Neutral Citation Number: [2021] EWHC 3422 (Comm)

Case No: CL-2020-000545

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 December 2021

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

GOLD POOL JV LIMITED	**Claimant**
- and -	
THE REPUBLIC OF KAZAKHSTAN	**Defendant**

- -
- -

Graham Dunning QC, Professor Malcolm Shaw QC and Edward Ho
(instructed by **Jones Day**) for the **Claimant**
Ali Malek QC and Cameron Miles
(instructed by **Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Defendant**

Hearing dates: 13, 14 December 2021

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Approved Judgment

Mr Justice Andrew Baker **Wednesday, 15 December 2021**
(**12:14** pm)

Judgment by **MR JUSTICE ANDREW BAKER**

Introduction

1. This claim concerns an Agreement for the Promotion and Reciprocal Protection of Investments concluded between Canada and the USSR in Moscow on 20 November 1989 that entered into force on 27 June 1991 ("the FIPA").
2. The defendant ("Kazakhstan") came into being as part of the dissolution of the USSR as the successor state to the USSR in respect of the territory of the Soviet Socialist Republic of Kazakhstan, one of the USSR's member republics. It is common ground that Russia declared itself to be, and was accepted by the international community as, the continuation of the USSR for public international law purposes. So Kazakhstan was, and is, a successor to, but not the continuation of, the USSR.
3. The claimant ("Gold Pool") claims that in or about August 1997, it was deprived of a valuable investment in Kazakhstan causing it loss it has claimed can be quantified at over US$900 million. Gold Pool says that the circumstances of the case entitle it to compensation from Kazakhstan if the FIPA was binding between Canada and Kazakhstan at the material time. It is common ground that:

   (1) Canada and Kazakhstan concluded no succession treaty in respect of the FIPA providing in terms for that result.

   (2) As a successor state, Kazakhstan could have succeeded to the FIPA impliedly through words or conduct (often referred to in this field, not entirely helpfully, as a 'tacit' agreement). As Kazakhstan put it in the skeleton argument from Mr Malek QC, "*A tacit agreement will exist where the successor state ... has indicated by words or conduct that it considers itself to have succeeded to a treaty of the predecessor state ... and the other state party to that treaty ... indicates by words or conduct that succession is accepted such that the Treaty is in force between them*".

(3) There is no requirement as to form in respect of an implied succession agreement, but the parties must be *ad idem*.

4. The FIPA contained an arbitration agreement providing investors of either contracting state with a right to refer to arbitration, in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, any dispute with the other contracting state relating to the effects of a measure taken by that state on the management, use, enjoyment or disposal of qualifying investments. Gold Pool commenced arbitration against Kazakhstan in respect of its asserted investor protection claim in March 2016, purportedly pursuant to that arbitration agreement, upon the basis, as it alleged, that there had been an implied succession agreement between Canada and Kazakhstan in respect of the FIPA. By an award dated 30 July 2020, the arbitrators found that they lacked jurisdiction *ratione voluntatis* in respect of Gold Pool's claim because, in their view, Gold Pool had failed to establish any such agreement.

5. That award followed a full hearing of all issues as to jurisdiction and as to merits, without prejudice to the objection to jurisdiction, the arbitrators having refused an application by Kazakhstan to bifurcate the arbitral proceedings to deal with jurisdiction first and separately. By the award, the arbitrators declared that Kazakhstan did not succeed to the FIPA and that the FIPA was not in force between Canada and Kazakhstan at the date of the award, upheld Kazakhstan's objection to jurisdiction *ratione voluntatis* and declared that they had no jurisdiction to entertain Gold Pool's claim, ordered costs (and interest on costs) against Gold Pool, and formally rejected all other claims.

The s.67 Claim

6. By this claim, Gold Pool seeks the setting aside or variation of parts of the award under s.67 Arbitration Act 1996. At the start of the first day of the hearing, I directed that it should continue in public, reversing a direction I made on paper for it to be in private under the default rule of CPR 62.10(3)(b). The existence, nature and outcome before the arbitrators of the jurisdictional issue in

the case is in the public domain, and the issue is of public interest. Neither party objected to sitting in public, and I concluded that it was in the interests of justice to do so. There will be no need to anonymise any part of this judgment in any report of it.

7. The nature of a s.67 claim, and the approach to be adopted by the court, requires no substantial elaboration on this occasion. It involves and requires a rehearing *de novo* by the court in which the arbitrators' conclusions have no legal or evidential weight. I agree with the explanation of the position in *GPF GP Sàrl v Republic of Poland* [2018] EWHC 409 (Comm), *per* Bryan J at [64] to [70]. It has been said that nonetheless the arbitrators' conclusions and reasons may be of interest rather more often than it has been explained why that might be so. For example, in *Dallah Real Estate v Pakistan* [2010] UKSC 46 at [160], Lord Saville (no less) said that "*The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question*" without explaining why a court might find it useful to look at conclusions that have neither legal nor evidential weight before it.

8. In *Republic of Korea v Dayyani et al*, [2019] EWHC 3580 (Comm) at [26], Butcher J said that "*A challenge under section 67 proceeds by way of a de novo rehearing of the jurisdiction issue(s). The award of the arbitrators has no automatic legal or evidential weight. Nevertheless, and given that the arbitral tribunal has considered the same issues, the court will examine the award with care and interest. If and to the extent the reasoning is persuasive, then there is no reason why the court should not be persuaded by it*." That idea needs to be applied with a degree of caution however as the court's task is to decide the case as presented to it by a party on the rehearing, as Bryan J explained in *GPF v Poland* at [70]. It should generally be for the parties to decide for themselves to what extent they each may wish to adopt any reasoning of the arbitrators as an argument of their own in court. In short, a s.67 claim does not operate by way of a review of the arbitrators' decision.

