



**KAZAKHSTAN : QUESTIONS ABOUT GOVERNMENT,
JUSTICE & INTERNATIONAL ARBITRATIONS**

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PREFACE

In November 2006, I visited Kazakhstan with John Traversi of 9 Bedford Row Chambers, London as part of an American Bar Association (ABA) Central Eastern European Law Initiative (CEELI) project to train Judges, Prosecutors and defence lawyers upon jury trials scheduled to become part of the national criminal justice system in January 2007.¹ At that time it was recognised that Kazakhstan as a newly independent state was coming to terms with the concept of democracy and attempting to understand the true principles of the Rule of Law that require a justice system totally independent of the state. Our training focussed upon the need for independence of the jury as finders of fact, particularly their equality in that regard to the trial judge who was included amongst them, as well as the need of the jury to follow the judge's directions upon the law. We recollect that there was a distinct note of cynicism amongst a significant number of the defence lawyers over the ability of the jury men and women to have the courage to give their views upon facts contrary to those of the judge. In fact, for one of the training events arranged for the judiciary in Astana, the judges failed to attend. However, all were optimistic that this was an important step towards strengthening the Rule of Law and protection of democratic freedoms.

In 2020 we decided to review progress made by Kazakhstan in respecting the Rule of Law, particularly as its first President had recently finished a term of 30 years in office during which an international arbitration centre had opened for business, but aware that there were a number of high profile international legal disputes that seemed to indicate a disparity in standards and conduct.

Our thanks go to Jill Kastner who joined us upon this project.

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This visit was also supported by the British Council <https://www.britishcouncil.org>.



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EXECUTIVE SUMMARY

The purpose of this report is to review the progress made by the Republic of Kazakhstan over the past 15 years with respect for the rule of law, prompted by the recent change in presidential leadership. We sought to determine if certain issues we observed during our time in Kazakhstan in 2006-2007 had been resolved and if the Republic had become a country in which legal standards and conduct are consistent for all. As part of this, the review considered a number of well-publicised international arbitration cases against Kazakhstan in which it had been the subject of awards, but failed to honour its obligations and indulged in strategies to avoid satisfaction of its liabilities at all costs. We considered this to be an external thermometer by which to judge the health of the Rule of Law within the state.

Overwhelming evidence shows that Kazakhstan struggles at every level to keep its word. Domestically, clear-cut laws for achieving justice, fighting corruption, and promoting freedoms and human rights are continuously challenged by the realities of life in the Republic, plagued by corruption, suppression of free speech and arbitrary law enforcement.

The country's internal approach to rule of law is also being "exported". Our report found too many cases in which Kazakhstan's Ministry of Justice ignores court rulings overseas which have not fallen in the country's favour, even when proceedings are final and non-appealable. The Ministry not recognising or obstructing important international frameworks, including the New York Convention and Energy Charter Treaty, stands at odds with its founding decree, which includes the responsibility for "ensuring the implementation of terms and conditions of international treaties" and "support[ing] the rule of law in the work of state bodies, organizations, officials and citizens."²

SECTION A: KAZAKHSTAN STRUCTURE OF GOVERNMENT & THE JUDICIAL SYSTEM

The first section of the report deals with the government and judicial system in Kazakhstan. It reviews the main provisions of government as stipulated in the Constitution while noting political developments since the resignation of President

² <https://www.gov.kz/memleket/entities/adilet/about?lang=en>



Nazarbayev in 2019 and the subsequent appointment and election of President Tokayev. We then examined the judicial system, focusing on the Ministry of Justice, the courts, judges, civil claims procedures, criminal trials, jury trials, and the role of legal representation. We also reviewed the development and structure of the Astana International Financial Centre and the International Arbitration Centre established under the New York Convention, both intended to be centres of business and legal excellence outside the purview of the Kazakhstan judicial system.³ We noted the significant attention the government of Kazakhstan has drawn to its efforts at reform of the judicial system.

Findings

When we compared our research with reports from news organisations, international bodies and NGOs, we found:

1. That the prosperity and stability Kazakhstan has enjoyed has come at a high price. Kazakhstan is a country of two realities, one for average citizens and one for the elite and the outside world.
2. Instead of addressing deficiencies in the judicial system and the rule of law, the government has created enclaves of excellence within the country that can be held up to the international community as examples of progress. Examples of this would include the Astana International Financial Centre and the International Arbitration Centre (established under the New York Arbitration Convention), as well as operations surrounding major oil fields and Nazarbayev University.
3. Citizens subject to Kazakhstan law face arbitrary standards, corruption and political oppression. An assessment of international concerns about corruption and issues with respect for the rule of law showed instances of abuse and corruption.
4. Media freedoms, freedom of assembly, and freedom of expression are all under threat.
5. The Kazakhstan tax authorities have been used to target, harass and silence individuals and organisations with whom the government disagrees, particularly with regard to human rights and election monitoring.

³ <https://www.newyorkconvention.org>



6. Police engage in arbitrary arrests and detentions. Prosecutions and prison sentences can be politically motivated. Police at times use excessive force and torture on detainees.
7. Within the judicial system, standards are uneven and corruption is frequent. Audio and video recordings of trials and procedures are not consistent. While arbitration and out of court settlement is increasing, jury trials are becoming less frequent and their acquittals are often overturned.
8. Minister of Justice Marat Beketayev is responsible for news releases on the Ministry of Justice website that are biased in favour of the Kazakhstan Government and often misrepresent international court findings. Government control of the media and the internet make it difficult for citizens of Kazakhstan to fact-check these reports.
9. Abroad, former President Nazarbayev and his family have come under the scrutiny of the UK National Crime Agency, leading to the issuance of three Unexplained Wealth Orders. Both the UK and the US have documented concerns about corruption and abuse of the judicial system both locally and at the highest levels of power.
10. Kazakhstan has made some progress toward adopting international norms in a few specific areas, but the broader application of the rule of law is selectively enforced, particularly for those close to power.
11. Former President Nazarbayev, his family and close associates have maintained an iron grasp on the political economy of the country.

SECTION B: INTERNATIONAL ARBITRATION AND KAZAKHSTAN

The second part of the report focuses on Kazakhstan's behaviour with respect to international law and arbitration. We review the Energy Charter Treaty, the basis of the arbitral disputes to which Kazakhstan has been a respondent, to clarify the protections it offers, including "fair and equitable treatment" of investors, protections from expropriation and provisions for dispute resolution. We then examine a number of high-profile international cases to determine how Kazakhstan has treated and treats investors and their investments, how it responds to arbitral jurisdiction and decisions to which it has consented, and how it has sought to avoid the consequences of contrary decisions.



We found that there was a clear pattern of conduct aimed at defeating arbitral awards made against Kazakhstan and there is a strategy in which the state is prepared to take extreme measures of forum shopping in order to allege fraud and relitigate the original matter in other jurisdictions. This has been escalated in the Stati case (below) to attack in the US courts a bond holder in the claim against Kazakhstan which is of no relevance to the substance of the arbitral award. The extensive legal costs incurred by parties attempting to enforce their rights against Kazakhstan in multiple sets of proceedings is plainly a significant financial burden.

Anatolie Stati and Others v Republic of Kazakhstan SCC Arbitration V (116/2010)

- A Swedish Tribunal found that Kazakhstan had violated its obligations under the Energy Charter Treaty with respect to the claimants' investments and ordered Kazakhstan to pay the claimants a net amount of US \$ 497,685.101.00 with interest from 30 April 2009, together with $\frac{3}{4}$ of the costs of arbitration and 50% of the claimants' costs of legal representation, i.e. US \$ 8,975,496.40. This award was made on 13 December 2013.
- The Stockholm District Court ordered the attachment of property belonging to Kazakhstan located in Sweden to the amount sufficient to cover the claimants' claims, stating that "Kazakhstan has clearly shown that Kazakhstan does not intend voluntarily to pay the debt under the legally binding arbitration award, despite the fact that an action for annulment was dismissed by the Svea Court of Appeals and that a request for extraordinary review was dismissed by the Supreme Court. This, taken together with what applicants have stated otherwise in this regard, means that it may reasonably be surmised that Kazakhstan will try to evade the debt by disposing of the property or by other means."
- The failure of Kazakhstan to abide by the judgment of the Arbitration Tribunal has been ongoing and seven years later in May 2020 the Supreme Court of Sweden rejected a petition for a new trial by Kazakhstan, declaring that it had "not shown any facts that can give rise to a review of the case".⁴
- In order to enforce the original arbitral award the claimants brought enforcement proceedings in the US and on 16 July 2019, the District Court for the District of Columbia entered judgment in favour of the petitioners against Kazakhstan in the sum of US \$ 506,660,597.40 plus interest.

⁴ Hogsta Domstolen File Exhibit 66, Case no. O 1888-20



- On 19 April 2018, on appeal by Kazakhstan to the US Court of Appeals for the District of Columbia, the District Court's decision confirming the award was upheld.⁵ In doing so, it stated that there is an "emphatic federal policy in favour of arbitral dispute resolution" thus district courts "have little discretion in refusing or deferring enforcement of foreign arbitral awards."
- The Kazakh authorities have embarked on a further international campaign to avoid payment of the award by claiming Tristan fraudulently obtained the award by misrepresentation in the arbitration court. However, courts in Italy, Luxembourg, Belgium and the Netherlands have all recognised the arbitration award and Kazakh assets of \$6.27 billion have been attached and frozen, across a number of jurisdictions.⁶
- A troubling feature of the Kazakhstan avoidance strategy is that news releases on the Ministry of Justice website that quote Minister Beketayev misrepresent international court findings.

Biedermann USA v Kazakhstan SCC Case No. 97/1996

- In 1999, a California-based Oil company, Biedermann International, successfully claimed for expropriation against the Republic of Kazakhstan, invoking the terms of the US-Kazakh Bilateral Investment Treaty (BIT) and the claimant was awarded US \$ 8,900,900.
- The Tribunal found that Kazakhstan had taken measures which amounted to expropriation in withdrawing a land-use permit, merely 6 weeks after having finally granted Biedermann the necessary drilling permits.
- The details of the award cannot be published under a deal reached with the government of Kazakhstan, which cooperated fully in paying compensation, provided that the award would not be publicized.

World Wide Minerals (Canada) v Republic of Kazakhstan 98 CV1199-RCL 2000-2013 International Arbitration Tribunal

- A US \$ 1.9 billion claim launched by a Canadian mining company, World Wide Minerals (WWM), which had contracted to manage and operate a large

⁵ No. 18-7047 United States Court of Appeals for the District of Columbia Circuit

⁶ USA, Belgium, Netherlands, Luxembourg, Italy, Sweden



uranium processing facility in Kazakhstan and assist in its reorganisation and re-admission to economic viability.

- The Tribunal issued an award dated 29 October 2019 totalling US \$40 million (plus US \$10 million legal costs) in favour of the claimants, concluding that Kazakhstan had improperly withheld a uranium export license for export to USA, without which their investment had little ongoing value and had applied arbitrary and ad hoc processes which were a clear breach of the fair and equitable treatment standards of the relevant BIT.

AIG (USA) V Republic of Kazakhstan ARB/01/6 2001 ICSID

- A US \$13.5 million claim arising out of the cancellation of a project for the development of a residential housing complex, for which land had been purchased (significantly, in the light of what later occurred, adjacent to the private residence of the President).
- The Government of Kazakhstan ordered the joint project to permanently halt construction. The property was transferred to Almaty City by Presidential decree. The construction permits were declared invalid. The claimants' contractors were physically expelled from the site.
- The Tribunal issued an award dated 7 October 2003 totalling US \$ 5,959,330 plus US \$ 1,250,000 in costs in favour of the investor and found that it had been proved that the claimants' investment had been expropriated and that it was not in accordance with procedures established by current Kazakh legislation. It recorded a finding that the taking was arbitrary, in wilful disregard of due process of law and the series of acts from February 26, 2000, culminating in the events of May 15, 2000, were shocking to "all sense of juridical propriety".

Rumeli Telekom and Telsim Mobil Telekomunikasyon Hizmetleri A.S (Turkey). v Republic of Kazakhstan ARB/05/16 2005 ICSID

- The two Turkish telecom companies, through their 60% shareholding in Kazakh company KaR-Tel, concluded an investment contract in 1998 with the Kazakh investment committee for "*the right to use the radio-frequency spectrum for the creation and operation of a GSM-standard communications network in the Republic of Kazakhstan*".



- Once KaR-Tel was operating successfully, Kazakhstan devised a scheme to orchestrate expulsion of the claimants from KaR-Tel for its sole benefit. The contract was unilaterally and unjustifiably terminated by the Kazakh investment committee in 2001.
- In 2008, the Tribunal ordered Kazakhstan to pay an award of US \$125 million in damages and 50% of the claimants' legal fees and costs. It was found that Kazakhstan had breached the investment contract and that that "decision was arbitrary, unfair, unjust, lacked due process and did not respect the investor's reasonable and legitimate expectations."

CCL Oil v Kazakhstan SCC Case No. 122/2001

- This case concerned the termination of a concession agreement for use and management of the State's shareholding in an oil refinery.
- The Tribunal noted "the confiscation or expropriation of property or other rights may take the form of "creeping" or "covert" encroachment on private assets, whereby the owner of the property or rights is exposed to measures which make the enjoyment of rights impossible or essentially reduced and forces the owner to abandon his ownership or rights".
- The Tribunal found that there had been no expropriation within the meaning of the Foreign Investment Law and thus found in favour of Kazakhstan, but in its jurisdictional phase consistently found against the representations made by Kazakhstan, which were aimed at frustrating a proper arbitral process.

Caratube International Oil Company and Davincci Hourani v. Republic of Kazakhstan ICSID CASE No. ARB/13/13

- A claim arising out of the appropriation of CIOC's investment in a significant oil field in Kazakhstan for expropriation, breach of the fair and equitable treatment and full security and protection standards, among others, relied on breaches of contract and Kazakhstan's own Foreign Investment Law (FIL).
- The Tribunal found that CIOC had been unlawfully expropriated of its rights under the contract. Based on an analysis of the involvement of the Aktobe Prosecutor and the General Prosecutor's office in the termination of the contract and their interventions it was held that Kazakhstan terminated the



contract using its “sovereign powers” rather than acting in a private manner as a party to the contract.

- The Tribunal awarded the claimants US \$ 39,200,000 plus interest.

**RUBY ROZ AGRICOL LLP v. REPUBLIC OF KAZAKHSTAN UNCITRAL IIC
602 (2013), SCI:3471053 2, 1 August 2013**

- Ruby Roz’s main activity was the production, breeding and marketing of poultry for the Kazakh market. It sought to bring arbitral proceedings against Kazakhstan for the expropriation of its assets, alleging that very serious losses had been caused through actions that were in violation of the law of Kazakhstan and the principles of international law.
- The Tribunal found there was no valid arbitration agreement and declined jurisdiction. However, the case centred around unusual governmental interest in and interference in a business which was subsequently purchased by Dariga Nazarbayeva, daughter of former President Nazarbayev.

AES Corporation and Tau Power BV v Kazakhstan ICSID Case No. ARB/09/10

- AES was subjected to a forced nationalization by Kazakhstan of its companies after fines and tariff restrictions were imposed by the Kazakhstan competition authorities. AES alleged harassment and coercion of its entities and employees, resulting in some of them leaving the country to avoid such behaviours.
- The Tribunal found that the drastic character and extended duration of the restrictions imposed not to have been justified and went beyond what could have been considered a proportional and reasonable response.⁷
- The Tribunal, despite finding that the tariff policy had breached the FET standard, declined to award damages as these had not been specifically allocated to the particular breach by the claimants.

Big Sky Energy Corporation v. Republic of Kazakhstan ICSID Case No. ARB/17/22

- Big Sky claims that the loss of its 100% shareholding in Kozhan followed a series of illegal domestic judicial proceedings in Kazakhstan, which began at

⁷ Award. para 433



about the time that Kozhan's market value had significantly increased following Big Sky's multimillion-dollar investment in the company and its successful operation.⁸

- Big Sky Energy initiated a claim at the ICSID against Kazakhstan based on breaches of fair and equitable treatment, minimum standard of treatment, including denial of justice claims, most-favoured nation treatment and indirect expropriation, among other breaches.
- The case is still pending, although the claim follows the pattern of previous cases.

Devincci Salah Hourani and Issam Salah Hourani v. Republic of Kazakhstan ICSID Case No. ARB/15/13

- The facts involve the seizure of a 10-hectare plot of land, transferred to Pharm Industry by one of the claimants, and the arbitrary annulment of the decree of a 42 hectare plot it had been granted. Kazakhstan's actions can be linked to the claimants' connections to a political rival and family connection of the then-President, who had fallen out with the "first family" due to internal disputes.
- The claim for US \$170 million was discontinued, but the claim follows the pattern of previous cases.

Aktau Petrol Ticaret A.S. v. Republic of Kazakhstan ICSID Case No. ARB/15/8

- The Tribunal awarded the claimant US \$ 22,700,000. The Tribunal held Kazakhstan to be in breach of the protections provided by the ECT and the Turkey - Kazakhstan BIT against uncompensated expropriation.
- It further held that Kazakhstan had violated the FET provision of the Switzerland - Kazakhstan BIT by virtue of a most favoured nation clause.⁹ There are pending annulment proceedings, Kazakhstan once more not accepting the binding nature of arbitration under its BIT with Turkey or under the ECT.

⁸ <https://globalarbitrationreview.com/kazakhstan-faces-icsid-claim-over-oil-fields>

⁹ <http://www.derainsgharavi.com/news/page/10/>



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SECTION A: KAZAKHSTAN STRUCTURE OF GOVERNMENT & THE JUDICIAL SYSTEM

INTRODUCTION

Kazakhstan is a country on the horns of a dilemma. It sits astride a swath of Central Asia, bordered by Russia and China, and is the ninth largest country in the world. The last of the former Soviet republics to declare independence from Moscow in 1991, it has weathered the storms of post-Soviet transition, bolstered by its phenomenal wealth of natural resources and the strong arm of its '*Elbasy*,' Leader of the Nation, Nursultan Nazarbayev, who stepped down in 2019 after thirty years as president only to take up a potentially more powerful position out of office. Nazarbayev's program of political stability and economic growth has boosted the country into one of the top 30 countries in the world for ease of doing business.¹⁰

But such prosperity and stability has come at a high price. The old legacies of Soviet life live on in Kazakhstan's political culture, environmental legacy, institutions and attitudes toward power and the rule of law. The challenges of nurturing a democratic society, with guaranteed freedoms and the social friction that accompanies open debate, have not been embraced by the government. Instead, it has chosen to create two realities. One is the Kazakhstan seen by the world, a regional economic powerhouse eager to garner international acceptance by creating enclaves within the country that meet international norms and standards. The Astana International Financial Centre (AIFC), which operates independently of Kazakh law and institutions, is an example of this phenomenon, as is the world-class operation surrounding the major oil fields of Tengiz, Karachaganak, and Kashagan.

The other Kazakhstan is the one experienced by its citizens, where the rights and freedoms neatly outlined in the Constitution are merely a suggestion, and oft-ignored. The rich and powerful, particularly those connected to Nazarbayev and his family, run a system of patronage and power that reaches into most aspects of commercial

¹⁰ Kazakhstan Among World's Top 30 Economies for Ease of Doing Business, October 31, 2018, <https://www.worldbank.org/en/news/press-release/2018/10/31/kazakhstan-among-worlds-top-30-economies-in-ease-of-doing-business>.



and political life. Censorship of the press is ubiquitous, and the internet is controlled by the government. Political dissidents are detained arbitrarily, prisoners are tortured, government offices harass and ultimately shut down organisations of civic dissent.

