

**BILATERAL INVESTMENT TREATIES
OF KAZAKHSTAN**

**52 TREATIES
SINCE 1992**

BILATERAL INVESTMENT TREATY



KAZAKHSTAN

USA



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ENERGY AND NATURAL RESOURCES LAW | 30 JANUARY 2020

**TREATY BETWEEN THE UNITED STATES OF AMERICA AND
THE REPUBLIC OF KAZAKHSTAN CONCERNING
THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT**



19 MAY 1992



PREAMBLE.

MAIN GOALS

- A. Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;
- B. Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;
- C. Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;
- D. Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights

PREAMBLE

WHATS MISSING?

- Reference to right to regulate (e.g. regulatory autonomy, policy space, flexibility to introduce new regulations) **No**
- Reference to sustainable development **No**
- Reference to social investment aspects (e.g. ~~human rights, labour, health, CSR, poverty reduction~~) **No / Yes**
- Reference to environmental aspects (e.g. plant or animal life, biodiversity, climate change) **No**

DEFINITION OF INVESTMENT

ASSET BASED DEFINITION

"Investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

- (i) tangible and intangible property, including movable and immovable property, as well as rights, such as mortgages, liens and pledges;
- (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
- (iv) intellectual property which includes, inter alia, rights relating to:
 - literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and
- (v) any right conferred by law or contract, and any licenses and permits pursuant to law;

SUBSTANTIAL BUSINESS ACTIVITY

INVESTOR

- Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.
- "company" of a Party means any kind of corporation, company, association, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled

APPLICABILITY PRE- AND POST-ESTABLISHMENT

ARTICLE 13

- It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

STANDARDS OF TREATMENT

ARTICLE 2.1

“Each Party shall **permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals** or companies, or of nationals or companies of any third country, whichever is the most favorable...”

Treaty is FET qualified:

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

Prohibition on unreasonable, arbitrary or discriminatory measures:

Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.

NT VS. MFN

ARTICLE 2.1

- “Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the **most favorable**...”
- right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty

AND THEN

- The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

SENIOR MANAGEMENT / NATIONALITY

ARTICLE 2.4

Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

UMBRELLA CLAUSE

ARTICLE 2.2 (C)

- *"Each Party shall observe any obligation it may have entered into with regard to investments."*

obliges host state to bring foreign investment under the protective "umbrella" of the BIT / broad / catch-all provision

- The significance of such an application is that the international arbitration tribunal constituted under the BIT would thereby have jurisdiction over breach-of-contract claims since a breach of the investment contract is also a breach of the umbrella clause.
Critically, this means that the investor can now seek redress of a breach of any investment contract between it and a Contracting State through international arbitration under the BIT.

NO PERFORMANCE REQUIREMENTS SPECIFIC LIST

- ARTICLE 2.5
- Neither Party shall impose performance requirements as condition of, establishment, expansion or maintenance of investments, which require or enforce commitments
 - to export goods produced, or
 - which specify that goods or services must purchased locally, or
 - which impose any other similar requirements.

EXPROPRIATION

ARTICLE 3.1

- Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except:
 1. for public purpose;
 2. in a nondiscriminatory manner;
 3. upon payment of prompt, adequate and effective compensation
- A national, or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law

CURRENCY CONTROL PROVISION

ARTICLE 4

Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include:

- (a) returns;
- (b) compensation pursuant to Article III;
- (c) payments arising out of an investment dispute;
- (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement;
- (e) proceeds from the sale or liquidation of all or any part of an investment; and
- (f) additional contributions to capital for the maintenance or development of an investment.

FORUMS FOR DISPUTE SETTLEMENT

ARTICLE 6 & 7

Disputes between USA and Kazakhstan - Arbitration rules of UNCITRAL

1. investors seek a resolution through consultation and negotiation, try local courts or after 6 months period, and if does not help then:
 - arbitration in ICSID using 1965 ICSID Convention
 - Additional Facility of the ICSID, if the Centre is not available
 - Arbitration Rules of UNCITRAL
 - any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed

Investors typically prefer ICSID awards over other arbitral awards, as the host state is more likely to comply with an ICSID award. This is because ICSID is part of the **World Bank Group**, and the host state's failure to comply with the award may jeopardise the state's access to World Bank funding or international credit in general.

CARVE OUTS

(a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States or

(b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes

No requirement for transparency of arbitral proceedings.

POLITICAL SUBDIVISIONS

ARTICLE 7 & 12

- a political subdivision is "...whether or not organized for pecuniary gain, or privately or governmentally owned or controlled"
- Political subdivision shall be treated as a company for dispute settlement purposes...
- Treaty shall apply to the political subdivisions of the Parties as if they are companies.

SURVIVAL/"SUNSET" CLAUSE

ARTICLE 13

- Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.
- With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be **effective for a further period of ten years** from such date of termination.

FINAL PROVISION

AUTHENTIC TEXTS / FORMULATION

- DONE in duplicate at Washington, this nineteenth day of May, 1992 in the English and Russian languages, both texts being equally authentic. A Kazakh language text shall be prepared which shall be considered equally authentic upon an exchange of diplomatic notes confirming its conformity with the English language text.



