

The Republic of Kazakhstan Won a Multimillion Arbitration Brought by Canadian Company “Gold Pool”: Arbitral Tribunal Confirms that Kazakhstan is Not Bound by the Soviet Treaty with Canada

On July 30, 2020, an international Arbitral Tribunal rendered a unanimous Award dismissing for lack of jurisdiction the arbitration initiated in 2016 by the Canadian company Gold Pool JV Ltd. against the Republic of Kazakhstan in relation to a trust management contract to operate the “Kazakhaltyn JSC” enterprise.

The total amount of the arbitration claims were US\$917 million.

In March 1996, Gold Pool was entrusted with management of Kazakhaltyn JSC with the goals to discharge the company’s debts, restore and modernize production, create a favorable financial environment and an effective marketing strategy. Gold Pool failed to meet its obligations under the contract. The debt to the employees of the enterprise’s town-forming facilities for wages were not paid for a long time and were steadily increasing. The functioning of the gold mines (Aksu, Zholymbet and Bestobe) was not well organized, and they were mostly idle. The enterprise’s other gold mines were abandoned and flooded. The enterprise’s production facilities were not upgraded, the necessary geological exploration work was not being conducted, the ore processing and gold production was not properly organized. The debts of the enterprise to the workers and contractors continued to increase. The management company demonstrated that it lacked financial capacities and became practically bankrupt. As a result of the operational failures, the mining towns were not made ready to be heated in the winter season and their citizens were suffering.

After the repeated criticisms, warnings and affording time to correct the deficiencies, the contract with the management company was terminated in August 1997, due to the mentioned systematic breaches.

Although Gold Pool soon filed an international commercial arbitration claim against the government under the management contract, it then failed to take any further procedural steps. Thus, it ceased prosecuting its claims in that legal proceeding. In accordance with the Kazakh law applicable to the contract, the statute of limitations for the claim expired in 2000.

Despite this, 17 years after the above events, in February 2014, Claimant sent a notice of dispute under the Canada-USSR Agreement for the Promotion and Reciprocal Protection of Investments of 1989, allegedly applicable to the Republic of Kazakhstan. In March 2016, Claimant initiated the arbitration proceedings.

Almost every arbitration process involves consideration of issues of jurisdiction, merits and quantum. Each of these areas requires careful preparation and collection of materials. Thus, since 2014, the Ministry of Justice and the Consultant of the Government of the Republic of Kazakhstan worked on collecting evidence for the proceedings.

Since Claimant stated that the Canada-USSR Agreement of 1989 applied to Kazakhstan, while the Republic does not consider itself bound by the Agreement, an extensive work was carried out to prepare the Republic's objections in the arbitration. This included the analysis of international treaties, locating and scrupulously studying archival documents of various ages starting from the country's gaining its independence, diplomatic notes, statements at the intergovernmental level, correspondence and records of state bodies and officials. This helped to restore the picture of the development of relations with Canada over the decades and contributed to the strengthening of the state's position on the absence of the Republic's legal succession to the Canada-USSR Agreement.

The laws and regulations of the 1990s that significantly changed by the time the arbitration claim was filed, were also analyzed. Among other things, work was carried out to locate witnesses. Their testimonies reinforced the views that the country did not succeed to the 1989 Agreement and the Government did not breach the management contract, and they played an important role in the arbitration proceedings.

Due to the remoteness of the events and the transfer of documents to the country's archives, a unique kind of work of searching and analyzing documents was conducted. The staff of the Ministry of Justice and the Consultant has studied the archives of the Akmola region (the cities of Kokshetau and Stepnogorsk), the National Archives of the Republic of Kazakhstan, the Archives of the President of the Republic of Kazakhstan, the city archives in Almaty and Nur-Sultan, as well as the materials of the departmental archives of state bodies. As a result, tens of thousands of documents were reviewed.

At the same time, Claimant, which initiated this arbitration proceedings 17 years after the events and requested almost a billion dollars in compensation taking into account the increased price of gold over this period, was obstinate in distorting the events of many years ago and aggressive in presenting far-fetched claims contradicted by the facts and documents that it initially tried to conceal.

It should also be noted that the Canadian authorities provided documents for the arbitration with such redactions that their content was rendered unreadable. All this hampered the work in defending the Republic's positions, however the Ministry and the Consultant managed to obtain the necessary evidence and get to the truth.

The hearing was held in June 2019 in Paris (France).

The Tribunal rejected Claimant's argument that Kazakhstan and Canada had reached a "tacit agreement" on the continuity of the Soviet BIT between them. The Tribunal's opinion is based,

inter alia, on new evidence and differs from that previously made by another tribunal in an arbitration case initiated on behalf of World Wide Minerals Ltd. and Paul Carroll.

The Tribunal ordered that Claimant pay the full costs incurred by the Republic in the Arbitration.

“The Gold Pool’s claim was another attempt by so-called “investors” to make money in arbitration based on dubious facts. The outcome in the decision of the Arbitral Tribunal confirms the forming of a modern legal system in Kazakhstan capable of resisting this type of aggressive action. Kazakhstan has the necessary resources and a team of reliable foreign consultants. Furthermore, the courts and government agencies are accumulating the necessary experience. All this ensures effective defence in arbitration processes”, - commented the Award the Minister of Justice of the Republic of Kazakhstan Mr. BEKETAYEV.

The Government of Kazakhstan in this case was represented by the Ministry of Justice of the Republic of Kazakhstan together with the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP.

<https://www.gov.kz/memleket/entities/adilet/press/news/details/respublika-kazahstan-vyigrala-mnogomilionnyy-arbitrazhnyy-process-protiv-kanadskoy-kompanii-gold-pool-arbitrazhnyy-tribunal-podtverzhdaet-cto-kazahstan-ne-svyazan-sovetskim-soglasheniem?lang=en>