

Kazakhstan defeats claim under Soviet treaty

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Astana, Kazakhstan (Credit: Shutterstock/Jane Peimer)

Kazakhstan has defeated a US\$917 million claim brought by a Canadian joint venture over the termination of a contract for a gold mining enterprise, after a tribunal found the state was not bound by an investment treaty signed by the former Soviet Union.

In a press release yesterday, Kazakhstan's ministry of justice said that an UNCITRAL tribunal dismissed the claim by Toronto-based Gold Pool for lack of jurisdiction after it ruled unanimously that Kazakhstan was not a legal successor to the Canada-USSR bilateral investment treaty.

The London-seated tribunal is chaired by **Albert Jan van den Berg** of the Netherlands and includes New Zealand's **David AR Williams QC** and Argentine **Gabriel Bottini** of Uría Menéndez. The proceedings were administered by the Permanent Court of Arbitration in The Hague.

Lawyers from Jones Day in Washington, DC, and London represented Gold Pool, while a team from Curtis Mallet-Prevost Colt & Mosle in Washington, DC, New York and Milan acted for Kazakhstan.

Gold Pool was at the time owned by Toronto-based joint venture partners Kazakhstan Goldfields and Central Asia Goldfields, with the former owning a 75% stake.

The joint venture won a government tender to manage state-owned Kazakhaltyn JSC and three gold mines it operates in Northern Kazakhstan – Aksu, Zholymbet and Bestobe. The contract under Kazakh law was signed in 1996.

Kazakhstan says that Gold Pool was awarded the contract to pay off Kazakhaltyn's debts, modernise production and improve performance.

The state says that Kazakhaltyn subsequently suffered from debts to contractors, idle and flooded mines, delays to facility renovations and production – as well as unpaid wages and underprepared working camps.

According to Kazakhstan, after Kazakhaltyn “practically went bankrupt” and the state gave several warnings to Gold Pool, the contract was terminated in 1997.

Canadian publication *Northern Miner* reported that year that Gold Pool claimed there were several force majeure events, including increased production costs, power shortages and processing restrictions at the mines. The parties were also in dispute over Gold Pool's decision to suspend operations as it deemed the project economically unviable, according to the publication.

Kazakhstan says Gold Pool initially filed commercial arbitration proceedings against government authorities under the management contract – but the claim expired in 2000 after the miner failed to take further steps.

In 2016, Gold Pool initiated the PCA proceedings under the USSR-Canada BIT. The treaty was signed in 1989 – two years before Kazakhstan became an independent state and the Soviet Union collapsed.

Kazakhstan disputed that it was bound by the BIT, citing diplomatic and inter-state correspondence with Canada. Kazakhstan said there was no basis for its

legal succession to the treaty and that it had not breached any of its provisions in any case.

The state says Gold Pool's demand for almost a billion dollars in compensation was based on, among other things, the increased price of gold seventeen years after the contract's termination.

A hearing took place in Paris in June last year.

The tribunal is said to have concluded that Kazakhstan was not bound by the BIT, rejecting Gold Pool's submission that Kazakhstan and Canada had reached a "tacit agreement" on the former's succession to the treaty.

Gold Pool was also ordered to pay Kazakhstan for all costs incurred in the arbitration.

Kazakhstan's minister of justice **Marat Beketayev**, says: "The Gold Pool lawsuit is another attempt by so-called investors to make money via arbitration, based on doubtful facts. The decision of the arbitration tribunal is confirmation that a modern legal system is being formed in Kazakhstan that can withstand such aggressive actions."

The Chairman of Kazakhstan Goldfields, Tom Griffis, tells GAR: "Gold Pool is extremely disappointed that the tribunal found no tacit agreement between Kazakhstan and Canada despite clear evidence that such an agreement was formed by 1992 or 1995 at the latest.

"Not only does the tribunal's finding fail to properly adduce the contemporaneous evidence presented by the claimant, confirmed repeatedly by Canada, but it also improperly uses non-contemporaneous evidence to determinative effect in its analysis. Needless to say, Gold Pool is currently examining all of its options with respect to the award."

Griffis adds that the tribunal's conclusion that the BIT did not apply to Kazakhstan is at odds with the findings of a separate tribunal hearing another claim under the same treaty, filed by Canada's World Wide Minerals and its CEO, Paul Carroll.

The tribunal hearing that case issued a partial award on jurisdiction in 2015 – finding that Kazakhstan could be found liable under the Canada-USSR BIT. Is it thought to be the first time a state other than Russia was held to be a legal successor to the investment treaty obligations of the USSR.

Although the bulk of the claim was dismissed, the claimants won a US\$50 million award last year.

Gold Pool JV Limited v Kazakhstan

Tribunal

- **Albert Jan van den Berg** (Netherlands) (president)
- **David AR Williams QC** (New Zealand)
- **Gabriel Bottini** (Argentina)

Counsel to Gold Pool

- Jones Day

Partners **Charles Kotuby** and **Melissa Gorsline** and associates **James Egerton-Vernon** and **Maria Pradilla Picas** in Washington, DC; and partners **Baiju Vasani*** and **Sylvia Tonova**, of counsel **Tatiana Minaeva**** and solicitor **Anatoly Matveev** in London

**left Jones Day to join Ivanyan & Partners in November 2019*

***left Jones Day to join RPC in London in September 2019*

Counsel to Kazakhstan

- Curtis Mallet-Prevost Colt & Mosle

Partners **Mark O'Donoghue** and **Alexandra Maier** and associates **Yerzhan Mukhitdinov**, **Iryna Voronov** and **Andrew Larkin** in New York, senior international consultant **Tullio Treves** and counsel **Alice Venturini** in Milan and counsel **Marat Umerov** in Washington, DC