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Founder: Prof. Pierre Lalive
Editor in Chief: Matthias Scherer



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Is Kazakhstan a State Successor to the USSR?

A Perspective from Investment Treaty Arbitration

CLÀUDIA BARÓ HUELMO¹

I. Introduction

On 15 October 2015, the arbitral tribunal (the “**Tribunal**”) constituted in the case of *World Wide Minerals* (“**WWM**” or the “**Claimant**”) v. *Republic of Kazakhstan* (“**Kazakhstan**” or the “**Respondent**”) issued a decision on jurisdiction. Although the decision is not publicly available, the Claimant issued a press release on 28 January 2016 explaining that the Tribunal had decided it had jurisdiction over the dispute under the 1989 Agreement between the Union of Soviet Socialist Republics (“**USSR**” or the “**Soviet Union**”) and Canada on the Promotion and Reciprocal Protection of Investments (“**FIPA**”).² This decision means that Kazakhstan has been considered to be a State successor to the USSR with regards to the Canada-USSR FIPA.

The aim of this article is to examine the potential reasoning reached by the Tribunal, comprised of Sir Franklin Berman QC, Professor John Crook and Professor William W Park, in holding that Kazakhstan succeeded the USSR in this particular instance. In order to do so, the rules of State succession will be briefly considered, taking special note of the particularities of the case of the USSR. These laws will then be applied in the context of the present case.

II. Rules of State succession

The concept of State succession can be understood as the “notion that a break in legal continuity has taken place which requires the application of

¹ Associate at LALIVE SA. The article represents the author’s personal views only. The author would like to thank Mr George Kiladze for all his comments during the multiple versions of this article and Professor Claus Kreß for his insightful suggestions to its final draft.

² “Tribunal’s Ruling Opens Door For Claims against Kazakhstan”, Law360, 28 January 2016, available at:

<https://www.law360.com/articles/752344/tribunal-s-ruling-opens-door-for-claims-against-kazakhstan>; “In a dramatic holding, UNCITRAL Tribunal finds that Kazakhstan is bound by terms of former USSR BIT with Canada”, Investment Arbitration Reporter, 28 January 2016, available at:

<http://www.iareporter.com/articles/in-a-dramatic-holding-uncitral-tribunal-finds-that-kazakhstan-is-bound-by-terms-of-former-ussr-bit-with-canada/>.

bridging rules [and] which presumes that the new sovereign is bound by the obligations of the former sovereign over the territory in question”.³ Therefore, when a State ceases to exist, the new State which exercises control over the same territory may be bound by the international commitments of the old State. However, this presumption can and has been rebutted depending on the specific circumstances which led to the change of power between the old and the new States.

The 1978 Vienna Convention on Succession of States in respect of Treaties (the “VCSS”) offers some insight in this matter.⁴ The VCSS purports to delineate how rights and obligations of States are affected when they cease to exist or disintegrate into a number of new States. A few articles are particularly relevant to the case of the USSR. However, in the present case, the VCSS would only apply to the extent that it reflects custom since neither the Russian Federation (“**Russia**”) nor Kazakhstan have ratified the Convention.⁵

The VCSS encompasses two distinct rules in relation to whether a succeeding State is bound by the obligations of the predecessor State. Broadly, this depends on whether the succeeding State is considered a “newly independent State” or a “separating State”.

1. Newly independent States

In the case of newly independent States, largely applicable in the context of decolonisation, Article 16 VCSS states the general rule, also known as the “clean slate” rule:

“A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in

³ Malcolm Shaw, “State succession revisited” (1994) 5 Finnish Yearbook of International Law 34 (“**Shaw, State succession**”), at 36.

⁴ Vienna Convention on Succession of States in respect of Treaties, done at Vienna on 23 August 1978, entry into force 6 November 1996, 1946 United Nations Treaty Series 3, (“VCSS”), available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-&chapter=23&clang=_en.

⁵ Out of the former Soviet Republics, only Moldova, Ukraine and Estonia have ratified the Convention. See “Status of the Vienna Convention on Succession of States in respect of Treaties”, United Nations Treaty Collection, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en.

*force in respect of the territory to which the succession of States relates.”*⁶

However, it must be noted that the clean slate rule does not mean that the newly independent State is free to disregard customary international law or the general principles of international law since the VCSS only applies to treaty obligations.

As can be seen by the negative wording of Article 16, the general rule is subject to certain exceptions. In the specific case of bilateral treaties relating to these newly independent States, Article 24 VCSS states that the treaty will be considered as being in force between the succeeding State and the other party when: (a) the parties expressly agree to do so; or (b) by reason of their conduct, they are considered as having so agreed. As such, this exception displaces the clean slate rule in Article 16 by considering the conduct of the newly independent State. The exception of Article 24 VCSS is generally thought to reflect international custom.⁷

2. Separating States

In the case of “separating States”, Article 34 VCSS establishes the principle of automatic continuity. This principle states that, in cases of separation, any treaties in force continue to be in force in respect only of the part of the territory of each successor State. However, this rule does not apply if: (a) the States concerned agree otherwise; or (b) if it appears that the application of the treaty by the successor State would be incompatible with the object and purpose of the treaty or would radically change its conditions.

