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KAZAKHSTAN: A CASE STUDY IN STATE SUCCESSION TO INVESTMENT TREATIES

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Abstract. Two arbitral cases were initiated against Kazakhstan on the basis of the 1989 Agreement between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments. The tribunal of the first case (World Wide Minerals v. Republic of Kazakhstan) determined that Kazakhstan was a legal successor to the Canada-USSR BIT and found breaches of fair and equitable treatment. While in the second case (Gold Pool Limited Partnership v. Republic of Kazakhstan) the tribunal rejected the claimant's argument that the Canada-USSR BIT was applicable to Kazakhstan. Since the decisions in these two cases have not been published, there is currently speculation that investors from other states besides Canada can take advantage of the Soviet Union's treaties, even if there is no treaty in force with Kazakhstan. Thus, the aim of this paper is to show the legal framework and practice for treaty-making related to investment in Kazakhstan both pre-and post-collapse of the Soviet Union. In particular, this paper examines the relevant international treaties, diplomatic notes, intergovernmental-level statements regarding the succession to the USSR treaties, and the USSR and Kazakh Soviet Socialist Republic investment legislations. It also provides recommendations for the future development of state succession and investment treaties.
Keywords: state succession, investment agreement, bilateral investment treaty, Canada, Kazakhstan.
JEL codes: K33

Аңдатпа. 1989 жылғы Канада үкіметі мен Кеңестік Социалистік Республикалар Одағы үкіметі арасындағы инвестициялар тарту мен өзара қорғау туралы келісім негізінде Қазақстанға қарсы екі арбитраждық іс қозғалды. Бірінші іс бойынша арбитраж (World Wide Minerals Қазақстан Республикасына қарсы) Қазақстан бұл келісімнің құқықтық мирасқоры болып табылатындығын және шарт талабының әділеттігі мен тең құқықты тәртіптемесінің бұзылуын анықтады. Алайда, екінші іс бойынша (Gold Pool Limited Partnership Қазақстан Республикасына қарсы) арбитраж Қазақстанға бұл келісімнің қолданылмайтындығы туралы шешім қабылдады. Екі істің шешімдері жарияланбаған, сол себепті қазіргі таңда Қазақстанмен қолданыстағы келісім болмаса да, Канададан басқа шетелдердің инвесторлары КСРО келісімдерін қолдануы мүмкін деген болжам бар. Сондықтан бұл мақаланың мақсаты – Кеңес Одағы ыдырағанға дейін және одан кейін Қазақстандағы инвестициялық келісімдердің құқықтық негіздері мен тәжірибесін көрсету. Атап айтқанда, КСРО шарттарының мирасқорлығына қатысты тиісті халықаралық шарттар, дипломатиялық жазбалар, үкіметаралық деңгейдегі мәлімдемелер, сондай-ақ КСРО мен Қазақ Кеңестік Социалистік Республикасының инвестициялық заңнамалары қарастырылады. Сонымен қатар, мақалада мемлекеттік мирасқорлық пен инвестициялық келісімдердің болашақтығының дамуы бойынша ұсыныстар берілген.
Түйін сөздер: құқықтық мирасқорлық, инвестициялық келісім, екіжақты инвестициялық шарт, Канада, Қазақстан.
JEL кодтар: K33

Аннотация. Два арбитражных дела были возбуждены против Казахстана на основании Соглашения 1989 года между правительством Канады и правительством Союза Советских Социалистических Республик о

