

THESIS APPROVAL FORM
NAZARBAYEV UNIVERSITY
SCHOOL OF HUMANITIES AND SOCIAL SCIENCES

POLITICS AND BUSINESS DISPUTES: THE ROLE OF LAWYERS IN FOREIGN
BUSINESS DISPUTING IN KAZAKHSTAN

САЯСАТ ЖӘНЕ БИЗНЕС ДАУЛАР: ҚАЗАҚСТАНДАҒЫ ШЕТЕЛДІК БИЗНЕС
ДАУЛАРДЫ ШЕШУДЕ ҚҰҚЫҚШЫЛАРДЫҢ РӨЛІ

ПОЛИТИКА И БИЗНЕС-СПОРЫ: РОЛЬ ЮРИСТОВ В РАЗРЕШЕНИИ
ИНОСТРАННЫХ БИЗНЕС-СПОРОВ В КАЗАХСТАНЕ

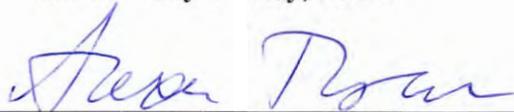
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by

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A Thesis Submitted to the School of Humanities and Social Sciences of Nazarbayev

University in Partial Fulfillment of the Requirements for the Degree

MASTER OF ARTS IN POLITICAL SCIENCE AND INTERNATIONAL RELATIONS

ASTANA, KAZAKHSTAN

2018

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May 2018

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List of Abbreviations

ADR	Alternative Dispute Resolution
BEEPS	Business Environment and Enterprise Performance Survey
BIT	Bilateral Investment Treaty
CEO	Chief Executive Officer
CNPC	China National Petroleum Corporation
EBRD	European Bank for Reconstruction and Development
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
ICSID	International Center for Settlement of Investment Disputes
KIA	Kazakhstani International Arbitration
LLC	Limited Liability Company
PwC	PriceWaterhouseCoopers
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations system in the field of international trade law
UNCTAD	United Nations Conference on Trade and Development

Abstract

The scholarship on business disputes settlement in non-democracies while emphasizing the importance of lawyers cannot explain why and how they shape the businesses disputing behavior. I argue that lawyers' case choices influence the business dispute settlement choices. Lawyers in non-democracies appear to be very important intermediaries for foreign businesses due to their informer role and dispute resolution services providing. Lawyers inform foreign businesses about the contextual peculiarities of business disputing in Kazakhstan, such as the importance of political actors. Using various data sources like legal documents, media stories, interview with lawyers and composing dataset of foreign businesses disputes against Kazakhstan, I find that when the political actors are parties to the dispute lawyers are unlikely to take the case and advise foreign businesses to settle the dispute in foreign arbitration tribunals, if that condition is supported by 100% loss of investments. The reason for such decisions lies in the awareness of the lawyers about the control political actors possess over all dispute settlement fora like arbitration, court, and negotiation. Another important factor appears to be the profit interests of the lawyers, which is comprised of time vs. money calculations and are lower in disputes with political actors. My study also reveals variation among lawyers' perception of reputation, that determines their choices in handling the disputes. In general, the study provides insight on how the law can be used by governments as an instrument of control over business-government relations in non-democracies, by lawyers as a reputation building mechanism and as a limited instrument of dispute settlement for foreign businesses.

Acknowledgments

Foremost, I would like to express sincere gratitude to my thesis supervisor, Professor Alexei Trochev, for encouragement and support throughout the entire writing process, especially during times of extreme difficulty and stress. His expertise in the field and faith in me at every stage of this research motivated me to work. This thesis would not have been possible without his patient guidance. I am also grateful for his supervision of the MAPSIR Program.

I would also like to thank my second reader, Professor Maja Savevska, and external reviewer, Professor Yoshiharu Kobayashi for their feedback and insightful comments that helped me significantly improve my thesis.

Thank you to the lawyers, arbiters, and experts that have taken part in the interviews for their honesty, help, and interest in the project.

I am deeply indebted to every professor in Political Science and International Relations Department, all of whom have greatly contributed to my studies at Nazarbayev University and my upbringing as a researcher.

I would like to thank all my friends and fellow students who helped me to get through two years of graduate school.

Last but not least, my greatest debt of gratitude is to my parents and family for their unconditional love and support that inspires and encourages me in whatever I pursue.

Chapter 1 Lawyers and Business Disputing in Kazakhstan

At the end of 2017, the news about the assets of National Fund of the Republic of Kazakhstan worth more than 27 billion US dollars frozen in Netherlands, Belgium, and Sweden caused public outcry and drew the attention to the long-drawn investment dispute between the Moldovan ASCOM owners Stati family and Kazakhstan. Anatole Stati and his son Gabriel Stati have won a case in the arbitration tribunal operating under Stockholm Chamber of Commerce. Stati were represented by King & Spalding LLP, American law firm with no offices in Kazakhstan (Crosby 2017). Stati accused Government of Kazakhstan of illegal expropriation of two oil and gas companies owned by ASCOM, a violation of the Energy Charter Treaty. Moreover, Stati claimed they had been harassed by the Kazakhstani state officials who had tried to force them to sell their shares to the state. Following the loss of the arbitration, Kazakhstan accused Stati of fraud yet it failed to win appeals of the arbitration decision in Sweden and the USA. The arbitration tribunal ruled that Kazakhstan had to pay 497 million USD to ASCOM, which was the highest award in Kazakhstan's history and which gave Stati a basis for initiating the freeze of Kazakhstani assets around the world until the award is paid. Kazakhstani attempts to cancel the SCC tribunal decision so far have failed, making sovereign wealth funds of other states nervous and raising the borrowing costs for Kazakhstan. The ASCOM case sets an important precedent because it illustrates how small investors operating in countries where courts are distrusted and the legal system can rarely protect investor rights can target the sovereign wealth funds and use them as a lever of influence on governments (Milhench 2018).

This investment disputing is in the stark contrast with other foreign investors in the hydrocarbon field, such as Shell, Eni, Lukoil, and Chevron, which have never used arbitration or litigation in their disputes with Kazakhstan. Indeed, the exact number of disputes as

disagreements between parties to the contract are hard to trace because they usually are settled and negotiated behind closed doors and are very rarely made public.

Why do some foreign investors choose to use third party resolution while others do not and what determines that choice? While scholarship suggests various structural and motivational conditions for foreign businesses to turn for arbitration, litigation or negotiation, important intermediaries in this decision making are largely left out of the analysis – the lawyers. I argue that lawyers play an important role in shaping the behavior of the foreign businesses disputing behavior.

The lawyers' choices are even more important in countries, where the political actors hold a strong control over business activities. Nowadays, the business and international law scholarship places a lot of emphasis on the significance of cultural backgrounds and training of lawyers to the cultural sensitivities in the circumstances of increasing globalization of business operations. However, sending lawyers to various host countries is expensive. The major corporate law firms have adapted to these realities by establishing their offices around the world and hiring and raising competent lawyers from the local labor market. In this way, these lawyers will be best informed about the peculiarities of operating in host countries and at the same time obtain the best competence from authoritative employers. For instance, in Kazakhstan large law firms like Grata International, Dentons, White & Case LLP, Signum Law Firm, Unicase Law Firm, Reed Smith LLP and etc. have their branches. Yet 90% of the lawyers working in their offices are Kazakhstani. Such professionals are valued because they know how the business is 'usually done' in Kazakhstan. There is no doubt foreign investors highly rely on their advice, expertise, and choices on how to proceed in unfavorable situations.

If to refer to the cases that have been arbitrated by foreign businesses against Kazakhstan, there are a lot of investor-state disputes over key sectors of the economy

initiated in international arbitration tribunals. Research has shown that lawyers, as well as foreign investors, are very reluctant to use formal means of solving the disputes, especially when it comes to disputes with host government (Lande 1998, Stipanowich 2004, Stipanowich and Lamare 2012, Peters 2008, Gilson and Mnookin 1994, Menkel-Meadow 1985). The reason is that formally solving the disputes is time and money consuming, plus may hurt the reputation of the business - client, for example, through revelations about fraud and corruption. There have been many reports on Kazakhstan government's involvement in bribery scandals with foreign investors (Reuters 2017, McKenzie and Baker 2016, Hanke 2017). One of the essential pillars of Western business culture is the reputation of partners and their trustworthiness. The host governments, on their part, are also reluctant to use formal means of dispute resolution because of the reputational costs associated with signaling to other investors about the issues with investor rights protection. In such circumstances, one would expect such disputes to be resolved through informal means like negotiation (Zakon.kz 2017, Farchy 2016).

Interestingly, while preferring the informal settlement of the disputes with the fact that in countries where courts can hardly be trusted the host governments try to increase their FDI attractiveness by establishing various dispute settlement venues domestically. Kazakhstani government attempts to strengthen the domestic formal venues for resolving investment disputes by creating in 2016 an Arbitration Chamber in Astana, the Special Collegium on Investment Disputes in the Supreme Court in Astana, and the establishing the Astana International Financial Court under the Astana International Financial Center. I argue that such developments allow political actors to exercise control over the dispute settlement in Kazakhstan, of which the lawyers are well informed. My findings suggest that state also tries to establish control over lawyers' activities by setting up similar chambers such as KazBar, which supposedly works for the benefit of legal representatives themselves. The findings of

my research will also contribute to the very limited knowledge on formal and informal dispute settlement mechanisms in countries where politics play a very significant role in all large business decisions. Moreover, all the available literature on dispute settlement in Kazakhstan is mostly descriptive and empirical research in this field would be of great use for both researchers and policymakers.

My study also helps to reveal the extra-legal context of broader business-government relations in Kazakhstan, the context that may explain the certain business choices, strategies, and actions. My research suggests that foreign businesses rely on lawyers for services and information. As a result, lawyers can shape the disputing behavior of foreign businesses. The choices lawyers make, I claim, depend on political factors, such as the involvement of state, state-owned company or financial-industrial group in the dispute, on the profit interest like time-consumption of the dispute and its cost, and on the reputation concerns.

Importantly, as in the Balkans (Schönfelder 2002), local businesses are reluctant to use domestic arbitration tribunals, despite the availability of these tribunals in Kazakhstan. The arbitration tribunals in Kazakhstan are fairly new organizations, which try to grow under the state control and in a very competitive domain with well-established and highly reputable international tribunals. My research reveals the systemic drawbacks like political control over arbitration, which fail to attract lawyers and foreign businesses to use the local tribunals. Moreover, the dataset of already arbitrated cases against Kazakhstan helps to trace the major disputing tendencies, which in turn will help to address the most disputed issues in order to enhance the attractiveness of Kazakhstan for foreign investors.

1.1 Research Questions and Hypotheses

The knowledge on how the business disputes are solved in countries like Kazakhstan where the politics and business are strongly intertwined in a multilayered web of informal

relationships is very limited. Experiences of foreign firms in handling their business disputes are determined by the choices of their lawyers and are usually viewed as a binary decision between negotiating and arbitrating abroad. However, that is a very simplistic approach to explain such decisions. I argue that business dispute settlement in countries where domestic politics have a strong influence on business sector is more complicated. It also depends on the availability of formal dispute settlement venues in host countries, such as domestic arbitration tribunals and the local courts. But even more important are connections with top politicians who usually directly or through the affiliate, persons own and control the sector of the economy. The information that foreign businesses obtain on their disputing options is provided by lawyers who know the formal and informal rules of dealings between government and businesses. Thus, I am interested in addressing the following theoretical question: how and why do lawyers shape business disputing behavior in non-democracies? My empirical research questions are: What roles do lawyers play in business disputes involving foreign firms in Kazakhstan? How do political actors, profit interests (time and cost), and reputation influence the roles the lawyers play in business disputes involving foreign firms in Kazakhstan?