This tension between maintaining a corrupt and authoritarian system at home while promoting Kazakhstan to the world as a law-based country eager to do business is at the heart of the government's dilemma.

The rule of law has suffered the most in this bifurcated reality. The strength and health of the judicial system in Kazakhstan remains the Achilles heel in the country's quest for international status and legitimacy. Justice is elusive and uneven, despite widely touted anticorruption efforts and reforms of the judiciary itself. The old tendrils of Soviet thought and practice still wind their way through much of Kazakh life. Corruption is endemic.

To understand the reality of the judicial system of Kazakhstan, one must juxtapose the written promises of the Constitution with the voluminous evidence of an overwhelming disregard for their existence. The Constitution sets out the sorts of structures expected of a nation striving to take its place among the successful democracies of the globe. It describes clearly a system in which a strong president is checked by an elected bicameral parliament and an independent judiciary. A Constitutional Council is intended to provide additional oversight, along with a Supreme Judicial Council to ensure proper administration and governance of the judiciary. Citizens are guaranteed rights of free speech, assembly and association, freedom from arbitrary detention and arrest, freedom from government brutality. Yet for each of the noble goals found in model constitutions, numerous examples exist to show that the reality of life in the Republic is significantly different from that envisaged by the Constitution.

This is not to say that reform efforts have not been initiated, nor that such efforts are all in bad faith. Indeed, by some measures Kazakhstan has made significant strides. Commercial disputes in civil proceedings are dealt with swiftly, and Kazakhstan has garnered some favourable rankings in terms of enforcing contracts, ranking fourth in the World Bank's 2019 "Doing Business" study, ahead of France, the US and Germany.¹¹ The AIFC and the International Arbitration Centre (IAC) in Nur-Sultan seek to provide a world-class hub of finance and law that operates under international norms. But a harder look at the effectiveness of the overall judicial system tells a different story. Kazakhstan ranked 65th out of 126 countries in the Rule of Law Index

¹¹ The World Bank, *Ease of Doing Business in Kazakhstan*, <https://russian.doingbusiness.org/en/data/exploreconomies/kazakhstan>.



for 2019 and was designated a non-free country by Freedom House for the same period.¹²

The issues of law and justice that persist in Kazakhstan play out on every level, from local courts to global centres of international arbitration. If Kazakhstan wants to be accepted as a member of the international club of law-abiding democracies, with all the rights and privileges attached, the opportunity is within its grasp. But there is much work to be done.

¹² World Justice Project, *Rule of Law Index 2019*, <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>; Freedom House, *Freedom in the World 2019*, <https://freedomhouse.org/report/freedom-world/2019/kazakhstan>.



STRUCTURE OF GOVERNMENT

1. The Constitution of the Republic of Kazakhstan was first adopted in 1995, replacing the Declaration of State Sovereignty of the Kazakh SSR of October 25, 1990 and the Constitutional Law of December 1991. It was adopted by national referendum and modelled on the French Constitution of 1958, giving the president considerable powers, including the right to veto parliamentary legislation, to propose constitutional amendments, and to appoint the governors of regions and major cities, a source of patronage and control. While the Constitution creates separation of powers through an executive, a bicameral parliament, and an independent judiciary, the reality is that the latter two are very much influenced by the former.
2. While in office, former President Nazarbayev initiated a series of constitutional amendments in the years leading up to his resignation that strengthened his position and effectively diverted some power from the presidency to himself. Amendments in 2017 exempted him personally from term limits and from the mandatory retirement age of 65 while shifting some powers from the office of the president to the Mazhilis, the lower house of parliament. Parliament was given greater influence over the choice of prime minister and some cabinet members, along with the authority to dismiss them. The president's ability to rule by decree was also limited. These changes were part of an initiative by Nazarbayev for a measure of succession planning, a topic of concern for foreign investors highlighted by events following the death of President Islam Karimov in neighbouring Uzbekistan.¹³ Despite leaving office in 2019, Nazarbayev retains considerable influence through his positions on the Security Council, in the Senate and as chair of the Assembly of People of Kazakhstan.
3. The Constitution on its face provides a detailed structure to contain power and guarantee basic rights and freedoms to the citizens of Kazakhstan. A glance through its main provisions provides context for understanding the impact of reported corruption and official disregard for the spirit of the document.

¹³ Uzbek strongman Islam Karimov died in September 2016 without a succession plan. Like Nazarbayev, he was a communist apparatchik who transformed himself into a nationalist dictator. At the time of his death, there was a days-long scramble to determine whether he had actually succumbed and who was in charge. After Karimov's death, his successful, Shavkat Mirziyoyev, used Karimov's own techniques to establish himself as the new strong leader. (e.g. Karimov had banned popular singers after the Andijon massacres - Mirziyoyev rehabilitated them. He extended amnesty to Karimov's political prisoners, much as Karimov had done when he felt his public support was wobbly.) Other changes, while appearing to be a softening when viewed from the outside, were intended to shore up Mirziyoyev's popularity. The result was large-scale reforms in almost every sector.



THE CONSTITUTION

4. The Constitution decrees the Republic of Kazakhstan to be a democratic, secular, legal and social state whose highest values are a person, his life, rights and freedoms. It emphasises public concord and political stability, economic development, Kazakhstani patriotism and conduct of state affairs by democratic methods. It stipulates that the Republic of Kazakhstan is a unitary state with a presidential form of government, and that the people are the sole source of governmental power.¹⁴
5. Government is via a bicameral parliament and a Constitutional Council. Power is divided into legislative, executive and judicial branches, with a system of checks and balances that governs their interactions.¹⁵
6. The Constitution grants international agreements primacy over Kazakhstan laws.¹⁶
7. The Constitution provides for ideological and political diversity and requires that public associations be equal before the law, prohibiting the state from illegal interference in the affairs of public associations and vice versa. However, activities of associations are curtailed through prohibitions on “pursuing the goals or actions directed toward a violent change of the constitutional system...undermining the security of the state, inciting social, racial, national, religious, and tribal enmity, as well as the formation of unauthorised paramilitary units.” The incitement to social enmity language gives broad leeway to interfere in the activities of political opposition groups.¹⁷
8. Political and religious activities of other states on the territory of the Republic is forbidden, as is the financing of political parties and trade unions of foreign legal entities and citizens, foreign states and international organisations.¹⁸

¹⁴ The Constitution of the Republic of Kazakhstan, (hereafter Constitution), Article 1, https://www.akorda.kz/en/official_documents/constitution.

¹⁵ Constitution, Article 50, Article 71.

¹⁶ Constitution, Article 4.

¹⁷ Constitution, Article 5.

¹⁸ *ibid.*



9. State and private property receive equal recognition. Property ownership imposes obligations that its use must “simultaneously benefit the society.” The state owns the land and underground resources unless addressed by law.¹⁹
10. Human rights and freedoms are recognized and guaranteed, but the exercise of a citizen’s human rights and freedoms “must not violate the rights and freedoms of other people nor infringe on the constitutional system and public morals.”²⁰
11. The Constitution provides the right to protect one’s freedoms, including by legal defence, assisted by legal counsel. In stipulated cases, legal assistance is provided free of charge.²¹
12. All citizens are equal before the law and the court. The right to life is guaranteed, with the death penalty applied only as an exceptional punishment for terrorist offenses which result in death or particularly serious war crimes.²²
13. The Constitution guarantees freedom from arbitrary arrest and detention, specifying that arrest and detention “shall be allowed only in cases stipulated by law and only with the right of appeal.” A person may not be detained for more than 72 hours without the authorisation of the court, and detainees are in theory guaranteed the right to legal defence from the moment of detention, arrest or accusation.²³
14. The Constitution states that no person shall be subjected to torture, violence, abuse or punishment degrading human dignity.²⁴
15. Freedom of speech is guaranteed. Censorship is prohibited. All citizens have the right to receive and disseminate information by any means not prohibited by law. However, “propaganda or agitation for the forcible change of the constitutional system, violation of the integrity of the Republic, undermining of state security” and advocating sectarianism and violence are prohibited.²⁵

¹⁹ Constitution, Article 6.

²⁰ Constitution, Article 12.

²¹ Constitution, Article 13.

²² Constitution, Article 14.

²³ Constitution, Article 16. Arbitrary arrest and detention is a recurring problem, particularly in relation to the recent parliamentary elections and the presidential elections of 2019.

²⁴ Constitution, Article 17.

²⁵ Constitution, Article 20.



16. Citizens have the right to freedom of association, private property, and freedom of entrepreneurial activity.²⁶
17. Citizens have the right to assemble peacefully and without weapons, hold meetings, campaigns and demonstrations, street processions and pickets. The use of this right may be restricted by law in the interests of state security, public order, and protection of health, rights, and the freedom of other persons.²⁷
18. Restrictions of the rights and freedoms of citizens for political reasons shall not be allowed in any form.²⁸

THE PRESIDENT

19. The president of the Republic of Kazakhstan is the head of state, with far-reaching powers. He/she is elected by adult citizens of the Republic by secret ballot for a 5-year term, with a two-term limit. The current president is former Senate Chairman Kassym-Jomart Tokayev.²⁹
20. The president sets the main guidelines for foreign and domestic policy, convenes Parliament, signs laws, appoints the prime minister, approves the prime minister's government, appoints government ministers in consultation with the prime minister and the Mazhilis, and independently appoints the ministers of foreign affairs, defence and internal affairs. The president also has the power to dismiss members of government and repeal the acts of akims (heads of local government) at the regional level as well as in cities of republican significance and the capital. The president may not be a deputy of a representative body, occupy other paid positions or engage in entrepreneurial activity.³⁰
21. The president has the power to appoint or dismiss the chairperson of the National Bank of Kazakhstan, the Prosecutor General and the chairperson of the Committee of National Security (KNB), with the consent of Parliament. He also holds the power to appoint and recall diplomatic representatives of Kazakhstan.³¹

²⁶ Constitution, Articles 23, 24, 26.

²⁷ Constitution, Article 32.

²⁸ Constitution, Article 39.

²⁹ Constitution, Articles 41,42.

³⁰ Constitution, Article 44.

³¹ *ibid.*



22. The president can call a national referendum, appeal to the Constitutional Council for consideration on an enacted law, conduct negotiations and sign international agreements of the Republic, act as Commander-in-Chief of the Armed Forces, resolve citizenship disputes, grant political asylum, grant pardons, impose a state of emergency or martial law, and form the Security Council and other bodies, as well as the Assembly of the People of Kazakhstan and the Supreme Judicial Council.³²
23. The Constitution stipulates that the honour and dignity of the president shall be inviolable. This also applies to ex-presidents.³³
24. The president may be removed from office for incapacity due to illness, but otherwise may only be removed from office in cases of high treason. If the president is discharged from office, is impeached or dies, the powers of the president pass to the chairperson of the Senate, and then to the chairperson of the Mazhilis.³⁴
25. A presidential decree of October 2019 requires that most appointments to key government positions, excluding foreign affairs, defence and internal affairs, be made in consultation with the chairman of the Security Council. This position was granted to former President Nazarbayev for life in 2018, effectively guaranteeing him much of the control he would later ostensibly give up when stepping down as president in 2019.³⁵

RECENT POLITICAL DEVELOPMENTS

26. Nazarbayev, who served as the powerful Chairman of the Supreme Soviet of Kazakhstan during Soviet times, took office in April 1990 as the first president of Kazakhstan. He supported Russian President Boris Yeltsin against the attempted hard-line coup in 1991 and was powerful enough for Soviet leader Mikhail Gorbachev to consider him for the post of vice president of the Soviet Union, an offer Nazarbayev declined. Discussions among Gorbachev, Yeltsin and Nazarbayev led to a decision that Nazarbayev would succeed Valentin

³² *ibid.*

³³ Constitution, Article 46.

³⁴ Constitution, Article 47.

³⁵ "Kazakhstan Remains Nazarbayev's State," <https://thediplomat.com/2019/10/kazakhstan-remains-nazarbayevs-state/>; Freedom to Participate in the Political Process, in <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.



Pavlov as Premier of the Soviet Union, but this was rendered moot by the disintegration of the Soviet Union following the coup.³⁶

27. In March 2019, following increasing public unrest, Nazarbayev resigned the presidency after more than 30 years in power, naming Senate leader Kassym-Jomart Tokayev as his successor. His resignation came after numerous constitutional and administrative changes that ensured the continuation of significant powers. He retains his title of “*Elbasy*”, which grants him immunity from any criminal prosecution. In addition, he holds a lifetime position as chairman of the Security Council, which was strengthened in May 2018 and elevated to the status of a constitutional body. He also remains chairman of both the ruling political party, Nur Otan, and the Assembly of People of Kazakhstan, a national political body designed to represent the various ethnic groups of Kazakhstan. He remains a member of the Constitutional Council and holds a seat as an honorary member of the Senate of Kazakhstan.
28. President Tokayev called snap elections in July 2019, running as the candidate of Nur Otan and winning in a vote described by international election observers as marred by “significant irregularities,” including ballot stuffing.³⁷ Protests were met with mass detentions while opposition figures were subjected to harassment and arrest. In the days following the election, at least 4,000 people were arrested for protesting the vote.³⁸ Opposition political activists and local journalists have continued to be subjected to travel bans, threats and surveillance, attacks, arrests, detentions and convictions. The Democratic Choice of Kazakhstan party (DVK), banned in 2018, has had numerous members detained or convicted.³⁹
29. Tokayev’s central election pledge was the continuation of stability. This was formalised in a decree of October 2019 that essentially granted Nazarbayev influence over key government appointments. Most cabinet ministers, excluding foreign affairs, defence and internal affairs, must now be appointed by the president in agreement with Nazarbayev.⁴⁰
30. President Tokayev has presented himself as a more liberal leader than his predecessor. In December 2019, he initiated a package of political reforms that

³⁶ https://en.wikipedia.org/wiki/Nursultan_Nazarbayev.

³⁷ Human Rights Watch World Report 2020, Kazakhstan: Events of 2019, <https://www.hrw.org/world-report/2020/country-chapters/kazakhstan>.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ “Kazakhstan Remains Nazarbayev’s State” <https://thediplomat.com/2019/10/kazakhstan-remains-nazarbayevs-state/>.



included a reduction in the threshold for signatures needed for registration of political parties, encouragement of parliamentary opposition, the introduction of a new law on peaceful assemblies and the decriminalisation of libel. He also backed away from a proposed measure that would require telecoms users to download a technology thought to allow government circumvention of encryption technologies, and pardoned a journalist (Yaroslav Golyshkin) who had been serving an eight-year sentence for blackmail.⁴¹

31. The January 10, 2021 parliamentary elections were the first since Tokayev's accession to power. Despite the president's promises that genuine opposition parties would be allowed to participate, none were registered or allowed on the ballot, despite the attempts of several to do so. On election day, members of the DVK and Oyan Qazaqstan were surrounded by police in Almaty and forced to stand outside for over eight hours in freezing temperatures. Two people were admitted to hospital, one with frostbite.⁴² Over 100 people were detained in Almaty, some as they were leaving their homes to vote. Election observers were harassed and turned away. The election returned the same three parties to Parliament – Nazarbayev's Nur-Otan party, Aq Zhol and the former Kazakhstan Communist Party (now renamed the People's Party of Kazakhstan.)⁴³
32. The relationship between Tokayev and Nazarbayev is delicate. In May 2020, Tokayev dismissed Nazarbayev's daughter, Dariga Nazarbayeva, from her position as chair of the Senate. Nazarbayeva had assumed the position shortly after her father stepped down as president; the position made her the automatic successor to Tokayev should he leave office. Her removal is rumoured to be linked to an April 8, 2020 London High Court ruling which lifted a freeze on £80 million in real estate holdings in London in exchange for information about the sources and scope of Nazarbayeva's wealth. Political commentators in Kazakhstan speak of two political camps, the Akorda, which is the name of Tokayev's presidential administration, and the Library, which refers to Nazarbayev and the Library of the First President.⁴⁴

⁴¹ UK Government Guidance, *Overseas Business Report - Kazakhstan*, updated 9 July 2020, <https://www.gov.uk/government/publications/overseas-business-risk-kazakhstan/information-on-key-security-and-political-risks-that-uk-businesses-may-face-when-operating-in-kazakhstan>.

⁴² "Elections in Kazakhstan, Kyrgyzstan Fail to Satisfy," Radio Free Europe/Radio Liberty, January 12, 2021. <https://www.rferl.org/a/elections-kyrgyzstan-kazakhstan-predictable-results-pannier/31043610.html>.

⁴³ *ibid.*

⁴⁴ "Kazakhstan: Nazarbayeva, Often Eyed As Successor, Removed as Senate Speaker," <https://eurasianet.org/kazakhstan-nazarbayeva-often-eyed-as-successor-removed-as-senate-speaker>, accessed January 29, 2021.



PARLIAMENT

33. The Parliament is the highest representative body and exercises legislative power. It consists of two chambers, the Senate and the Mazhilis, and usually sits in session from September to June.⁴⁵
34. The Senate is composed of two representatives from each region, each city of republican significance, and the capital of the Republic. Senators are indirectly elected by local legislative bodies (called maslikhats) for six-year terms, with half elected every three years. Fifteen deputies are appointed by the president, also for six-year terms. The total number of senators at present is 49.⁴⁶
35. In May 2019, the position of “honorary senator” was created and awarded to former President Nazarbayev.
36. The Mazhilis consists of 107 members elected to five-year terms. Ninety-eight deputies are elected by universal, equal and direct suffrage by secret ballot. Nine deputies are elected by the Assembly of People of Kazakhstan, a national political body designed to represent the various ethnic groups of Kazakhstan at the national level and currently chaired by former President Nazarbayev.⁴⁷
37. Two amendments to the election laws in June 2018 are worth noting. One curtailed the independence of the local representative bodies (the maslikhats) by removing the right of citizens to nominate and vote for candidates in elections to the maslikhats. Citizens now vote for parties, which then select candidates for the maslikhats. Another introduced strict guidelines for opinion polling, requiring registration and at least 5 years’ experience in conducting opinion surveys. In 2019, three individuals and four organisations were fined for conducting unauthorized public opinion surveys on social media before the presidential campaign. A publishing house (“Exclusive”) was fined for conducting a poll on its YouTube channel and publishing the results.⁴⁸
38. Deputies of Parliament vote on legislation in person. They are prohibited from serving as a deputy of another representative body, occupying other paid positions (excluding research, teaching or creative activities), engaging in entrepreneurial activity or serving as a member of a supervisory board of a

⁴⁵ Constitution, Article 49.

⁴⁶ Constitution, Article 50.

⁴⁷ Constitution, Articles 50, 51.

⁴⁸ U.S. Department of State, *2019 Country Reports on Human Rights Practices: Kazakhstan*, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.



commercial organisation. They are immune from arrest, detention, administrative punishment or criminal prosecution without the consent of their respective Chamber except for cases of being detained at the scene of a crime or the commission of serious crimes.⁴⁹

39. Deputies from both chambers may be deprived of their mandate for moving their permanent residence outside of Kazakhstan, being convicted by a court or losing their Kazakhstani citizenship.⁵⁰
40. A deputy of the Mazhilis will be deprived of his mandate if he withdraws or is expelled from the political party from which he has been elected, or if the political party is terminated.⁵¹
41. Senators' terms may be terminated early by decree of the president.⁵²
42. Parliament may introduce constitutional amendments pursuant to proposals of the president, approve government reports and budgets, vote on issues of war and peace, authorise use of the armed forces pursuant to a proposal from the president, and form joint commissions of the Chambers.⁵³
43. Parliament adopts constitutional and other laws, approves budgets, establishes and annuls state taxes and dues, establishes rules for the administrative and territorial structure of the Republic, deals with state awards, state loans and economic assistance, resolves amnesty issues, and ratifies and annuls international treaties.⁵⁴
44. If the president objects to a law, Parliament must hold discussions and a vote within one month. Failure to comply implies acceptance of the president's objections. If the Mazhilis and Senate vote to overturn the president's objection by two-thirds majority in both chambers, the bill becomes law. If neither of the two chambers votes down the president's objections, the law shall be deemed either rejected or adopted in the wording proposed by the president. If the president objects to constitutional laws, these may be rejected by a three-quarters majority vote of each chamber.⁵⁵

⁴⁹ Constitution, Article 52.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ Constitution, Article 53.