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привлечении и взаимной защите инвестиций. Арбитраж по первому делу (World Wide Minerals против Республики Казахстан) определил, что Казахстан является правопреемником этого соглашения и арбитражем были установлены нарушения в условиях соглашения по справедливому и равноправному режиму. В то время как во втором деле (Gold Pool Limited Partnership против Республики Казахстан) арбитраж отклонил аргумент истца о применении этого же соглашения к Казахстану. Поскольку указанные решения по этим двум делам не опубликованы, в настоящее время имеется предположение, что инвесторы из других государств, помимо Канады, могут воспользоваться договорами СССР, даже если нет действующего договора с Казахстаном. Поэтому цель данной статьи – показать правовую основу и практику заключения инвестиционных договоров с Казахстаном до и после распада Советского Союза. В частности, рассматриваются соответствующие международные договоры, дипломатические ноты, заявления на межправительственном уровне касательно преемственности договоров СССР, а также инвестиционные законодательства СССР и Казахской Советской Социалистической Республики. В статье также предлагаются рекомендации для будущего развития преемственности государств и инвестиционных договоров.
Ключевые слова: правопреемство, инвестиционное соглашение, двусторонний инвестиционный договор, Канада, Казахстан.
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1. Introduction

In December 2013, after several unsuccessful attempts to sue the Republic of Kazakhstan, World Wide Minerals Ltd ('WWM') turned to the 1989 Agreement between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (Canada-USSR BIT). WWM was a Toronto-based mining company. In June 1996, it agreed to manage and operate Tselliny Gorno-Khimicheskii Kombinat located in Kazakhstan. The dispute concerned the Kazakhstani government's alleged failure to observe its contractual obligations such as to permit an export licence. Because there was no investment protection agreement between Canada and Kazakhstan, the WWM sought to hold Kazakhstan accountable under the Canada-USSR BIT. The Canadian government submitted an *amicus curiae* brief, supporting the argument that Kazakhstan succeeded the Canada-USSR BIT. On 19 October 2015, the UNCITRAL tribunal held that Kazakhstan was a successor state to the Canada-USSR BIT. This caused another Canadian investor to bring a claim against Kazakhstan.

In March 2016, Gold Pool JV Limited, a Canadian entity, initiated arbitration proceedings against Kazakhstan at the Permanent Court of Arbitration (PCA), claiming wrongful termination of their trust management contract to operate the Kazakhaltyn JSC enterprise. On 30 July 2020, the PCA rendered an award dismissing Gold Pool JV Limited's case for lack of jurisdiction. Thus, two arbitral cases were initiated against Kazakhstan under the Canada-USSR BIT. Though both claims were similar in nature, the PCA dismissed the Gold Pool's argument that the Canada-USSR BIT was in force between Canada and Kazakhstan. The decisions in both cases are unpublished, so there is speculation of which sources served as the basis for the decisions.

Materials and methods

The method of the paper is the analysis of primary and secondary sources on succession of treaties.

This paper is organised as follows. It first analyses the relevant international treaties, diplomatic notes, intergovernmental-level statements regarding the succession to the USSR treaties, and USSR and Kazakh Soviet Socialist Republic (Kazakh SSR) investment legislations before the collapse of the union in 1991. Then, it examines official correspondence and records of state bodies starting in 1991 when the Soviet Union officially collapsed. Finally, this paper concludes with recommendations for the future development of state succession and investment treaties.

2. The Pre-Collapse Period

The Kazakh SSR was an autonomous republic of the Soviet Union from 1936 to 1991. Its government was managed by the Communist Party of the Kazakh SSR. In the 1930s and 1980s, there was almost no foreign direct investment in the country *(Meyer & Pind, 1998, p. 6)*.

In 1987, the Soviet republics were allowed to establish joint ventures, which was considered as the beginning of the Soviet Union's open-door policy. As part of this policy, the USSR signed 15 BITs between 1989 and 1990, in particular with Austria, Belgium, Canada, Finland, France,

Germany, South Korea, Luxembourg, Netherlands, Spain, Switzerland, UK, China, Denmark and Turkey (Investment Policy Hub, n.d.). The Canada-USSR BIT was signed on 20 November 1989 and came into force on 27 June 1991. Its objective was to stimulate business initiatives and develop economic cooperation. The USSR also signed some other investment related multilateral agreements such as the New York Convention and MIGA Convention *(UNCTAD, 2021).*

For the first time, the central government of the Soviet Union allowed its republics to participate in international investment relations and it granted its republics the right to apply their legislations as long as they did not contradict the Soviet Union's constitution. First, on 10 December 1990 the government adopted the Fundamentals of Legislation on Investment Activity in the USSR. Second, on 5 July 1991 it adopted the Fundamentals of Legislation on Foreign Investments in the USSR'.