Despite the possible relevance of Article 34 for separating States to the present case, it must be highlighted that the VCSS in its entirety is not generally thought to reflect custom.⁸ With particular attention to Article 34 VCSS, the International Court of Justice (the “**ICJ**” or the “**Court**”) has been asked to discuss this issue in two instances.

⁶ Draft Articles on Succession of States in respect of Treaties with Commentaries (1974) (“**ILC Commentary**”), Yearbook of the International Law Commission Vol. II, Part One, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/3_2_1974.pdf.

⁷ Patrick Dumberry, “State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention” (2015) 28 Leiden Journal of International Law 13 (“**Dumberry**”), at 24.

⁸ Christian Tams, “State succession to investment treaties: mapping the issues” (2016) 31(2) ICSID Review 314, at 318, 326; Detleu Vagts, “State succession: the codifiers’ view” (1993) 33 Virginia Journal of International Law 275, at 287-288.

In its third Preliminary Objection to the *Application of the Genocide Convention* case, Yugoslavia stated:

*“Article 34 of the VCSS [...] is not applicable as a rule of customary international law. It has been introduced in the Convention not as the result of codification but as a result of progressive development.”*⁹

Further, Yugoslavia remarked upon the example of the new States established in the territory of the former USSR and concluded that “*all of them acted in lined with the ‘clean slate’ rule and entered into the treaties of the predecessor state by means of accession.*”¹⁰ This approach seems to suggest that a formal act of accession, on a treaty-by-treaty basis, would be required even in the case of separating States, thus rejecting the principle of automatic continuity.

Moreover, Hungary also expressed a similar opinion in its reply to the *Gabčíkovo-Nagymaros* case:

*“[the VCSS] is widely regarded as an unsuccessful exercise in international law-making [...] that does not correspond to subsequent practice [...] The conditions laid down by the Court [...] for law-making by multilateral treaty have certainly not been met in the case of Article 34 of the [VCSS].”*¹¹

Although the ICJ did not discuss the merits of whether or not Article 34 VCSS is indicative of customary international law, the arguments were not rejected in either case.¹² In fact, State practice and academic opinion would suggest that Article 34 VCSS has not reached customary status at the present time and that it was included in the VCSS as a progressive development of international law by the International Law Commission (the “ILC”).¹³ Therefore, as it is unlikely that Article 34 VCSS codifies customary international law, there seems to be no established norm of

⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objection of Yugoslavia)* [1995], [B.1.4.1].

¹⁰ *Ibid.*, [B.1.4.3].

¹¹ *Case concerning Gabčíkovo and Nagymaros Project (Hungary v Slovakia) (Reply of Hungary)* [1995] ICJ Rep 173, [3.157].

¹² *Case concerning Gabčíkovo and Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, [123]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Preliminary objections)* [1996] ICJ Rep 595, [23].

¹³ Rein Müllerson, “The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia” (1993) 42(3) *The International and Comparative Law Quarterly* 473 (“**Müllerson, Continuity and Succession**”), at 474 and 488.

continuity of treaty obligations in the field of State succession in the cases of dismemberment or separation of States.

3. Main conclusions

The difference between the two approaches mentioned above can largely be summarised in the form of a rebuttable presumption. In the case of bilateral treaties with newly independent States, it is presumed that the treaties do not remain in force, unless contrary conduct is shown. However, in the case of separating States, it is presumed that the treaties remain in force, subject to an agreement to the contrary or incompatibility with the object and purpose of the treaty.

Thus, the VCSS seeks to establish two regimes for State succession of bilateral treaty obligations. One is based on the clean slate rule, which applies to newly independent States and largely in the context of decolonisation, where successor States are not bound by their predecessor States obligations *vis-à-vis* the relevant territory. This has, to an extent, been adhered to in State practice as the general rule.

The second regime in the VCSS, based on the automatic continuity rule, which applies to separating States, predicates that a State is presumed to be automatically bound by its predecessor State's obligations, although this rule has largely been rejected as representing customary international law.

In practice, there appears to be a great divide between what is enshrined in the VCSS and what States actually do.¹⁴ In several instances, States have therefore relied on the general rule as stated in Articles 16 and 24 VCSS, even when they were considered to be separating States. For example, this was the case of the dissolution of the Austro-Hungarian empire, where Austria asserted that it was not bound by any of the treaties of the former empire and, therefore, each specific treaty would need to be agreed upon with each specific State.¹⁵

¹⁴ Odysseas G. Repousis, "On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao" (2015) 37(1) *Michigan Journal of International Law* 113, at 181.

¹⁵ Paul R. Williams, "The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?" (1994) 23 *Denver Journal of International Law and Policy* 1 ("Williams"), at 14-15.