⁵⁴ Constitution, Article 54.

⁵⁵ *ibid.*



45. The Parliament can request the president to call a national referendum but cannot do so itself.
46. The Senate has exclusive responsibility for:
- a. Electing or removing from office the chairperson and judges of the Supreme Court upon the recommendation of the president.
 - b. Appointing or removing the Human Rights Commissioner of Kazakhstan for a five-year term upon the recommendation of the president.
 - c. Approving the president's nominees for chairperson of the National Bank, Prosecutor General and chairperson of the National Security Committee of Kazakhstan.
 - d. Removal of immunity of the Prosecutor General, the chairperson and judges of the Supreme Court.
 - e. Adoption of constitutional and other laws when the Mazhilis is absent due to early dissolution.⁵⁶
47. The Mazhilis has exclusive responsibility for:
- a. Considering draft constitutional and other laws.
 - b. Accepting the president's candidate for prime minister by majority vote.
 - c. Announcing regular presidential elections.
 - d. Undertaking a vote of no confidence in the government upon the proposal of one-fifth of its total membership followed by a simple majority vote.⁵⁷
48. Each of the chambers shall:
- a. Appoint two members of the Constitutional Council, two members of the Central Election Commission for a five-year term, and three members of the Accounts Committee for control over the Republican budget.
 - b. Delegate half the members of a parliamentary commission for removing the president due to illness.
 - c. Elect half the members of joint commissions of the Chambers.
 - d. Terminate the powers of their deputies and remove their immunity upon recommendation of the Prosecutor General.

⁵⁶ Constitution, Article 55.

⁵⁷ Constitution, Article 56.



- e. Hold Parliamentary hearings.
 - f. Have the right, upon one-third vote of the total membership, to hear reports of the government on their performance. After hearings, a majority of two-thirds vote of the total membership of the chamber may adopt the request of the president to remove the member of government from office.⁵⁸
49. Chairpersons of the Senate and the Mazhilis are elected by majority vote with a secret ballot. The chairperson of the Senate is nominated by the president, while the chairperson of the Mazhilis is nominated by the chamber deputies. Chairpersons may submit their resignation and be relieved of office by majority vote.⁵⁹
50. Although Parliamentary sessions are convened from September until June, the president may convene an extraordinary session during the intersession period to deal with specific issues.⁶⁰
51. Chamber sessions may be held if at least two-thirds of members are present. Sessions shall be open unless specified to be held behind closed doors. The president, prime minister, members of government, Chair of the National Bank, Prosecutor General, and the chairperson of the National Security Committee have the right to be present and to be heard.⁶¹
52. The right of legislative initiative belongs to the president, the deputies of Parliament and the government. Draft legislation is introduced in the Mazhilis. The president can determine priority consideration of draft laws so that they may be adopted within two months as a matter of urgency.⁶²
53. Parliament shall have the right to issue laws relating to:
- a. the legal capacity of individuals and legal entities, civil freedoms and rights, and the obligations and responsibilities of individuals and legal entities;
 - b. the system of ownership and other real property rights;
 - c. the basis of the organization and activities of central and local government bodies and of civil and military service;

⁵⁸ Constitution, Article 57.

⁵⁹ Constitution, Article 58.

⁶⁰ Constitution, Article 59.

⁶¹ *ibid.*

⁶² Constitution, Article 61.



- d. taxation and the application of fees and other mandatory charges;
 - e. the republican budget;
 - f. issues of the judicial system and legal proceedings;
 - g. education, health care and social provisions;
 - h. the privatization of enterprises and their property;
 - i. environmental protection;
 - j. the administrative and territorial structure of the Republic;
 - k. national defence and security.⁶³
54. Draft laws are presented to the Senate by the Mazhilis within sixty days of passage by majority vote. The Senate may pass legislation by majority vote; the adopted legislation is then submitted to the president for signing. Laws rejected by the Senate may be voted upon in the Mazhilis and returned to the Senate a second time with a two-thirds majority vote, but draft laws may be submitted no more than twice in one legislative session.⁶⁴
55. Laws come into force after being signed by the president.⁶⁵
56. The president, after consulting with the chairpersons of the Senate and Mazhilis and the prime minister, may dissolve Parliament or the Mazhilis. This may not happen during a state of emergency or martial law, during the last six months of a president's term in office, or within one year of a previous dissolution.⁶⁶

GOVERNMENT ADMINISTRATION

57. The government wields the executive power of the Republic of Kazakhstan, heads the system of executive bodies and manages their activities. It is a collegial body accountable to the president and Parliament.⁶⁷
58. The government is formed by the president as prescribed by the Constitution. Proposals on the structure and composition of the government are made to the president by the prime minister within ten days of his appointment. Government members take an oath to the people and the president of Kazakhstan.⁶⁸
59. The government of the Republic of Kazakhstan:

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ Constitution, Article 62.

⁶⁶ Constitution, Article 63.

⁶⁷ Constitution, Article 64.

⁶⁸ Constitution, Article 65.



- a. develops social and economic policy, defence policy, and policies for security and public order, and organizes their implementation; it approves state programmes in coordination with the president and ensures their implementation;
 - b. submits the budget to Parliament along with a report on its execution, and ensures execution of the budget;
 - c. submits draft laws to the Mazhilis and ensures their implementation once passed;
 - d. organizes the management of state property;
 - e. conducts foreign policy;
 - f. manages the activities of ministries, state committees, and other central and local executive bodies;
 - g. has the power to cancel or suspend, either in whole or in part, the actions of ministries, state committees, or other central and local executive bodies of the Republic;
 - h. in agreement with the president of the Republic, approves a unified system of financing and remunerating employees for all bodies maintained at the expense of the state budget;
 - i. performs other functions assigned to it by the Constitution, laws and acts of the president.⁶⁹
60. The prime minister organises and manages the government and is personally responsible for its work. He signs orders of the government and reports to the president and Parliament on government activities and decisions.⁷⁰
61. Government members are independent in decision-making within their departments and are accountable to the prime minister for the work of state bodies subordinate to them. A member of government who disagrees with official policy should resign or will be dismissed.⁷¹
62. Government members may not be deputies of a representative body, occupy other paid positions (except for teaching, scientific or other creative activities), carry out entrepreneurial activities, or be part of the governing body or supervisory board of a commercial organization, except when it is their job in accordance with the law.⁷²

⁶⁹ Constitution, Article 66.

⁷⁰ Constitution, Article 67.

⁷¹ Constitution, Article 68.

⁷² *ibid.*



63. The government issues decrees binding throughout the territory of Kazakhstan. Government decrees and orders of the prime minister may not contradict the Constitution, legislative acts or orders of the president.⁷³
64. In the event of a vote of no confidence in Parliament, the government will tender its resignation to the president, who will have ten days within which to accept or reject the resignation.⁷⁴
65. Accepting the resignation of a minister means terminating his authority. Accepting the resignation of the prime minister means the termination of the powers of the entire government.⁷⁵

CONSTITUTIONAL COUNCIL

66. The Constitutional Council is a seven-member body made up of the former president, two appointees of the sitting president, two appointees from the Senate, and two from the Majilis. Terms are for six years, with half of the members appointed every three years. Ex-presidents of the Republic hold life-long membership.⁷⁶
67. The chairperson is appointed by the president, and in the event of a split vote, his vote is decisive.⁷⁷
68. The chairperson and members of the Constitutional Council may not hold other deputy positions, occupy paid positions (except for teaching, scientific or other creative activities), undertake entrepreneurial activities, or hold membership in the governing body or supervisory board of a commercial organization. They are immune from arrest, detention, administrative measures imposed in court, or criminal prosecution without the consent of Parliament, except in cases of detention at the crime scene or committing serious crimes.⁷⁸

⁷³ Constitution, Article 69.

⁷⁴ Constitution, Article 70.

⁷⁵ *ibid.*

⁷⁶ Constitution, Article 71.

⁷⁷ *ibid.*

⁷⁸ *ibid.*



69. The Constitutional Council may take the following actions when requested by the president, the chairperson of the Senate or the Mazhilis, at least one-fifth of the total number of deputies of the Parliament, or the prime minister:
- a. Decide issues of election conduct of the president, the parliamentary deputies or the conduct of a referendum.
 - b. Determine the constitutionality of laws before they are signed by the president and resolutions adopted by the Parliament and its chambers.
 - c. Approve international treaties before ratification.
 - d. Give an official interpretation of the norms of the Constitution.
 - e. Give conclusions on cases involving the removal of the president from office due to illness or through impeachment.
 - f. Examine an appeal of the president objecting to an enacted law or other legal act in the interests of protecting the rights and freedoms of person and citizen, ensuring national security, sovereignty and integrity of the state.⁷⁹
70. Issues under appeal to the Constitutional Council are suspended until a judgement is reached. Decisions are normally made within one month, but the president may shorten this time to ten days if needed. Decisions of the Council are final and not subject to appeal.⁸⁰

⁷⁹ Constitution, Article 72.

⁸⁰ Constitution, Article 73.



THE JUDICIAL SYSTEM

INTRODUCTION

The establishment of an independent judiciary has been a continuing challenge for Kazakhstan. A Freedom House report from 2018 concluded: “The judiciary is effectively subservient to the executive branch, with the president nominating or directly appointing judges based on the recommendation of the Supreme Judicial Council, which is itself appointed by the president. Judges are subject to political influence, and corruption is a problem throughout the judicial system.”⁸¹

There have been attempts at judicial reform, most notably in Kazakhstan’s participation in the ABA ROLI program begun in 2012, which implemented a four-year program to support the modernization of the judicial system and increase public trust. The program was designed to promote cooperation between the Supreme Court, the Union of Judges and the Institute of Justice to improve judges’ knowledge, promote best practices and encourage the use of alternative dispute resolution methods, as well as boost resources for judges.

MINISTRY OF JUSTICE

71. The Ministry of Justice oversees all legal agencies of Kazakhstan. The current Minister of Justice is Marat Beketayev (b. 1977), a graduate of Kazakh State Law University (1998) and the London School of Economics (2000). Beketayev worked in the diplomatic civil service before becoming an advisor to the deputy prime minister and then prime minister. He served as Vice Minister of Justice from 2007-2010, executive secretary for the Ministry of Justice 2010-2015, and Deputy Head of the Presidential Administration from 2015-2016. Beketayev was made Minister of Justice in 2016 by presidential decree and reappointed in February 2019.

COURTS

72. The Kazakhstan judicial system has three levels of courts. First instance matters are heard by district and city courts. Appellate courts include oblast (regional) courts, Nur-Sultan City Court and the Almaty City Court. The Kazakhstan Supreme Court is the highest judicial authority.

⁸¹ Freedom House, *Freedom in the World 2019: Kazakhstan*, <https://freedomhouse.org/country/kazakhstan/freedom-world/2019>.



73. The Supreme Court is currently chaired by Justice Jhakup Asanov, who has remarked publicly about the lack of fair trials, lack of independent judges and poor judicial oversight.⁸²
74. There are two types of first instance courts: general courts and specialised courts for certain dispute categories (economic, administrative, juvenile, etc.) Most commercial disputes are reviewed by specialised inter-district economic courts. Investment disputes involving investments greater than ca. USD 13.789 million as of Jan 1, 2020 are reviewed by a specialised judicial board of the Supreme Court. Others are reviewed by the Nur-Sultan City Court. These specialised economic and financial courts have the status of district or regional courts. The specialised economic courts have jurisdiction over all cases to which a legal entity or an entrepreneur is a party, as well as all corporate disputes. As of 2018, there were 224 first instance courts, 109 first instance specialised courts, 18 regional courts and 395 courts in total, including the Supreme Court.⁸³
75. The public can access legal texts, higher court case law, forms and online registration through various portals and websites (eg Ministry of Justice).⁸⁴
76. Courts may not infringe upon the rights and freedoms of a person and citizen enshrined in the Constitution. Cases where court findings threaten to do so may be referred to the Constitutional Council.⁸⁵
77. Courts are funded through the Republican budget; judges are provided with housing to ensure the independent administration of justice.⁸⁶
78. The Prosecutor's Office is a state body accountable to the president. It represents the interests of the state in court and supervises criminal prosecutions on behalf of the state. The office consists of a single centralised system, with lower-level prosecutors subordinate to higher, and all subordinate to the Prosecutor General.⁸⁷

⁸² <https://informburo.kz/novosti/zhakup-asanov-rasskazal-o-semi-kamnyah-sudebnoy-sistemy.html>.

⁸³ Council of Europe, Evaluation of the judicial systems (2018-2020), Kazakhstan, <https://rm.coe.int/en-kazakhstan-2018/16809fe312>.

⁸⁴ Council of Europe, Evaluation of the judicial systems (2018-2020), Kazakhstan, <https://rm.coe.int/en-kazakhstan-2018/16809fe312>.

⁸⁵ Constitution, Article 78.

⁸⁶ Constitution, Article 80.

⁸⁷ Constitution, Article 83.



79. The Prosecutor serves for a term of five years. During his term, he may not be arrested, brought to trial, be subject to administrative measures imposed in court or brought to criminal responsibility without the consent of the Senate, except in cases of detention at the crime scene or committing serious crimes.⁸⁸

JUDGES

80. The Constitution stipulates that a judge is independent and subject only to the Constitution and the law. Judges serve for life and may be suspended solely on grounds established by law.⁸⁹
81. Judges are directed by the Constitution to adhere to the following principles: a person is innocent until proven guilty, no one may be prosecuted for the same offence twice, jurisdiction cannot be changed without the consent of the accused, all citizens have the right to be heard in court, laws may not be retroactive, those accused are not obliged to prove their innocence, the accused may not be forced to testify against himself, his spouse or his family. Priests are not obliged to testify against those who have confided during confession. Any doubts about guilt should be interpreted in the favour of the accused. Evidence obtained unlawfully is not legally binding. No one can be convicted solely on the basis of his own confession.⁹⁰
82. Judges are immune from arrest, detention, administrative censure and criminal prosecution without the consent of the president, based on the opinion of the Supreme Judicial Council of the Republic, or in certain cases without the consent of the Senate, except in cases of detention at the crime scene or commitment of serious crimes. They may not serve as deputies, occupy paid positions (except for teaching, scientific or other creative activities), engage in entrepreneurial activities or join the governing body or advisory board of a commercial organisation.⁹¹
83. The Supreme Judicial Council recommends nominees for the Supreme Court to the president, who then submits them to the Senate for confirmation. The Council's members are appointed by the president and include the president himself, the chair of the Constitutional Council, chair of the Supreme Court, the Prosecutor General, the Minister of Justice, the Minister for Civil Service Affairs

⁸⁸ *ibid.*

⁸⁹ Constitution, Article 77.

⁹⁰ Constitution, Article 77.

⁹¹ Constitution, Article 79.



and the chairmen of the respective standing committees of the Senate and the Mazhilis.⁹²

84. A Board of Experts exists under the aegis of the Supreme Judicial Council for conducting qualifying examinations for candidates of judgeship.
85. Lower level judges are appointed for life by the president based on the recommendation of the Supreme Judicial Council.⁹³
86. While the Constitution calls for public trials in which the defendant has the right to be present, to have counsel and to call witnesses, the reality has been that some trials have been closed (for political opposition figures, for example), and there has been wide-spread corruption among judicial personnel.⁹⁴
87. The executive branch exerts a tremendous influence over the judiciary. In 2018, then-President Nazarbayev dismissed Aktau judge Malik Kenzhaliyev at Kenzhaliyev's "own request." Kenzhaliyev had served as the chairman of a court that had acquitted Aigul Akberdiyeva, who participated in a Telegram chat group affiliated with the banned political party DVK. Subsequently, the Aktau judicial ethics commission suspended Kenzhaliyev for an ethics violation connected to a personal matter from several years prior. Kenzhaliyev maintained publicly that the real reason for his suspension was his refusal to follow his supervisor's order to convict Akberdiyeva.⁹⁵
88. The judicial process is plagued by corruption at every level. Prosecutors have immense power and have the authority to suspend court decisions.⁹⁶ Judges, prosecutors and other officials demand bribes to secure favourable rulings in both civil and criminal cases. A Freedom House *Nations in Transit* report for 2018 concluded that courts are often controlled by elites, and anticorruption criminal legislation is frequently utilized in inter-elite struggles or to crackdown on dissent.⁹⁷ Judges may be subject to disciplinary action, including prison sentences and a life ban on holding government office.

⁹² Constitution, Article 82.

⁹³ *ibid.*

⁹⁴ Constitution, Article 77.

⁹⁵ U.S. Department of State, 2019 Country Reports on Human Rights Practices: Kazakhstan, Section 1. Respect for the Integrity of the Person: Denial of Fair Public Trial

<https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.

⁹⁶ *ibid.*

⁹⁷ <https://freedomhouse.org/country/kazakhstan/nations-transit/2018>.



CIVIL CLAIMS PROCEDURES

89. Civil court proceedings and commercial proceedings are the strongest aspect of the judicial system, and Kazakhstan has received international recognition for certain categories of law, such as contract enforcement.⁹⁸
90. Court proceedings are usually public, though some hearings may be closed to the public if it is deemed necessary to shield commercial or other secrets, including state secrets, protected by law. Certain categories of dispute have a mandatory pre-trial settlement procedure (for example, claims for amendment and cancellation of contracts and claims against transporters). Some contracts can also specify mandatory pre-trial settlement. There are currently no penalties for failure to comply with pre-action conduct requirements, but failure to comply may result in a costs judgement against the party in non-compliance.⁹⁹
91. Claims that meet the Civil Procedure Code are accepted by a judge and initiated as a civil case within five days of filing in court. Notification is sent by the court to the defendant and third parties within three business days. Defendants must submit a statement of defence within ten days of receiving notice of the claim. Proceedings begin no later than 20 business days after the initiation of the case.¹⁰⁰
92. Court procedure is governed by the Civil Procedure Code and is managed and controlled by the court. Online dispute resolution is not available, but some procedural actions can be performed online (some documents can be downloaded from and filed on the “Court Cabinet” web platform). Court hearings are audio and video recorded and parties may participate using videoconference services. This is an improvement prompted by anti-corruption measures of 2015-2017, but the reality is that availability of technical equipment is a point of vulnerability to corruption. (See Point 131 below).¹⁰¹
93. The general limitation period is three years and applies to most contractual, tort and commercial claims. Special limitation periods apply to certain categories of disputes, including shipping and transport (1 year), creditor claims against guarantors (1 year), bank claims against borrowers for loan agreement violations (5 years), claims challenging illegal resolutions of a limited liability partnership’s

⁹⁸ “Doing Business,” The World Bank Group, <https://russian.doingbusiness.org/en/data/exploreconomies/kazakhstan>.

⁹⁹ *Litigation and enforcement in Kazakhstan: overview* [https://uk.practicallaw.thomsonreuters.com/w-019-2504?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a107963](https://uk.practicallaw.thomsonreuters.com/w-019-2504?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a107963).