On 7 December 1990, the government of the Kazakh SSR adopted the Law on Foreign Investment. The aim of this law was to attract foreign investment by providing minimum guarantees to entrepreneurs. The minimum guarantees included the nationalisation clause and free transfer of capital with some exceptions. Disputes of a foreign entity with state bodies of the Kazakh SSR were subject to the jurisdiction of State Arbitration, the Kazakh SSR courts and an arbitration court if the parties agreed.

On 10 June 1991, the Kazakh SSR adopted the Law on Investment Activities, which defined the basic legal conditions for investment activities and state regulation in the country. Pursuant to its article 4, this law and the USSR's law on investment regulated investment activities in the country. Compared with the law on Foreign Investment, the Law on Investment Activities provided for the equal protection of investors' rights and interests. Should state bodies violate investors' rights, the Kazakh SSR or the Soviet Union would reimburse damages.

Thus, in the pre-independence period, the laws of the Kazakh SSR contained principal rules for the protection of investment, but eventually, the regulation of dispute resolution remained under the Soviet Union's authority. Therefore, all international agreements signed by the Soviet Union would prevail over the legislation of the Kazakh SSR. Thus, the BIT between Canada and the USSR, which entered into force on 27 June 1991, had priority over all the laws of the Kazakh SSR in relation to the regulation of investment disputes, which were brought from the moment the BIT entered into force until the official collapse of the Kazakh SSR.

3. The Post-Collapse Period

On 8 December 1991, the heads of the three republics of the USSR – Belarus, Russia and Ukraine – signed an agreement establishing the Commonwealth of Independent States (CIS), announcing that 'the USSR, as a subject of international law and a geopolitical reality, is ceasing its existence' *(Soglashenie o sozdanii Sodruzhestva nezavisimyh gosudarstv 1991).* Shortly after, the heads of 11 Soviet republics signed the Alma-Ata Protocol of 21 December 1991, in which the Kazakh SSR officially became the Republic of Kazakhstan. On 21 December of the same year, the Council of Heads of States of the CIS supported the Russian Federation to continue the USSR's UN membership and its permanent seat on the UN Security Council and other international organisations *(Decision of the Council of Heads of States of the CIS, 1991).*

Moreover, on 23 December 1991, the representatives of 12 European Community (EC) countries issued a statement declaring that it recognised the decision of the 1991 Alma-Ata Protocol and that Russia will continue to implement the rights and obligations of the USSR under the Charter of the United Nations *(Zayavlenie «dvenadcati» o budushchem statuse Rossii i drugih byvshih respublik, 1991).*

On 13 January 1992, the Ministry of Foreign Affairs of Russia issued a note informing about its continuity of international agreements signed by the USSR, which is as follows:

The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Heads of Diplomatic Representations in Moscow and has the honor to request them to inform their Governments about the following.

The Russian Federation continues to perform the rights and fulfill the obligations following from the international agreements

signed by the Union of the Soviet Socialist Republics.

Accordingly, the Government of the Russian Federation shall perform the functions of a depository in conformity with the corresponding multilateral agreements instead of the Government of the USSR.

Therefore, the Ministry kindly requests to consider the Russian Federation as a Party to all international agreements in force instead of the USSR.

The Ministry avails itself of this opportunity to renew to the Heads of Diplomatic Representations the assurances of its highest consideration (Note of the Ministry of Foreign Affairs of the Russian Federation, 1992).