I argue that lawyers shape the disputing behavior of businesses because the choices of lawyers determine the ways the business will handle the dispute. Lawyers provide four types of valuable services to businesses which make them perform six different roles when it comes to dispute management. In all circumstances, the lawyers act as informers - they present their clients with various options and advise on the best course of action. There are three courses of dispute settlement: negotiation, arbitration, and litigation. Lawyers can be involved in various ways in these three processes. During the negotiation process, they negotiate for their clients and can also act as intermediaries. Participation in the negotiations and the information on the context of the dispute settlement, such as the possibility of resolving the as

by bribing, allows them to transmit resources between the parties (Lambsdorff 2013). During the process of arbitration, lawyers, in general, can be on both sides of the dispute: arbiters or representatives. As legal representatives of firms, lawyers carry their basic functions in the disputing. My investigation of arbitration in Kazakhstan has shown that almost all the authoritative arbitrators are practitioner-lawyers. This shows that legal knowledge and reputation are valued in Kazakhstan. As for litigation, the role of lawyers is not restricted to litigating, sometimes lawyers also can carry out an intermediary role by bribing the judges (Li 2011). By holding such roles and providing respective services, lawyers shape the disputing behavior of foreign businesses. It has already been mentioned that the main role of lawyers is that of the informer, which consists of advising the businesses on what is the best way to settle the dispute. But before providing any of these services the lawyers have to choose whether they will accept the case to work on or reject.

Table 1 The Roles Lawyers Play in Various Dispute Settlement Settings

The dispute settlement mechanism	The role of lawyers
litigation	informer role
	litigator role
	intermediary role
arbitration	informer role
	arbitrator role
	representative role
negotiation	informer role
	intermediary role
	negotiator role

The choice the lawyers make on accepting the case or not depends on three major variables: the offending party is the state, state-owned company or the oligarch (H1), profit interest (time and cost) (H2) and the value of reputation (H3). I have developed several hypotheses, which test the importance of these factors.

I argue that the interest (and involvement of) political actors – government agency, state-owned companies and oligarchs with ties to top state officials involvement – determines the choice of lawyers on taking or not taking the case and further helps them to evaluate where the foreign business dispute will be settled in the formal venues like court and arbitration, where international tribunal has to be distinguished from domestic or through informal means like negotiations. The major assumption is that lawyers in Kazakhstan fear to upset the major political figures in the country and are able to assess the whether they will or will not be able to succeed. Involvement of political actors in disputes in Kazakhstan signals lawyers that the fair litigation and arbitration domestically would be hard to achieve, a signal that is prevalent in many non-democracies. Thus,

H1: Lawyers are less likely to take the case if the other side is closely connected to the state, state-owned company and oligarchs.

Another significant variable is the profit interest, which is comprised of the calculations on time required for the settlement of the case and calculations on the cost of the case as the proportion of the cost of the dispute against the total investments in the country. This amount also determines the profit that lawyers would receive. In this sense, such calculations of the disputes by lawyers is not surprising because it is at work in both democracies and non-democracies. Therefore,

H2: Lawyers are less likely to take the case if it requires a lot of preparation and a little reward.

The significance of reputation variable for the choice of lawyers is based on the assumption that lawyers value their reputation and are not cheaters. The literature on well-developed legal systems suggests that lawyers care about their reputation because they work in a dense network of judges, lawyers, and businessmen. Such context does not create the incentives to cheat, meaning to take the case knowing that it can potentially hurt the reputation. Even though they calculate the time and cost of the dispute, the value of reputation outweighs these determinants. If reputation is important, it implies long-term orientation of some Kazakhstani lawyers, similar to lawyers in well-established legal systems.

H3: Lawyers are more likely to take the case that they think they will win, not simply take any case just to get paid for legal services.

Before proceeding to the research design, let me explain the key concepts used in my hypotheses. The concept of disputes is tricky. The scholarship suggests that the starting point of any dispute is grievances (Miller and Sarat 1980), which means that disputes are socially constructed phenomenon (Felstiner, Abel and Sarat 1980). Grievance here is to be understood as “an individual's belief that he is entitled to a resource which someone else may grant or deny” (Miller and Sarat 1980, 52). This is what makes disputes so hard to define: their meaning and definition is the matter of perception (Felstiner, Abel and Sarat 1980). Miller and Sarat (1980) suggest that the transformation of the grievances to the dispute depending on the way people respond to it: the claims can be accepted, then there is no dispute, they can be partially accepted, which leads to partial dispute but a room for negotiation (Nader and Todd 1978) and it is when the claims are rejected the disputes arise (Miller and Sarat 1980). Therefore, for the purposes of this research, I would like to refer to the definition suggested by Miller and Sarat (1980) which define disputes in general as a phenomenon when “there is a claim based on a grievance is rejected either in whole or in part” (53).

When it comes to the investment disputes, I refer to the definition outlined in the Entrepreneurial Code: "a dispute ensuing from the contractual obligations between investors and state bodies in connection with investment activities of the investor" (2015). However, during the data collection, I was able to gain access to interesting observations in the sphere of tax disputes, which are also 'popular' disputes between foreign businesses and Kazakhstan. However, the taxation and issues arising from it are not in the interest of this paper. Thus, I will simply be referring to some surprising tax disputes data I have been able to collect.

In order to define the definition of the disputes regarded in this paper, one has to account for the involvement of the foreign business. I am interested in the disputes, where one of the parties are foreign businesses. I define foreign businesses, as companies or firms operating on the territory of Kazakhstan but registered abroad. One aspect to clarify here is that it excludes offshore firms, where controlling package of shares belongs to Kazakhstani citizens but the firms itself is registered abroad.

Thus, foreign investment disputes in this study have to be understood as the grievance based claims by the foreign investor (operating in Kazakhstan) which have been rejected or partially rejected by their Kazakhstani counterparts.

Chapter 2 Designing the Study of Foreign Business Disputes in Kazakhstan

In order to answer the research questions, my research relies on analysis of data collection by triangulation of five data sources. Triangulation of data sources is argued to be one of the best methods to increase the validity of data, by confirming and supporting it with the help of data from different sources (Adami and Kiger 2005, Carter et al. 2014, Flick 2004, Thurmond 2001). The use of triangulation method is of specific importance for my study because there is no empirically operational data on lawyers' choices in shaping the disputing behavior in Kazakhstan. Moreover, in terms of statistical data on tribunals and courts, I have to rely on the information provided by the Kazakhstani agencies, which raises concerns about their reliability. Therefore, triangulation of data sources will help me increase the validity of my thesis, by confirming the reliability of my data.

The triangulation of data sources often includes the documents analysis as a complementary data source (Angers and Machtmes 2005, Merriam 1988). The document analysis is argued to be very useful for studying the context of the phenomena and for tracing the changes and developments in that context (Bowen 2009). As such, I use the legal documents and media stories as a data source. The first data source is the foreign investment legal framework of Kazakhstan, which sets the regulatory context on paper in which major foreign businesses have to operate. Understanding the business environment helps to explore structural determinants of lawyers' choices. This includes all government regulations and BITs, by which most of the times foreign firms' experience in international disputing are guided, other multilateral international agreements, such as the Energy Charter Treaty, and multilateral international conventions on arbitration, such as New York Convention. The research includes indicators and documents starting from the year of 2003 when the government adopted new Law on Investments, which set the foundation of investment

protection in Kazakhstan, under which the most foreign firms operate in the country. Furthermore, the first and more or less popular arbitration tribunal in Kazakhstan, which on average hears between 50 – 60 cases yearly, was established in 2005. In other words, the early 2000s capture the beginning of arbitration practices in Kazakhstan as opposed to litigation.

The second source to include in the media stories about business lawyers and foreign business disputes. As previously mentioned, there is a lack of information on these disputes, the analysis of media publications on companies threatening to file a case and on government officials' views on arbitration with foreign investors may help to overcome this challenge. Furthermore, the media discourse analysis helps to see under what circumstances the lawyers may abstain from arbitrating or litigating. Finally, the government may use domestic or international media outlets to create an image of “bad” foreign investors through the use of compromising information in order to hurt the reputation of firms, something that foreign firms highly value.

The third data source is comprised of a dataset of the dispute cases on violation of investor rights in Kazakhstan brought by foreign businesses to international arbitration tribunals. Since there is no available dataset of such cases, I had to collect the data on foreign business cases myself. Some of this information is presented in Table 3. Studying the disputes that already have occurred helped to investigate if there are any patterns in why, how, where and against whom the cases were brought. Moreover, they contributed to drafting the interview questions for field research. This dataset relies on sources like italaw.com, ICSID database and some other websites that publish information on arbitrated cases.

Research on lawyers' activities often relies on interview and survey data (Hendley, Murrell and Ryterman 2001). There are some studies on business disputing behavior that also rely on interviews with lawyers (Lu, Pan and Zhang. 2015, Lande 1998). The fourth data

source consists of my interviews with (1) in-house lawyers from major foreign companies, (2) interviews with commercial lawyers and (3) interviews with arbiters. These interviews helped investigate the experiences of lawyers in dispute settlement closer. These participants are people who deal with business disputing experience on daily basis. In-depth interviews help to understand the conditions for lawyers' choice and test my hypotheses.

Interviews with in-house lawyers were constructed in order to gather the information about their experiences in settling the disputes in which their company has been involved. I reached foreign companies' legal department or other equivalent department dealing with disputes resolutions. The data that they provide helped to gain insight on how the process goes within the businesses and if the choices of in-house lawyers differ from those of commercial.

Interviews with both types of lawyers served two purposes. First, their experience and the information they provide helped to include in the sample the companies that do not have incorporated special units dealing with disputes settlement or the ones that basically outsource such activities. Second, these interviews helped to understand the costs, time and reputation motives of lawyers.

Interviews with arbiters helped to gather information on the essence of arbitration practices in Kazakhstan, understand features of arbitration courts that seem favorable for foreign businesses and to see if the choices of lawyers who are also arbitrators differ from commercial and in-house lawyers' perspective.

In total, I conducted 16 interviews on average 37 minutes long in cities of Astana and Almaty: 4 with in-house lawyers, 7 with commercial lawyers, 4 with arbiters and 1 with the expert and researcher on arbitration practices in Kazakhstan. The initial research design did not include the interview with the researchers and experts, because most texts on business disputes in Kazakhstan are written by the lawyers-practitioners. However, I discovered in the

process of field research that there is a couple of researchers already in the process of data collection.

Due to the ethical considerations, I cannot reveal the identities of the interviewees but there are several issues I want to mention. First of all, contacting in-house lawyers turned out to be quite hard. They also were very reluctant to be interviewed and preferred absolute confidentiality. As representatives of foreign entities, they certainly felt the responsibility for accidentally not providing confidential data. I do not think that such aspect may have hurt the results because, as the interview proceeded, the participants were feeling more comfortable.

It was easier to set up interviews with commercial lawyers and arbiters because both groups of participants were interested in having the access the results of the study. This difference in approaches between in-house lawyers and commercial lawyers and arbiters, from my perspective, was interesting because it reflects the power imbalance and reputation concerns.

As for the data analysis, I have transcribed all the interviews and then did the open coding, that was followed by axial coding. Afterwards, I compared text sections that were assigned the same code in order to integrate the codes into broader themes. Such method helped to see the patterns where participants referred to important determinants such as political actors, reputation, time issues, the importance of cost and other factors like trust in judges and arbitrators.

Chapter 3 Keeping Foreign Investors under Control in Non-Democracies

This chapter is a review of existing research about the ways autocrats keep foreign investors under control. According to annual World Investment Reports, the investment flows by 2017 are 9 times bigger in comparison to 1991 indicators, when the first report was published (UNCTAD 2017, Centre on Transnational Corporations, UN and UNCTAD 1991). The number of investors grew along with the diversification of home-host country dyads. Investor activities were challenged by the differences in the legislation of the countries. This challenge was addressed by incorporating third-party alternative dispute settlement tool such as arbitration, along with informal mechanisms like negotiations and formal like state courts (Allee and Peinhardt 2010).

Emerging markets most often struggle with providing proper judicial services (which can be due to various issues like corruption, the role of government in the business affairs and so on) (Rose-Ackerman and Tobin 2011, Rose-Ackerman and Tobin 2005, Poulsen and Aisbett 2013, Abbott, Erixon and Ferracane 2014). For instance, Berger et al. (2010) find this observation to be true in case of the transition state in Eastern and Central Europe. It turns out these countries needed to provide investors with guarantees and signal their market credibility after the transition period (Berger et al. 2010). Literature suggests that availability of appealing to arbitration tribunals in such host country does affect the FDI flows (Allee and Peinhardt 2010, Bergstrand and Egger 2013). Most researchers emphasize the positive relationship between BITs and FDI (Rose-Ackerman and Tobin 2005 and 2011, Busse, Goyal and Wahal 2010, Neumayer and Spess 2005, Haftel Yoram 2010).