9. In the present case, in fact the arbitrators formulated the applicable legal rule accurately in the award and both parties accept as much. The arbitrators stated the rule in these terms: "... *States may agree to continue a pre-existing treaty relationship following the emergence of one of them as a new State and such agreement may be either explicit or tacit and may lack the ordinary formalities associated with the conclusion of a new treaty. ... whether this represents the formation of a new legal agreement between the States concerned, or constitutes an agreement confirming succession to an earlier agreement represent[s] fine shades of nuance, but in either view the existence of an agreement is paramount.*"

10. The question is whether, applying that rule to the facts, there was an implied succession agreement here. The case advanced by Gold Pool is a confined one that raises almost no disputed question of fact. Gold Pool claims that Canada and Kazakhstan impliedly agreed that Kazakhstan had succeeded to the FIPA such that it applied between them and bound them:

    (1) by paragraph 3 of a Declaration of Economic Co-operation between Canada and Kazakhstan signed between the two countries at Alma-Ata on 10 July 1992 in English, French, Kazakh and Russian ("the 1992 Declaration");

    Alternatively

    (2) by Note 43/94 dated 13 April 1994 from the Canadian Embassy in Almaty to the Kazakhstan foreign ministry, unsigned but stamped by the Embassy, and the latter's signed reply dated 21 April 1994 although signed the previous day ("the 1994 Exchange");.

    Alternatively

    (3) by a recital referring to the FIPA in a Trade Agreement between the Government of Canada and the Government of the Republic of Kazakhstan, signed between the two governments at Ottawa on 29 March 1995 in English, French, Kazakh and Russian, all four texts being said to be equally authentic ("the 1995 Recital" and "the Trade Agreement").

11. Since the views of the arbitrators in the very case before the court have no legal or evidential weight, all the more so the views of arbitrators in a different case considering the same or a similar question between different parties. Another Canadian company, World Wide Minerals Limited, together with Paul A Carroll QC, brought an investor protection claim against Kazakhstan pursuant to the FIPA alleging, as does Gold Pool, an implied succession agreement by reference to the 1992 Declaration, the 1994 Exchange and the 1995 Recital. The arbitrators in that case decided that they did have jurisdiction on that basis.

12. An attempt by Kazakhstan to challenge that decision out of time under s.67 failed: *State Party A v Party B et al* [2019] EWCH 799 (Comm). It seems that the claim subsequently succeeded on the merits, although there was then a successful challenge under s.68 of the 1996 Act to the resulting damages award, with remission to the arbitrators, as it was held by the court that the arbitrators had awarded damages on a basis that Kazakhstan had not had a fair opportunity to address: *Republic of Kazakhstan v World Wide Minerals Limited et al* [2020] EWHC 3068 (Comm).

13. The award on jurisdiction in that case was considered by the arbitrators in this case, and referred to by the parties before me, especially by Gold Pool. Inasmuch as Mr Dunning QC chose to adopt passages of reasoning in that award in argument, they can be considered as such, i.e. as arguments of Gold Pool and nothing more. I found unhelpful submissions by Mr Dunning seeking to compare the experience and expertise of the two sets of arbitrators as if the awards were expert evidence on the question I have to decide and my task was or included a choice as to which expert opinion to prefer.

14. Certain materials from the World Wide Minerals case in addition to the award on jurisdiction were also in evidence before me. To the limited extent they, or for that matter parts of the award, provided hearsay evidence as to matters of fact, they were in principle admissible in this claim (leaving aside questions of relevance or weight) in respect of any fact-finding that might be

required, but that is a different point and it does not make the evaluation of the issue by the arbitrators in that case, or the reasons they gave for their decision, admissible evidence in this claim as to whether on whatever facts have been proved there was an implied succession agreement as alleged by Gold Pool.

The Main Facts

15. For Gold Pool, Mr Dunning QC submitted, at all events as a primary argument, that an opinion or understanding on the part of Canada or Kazakhstan, uncommunicated to the other, as to whether Kazakhstan had succeeded to the FIPA, was of little or no weight in determining whether agreement to that effect had been reached, expressly or impliedly. I agree, but I would be more definite.

16. An uncommunicated opinion or understanding on either side is irrelevant in this case, because it concerns the meaning and effect of the express consensus *ad idem* contained in the 1992 Declaration, 1994 Exchange or the 1995 Recital respectively. This is not a case about whether it is properly to be inferred from evidence not itself evidence of an agreement that an agreement must have been reached. It is about the purport and effect of express, documentary accords.

17. The fact that Canada or Kazakhstan had a certain State understanding – to the extent that were proved, which might be far from trivial – or the fact that an individual with some capacity to represent or act for Canada or Kazakhstan had a certain opinion, might make it more or less likely that Canada or Kazakhstan, or that individual, might have said or done something at a time when that understanding or opinion was held so as to make it relevant to a determination of a dispute about some such point or fact. However, the very limited element of factual dispute here does not involve any consideration of that kind.

18. With this account of the main facts therefore, I focus only on facts that were *inter partes* between Canada and Kazakhstan, or that were public acts or statements by either of them intended, looking at the matter objectively, for consumption by the other (it may be amongst many others too).

19. Mr Dunning QC also submitted, again at all events as his primary argument, and again I agree with his submission, that subsequent expressions of view *inter partes* as to the meaning or effect of the 1992 Declaration, or the 1994 Exchange or the 1995 Recital respectively, cannot influence or alter their true meaning and effect. An expression of view *inter partes* after one of them and before another of them might be capable of influencing an objective understanding of the latter, but not the former, applying Mr Dunning's proposition here endorsed. No argument of estoppel arising after the fact as to the meaning of a prior agreement, if a doctrine of that kind would be known in this field, was advanced.

20. In setting out the main facts now, therefore, I take matters only as far as July 1996 when Kazakhstan ratified the trade agreement.

21. Taking matters chronologically, then, I start by identifying some Soviet era treaties other than the FIPA to which reference is made in some of the post-Soviet materials with which I am concerned: first, a Long Term Agreement Between the Government of Canada and the Government of the USSR to Facilitate Economic, Industrial, Scientific and Technical Co-operation signed in Ottawa on 14 July 1976 ("the 1976 Agreement"); second, an Agreement Between the Government of Canada and the Government of the USSR for the Avoidance of Double Taxation on Income signed in Moscow on 13 June 1985 ("1985 DTA").