On this basis, it should be noted that Russia assumed the obligation to implement all the international treaties of the USSR. Because no states were objecting to this note, all investment treaties signed by the Soviet Union had become the BITs of the Russian Federation. In total, the Soviet Union signed 15 BITs, three of which were terminated – these are the BITs with China, Denmark and Turkey. Russia has signed new BITs with these countries and in fact, the new BIT with China clearly states that the former China-USSR BIT should be terminated in relation to Russia and China *(China-Russia BIT, 2006).* Unlike the China-Russia BIT, the China-Kazakhstan BIT does not contain a similar provision assuming that Kazakhstan was not bound by the Soviet treaty. In terms of the BITs with Austria, Belgium, Canada, Finland, France, Germany, South Korea, Luxembourg, Netherlands, Spain, Switzerland, and the UK, they all remain in force as Russia's BITs. In addition, the Russian Federation succeeded to the New York Convention and the MIGA Convention, whereas Kazakhstan joined the New York Convention in 1995 and the MIGA Convention in 1993 by accession to them.

The rest of the former republics have concluded their own BITs. In 1992, Kazakhstan signed its first BIT with Turkey. Furthermore, between 1992 and 2010, Kazakhstan concluded BITs with states that were the former BIT partners of the Soviet Union (with the exception of Canada and Denmark). Canada, in turn, after the collapse of the Soviet Union, entered into BIT with three former republics: Ukraine (1994), Latvia (1995; this BIT was replaced by the new BIT in 2009) and Armenia (1997). These agreements apply to any investment made before and after the agreement's entry into force (Canada-Ukraine BIT 1994, art. XVII (1), Canada-Latvia BIT 2009, art. XVII (1), Canada-Armenia BIT 1997, art. XVII (1)). Therefore, no matter whether they were made before or after the collapse of the Soviet Union, the investments of these countries are protected by their own investment treaties.

Canada and Kazakhstan did not sign a bilateral investment agreement. However, in 2005, Kazakhstan registered the draft of the Kazakhstan-Canada BIT *(Catalog of International Agreements (Drafts), 2005).* The record shows that there was a draft by the government to sign the BIT with Canada, which was registered with the Tax Committee of Kazakhstan in 2005.

Despite the absence of a BIT between Canada and Kazakhstan, the tribunal in the *World Wide Minerals v Republic of Kazakhstan* determined that Kazakhstan was the legal successor to the Canada-USSR BIT *(Jones, 2016).* Particularly, having applied a "tacit agreement" on the continuity of the Soviet BIT between Canada and Kazakhstan, the tribunal found breaches of fair and equitable treatment (FET), including denial of justice (Final award on merits dated 29 October 2019). It should be noted that in 4 out of 19 known investment claims against Kazakhstan the tribunal found breaches of FET clauses. Most of the BITs of Kazakhstan contain self-standing FET.[1] The Canada-USSR BIT contained FET linked to international law ensuring the use of international law principles and customary international law. Therefore, the Canada-USSR BIT had stronger protection for foreign investors than the current BITs of Kazakhstan.

A similar decision of arbitral tribunal that has considered this issue is the case of *Gold Pool Limited Partnership v. Republic of Kazakhstan.* In this case, the tribunal found

[1] Currently, according to UNCTAD there are five approaches to FET clauses in treaty practice: no FET, self-standing FET, FET linked to international law, FET with additional substantive content and FET linked to the minimum standard under customary international law.

that Kazakhstan is not bound by the Soviet BIT with Canada (Award dated 30 July 2020). Thus, the decision in Gold Pool JV Limited reached the opposite opinion on the succession of Kazakhstan. The latter decision is likely more justifiable because these investors came to Kazakhstan when the government began to sign its own agreements. All agreements that the Soviet Union signed were no longer applicable to Kazakhstan.

There are two claims similar in nature, but two contradictory decisions regarding Kazakhstan's succession to the Soviet BIT. The same matters may have different arbitral decisions, whether it is because arbitrators feel pressure to deliver an enforceable decision or they attempt to respect both parties' interests. Claimant-investors and respondent-states have a great concern over the predictability of arbitral cases. Nevertheless, the WWM case provided little hope for investors from Canada and other states to take advantage of the Soviet Union's treaties, even if there is no treaty in force with the newly independent state. Therefore, the issue of state succession related to investment is important in order to avoid future controversy on investment treaties.