While a number of studies focus on how some features of investment agreements may foster FDI, others emphasize the importance of host country characteristics such as the strength and availability of domestic institutions that protect investor rights such as

arbitrations (Berkowitz, Moenius and Pistor, 2006). In this regard, Dollar and Kraay (2003) argue that while the volumes of FDI flows are important for economic growth, stronger mechanisms of property rights protection are important for FDI flows.

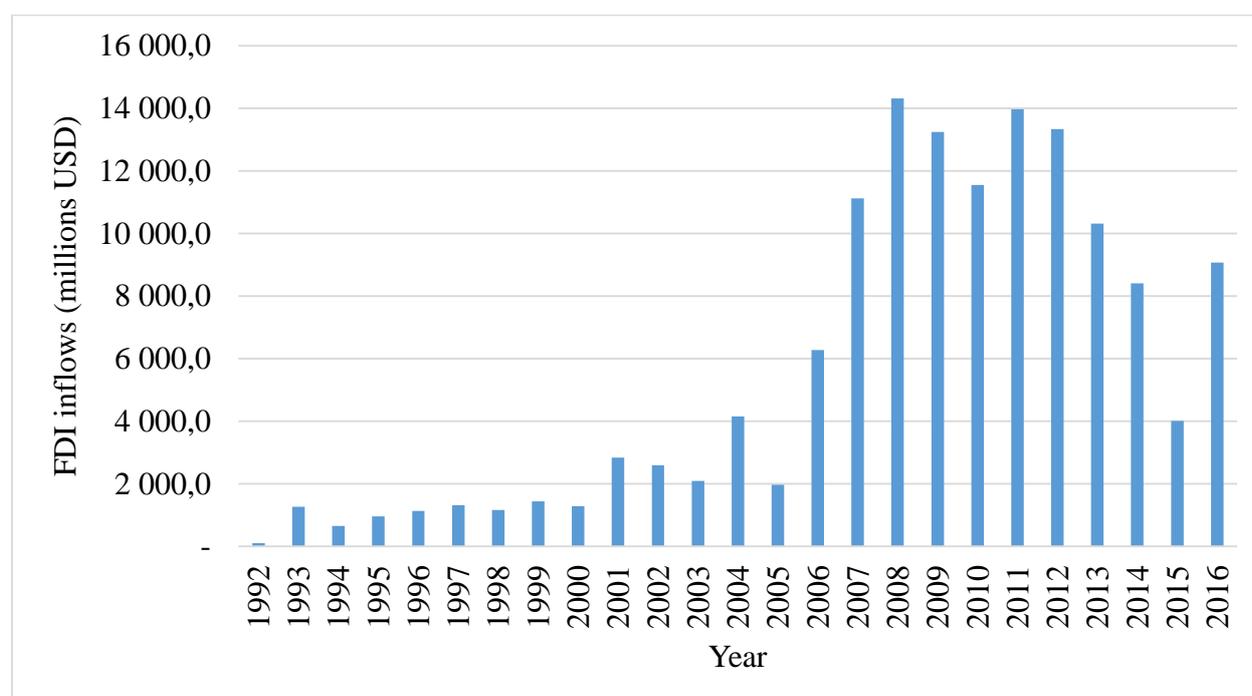
Several authors contribute to this discussion by arguing that arbitration matter for FDI. For instance, Wagle's (2011) article supports this argument by examining how the quality of arbitration institutions affect the inflows of FDI. The author refers to Arbitrating Commercial Disputes index scores provided by World Bank. If Wagle (2011) gets his evidence from country survey data, Myburgh and Paniagua (2016) find empirical evidence and conclude that availability of appealing to the court of arbitrators fosters FDI flows and that this effect is stronger in the context of weak institutions. By contrast, Benson (1995) suggests that in the United States the increasing number of cases brought to the arbitration courts instead of tribunals in the host states ones is due to the non-legal sanctions such as reputational costs. While this study considers an environment when national and arbitration courts can be trusted equally, a different situation may be observed in countries where businesses distrust state courts (Schönfelder 2007, Berger et al 2010).

Kazakhstan has employed similar tactics in order to increase its investor attractiveness. Table 2 lists key legislation on investments in Kazakhstan, while Figure 1 below shows the data on FDI inflows in the same period. Based on this data, one may observe that over time the development of legal domestic and international regulations on investments was followed by the growth in FDI volumes. Of course, it is rather too simplistic to assume such relationship between these phenomena, however, according to above-mentioned research, there is at least association between these two variables. The increase in cases initiated against Kazakhstan in international arbitration tribunals (see Table 5 in Chapter 5) can be observed, which means that legal improvements on investment regulations have failed to protect the rights of foreign investors and abuses have continued. As already

Table 2 The Regulations on Investments in Kazakhstan

Year	Regulations Adopted
1990	— Law on foreign investments in Kazakhstan; — Law on free economic zones in Kazakhstan
1994	— New Law on foreign investments; — Presidential Decree on oil operations (has the power of law);
1995	— Presidential Decree on oil (has the power of law); — Ratification of Energy Charter Treaty; — Ratification of New York Convention
1996	— Presidential Decree on subsoil and subsoil use (has the power of law);
1997	— Law on state support for direct investments
2000	— Ratification of the Washington Convention
2003	— The Law on foreign investments replaced by the Law on investments
2015	— Entrepreneurial Code (Chapter 25. State support of investment activity articles 273-296) – includes all the laws on investments — Constitutional Law about Astana International Financial Center
2016	— Law on arbitration

Source: Suleimenov (2017).

Figure 1 The FDI inflows to Kazakhstan 1992-2016

Source: UNCTAD FDI/MNE database (2017).

noted, the fact that all the publicly available investment disputes with Kazakhstan are settled in the international arbitration is interesting, since there are different options regarding where to settle the dispute, such as courts or domestic arbitration tribunals, which are established since 2005. Then, there is a need to investigate what other scholars suggest as conditions for certain disputing behavior in non-democracies.

3.1 Structural and Motivational Determinants of Disputing Experience. What Affects Business Disputing Behavior in Non-Democracies?

The scholarship on business disputes has various approaches on what shapes their experience. In general, they can be grouped into business motivations and structural conditions. Structural conditions can include variables like politics, in their broad sense. Under the political aspects shaping the experience of investors, the literature suggests the distrust in state courts and the party capability explaining the significance of opponent. Such structural conditions can also include legal conditions like enforceability of the arbitration and courts decisions and the form of contract between the parties to the dispute. As for motivations, researchers suggest several important variables like cost of arbitrating and litigating, the cost of the case, the length of dispute settlement in courts and arbitration tribunals and the previous litigating or arbitrating experiences of the foreign businesses. The literature on disputing experience of businesses usually approaches the phenomenon from the perspective of deciding between arbitration tribunals and state courts. Here scholarship more focuses on the advantages of the former in comparison with the latter.

Many argue arbitration tribunals are convenient fora for dispute resolution (Hylton 2005, Deffains et al. 2017). In comparison to host country courts tribunals have advantages such that cases are regarded in secret, by arbitrators who are professional in the field, and as a result are more competent and procedures are less time-consuming (in some countries trials may last a long time due to court delays). Hylton (2005) contributes to this discussion by

arguing that deciding on whether to arbitrate or litigate depends on the differential between governance benefits and enforcement costs. Hylton's (2005) argument evolves on the idea that these two determinants are also interdependent, meaning that increase in governance benefits will lead to higher enforcement costs. In this regard, arbitration turns out to be more beneficial and less costly in comparison to the adjudication. One of the reasons for that as argued by Hylton (2005) is the ability of parties to "structure rules and enforcement methods so that the difference between governance benefits and enforcement costs is larger than in the default regime represented by ordinary courts" (pp. 493).

As for the agency motives, Hylton (2005) argues that repeated relations between the parties are crucial because interest in future benefits and relationships often result in parties 'waiving the legal rules'. In other words, when there is a prospect of further interaction parties choose neither litigation nor arbitration and settle disputes through negotiation without a third-party intervention. This explains well why the large foreign oil companies in Kazakhstan prefer negotiation over arbitration and litigation, while smaller foreign firms take Kazakhstan to arbitrate and litigate. For instance, in one of the recent disputes over Karachaganak gas condensate field where major investors - Shell, Eni, and Chevron operate, in response to Kazakh government push towards increasing its share in the consortium, instead of turning towards dispute settlement the investors have offered the government 300 million USD to settle the case (Farchy 2016). Such 'move' towards informal settlement can be determined by that these investors at the same time operate in large Kashagan and Tengiz oilfields in Kazakhstan, especially when the government is threatening to take the dispute to the arbitration tribunal and when investors can't exit Kazakhstan (Reuters 2016).

Arbitration, for the most part, is viewed as a substitute for national courts (Benson 1995, Chamy 1990). Taking into account that for investors availability of arbitration options does make a difference while allocating investments, one may argue that businesses perceive

arbitration tribunals to some extent as a better substitute for “weak” national courts. Therefore, the experience of turning to arbitration may be affected by lack of trust in host country national courts. Yet lack of trust in national courts does not automatically translate in turn to arbitration. Schönfelder’s (2007) study reveals the reasons for underuse of arbitration in the Balkans through a survey of 160 lawyers from Balkan cities of Varna and Plovdiv with an aim of investigating them. He criticizes the idea that the distrust of courts alone is a sufficient condition for firms to arbitrate their disputes. According to Schönfelder (2007), arbitration is rarely used because of the legal illiteracy of these traders. A less relevant for Schönfelder, and more relevant for my study, the reason for the underuse turned out to be the distrust in arbiters. In this regard, some of the Schönfelder’s (2007) respondents relied on their sad experiences with arbitration and argued that there was a little difference between the national court judges and arbiters.

Markus (2015), in turn, criticizes the idea that “structure as legal literacy” is crucial for determining how businesses handle business disputes. Drawing on the international relations theory, he insists that the agency factor, namely, the ability of domestic and foreign investors to make alliances and to bring disputes to international arbitration is important for protecting property rights. He addresses an interesting puzzle of “agent predation” in developing states. Markus argues that low-level bureaucrats, not the rulers, are the ones jeopardizing the ownership rights of the entrepreneurs. His investigation of Russian and Ukrainian cases proves that institutional commitments are unable to secure the property rights in country Markus claims that alliances between domestic businesses and foreign investors and actors and with local labor communities are useful in constraining “agent predation” and securing the property rights. It turns out that security of property rights in developing countries is largely defined by the “firm-level strategies” rather than by the “macro-institutional design” (Markus 2015, pp.201). Markus refers to several cases of disputes

between Russian and Ukrainian local (low-level) bureaucrats and major businesses. For this businesses alliances with foreign partners were crucial in protecting the ownership rights. Important outcome from Marcus's examples is that even the alliances with foreign investors are sufficient to restrain the behavior of local state actors. This study also contributes to the discussion on arbitration practices in developing countries: in instances where the threat to investor rights is imposed by the local or central government bringing the dispute to the national court is not an option, which means that the alliance with the foreign actors can be viewed as an opportunity to utilize the services of international arbitration courts.

Yet, in contrast to Russia and Ukraine, Kazakhstan's economy is less diversified and more dependent on natural resource extraction, thus, producing much stronger centralization of government-business relations. There is a number of studies that point out the existence and importance of a pyramid-shaped financial groups in Kazakhstan (Kjærnet et al. 2008, Junisbai 2011, Khlyupin 1998), which are reviewed in the following chapter. The importance and power of such groups are determined by their relations with President and his surroundings, in fact, these financial groups constitute that surrounding (Junisbai 2011). However, little is known about their alliances with foreign investors. One of the implications of that for my research would be the extent to which having such a financial group as an opponent would shape the disputing experience of foreign investors.

Studies on the conditions that determine the dispute settlement venue empirically rely on the survey and interview with lawyers (Hendley, Murrell and Ryterman. 2001, Lande 1998, Lu et al. 2015). However, none accounts for the role of lawyers. This is a major drawback of the existing literature because lawyers inform businesses about their options and moreover, advice which course of actions would be advantageous in a certain case. To add, the research on dispute settlement experiences of businesses in countries where the lawyers are viewed as important intermediaries is very limited. The role lawyers play in shaping the

foreign businesses disputing behavior gains specific significance in the circumstances of the highly dependent-on-politics business environment in Kazakhstan. My study addresses this issue by concentrating on the importance of lawyers in advising foreign businesses on how and where to resolve the dispute: informally by negotiating or formally in the state court or in the arbitration tribunal.