22. As I noted at the outset, the FIPA was signed in Moscow on 20 November 1989 and came into force on 27 June 1991. It was thus a *glasnost*/*perestrioka* era treaty from President Gorbachev's time in power as the USSR took steps to move away from the Cold War and engage more with the West. On Canada's side, the evidence I have is that the FIPA was one of the first bilateral investment protection treaties concluded after Canada began negotiating such treaties for the first time in 1989. The other investor protection treaties resulting from that initial foray into the field by Canada were

treaties with Argentina, Czechoslovakia, Hungary, Poland and Uruguay. History now tells us that as the FIPA was thus coming into force in the summer of 1991, the end of the USSR was nigh.

23. On 19 August 1991, several thousand soldiers, supported by tanks and armoured personnel carriers, were mobilised to Moscow in an attempt by hardliners to depose President Gorbachev. They failed and within three days the attempted coup had collapsed and President Gorbachev returned to Moscow. But his position, and potentially that of the USSR as a federal state, had been fatally weakened. A few days later President Gorbachev resigned and in the period that followed the USSR was dissolved. The pre-existing Soviet Socialist Republics declared their independence as new states and the three Baltic States resumed their earlier sovereignty, as did Russia. In particular, Kazakhstan proclaimed itself a sovereign state on 25 October 1991 and formally seceded from the USSR on 16 December 1991 when it declared its own independence.
24. In early December 1991, the then Presidents of Russia, Ukraine and Belarus met in the Belavezha forest in a final attempt to agree a new union treaty. The negotiations were unsuccessful, and in the absence of a new federal union treaty the three leaders decided to dissolve the USSR and create a new body, the Commonwealth of Independent States or "CIS".
25. The CIS was thus formally created by an Agreement establishing the Commonwealth of Independent States dated 8 December 1991 ("the CIS Agreement"). It was originally signed by those three originators – Russia, Ukraine and Belarus – and by a protocol dated 21 December 1991 ("the CIS Protocol") Kazakhstan, along with a number of other USSR successor states, agreed to be bound by it upon its ratification. In conjunction with the CIS Protocol, the parties to it also issued what has become known as the Alma-Ata Declaration, which set out a number of principles to which the signatories committed themselves.
26. Article 12 of the CIS Agreement stated that the contracting parties undertook to discharge the international obligations incumbent on them under treaties and agreements entered into by the

former USSR. To similar effect, the Alma-Ata Declaration pronounced amongst other things that the states participating in the CIS guaranteed, in accordance with their constitutional procedures, the discharge of the international obligations deriving from treaties and agreements concluded by the former USSR. They undertook to each other by the Alma-Ata Declaration, as States participating in the CIS, to comply strictly with that principle.

27. Three months later, on 13 March 1992, the CIS member states concluded an Agreement on Principles of Tax Policy ("the CIS Tax Policy Agreement"). That agreement therefore was signed amongst others by Kazakhstan. Its Article 4 referred back to Article 12 of the CIS Agreement and stated: "*In accordance with [Article 12 of the CIS agreement] the parties shall ensure the performance of treaties that were concluded earlier by the Union of Soviet Socialist Republics with foreign states for the avoidance of double taxation of income and property.*" Plainly, in the case of Kazakhstan, that would include the 1985 DTA with Canada.

28. At about this time, more specifically on 19 or 20 March 1992, Mr Ghani Kasimov, the chief foreign policy adviser to President Nazarbayev of Kazakhstan and himself a former deputy foreign minister, met with a Mr Quraishi, a representative of Canada's Department of External Affairs and International Trade. Mr Kasimov was assessed by Canada, so far as I can see reasonably so at the time, as being the real power in Kazakhstan so far as concerned its nascent foreign policy as a new independent state.

29. At his meeting with Mr Quraishi, Mr Kasimov was recorded in a reporting cable sent to Canadian diplomats a few days later as having discussed with Mr Quraishi what were expressed to be Canada's concerns in respect of Kazakh foreign policy which had been set out in a then recent letter from Canadian Prime Minister Mulroney to President Nazarbayev that had apparently landed on Mr Kasimov's desk for consideration. Mr Kasimov is recorded as having sought to reassure the

Canadian representatives that Kazakhstan was "*intent on honouring all international commitments inherited from the USSR including agreements on human rights, debt and nuclear weapons*".

30. It will be no surprise, given the historical context of the end of the Cold War, that matters concerning nuclear weaponry were at the forefront of all international concerns and their dialogue with the succession States of the USSR in the early months of the collapse of the union, but plainly the reassurance was not limited to those particular and significant concerns.

31. At the same time, on 20 March 1992, the Council of the Heads of State of the members of the CIS issued a Decision ("the CIS Council Decision"), which was therefore signed, amongst others, by Kazakhstan, which stated, amongst other things: "*Having reviewed a series of issues relating to succession with respect to treaties of mutual interest ... the heads of state have decided: (1) to acknowledge that all Member States of the Commonwealth of Independent States are successors to the rights and obligations of the former USSR …*".

32. A few months later, on 6 July 1992, the CIS States, again including Kazakhstan, concluded a Memorandum on Mutual Understanding on the issue of legal succession in respect of the treaties of the former USSR having mutual interest ("the Moscow Memorandum"). Without reviewing here the terms of the Moscow Memorandum in detail, it may be said that it envisaged the possibility under public international law of succession by the successor states to the USSR to both multilateral and bilateral treaties entered into by the former USSR, and was otherwise unspecific as to methods by which any such succession would, in the case of any given successor state, or any given treaty, be achieved or implemented if desired.

33. That brings me to the 1992 Declaration concluded on 10 July 1992. It was signed for Canada by Mr Michael Wilson, Minister for International Trade, and for Kazakhstan by Mr Syzdyk Abishev, Minister of Foreign Economic Relations. It provided, *inter alia*, as follows:

"*Canada and Kazakhstan, inspired by the traditional links of economic co-operation which exist between them, and persuaded that market-based free enterprise forms the basis for greater prosperity, declare that:*

1. Canada and Kazakhstan will seek to begin negotiations on a more modern bilateral agreement on economic co-operation by 1 January 1993 with a view to replacing the [1976 Agreement]. This agreement will create more appropriate conditions for the development of economic co-operation between Canada and Kazakhstan, taking into account the new realities which have appeared.