III. State succession with regards to the obligations of the USSR

In the specific case of the USSR, the Federation of Soviet Republics was officially dissolved on 26 December 1991 by the Declaration of Alma-Ata. This document is also well known for establishing the Commonwealth of Independent States (“CIS”) between eleven former Soviet Republics. Despite the fact that the Alma-Ata Declaration involved all the former Soviet Republics (with the exception of the Baltic States), Russia is generally believed to be the sole successor State to the USSR.¹⁶

Regarding the commitments contained in treaties ratified by the USSR, the newly created CIS members stated that:

“Member [S]tates of the commonwealth guarantee, in accordance with their constitutional procedures, the fulfilment of international obligations stemming from the treaties and agreements of the former USSR.”¹⁷

Article 12 of the Agreement on the Creation of the CIS also establishes that the High Contracting Parties guarantee the execution of the international obligations that derive from the agreements that the High Contracting Parties have with the USSR.¹⁸ Further, the Council of Heads of State of the CIS signed a memorandum of understanding on issues of succession to treaties of the USSR in which they decided to recognise that all members of CIS were successors to the obligations of the Soviet Union.¹⁹

Therefore, according to the intention stated in these documents, the former Soviet Republics, including Kazakhstan, acknowledged their

¹⁶ The European Community also recognised that the “*international rights and obligations of the former USSR, including those under the UN Charter, will continue to be exercised by Russia.*” However, no mention of the other former Soviet Republics was made. See Vladimir-Djuro Degan, “State succession: especially in respect of state property and debts” (1993) 4 Finnish Yearbook of International Law 130 (“Degan”), at 145.

¹⁷ Declaration of Alma-Ata, done at Alma-Ata on 21 December 1991 (“**Declaration of Alma-Ata**”), available at: <http://www.nytimes.com/1991/12/23/world/end-soviet-union-text-accords-former-soviet-republics-setting-up-commonwealth.html?pagewanted=all>.

¹⁸ Translated from the French version of the Agreement on the Creation of the Commonwealth of Independent States, done at Minsk on 8 December 1991, available at: http://www.cvce.eu/en/obj/accord_portant_creation_de_la_communaute_des_etats_independants_minsk_8_decembre_1991-fr-d1eb7a8c-4868-4da6-9098-3175c172b9bc.html.

¹⁹ Rein Müllerson, “Law and Politics in Succession of States: International Law on Succession of States” in Brigitte Stern, *Dissolution, Continuation, and Succession in Eastern Europe* (1998, Kluwer Law International, 1st edition), at 12.

willingness to comply with all the international commitments undertaken by the USSR, which would presumably include the FIPA with Canada.²⁰

However, it is clear that not all previous rights and obligations of the USSR could reasonably be assumed by all CIS members on an individual basis. For example, the Council of Heads of State of the CIS unanimously endorsed Russia's continuance of the membership of the USSR in the United Nations (the "UN") and other international organisations, including the USSR's permanent seat in the UN Security Council.²¹ Similarly, all USSR embassies became Russian embassies.²² Further, certain USSR treaties establishing obligations over a particular territory such as the Caspian or the Baltic Sea could not possibly be complied with by any other State than the one with sovereignty over that specific territory, as opposed to being borne by other CIS members.²³

With CIS support, Russia sent a communication to the UN Secretary-General stating it would continue to exercise its rights and honour its commitments deriving from international treaties concluded by the USSR and, therefore, requested that Russia be considered a party to all international agreements instead of the USSR.²⁴

Nonetheless, Russia also added that "*the other former Soviet Republics [...] would share the responsibility for the performance of the international obligations of the USSR insofar as they concerned their jurisdiction.*"²⁵ This could be interpreted as a declaration that the former Soviet Republics would assume treaty obligations which related to their territories or which were reasonably within their jurisdiction. In favour of this argument, the statements of Mr Vsevolod Soukhov, the Russian General Consul in Strasbourg in 1992 are helpful:

²⁰ Müllerson, Continuity and Succession, see supra note 13, at 479.

²¹ Declaration of Alma-Ata, available at: <http://www.nytimes.com/1991/12/23/world/end-soviet-union-text-accords-former-soviet-republics-setting-up-commonwealth.html?pagewanted=all>; Yehuda Z. Blum, "Russia Takes Over the Soviet Union's Seat at the United Nations" (1992) 3 European Journal of International Law 354 ("Blum"), at 355-356.

²² Degan, see supra note 16, at 146.

²³ ILC Commentary, page 213, paragraph 15; Ahmet Sözen and Kudret Özersay, "The Annan Plan: State Succession of Continuity" (2007) 43(1) Middle Eastern Studies 125, at 134; Mariangela Gramola, "State Succession and the Delimitation of the Caspian Sea" (2004) 14 Italian Yearbook of International Law 237, at 253 and 267-268.

²⁴ Marja Lehto, "Succession of state in the former Soviet Union: arrangements concerning the bilateral treaties of Finland and the USSR" (1993) 4 Finnish Yearbook of International Law 194 ("Lehto"), at 197.

²⁵ *Ibid.*

“The fact that [...] Russia [...] is the continuing [S]tate of the former USSR at the level of international law certainly does not imply that the former Republics of the [Soviet] Union will not comply with international undertakings and obligations. They are bound by its undertakings and obligations to the extent that [these] concern each new State. In this manner, the Republics are the successors of the former USSR.”²⁶

This approach by Russia and the CIS members seems to be consistent with the rules prescribed in Article 34 VCSS in the case of separating States since it would imply automatic continuity of the treaties in respect only of the part of the territory of each successor State.