The loyalty of courts towards governments builds on the theory of party capability in litigation. Galanter (1974) has first suggested the idea of 'haves' having an advantage over 'have nots' in courts. Here the difference between these two categories of litigants was defined by the repetition of the experience in litigation and the resources that the parties obtained. This idea was taken further by Kritzer (2003), who that it is not 'haves' always having the advantage rather it is the government that always wins. Even though governments do have extensive resources to be advantageous 'haves', their capability is defined by three major components: governments make rules, judges are appointed by the governments and courts are 'agencies' of governments (Kritzer 2003, Shapiro 1964). In order to prove the insignificance of resource and experience party capability arguments, Kritzer (2003) has compared business and government litigation, which, indeed, have supported his claims.

The similar approach to explaining the biasness of courts towards government has then been extended by He and Su (2013), who have applied Galanter's theory to the case of Shanghai courts. He and Su (2013), while supporting Kritzer's (2003) argument, add that penetration of courts by the government in China goes beyond institutional disposition. Courts can also be penetrated through powerful social linkages behind the scenes, which is a frequent practice "in a society where the ethical codes of conduct for judges are not rigorously enforced or even non-existent" (He and Su 2013, 140). Lu et al. (2015) contribute to this discussion by bringing up the importance of political connectedness of businesses in China and its effect on the outcome of litigation. The political connectedness of the business

was defined by two factors: it was either state-owned company, where the control was in the hands of the Chinese government and personal linkages of the business executives (Lu et al. 2015). When these two group of litigants analyzed against other litigants, the court was biased towards the former. However, when the case involved both state-owned business and businesses with personal linkages, the ‘capabilities’ of former to win the case outweighed those of latter (Le et al. 2015). The interests and professional ambitions of the judges turn out to be also strong independent variable when it comes to the determinants of courts biasness (Xu 2017). Xu (2017) argues that judges interested in the career improvements usually are loyal to the government, which in general contributes to the claims about the dependence of judiciary.

The political connectedness of the Chinese business environment and the dependence of the judiciary and its biasness towards the government in China is very similar to the situation in Kazakhstan, where the political elite comprises the business elite. Thus, relying on this scholarship, the determinants of disputing behavior in non-democracies, primarily in those like China (in which government holds the control over the business), have to account for political involvement as a key variable in foreign business disputes.

3.2 Financial-Industrial Groups as Political Actors in Kazakhstan

Party capability theory and the dispute settlement studies in China claim that involvement of political actors significantly influences the resolution of the business disputes in non-democracies. In Kazakhstan ‘capable’ political actors are comprised of not only government bodies and institutions. The scholarship emphasizes the role of top politicians and businessmen who have a notable influence in the country due to their ties with the President Nazarbayev.

Political and business elite of Kazakhstan is comprised of the same businessmen and same top government officials. As it has been briefly mentioned earlier groups of major

business actors in Kazakhstan consist of persons close to President (Junisbai 2011). Kjærnet et al. (2008) argue that political and business elites of the country have symbiotic relationships. The scholarship in this regard suggests various forms and classifications of relations established between such groups.

Such situation enabled very intertwined political and the business community. According to Kjærnet et al. (2008), there are three major types of symbiotic relationships between these communities. There are business enterprises that do not have constant and direct linkage with the government but that through “trusted contacts” can get an ad hoc support (Kjærnet et al. 2008). The second type is usually referred to as having a roof, which is having a powerful protector with links with other more powerful people (Kjærnet et al. 2008). That kind of relationship also involves profits being cuts going to the protector. Moreover, there are some big business enterprises are owned by top-level politicians. Kinship with such authoritative officials is also an advantageous factor for businesses. For instance, President Nazarbayev’s son-in-law Timur Kulibayev has been appointed to important economic positions and controls one of the major banks in the country. Kulibayev also was known as ‘roofing’ several oil and mining companies (Kjærnet et al. 2008). Özcan (2008) argues that such ties with the government help businesses to overcome “issues ... related to abuse by tax officials and state inspectors, unpaid debts, illegal extortion by criminal gangs, and bureaucratic hurdles” (55). Peyrouse (2012) agrees with that position of Özcan (2008) in that he also highlights the importance of family ties and with that of Kjærnet et al. (2008) in that political and business system operates through patronal relationships. Peyrouse (2012) claims that three groups can be distinguished in this patronal system: family (of the President), the oligarchs and technocrat elite (“key ministers, governors of both capitals and the regions, heads of the presidential administration, etc.” (348)). Junisbai (2011) suggests there are two large clusters that are formed of financial-industrial groups concentrated around

representatives of these 'powerful' clusters. The 'power' of these clusters is also determined by the closeness of its members to the President. Junisbai (2011) distinguishes them into "inner circle and second tier".

Therefore, financial-industrial groups in Kazakhstan thanks to their patronal ties with the top politicians have a significant power in the country. As it has been proved by the studies in China, close relations with government officials help businessmen to affect the court decisions. In Kazakhstan, I assume that the power of businesses with 'the roof' to influence the courts is even more extensive due to strongly intertwined family and friendship ties between politicians and financial-industrial groups.

Chapter 4 The Roles of Lawyers in Shaping the Disputing Behavior of Their Clients and Determinants of Lawyer's Decisions

The role of lawyers and their importance for businesses and even in the political life of some countries is widely investigated by the scholars. Gomez (2011) draws his analysis on the case of Venezuelan lawyers, who have formed the political elite of the country due to their extensive networks with judges and prosecutors. Such powerful ties and their role in the politics have increased their significance for the businesses, especially for foreign investors. The lawyers, who are usually viewed as intermediaries in government business relations, in Latin America have been more like shapers of the government business relations (Gomez 2011). Dezalay and Garth (2011) observe the similar situation in Korea and Indonesia, where during the political restructuring the lawyers have been able to increase their importance by forming a web of linkages and establishing bars, this turns out to be especially true in case of lawyer brokers. The core of their argument is that “lawyers convert and invest various forms of capital—including social, economic, intellectual, political—into the law and legal institutions” (Dezalay and Garth 2011, 260). Such conversion and investment found the process of building the rule of law and the role of lawyers in the state and society (Dezalay and Garth 2011). Thus, the significance of lawyers stretches far beyond the simplistic legal environment.

There is a number of researchers that illustrate the importance of lawyers for businesses when it comes to dispute settlement. Lande (1998) investigates the phenomenon of “failing faith in litigation” in the United States. The author argues that public opinions on litigation and faith in courts have been very negative because for non-professionals in that field the judicial system seems to be very complicated and confusing. The attitudes of lawyers and businessmen who deal with court system more often should be different, but turns out they are not because CEOs largely rely on the advice of lawyers. The inclusion of

executives in the sample is very interesting because it turned that even though this group has no direct interaction with the litigation, 82% of respondents took part in decision-making over business lawsuit (Lande 1998, 14). One of the important outtakes from Lande's (1998) work is the notion of risk for executives in such decision-making process. One of the participants points out that for businessmen bringing the dispute to the court is a very risky decision (Lande 1998, 20). Moreover, turns out that businesses attain to file a case if they see a little chance of losing it because most of the times the 'price to pay' is very high and there is no certainty about the outcome of the process (Lande 1998). Therefore, CEOs usually try to outsource that burden to lawyers.

What are the factors affecting the choices of lawyers when it comes to dispute settlement? Some claim the importance of social backgrounds like personal beliefs (Chamarinsky 1980) family origins, education and work situation (Ladinsky 1963), while others focus on the effect of more abstract determinants such as status, eliteness and school performance (Sander and Bambauer, 2012). No doubt, that social and economic backgrounds play a significant role in shaping the practices and choices of lawyers, however, my research is not interested in the identity of lawyers. Rather I am interested in the conditions contextual like the activities of political players in the country, the importance of profit interest (money) and output (time) required for the case and the value of reputation.

The body of literature that views lawyers as agents of their clients is extensive. The theoretical framework such phenomena has been suggested by Gilson and Mnookin (1994). The central question for this work is what can explain lawyers disputing behavior and in what circumstances they would be interested in the cooperative settlement of the case. Their arguments derive from the ideas that lawyers can be interested in the prolongation of the litigation in order to increase their profits. The analysis is drawn on the prisoner's dilemma analogy, where the incentives of lawyers to cooperate are determined by the prospects of

repeated engagement. More precisely, lawyers value their reputation before their colleagues and judges, which makes them more prone to cooperate and share information (in prisoner dilemma setting) because “the reputation for being a cooperative problem-solver may be a valuable asset” (Gilson and Mnookin 1994, 564). Therefore, lawyers, in general, highly value their reputation. McEwen (1998) contributes to this discussion by arguing that lawyers are interested in the early settlement of the cases and by doing so reducing the business-clients expenditures on litigation.

Further, the lawyers as agents are argued to have the ability to transform the disputes (Menkel-Meadow 1985). There are two ways in which lawyers can transform the disputes: narrow or expand them (Menkel-Meadow 1985). The disputes are narrowed by the lawyers when they categorize the “events and relationships”, which leads to a redefinition of the dispute in legal terms (Mather and Yngvesson 1980). Menkel-Meadow (1985) also argues that dispute is also being narrowed when during the negotiation process. Basically, the lawyers during negotiations use the same tactics and arguments to persuade the opponent as during the litigation process. Taking into account that litigation is a zero-sum process, stretching such tactics narrows the dispute down to simplistic win/loss even during the negotiations (Menkel-Meadow 1985). When it comes to the expansion of the dispute, it usually deals with the lawyers’ tactics of increasing the number of disputants, transforming the case into political and social one (Menkel-Meadow 1985). Menkel-Meadow (1985), for instance, refers to the abortion disputes against states, where the disputants' number is increased to transform the dispute into a socially effective one. Handler et al. (1978) suggest that there was raised a new generation of lawyers, that perceive their roles extending beyond the legal paradigm and that perceive their activities aimed at accomplishing larger social impact.

As for the role of lawyers when it comes to the business operation in the foreign countries, practices of providing international support have been developed. As argued by Flood (2007), refers to the experiences of major UK and US law firms that through wide web of linkages with other practitioners around the world have established the system of providing a wide range of legal services in countries all over the world. While conventional wisdom holds that litigation services only can be provided by law firms domestically, thus globally operating firms are not really able to provide such services, Flood (2007) argues the opposite. Expertise in dispute settlement turns out to be gaining even more importance when it comes to accompanying the activities of businesses in foreign states. Flood (2007) claims such reputable global law firms helps to address the uncertainty issues when the businesses enter to new markets or have disputes in foreign markets. Notably, law firms as such are able to develop set of international practices that can be utilized to maximize the certainty within the context of high uncertainty and “de facto lawlessness” (Flood 2007, 22).

In-house lawyers are argued to play a different role within the domestic business enterprises (Hendley, Murrell and Ryterman 2001). In-house and commercial lawyers are usually argued to play the similar role and carry out similar functions. As the previously mentioned pieces suggest, lawyers can also be the ‘agent of change’ during political transition periods. However, the evidence from Russia shows that in-house lawyers and commercial lawyers are differently perceived by the businesses (Hendley, Murrell and Ryterman 2001). Due to the Soviet legacy and the lack of standards for minimum competence for in-house lawyers their functions are limited to performing routine tasks like preparing contracts and handling labor relations (Hendley, Murrell and Ryterman 2001). This has resulted in their diminished role in the corporate decision-making. When it comes to their functions regarding litigation, around 40% of research participants working in the enterprises without formal legal department (employees provide legal advice) turned out to never have

engagement with courts of general jurisdiction (Hendley, Murrell and Ryterman 2001). I assume that limited functions of in-house lawyers in regards to the dispute settlement are fulfilled by outsourcing them to commercial lawyers.

Summing up the role that lawyers play in shaping the disputing, one may argue that scholarship suggests some assumptions, that prove the significance of lawyers' choice on the outcome of the dispute. However, the biggest gap that my thesis is trying to address is associated with the choices lawyers make on dispute settlement venues and mechanisms. While literature argues for the importance of identity and social background factors in determining the choices of lawyers, my study goes beyond such arguments and focuses on the contextual aspects within which the choices are made and on the perception of lawyers' self-reputation and profit interests. These determinants should be specifically emphasized in the non-democracy where the dispute settlement environment is very uncertain. The most important client-businesses of lawyers view them as "sanctifiers" (Flood 2007) in countries like Kazakhstan and largely rely on their choices.

Chapter 5 How Do Political Actors Determine the Choices of Lawyers?