2. The two countries recognise that economic restructuring and progress towards a market-based economy in Kazakhstan is creating expanded opportunities for business co-operation. Kazakhstan's increasing role in international economic institutions dedicated to a more open global trading system and liberalised investment regime is also acknowledged ...

3. Confident that a liberalised market-based system enhances the efficiency of national economies, Canada welcomes the ongoing transition of Kazakhstan towards a market economy. Both countries are conscious of the already substantial level of trade and economic co-operation between them. The two countries are resolved to facilitate sustained efforts to consolidate, develop and diversify their economic co-operation in accordance with [the FIPA] and [the 1985 DTA].

4. Canada and Kazakhstan also recognise the broader and more diversified links between their respective business communities are of increasing interest. Greater efforts will be made to optimise contacts between government agencies, public institutions, enterprises and industry associations such as the Canada-Kazakhstan Business Council. The two countries are resolved to promote the activities of their respective business sectors in furthering joint endeavours. ...

…

6. *Canada and Kazakhstan will undertake to promote trade and investment missions, commercial exhibitions and seminars, exchange of commercial and technological marketing information, business and institutional linkages and other initiatives which bring together potential partners. ...*

..."

34. Continuing at this stage just the chronology of the main facts, in January 1993 Kazakhstan adopted a transitional constitution, Article 7 of which provided that: "*International treaties of the USSR shall apply in the Republic of Kazakhstan to the extent they do not contradict this Constitution, laws and international treaties of the Republic of Kazakhstan. Contradictory provisions of said treaties shall become null and void as provided by Republic of Kazakhstan law*."

35. By then, that is by early 1993, Canada and Kazakhstan were in the early stages of negotiating what eventually became the Trade Agreement in 1995, and a joint Declaration on Principles of Mutual Relations eventually executed along with the Trade Agreement on 29 March 1995 ("the Mutual Relations Declaration").

36. In December 1992, Canadian officials in Alma-Ata met Ms Gulnara Sattarova, the Chief of the Legal and Treaty Department of the Kazakhstan Ministry of Foreign Economic Relations, to discuss the draft Trade Agreement as it then stood. The Canadian participants promptly reported to Canada from the Embassy in Moscow, with a summary of the key points of the discussion with Ms Sattarova. That note included the following:

"*FORMER AGREEMENTS WITH USSR: GS [i.e. Ms Sattarova] SAID THEY DID NOT WANT REFERENCE TO PREVIOUS AGREEMENTS CONCLUDED WITH USSR, PREAMBULE [sic.] SHOULD RATHER MAKE REFERENCE TO DECLARATION ON ECONOMIC CO-OPERATION SIGNED DURING MIN WILSON VISIT IN JULY [i.e. the 1992 Declaration]. WHEN WE EXPLAINED THAT REFERENCE TO PAST AGREEMENTS IN OUR DRAFT WAS*

BASED ON SUCCESSOR OBLIGATIONS, E.G. REGARDING INVESTMENT PROTECTION, MADE EXPLICIT IN [the 1992 Declaration], SHE INTIMATED KAZAKHSTAN WOULD PREFER TO START NEGOTIATING NEW AGREEMENT ON INVESTMENT PROTECTION (POINT WHICH MFA [i.e. the Ministry of Foreign Affairs] HAD MADE EARLIER TO US) AND NOT HAVE REFERENCE TO FORMER AGREEMENT IN TRADE AGREEMENT. FORMER AGREEMENT WITH USSR WAS OBSOLETE AND DID NOT TAKE INTO ACCOUNT NEW INDEPENDENCE OF KAZAKHSTAN."

37. Ms Sattarova, in a witness statement provided to the arbitrators in this case, attempted to add what Mr Dunning QC in my judgment rightly characterised as a subjective and very belated gloss to this note by claiming that she "*could not have meant that the [FIPA] continued to be in force and had merely become outdated*". Her evidence indeed went on to claim an ability almost 25 years later to recall more precisely that what she had said was that: "*In order to have bilateral guarantees of investment protection between Kazakhstan and Canada it was necessary to conclude a new bilateral investment agreement because the former Canadian agreement with the USSR was not applicable to Kazakhstan upon the gaining of independence by Kazakhstan.*"

38. In my judgment it is highly improbable, to the point of fanciful, to suppose that Ms Sattarova might be able to recollect so many years after the fact so precisely what she said during the conversation, and Canada's contemporary note of it is far more likely to be an accurate record of the gist of what she said. That said, as it seems to me, what she is recorded by way of gist to have said might have been intended to convey that the FIPA was not in force and a fresh treaty was required if there was to be bilateral investment protection of the sort provided by such a treaty. Equally though, as it seems to me, the gist as recorded was capable of being understood as conveying no more than that the treaty concluded during the existence of the USSR would, in Kazakhstan's view, need to be updated and replaced, but nonetheless would be regarded as applicable in the meantime.