However, the succession of the obligations of the USSR between the former Soviet Republics was far from uniform. In the field of bilateral investment treaties (“**BITs**”), it must be noted that several former Soviet Republics are currently parties to the Spain–USSR BIT and the Belgium–Luxembourg–USSR BIT.²⁷ Both were signed and entered into force before the dissolution of the USSR and the former Soviet Republics of Armenia²⁸, Turkmenistan²⁹, Tajikistan³⁰, Belarus³¹, Kyrgyzstan³² and Georgia³³ are currently bound by one or both of these agreements.

Nonetheless, not all former Soviet Republics succeeded the USSR in all of its BITs which means that there was a pick-and-choose application of

²⁶ *Ibid.*, at 212.

²⁷ Convenio de Fomento y Protección Recíproca de Inversiones entre España y la Unión de Repúblicas Socialistas Soviéticas (1991), available at:

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/5118>; Accord entre les Gouvernements du Royaume de Belgique et du Grand-Duché de Luxembourg, et le Gouvernement de l’Union des Républiques Socialistes Soviétiques, concernant l’encouragement et la protection réciproques des investissements (1989), available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4691>.

²⁸ “Bilateral Investment Treaties of Armenia”, Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/9#iiaInnerMenu>.

²⁹ “Bilateral Investment Treaties of Turkmenistan”, Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/215#iiaInnerMenu>.

³⁰ “Bilateral Investment Treaties of Tajikistan”, Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/206#iiaInnerMenu>.

³¹ “Bilateral Investment Treaties of Belarus”, Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/18#iiaInnerMenu>.

³² “Bilateral Investment Treaties of Kyrgyzstan”, Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/113#iiaInnerMenu>.

³³ “Bilateral Investment Treaties of Georgia”, Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/77#iiaInnerMenu>.

the principle of automatic continuity with regards to obligations arising from bilateral treaties.³⁴ In fact, considering that only six of the eleven Soviet Republics consider themselves bound by only two of the BITs concluded by the USSR, it seems like the clean slate rule was more widely applied than the principle of automatic continuity.³⁵ Academics have also noted these discrepancies and have argued that “*the ex-USSR Republics ditched, without any apparent regrets, the Alma-Ata Declaration, which incidentally was their general note of succession. If anything else, their behaviour clearly reflected a ‘clean slate’ mindset*”.³⁶

On the other hand, Russia not only succeeded the USSR in its BIT with Spain and with Belgium-Luxembourg but also the BITs concluded with Finland, the United Kingdom, Germany, France, The Netherlands, Canada, Austria, Switzerland and the Republic of Korea.³⁷ The question here remains as to why some former Soviet Republics followed the principle of automatic continuity in relation to some BITs and why others applied the clean slate rule. Part of the answer could be that Russia was considered by many as a “continuing State” which simply lost part of its territory. As a result, rather than the non-customary regime in Article 34 VCSS, one could argue that it was merely following the general rules of the consent to be bound by a treaty.

Another indication that the Alma-Ata Declaration should not be considered as an endorsement of the principle of automatic continuity is the fact that both Belarus and Ukraine expressly committed to accede to the Treaty on the Non-Proliferation of Nuclear Weapons as non-nuclear States.³⁸ The fact that this commitment was highlighted in relation to this specific treaty, but not in relation to others, could suggest that a clean slate rule was adopted. Therefore, neither State considered itself to be bound by the previous USSR ratification of the aforementioned treaty, which indeed suggests the application of the clean slate rule in this particular instance.³⁹

³⁴ Patrick Dumberry and Daniel Turp, “State Succession with Respect to Multilateral Treaties in the Context of Secession: From the Principle of *Tabula Rasa* to the Emergence of a Presumption of Continuity of Treaties” (2013) 13 *Baltic Yearbook of International Law* 27, at 48.

³⁵ Akbar Rasulov, “Revisiting State Succession to Humanitarian Treaties: Is there a Case for Automaticity?” (2003) 14(1) *European Journal of International Law* 141, at 163.

³⁶ *Ibid.*

³⁷ “Bilateral Investment Treaties of the Russian Federation”, Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/175>.

³⁸ Lehto, see *supra* note 24, at 196.

³⁹ United Nations Office for Disarmament Affairs, “Status of the Treaty on the Non-Proliferation of Nuclear Weapons”, available at: <http://disarmament.un.org/treaties/t/npt>.