5.1 Control over State Courts

The legal regulations on the protection of investor rights and the state guarantees of courts' and arbitrations' impartiality constitute a mere façade of the control that the government holds over the all dispute settlement fora.

The findings of my research confirm the idea that political actors' involvement in the disputing process have a strong effect on the choices lawyer make on taking the case or not. I have hypothesized that when the offending party is the state, state-owned company or oligarch with powerful linkages to the first, the lawyers are unlikely to take the case. Indeed, the general perception that the interviewed lawyers conveyed to me is that they largely try to avoid such cases, and when they cannot do so they try to settle the dispute informally. The reason why lawyers neglect to take cases involving political actors is the control that the government directly or indirectly possesses over various dispute settlement fora and pathways in Kazakhstan.

The assumption that in non-democracies the courts are biased towards those with a strong connection to the government is pretty valid. The case of litigation in Kazakhstan is not an exception. I have found the strong evidence on that the control of political actors over courts constitutes an indirect influence. So as Xu (2017) was arguing in China, the judges' ambitions and career interest can play an important role in determining their impartiality towards the state. The data shows that state courts almost never rule against the state. Lawyers argue that it is some kind of general wisdom that judges are very hesitant to break.

Nevertheless, in recent years several developments in regards to disputes initiated by foreign businesses have taken place. In January 2016, a Special Collegium on investment disputes was created within the Supreme Court of the Republic of Kazakhstan. This

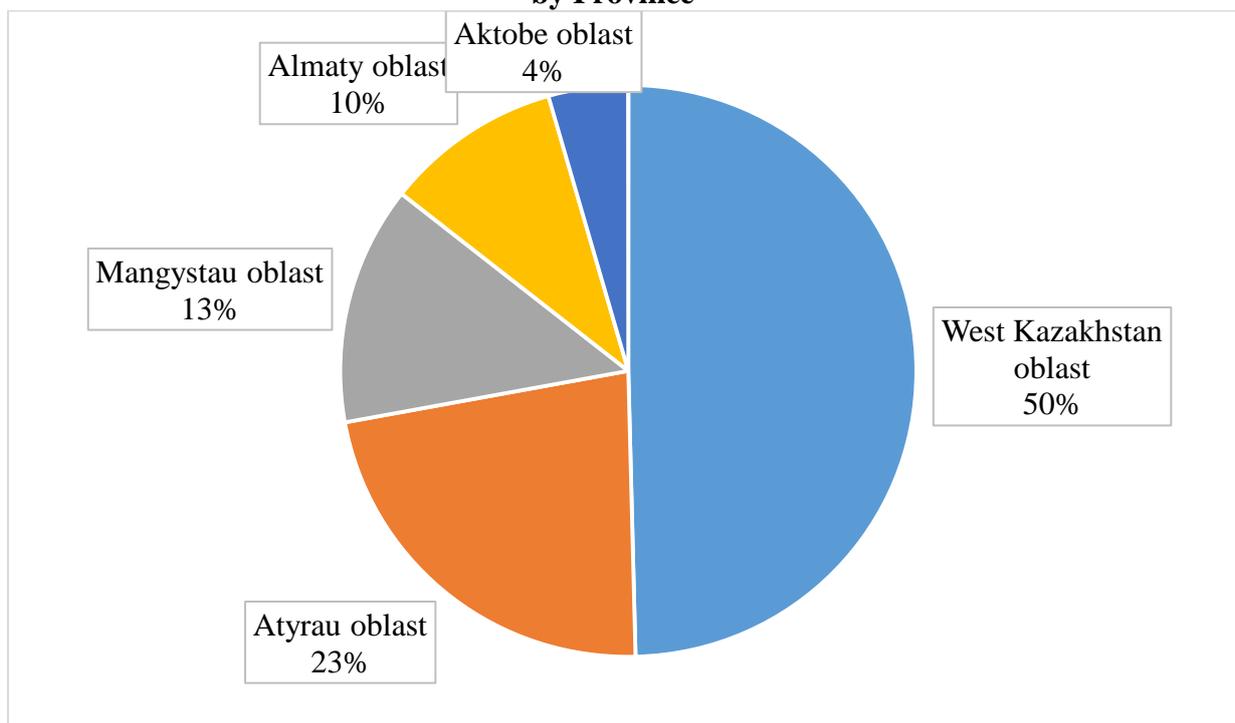
Collegium handles the lawsuits brought by large investors only. According to the Article 274 of the Entrepreneurship Code, “a large investor is a physical or legal person that carries out investments in the Republic of Kazakhstan in the amount of at least two-million of the monthly calculated indices” (The Entrepreneurship Code of the Republic of Kazakhstan). Therefore, even a separate Collegium of the Supreme Court is out of reach for a large number of foreign firms operating on the territory of Kazakhstan. By the end of 2016, the Special Collegium of the Supreme Court of Kazakhstan has provided some limited data about its caseload (see Table 3 and Figure 2 below).

Table 3 Lawsuits against Decisions, Actions and Inaction of State Authorities Brought to the Special Collegium of the Supreme Court of the Republic of Kazakhstan, by the Issue Area

Issue Area	Number of cases	Share of disputes initiated by foreign investor
Tax	11	86% of cases initiated by foreign investor (19 cases)
Environment	8	
Natural monopoly and protection of competition	2	
Industrial development and security	1	
Total	22	

Source: sud.gov.kz

Figure 2 Lawsuits against Decisions, Actions and Inaction of State Authorities Brought to the Special Collegium of the Supreme Court of the Republic of Kazakhstan, by Province



Source: sud.gov.kz

It is interesting that most of the investment disputes were initiated by large investors working the Western part of the country, where the oil fields are developed. Most of the investors coming to Kazakhstani market are primarily interested in that regions. With a certain degree of confidence one may argue that the mentioned cases are somehow related to the issues of taxation, environmental protection etc. specifically in the oil sector. Such distribution is similar in the cases brought to the international arbitration, as outlined in Table 3 above. Most of the disputes arise out of expropriation of assets of companies operating on oil fields or illegal revoke of the licenses for oil production or development of oil fields. Thus, such regional distribution of investment disputes is not surprising.

The existence of such Collegium within the Supreme Court, however, does not guarantee the fairness of the system when the political actors are involved in the dispute.

Table 4 below summarizes the information on the business disputes settled in the Investment courts by clients

Table 4 The Disputes of PwC Clients Handled in the Investment Court

Period	Result	Type of dispute			Total
		tax	environment	customs	
2016	In favor of taxpayers	1			1
	Partially in favor of taxpayers	2			2
	In favor of state bodies	5	4		9
	Partially in favor of state bodies				0
	Total	8	4	0	12
2017	In favor of taxpayers	2		1	3
	Partially in favor of taxpayers	6		3	9
	In favor of state bodies	18	9	2	29
	Partially in favor of state bodies		3		3
	The application not reviewed	2	2		4
	The case ceased	2	1		3
	The case closed	1			1
	The case passed to the Supreme Court	1			1
	The decision of the court not uploaded to the Court Cabinet	2			2
Total	34	15	6	55	

Source: PwC (2017).

of PriceWaterhouseCoopers in Kazakhstan. It is evident that in general for instance, in tax disputes in 2016-2017, judges decided 23 out 34 cases in favor of state bodies. Interestingly, the disputes are not resolved partially in case of state bodies, so it is all or nothing.

One of the lawyers has argued that the ‘popular’ moves of Kazakhstani businesses in solving the disputes are the “justice by a phone call”. Here the respondent refers to the importance of ties with top politicians in the country that have been discussed earlier. The ‘justice by phone call’ happens when the party to the dispute utilizes its connections with powerful politicians that usually obtain higher positions in the chain and asks to influence the judge to decide in favor of that party. The effectiveness of such phone calls on the decision of the judges needs more investigation, but their occurrence is a fact. The interviewees also

emphasized the disputes with state bodies or state-owned businesses to be the most complicated ones in terms of getting a fair decision from the court. The judicial system as a whole is biased towards the state. An interesting case from practice was shared by one of the lawyers:

In the recent year, I had two such cases. For example, I am a business that wants to change the purpose of the business (tselevoe naznachenie biznesa). Only the local Akimat is capable of issuing permits to do so. In Akimat if you don't pay [bribe the officials], they will simply reject your request and will not issue the permission referring to the variety of reasons. Their favorite is "inconsistency with the master of the city development". I file a case with the court asking to recognize the actions of Akimat as illegal and oblige Akimat to change the purpose of the business. What do courts do? They decide that the actions of the Akimat were illegal but say that they cannot oblige the body to do so. Happens in 95% of instances. Judges say that is an established practice that the courts cannot dictate an authorized body what to do.

This example pretty much illustrates how the courts even acknowledging the illegality of the actions of state bodies do not have the "bravery" to decide against the 'system'. The same lawyer claimed that during informal meetings judges argue that they get reprimands for such actions.

5.2 Control over Arbitration

While the situation with political actors influencing the courts is quite expected, the control that the government holds over domestic arbitration tribunals is very surprising. There are two ways in which political actors can control the arbitration tribunals, directly through the legislation and indirectly through the Arbitration Chamber.

In terms of direct control, domestic arbitration tribunals cannot consider disputes when one of the parties is the state or state-owned company.

Disputes related to property rights are regulated by the Civil Code of Kazakhstan. Disputes that involve a foreigner person as a party to the case can be considered by Kazakhstani courts. So, disputes that arise out of property rights violations against foreign firms operating on the territory of Kazakhstan can be settled in the local courts. The judicial

system of Kazakhstan consists of the district and regional courts and Supreme Court on top. The claims by foreign companies can be filed to the district courts where the firm operates. However, local courts in remote locations usually appear to be more corrupt and more unwilling to rule against the regime.

Both the 2004 Law on International Commercial Arbitration and the 2004 Law on Arbitration Tribunals (for domestic tribunals) were the first pieces of legislation adopted in Kazakhstan. The Law on International Commercial Arbitration states that for the case to be regarded in international arbitration at least one of the parties to the dispute supposed to be nonresident of Kazakhstan. There is a special category of disputes that are prohibited to be solved in tribunals:

- Real estate disputes;
- Disputes between shareholders and internal disputes;
- Bankruptcy;
- Disputes arising from transportation agreements;
- Disputes arising from agreements or contracts with market-dominating or monopolist entities;
- Disputes related to state interests and state companies (Law on Arbitration Tribunals).

However, other commercial disputes can be settled in arbitration tribunals.

As for arbiters, in order to be appointed for the case, they have to be at least 25 years old, to have a law degree and at least two years of legal work experience (Law on Arbitration Tribunals). The law also allows parties to appoint foreign lawyers as arbiters to the case (Law on Arbitration Tribunals).

Interestingly, if the foreign-based arbitration tribunal issues an award regulating the dispute between Kazakhstani companies, it cannot be enforced in Kazakhstan (Law on International Commercial Arbitration). This means that in such disputes Kazakhstani companies are stuck between using domestic arbitration and domestic courts. Moreover, the foreign arbitration decisions are reviewed and usually rejected in Kazakhstani courts. The Almaty Specialized Interdistrict Economic Court's jurisdiction deals with enforcing arbitral awards. According to estimates, total enforcement procedure takes about 5 weeks and it is the same for foreign arbitration awards (World Bank).

In addition, the law of the Republic of Kazakhstan on arbitration states:

Arbitration is not entitled to consider disputes between physical and (or) legal persons of the Republic of Kazakhstan on the one hand and state bodies, state enterprises, as well as legal entities, fifty or more percent of voting shares (participation interests in the authorized capital) of which are directly or indirectly owned by the state, on the other hand, in the absence of the consent of the authorized body of the relevant sector (in respect of the republican property) or the local executive body (in respect of communal property Islands).