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*



bodies (6 months), and claims to invalidate transactions made under deceit, violence, threat or collusion (1 year).¹⁰²

94. Some claims concerning property rights, bank depositors and individual rights have no time limit.¹⁰³

CRIMINAL TRIALS

95. In contrast to civil and commercial proceedings, Kazakhstan's criminal justice system is renowned for its lack of judicial independence, torture cover-ups, politicised criminal trials of political opponents and judicial corruption.¹⁰⁴ Criminal trials have been described as "quick, boring and strictly controlled," with judges systematically biased in favour of the state prosecution in the criminal justice system.¹⁰⁵ Judges consistently show "accusatory bias" and side with the state prosecution in both the pre-trial and trial stages of criminal proceedings. The post-communist legacy of near universal approval of pre-trial detention and avoidance of acquittals persists. Judges approve 95% of detention requests and nearly all requests by state prosecutors for extension of detention.¹⁰⁶

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ American Bar Association's Central European and Eurasian Law Initiative, *Judicial Reform Index for Kazakhstan 2* (Feb. 2004), <http://www.americanbar.org/content/dam/aba/directories/roli/kazakhstan/kazakhstan-jri-2004.authcheckdam.pdf> [<https://perma.cc/474N-GBHB>]; Maksat Kachkeev, "Judicial Independence in Kyrgyzstan and Kazakhstan: A Legislative Overview," in *Judicial Independence in Transition* 1255, 1268 (Anja Seibert-Fohr et al. eds., 2012); Daniyar Kanafin, "Criminal Justice Reform in Kazakhstan and OSCE Commitments," 20 *Security & Hum. Rts.* 56, 57 (2009); see Martha Brill Olcott, *Kazakhstan: Unfulfilled Promise?* 214, 218 (2010); Cynthia Alkon, "The Increased Use of "Reconciliation" in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?" 8 *Pepp. Dis. Resol. L.J.* 41, 58–59 (2007–2008); Kyle W. Davis, "Purging the System: Recent Judicial Reforms in Kazakhstan," 8 *U.C. DAVIS J. INT'L L. & POL'Y* 255, 269–70 (2002); Marina Shin et al., "Implementation of Judicial Independence in Uzbekistan and Kazakhstan in the Rule of Law Context," 46 *MANAGERIAL L.* 86, 90–94 (2004); Gulnar Suleimenova, "Sudebnaia Reforma v Respublike Kazakhstan: Obzor Osnovnykh Etapov [Judicial Reform in the Republic of Kazakhstan: A Review of Main Phases]," *Zakon* (2010), https://online.zakon.kz/Document/?doc_id=38412079 [<https://perma.cc/6FBC-3HTF>]; Iskander Tugelbaev, "Kazakhstan Slammed Over Torture Claims," *Transitions Online* (Mar. 4, 2016) <http://www.tol.org/client/article/25656-kazakhstan-slammed-over-torture-claims.html> [<https://perma.cc/6RLQ-ER33>].

¹⁰⁵ Peter H. Solomon, Jr., "Post-Soviet Criminal Justice: The Persistence of Distorted Neo-Inquisitorialism," 19 *Theoretical Criminology* 159, 159 (2015), in Alexei Trochev, "Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts," <https://www.lawschool.cornell.edu/research/ILJ/upload/Trochev-final.pdf> p.110.

¹⁰⁶ Alexei Trochev, "How Judges Arrest and Acquit: Soviet Legacies in Postcommunist Criminal Justice," in *Historical Legacies of Communism in Russia and Eastern Europe*, Table 2, 152, 152–53 (Mark Beissinger & Steven Kotkin eds., 2014).



96. There have been some improvements. Kazakhstan has managed to reduce its prison population and abolish Soviet-era supervisory review of final court judgements and return of criminal cases for additional investigation, which unfairly advantaged the prosecution. Jails are not overcrowded and some have been closed. Kazakhstan was the first country in Central Asia to introduce probation, including pre-trial probation. Its trials by mixed juries have produced an unusually high proportion of acquittals, although this contradicts other reports that such trials are vulnerable to corruption because of the judge's ability to influence jurors.¹⁰⁷
97. Less serious crimes are less likely to be sent to trial and are more often settled by reconciliation between the defendant and the victim of crime. Part of this rise of reconciliation is due to judges' desire to avoid a risky and labour-intensive investigation and trial. Judges now receive generous salaries, retirement benefits and housing. If judges disagree with state prosecutors over detentions or convictions, those prosecutors may bring charges of incompetence, suspicious leniency or selling of judicial decisions, all bases for potential dismissal. Judges are vulnerable to unfounded accusations due to public distrust of the judiciary, political blame for corruption and sensationalist media reports of judicial bribery.¹⁰⁸
98. Judges face formal and informal pressure to obtain convictions, avoid acquittals and grant detention requests. The Soviet judicial legacy – in which the essential task of judges was to support the Procurator General (or the equivalent chief law-enforcement institution of the state) – is entrenched in the Criminal Procedure Code.¹⁰⁹ The Soviet legacy still runs deep. The last six chairmen of the Supreme Court all made their careers in law during the Soviet period.¹¹⁰
99. Judges face pressure to show a track record of “stability of sentencing,” the Soviet-era indicator of the number of sentences overturned on appeal. Denials of

¹⁰⁷ “Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts,” <https://www.lawschool.cornell.edu/research/ILJ/upload/Trochev-final.pdf>, p. 109.

¹⁰⁸ Alexei Trochev, “How Judges Arrest and Acquit: Soviet Legacies in Postcommunist Criminal Justice,” in *Historical Legacies of Communism in Russia and Eastern Europe*, 152, 152–53 (Mark Beissinger & Steven Kotkin eds., 2014).

¹⁰⁹ Peter H. Solomon, Jr., “The Case of Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice,” 39 *Soviet Studies* 531, 536–37 (1987); Dmitri Nurumov, “Has the New Kazakhstani Criminal Procedure Code Already Fallen Short?” *Fair Trials* (Feb. 24, 2015), <https://www.fairtrials.org/guest-post-has-the-new-kazakhstani-criminal-procedure-code-already-fallen-short/> [https://perma.cc/RG58-X5C4].

¹¹⁰ See *Summaries of the Chairmen of the Supreme Court of Kazakhstan*, SUP. CT. REPUBLIC KAZ., <http://sud.gov.kz/eng/content/chairmen-supreme-court-kazakhstan> [https://perma.cc/VK6D-YQFD].



arrests and acquittals are seen by state prosecutors as unacceptable failures. Convictions are the gold standard for prosecutors, while acquittals are often overturned on appeal. Those who fail to convict may fear dismissal from the bench.¹¹¹

100. There is an informal culture of deference to political bosses and law-enforcement agencies that results in mutual agreements, cover-ups and a well-entrenched impunity for ignoring formal criminal procedure. One former judge, following a forty-year career that spanned the judiciary, the Procuracy and the presidential administration, complained that not a single government official had been prosecuted for “telephone law,” the illegal abuse of power by higher-ups giving orders to subordinates on how to decide cases.¹¹²
101. Defence attorneys could expose cover-ups and other malfeasance, but are disincentivised to do so, as most of them depend on the approval of law-enforcement officials to receive payments from the state budget for providing legal aid to low-income defendants.¹¹³

JURY TRIALS

102. Jury trials have failed to take hold in Kazakhstan. Efforts were made in 2007 to introduce them under the ABA ROLI’s Regional Advocacy Program, and the first jury trials were conducted that year alongside training for advocates and judges.
103. In 2015, as part of the government’s “100 Concrete Steps” program to boost Kazakhstan into the top 30 most competitive countries globally, the expansion of jury trials was listed as a separate and concrete goal. Yet this led to only minor and cosmetic changes (for example, requiring jury trials in cases of kidnapping or human trafficking, which are extremely rare). Jury trial institutions are still

¹¹¹ “Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts,” Alexei Trochev, <https://www.lawschool.cornell.edu/research/ILJ/upload/Trochev-final.pdf>.

¹¹² Oleg Gubaidulin, *Ni Odnogo Chinovnika v Kazakhstane ne Privlekli k Otvetstvennosti za Telefonnoe Pravo - Pakirdinov* [Not a Single Government Official Had Been Held Liable for Telephone Law - Pakirdinov], KARAVAN (Feb. 7, 2017), <https://www.caravan.kz/gazeta/ni-odnogo-chinovnika-v-kazakhstane-ne-privlekli-k-otvetstvennosti-za-telefonnoe-pravo-pakirdinov-389962/> [https://perma.cc/YVM3-6D2X]; Kathryn Hendley, ‘Telephone Law’ and the ‘Rule of Law’: The Russian Case, HAGUE J. ON RULE L. 241, 241–62 (2009).

¹¹³ Gulnar Suleimenova, “Model’ Ugolovnogo Protsessa Kazakhstana [The Model of Criminal Procedure of Kazakhstan],” in *Das Strafprozessuale Vorverfahren in Zentralasien Zwischen Inquisitorischem und Adversatorischem Modell*, 160–61 (Friedrich-Christian Schroeder & Manuchehr Kudratov eds., 2012).



weak and their development remains hampered by political interference. Issues include:

- A “mixed” trial jury model in which the judge joins the jurors in the deliberation room, raising the possibility of undue influence by the judge on the jurors. As of 2010, the trial jury composition was changed from 9 jurors and 2 judges to 10 jurors and one judge, exacerbating this further.
- A low number of jury trials overall, which impedes the improvement and growth of jury trials. Currently jury trials are used only in criminal cases where there is a possible penalty of life imprisonment or death.
- Jury acquittals being frequently overturned. According to the General Prosecutor’s Office of the Republic of Kazakhstan, roughly half of jury acquittals from 2012-2015 were overturned on appeal.
- Judges dissolving juries for perceived disobedience to judges’ orders.¹¹⁴

104. Jury trials’ use has fluctuated since their introduction. From 2007-2009, they were used only in cases where the penalty was life imprisonment or death. From 2010-2013, they were used more generally for criminal cases. This was reduced in 2013, when the original jurisdiction was reinstated. For the period ending in 2017, less than one percent of criminal cases were tried by jury. In cases with a prosecutor and no jury, more than 99% of criminal cases resulted in a guilty verdict. The presence of jurors more often results in acquittal, which is then often overturned on appeal.¹¹⁵

LEGAL REPRESENTATION/LAW FIRMS

105. Until roughly 2013, Kazakhstan’s legal market was small, with around 10,000 lawyers and 15 full-service corporate firms, including Baker & McKenzie, Morgan Lewis, Norton Rose Fulbright and White & Case. With the increase in UK investors in Kazakhstan, an increasing number of Kazakh law firms have ventured into London in the past decade. One result of this has been the growth

¹¹⁴ U.S. Department of State, 2019 Country Reports on Human Rights Practices: Kazakhstan <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.

¹¹⁵ “Kazakhstan: Why the Institute of Trial Jury Cannot Function in Full Power?” Central Asian Bureau for Analytical Reporting, 3 September 2019, <https://cabar.asia/en/kazakhstan-why-the-institute-of-trial-jury-cannot-function-in-full-power>.



of the British-Kazakh Law Association (BrKLA), with support of the Law Society of England and Wales.

106. The legal profession is divided into commercial lawyers and advocates. Both have rights of audience in civil, tax and business cases, including large commercial disputes, but only advocates may represent clients in criminal or administrative proceedings in the courts. Commercial lawyers and legal advisors are lightly regulated and do not require a licence to practice, while advocates require a licence from the Ministry of Justice.¹¹⁶ Foreign nationals are not required to register with a Kazakhstan bar association to practice, but nationality requirements mean that they cannot conduct litigation or advocacy work in the Kazakh courts.
107. The Kazakhstan National Bar Association and local bar associations have come under increasing government pressure, including intimidation and harassment of its leadership and individual lawyers. The legal profession struggles for independence. In 2018, the government adopted new laws extending control of the Ministry of Justice in admitting lawyers to practice and issuing licenses. Lawyers must now be assessed by a seven-member commission under the authority of the Ministry of Justice. The Disciplinary Commission now includes retired judges and representatives of the public appointed by the Ministry of Justice.¹¹⁷ The reforms prompted protest resignations from high-level lawyers and disbarments of others who criticised the government's move, prompting the president of the Council of Bars and Law Societies of Europe (CCBE) to write a letter of protest to then-President Nazarbayev in February 2019.¹¹⁸
108. Lawyers have been subjected to government harassment. In October 2018, a lawyer named Tolegan Shaikov, an advocate for civil rights activists, represented an individual detained for participating in an unsanctioned rally in Nur-Sultan. The next day, he himself was detained, held without explanation and later told that he had been designated a witness in a criminal case involving a car theft. Such a designation involved curtailment of his professional activities.

¹¹⁶ "Kazakhstan is a magnet for investors but its legal system is a work in progress," *The Law Society Gazette*, 11 November 2013, <https://www.lawgazette.co.uk/practice/kazakhstan-is-a-magnet-for-investors-but-its-legal-system-is-a-work-in-progress/5038664.article>.

¹¹⁷ "New Law Could Undermine Independence Legal Profession Kazakhstan," 20 July 2018, <https://lawyersforlawyers.org/en/new-law-puts-pressure-on-the-independence-of-the-legal-profession-in-kazakhstan-2/>.

¹¹⁸ Letter from José de Freitas, President of the CCBE, to H.E. President Nursultan Nazarbayev, 14 February 2019,

https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Kazakhstan_-_Kazakhstan/2019/EN_HRL_20190214_Kazakhstan_Situation-of-lawyers-in-Kazakhstan.pdf.



Shaikov went to the media to complain that the case was fabricated in an effort to punish him for defending civil rights activists.¹¹⁹

109. In March 2020, the International Bar Association's Human Rights Institute publicly condemned the Supreme Court's decision to disbar two lawyers, one of them the chair of the Lawyers' Rights Committee, for posting archive video online of a judge disparaging the legal profession during a court hearing.¹²⁰

THE ASTANA INTERNATIONAL FINANCIAL CENTRE AND THE INTERNATIONAL ARBITRATION CENTRE

110. The Astana International Financial Centre (AIFC) and the International Arbitration Centre (IAC) opened in 2018 as part of an ambitious effort to provide a regional centre of excellence for their respective activities, boosting Kazakhstan's prestige while attracting lucrative banking and legal business to the country.
111. Historically, Kazakh law exposed businesses to various issues, including the lack of commercial experience of local judges and the lack of consistent standards across the Kazakh judicial system. Some legal concepts key to international finance and M & A deals did not exist in Kazakhstan, leading investors to eschew Kazakh law for contracts even if there was a danger that judgements from American or European courts would be unenforceable.
112. The AIFC was opened on January 1, 2018 to provide a regional centre for financial and legal services. It encompasses eleven separate bodies dealing with finance, wealth management and law: the International Arbitration Centre, the AIFC Court, the Astana Financial Services Authority, a centre for financial technology (Fintech), the Astana International Exchange, a marketing service for local projects (AIFC Business Connect), the Bureau for Continuing Professional Development, a Green Finance Centre, administrative services for expats, and the AIFC Academy of Law, which provides legal training and pro bono lawyers. Its ambition is to bring together the financial markets of Europe, the Persian Gulf and China and provide trading partnerships with all major international trading platforms.

¹¹⁹ U.S. Department of State, 2019 Country Reports on Human Rights Practices: Kazakhstan, Section E: Denial of Fair Public Trial, in <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.

¹²⁰ "Kazakhstan: IBAHRI condemns disbarment of two lawyers," <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUId=b740986b-1b74-4a36-b6b6-a3a41e9d45e3>.



113. The AIFC provides tax breaks for companies based there, with zero corporate, property, income and land tax under certain conditions until 2066.¹²¹
114. The AIFC Management Council is a 12-member body chaired by the president of Kazakhstan and comprised of a group of Kazakhstan authorities, including the prime minister and the ministers of Finance and National Economy as well as the Governor of the National Bank of Kazakhstan, along with a distinguished group of international advisors, including the CEOs of Sberbank and Yandex, former EBRD President Summa Chakrabati and JP Morgan Chase International chairman Jacob Frenkel.
115. The AIFC Court is fully autonomous from the Kazakhstan judicial system and uses English common law and the English language in all proceedings. It is currently led by Chief Justice The Right Hon. The Lord Mance. Its nine justices are all English, as is the Registrar and Chief Executive of the AIFC Court, Mr. Christopher Campbell-Holt. The Court has two tiers, a Court of First Instance that includes a Small Claims Court, and a Court of Appeal. It has exclusive jurisdiction over disputes arising out of the activities and operations of the AIFC and jurisdiction in cases where the parties have specified this in writing. It has no jurisdiction over criminal or administrative matters but does have jurisdiction over:
- Disputes between AIFC participants, bodies and/or foreign employees.
 - Disputes relating to AIFC operations under AIFC law.
 - Disputes referred to the Court by agreement of the parties.
 - Interpretation of the AIFC acts.
116. The IAC is an independent legal entity established under the New York Arbitration Convention¹²² and chaired by Barbara Dohmann QC.¹²³ Its panel of

¹²¹ UK Government Guidance, *Overseas Business Report – Kazakhstan*, updated 9 July 2020, <https://www.gov.uk/government/publications/overseas-business-risk-kazakhstan/information-on-key-security-and-political-risks-that-uk-businesses-may-face-when-operating-in-kazakhstan>.

¹²² <https://www.newyorkconvention.org>

¹²³ She has been appointed as arbitrator at ICSID, the LCIA, the London Metal Exchange, the Paris International Chamber of Commerce, and at the Hong Kong International Arbitration Centre. Her experience covers international joint ventures, metal trading, oil and gas, media, insurance, M&A and much more. Previous positions include Deputy High Court Judge (1994-2002), Judge at the Qatar Financial Centre International Court (2007-2017), Chair of the Commercial Bar Association (1999-2001), Leader of the European Circuit (2014-2016). She is a member of the Special Committee of the London Metal Exchange, the Lord Chancellor's Advisory Committee on Private International Law, of



international arbitrators and mediators have backgrounds in commercial law, oil and gas, trade, construction, energy, financial services, banking, Islamic finance, insurance and intellectual property. They hail from the EU (5), Hong Kong (4), Japan (1), India (1), Kazakhstan (3), Russia (4), Singapore (2), the UK (13), Ukraine (1), the USA (3), and China (1). IAC arbitration awards are enforceable in Kazakhstan as Orders of the AIFC Court and internationally under the New York Convention.

117. Since opening in January 2018, the AIFC Court has heard 12 cases and filed judgements in 9 of them. The IAC settled 282 cases in that same period, mostly via mediation but with a significant increase in arbitration cases over time. The cases involved parties from 11 countries and 11 different cities and regions within Kazakhstan, and covered subjects including contract issues, non-payments, debt obligations, and property (including land). From March 2020, proceedings at the AIFC Court and the IAC moved completely online due to Covid and fees were waived for the parties. Thus far, over 200 lawyers from 23 countries have registered with the AIFC Court for rights of audience.
118. The AIFC and IAC claim success in boosting investor confidence by their nomination as the preferred institution of dispute resolution in more than 4000 business contracts, including those between Chevron and Tengizchevroil LLP.
119. However, Kazakhstan's professed support for the rules of international arbitration has been called into question in several cases in which Kazakhstan challenged binding arbitration decisions with which it did not agree.¹²⁴

REFORM EFFORTS

Kazakhstan has continuously sought a greater international role and increased recognition on the world stage, carefully nurturing the country's regional and international standing. It has cultivated Western institutions and governments – especially the US and the UK – to promote a strategic reputation as a reliable international partner. It has hired several European public relations firms to raise its visibility, including the now-disbanded Bell Pottinger and BGR Gabara in London,

the Learned Society for International Procedure Law and of the Deutscher Anwaltsverein.