This also suggests that the Alma-Ata Declaration did not give certain third States the requisite comfort in terms of good faith compliance by CIS members. This may be because of the lack of clarity in defining which USSR treaty obligations fell into which CIS members' jurisdiction. One could argue that it would be easier for third States to assume that Russia retained the USSR's obligations, and that they would enter into new international treaties with the relevant CIS members anew. For example, despite the fact that the United States of America (the "US") has presumed that treaties in force between the US and the USSR have continued to be in force with respect to the former Soviet Republics, the US opted to sign new agreements with Ukraine, Belarus and Kazakhstan to ensure their compliance with the arms control treaties previously entered into with the USSR.⁴⁰ Remarkably, it must be noted that, through a series of letters between the US and Kazakhstan, the latter accepted the offer to establish diplomatic relations but did not provide any assurances that Kazakhstan would continue to fulfil the treaty obligations of the USSR.⁴¹

As a final consideration, the issue of whether Russia itself could be the successor of the USSR has been considered by academics such as Professor Shaw, who argues that, taking into account the content of the Alma-Ata Declaration, Russia could not be the successor to the USSR since "*documentation proclaiming the end of the USSR in terms which in law would suggest dissolution or dismemberment of that entity [would] logically preclud[e] continuity*".⁴² However, he adds:

*"it is clear from all the circumstances that this was an essentially political statement not taken by either the parties themselves or by third States as constituting a proclamation of dissolution preventing claims by Russia of continuity."*⁴³

Despite this comment, it is undeniable that the Alma-Ata Declaration had practical legal effects since it is the instrument by which the USSR ceased to exist. Even so, one must distinguish the legal and political effects of the Alma-Ata Declaration, and the subsequent State practice, which largely accepted Russia's succession of the USSR's treaty obligations.

⁴⁰ Shaw, State succession, see *supra* note 3, at 73; Malcolm Shaw, *International law* (7th edition, Cambridge University Press, 2014), at 707-708; Edwin D. Williamson and John E. Osborn, "A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia" (1992-1993) 33 *Virginia Journal of International Law* 261, at 264.

⁴¹ Williams, see *supra* note 15, at 21.

⁴² Shaw, State succession, see *supra* note 3, at 49; Blum, see *supra* note 21, at 359-360.

⁴³ Shaw, State succession, see *supra* note 3, at 49-50.

In effect, although Russia considered itself to be the successor of the USSR, it nevertheless maintained that certain obligations would be assumed by CIS members, to the extent that it related to their jurisdiction.⁴⁴ The latter part has, however, not provided third States with sufficient legal certainty. These have often relied instead on expressly new commitments being granted by CIS members. Therefore, it appears that the rules codified in the VCSS have been applied in different ways depending on each succeeding State and each specific treaty. This suggests that we have to examine whether Kazakhstan succeeded the USSR with regards to its obligation under the USSR-Canada FIPA in accordance with the specific circumstances.

IV. Did Kazakhstan succeed the USSR for the obligations contained in Canada-USSR FIPA?

In light of the above, this section will consider whether Kazakhstan was a successor to the treaty obligations of the USSR under the FIPA with Canada, or whether Russia was the sole successor of the obligations of the USSR under that treaty. Based on the above, it would seem that, under the Alma-Ata Declaration, to the extent that obligations under the FIPA were within the jurisdiction of various CIS members, they would be considered as partial successors to the USSR. However, as stated above, there was not a uniform approach in State practice after the dissolution of the Soviet Union.

When considering whether Kazakhstan is a partial successor to the obligations of the USSR, one must first determine whether Kazakhstan should be considered as a newly independent State or as a separating State.

If Kazakhstan is considered a newly independent State, the clean slate rule would be the most appropriate norm according to the VCSS and custom. In favour of the application of the clean slate rule to the case of Kazakhstan, some academic commentators have highlighted that the former USSR Republics:

“could argue that the central Soviet government had the power to make treaties and the individual republics did not have a true democratic opportunity to give meaningful input or to stop ratification of treaties made under the Soviet government.”⁴⁵

⁴⁴ Lucinda Love, “International agreement obligations after the Soviet Union’s break-up: current United States practice and its consistency with international law” (1993) 26 *Vanderbilt Journal of International Law* 373, at 394.

⁴⁵ *Ibid.*, at 389.

Therefore, a case could be made for the application of the clean slate rule to these republics since they did not truly consent to be bound by these agreements.

Further, the VCSS's definition of "newly independent States" specifies that it applies to States "*the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.*"⁴⁶ One could argue that the territory of Kazakhstan, during the period of the Soviet Union, was dependent on the central government of the predecessor State for its international relations, which would have likely included the conclusion of treaties.⁴⁷

On the other hand, if Kazakhstan is considered a separating State, the principle of automatic continuity could be applied. However, as illustrated in the first section, the VCSS does not seem to reflect custom in its entirety. As a result, courts and tribunals may hold that Article 34 VCSS is not applicable if they decide it still has not crystallised as custom. In this case, even if Kazakhstan is considered a separating State, it may be that the customary rule codified in Articles 16 and 24 VCSS would be applied instead despite not being a newly independent State.

No definition can be found in the VCSS for the term "separating State". A possible interpretation is that it could be negatively defined by reference to the definition of a "newly independent State".⁴⁸ The ILC Commentary on the VCSS states that the key distinction is whether the new State was a former dependent territory.⁴⁹ However, it still remains unclear how to assess the dependence between the territories of the USSR since they can either be considered as a true union of States, in which case Kazakhstan would be a separating State, or they can be considered as a dependent territory comparable to a colony or a protectorate, in which case Kazakhstan would be a newly independent State.⁵⁰ An example of separating States can be found in the dissolution of the union between the Kingdoms of Norway

⁴⁶ VCSS, Article 2(f), (emphasis added).