State bodies, state enterprises, as well as legal entities, with fifty or more percent of voting shares (stakes in the authorized capital) of which are directly or indirectly owned by the state, intending to enter into an arbitration agreement, should send to the authorized body of the relevant branch (in respect of the republic's property) or a local executive body (in respect of communal property) a request for consent for the conclusion of such an agreement with an indication of the projected amounts of expenditures for arbitration proceedings. The authorized body of the relevant branch or local executive body is obliged to consider the request within fifteen calendar days and send a written communication on consent or a reasoned refusal to give consent. When considering the request, the authorized body of the relevant branch or local executive body should take into account economic security and the interests of the state. (Law of the Republic of Kazakhstan On Arbitration, 2016)

The government even controls what arbitration tribunals are being indicated in the contracts of state-owned companies. The expert argued that there were several occasions when state-owned companies like KazMunaiGas, have approached for consultation on what Government body has the authority to provide permission for enclosing arbitration clauses to their contract. There is no complex answer to such question, the interviewee stated. Therefore, by not allowing to bring disputes with states to local arbitration tribunals, the state

diminishes the role of local arbitration courts. To add, the expert claims that Kazakhstani state-owned enterprises are never interested in local arbitration, they prefer tribunals in London or Stockholm. I assume that it happens because there is a little chance that their partners in the contract would agree on settling the cases in domestic courts because domestic arbitration has no jurisdiction over disputes with national companies' involvement. The data on Kazakhstan's disputing in international arbitration shows that most of the cases quite often are taken to SCC and ICSID (Table), in addition, the expert argued political actors in Kazakhstan prefer British law applicability in such cases. Thus, state-owned companies interest in Stockholm and London is defined by the experience in these courts.

Another illustration of political actors controlling arbitration is the creation of a special Arbitration Chamber of Kazakhstan in 2016. The idea of creating such body was at first largely criticized by arbiters themselves because the establishment of such tribunal would again undermine the idea of independence of arbiters. However, the Chamber was formed and its functions are to promote the institute of arbitration and represent the tribunals in a dialogue with state bodies, without interfering the activities and decisions of tribunals.

Expert argues that there are some issues that arbitration tribunals in Kazakhstan. For instance, right after the arbitration law was passed and local tribunals started operating, resolving the disputes, there were several cases when the state judges have discredited the decisions of arbiters. When arbitral decisions were brought to the judges instead of simply issuing the 'executive decree' they were trying to revise the arbitral decision, which damaged the reputation of both the judges and undermined the trust in arbitration. In this regard, the Chamber at this point has only once shown itself in action, but still, it is early to say that the chamber has proved itself as an effective body, which raises concern about the adherence of the Chamber with its proclaimed goals and supports the proposed argument of the control mechanism. The essence of the above-mentioned case lies in the fact that the judge of Special

Economic Court of Almaty city instead of simply enforcing the arbitral decision analyzed the substance matter of the dispute and found the decision of arbitration tribunal as unlawful and decided in favor of the other party. Kazakhstani International Arbitration, the decision of which was found 'unlawful', wrote an open letter to the Supreme Court which was followed by appealing to the next instance that has supported the decision of Special Economic Court of Almaty (Suleimenov 2016). In this case, the Arbitration Chamber tried to initiate dialogue with Supreme Court representatives and the Arbiters. However, since there is no evidence on how exactly the Chamber helped to resolve the issue, there is not enough data to argue that this body's performance is contributing to the enhancement of the arbitration institution in Kazakhstan. Moreover, despite the fact that all the arbitration courts are the members of the Chamber, there cannot be traced any coordination, cooperation or competition between the tribunals, meaning that their independence is being maintained.

Here the arbitration chamber is used as a covert instrument of political control because the proclaimed goal of the chamber is to promote the relations between government bodies and arbitration tribunals, but in the case when arbitral decision was discredited by the court the chamber did little to support the legitimate claims of the arbitrator unless appeal to the Supreme Court.

The statistics on the arbitrated cases in Kazakhstan as well as other data about their activity is very limited. There is also no data on how effective the arbitration awards are enforced. On the other hand, one can observe a lot of cases against Kazakhstan being raise in international arbitration tribunals (Table 5).

Table 5 Publicly Available Information on Investment Disputes against Kazakhstan, Which Have Been Arbitrated in International Arbitration Tribunals

#	Dispute (Year)	Tribun	The issue (sector	Claimed	Winning	Relevant
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		al	of economy)	by investor (\$US)	party and award amount (\$US)	treaty or agreement (Year signed)
1	Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (2005)	ICSID	termination of an investment contract for the creation and exploration of digital cellular radiotelephone connection	458.00 mln USD	Investor; 125.00 mln USD	BIT Turkey - Kazakhstan 1992 - Investment Law - Kazakhstan (1994)
2	Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan (2007)	ICSID	the transfer of claimants' license to explore and extract hydrocarbons in the Liman block in Western Kazakhstan	200.00 mln USD	State	Energy Charter Treaty ("ECT") (1994)
3	AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan (2001)	ICSID	the cancellation of a project for the development of a residential housing complex, and the subsequent transfer of the project's property to the City of Almaty without compensation	13.50 mln USD	Investor; 6.00 mln USD	BIT United States of America - Kazakhstan (1992)
4	Biedermann International, Inc. v. The Republic of Kazakhstan and The Association for Social and Economic Development of Western Kazakhstan "Intercaspian" (1996)	SCC	the Government's termination of an oil concession agreement entered into with the claimant.	n/a	Investor; 8.90 mln USD	Kazakhstan - United States of America BIT (1992)
5	CCL Oil v. Republic of Kazakhstan (2001)	SCC	the termination of a concession agreement for use and management of the State's shareholding in an oil refinery.	224.90 mln USD	Investor	Kazakhstan - United States of America BIT (1992)

6	Caratube International Oil Company LLP v. Republic of Kazakhstan (I) (2008)	ICSID	the termination by the Government of Caratube's licence to an oilfield in Kazakhstan and allegations that the investor had been continuously harassed by the authorities.	1149.00 mln USD	State	Kazakhstan - United States of America BIT (1992)
7	KT Asia Investment Group B.V. v. Republic of Kazakhstan (2009)	ICSID	the Government's alleged forced nationalization of claimant's interest in BTA Bank, by means of Kazakhstan's acquisition of around 75 per cent of the shares of BTA through the National Welfare Fund Samruk-Kazyna.	1500.00 mln USD	State	Kazakhstan - Netherlands BIT (2002)
8	GEM Equity Management AG v. Republic of Kazakhstan (2009)	UNCITRAL rules but institution is unknown	the Government's alleged forced nationalization of claimant's interest in BTA Bank, by means of Kazakhstan's acquisition of around 75 per cent of the shares of BTA through the National Welfare Fund Samruk-Kazyna	1500.00 mln USD	Pending	Kazakhstan - Switzerland BIT (1994)
9	Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading Ltd. v. Republic of Kazakhstan (2010)	SCC	the alleged campaign of harassment by the Kazakh State which culminated with the abrupt cancellation of oil and gas exploration contracts held by	2631.00 mln USD	Investor; 497.00 mln USD	The Energy Charter Treaty (1994)

			claimant's local operating companies, followed by the seizure of its Kazakh assets.			
10	AES Corporation and Tau Power B.V. v. Republic of Kazakhstan (2010)	ICSID	a series of actions including fines and tariff restrictions imposed to claimants by Kazakh competition authorities concerning energy prices that allegedly had adverse financial impacts on the company's operations in the country.	1290.00 mln USD	Neither party (liability found but no damages awarded)	Kazakhstan - United States of America BIT (1992) The Energy Charter Treaty (1994)
11	World Wide Minerals v. Republic of Kazakhstan (2013)	UNCITRAL rules but institution is unknown	Government's alleged failure to observe its contractual obligations, including the granting of an export license to WWM to market Kazakh uranium internationally, which allegedly led the claimant to suspend operations at its Kazakh facility and resulted in the bankruptcy, confiscation and forced sale of its local assets		Pending	Canada - Russian Federation BIT (1989)
12	Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of	ICSID	the termination by the Government of Caratube's licence to an oilfield in Kazakhstan and allegations that the	1000.00 mln USD	State	Kazakhstan - United States of America BIT (1992)

	Kazakhstan (II) (2012)		investor had been continuously harassed by the authorities.			
13	Devincci Salah Hourani and Issam Salah Hourani v. Republic of Kazakhstan (2015)	ICSID	the alleged unlawful expropriation and liquidation of a pharmaceuticals manufacturer, Pharm Industry including the alleged seizure of a 10-hectare plot of land transferred from Issam Hourani to Pharm Industry as well as the annulment of a decree that had granted Pharm Industry ownership of a 42-hectare plot of land.	170.00 mln USD	Pending	Kazakhstan - United Kingdom BIT (1995) Kazakhstan - United States of America BIT (1992)
14	Aktau Petrol Ticaret A.S. v. Republic of Kazakhstan (2015)	ICSID	a series of measures taken by the respondent's courts, which allegedly resulted in the unlawful transfer of claimant's assets to a third party, connected to the government.	150.00 mln USD	Investor: 22.7 mln USD	Kazakhstan - Turkey BIT (1992)
15	Gold Pool Limited Partnership v. Republic of Kazakhstan (2016)	UNCITRAL Permanent Court of Arbitrators (PCA)	the allegedly wrongful termination in 1997 of the claimant's management contract rights to operate certain gold mines in Kazakhstan.		Pending	Canada - Russian Federation BIT (1989)
16	Alhambra Resources Ltd. and Alhambra Coöperatief U.A.	ICSID	an allegedly unlawful assessment of taxes on the claimants'	100.00 mln USD	Pending	Kazakhstan - Netherlands BIT (2002)

	v. Republic of Kazakhstan (2016)		local subsidiary Saga Creek, the withholding of required mining and financing approvals and other actions of the Government, which allegedly culminated in the bankruptcy of Saga Creek in 2015.			
17	Big Sky Energy Corporation v. Republic of Kazakhstan (2017)	ICSID	a series of alleged illegal actions by the Government and its courts, including domestic judicial proceedings through which Big Sky Canada allegedly lost its 100 per cent shareholding in Kozan to the original Kazakhstani shareholders, without being compensated for the dispossession.		Pending	Kazakhstan - United States of America BIT (1992)
18	Windoor v. Republic of Kazakhstan (2017)	SCC	government's alleged failure to observe its contractual obligations, including the granting the payment of 25 mln euros for the design and supply of glass-aluminium structures for an international business and conference center under construction in Astana.	~22.7 - 25 mln euros.	Investor	Estonia-Kazakhstan BIT (2011)

19	Ruby Roz Agricol and Kaseem Omar V. Kazakhstan (2013)	UNCITRAL tribunal	Government's alleged expropriation of the claimant's assets, due to political rationale associated with the situations with Rakhat Aliev.	63 mln USD	State	Investment Law - Kazakhstan (1994)
20	Claimant-investor (New York, USA)	SCC	Termination of lease agreement concerning the refinery ownership	217 mln USD	State	Investment Law - Kazakhstan (1994) BIT United States of America - Kazakhstan 1992
21	TPAO v. Kazakhstan (2011)	ICSID	Government's measures allegedly affecting claimant's investment in an oil exploration and production joint venture which held exploration and production activities in seven oil fields in the Mangistau and Aktobe regions in Kazakhstan.		Award embodying the parties' settlement agreement dated 18 August 2014	Kazakhstan - Turkey BIT (1992) The Energy Charter Treaty (1994)
22	Enrho St Limited v. Republic of Kazakhstan (2011)	ICSID			Settled	

Sources: UNCTAD, italaw, ICSID.

While state controls how the disputes are settled in the country, it obviously lacks the power to control for the settlement in international arbitration. That is why we observe so many cases against Kazakhstan even if the international arbitration may take several years. That supports the idea that domestically the arbitration is controlled, thus there is almost no data that can be obtained. The data on the decisions of arbitration tribunals is combined with the data on state courts, which makes it harder to trace the enforcement of arbitration decisions. If to look at this as opposed to how many data is there available on the decisions

and enforcement of the international arbitration, one may assume that arbitration tribunals' decisions and their statistics are controlled by the political actors.

Lawyers do play important role in disputing in international arbitration also. When involved in such cases, foreign investors prefer to hire foreign law firms, because this way the political control can be even more minimized. The following part of this chapter discusses more thoroughly how political actors can control lawyers' practices in Kazakhstan. Another important advantage of the foreign lawyers is that they have more competence in international disputing, and as much as local lawyers know well Kazakhstani law and the features of disputing in the country, foreign lawyers are more competent in their domestic law. As it has been argued earlier Kazakhstani state-owned companies prefer foreign law applicability, for instance, in the case against Anatoli Stati, during the hearing in Washington D.C., Kazakhstani government was represented by Norton Rose Fulbright LLP, the US law firm. Similarly, when it comes to disputing in international arbitration foreign businesses prefer hiring foreign law firms due to their competence and due to their independence from Kazakhstani political control.