<https://iac.aifc.kz/who-we-are/chairman-iac/ms.-barbara-dohmann-qc/>.

¹²⁴ United Nations UNCTAD Investment Policy Hub: Kazakhstan,

<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/107/kazakhstan>.



and Consultum Communications in Berlin.¹²⁵ These efforts have been ambitious and occasionally aggressive. The Open Society news program *EurasiaNet.org* claims to have “uncovered evidence that suggests PR firms may have massaged Wikipedia entries in ways that cast the Kazakhstani government in a better light.”¹²⁶

In tandem with its PR work, the government has undertaken various reform efforts in recent years to address issues of criticism at home and to burnish Kazakhstan’s reputation abroad.

120. “100 Concrete Steps” of May 2015, were reforms intended to strengthen the formation of a professional state apparatus, streamline of the civil service, police and courts, improve transparency and accountability, and increase support for the rule of law. The reforms were prompted by anxiety over rising socio-economic disaffection after the economic slowdown of 2014. Elites, uncertain of their fate in the Nazarbayev patronage system, have contributed to a capital flight of over \$140 billion since independence.¹²⁷
121. Anti-Corruption Strategy 2015-2017 – aimed at reducing corruption in the civil service, state sector, private sector, judiciary and law enforcement. Part of the “100 Concrete Steps.” Its most significant achievement was the introduction of audio and video hearings across the country, though this has been uneven.
122. The American Bar Association’s Rule of Law Initiative (ABA ROLI) –a four-year-program begun in 2012 to promote modernization of the judicial system. ABA ROLI works with the Supreme Court, the Union of Judges and the Institute of Justice to enhance training of judges, encourage alternative dispute resolution and provide resources and support.
123. While the ABA ROLI website confirms that Kazakhstan has made progress in bringing its criminal legislation and national laws in line with international standards, problems remain. A 2018 World Bank report concluded that the

¹²⁵ Corporate Europe Observatory (2015), *Spin Doctors to the Autocrats: How European PR Firms Whitewash Repressive Regimes*, Brussels: Corporate Europe Observatory, pp. 39–42, https://corporateeurope.org/sites/default/files/20150120_spindoctors_mr.pdf. See especially pp.39-42.

¹²⁶ *ibid.*

¹²⁷ МК.ру (2015), ‘Отток капитала из Казахстана в офшоры составил 140 млрд. долларов’ [Capital outflow from Kazakhstan to offshore companies amounted to 140 billion US dollars], 21 May 2015, <https://mk-kz.kz/articles/2015/05/21/ottok-kapitala-iz-kazakhstan-v-ofshory-sostavil-140-mlrd-dollarov.html>.



Kazakhstan judicial system is one of the biggest barriers to the economy.¹²⁸ World Bank Enterprise Survey data identified corruption as the top obstacle for private businesses in Kazakhstan across all sectors. The 2015 government strategy for combatting corruption (Plan of Activities for 2015-2017) contained 64 anti-corruption measures and 65 measures aimed at combatting the “shadow economy.” While some of the measures have been implemented (notably the eGov website), the OECD reports that the activities of the plan “do not align with the objectives.”¹²⁹

124. Istanbul Anti-Corruption Action Plan - a sub-regional peer-review program begun in 2003 within the OECD’s Anti-Corruption Network for Eastern Europe and Central Asia. It supports anti-corruption reforms in Armenia, Azerbaijan, Georgia, Kyrgyzstan, Mongolia, Tajikistan, Ukraine and Uzbekistan through country reviews and monitoring of implementation of the UN Convention Against Corruption. Kazakhstan has been a participant since 2003, with uneven outcomes.¹³⁰
125. The OECD’s most recent monitoring efforts in 2018 reported mixed results. The government was commended for “serious efforts to modernise and increase confidence in the national judicial system.”¹³¹ Among other measures, Kazakhstan adopted the new wording on basic laws on the judiciary, a new Judicial Ethics Code, an updated statute on juries, and provisions for assessment of judicial performance. However, reforms on assets and income declarations of public officials were postponed, and only minor progress was achieved toward improving the integrity of political officials.¹³² Additional issues included insufficient guarantees of judicial independence, an excessive role of political bodies in the appointment and dismissal of judges, sub-standard procedures for the formation of the Supreme Judicial Council, insufficient transparency and openness of courts to the public and media. Grounds for disciplinary action against judges remained vague and there remained no possibility to challenge decisions of the Judicial Jury in court.”¹³³

¹²⁸ “Kazakhstan Needs Robust Reforms to Boost Productivity and Growth,” November 8, 2018, <https://www.worldbank.org/en/news/press-release/2018/11/08/kazakhstan-needs-robust-reforms-to-boost-productivity-and-growth>.

¹²⁹ Istanbul Anti-Corruption Action Plan Fourth Round of Monitoring, <https://www.oecd.org/corruption/acn/OECD-ACN-4th-Round-Report-Kazakhstan-Progress-Update-July-2018-ENG.pdf>.

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ Executive Summary, <https://www.oecd.org/corruption/acn/OECD-ACN-Kazakhstan-Round-4-Monitoring-Report-ENG.pdf>.



126. “Kazakhstan 2050”, launched in 2012 with the goal of making Kazakhstan one of the top 30 global economies by 2050. Economic and social development was planned with an emphasis on stable growth, the development of a middle class and improvements in innovation and new technologies. The opening of the IAC and the AIFC forms part of the platform to improve the rule of law.
127. Through these reform efforts, Kazakhstan has made some progress, ranking 25th out of 190 countries in 2020 for doing business, up from 77th place in 2015.¹³⁴ A Boston Consulting Group report from late 2018 was optimistic about improvements in the judicial system and government transparency and accountability.¹³⁵ However, the overall results of reform efforts have been mixed, particularly within the judiciary.

INTERNATIONAL CONCERNS ABOUT CORRUPTION AND ISSUES WITH RESPECT FOR THE RULE OF LAW

(A) CONCERNS ABOUT THE INDEPENDENCE AND ABUSE OF THE JUDICIAL SYSTEM

128. The Kazakhstan tax authorities have been used to silence organisations. In December 2020, they targeted over a dozen human rights NGOs with fines and possible suspension for alleged financial reporting violations. The groups involved, including the Kazakhstan International Bureau for Human Rights and Rule of Law, International Legal Initiative, Kadyr Kasiyet and the Echo Public Foundation, work on human rights, election monitoring and media freedoms. The crackdown was perceived to be related to the parliamentary elections scheduled for January.¹³⁶
129. In January 2021, the Kazakhstan International Bureau for Human Rights and Rule of Law, or KIBHR, and the International Legal Initiative received fines and bans on operations for three months for alleged violation of laws regulating payments to NGOs from foreign sources. Both groups are initiating a legal

¹³⁴ Ease of Doing Business Rankings: Kazakhstan, <https://www.doingbusiness.org/en/rankings>.

¹³⁵ https://www.bcg.com/Images/BCG-Investing-In-Central-Asia-report-ENG_tcm26-212857.pdf.

¹³⁶ “Kazakhstan: Human Rights Groups Under Pressure. Tax Officials Should End Harassment, Withdraw Their Notices,” 4 December 2020, International Partnership for Human Rights, <https://www.iphronline.org/kazakhstan-tax-officials-should-end-harassment-withdraw-their-notice.html>.



appeal. The president of the International Legal Initiative has called the charges “politically motivated” and “absolutely unlawful.” The Echo Public Foundation was suspended on January 15 for three months and fined \$1400.¹³⁷

130. Due process is problematic. Freedom House reported, “Police reportedly engage in arbitrary arrests and detentions, and violate detained suspects’ right to assistance from a defence lawyer. Prosecutors, as opposed to judges, are empowered to authorize searches and seizures. Defendants are often held in pre-trial detention for long periods. Politically motivated prosecutions and prison sentences against activists, journalists, and opposition figures are common.”¹³⁸
131. Individuals are vulnerable to the illegitimate use of force. “Conditions in pretrial detention facilities and prisons are harsh. Police at times use excessive force during arrests, and torture is widely employed to obtain confessions, with numerous allegations of physical abuse and other mistreatment documented each year.” In August 2018, for example, there were several incidents of prisoner deaths after alleged torture while in custody.¹³⁹
132. The watchdog group Civic Foundation Transparency Kazakhstan (part of the Open Society Foundation) has highlighted vulnerabilities to corruption in the courts, especially surrounding the issue of audio and video recordings of trials and procedures. Equipment is often missing or faulty, and court rules which allow cases to proceed without audio and visual equipment then go ahead, even though the equipment is mysteriously missing or defective. The group notes that more and more people are taking disputes to court, mediation is growing, and sentencing is now more creative, with less prison time and more fines and community work. However, the situation for jury trials is worsening.¹⁴⁰
133. The UN Working Group on Arbitrary Detention has declared the detention of land code activist Maks Bokayev, sentenced to five years in prison for organising

¹³⁷ “Kazakhstan: Government’s War on NGOs Claims More Victims,” <https://eurasianet.org/kazakhstan-governments-war-on-ngos-claims-more-victims>, January 27, 2021, accessed January 29, 2021.

¹³⁸ Freedom House, *Freedom in the World 2019: Kazakhstan*, <https://freedomhouse.org/country/kazakhstan/freedom-world/2019>.

¹³⁹ *ibid.*; “Kazakh Inmate Dies in Hospital After Alleged Torture,” Radio Free Europe/Radio Liberty, 28 August 2018, <https://www.rferl.org/a/kazakh-inmate-egimbaev-dies-in-hospital-after-alleged-torture/29457366.html>.

¹⁴⁰ *Report on the Prevention of Corruption in Kazakhstan*, Civic Foundation Transparency Kazakhstan, 2018, Soros Foundation-Kazakhstan, <https://knowledgehub.transparency.org/assets/uploads/kproducts/REPORT-ON-THE-PREVENTION-OF-CORRUPTION-IN-KAZAKHSTAN.pdf>.



peaceful land reform protests, to be a case of arbitrary imprisonment. Bokayev was arrested in May 2016 after posting on social media his intention to participate in demonstrations against new laws allowing land to be sold to foreign states and companies. Charges included social discord, promoting “knowingly false” information and violating rules for public demonstrations.¹⁴¹

134. In law enforcement, the “penal culture, the emphasis on getting low numbers of acquittals, the pro-accusation bias in the criminal proceedings as well as the lack of autonomy of the judicial system because of improper government influence are all signs of the remnant of the Soviet era.” Citizens remain wary of criminal justice institutions and unwilling to cooperate with law enforcement.¹⁴²

(B) UK CONCERNS

135. The UK National Crime Agency issued three Unexplained Wealth Orders (UWO) in 2019 and 2020 in relation to properties in London linked to Nazarbayev and his family and valued at over £100 million.¹⁴³
136. A 2019 Chatham House analysis reported that the government “does not respect political and civil liberties. It fails to uphold its commitments either under international agreements or under its own constitution and laws. It holds choreographed elections...The Judiciary is abused for political ends.”¹⁴⁴
137. The same report detailed the ways in which Kazakhstan is governed by a system of informal patronage networks centred around former President Nazarbayev and marked by a system of checks and balances of different allies and interest groups. By ensuring the distribution of rents to family members and loyalists, Nazarbayev has created an informal network of allies whose first loyalty is to him, not Kazakhstan’s institutions. Those closest to the former president benefit the most. Various family syndicates have developed over the years, centred around Nazarbayev’s eldest daughter, Dariga, his son-in-law, Timur Kulibayev

¹⁴¹ “Why Kazakh Political Prisoner Maks Bokayev Should be Released,” Open Democracy, 24 April 2019, <https://www.opendemocracy.net/en/odr/why-kazkh-political-prisoner-max-bakayev-should-be-released/>.

¹⁴² “Trials and Tribulations: Kazakhstan’s Criminal Justice Reforms,” Alexei Trochev and Gavin Slade, in *Kazakhstan and the Soviet Legacy: Between Continuity and Rupture*, ed. Jean-François Caron, Singapore: Palgrave Macmillan, 2019, https://link.springer.com/chapter/10.1007/978-981-13-6693-2_5.

¹⁴³ “TI-UK Welcomes Landmark Legal Action Against Assets Linked to Kazakh Political Elite,” <https://www.transparency.org.uk/press-releases/unexplained-wealth-order-london-mansion-linked-former-kazakh-president-family-nursultan-nazarbayev>.

¹⁴⁴ Chatham House, *Kazakhstan: Tested by Transition*, <https://www.chathamhouse.org/2019/11/kazakhstan-tested-transition>.



(married to Nazarbayev's second daughter, Dinara), and his nephew, Kairat Satybaldy. These groups influence a large proportion of the national economy.¹⁴⁵

(C) US CONCERNS

138. According to the US State Department Country Report for 2019, corruption “was widespread in the executive branch, law enforcement agencies, local government administrations, the education system, and the judiciary.” In 2018, criminal law was amended to reduce punishments for various acts of corruption by officials, including decriminalising official inaction, hindering business activities, and falsifying documents. Fines for bribery were reduced and a statute of limitations on corruption crimes was reintroduced. In August 2019, the former deputy governor of the Mangystau region was convicted of accepting a €400,000 bribe from a representative of a Czech construction company for awarding his company a project.¹⁴⁶
139. In some instances government agents have committed arbitrary killings or beatings that resulted in death. Deadly abuse in prisons is frequent. Police and prison officials have tortured and abused detainees.¹⁴⁷ The government created the National Preventive Mechanism (NPM) against Torture in 2014 as part of the Office of the Human Rights Ombudsman, which is a government office. In 2018, the ombudsman received 148 complaints of torture, violence and degrading treatment, mostly within the prisons and temporary detention centres. Videos of prison officials abusing inmates, including one instance in which a prisoner was beaten while hanging by his arms, have been posted on YouTube and other social media. There have been some attempts to mitigate the situation. Some of the worst prisons have been closed, and some offending prison officials have received prison sentences from the courts. However, the situation remains troubling.¹⁴⁸
140. While individuals under arrest are guaranteed a right to an attorney prior to interrogation under the 2015 criminal procedure code, in practice prisoners are dissuaded from seeing an attorney, hindered in their ability to communicate

¹⁴⁵ Isaacs, R. (2009), *Between Informal and Formal Politics: Neopatrimonialism and Party Development in Post-Soviet Kazakhstan*, doctoral dissertation, Oxford: Oxford Brookes University.

¹⁴⁶ U.S. Department of State 2019 Country Reports on Human Rights Practices: Kazakhstan, Government, in <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.

¹⁴⁷ U.S. Department of State, 2019 Country Reports on Human Rights Practices: Kazakhstan, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>

¹⁴⁸ *ibid.*



with attorneys, sometimes secretly recorded by prison staff and prohibited from holding attorney-client meetings in private.¹⁴⁹

141. The government is reported to frequently arrest and detain political opponents and critics for minor offenses that can lead to fines or administrative arrest for up to 10 days. This has happened on a large scale. During 2018, thousands were detained for participating in unsanctioned anti-government rallies.¹⁵⁰

(D) CONCERNS ABOUT HIGH-LEVEL CORRUPTION

142. In October 2020, various outlets of the MEGA shopping mall network in Kazakhstan were subjected to a barrage of inspections, including by the local branches of the Nur Otan political party and a police squad that arrested the CEO of one of the malls, despite the malls' compliance with a directive from the Interdepartmental Commission authorizing opening hours until 5pm. These "raids" were repeated at other MEGA malls in Almaty and Nur-Sultan. According to one source, billionaire businessman and Nazarbayev ally Bulat Utemuratov sought to damage business at the malls in order to be able to take over the business.¹⁵¹
143. Utemuratov is also in the spotlight because of a \$5 billion asset freeze imposed by a UK court at the behest of BTA Bank, which added Utemuratov to a list of defendants in its on-going legal battle for asset recovery from fugitive financier and political opposition funder Mukhtar Ablyazov. BTA Bank is backed by the Kazakhstan government, and there is speculation that Utemuratov may be in trouble politically with Nazarbayev.¹⁵²
144. In another case in 2020, a governmental "green economy" department in Almaty filed a claim against a company owned by the Mukashev family, ostensibly close allies of Dariga Nazarbayeva, after civil activists exposed the illegal cutting of 11,000 trees on a tract of land to make way for a shopping centre. The case was heard in the Almaty specialised intra-district economic court. The claim was denied.¹⁵³

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ "Who Is Behind the Mega Mall Problems?" *Kazakhstan 2.0*, 29 October 2020, https://kz.expert/en/news/inside/2151_who_isbehind_the_mega_mall_problems

¹⁵² "Kazakhstan: Nazarbayev-Linked Billionaire Sucked into UK Court Battle," Eurasianet, 2 December 2020, <https://eurasianet.org/kazakhstan-nazarbayev-linked-billionaire-sucked-into-uk-court-battle>

¹⁵³ "Have Protection, A Fixer Will Turn Up," *Kazakhstan 2.0*, 24 December 2020, https://kz.expert/en/news/inside/2229_have_protection_afixer_will_turn_up



145. Timur Kulibayev, husband of Nazarbayev's daughter Dinara and former chair of the Samruk Kazyna sovereign wealth fund, is alleged to have been involved in a scheme with Russian businessman Alexander Karmanov to siphon millions of dollars from pipeline contracts within the Asia Gas Pipeline Project between 2008 and 2014. According to the Financial Times, Kulibayev received a share of the profits worth an alleged \$53 million for one transaction alone.¹⁵⁴

(E) CURTAILMENT OF MEDIA FREEDOM

146. The government in Kazakhstan controls the internet, blocking or slowing access to opposition websites and interfering in chatrooms. Amendments to the media law in January 2018 prohibit citizens from posting anonymous comments on media websites. Outlets are required to register all online commentators and provide law enforcement agencies with this data upon request. Internet cafes are required to have surveillance cameras and visitors must present ID to use internet facilities. Internet cafes are required to keep logs of visited websites. Under the current law, the prosecutor general may suspend access to the internet or other forms of communication without a court order. In 2019, the Almaty City Court rejected the appeal of a citizen sentenced to four years in prison for Facebook posts in support of the banned DVK political opposition movement.¹⁵⁵

147. National security law criminalises the release of information about the health, finances or private life of the president, as well as economic information, including debts to foreign creditors. Broad categories of crime, including dissemination of "unreliable information," invite corruption. Any statement deemed to glorify "extremism" or "incite discord" is prohibited. This was used in the case of Serikzhan Bilash, who was charged with calling for "jihad" against the Chinese.¹⁵⁶

148. A new media law in 2018 required foreign TV channels to register with the authorities, leading to the revocation of 88 licenses by August 2018. The media law also prohibits websites from allowing anonymous comments, stifling free expression.

¹⁵⁴ "Secret scheme aimed to siphon cash to tycoon," Financial Times, December 4, 2020.

¹⁵⁵ U.S. Department of State, 2019 Country Reports on Human Rights Practices: Kazakhstan, Internet Freedom, in <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.

¹⁵⁶ He claimed he had called for a "jihad of words" in a video clip which was then edited to distort the facts. U.S. Department of State, 2019 Country Reports on Human Rights Practices: Kazakhstan, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>, Section 5.