39. In response it would seem to Ms Sattarova's comments at the December 1992 meeting, as reported by the Canadian officials at the Moscow embassy, on 26 January 1993, the Deputy Director, Central and Eastern Europe Trade Development Division of Canada's Ministry of External Affairs and International Trade, circulated a memo seeking comments on an attached draft telex to Moscow intended to form the basis for further discussions with Kazakh representatives. The draft telex included the following quote:

> "*REFERENCES TO FORMER AGREEMENTS WITH THE USSR IN THE PREAMBLE AND ELSEWHERE IN THE AGREEMENT REFLECT CONTINUITY AND ARE IN LINE WITH THE ALMA-ATA DECLARATION OF DEC91 WHERE KAZAKHSTAN AND OTHER FSU STATES COMMITTED THEMSELVES TO RESPECT INTERNATIONAL OBLIGATIONS OF THE USSR. KAZAKHSTAN IS A SUCCESSOR STATE AND THESE REFERENCES DEMONSTRATE KAZAKH COMMITMENTS TO UPHOLD EXISTING OBLIGATIONS. IT IS FAR PREFERABLE FOR BUSINESS DEVELOPMENT BETWEEN OUR TWO COUNTRIES THAT KAZAKHSTAN MAINTAIN ITS COMMITMENTS UNDER THE AGREEMENTS SUCH AS [the FIPA] AND [the 1985 DTA]*
>
> ...
>
> *IF, HOWEVER, KAZAKH IS INTENT ON REMOVING USSR REFERENCES FROM PREAMBLE, WE WOULD REQUIRE A CLEAR UNEQUIVOCAL WRITTEN STATEMENT THAT KAZAKHSTAN WAS BOUND AND CONTINUES TO BE BOUND BY THE REFERENCED TRADE AND ECONOMIC AGREEMENTS SIGNED BY THE USSR. THIS STATEMENT WOULD NOT NEED TO BE CONTAINED IN THE AGREEMENT*."

40. Mr Dunning QC submitted that, given the references to agreements in the plural, and specifically to both the FIPA and the DTA, in the context of a discussion of the preambles as they then stood in the draft for what became the Trade Agreement, I should find by inference that the draft, as it stood at

that time, indeed referenced, presumably in similar or equivalent terms, both of those treaties; that is to say, both the FIPA and the 1985 DTA. In my judgment, that is a fair inference and I do make that finding. It is reinforced by the proposition in fact agreed between the parties that, in the Trade Agreement as ultimately concluded in March 1995, the 1985 DTA was not merely omitted, but reference to it in a prior draft had at some stage been removed.

41. On 1 February 1993, the Director of the Economic and Trade Law Division provided comments on the draft telex to Moscow. The two paragraphs I quoted were redrafted by the director to read as follows:

> "*WE DO NOT AGREE WITH KAZAKHSTAN'S SUGGESTION OF REMOVING REFERENCES IN DRAFT AGREEMENT TO TREATIES BETWEEN CANADA AND THE FSU AND REASONS FOR REQUESTS ARE UNCLEAR. GRATEFUL YOU SEEK CLARIFICATION ON THIS POINT AND CONFIRM WITH KAZAKHSTAN THAT IT CONTINUES TO BE BOUND BY TREATIES AND AGREEMENTS BETWEEN CANADA AND FSU. FOR YOUR INFO, IN THE ALMA-ATA DECLARATION OF DECEMBER 1991, FSU SUCCESSOR STATES AGREED TO RESPECT THE FSU'S INTERNATIONAL OBLIGATIONS IN ACCORDANCE WITH THEIR CONSTITUTIONAL PROCEDURES.*
>
> ...
>
> *WE CAN AGREE TO REMOVE REFERENCES TO CANADA-FSU TREATIES IN PREAMBLE ONLY IF WE RECEIVE A CLEAR AND UNEQUIVOCAL WRITTEN STATEMENT FROM KAZAKHSTAN THAT IT IS BOUND AND CONTINUES TO BE BOUND BY THESE AGREEMENTS ... THIS STATEMENT NEED NOT BE CONTAINED IN THE AGREEMENT.*
>
> ...
>
> *GRATEFUL YOU SEEK KAZAKHSTAN'S ASSURANCES THAT IT CONSIDERS ITSELF BOUND TO IMPLEMENT THE UNDERTAKINGS GIVEN TO CANADA IN THE [FIPA]*".

42. Mr Dunning QC invited the inference, as a matter he suggested of overwhelming inherent probability, that although a message as ultimately sent by way of instruction for any next round of negotiations has not been located, instructions along the lines of those indicated in those drafts for the telex to Moscow will have been sent. It seems to me again that that is a fair inference to draw, although going beyond that, to seek to make any finding as to what exactly was then said, when, and what response was made by Kazakhstan, at any next round of negotiations by reference to those instructions would become an exercise in speculation.

43. So far as the chronology of main events is concerned, I move on over a year to April 1994. Early that month Kazakhstan's then Deputy Minister of Foreign Affairs, Mr Gizzatov, met with the Canadian Chargé d'Affaires, Mr Michael Vujnovich. In a diary entry made by Mr Gizzatov that has only emerged within the process of document retrieval within the litigation quite recently, Mr Gizzatov recorded himself as having emphasised that Kazakhstan would like to sign the Trade Agreement and the Mutual Relations Declaration in the course of what was then a proposed visit of Prime Minister Tereshchenko of Kazakhstan to Canada.

44. Towards the end of the diary note, Mr Gizzatov records that he was asked for a comment or opinion concerning the status of former treaties as entered into between the USSR and Canada, and that he had responded that: "*now they do not have legal force as the USSR as a state no longer exists and besides it had a planned economy. While Kazakhstan is transitioning to a market economy, its draft treaties and agreements reflect these realities*."

45. At this time, as indicated by that diary note, advanced drafts appear to have been in existence for the Mutual Relations Declaration. They, however, included an express statement as to treaty succession to opposite effect to the view thus apparently expressed by Mr Gizzatov. Thus, a draft of the Declaration was circulated within the Canadian Department of Foreign Affairs and International Trade on 28 March 1994 for comment. Paragraph 13 of that draft said: "*Taking into consideration*

the fact that Kazakhstan is a successor state of the former Soviet Union, the parties agree that international treaties which have been concluded between the union of Soviet socialist republics and Canada remain in force until different provisions are made". Internally still, on 14 April 1994, the Trade Law Department provided comments on that draft. Their comment on draft paragraph 13 was: "*Canada takes the position that under international law a successor state is bound by agreements and treaties entered into by the former state. Thus, Kazakhstan, as a successor state to the USSR, is bound by treaties entered into by Canada and the USSR. Accordingly you may wish to discuss with JLAB/Fraser whether paragraph 13 is necessary.*" To the extent that that expressed a view internally, it would seem, that succession might occur automatically by some operation of public international law upon the fact of Kazakhstan becoming an established successor state, and although not instructed to concede the incorrectness of that proposition, Mr Dunning QC has pursued no claim based upon any such possible contention.