5.3 Control over Negotiation and Lawyers' Practices

There is an evidence on that political actors also try to control the negotiation processes with investors. To be more precise, I refer to the case of Foreign Investors' Council chaired by the President of the Republic of Kazakhstan. The council consists of representatives from the major foreign companies such as CNPC, Eni, Baker & McKenzie and etc. (Foreign Investors' Council chaired by the President of the Republic of Kazakhstan). The representation from Kazakh side consists of Prime Minister, Ministers' cabinet and Head of state-owned "Baiterek" fund (Foreign Investors' Council chaired by the President of the Republic of Kazakhstan). Plus, as already mentioned the President chairs the council. In general, members of the Council can bring up any issues related to the investment activity in

the country from human capital development to judicial reform. The council sits once a year. The existence of council itself illustrates politicians attempts to take 'first row' sits on the negotiation table. This way they are able to control for the negotiation process. The President himself tries to foster the dialogue between major foreign businesses and Government bodies. This is an excellent instance showing the attempts of the state politicians to create platforms for solving disagreements not resorting to formal institutions. Thus, major foreign businesses have the opportunity to directly negotiate the disputes with the Government.

This council includes large investors only, whereas small investors are being neglected. This is interesting because it shows that government values large investors and tries to prevent the dispute directly without lawyers and third-party intervention. This is where the information from lawyers become important, it is with small investors. Such council signals other parties that political actors are interested in negotiations. Therefore, lawyers acknowledge such signals and when it comes to the disputes between small investors and political actors they negotiate first. Another implication of small investors being excluded from this council is the assumption that maybe there is enough control over disputes with small investors in courts and domestic arbitration tribunals. That differentiated approach towards various investors certainly is puzzling enough to be researched in the future.

I have also found some evidence that political actors control spreads beyond the court, arbitration and negotiation procedures. They even try to control for the activities of law firms and lawyers. For instance, one of the interviewees said that Samruk Kazyna usually issues a list of lawyers and law firms that are not able to participate in their project, if they have ever been taking part in disputing against Kazakhstan.

Lastly, during the interviews, I have noticed an interesting phenomenon of how the participants were occasionally referring to the state and its role for in the law enforcement. To

be more precise, several respondents stated “if the government officials supported” or “if the President officially stated” or “the President has said so”. These phrasings were used in regards to the enforcement of arbitral decisions and the promotion of the arbitration institution. It was interesting to see how, first of all, state officials’ and president’s support meant the support of the state, and secondly, how that support was needed to increase the legitimacy of arbitration tribunals and their decisions. This approach illustrates that choices of lawyers can be strongly influenced by the political actors and government involvement. Only states’ approval which is the approval of the President can guarantee the protection of foreign investment. State somehow is perceived to be an overlooking and approving entity that is above the law. From my perspective, as some of the interviewees have also argued this, such perceptions are the Soviet legacy to the law and state. In the Soviet culture, the state led by the communist party was the only source of law and legitimacy. This phenomenon observed in Kazakhstan contradicts the major principles of democracy. No doubt, that political system in Kazakhstan can hardly be approached as democratic, but such essential contradictions are very surprising and definitely worth further investigation. The judicial system in the ideal democratic environment is the one assessing the performance of lawmaking and executive branches. This finding is similar to the results He and Su (2013) got in China, where the court is viewed as an agency of the state. According to the Civil Code of the Republic of Kazakhstan, the state is an equal subject of the law. This perception of the state being above the law has a very damaging effect on the choices of lawyers and their clients disputing behavior. As a result of such approach, judiciary works on ‘autopilot’ mode, when the “call of justice” or the instructions for judges to decide in favor of state (in foreign firm vs state or state-owned enterprise disputes) are not needed because it is already a “common practice”.

5.4 Pathways of the Foreign Business Disputes with Political Actors in Kazakhstan

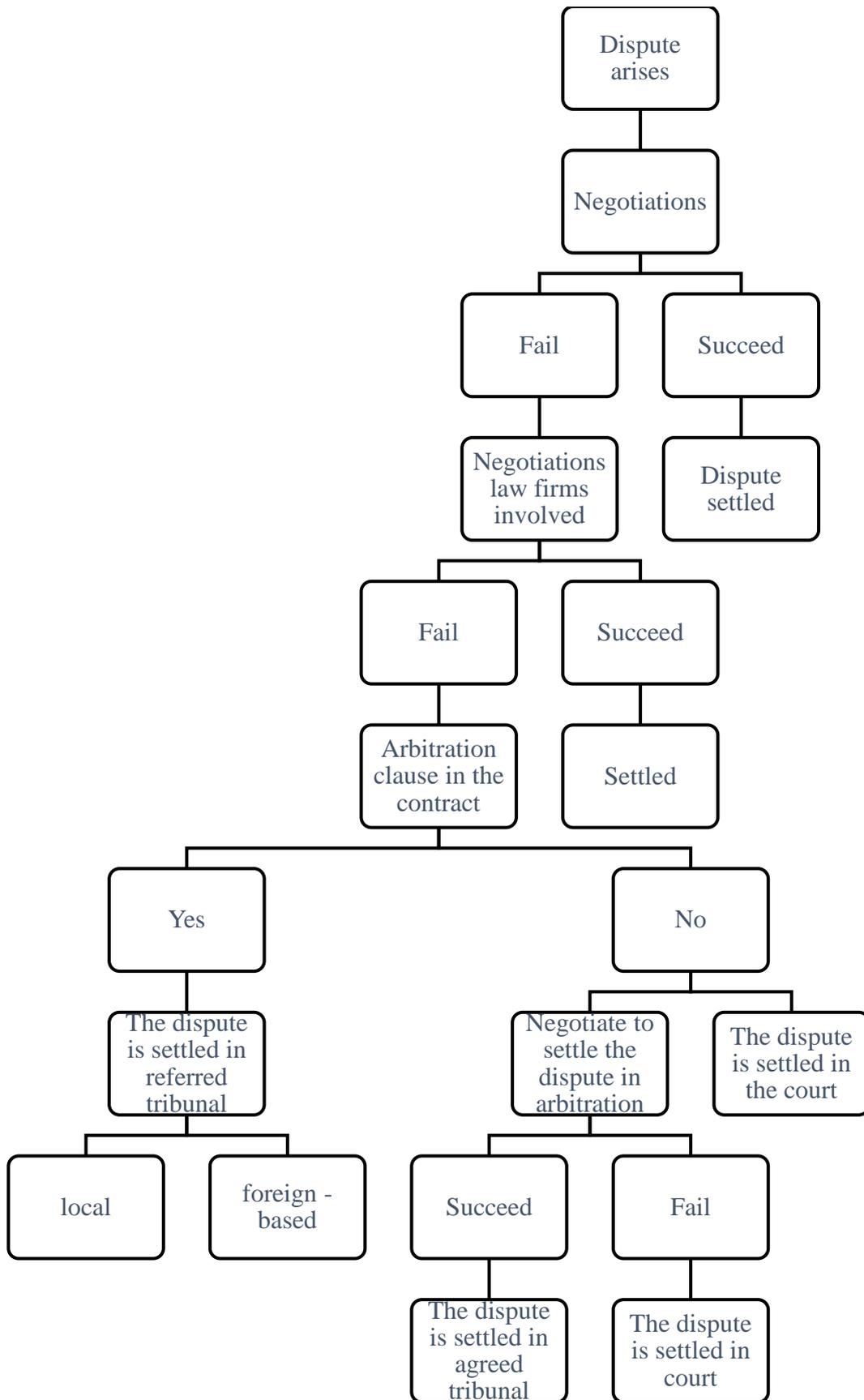
The settlement of the dispute usually takes the following path (Figure 2).

First, parties to the dispute try to settle the issue by negotiating themselves without bringing the law firms to the table. If negotiations succeed, then the dispute is simply settled. If the parties will fail to reach the agreement, foreign businesses usually call for the help of lawyers. Commercial lawyers argue that when they get involved in the dispute they try to settle the dispute by informal means. Therefore, the second round of negotiations start. There are several reasons both commercial lawyers and in-house lawyers have argued for the informal resolution being preferable in comparison to the formal settlement of the case.

In support of the party capability hypothesis, in-house lawyers have claimed that when the dispute with state or any state-related business arise they try to settle the dispute by negotiation at any means. However, the interviewed expert suggested that it can be quite problematic to negotiate with the state bodies or state-owned companies because the terms they agree upon have to pass through the bureaucratic chain. No evidence was found to confirm or reject the importance of businesses' informal connections with top politicians due to that interviewees both in-house and commercial had no such experience. Nevertheless, when the opponent has a strong formal connection to Government, lawyers try to avoid the formal resolution of the case. Moreover, such disputes rarely occur. In this regard one of the interviewees said a comment, that in my opinion sums up the trickiness of the dispute with the state: "we had very few [disputes with the state], I hope there won't be any".

Local lawyers obtain the information about the business-government relations in Kazakhstan. Knowing that government in the country seizes a strong control over the investment settlement venues and procedures lawyers advise their clients negotiate first, and most often themselves try to negotiate the dispute.

Figure 3 The Disputing Experience of the Foreign Firms with All Stages of Settlement



When the negotiations cannot reach an agreement the lawyers refer to the provisions of the contract, and if the contract does specify the way the disputes have to be settled they have to follow that path. In general, such provisions usually specify which arbitration tribunal and which law will have an applicable jurisdiction if the disputes arise.

If the applicable tribunal and law has not been specified lawyers argue that the chances are that the dispute will end up in the state court. This, however, happens after another round of negotiations, which now are aimed at reaching the agreement about settling the dispute in the arbitration tribunal. According to professionals, this is a “part of arbitration law and practices that seem rarely to work out”. The problem is that for the dispute to be resolved in the arbitration tribunal when such have not been specified in the contract, needs the consent of both parties. It means that parties that already have failed to reach the agreement on the dispute settlement again have to negotiate about the arbitration. In practice, lawyers argue that in Kazakhstan that is a big problem due to several reasons. First, it depends on the opponent. If the opponent is the local firm – counteragent, it is more likely that the agreement on arbitration will not be reached because the arbitration tribunals are quite unpopular among Kazakhstani businesses. This is, in general, is the issue of legal illiteracy of their opponent. Secondly, some practitioners argue how parties can negotiate and agree on something when they are already in the dispute? Thus, when the parties are already in the disputes the chances of the dispute being settled by the arbitration is extremely low.

If the dispute arises out of contract with the government and contract still does not have the arbitration clause the dispute will either end up in the state court or international arbitration tribunal. The differentiation here is made based on the cost of the dispute. For example, one of the interviewed in-house lawyers shared that when it comes to international arbitration, they usually try to include such provisions in the contracts worth more than 20 million KZT. Otherwise, he argued it would be irrational because the cost of arbitration

would exceed the amount won by the settlement. This means that the hypothesis on the comparative cost of the dispute to the cost of the procedure of arbitrating is supported by such evidence. One of the major concerns here is the inability of the foreign companies to bring the state to the local arbitration. Therefore, lawyers argue that for the case to end up in international arbitration 100% of investments have to be expropriated. In other words, lawyers suggest international arbitration is an option when there is nothing to lose.

It is worth to note that the choices of lawyers can be different depending on if the dispute is resolved in arbitration tribunals based in Kazakhstan or tribunals based outside of the country. Another in-house lawyer argued that cost is also important for differentiation between such platforms, so when the contract amount exceeds 25000-30000 USD they are more likely to indicate the London Arbitration tribunal with the applicability of the English Law. If the case is below that threshold and they would like to the case still be settled in the arbitration, they indicate the Arbitration Center under the auspices of the National Chamber of Entrepreneurs of the Republic of Kazakhstan “Atameken”. In more general terms, the lawyers argue that an international arbitration tribunal is an option when there is nothing to lose and all the investments poured into the country have been expropriated. This is also one of the ways of how the profit interests (cost and time) determine the choices of lawyers on where to settle the dispute.

Therefore, when the political actor is involved and 100% of investments have been expropriated by the state, the foreign business dispute is settled in the international tribunal, because state courts and domestic arbitration cannot be trusted (due to state control again) and there are no matters to negotiate about.

In conclusion, Chapters 5 and 6 paint a pessimistic story of politics trumping the legal pathways of handling foreign business disputes in Kazakhstan and of lawyers clearly being

afraid of upsetting the powerful. Yet Kazakhstani lawyers differ in evaluating their own reputation and of other legal professionals involved in foreign business disputes, a sign of autonomy (even if very limited) of the legal profession in the country.