NEGATIVE-LIST RESERVATIONS

ANNEX

USA / national treatment

1. air transportation;
2. ocean and coastal shipping;
3. banking;
4. insurance;
5. government grants;
6. government insurance and loan programs;
7. energy and power production;
8. custom house brokers;
9. ownership of real property;
10. ownership and operation of broadcast or common carrier radio and television stations;
11. ownership of shares in the Communications Satellite Corporation;
12. the provision of common carrier telephone and telegraph services;
13. the provision of submarine cable services;
14. use of land and natural resources;
15. mining on the public domain;
16. maritime services and maritime-related services;
17. and primary dealership in United States government securities.

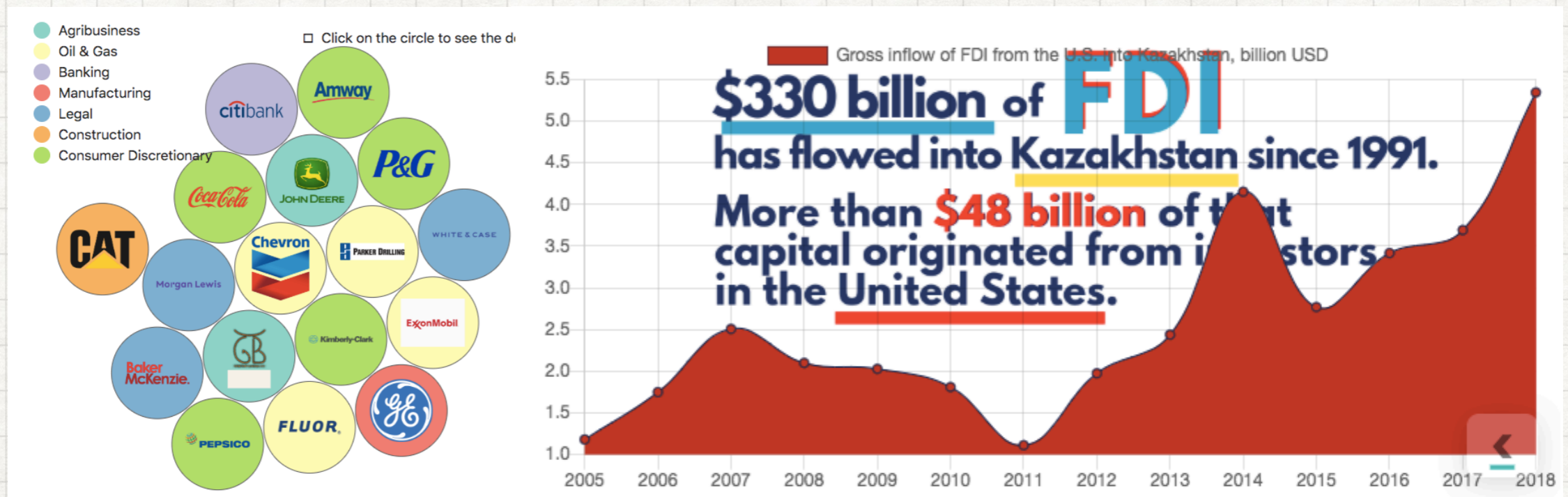
USA / most favored nation

1. ownership of real property;
2. mining on the public domain; maritime-related services; and
3. primary dealership in United States government securities.

KAZAKHSTAN / national treatment

1. ownership of land,
2. its subsoil, water, plant and animal life, and other natural resources;
3. ownership of real estate (during the transition period to a market economy);
4. ownership of control of television and radio broadcasting;
5. air transportation; and,
6. preparation of stocks and bond notes issued by the Government of Kazakhstan

FACT SHEET ON US INVESTMENTS



- **EXXONMOBIL \$20.2 BLN**
THE NORTH CASPIAN SEA PRODUCTION SHARING AGREEMENT (NCSPSA) PROJECT IS KAZAKHSTAN'S LARGEST DIRECT FOREIGN INVESTMENT PROJECT. THE KASHAGAN PHASE 1 PROJECT COST APPROXIMATELY **\$55 BILLION**.
- **TCO - OVER \$143 BLN SINCE 1993 VS.**

"AGRICULTURE. THE UNITED STATES AND KAZAKHSTAN VALUE OUR AGRICULTURAL TRADING RELATIONSHIP AND WILL **CONTINUE TO SEEK OPPORTUNITIES** FOR COOPERATION"

TCO DEAL ANALYSES

DATA FROM MEDIA / UNCONFIRMED



- 1979 - Oil production in Tengiz starts
- 1985 - 1986 - Well 37 over 400 days of fire.
- 1988-90 - USSR rejects offer from Chevron on Tengiz & Korolevskoye.
- 1993 April 6 - TCO Contract signed for 40 years.
- 1993 Chevron 50% - USD420mln
- 1996 - Mobil 25% - USD1.1bln
- 1998 - Exxon merges with Mobil.
- 2009 - Lucarco 5% - USD1.6bln.
- \$143bln TOTAL TCO INVESTMENTS.

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REVENUES

- 2016 - 2018 CHEVRON - \$41BLN
- 2018 REVENUES \$17.3BLN
- TENGIZ FIELD PLANNED PRODUCTIVITY - UNTIL 2100
- CHEVRON WANTS PROLONGATION UNTIL 2070.