4. Future Development of State Succession and Investment Treaties

Investment law depends on general international law *(Simma & Pulkowski, 2015, pp. 361–362).* International law has some regulations on state succession of treaties. According to Article 59 of the Vienna Convention on the Law of Treaties:

A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time (Vienna Convention on the Law of Treaties 1969).

Furthermore, Article 24 of the Vienna Convention on Succession of States in respect of Treaties provides the following conditions:

A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party when:

(a) they expressly so agree; or

(b) by reason of their conduct they are to be considered as having so agreed (Vienna Convention on Succession of States in respect of Treaties 1978).

Another provision of the Vienna Convention on Succession of States in respect of Treaties is Article 34 that provides that:

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation (Vienna Convention on Succession of States in respect of Treaties 1978).

The decision in *World Wide Minerals v Republic of Kazakhstan* demonstrates that states that agree on the succession of one state cannot be exempted entirely from the investment treaties of the predecessor state. It is necessary to make a direct declaration by all parties to the treaty (i.e. the predecessor state, successor state and third state that entered into the agreement). Furthermore, it is advisable to set clear rules for states, which leave the union to establish a new government.

International law should protect both the legitimate expectations of states and the interests and rights of investors, whereas a

host state should provide guarantees against unlawful expropriation in order to stimulate business initiatives and develop economic cooperation with foreign countries. In the case of Kazakhstan and Canadian investors, neither party was protected by a clear and unambiguous rule of international law or a bilateral agreement.

On the other hand, all existing and future investment agreements of Kazakhstan with partners of the former USSR need to be amended in terms of their application. As a host state, Kazakhstan can practise defensive regulations by concluding the rules that do not apply to disputes arising before the entry into force of a bilateral investment agreement. Moreover, in the future, if the government of Kazakhstan decides to renew its BITs, it should include a termination statement on any previously existed treaties.

5. Conclusion

World Wide Minerals v Republic of Kazakhstan is an instrument of hopelessness for investors, and the decision remains controversial to this day. The UNCITRAL tribunal determined Kazakhstan as a successor state to the Canada-USSR BIT, which is now the Canada-Russia BIT.

The example of Kazakhstan with Canadian investors is the basis for concluding investment agreements with certain disputes, subject to the BIT rules. State succession to investment treaties should be regulated by an agreement among the concerned states. Despite there being no BIT between Canada and Kazakhstan, the representatives of the Canadian investor have achieved a solution in international arbitration. Following WWM's claim, another Canadian company initiated arbitration against Kazakhstan. While both claims are similar in nature, in the second claim the court rejected the claimant's argument that a BIT was in force between Canada and Kazakhstan.

After the collapse of the Soviet Union, Russia declared itself a 'continuator state' and requested other states to consider it as a party to international treaties instead of the Soviet Union. No state objected to this declaration. The Russia's unilateral statement was relevant to its BIT succession. Russia had succeeded to 15 BITs, three of which were renegotiated. Therefore, the decision in *World Wide Minerals v Republic of Kazakhstan* has become historic in international investment law, as the application of the old bilateral agreement between Canada and the USSR to Kazakhstan as a successor state has radically changed the conditions for the validity of state's unilateral statements.

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ҚАЗАҚСТАННЫҢ ИНВЕСТИЦИЯЛЫҚ КЕЛІСІМДЕРГЕ ҚҰҚЫҚТЫҚ МИРАСҚОРЛЫҒЫ БОЙЫНША ЖАҒДАЙЫН ЗЕРТТЕУ

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ИССЛЕДОВАНИЕ СИТУАЦИИ КАЗАХСТАНА ПО ЕГО ПРАВОПРЕЕМСТВУ В ОТНОШЕНИИ ИНВЕСТИЦИОННЫХ ДОГОВОРОВ

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