Chapter 6 Reputation Matters: Views of Lawyers, Arbiters, and Judges in Kazakhstan

One of the important outtakes of my research is that Kazakhstani lawyers differently value their reputation and reputation of other legal actors involved in handling foreign business disputes. This chapter first explores how lawyers vary in terms of valuing their own reputation and then analyzes how lawyers perceive arbiters and judges. Reputation is important in the business world in general, and trustworthiness of the partners is the basis of successful business interactions. Lawyers as informers, arbitrators, litigators, intermediaries, negotiators, and representatives highly value their reputation and trust of their clients, because that determines their professional success. However, even though the lawyers across the country provide these same services (in similar situations) they differently approach the importance of their reputation, which leads to different choices on taking the case or not.

The data collected from interviews show that the lawyers are hesitant to take the cases when that they know they will lose. Their knowledge about their chances to lose a certain case in Kazakhstan is formed by the information they obtain about the political actors' involvement. This knowledge also is based on the previous experience with litigation, arbitration or negotiation in Kazakhstan and on the experiences with disputes where such actors have been involved. For instance, the above-mentioned case with the lawyer, who was offered to work on the dispute with Akimat. He noted that lately, he has been rejecting such cases because he knew he won't be able to succeed due to Akimat's involvement. He refused to fool the client by promising to win the cases against Akimat. His choice about not taking this case was determined by two reputational considerations: not hurting the record by losing the case and not hurting the reputation of a fair lawyer who is more interested in the outcome instead of money. On the other extreme, there are lawyers who value money more than their reputation and would take any case in order to earn a quick profit. One of the limitations of

my research in this sense is that I was not been able to collect the data on this group of lawyers.

Lawyers also value their time, since time is money. Law firm representatives and arbiters argued that on average the arbitration proceeds faster with their decisions than the state courts. This group of participants pointed out that courts in Kazakhstan are overloaded with cases of business litigation, whereas the arbitration courts on the average deal with 20-25 cases in a year. According to them, arbitration of a foreign business dispute can be done within a few weeks. Another group of participants, comprised of the in-house lawyers argues that state courts procedures do not take 'that long'. They also pointed out the 'comfortability' of the state courts in terms of IT developments and the system of online tracking the documents in the court case. The recent introduction of the system of online application to the court and the creation of court cabinet helped to reduce the time the disputants usually spent on providing different documents personally. This supports the hypothesis about lawyers caring for their reputation because they rely on their previous experiences and tend to take the case if there are prospects of settling the case in "comfortable" fora.

Another way in which reputation is important is lawyers' perceptions of arbiters and judges, which also turns out to be an important factor in making the choice over the case. I have been able to identify four types of perception of judges and arbitrators by the lawyers. There are lawyers that trust judges, do not trust judges, trust arbitrators and do not trust them.

When it comes to the trust in judges, I have noticed an interesting observation that respondents perceive the Supreme Court differently from other state courts. One of the respondents argued that for example in tax disputes, they do not actively get involved in the disputing until it reaches the Supreme Court. Basically, they kept appealing to different courts until they reach the highest judicial tribunal in the country. There are several reasons for such approach.

Judges in the Supreme Court are argued to be more professional and competent in comparison to the judges in regional courts. Expert argues that in order to be appointed in the Supreme Court judges have to have a decent experience and reputation. They also are perceived to be more competent in interpreting and using the law. Another argument holds that only judges of the Supreme Court have the influence on lawmaking and law interpretation. Through the decisions during Plenary Sessions, these judges have the ability to refer to different judicial and lawmaking issues. That extended capabilities of the Supreme judges make the foreign businesses perceive them as more reliable in comparison to regional judges. Hence, the role and reputation of judges that shapes lawyers trust in them.

Even though the judges of the Supreme Court are thought to be more professionals than regional judges there are still some problems associated with their competence. The expert argues that the judicial system in Kazakhstan does not classify the judges according to their specialization and that affects their performance. In fact, the specialization does exist, but it is very vague. There are judges specializing on civil disputes, criminal disputes, and administrative disputes. The range of civil disputes, where the business disputes usually are referred to, is very wide, which means that on daily basis the judges have to deal with tons of different cases on various issues from divorces to tax disputes. The lawyers argue that when it comes to disputes where the understanding the technical matter are important for the judgment they do not trust judges and trust arbiters.

The distrust in court and the concept of courts being corrupt and biased was used by the respondents interchangeably. Most argued that in general they and foreign firms, their clients, do not trust courts. There were several explanations for such phenomenon suggested by the participants. One of the lawyers claimed that the reason for judges and the judicial system in Kazakhstan to be distrusted is that the courts are overloaded with disputes and the judges are pressured by the deadlines. In such stressful working environment, judges simply

don't have time for properly approaching and studying all the materials and evidence presented by the parties to the dispute. This leads to rushed decisions, which then may end up to be not very fair. Another reason for distrusting the courts was the perception that they are corrupted. One of the respondents argued that the judges, in fact, do not ask for bribes. The corruption usually occurs when initiated by one of the parties to the dispute. In other words, the biasness of the judges caused by corruption directly depends on the opponent. If the opponent is a Kazakh business the chances that the firm will try to affect the judges' decision through bribery are quite high. The culture of solving the disputes in the court by informal or illegal means is claimed to be the "mentality of the people in Kazakhstan". Another lawyer referring to his close ties with the judges was arguing that he knows well how the judges settle the cases. The respondent claimed that his friends – judges honestly declare that they are to be punished if ruled against state body. And acknowledging such information the lawyer does not trust judges.

The role of arbiters and their reputation are argued to be one of the essential advantages of arbitration over litigation. Arbiters that have been interviewed claimed they care about their reputation more in comparison to judges because they get selected to the disputes. Also, the expert argued that if the arbiter will fail to act accurately and unbiased in the business environment such news spread very quickly and the reputation of the arbiter may be ruined. Also, arbiters pointed out the importance of professionalism and relevance of that professionalism to the matters of the dispute. In general, all the arbiters have stated all the most popular advantages of arbitrating in the literature. However, the lawyers have perceived the arbiters in Kazakhstan as professional and advantageous as judges. The reason is simple, there are not so many businesses that have actually settled the case in local arbitration courts. The expert argues that statistics show that only around 2-3% of all the business disputes are being solved in Kazakhstani tribunals. The law representatives also argued that they advise

clients to go to arbitration when the dispute needs specialization (for example, technical understanding) and if the client is concerned about the impartiality of the courts. The opinion of foreign companies about the condition of the judicial system important for their experience of dispute settling.

The distrust in arbitrators turned out to be rooted in the problems of enforceability of arbitration decisions. According to some interviewees, there is no difference in the enforceability of court or arbitration decisions because both procedures end with the court issuance of the ‘executive decree’ which basically guarantees the equal enforcement of court and arbitral decisions. Expert argues that the core of the enforceability issues lay in that these acts are enforced by state or private bailiff offices. Bailiff offices are usually overloaded with such acts which may result in problems in enforceability and which means that court and arbitral decisions can be equally unenforced due to that. To add, private bailiffs have the opportunity to choose the acts they want to enforce and according to interviewees, they prefer ‘expensive’ ones, because of the dividends they receive for the enforcement of the decision.

And others were claiming the importance of the support of the government for the arbitration decisions to be successfully enforced, which is the evidence of distrust in arbitration practices in Kazakhstan. As one lawyer stated:

“if the officials or the state itself confirm that the enforcement procedure of the arbitral decisions will be supported and that the arbitral decisions will be enforced, this would attract more companies to arbitration.”

This statement is yet another illustration of how politics may affect the choices of lawyers. The idea of ‘confirmation’ from top politicians sounds very natural in Kazakhstani realm. Even the professionals in the field, the lawyers, argue that state needs to ‘approve’, therefore provide guarantees that an already legal decision has to be enforced.

This chapter has shown that professional reputation matters in the Kazakhstani legal community. The fact that some lawyers view the Supreme Court judges as more competent

than local judges shows that some amount of meritocracy exists in the judicial system and that this top tribunal may be friendlier to firms. Still, legal professional autonomy is heavily restricted by the state. Paradoxically, when political control over foreign business disputes is present – the state is all-powerful. Yet when political control is absent, the state is too weak to enforce court and arbitral decisions.

Chapter 7 Conclusion

My thesis intended to answer the question of how and why the lawyers shape the disputing behavior in non-democracies. I argue that the choices lawyers make determine the ways business will handle the disputes. The importance of information the lawyers obtain and various dispute management services they provide make them important intermediaries in dispute settlement. In Kazakhstani realities, their role as informers is very significant for foreign businesses due to peculiarities of business-government relations. A contextual condition such as very tight connectedness of business and political spheres and the role of political actors in the business environment also determine the choices lawyers make. My evidence supports my hypothesis on that when the political actors are parties to the dispute the lawyers are unlikely to take the case, because of their awareness of government control over negotiation, arbitration, and litigation. Another important factor for lawyers' choice is the profit interest and reputation costs. When the case requires a lot of time and the cost of the dispute is not rewarding enough lawyers are very unlikely to take the case. This also can be related to the previous argument because the cases with political actors representing offending party would require a lot of preparation and effort. Notably, when the foreign business approach lawyers with a dispute against the state or state-owned company and all the money invested has been expropriated, meaning there has left nothing to lose, the lawyers suggest arbitrating abroad.

When it comes to reputation, there are two types of lawyers and those who value their reputation of trustworthy professional over their profit interests tend to decline offers on disputes where they know beforehand that chances to win are minimal. My analysis also reveals important variation on the lawyers' perception of arbitrators and judges, where different factors like friendship with judges, arbitrators value of reputation and etc. interplay.

While my analysis significantly contributes to the knowledge on disputes management in non-democracies, the most important outcome of my thesis lies in the placement of law in business-government relations. The law turns out to be more than a simple façade of the business-government relations. Through different mechanisms like the establishment of chambers and councils, legal restrictions and court's agency dependency, the political actors are able to utilize law as an instrument of controlling foreign firms. For lawyers, the law turns out to be the reputation building mechanism, whereas for foreign businesses law turns out to be a very limited mechanism of dispute settlement.

My study's significant theoretical contribution is that it incorporates the role of the lawyer in disputing behavior of foreign investors. The scholarship has focused on structural and motivational conditions determining dispute settlement, whereas the importance of intermediaries like lawyers have been neglected. In the realities of non-democracies, where the investors face a lot of challenges associated primarily with the uncertainty issues, foreign businesses largely rely on the information and services provided by lawyers when it comes to a dispute. In this regard, the case of Kazakhstan as it has been shown is a perfect instance to study the role of lawyers in shaping the disputing behavior of foreign businesses in non-democracies. In addition, my research contributes to the understanding that the factors influencing business disputing behavior lay beyond the business characteristics.

The policy implication of my study can be regarded in the framework of the newly established Astana International Financial Center Court. The Court was formed as an attempt to address the issue of investor property rights protection and attract more FDI by applying the English Law and all foreign judges. Such structure of the Court shows that Government is aware of the foreign businesses' distrust in litigation in Kazakhstan. Another important policy implication of the study is that it proves that political actors are very creative when it comes to the business disputing in the country and obtain powerful instruments to control the

process. That raises sound concerns about the ability of AIFC court to resist the power of political actors.

I have to acknowledge for the limitations of my thesis and the prospect research areas. The major limitation of the study is that it does not include the data from businesses. The interviews with foreign businesses CEOs would help to understand their perception of the lawyers' role and reputation and foreign businesses' decisions on disputing against political actors. Due to the graduate program commitments the sample couldn't be enlarged to include the heads of foreign firms. This, however, shows a great prospect for future research on business disputing in Kazakhstan. Inclusion of foreign businesses' 'opinions' will help to understand and trace the decision-making process behind disputing in Kazakhstan. The 'power' balance in between heads of business and lawyers when it comes to disputing decisions constitute another angle from which the business-government relations and the role of lawyers in this dyad can be studied.

To conclude, foreign disputes settlement in Kazakhstan is a unique instance to research due to the converges of various obsolete political control mechanisms with contemporary dispute management and resolution instruments. Approaching the law as an instrument of political control appears to be the legacy of communist past in the Soviet Union, which nowadays also can be evident from the case of China. In the same context, there are lawyers valuing their reputation and trying to incorporate contemporary dispute management mechanisms, imposed by international practice Kazakhstan's involvement with international agreements like New York convention, ICSID Convention, and various BITs. As in many spheres of Kazakhstan's development unique mixture of past, present and future practices in approaching the law are making it one leg in the past, and one leg in the future.

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