⁴⁷ Andrew M. Beato, "Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union" (1994) 9(2) American University International Law Review 525 ("Beato"), at 550-552 and 554.

⁴⁸ ILC Commentary, p. 176, paragraph 8.

⁴⁹ *Ibid*, p. 266, paragraph 32.

⁵⁰ Tammy Fahmi, "Succession of states and international treaty obligations as applied to the break-up of the Soviet Union and Yugoslavia" (1995) 1 New England Annual 85, at 95; ILC Commentary, page 260, paragraph 2.

and Sweden in 1905. An example of a newly independent State would be the creation of the State of Upper Volta (now Burkina Faso) and its independence from France in 1960.⁵¹

Against this background, the ruling in *WWM v. Kazakhstan* which held that Kazakhstan was a successor to the obligations contained in the Canada-USSR FIPA may rest on different rationales. The Tribunal may have either:

- a) applied the principle of automatic continuity as established in Article 34 VCSS and, therefore, by default, determined that Kazakhstan was a separating State which is bound by obligations of the predecessor State;
- b) decided that Kazakhstan was a newly independent State, but had, by its conduct, waived the clean slate rule and adopted the FIPA; or
- c) decided that Kazakhstan was a separating State, and that Articles 16 and 24 VCSS applied nevertheless as customary rules, that is rejecting Article 34 VCSS' status as reflecting custom, but that Kazakhstan had, by its conduct, waived the clean slate rule and adopted the FIPA.

With regards to argument (a), it seems highly unlikely that the Tribunal applied Article 34 VCSS due to its clear lack of customary status.⁵² When considering arguments (b) and (c), it must be taken into account that Kazakhstan would have had to agree to the applicability of the Canada-USSR FIPA tacitly or expressly through, for example, an exchange of notes or letters with Canada since, in general, the continuance of bilateral treaties is a matter not of right but of agreement.⁵³ However, in cases where the agreement is tacit such as in the present case, it is remarkably difficult to assess whether both parties consented to the continuation of the treaty. When differentiating between arguments (b) and (c), it must be noted that Kazakhstan seems more likely to fall into (c) as a separating State than as a newly independent State.

With regards to Canada's position, the ILC Commentary sets out Canada's stance in the case where a newly independent State has not made any declarations with regards to the bilateral treaties of the predecessor State:

⁵¹ Beato, see *supra* note 47, at 539-543.

⁵² Gerhard Hafner and Elisabeth Kornfeind, "A Recent Austrian Practice of State Succession: Does the Clean Slate Rule Still Exist" (1996) 1 *Austrian Review of International and European Law* 1, at 12.

⁵³ ILC Commentary, page 238, paragraph 9.

*“[Canada has] normally sought information from the Government of that State as to whether it considered itself a party to the particular multilateral or bilateral treaty in connexion with which we require such information.”*⁵⁴

In this instance, there is no public record of Canada requesting this type of information, which sheds further doubt on the continuation of the Canada-USSR FIPA *vis-à-vis* Kazakhstan. However, the Canadian Government allegedly submitted an *amicus curiae* brief that supports the conclusion that Kazakhstan was also a successor to the Canada-USSR FIPA.⁵⁵ Thus, it would seem that Canada actually did conduct a series of inquiries and determined that Kazakhstan was a successor to the relevant treaty but it is uncertain why the treaty is then not listed as in force between these two parties in neither Canadian nor Kazakh public electronic records.⁵⁶

Therefore, in light of the legal framework, the potential arguments in favour and against the application of the exception to the general presumption that Kazakhstan should not be bound by the treaty as established by the clean slate rule in Articles 16 and 24 VCSS will now be considered in the case of *WWM v. Kazakhstan*.

1. Arguments advanced by the Claimant in *WWM v. Kazakhstan*

Despite the fact that Kazakhstan has not made any public pronouncement acknowledging the continuity of the obligations arising from bilateral treaties concluded by the USSR, the Claimant could have argued that Kazakhstan indicated its willingness to be bound by the Canada-USSR FIPA in its relationship with Canada through a series of statements and representations

⁵⁴ *Ibid*, page 239, paragraph 11.

⁵⁵ “In a dramatic holding, UNCITRAL Tribunal finds that Kazakhstan is bound by terms of former USSR BIT with Canada”, Investment Arbitration Reporter, 28 January 2016, available at:

<http://www.iareporter.com/articles/in-a-dramatic-holding-uncitral-tribunal-finds-that-kazakhstan-is-bound-by-terms-of-former-ussr-bit-with-canada/>.

⁵⁶ “Treaties between Canada and the Republic of Kazakhstan”, Global Affairs Canada, 30 January 2017, available at:

<http://www.treaty-accord.gc.ca/result-resultat.aspx?type=1>; “Bilateral International Treaties of the Republic of Kazakhstan: Canada” Ministry of Foreign Affairs of the Republic of Kazakhstan, 30 January 2014, available at: <http://mfa.gov.kz/en/content-view/kanada>.

and, thus, the exception to the general clean slate rule should be applied.⁵⁷ One of the main arguments to support this theory would be the commitment undertaken by Kazakhstan in the Alma-Ata Declaration, among others.⁵⁸

Further, when examining the treaty relations between Canada and Kazakhstan, it must be noted that a Canada-USSR tax treaty was applied between Canada and Kazakhstan until Kazakhstan unilaterally terminated it on 1 January 1996.⁵⁹ Therefore, Kazakhstan itself considered it was bound by at least part of the treaty obligations of the USSR, as announced in the Alma-Ata Declaration.