(F) RESTRICTIONS UPON FREEDOM OF ASSOCIATION AND ASSEMBLY

149. Though guaranteed by the Constitution, freedom of assembly is limited, with unsanctioned gatherings, meetings or marches labelled as national security threats. Permits for a demonstration or meeting must be obtained at least 10 days in advance, and a complicated and confusing registration procedure gives the authorities numerous opportunities to thwart registration. According to the US State Department's 2019 Country Report for Kazakhstan, unsanctioned demonstrations around the time of the presidential elections in June of that year led to the detention of roughly 4000 people.¹⁵⁷
150. Any public organisations, including political and religious groups, must be registered with the Ministry of Justice as well as the local justice departments in every region in which they wish to operate. The law requires them to define their activities, and organisations that act outside their charter may be fined or banned. Participation in unregistered organisations may lead to criminal charges. Issues with paperwork may be used to deny registration for an organisation that is unpalatable to the government. Laws for associations' activities and reporting requirements are broad, with administrative and criminal penalties for non-compliance.¹⁵⁸

(G) HARASSMENT OF INTERNATIONAL AND NGO INVESTIGATIONS INTO HUMAN RIGHTS ABUSES

151. Domestic and international human rights groups operating in Kazakhstan have nominal freedom to investigate and publish their findings, but restrictions remain. Government monitoring of NGO activities on sensitive issues continues, along with harassment, including police visits and surveillance of NGO offices, personnel and their families. The government uses the registration process to constrain NGOs.¹⁵⁹
152. In the 2019 case of Atajurt, an organisation that advocates for the rights of ethnic Kazakhs in China, the government refused repeated applications to register, citing paperwork errors. Atajurt leader Serizhan Bilash was fined for leading an unregistered organisation and signed a plea agreement related to a criminal case

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*



for incitement of discord that banned him from political activism. Meanwhile, Atajurt filed a claim in the district court of Almaty against the Ministry of Justice for refusing to allow the group to register. Because Bilash had been banned, the Ministry of Justice approved the registration under different leadership.¹⁶⁰

153. The UK Government has warned that Kazakhstan authorities “continue to suppress civil activists, journalists and bloggers. The most recent case is a criminal prosecution of an Almaty-based activist who was sentenced to three years of freedom restriction for criticizing the ruling party Nur Otan. Authorities are also excessively using Article 174 (incitement of social, national, racial or religious hatred) to persecute those opposing the regime - according to legal experts the article is worded vaguely and provides a convenient pathway to misuse it.”¹⁶¹

(H) RESTRICTIONS UPON FREEDOM OF EXPRESSION

154. In March 2018, authorities charged Shymkent-based human rights activist, Ardak Ashim, with “inciting discord” for her critical social media posts. She was placed in court-sanctioned psychiatric detention. A court later exonerated and freed her.¹⁶²
155. The atheist writer Aleksandr Kharlamov, charged in 2013 with “inciting religious discord,” sued authorities for abuse during his forced detention in a psychiatric facility. The case was closed in April 2018 and a court subsequently granted him approximately US\$2,700 in damages.¹⁶³
156. Human rights activist Elena Semenova was criminally charged in 2018 with “disseminating false information” and placed under house arrest following a speaking engagement with European Parliament members in Strasbourg about prison conditions. She was subsequently prevented from traveling to Strasbourg for further meetings. Her home was attacked with Molotov cocktails.¹⁶⁴
157. 2019 saw an increase in harassment of journalists, with 54 detentions, arrests, convictions, or other limits on freedom of the press between January and

¹⁶⁰ *ibid.*, Section 5.

¹⁶¹ UK Government Guidance, *Overseas Business Report – Kazakhstan*, updated 9 July 2020, <https://www.gov.uk/government/publications/overseas-business-risk-kazakhstan/information-on-key-security-and-political-risks-that-uk-businesses-may-face-when-operating-in-kazakhstan>.

¹⁶² *Human Rights Watch World Report 2019*, <https://www.hrw.org/world-report/2019>.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*



September. Adilsoz, a local media watchdog, reported eight attacks, one of which occurred during a press conference hosted by a human rights group in which five journalists had equipment damaged or stolen. Radio Azattyq, the Kazakh-language service of Radio Free Europe/Radio Liberty, complained of repeated interference in its work, including attacks with pepper spray.¹⁶⁵

CONCLUSION

Overwhelming evidence shows that Kazakhstan struggles at every level to keep its word. Domestically, clear-cut laws for achieving justice, fighting corruption, and promoting freedoms and human rights are continuously challenged by the realities of life in the Republic, plagued by corruption, suppression of free speech and arbitrary law enforcement. At the international level, these same attitudes reveal themselves in a pattern of challenge across the globe to unfavourable legal rulings and arbitration awards. The rule of law is touted to the outside world as a benefit and an enticement for those intent on doing business in Kazakhstan, but it only applies as long as it does not interfere with the agenda of those in power, whether in government or behind the scenes. As Kazakhstan promotes itself to the world as a regional financial and business powerhouse, it cannot conceal this glaring contradiction.

¹⁶⁵ *Human Rights Watch World Report 2020*, <https://www.hrw.org/world-report/2020>.



SECTION B: INTERNATIONAL ARBITRATION AND KAZAKHSTAN

INTRODUCTION

Kazakhstan's mineral wealth lies at the heart of investment in the country. This vast country, with equally vast reserves of hydrocarbons, has attracted a considerable amount of foreign investment since the collapse of the Soviet Union.¹⁶⁶ Such investment was necessary to improve, update and expand on what had existed in previous times. Most disputes that Kazakhstan has been involved in have been over the oil and gas industries. Others, as will be seen, involve mining, telecommunications, construction, banking, and even poultry. Investors have predominantly been from the USA, with significant numbers from Turkey, the Netherlands and Canada. The main causes of action have been expropriation and breach of the fair and equitable standard.¹⁶⁷

Kazakhstan is a party to 51 bilateral investment treaties with at least three others signed but not yet in force and 12 Treaties with Investment Provisions.¹⁶⁸ It has been a respondent in more cases than any other Central Asian state. Further, the cases filed against Kazakhstan are significantly larger than those filed against other Central Asian states, mainly because these disputes arose from investments in its rich oil and gas sector.¹⁶⁹

An analysis of some of these cases is instructive in the assessment of how Kazakhstan has treated and treats investors and their investment, how it responds to the arbitral jurisdiction and decisions it has consented to and how it has sought to avoid the consequences of contrary decisions. The "Tristan" case discussed below is of particular significance not only because of the size and importance of the award but also because of what it reveals about Kazakhstan's conduct. It shows that Kazakhstan uses attritional tactics to undermine an investment in an effort to acquire its assets for itself or for the enrichment of individuals within the political elite of the country. It deploys multi-jurisdictional efforts to overturn a final, binding arbitration award. It undertakes protracted and spurious efforts to avoid payment of the award and overturn conservatory orders made in respect of its assets abroad. Reflections of these reactions can be seen in the cases cited below, in which even if the decision did not go

¹⁶⁶ 2,724,900 Sq kilometres.

¹⁶⁷ TDM ISSN 18975-4120, Vol 10, issue 4 September 2013

¹⁶⁸ <https://investmentpolicy.unctad.org/international-investment-agreements/countries/107/kazakhstan>

¹⁶⁹ https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf



in favour of the investor, for whatever reason, a disturbing pattern of behaviour on the part of Kazakhstan emerges.

THE ENERGY CHARTER TREATY¹⁷⁰

1. The basis of the arbitral disputes in which Kazakhstan has been a respondent requires a view of the provisions of the Energy Charter Treaty (ECT) in respect of “fair and equitable treatment” of investors and other protections offered, such as protection from expropriation, together with the provisions that deal with dispute resolution. These provisions are mirrored in other treaties, bilateral or multilateral. The Energy Charter Treaty is of particular importance in Kazakhstan because of the vast wealth of the country in oil and gas and some of its important aspects are set out below.
2. The foreword to the ECT states that it is “one of the most significant multilateral instruments dealing with energy” and provides “an unprecedented legal basis for the creation of an open international energy market for the 21st century”. Over 50 states are involved in its process and the treaty remains open for accession by all countries which are “committed to observance of its principles of open and non-discriminatory energy markets”. The treaty entered into force on 18 April 1998 and Kazakhstan is a signatory to and has ratified the Treaty. The primary focus of the participating countries was to ensure full implementation of the Treaty’s commitments.
3. The objectives of the Treaty were the improvement of the security of energy supply and the maximisation of the efficiency of production, conversion, transport, distribution and use of energy, on an acceptable economic basis. The aim was to create a market based on non-discrimination and on market prices in a climate favourable to the operation of enterprises and the flow of investments and technologies.
4. It was agreed that the signatories would ensure that the international rules on the protection of industrial, commercial and intellectual property would be respected and that access to and development of resources by interested operators would be facilitated, and they undertook to avoid imposing discriminatory rules on operators, notably rules governing the ownership of resources, the internal operations of companies and taxation.

¹⁷⁰ https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf



5. It was agreed that the promotion and protection of investments were to be advanced. The signatories agreed at a national level to provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade. It was affirmed that it was important for the signatory states to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes. The right to repatriate profits or other payments relating to an investment was to be guaranteed.

6. Article 10 of the Treaty deals with the promotion, protection and treatment of investments:

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties **fair and equitable treatment**. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

“Fair and equitable treatment” (FET) is a vital element of the Treaty and at the heart of the relationships that it governs and the subject of many of the disputes that come to arbitration under the treaty.

7. Each contracting Party to the treaty agreed to ensure that its domestic law provided effective means for the assertion of claims and the enforcement of rights with respect to investments, investment agreements and investment authorisations.

8. Article 13 provides that the investments of investors of a contracting party in the area of any other contracting party should not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation except where such expropriation is:



- a) for a purpose which is in the public interest;
 - b) not discriminatory;
 - c) carried out under due process of law; and
 - d) accompanied by the payment of prompt, adequate and effective compensation.
9. Compensation is to amount to the fair market value of the Investment expropriated at the time immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment (the valuation date).
10. "Expropriation" is expressly stated to include the situation where a contracting party expropriates the assets of a company or enterprise in its area in which an investor of any other contracting party has an investment, including through the ownership of shares.
11. Article 26 of the Treaty provides for the settlement of disputes between an investor and a contracting party and provides that such disputes should, if possible, be settled amicably in the first instance and that if that is not possible, then within three months of either party requesting an amicable settlement, the investor may choose to submit the dispute for resolution,
- a) to the courts or administrative tribunals of the Contracting Party to the dispute,
 - b) in accordance with any applicable, previously agreed dispute settlement procedure or
 - c) to international arbitration under the aegis of the ICSID convention, UNICITRAL or an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

Each contracting party gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of Article 26.

11. The Treaty states that the awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute and that each contracting party shall carry out without delay any award and make provision for effective enforcement of such awards.



- **ANATOLIE STATI AND OTHERS V REPUBLIC OF KAZAKHSTAN SCC ARBITRATION V (116/2010)**

In 2010, following an attritional campaign of harassment against Tristan Oil by Kazakhstan tax and other authorities, which amounted to a programme of trumped-up accusations of criminal conspiracies, the bringing of false charges against local management, the making of vastly inflated tax demands, the arbitrary withdrawal of necessary licences and continuous interference by means of unannounced inspections and audits, Tristan's assets were forcibly nationalised by the Kazakh authorities. Government representatives took over the assets and Tristan management were forced to cede control. This arbitrary, unjustified and unlawful seizure had plainly been the long-term intention of the Kazakh authorities.

SCC Arbitration V (116/2010) is the Swedish Arbitration case brought by four parties, Anatolie Stati, Gabriel Stati, Ascom Group S.A and Terra Raf Trans Trading Ltd against the Republic of Kazakhstan under the ECT dispute resolution process via Swedish arbitration.¹⁷¹ Notwithstanding Kazakhstan is a party to the ECT and bound by its terms, it sought to frustrate the operation of its provisions and the Tribunal itself by raising procedural and jurisdictional objections which were found to be without merit.

Having decided that the action was properly brought and that the claimants were investors whose investment attracted the protection of treaty provisions, the Tribunal considered the question of whether there had been a breach of the "fair and equitable treatment" standard in Kazakhstan's conduct vis-à-vis the claimants' investment and that the relevant treatment to be considered was not any one particular action of Kazakhstan but rather its treatment of the claimants' investment over a longer period.¹⁷²

The Tribunal found that from the beginning of contacts between the parties in 1997 to 6 October 2008, a normal sequence of contact and cooperation between the parties had existed regarding the investments that had been and were being made. Significantly, it reached the conclusion that that sequence provided no indication that Kazakhstan considered major aspects of the investment or the conduct of the investors as illegal or that it had any intention to bring the investment to an end.¹⁷³

¹⁷¹ https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf

¹⁷² Para. 945

¹⁷³ Para. 946



However, it then went on to examine Kazakhstan's conduct from 6 October 2008 onwards, setting out a timetable of those actions and reaching decisions as to whether they constituted a breach of the "fair and equitable treatment" standard.

The triggering event of that date was a letter written by the then president of Moldova (Vladimir Voronin) to Nursultan Nazarbayev, the president of Kazakhstan, which made allegations that Anatolie Stati concealed profits from states where he earned them and used the profits from activities in Kazakhstan to fund investments in areas such as South Sudan, which were subject to international sanctions, and that the reputations of Moldova (Anatolie Stati's state of origin) and Kazakhstan were thus damaged.¹⁷⁴

The Tribunal found that based expressly on that letter, President Nazarbayev issued an order dated 14/16 October 2008 to the Kazakh deputy prime minister and the head of the Agency for Fighting Economic and Corruption Crimes (Financial Police) "at the request of the Moldovan party" to thoroughly check the company's work and to take decisions on its further work in the best interests of the country.¹⁷⁵ Following on from these events a campaign of harassment of the claimants ensued as set out in the Tribunal's findings, which included (not exhaustively) prosecution on trumped up criminal charges of local employees, comprehensive and unjustified tax audits, audits of the claimants' use of their subsoil use licences, examination of their compliance with industrial safety, and inspections regarding the payment of export duties, together with numerous unscheduled inspections by different Kazakh agencies, ordered by the prime minister with the involvement, as with other actions, of the financial police. Among these actions was a quite unjustified, unilateral "re-classification" of one of the claimants' pipe-lines as a "trunk" pipeline, requiring the holding of a licence, absence of which led to the imposition of large, penal (USD 348 million and USD 314 million) liabilities for "illegal profits" from such unlicensed operation of a purported trunk pipeline. In July of 2010, then Prime Minister Karim Massimov and then Minister for Oil and Gas Sauat Mynbayev publicly declared the takeover and abrogation of the claimants' subsoil use contracts and seized their companies' assets, many of those assets having been attached by Kazakhstan court administrators earlier in the year.¹⁷⁶ The charge which led to the "trunk pipeline" fines being levied was found by the Tribunal not to accord with Kazakh law and the calculation of the fines to be both unfair and contrary to Kazakh law.

The Tribunal found that Kazakhstan's actions, when taken cumulatively in context to each other, together with the difference in treatment of the claimants' investments

¹⁷⁴ Para 946

¹⁷⁵ Para 950

¹⁷⁶ Para 1084



before and after the President's order of 14/16 October 2008 "permit only the conclusion that the Respondent's (Kazakhstan) conduct after the President's order was a string of coordinated harassment by various institutions of the Respondent and has to be considered as a breach of the obligation to treat investors fairly and equitably, as required by Art. 10(1) ECT".¹⁷⁷

The Tribunal's decision on the controversy surrounding the "re-classification" of the pipeline, which Kazakhstan sought to characterise as a "discovery" rather than a "re-classification" is instructive as to the intentions of Kazakhstan in regard to this and other actions and investments. Had it in truth been a "trunk" pipeline, then that would undoubtedly have been discovered in the 6-year period between 2002 and November 2008 in routine inspections. The evidence disclosed that it was only immediately before the claimed "discovery" (12/11/08) that the Financial Police began to seek information on whether the claimants held licences to operate trunk pipelines, and having received the information that they did not hold such licences (14/11/08) within two days and over a weekend (17/11/08) they "discovered" that the claimants operated a trunk pipeline and ordered the Tax Committee to calculate the profit earned from operating such.¹⁷⁸ Although the claimants received confirmation that it was not in fact a "trunk" pipeline from numerous Kazakh authorities, the Financial Police compelled these authorities to withdraw their statements.¹⁷⁹ Significantly the Tribunal expressed the view that the "discovery" "appears to have been an important step for the State to have obtained the assets of (the claimants) without sacrificing their working ability".¹⁸⁰

The Tribunal was further satisfied that the "barrage" of "sudden inspections" involving "no fewer than seven Kazakh agencies" unduly harassed the claimants, "forcing them to spend their time and resources addressing the inspections, rather than operating normally". Despite filing appropriate complaints with the authorities, no remedies were available to them and no help was forthcoming.

The Tribunal went on to consider other heads of claim, firstly under Art.13 ECT (Expropriation) and decided that because it had already come to the conclusion that Kazakhstan was liable for breach of the FET standard in Art.10(1) and that that breach had caused a taking of the claimants' investment, resulting in respective damages, it was not necessary for the Tribunal to decide whether the same relief would have been granted on the basis of breach of another ECT provision and that such an enquiry would only be necessary if further damages were sought which were not covered by

¹⁷⁷ Para.1086

¹⁷⁸ Para 1088

¹⁷⁹ Para. 1089

¹⁸⁰ Para. 1091



the FET breach.¹⁸¹ Similar reasoning was applied to claims under Art.10(12) – provision of domestic legal remedies; Art. 10(1), the provision of constant protection and security to an investment; the application by Kazakhstan of unreasonable and discriminatory measures; whether there was a breach of the obligations Kazakhstan entered into with respect to the claimants’ investments; Art. 11(2) the obligation to permit the claimants to employ key personnel of their choice (this head of claim related to the unjustified prosecution and imprisonment of an employee of the claimants, in relation to the “trunk pipeline”, an action which caused most of the senior management of the claimants’ companies to flee Kazakhstan to avoid similar arbitrary and unwarranted arrest.)

Having decided that Kazakhstan had violated its obligations under the Energy Charter Treaty with respect to the claimants’ investments, the Tribunal decided that Kazakhstan should pay the claimants a net amount of **USD 497,685.101.00** with interest from 30 April 2009, together with $\frac{3}{4}$ of the costs of arbitration and 50% of the claimants’ costs of legal representation, i.e. **USD 8,975,496.40**. This award was made on 13 December 2013.