46. There is no evidence that I have seen as to whether a Canadian draft including that paragraph 13, or the particular draft there being discussed, found its way to Kazakhstan. However, it is clear that at about this time a Kazakh draft had gone to Canada, and indeed had done so by about the time of Mr Gizzatov's comment, paragraph 9 of which Kazakh draft provided that: "*International treaties which had been concluded between the USSR and Canada remain in force until the sides make different provisions.*"

47. That, then, was the context for the 1994 Exchange: Mr Gizzatov's comment in his meeting with the Canadian Chargé d'Affaires, on the one hand; what Kazakhstan was apparently indicating its position to be, through the draft Mutual Relations Declaration, on the other hand. The Canadian Embassy to Kazakhstan therefore presented Note 43/94, dated 13 April 1994, to the Kazakh Foreign Ministry. It said:

> "…

The Ministry of Foreign Affairs of Canada would also be grateful for a clarification of the statement that all previous agreements relating to the former Soviet Union are now null and void [I infer, a reference to Mr Gizzatov's statement]. This appears to be at variance with paragraph 9 of the Kazakhstan draft declaration on principles of mutual relations which states: 'International treaties which had been concluded between the USSR and Canada remain in force until the sides make different provisions'."

48. The Kazakh ministry of affairs replied by its note dated 21 April 1994 in the following terms: "*The Ministry confirms the provision in paragraph 9 of the draft declaration on principles of mutual relations between the Republic of Kazakhstan and Canada, as it is stated in the draft which was transmitted to the Canadian side for consideration. That said, the Kazakhstani side would like to inform of its intention to commence the revision of the early operating treaties between the USSR and Canada and to enter into new treaties of a bilateral basis.*"

49. Interrupting the chronological account of the facts, to dispose of one particular point along the way, it was suggested in his written skeleton argument by Mr Dunning QC that the 1994 Exchange was an example of an Exchange of Notes which is "*... in modern times the most frequently used device for formally recording the agreement of two governments on all kinds of transactions*" and a "*very convenient and flexible instrument for treaty makers*", as it is put by I Roberts in *Satow's Diplomatic Practice* (7th Edition) 2016, at paragraphs 33.16 and 33.17 (see also *Oppenheim's International Law* (9th Edition) 1992, at paragraphs 586 and 601 for a discussion). In my judgment, not so.

50. I agree with Mr Malek QC, not only because of, although reinforced by, examples that are in evidence of an Exchange of Notes such as is there described, that what is described in *Satow* and *Oppenheim* is, in truth, a formal, express treaty-making mechanism, albeit one that is recognised internationally as involving different, in a sense lesser, formalities than a fully-fledged formal treaty

typically requiring subsequent contracting party ratifications. The 1994 Exchange, whatever it is or is not, is not an Exchange of Notes, such as would then have been immediately recognised as, and in all probability registered in Canada's registry of treaties as, a new formal treaty.

51. Returning to the chronology, a second diary note of Mr Gizzatov has relatively recently been retrieved dated 1 September 1994. It is his record of a discussion he had with a Mr J P Armstrong, described in the diary entry as a Counsellor at the Canadian Embassy in Moscow. The note indicates that Mr Gizzatov was asked about the progress of economic reforms in Kazakhstan, and historically a most interesting dialogue appears to have ensued. Passing over those elements, the conversation as noted by Mr Gizzatov moved on to the fact that Kazakhstan had forwarded drafts for new treaties or bilateral agreements, co-operation agreements, with Canada for its consideration, including what would become the Trade Agreement and the Mutual Relations Declaration, and (it seems) early drafts for what might become new bilateral treaties on the promotion and protection of investments and on the avoidance of double taxation.

52. Mr Gizzatov records himself as having commented that: "*At the present time many Canadian companies are doing business in Kazakhstan and it is necessary to legally set the framework of their activities for businessmen for which the latter two documents [that is a new investment protection treaty and a new double taxation agreement] are quite important. We are not insisting on signing these documents by the Canadian side, but would not like that the Prime Minister's visit turns out to be a touristic trip.*"

53. On 3 November 1994, the Supreme Council of the Republic of Kazakhstan adopted a Resolution ("the 1994 Resolution"), having reviewed the question of the possible application in the territory of Kazakhstan of double taxation agreements concluded between the USSR and other states, in the following terms:

"*To terminate effective from 1 January 1995 the application in the territory the Republic of Kazakhstan the conventions on the avoidance of doubling taxation in respect of income and capital that had been signed on behalf of the government of the former USSR with governments of the other states.*"

54. A copy of that Resolution was presented formally by Kazakhstan to Canada, by way of a diplomatic note, on 1 December 1994. The note provided no covering explanation or comment.

55. That brings me to March 1995, when the Trade Agreement and the Mutual Relations Declaration were signed, as I noted at the outset, in Ottawa, on 29 March 1995. The Trade Agreement included preambular reference to the 1992 Declaration, the 1976 Agreement and the FIPA, but not the 1985 DTA. Thus the suggestion or request intimated by Ms Sattarova back in December 1992 not to include such preambular references either never came as a formal negotiating request, or was not prefaced. There is no record that I have seen in the evidence of how exactly that was dealt with in the negotiating process.

56. As to the Mutual Relations Declaration, as finally executed it did not include anything similar to paragraph 9 of the Kazakh draft that had been equivalent to paragraph 13 of at least one Canadian draft to which I referred from around a year earlier in April 1994. Again, there is no basis in evidence that I have for any finding one way or the other as to exactly when or why that provision was not retained, let alone what, if anything, was said *inter partes* as to its removal.

57. Mr Malek QC in that regard submits, by reference to some evidence that at about the time of the 1994 Exchange or shortly thereafter there was internally in Kazakhstan a review of the draft, that the likelihood is that the paragraph was removed at that stage on the basis that the Kazakhstan side was unwilling to commit to it. In my judgment, that is speculative, as is Mr Dunning QC's submission that I could make a positive finding by inference that reference to the 1985 DTA was removed on

the agreed basis that the 1994 Exchange had provided sufficient reassurance and confirmation of the position.