Moreover, a 1997 Trade Agreement between the Government of Canada and the Government of the Republic of Kazakhstan (“FTA”) also makes explicit reference to two treaties between the USSR and Canada. It has been argued that the fact that Kazakhstan agreed to an explicit reference to these treaties in the preamble of the FTA could indicate their intention to be bound by the obligations undertaken by the USSR regarding its relations with Canada.⁶⁰

These claims have allegedly been corroborated by the Government of Canada. Despite the fact that the Canadian Department of Foreign Affairs used to list on its website that Russia was the State bound by that particular treaty⁶¹, the Canadian Government allegedly submitted an *amicus curiae*

⁵⁷ “After failure of claim under Kazakh Statute, Canadian miner hoped that USSR-Canada investment treaty permits arbitration with Kazakhstan”, Investment Arbitration Reporter, 18 December 2013, available at: <http://www.iareporter.com/articles/after-failure-of-claim-under-kazakh-statute-canadian-miner-hopes-that-ussr-canada-investment-treaty-permits-arbitration-with-kazakhstan/>.

⁵⁸ Odysseas G. Repousis and James Fry, “Armed Conflict and State Succession in Investor-State Arbitration” (2016) 22 Columbia Journal of European Law 421, at 443.

⁵⁹ Convention between the Government of Canada and the Government of the Republic of Kazakhstan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital (1998), available at <http://www.treaty-accord.gc.ca/text-texte.aspx?id=102415>; Alan Kessel, “Canadian practice in international law: at the Department of Foreign Affairs and International Trade in 2012” (2012) 50 Canadian Yearbook of International Law 395 (“Kessel”), at 415.

⁶⁰ Trade Agreement between the Government of Canada and the Government of the Republic of Kazakhstan (1997), available at <http://www.treaty-accord.gc.ca/text-texte.aspx?id=100670>; Kessel, see *supra* note 59, at 417.

⁶¹ “After failure of claim under Kazakh Statute, Canadian miner hoped that USSR-Canada investment treaty permits arbitration with Kazakhstan”, Investment Arbitration Reporter, 18 December 2013, available at: <http://www.iareporter.com/articles/after-failure-of-claim-under-kazakh-statute-canadian-miner-hopes-that-ussr-canada-investment-treaty-permits-arbitration-with-kazakhstan/>.

brief that supports the conclusion that Kazakhstan was also a successor to Canada-USSR FIPA.⁶²

Finally, it is also interesting to note that counsel for the Claimant relied upon Judge Stephen M. Schwebel and Professor Shaw to argue the legal point of Kazakhstan's obligations under the Canada-USSR FIPA.⁶³

2. Arguments advanced by the Respondent in *WWM v. Kazakhstan*

As for the arguments Kazakhstan submitted, no information has been found regarding the defence strategy pursued by the State's counsel. However, the most evident argument would be that Russia is "*the State continuing the legal personality of the [USSR]*"⁶⁴ and that the other former Soviet Republics have not inherited the international obligations from USSR treaties concluded with third parties, including BITs such as the Canada-USSR FIPA, since the clean slate rule applies. A clear example of this policy would be Russia's accession to the Soviet permanent seat in the UN Security Council and the Soviet seat in the Conference on Security and Co-operation in Europe.

Moreover, in the last ten years, several cases have been brought against Kazakhstan in investment-related disputes but none of the claimants have advanced any arguments in relation to Kazakhstan's obligations as a State successor to the USSR. The lack of previous claims could be used to highlight a certain opinion that the obligations of the USSR with regards to bilateral investment treaties have not been succeeded by Kazakhstan.

With regards to the Alma-Ata Declaration, Kazakhstan could potentially have argued that the declaration was merely a political statement,

⁶² "In a dramatic holding, UNCITRAL Tribunal finds that Kazakhstan is bound by terms of former USSR BIT with Canada", Investment Arbitration Reporter, 28 January 2016, available at:

<http://www.iareporter.com/articles/in-a-dramatic-holding-uncitral-tribunal-finds-that-kazakhstan-is-bound-by-terms-of-former-ussr-bit-with-canada/>.

⁶³ Jones Day, "World Wide Minerals achieves right to arbitrate its expropriation and international law claims against Republic of Kazakhstan", January 2016, available at: <http://www.jonesday.com/world-wide-minerals-achieves-right-to-arbitrate-its-expropriation-and-international-law-claims-against-republic-of-kazakhstan/>.

⁶⁴ *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia) (Judgment)* [2008] ICJ Rep 353, [105].

but this argument is severely weakened by the fact that the declaration had important legal effects such as effectively dissolving the Soviet Union.