APPEAL TO THE SVEA COURT OF APPEAL AND TO SWEDISH SUPREME COURT

Kazakhstan appealed the Arbitration Tribunal’s findings to the Svea Court of Appeal in Sweden, on a number of grounds, seeking to have the award overturned. The appeal court’s judgement was delivered on 9 December 2016, in Stockholm, dismissing Kazakhstan’s appeal and ordering it to pay the cost of the litigation.¹⁸²

The Court found that that in no respect did it find any circumstance that might constitute grounds for the invalidity of the arbitral award, and that this applied with respect to Kazakhstan’s allegations regarding the so-called fraudulent scheme, the alleged filing of false evidence and misleading information during the arbitration, the complaints raised by Kazakhstan concerning alleged irregularities in the appointment of arbitrators in the original proceedings, the contention that in some way the award was contrary to Swedish national law and the argument that the award was flawed because of excess of mandate and procedural irregularity.¹⁸³

On 24 October 2017, on appeal by Kazakhstan to the Swedish Supreme Court, that court decided that Kazakhstan had not shown any circumstance that constituted a

¹⁸¹ Para.1204

¹⁸² Svea Court of Appeal, Division 02, Bench 020106, Case no. 2675-14

¹⁸³ Para. 5.3.5, p.70



grave procedural error in the proceedings before the arbitration Tribunal and rejected Kazakhstan's request for extraordinary review.¹⁸⁴

On 24 January 2018, the Stockholm District Court ordered the attachment of property belonging to Kazakhstan located in Sweden to the amount sufficient to cover the claimants' claims.¹⁸⁵ In so doing, the court stated that "Kazakhstan has clearly shown that Kazakhstan does not intend voluntarily to pay the debt under the legally binding arbitration award, despite the fact that an action for annulment was dismissed by the Svea Court of Appeals and that a request for extraordinary review was dismissed by the Supreme Court. This, taken together with what applicants have stated otherwise in this regard, means that it may reasonably be surmised that Kazakhstan will try to evade the debt by disposing of the property or by other means."¹⁸⁶

INTERNATIONAL LITIGATION TO CHALLENGE THE ARBITRAL AWARD

On 11 May 2016, the claimants petitioned to have the arbitration award they had obtained against Kazakhstan confirmed in the US District Court for the District of Columbia. Kazakhstan sought leave to submit additional grounds in opposition to the petition, on the grounds that the petitioners had "fraudulently and materially misrepresented the LPG Plant construction costs for which they claimed compensation in the (arbitration)." The court noted that this "new evidence had apparently been obtained in connection with proceedings in Sweden to set aside the arbitral award." (Those proceedings were the appeal to the Svea Court of Appeal). The court refused the application to submit additional grounds because the arbitrators had themselves expressly disavowed any reliance on such material.¹⁸⁷

On 23 March 2018, the petition to confirm the arbitral award was granted as a final and appealable order by the US District Court for the District of Columbia in Washington, DC.¹⁸⁸

On 19 April 2018, on appeal by Kazakhstan to the US Court of Appeals for the District of Columbia, the District Court's decision confirming the award was upheld.¹⁸⁹ In doing so, it stated that there is an "emphatic federal policy in favour of arbitral dispute resolution" thus district courts "have little discretion in refusing or deferring enforcement of foreign arbitral awards." It went on to state that the New York

¹⁸⁴ Hogsta Domstolen File appendix 15, Case no. O 613-17

¹⁸⁵ Stockholm District Court T 10498-17

¹⁸⁶ Idem P. 26

¹⁸⁷ Anatolie Stati et al v Republic of Kazakhstan, Civil action No. 14-1638 (ABJ)

¹⁸⁸ Civil Action No.14-1638 (ABJ) <https://www.italaw.com/sites/default/files/case-documents/italaw9719.pdf>

¹⁸⁹ No. 18-7047 United States Court of Appeals for the District of Columbia Circuit



Convention was “clear” that a court may refuse to enforce the award only on the grounds explicitly set out in Article V of the Convention and that Kazakhstan had failed to show that any exceptions to enforceability were appropriate.¹⁹⁰

On 16 July 2019, the District Court entered judgment in favour of the petitioners against Kazakhstan in the sum of US \$ 506,660,597.40 plus interest.

In addition to this suit, Kazakhstan also attempted in October 2017 to use the same US court to file a Racketeer Influenced and Corrupt Organisations Act (RICO) claim against Anatolie Stati, Gabriel Stati and the two companies they own, Ascom Group S.A. and Terra Raf Rans Trading Ltd, along with charges of fraud and civil conspiracy.¹⁹¹ In March 2019 the Kazakhstan claim was dismissed by the court holding “A RICO civil suit is not a vehicle to challenge non-frivolous litigation, or in this case, a valid and final foreign arbitral award.”¹⁹²

The Kazakh authorities have all along refused to comply with the Swedish arbitration court’s decision and, of course, have not paid the award. They have embarked on a campaign in which it is claimed that Tristan fraudulently obtained the award by misrepresentation in the arbitration court. These were claims and arguments that they made in challenging the award in the Swedish courts.¹⁹³

In a clear case of “forum-shopping”, the Kazakh authorities have raised similar arguments to those in the US, seeking rulings from courts elsewhere to refuse to confirm the award. In this they have resoundingly failed, the US Federal Court in DC having issued a final judgment confirming the arbitration award and, further, making it an enforceable US judgment.¹⁹⁴ The Kazakhs have thus exhausted all possible avenues of appeal in both Sweden and the US. The matter is thus *res judicata*.

Further to the above, in the face of Kazakhstan’s repeated claims of fraud by Tristan, courts in Italy, Luxembourg, Belgium and the Netherlands have all recognised the arbitration award and Kazakh assets of \$6.27 billion have been attached and frozen, across a number of jurisdictions.¹⁹⁵ They have also returned to the US and filed a case against affiliates of Argentem, based on their having paid some of Tristan’s legal costs and thus being a party to the discredited allegation of fraud made against Tristan.

¹⁹⁰ *Idem* Para 8 and Article v New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) <https://www.newyorkconvention.org/english>

¹⁹¹ District Court for the District of Columbia Case 1:17-cv-02067-ABJ

¹⁹² Case 1:17-cv-02067-ABJ Memorandum of Opinion 30 March 2019 p.2

¹⁹³ Svea Court of Appeal, Division 02, Bench 020106, Case no. 2675-14

Hogsta Domstolen File Exhibit 66, Case no. O 1888-20

¹⁹⁴ Civil Action No.14-1638 (ABJ) <https://www.italaw.com/sites/default/files/case-documents/italaw9719.pdf>

¹⁹⁵ USA, Belgium, Netherlands, Luxembourg, Italy, Sweden



On 18 May 2020, the Supreme Court of Sweden rejected yet a further petition for a new trial by Kazakhstan, declaring that it had “not shown any facts that can give rise to a review of the case”.¹⁹⁶

In 2006, Black River Asset Management had bought bonds issued by Tristan, which owned and was producing oil and developing valuable oil assets in Kazakhstan, investing in the fields and building a new facility for processing liquefied petroleum gas (LPG). The Black River team who were involved with Tristan subsequently migrated to Argentem Creek Partners.

In most recent developments, Kazakhstan has returned to the courts in USA with a new approach, namely that the funders of the litigation of the claimants, which have included at times Argentem Creek Partners, are themselves guilty of fraud in the proceedings.¹⁹⁷

Attacking in the US courts against a bondholder in the claim against Kazakhstan, which is of no relevance to the substance of the arbitral award, is difficult to comprehend in legal terms. It is certainly irrelevant to the original arbitral dispute. Alongside the attack against Argentem, its CEO Daniel Chapman has been personally named as a defendant, marking a further escalation in Kazakhstan’s tactics.

A similar action is afoot in Gibraltar, where claims for fraudulent misrepresentation, causing loss by unlawful means and unlawful means conspiracy are raised, under the device that a company that was owned by the claimants in the Arbitration was in bankruptcy which, ironically, flowed entirely from the Republic’s wrongful acts in respect of the original claimants’ investments. The Gibraltar Supreme Court has noted the uncommon nature of such claims.¹⁹⁸

Kazakhstan’s behaviour was examined in the United States District Court for the District of Columbia in August 2020 by The Honourable Amy Berman Jackson, the United States District Judge, who had extensive dealings with the litigation to avoid the Stockholm arbitral award.¹⁹⁹ As the Judge observed: “I note that Kazakhstan

¹⁹⁶ Hogsta Domstolen File Exhibit 66, Case no. O 1888-20

¹⁹⁷ Supreme Court of the State of New York, County of New York Case 1:14-cv-01638 -ABJ-DAR, alleging a fraudulent scheme accusing the respondents of “conspiring with and aiding and abetting, s fraudulent scheme and seeking jury trial and compensatory and punitive damages.

¹⁹⁸ Supreme Court of Gibraltar 2020/ORD/072

¹⁹⁹ US District Court for the District of Columbia Civil Action No. 14-CV-1638 Telephonic Status Conference “Don’t get me wrong, the Republic of Kazakhstan has every right to litigate the petition to confirm the arbitral award, and they have every right to appeal my decision. But those proceedings are over. These are post-judgment proceedings. And the Republic of Kazakhstan and its counsel need



repeatedly insists that this is a foreign arbitral award and its assets are in foreign countries. The way to avoid further proceedings in the United States, then, would be to satisfy the arbitral award with those assets and jointly inform the court that that has been accomplished.”²⁰⁰

The award remains unpaid, perpetuating Kazakhstan’s breach of the ECT provision for FET and that which provides for prompt settlement of arbitral awards.

THE MINISTRY OF JUSTICE AND THE STATI CASE

As can be seen from the citation below, news releases on the Ministry of Justice website that quote Minister Beketayev are biased in favour of the Kazakhstan Government and often misrepresent international court findings. Government control of the media and the internet make it difficult for citizens of Kazakhstan to fact-check these reports.

- a. In April 2020, in *National Bank of Kazakhstan and the Republic of Kazakhstan v The Bank of New York Mellon, Anatolie Stati and Ors*, the High Court in London had been referred a question of English law by a court in Belgium considering an attachment or garnishment order issued in October 2017 in respect of securities or cash held by the Bank of New York Mellon (BNYM), a Belgian bank. Those assets were part of the National Fund for the Republic of Kazakhstan held in its London branch for the National Bank of Kazakhstan (NBK) and subject to English law. The BNYM froze the National Fund assets valued at US \$ 22.6 billion. Kazakhstan challenged the Belgian order, which was rejected, although the assets frozen were reduced to US \$ 530,000,000 – the value of the Stati arbitral award. The point of law referred to the English court was whether the BNYM had “no attachable obligation” to the Republic of Kazakhstan.

As the Stati parties had not advanced in the trial that the BNYM held the assets of the National Fund as part of a “sham or simulation or pretence” to shield assets of the Republic from creditors, the High Court found that BNYM owed obligations solely to NBK and not Kazakhstan under a Global Custody Agreement (GCA) and had no obligation to pay any

to get that into their heads because the level of intransigence that we have seen today is not acceptable and it officially ends today.” p. 3 @ line 18.

²⁰⁰ *ibid.* p. 27 @ line 13



debt.²⁰¹ The High court left the matter to the Belgian Court to decide whether the Stati parties could advance such arguments in that jurisdiction and whether the principle of *res judicata* might apply.

The Ministry of Justice website touted the ruling as “a further defeat” for Anatoli and Gabriel Stati in an article headlined “Kazakhstan succeeds in English High Court trial regarding National Bank assets.” The Ministry of Justice website quotes Minister Beketayev as saying: “Once again, the English High Court has found against the Statis. Three years ago, the Court found there is a *prima facie* case of fraud by the Statis. Now it has found they have frozen the assets of an uninvolved party. We remain determined to take all necessary steps to fight the Statis’ arbitration fraud in every jurisdiction they’ve chosen to take action.”²⁰² This misrepresents the issues raised in the London proceedings which solely concerned whether assets within the BNYM could be attached to enforce the original Swedish arbitral award. “*Prima facie* case of fraud” was rejected by the Belgian court in December 2019 and was not the outcome of the decision in London.²⁰³

- b. The allegation of fraud cited above was highlighted again in a Ministry of Justice article in a costs judgement from the April 2020 hearing in which it was alleged that the Statis “had obtained an arbitral award by fraud and are attempting to enforce it in multiple countries.” The article claimed that the Statis “concealed their fraud during the arbitration but, since 2015, evidence of it has emerged gradually.”²⁰⁴
- c. In a Ministry of Justice press release regarding a ruling in August 2020 in U.S. District Court for the District of Columbia, the headline read “Kazakhstan Secures Partial Victory against Statis in Hard-Fought Washington, DC Discovery Dispute.” In reality, the U.S. District Court rejected Kazakhstan’s objections to a discovery order in the case.²⁰⁵

²⁰¹ England and Wales High Court (Commercial Court) Decisions, <https://www.bailii.org/ew/cases/EWHC/Comm/2020/916.html>.

²⁰² “Kazakhstan succeeds in English High Court trial regarding National Bank assets,” <https://www.gov.kz/memleket/entities/adilet/press/news/details/57520?lang=en>.

²⁰³ “Belgian Court Confirms US\$540 Million Award Against the Republic of Kazakhstan,” <https://www.prnewswire.com/in/news-releases/belgian-court-confirms-us-540-million-award-against-the-republic-of-kazakhstan-849538461.html>.

²⁰⁴ “English High Court orders Stati to pay over US \$3.7 million in legal costs to Kazakhstan,” <https://www.gov.kz/memleket/entities/adilet/press/news/details/145238?lang=en>.

²⁰⁵ “Kazakhstan Secures Partial Victory Against Statis in Hard-Fought Washington, DC Discovery Dispute,” Press Centre, Ministry of Justice of the Republic of Kazakhstan,



- d. Beketayev has taken a personal interest in the Stati case, testifying in the April hearing before the London High Court.²⁰⁶
- e. The Stati case is one of many involving protracted legal battles in which the Republic of Kazakhstan sought to overturn arbitration awards. A list of additional disputes can be found here:
<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/107/kazakhstan>.

- **Biedermann USA v Kazakhstan SCC Case No. 97/1996**

In 1999, a California-based Oil company, Biedermann International, successfully claimed for expropriation against the Republic of Kazakhstan, invoking the terms of the US-Kazakh Bilateral Investment Treaty (BIT). The case is the first treaty claim under SCC rules and the first where the provisions of the US-Kazakh BIT were successfully deployed by a foreign investor in an investor-state arbitration - although it is possible that other arbitrations have taken place without any public disclosure.

The Biedermann case arose out of the treatment it received at the hands of Kazakh authorities in relation to the firm's 25-year joint venture agreement to explore the Kenbai oil field. A Tribunal operating under the Stockholm arbitration rules found that Kazakhstan had taken measures which amounted to expropriation in withdrawing a land-use permit, merely 6 weeks after having finally granted Biedermann the necessary drilling permits.

The Tribunal held that the 6-week window from April 30, 1992 to June 15, 1992, was "clearly insufficient" as a basis for Biedermann to exercise its legitimate expectations of long-term profits from the oil exploration deal.

In an award handed down on August 2, 1999, Biedermann International won a claim for damages for its sunk costs and interest and was awarded US \$8,900,900. A much larger claim for lost profits was not upheld in the case.

<https://www.gov.kz/memleket/entities/adilet/press/news/details/87809?lang=en>; Order of the United States District Court for the District of Columbia, 11 August 2020, https://jusmundi.com/en/document/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-order-of-the-united-states-district-court-for-the-district-of-columbia-tuesday-11th-august-2020#decision_11976.

²⁰⁶ "The Truth and Lies of Marat Beketayev in the Stati Case," *Kazakhstan 2.0*, April 28, 2020, https://kz.expert/en/news/analitika/1927_the_truth_and_lies_ofmarat_beketayev_inthe_stati_case.



The award cannot be published under a deal reached with the government of Kazakhstan, which cooperated fully in paying compensation, provided that the award would not be publicized. This is a recurrent theme in arbitration cases concerning Kazakhstan where settlement is reached.

- **World Wide Minerals (Canada) v Republic of Kazakhstan 98 CV1199-RCL 2000- 2013 International Arbitration Tribunal**

This was a US \$ 1.9 billion claim launched by a Canadian mining company, World Wide Minerals (WWM), which had contracted to manage and operate a large uranium processing facility in Kazakhstan and assist in its reorganisation and re-admission to economic viability. WWM also agreed to lend money to the Republic of Kazakhstan to meet outstanding liabilities such as past unpaid wages and pensions and as working capital. WWM was to have the right to freely market uranium it produced in Kazakhstan in the international market and was specifically advised by Kazakhstan that that would be the case. The government of Kazakhstan contracted that it would cooperate fully in the venture.

WWM invested heavily in the repair and modernisation of the uranium processing facilities, and entered into contracts to supply uranium with Consumers Energy in the USA and Taiwan Power, only for Kazakhstan to breach its obligations by imposing restrictions that resulted in the suspension of operations and the eventual bankruptcy, confiscation and forced sale of WWM's assets by Kazakhstan. The result was that the state-owned uranium producer benefited from WWM's imposed inability to sell its uranium on the world market to become the world's largest supplier of uranium.

In 2006, WWM commenced arbitration proceedings under UNICITRAL rules in Stockholm. In accordance with Kazakhstan's own Foreign Investment Law, it offered settlement talks, but no real response was received to that offer and in 2007 arbitral proceedings were again instituted by WWM.

The Tribunal issued an award dated 29 October 2019 totalling US \$40 million (plus US \$10 million legal costs) in favour of the claimants, concluding that Kazakhstan had improperly withheld a uranium export license for export to USA, without which their investment had little ongoing value and had applied arbitrary and ad hoc processes which were a clear breach of the fair and equitable treatment standards of the relevant BIT.

The award was challenged by Kazakhstan at the Commercial Court in London, which found, in November 2020, that the parts of the award quantifying loss to WWM, should be set aside and the case remitted to the Tribunal for a quantification of the loss referable



to the breaches found by the Tribunal. These were the only parts of the award set aside by the Commercial Court. All other findings of the Tribunal, in particular those that confirmed breaches of the Foreign Investment Law by Kazakhstan, remain in force.²⁰⁷

- **AIG (USA) V Republic of Kazakhstan ARB/01/6 2001 ICSID**

This was a US \$13.5 million claim arising out of the cancellation of a project for the development of a residential housing complex, for which land had been purchased (significantly, in the light of what later occurred, adjacent to the private residence of the President). All necessary permissions at a local and national level had been obtained for the project and work by the claimants had commenced on the design, engineering, procurement and the financing work necessary for the project. Engineering networks had been established on the property together with other improvements.

A US \$7.3 million contract was entered into for the construction of the first phase and agents instructed who launched a marketing programme. US \$3,500,000 was spent on designing and implementing the project, before the Government of Kazakhstan ordered the joint project to permanently halt construction. The Government informed the claimants verbally that it had decided to cancel the project because the property was needed for a “national arboretum.” The Governor (Akim) of the Almaty Oblast, where the project was located, informed the claimants that the permissions had been granted in error and that the claimants would not be able to construct the project on the site. He was to inform the claimants that this was a decision made at the highest levels of government and that the only recourse available to the claimants would be to construct their project on another site that was offered.

On April 2, 2001, the property was transferred to Almaty City by Presidential decree and thus out of the jurisdiction of the Almaty Oblast. The construction permits were declared invalid. The claimants’ contractors were physically expelled from the site. The claimants had no option but to accept that the government of Kazakhstan had terminated the contract and claimed breaches of the BIT as regards Article II (2) – fair and equitable treatment and protection from arbitrary or discriminatory measures and Art. III (1) protection from expropriation and nationalisation.

Despite its ratification of the treaty and despite the voluminous correspondence sent to it during the initial procedures to set up the arbitration, Kazakhstan denied knowledge of any communications prior to July 2002, from the claimants or from ICSID relating to the appointment of the arbitrators. It then contended that the

²⁰⁷ <https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=27664>



Tribunal had been appointed without proper notice. This contention was dismissed by the Tribunal, which also decided a jurisdictional objection raised by the respondents against them. The respondent also sought to suggest that the Oblast had no authority to grant construction permits to the claimants or that there had been some “mistake” in granting them, but this was not referenced by Kazakh law.

The Tribunal found that it had been proved that the claimants’ investment had been expropriated and that it was not in accordance with procedures established by current Kazakh legislation. It recorded a finding that the taking was arbitrary, in wilful disregard of due process of law and the series of acts from February 26, 2000, culminating in the events of May 15, 2000, were shocking to “all sense of juridical propriety”. The contention raised by Kazakhstan that compensation should not be awarded or should be reduced because the claimants had not accepted the “verbal” offer of alternative land for their project was rejected by the Tribunal on the basis that the doctrine of mitigation of loss had no place here and that the legal consequences of expropriation necessarily had to be compensation in the form of currency.