58. The preambular references in the trade agreement were in these terms:

"*TAKING INTO CONSIDERATION the Declaration on Economic Co-operation between Canada and the Republic of Kazakhstan of July 10, 1992 [i.e. the 1992 Declaration];*

[TAKING INTO ACCOUNT] the Long Term Agreement to Facilitate Economic, Industrial, Scientific and Technical Co-operation of July 14, 1976, and the Agreement for the Promotion and Reciprocal Protection of Investments of November 20, 1989 [i.e. the 1976 Agreement and the FIPA]".

59. Whilst quoting from the Trade Agreement, Mr Dunning QC also placed reliance on a provision right at the end, Article XVII.4, which was in these terms: "*Except as expressly provided herein, nothing in this Agreement overrides or modifies agreements already in force between the parties.*"

60. I should explain that I have rendered the preambular reference to the 1976 Agreement and the FIPA as commencing with the turn of phrase "*TAKING INTO ACCOUNT*". In fact, the English authoritative text says "*REFERRING TO*". However, it is common ground that in the equally authoritative Kazakh text the word used is more properly or more accurately translated as 'taking into account'. I shall come back to that in relation to the submissions that the parties make about the 1995 Recital. I render it the way I do because one upshot of the oral argument in relation to those submissions was a fair acceptance by Mr Malek QC that the claim made can and should properly stand or fall on the basis of construing the meaning and effect of the 1995 Recital, reading the English used, "*REFERRING TO*", as intended to have the same sense as the Kazakh, that is to say, as "*TAKING INTO ACCOUNT*".

61. There was also signed in Ottawa on that occasion, 29 March 1995, a Memorandum of Intent in these simple terms:

"*(1) Pursuant to discussions conducted between officials of our two countries, the government of Canada and the government of the Republic of Kazakhstan intend to begin negotiations and to conclude on an ad referendum basis:*

(i) a convention for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and capital; and

(ii) an agreement for the promotion and protection of investment.

(2) It is the intention of the government of Canada and the government of the Republic of Kazakhstan to pursue negotiations in an expeditious manner with a view to signing the agreements at an early opportunity."

62. Internal Kazakh documents from February and early June 1995 make it tolerably clear that those responsible for implementing the 1994 Resolution in Kazakhstan took the view that Kazakhstan had succeeded by agreement to the 1985 DTA so that: (a) implementing the 1994 Resolution in respect of Canada would require the 1985 DTA to be terminated; and (b) that, in turn, would require steps to be taken in accordance with its termination provision, Article XXIII.

63. There is no evidence that that internal analysis or understanding was shared with Canada. However, the action proposed by it, namely termination of the 1985 DTA in accordance with its terms, treating it thereby as having been in force the while, was duly taken by Note 18/812, signed and dated 26 May 1995, from the Kazakh Ministry of Foreign Affairs to the Canadian Embassy, by which Kazakhstan gave notice of termination, expressed to be pursuant to Article XXIII of the 1985 DTA, to the effect that the 1985 DTA would "*cease to be effective on 1 January 1996*".

64. That DTA termination note went on to express the hope "*that the Canadian side will accept this decision only as a desire of Kazakhstan which became a sovereign state to fulfil financial and tax obligations which have been entered into in view of new political and economic conditions on behalf of the government of Kazakhstan. The Ministry hopes for a swift commencement of negotiations to*

prepare a new taxation agreement between the government and the Republic of Kazakhstan and the government of Canada as well as for further fruitful co-operation in a spirit of friendship and mutual understanding."

65. In due course a replacement DTA was indeed concluded between Canada and Kazakhstan, in September 1996, which when it entered into force in March 1998 had retrospective effect from 1 January 1996 in that its provisions were stated to have effect, in respect of tax withheld at source, for amounts paid or credited on or after that date, and in respect of other taxes, for taxable periods beginning on or after that date.

66. Completing the main factual narrative, Kazakhstan ratified the Trade Agreement on 12 July 1996 by Law No 23-1, and notified Canada of that ratification on 22 July 1996.

67. Those being the main facts, I turn now to consider and judge the rival contentions as to the meaning and effect of the 1992 Declaration, the 1994 Exchange and the 1995 Recital.

The 1992 Declaration

68. As relevant context, Mr Dunning QC emphasised that Kazakhstan had committed formally and publicly to honour the treaty commitments of the USSR applicable to its territory by acceding to the CIS Agreement under the CIS Protocol, by the Alma-Ata Declaration, and by the Moscow Memorandum, albeit the last of these was perhaps less by way of expressed commitment and more by way of an agreement between the CIS member states as to means of achieving succession to former USSR treaties.

69. In March 1992, that commitment had been reiterated generally by the CIS Council Decision and, as regards DTAs specifically, by the CIS Tax Policy Agreement. Also in March 1992, Canada had received direct assurance from Mr Kasimov that Kazakhstan was intent upon honouring international commitments inherited from the USSR.

70. Furthermore, the FIPA was a very recent, outward-looking, bilateral treaty serving to encourage inward investment from an important Western economy. Whether or not this would be true for every single treaty entered into by the USSR to which Kazakhstan would have been capable of succeeding, no reason is apparent to me why Kazakhstan would not wish the FIPA to continue, even if for the longer term there might also be a wish to negotiate a fresh treaty to take over from it. Likewise as regards the 1985 DTA, albeit that was not quite so brand new.

71. No formality was required for there to be a binding succession agreement, so long as there was a meeting of minds between Kazakhstan and Canada on the point.

72. For his part, Mr Malek QC emphasised that although indeed no formality was required, nonetheless succeeding to the FIPA would be a serious legal commitment for Kazakhstan, granting to private parties, in the rather bespoke way that bilateral investor protection treaties do, both substantive rights and a binding procedural process whereby to seek to enforce them on neutral ground, *viz.* in international arbitration. Mr Malek took the submission too far, with respect, when he suggested that only words that were in themselves words of legal obligation, or that were contained in an instrument that was more generally intended to create legal obligations, would do. After all, it is recognised, and Kazakhstan accepted, that an implied succession agreement might be created simply by conduct.