3. Decision reached by the Tribunal

As was stated in the outset, the Tribunal has reportedly found the Claimant's arguments to be more persuasive. Yet, it is unknown why the decision has not been made public by either party. It is also not likely that the decision will be made public in the near future.⁶⁵ It is submitted that it is most likely that Kazakhstan's conduct with regards to Canada, as evidenced by the *amicus curiae* brief, tipped the balance in favour of the Claimant.

In this sense, and taking into account that in bilateral treaties such as the Canada-USSR FIPA the identity of the other contracting party plays a very dominant role, it is not possible to automatically infer that the original contracting party will want to have the same rights and obligations *vis-à-vis* the new State than with regards to the other original State party.⁶⁶ Therefore, unless the Tribunal in its decision was satisfied that Kazakhstan's tacit approval left no room for interpretation, it could be argued that Kazakhstan did not truly consent to be bound by this treaty.

Another potential consideration made by the Tribunal could be the doctrine of estoppel. By virtue of Kazakhstan's declarations where it accepts the obligations deriving from treaties concluded by the USSR, the Tribunal may have considered that Kazakhstan had, by its conduct, accepted to be bound by the treaty. Canada, and Canadian companies, may have relied on this conduct as a means of establishing that Kazakhstan remained bound by the treaty, and that therefore their rights as investors were protected. An argument could be made that, following the alleged loss suffered by WWM, Kazakhstan now should be estopped from arguing that it was not bound by the FIPA.

⁶⁵ Counsel for one of the parties confirmed to this author that there were no ongoing discussions between the parties to publish the arbitral decision at the present time.

⁶⁶ Dumberry, see *supra* note 7, at 25-26.

V. Conclusion

As previously seen, the decision on jurisdiction of the case *WWM v. Kazakhstan* has been the first disclosed case to consider whether any of the former Soviet Republics are successors to the BITs concluded by the USSR. Despite the fact that the decision is only binding for the parties of the dispute, by finding that Kazakhstan is indeed bound by these commitments, a great number of possibilities has been opened to investors wishing to benefit from the protections of such BITs. Even so, each investor will have to prove that the specific former Soviet Republic signalled its intention to be bound if they hope to benefit from the exception to the clean slate rule. However, considering the existence of the Alma-Ata Declaration, this argument may be somewhat easier to make.

In the case of the Canada-USSR FIPA, such an argument will be easier to substantiate taking into account the Tribunal's decision in *WWM v. Kazakhstan*. Another possible argument would be that the principle of automatic continuity is custom, which seems highly unlikely due to the lack of State practice.

Less than a month after the outcome of the decision on jurisdiction on *WWM v. Kazakhstan* was made public, its effects in the field of investment arbitration were already apparent. After discontinuing arbitral proceedings before the Permanent Court of Arbitration due to funding issues, Kazakhstan Goldfields Corporation, a Canadian firm, instituted new proceedings against Kazakhstan under the Canadian-USSR FIPA because of a dispute involving one of its subsidiaries, Gold Pool LLP.⁶⁷ It remains to be seen whether the arbitral tribunal constituted to hear this case will be as receptive as the Tribunal in *WWM v. Kazakhstan* regarding Kazakhstan as a State successor to the USSR.⁶⁸

⁶⁷ "Kazakhstan round-up: new disputes, new tribunals and procedural developments in ongoing cases", Investment Arbitration Reporter, 24 February 2016, available at: <http://www.iareporter.com/articles/kazakhstan-round-up-new-disputes-new-tribunals-and-procedural-developments-in-ongoing-cases/>.

⁶⁸ "UNCITRAL tribunal is finalized to hear second investor claim against Kazakhstan under long-dormant USSR-Canada investment treaty", Investment Arbitration Reporter, 7 August 2016, available at: <https://www.iareporter.com/articles/uncitral-tribunal-is-finalized-to-hear-second-investor-claim-against-kazakhstan-under-long-dormant-ussr-canada-investment-treaty/>.

Clàudia BARÓ HUELMO, *Is Kazakhstan a State Successor to the USSR? A Perspective from Investment Treaty Arbitration*

Summary

In its decision on jurisdiction, the arbitral tribunal in *World Wide Minerals v. Republic of Kazakhstan* held that Kazakhstan succeeded to the obligations of the Soviet Union with regards to its 1989 Agreement with Canada on the Promotion and Reciprocal Protection of Investments.

The aim of this article is to examine the potential legal reasoning by which the arbitral tribunal reached this conclusion. In order to do so, the rules of State succession, as partly codified in the 1978 Vienna Convention on Succession of States in respect of Treaties, are considered. Taking special note of the particularities of the case of the USSR, the specific circumstances of the dissolution of the Soviet Union are examined. In particular, the question of which (if any) obligations may have fallen upon Kazakhstan as a former Soviet Republic is explored.

The article concludes by suggesting which arguments may have been used by each of the parties with regards to State succession during the arbitral proceeding and why the Tribunal may have found the arguments proposed by the Claimant to be more persuasive.

As a result of this decision, the door could be opened for investors wishing to benefit from the protections included in bilateral investment treaties from the USSR-era, which had until now remained inactive or whose commitments had been honoured exclusively by the Russian Federation.

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