The Tribunal issued an award dated 7 October 2003 totalling USD 5,959,330 plus 1,250,000 in costs in favour of the investor. Enforcement was disputed in UK courts in 2005, where the court held that the award could not be enforced against certain state funds. Nonetheless, there was no determination that undermined the validity of the award.²⁰⁸

- **Rumeli Telekom and Telsim Mobil Telekomunikasyon Hizmetleri A.S (Turkey). v Republic of Kazakhstan ARB/05/16 2005 ICSID²⁰⁹**

The two Turkish telecom companies, through their 60% shareholding in Kazakh company KaR-Tel, concluded an investment contract in 1998 with the Kazakh investment committee for “*the right to use the radio-frequency spectrum for the creation and operation of a GSM-standard communications network in the Republic of Kazakhstan*”. This contract obliged the Turkish companies to make substantial investments in KaR - Tel, apply advanced technology and provide the investment committee with regular and detailed information on the investment’s progress. In return, KaR-Tel was granted tax and other benefits, including a five-year total exemption from corporate and property tax, and reduced rates for the five years thereafter. The investment contract was to expire on July 31, 2009. Once KaR-Tel was operating successfully, Kazakhstan devised a scheme to orchestrate a definitive expulsion of the claimants

²⁰⁸ AIG Capital Partners Inc & Anor. v Kazakhstan [2005] EWHC (Comm) (20 October 2005)

²⁰⁹ <https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf>

<https://www.iisd.org/itn/en/2010/04/08/ad-hoc-committee-confirms-that-kazakhstan-is-on-the-hook-for-us-125-million/>



from KaR-Tel for its sole benefit. The contract was unilaterally and unjustifiably terminated by the Kazakh investment committee in 2001.

Rumeli and Telsim went to arbitration and, in familiar fashion, Kazakhstan challenged the jurisdiction of the Tribunal on grounds which were found to be without foundation. Rumeli and Telsim argued that Kazakhstan had breached obligations it owed to foreign investors under international law and the Kazakhstan-Turkey BIT.

In 2008, the Tribunal ordered Kazakhstan to pay an award of US \$125 million in damages and 50% of the claimants' legal fees and costs. It was found that Kazakhstan had breached the investment contract and that that "decision was arbitrary, unfair, unjust, lacked due process and did not respect the investor's reasonable and legitimate expectations", and "lacked transparency and due process and were unfair, in contradiction with the requirements of the fair and equitable treatment principle".²¹⁰ Further, "In summary, the conclusion of the Tribunal is that this was a case of 'creeping' expropriation, instigated by the decision of the Investment Committee which was then collusively and improperly communicated to Telcom Invest and its shareholders before Claimants were made aware of it, and which proceeded via a series of court decisions, culminating in the final decision of the Presidium of the Supreme Court. The decision of the Investment Committee was moreover unfair and inequitable in itself, as the Tribunal has found".²¹¹

- **CCL Oil v Kazakhstan SCC Case No. 122/2001**

CCL Oil v Kazakhstan concerned the termination of a concession agreement for use and management of the State's shareholding in an oil refinery. The Tribunal in that case also noted that "the confiscation or expropriation of property or other rights may take the form of "creeping" or "covert" encroachment on private assets, whereby the owner of the property or rights is exposed to measures which make the enjoyment of rights impossible or essentially reduced and forces the owner to abandon his ownership or rights".²¹²

Although the Tribunal, in the latter case, found that there had been no expropriation within the meaning of the Foreign Investment Law and thus found in favour of Kazakhstan, it nonetheless, in its jurisdictional phase, consistently found against the representations made by Kazakhstan, which were aimed at frustrating a proper arbitral process.

²¹⁰ Para.615; Para 618

²¹¹ Para 708

²¹² Jurisdiction award rendered in 2003 p. 173



- **Caratube International Oil Company and Davincci Hourani v. Republic of Kazakhstan ICSID CASE No. ARB/13/13** ²¹³

This dispute gave rise to several proceedings. In Caratube I, an ICSID case brought under the Kazakhstan - USA BIT, the claim was dismissed for lack of jurisdiction, which resulted in successful annulment proceedings.²¹⁴ The later claim, for expropriation, breach of the fair and equitable treatment and full security and protection standards, among others, relied on breaches of contract and Kazakhstan's own Foreign Investment Law (FIL), which contains substantive protections.

Kazakhstan sought to frustrate the second proceedings by claiming an abuse of process on the part of Caratube International Oil Company (CIOC) by bringing repetitive claims which should have been contained in Caratube I. This argument was rejected. Kazakhstan sought further to claim that the claims were contractual in nature and therefore governed by Kazakhstan law and its statute of limitations, and were out of time. Again, this argument was rejected because the Tribunal found that the claimants had acted diligently in initiating Caratube I and the consequent annulment proceedings. It was wrong on international law principles to find against a party who had acted diligently in pursuit of a properly grounded claim. Kazakhstan's further arguments that the claims were barred by the doctrine of estoppel and of res judicata also failed, as did objections of the status of CIOC as an "investor" and relating to the question of consent.

CIOC claimed US \$1,214,400,000 for damages and compensation (including interest) arising out of the appropriation of its investment, a significant oil field in an oil rich area of Kazakhstan. It claimed that it had invested millions of dollars in the exploration of the oil field and its development and that it was entitled to an exclusive 25-year commercial production licence since it had a commercial discovery. It further claimed for damages in respect of the moral harm that it had suffered at the hands of Kazakhstan.

²¹³ <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/297/caratube-v-kazakhstan>
<https://www.italaw.com/sites/default/files/case-documents/italaw3082.pdf>
<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/08/12>
<https://www.italaw.com/sites/default/files/case-documents/italaw1100.pdf>
https://www.transnational-dispute-management.com/downloads/19208_case_report_caratube_v_kazakhstan_award_2017.pdf
<https://www.iisd.org/itn/en/2017/12/21/kazakhstan-liable-expropriation-hourani-family-investment-second-round-icsid-arbitration-caratube-international-oil-company-llp-devincci-salah-hourani-icsid-case-arb-13-13/>

²¹⁴ ICSID CASE NO. ARB/08/12



For 5 years, CIOC had successfully and without serious controversy pursued its investment in the oil field until Kazakhstan unlawfully and unilaterally terminated the contract and expropriated CIOC of its investment, following a recommendation from the prosecutors' office. The allegation made was that the terminations were due to CIOC's failure to carry out essential exploration works, amounting to material breaches. The Tribunal decided that Kazakhstan had "unlawfully terminated the contract and that due to this unlawful termination, CIOC, at the time of the termination, was unreasonably and substantially deprived of its existing rights under the contract".²¹⁵ Further "...in the absence of the contract, which was CIOC's sole *raison d'être*, CIOC's investment in the project was virtually worthless".²¹⁶ Kazakhstan had "breached its obligations towards CIOC under the contract, Kazakh law, the FIL and/or international law".²¹⁷

The Tribunal found, by a majority, that CIOC, through the unlawful termination of the contract, had been unlawfully expropriated of its rights under the contract. Based on an analysis of the involvement of the Aktobe Prosecutor and the General Prosecutor's office in the termination of the contract and their interventions in the allegations of supposed breaches of contract by the claimants and the actions of the Kazakhstan National Bank in taking *de facto* control of the Caratube field, the Tribunal found that the unreasonable and substantial deprivation of CIOC's existing rights under the contract was caused by a sovereign act, "in particular the respondents' intervention in the private contract between CIOC and the MEMR, through the Aktobe Prosecutor's Office and the General Prosecutor's Office."²¹⁸ These interventions were found not to correspond to normal, regular practice. The comment can be made that, as is plain, in any well-founded system operating under the rule of law, a prosecutor, absent any allegation of criminal fraud, has no locus for intervention in a private contract.

Significantly, the Tribunal found that CIOC had established convincingly that it was the interventions by the Prosecutors' Offices that ignited the process that was intended to, and resulted in, the termination of the contract and that Kazakhstan terminated the contract using its "sovereign powers" rather than acting in a private manner as a party to the contract.²¹⁹ The Tribunal followed the expropriation standards of customary international law as adopted by the legal standards of Kazakhstan's FIL. Furthermore, a majority of the Tribunal found that the real motivation behind the termination of the contract lay in the family and political context which underlay the case and that

²¹⁵ Para 905

²¹⁶ Para 904

²¹⁷ Para. 1268

²¹⁸ Paras. 934 and 935

²¹⁹ Para. 935



Kazakhstan's actions coincided with the falling out of favour with the respondent of the family of the second claimant.²²⁰

The Tribunal found that the facts in the record of the present arbitration were troubling and stated that the claimants' allegations of harassment by the respondent had "occupied and preoccupied" it from "the beginning and throughout" the proceedings.²²¹ The previous Tribunal, which had declined jurisdiction over the claims, ultimately denied the claimants' requests for provisional measures because they had not satisfied the burden of proof in establishing that the respondents had been involved in the acts of harassment complained of.²²² However, it nonetheless clarified that doubts remained and it was troubled by them. This second Tribunal maintained that position, stating that it was troubled by the "conspicuous timing and circumstances of the alleged events when put into perspective and viewed against the timeline as a whole".²²³

The claims for lost profit and opportunity were rejected for uncertainty as were the claims for moral damage. The Tribunal awarded the claimants US \$39.2 million plus interest for the sunk investment costs. The respondents were ordered to pay the claimants for advance payments made by the claimants on their behalf to ICSID to meet costs to a total of US \$ 1,207,757.

- **RUBY ROZ AGRICOL LLP v. REPUBLIC OF KAZAKHSTAN UNCITRAL IIC 602 (2013), SCI:3471053 2, 1 August 2013**

Ruby Roz's main activity was the production, breeding and marketing of poultry for the Kazakh market. It sought to bring arbitral proceedings against Kazakhstan for the expropriation of its assets, alleging that very serious losses had been caused through actions that were in violation of the law of Kazakhstan and the principles of international law.

In its conclusions, the Tribunal found that there was no valid arbitration agreement between the parties and that even if it might be tempted to do so, could not take a "pro-arbitration stand" and declined jurisdiction to determine the dispute, a decision upheld by the Commercial Court in London.²²⁴ In reaching that decision, however, it

²²⁰ Para.936

²²¹ Para. 909

²²² ICSID CASE NO. ARB/08/12

²²³ Para. 913

²²⁴ Ruby Roz Agricol v Republic of Kazakhstan Case No. CL-2013-001028 Knowles J.



found it necessary to consider the factual matrix of the case, as advanced by both parties.

Ruby Roz had been established in Kazakhstan by a Mr El-Badaoui and his wife. Its operations consisted of a poultry facility located in Almaty on land said to have been bought from Issam Hourani, the brother in law of a Mr Rakhat Aliyev who was married to Mrs Dariga Nazarbayeva, eldest daughter of the President of Kazakhstan, from whom he was divorced in June 2007. Mr El-Badaoui claimed to have paid protection money to Issam Hourani in order to carry out his business.

By 2002 Ruby Roz was a modern business employing many hundreds of employees. It alleged that, when close to achieving its business and contractual objectives, it was “raided” by Issam Hourani.²²⁵ Mr El-Badaoui claimed in a witness statement that in August 2004, he and his wife were stopped at Almaty Airport and prevented from entering Kazakhstan, and he was forced into discussions with Issam Hourani and given to understand that he should sell Ruby Roz.

On 2 September 2004 Mr. El-Badoui and his wife sold the company to a Kassem Omar, Issam Hourani’s brother in law, for US \$9.6 million. The allegations of forced sale were, of course, denied by Issam Hourani.²²⁶

Ruby Roz appears to have flourished under its new ownership, by 2007 becoming the biggest producer of poultry meat in the country. According to an expert witness, a breakdown in relationships between the President of Kazakhstan and his son- in-law Mr Aliyev had reached such a low point in May 2007, that he was stripped of all his governmental positions and a “campaign of persecution” launched against him and those associated with him.²²⁷ This included Issam Hourani and his brother Davinnci and their family who “operated significant and diverse businesses, but (*were*) currently under attack by the Nazarbayev government because they were viewed as close associates of Rakhat Aliyev and their assets were presumed somehow to be controlled by or available to fund Rakhat Aliyev”.

Apart from, or possibly because of, his marriage to Dariga Nazarbayeva, Aliyev, a surgeon by training, had held senior positions in Kazakhstan’s domestic intelligence agency and foreign ministry, headed the tax police and been appointed as ambassador to Austria. He and his wife, an amateur opera singer, who had been appointed as Vice-Prime Minister by Presidential decree (i.e. by her father) in 2015, had amassed a considerable fortune in banking and the media, something approaching US \$600

²²⁵ See Caratube I and II at 5 above

²²⁶ Paras. 39,40,41,42,43 of the Award on Jurisdiction

²²⁷ Para 45 Professor Scott Horton First Report



million in her case.²²⁸ Aliyev was convicted in absentia for various crimes in Kazakhstan, Austria having refused to extradite him. He was found dead in an Austrian jail cell pending his trial for the kidnapping and murder of two Kazakh bank officials.²²⁹

Issam Hourani left Kazakhstan in April 2007.²³⁰ Davinnci Hourani, his brother, remained but, in a witness statement to the Tribunal, spoke of his growing concern at what he described as “unusual governmental interest and interference with my family and their businesses” ... “It was becoming clear that my family was being targeted by the Kazakh authorities, apparently because of the family connection with Mr Aliyev through marriage.”²³¹ He described how, on 27 June 2007, armed police had raided the offices from which all the Hourani family businesses were managed, including Ruby Roz.

Significantly, two days after the raid, on 29 June 2007, an agreement for the sale of Ruby Roz was signed between Kassem Omar as seller and Dariga Nazarbayeva as buyer.²³²

On 10 January 2021, Kazakhstan’s ruling party, Nur Otan, led by the now-titled First President Nursultan Nazarbayev, topped the election results, “capturing” 71.1% of the vote, in an election which the Organisation for Security and Cooperation in Europe (OSCE) said lacked genuine competition.²³³ Dariga Nazarbayeva, who had been appointed to the Senate previously and risen to be Speaker of that body and hence successor to the new president, on the resignation of her father from the presidency, prior to her departure from that post in May 2020, is among the new members sent by Nur Otan to the newly elected parliament.

- **AES Corporation and Tau Power BV v Kazakhstan ICSID Case No. ARB/09/10**

AES is a US power company that owned Tau Power and was one of the first foreign companies to invest in Kazakhstan. AES was subjected to a forced nationalization by Kazakhstan of its companies. The subject matter of the dispute concerned fines and

²¹ "Дарига Назарбаева – Forbes Казахстан". www.forbes.kz/

²²⁹ <https://www.nytimes.com/2019/03/20/world/asia/rise-of-first-daughter-in-kazakhstan-fuels-talk-of-succession.html>

²³⁰ Para. 47

²³¹ Para. 47

²³² Para.53

²³³ <https://www.osce.org/files/f/documents/c/6/475538.pdf>



tariff restrictions imposed by the Kazakhstan competition authorities that had adverse effect on their legitimate expectation they would have the opportunity to make a reasonable return on their investment and repatriate such return within a reasonable time frame.

The Tribunal found that “in view of the drastic character and extended duration of the restrictions imposed.....such restrictions cannot be deemed to have been justified by the underlying policy” and “... went beyond what could have been considered a proportional and reasonable response to the threat of collapse of the electricity supply system.”²³⁴ The Kazakh authorities were therefore in breach of the FET standard afforded by the ECT.

According to the claimants, these actions included harassment and coercion of AES entities and their employees, resulting in some of them leaving the country to avoid such behaviours. The Tribunal found that “whilst it is possible that the manner in which these investigations were conducted may not have been exemplary”, the factual elements raised were not sufficient for a finding of “coercion or harassment” or a breach of the FET standard for those reasons.²³⁵ The Tribunal, despite finding that the tariff policy had breached the FET standard, declined to award damages as these had not been specifically allocated to the particular breach by the claimants. The claimants had to pay 67% of the court proceeding costs. Although in one sense this was a victory for the claimants, it was none the less a Pyrrhic one.

Big Sky Energy Corporation v. Republic of Kazakhstan ICSID Case No. ARB/17/22

This case concerns an indirect shareholding through a Canadian subsidiary of Big Sky Canada - Big Sky Energy Kazakhstan Ltd, in a Kazakh oil and gas company Kozhan LLP, which held exploration and development rights to three oil fields in Kazakhstan.
²³⁶

Big Sky Canada lost its 100% shareholding in Kozhan, receiving no compensation for the dispossession. Big Sky claims that the loss followed a series of illegal domestic judicial proceedings in Kazakhstan, which began at about the time that Kozhan’s market value had significantly increased following Big Sky’s multimillion-dollar investment in the company and its successful operation.²³⁷

²³⁴ Award. para 433

²³⁵ Para. 319

²³⁶ Investmentpolicy.unctad.org

²³⁷ <https://globalarbitrationreview.com/kazakhstan-faces-icsid-claim-over-oil-fields>



Big Sky Energy initiated a claim at the ICSID against Kazakhstan the claim was based on alleged breaches of fair and equitable treatment, minimum standard of treatment, including denial of justice claims, most-favoured nation treatment and indirect expropriation, among other breaches. The case is still pending. The pattern of conduct of Kazakhstan follows that of previous cases.

- **Devincci Salah Hourani and Issam Salah Hourani v. Republic of Kazakhstan ICSID Case No. ARB/15/13**

This case arose out of the unlawful appropriation and liquidation of a pharmaceutical manufacturer named Pharm Industry. The facts involve the seizure of a 10-hectare plot of land, transferred to Pharm Industry by one of the claimants, and the arbitrary annulment of the decree of a 42 hectare plot it had been granted.

The claim was for US \$170 million. Kazakhstan's actions can be linked to the claimants' connections to a political rival and family connection of the then-President, who had fallen out with the "first family" due to internal disputes. A comparison can be drawn with the Ruby Roz case above.

In June 2020, the parties filed a request for discontinuance of the proceedings. An order taking note of the discontinuance was issued on 15 July 2020. The terms of the order and of the discontinuance are not publicly available. The pattern of conduct of Kazakhstan follows that of previous cases.

- **Aktau Petrol Ticaret A.S. v. Republic of Kazakhstan ICSID Case No. ARB/15/8**

Between 2006 and 2014 Aktau Petrol Ticaret A.S. (Aktau) had invested in oil transportation and storage facilities at the port of Aktau. Aktau's owners had entered into a commercial relationship with Askar Kulibayev, who was a prominent Kazakh businessman and former government official and, not insignificantly in the context of this and other similar disputes, related by marriage to the President of Kazakhstan.

Aktau claimed that this commercial relationship, entered into for reason of the influence in high circles that Kulibayev had, was abused by him, in his orchestration of the multiple court proceedings that led to the expropriation of Aktau's investments. The claims arose out of a series of measures taken by the courts of Kazakhstan, which resulted in the unlawful transfer of the claimant's assets to a third party connected to the Government of Kazakhstan, through the "executive action" of court bailiffs that went uncorrected by the courts.



Allegations of judicial corruption were rejected, but the Tribunal stated that the courts had failed to correct the actions of the court bailiffs despite having “every available opportunity” to do so and were “uninterested” and thus “crystallised” the expropriation”. The appellate courts “demonstrably lacked any will to intervene” which the Tribunal found could have made Kazakhstan also liable for a denial of justice due to a “failure of proper judicial supervision of executive action”.

The Tribunal decided that it had jurisdiction and held Kazakhstan to be in breach of the protections provided by the ECT and the Turkey - Kazakhstan BIT against uncompensated expropriation. It further held that Kazakhstan had violated the FET provision of the Switzerland - Kazakhstan BIT by virtue of a most favoured nation clause.²³⁸

The Tribunal awarded the claimant US \$22.7 million in a claim for US \$150 million, on 13 November 2017, together with the costs of the arbitration. There are pending annulment proceedings, Kazakhstan once more not accepting the binding nature of arbitration under its BIT with Turkey or under the ECT. The award is not currently publicly available.

²³⁸ <http://www.derainsgharavi.com/news/page/10/>