from the investor-State settlement system, thus limiting admissible claims to treaty breaches only
- Omit the umbrella clause entirely

Disputes arising without any agreement between an investor and the State

- Consent can be given in a number of ways, including a provision in an investment contract, investment law, or a compromise signed by both parties contract
- No jurisdiction without consent, often a question of interpretation of consent
- If no consent, then decided in domestic courts

Chart 5: Basis of Consent Invoked to Establish ICSID Jurisdiction in Cases Registered under the ICSID Convention and Additional Facility Rules:



Narrow exposure to ISDS

- To narrow the range of protected investments, UNCTAD recommends adopting several options:
  - Include additional criteria in definitions of “investor” or “investment”, such as the requirement to engage in “substantial business activities”;
  - Clarify standards like MFN treatment, FET and indirect expropriation, as well as umbrella clauses; and
  - Make the right to regulate more explicit in the treaties, including by use of exceptions for public policy or national security.

Investment disputes involving legal entities which are directly or indirectly owned by the state

- As long as the entity has a separate legal personality from the State, its actions will not be attributable to the State except when:
  - there is evidence of direct State control over the entities decision-making; or
  - if the entity preforms certain regulatory functions or otherwise exercises sovereign powers in some areas
- Tribunals give different interpretations of what constitutes control or regulatory functions depending on the facts of the case

Recent reform initiatives

- More restrictive approaches to the treatment of foreign investments in international treaties
- Some States consciously avoid the system of investor-State arbitration, prefer to use State to State dispute resolution mechanisms and domestic courts
- The EU-Canada Comprehensive Economic and Trade Agreement (CETA) - restrictive approach to investor rights. (e.g. the legitimate expectations of investors subject to effective representation made to the investor by the host State)
- The China-Australia Free Trade Agreement (ChAFTA) guarantees national treatment and MFN standard but no “the minimum standard of treatment” or guarantees in the event of expropriation.

How reform can be achieved?

- Issue joint interpretative statements by parties to IIAs
- Replace old BITs with modern versions one by one
- Consolidate several investment treaties into one modern regional agreement; and
- Manage relationships between coexisting treaties using transition clauses
- Most investment treaties contain the so-called “sunset clauses”, protections may last for many years even after a treaty is terminated or amended.