73. The underlying point has force nonetheless, namely that succession to a treaty like the FIPA or the 1985 DTA was a significant commitment. Though there is no requirement of form, the more informal the means by which it is claimed that succession was implied and agreed, the more room there may be to question whether that is clearly enough the import of what was said or done. Where, as in this case, what is relied on is bilateral communication using written words, the words as used in their context must not be reasonably and sensibly capable of having conveyed *inter partes* a

meaning other than that the parties were agreed on succession, as otherwise they are properly to be regarded as ambiguous, and ambiguous exchanges do not amount an agreement.

74. Mr Malek QC advanced a further submission arising out of the particular nature and consequences of the FIPA. Since such a treaty will be concluded for the benefit of investors of the contracting States, whereby indirectly to further their own public interest by the encouragement of inwards investments and thus the building up of commercial links, it is not to be expected that States would keep such a treaty secret. As with the previous submission there is some force in the point, but it must not be taken too far. For example, it is irrelevant that in public-facing website listings maintained by Canada that did not exist in 1992 to 1995, the FIPA is listed as being in force between Canada and Russia but not as between Canada and Kazakhstan. There could be any number of reasons for that, but it could not be said, for example, that when concluding the 1992 Declaration the parties jointly contemplated the future existence of internet listings of treaties on which the FIPA would not be treated as in force between them.

75. That responsive thought generalises. Unless it can be said that when concluding the 1992 Declaration, or (below) when communicating through the 1994 Exchange or when including the 1995 Recital in the Trade Agreement, the parties reasonably must have intended or understood that what they were doing would be kept secret, the need in concept for investors to be aware of the protection available to them adds nothing in my judgment to any debate over the meaning and effect of what the parties, i.e. Canada and Kazakhstan, actually said by the 1992 Declaration, respectively the 1994 Exchange or the 1995 Recital.

76. Finally, by way of general submission, Mr Malek QC of course emphasised that if the parties meant to articulate an agreement that Kazakhstan was succeeding or had succeeded to the FIPA, it would have been easy for them to say so in terms. But it would be an empty doctrine that there can be an implied succession agreement, as in commercial law there would be almost nothing in any doctrine

of implied terms or indeed in the process of construing express terms, if that was a sufficient answer. It is of the essence of such a doctrine that it recognises as a reality that parties will say things together that realistically make sense only if something is agreed between them that they do not think to spell out in terms precisely because they both regard it as a given between them such that it does not need spelling out. In substance this is, in my judgment, but an aspect of the need for unambiguity.

77. The 1992 Declaration was not a treaty, but it was a public joint declaration of intent in writing by appropriate ministers of the respective governments. It was, as it seems to me, an apt vehicle through which a consensus between Canada and Kazakhstan that the latter was to be treated as having succeeded to the FIPA, and for that matter the 1985 DTA, might find itself being articulated if it was not being made the subject of a fully-fledged and formal treaty.

78. As regards the principal provisions of significance, it seems to me that the clear tenor of paragraph 1 is that the parties are resolved to negotiate a replacement for the 1976 Agreement, recognising that it needs to be or appropriately should be updated, not that some such agreement should be put in place because there is nothing in place for the time being.

79. In my judgment, in the context of the 1992 Declaration and its various statements as to the joint interests to be promoted by the parties acting in accordance with it in the future, the tenor of paragraph 3 is similar, save that (in this document at this time at any rate) there is not a record of the parties intending in the short term to negotiate replacement treaties. That is to say, as it seems to me, the way in which the parties expressed themselves in paragraph 3 takes it as a given not requiring to be spelt out that for the time being the FIPA and the 1985 DTA applied between Canada and Kazakhstan, as a successor state to the USSR.

80. As a matter of specific linguistic points, I respectfully agree with Mr Dunning QC's submission that that is the only sensible reading of the parties' choice of language, to resolve as they did to facilitate

efforts to expand from (I there paraphrase) what they have, namely the FIPA and the 1985 DTA, all "*in accordance with*" those agreements. The commitment was to foster sustained efforts to move beyond what was already there, already extant, and ongoing, namely "*co-operation in accordance with [the FIPA] and [the 1985 DTA]*".

81. In my judgment, fully recognising that the 1992 Declaration is a joint declaration of the governments – what is sometimes referred to as a political declaration to distinguish it from a formal treaty – and that the parties could have chosen to memorialise the succession to the FIPA and the 1985 DTA more explicitly and formally by way of short treaty or Exchange of Notes, thus bearing that and the other general submissions of Mr Malek QC well in mind, but also balancing those with the powerful submissions of Mr Dunning QC as to the background and context that I have already summarised, in my judgment by paragraph 3 of 1992 Declaration, Canada and Kazakhstan impliedly confirmed, as Gold Pool has claimed, that the FIPA then applied as between them. That was and is an implied succession agreement, and that is sufficient for this s.67 claim to succeed, since it is not suggested that the FIPA, if impliedly rendered applicable as between Canada and Kazakhstan by the 1992 Declaration, was disapplied at any material time thereafter, which, it is common ground, would have required an effectual treaty termination.

The 1994 Exchange

82. The parties' respective general submissions as to context and approach when assessing the meaning and effect of Canada and Kazakhstan's communications *inter partes* were repeated, and my assessment of them does not alter.

83. By April 1994, there was, additionally as context, the fact that Kazakhstan's transitional constitution had provided for the applicability of international treaty obligations of the USSR in Kazakhstan where not inconsistent with Kazakh law. Mr Malek QC is correct, I apprehend, to submit that this is inconsistent with any notion that Kazakhstan accepted a doctrine of automatic succession to Soviet

treaties by virtue of being a successor state, since upon succession it would owe its treaty counterparties a legal obligation on the public international law plane not to legislate inconsistently. That, it seems to me, rather misses the point for present purposes, though, which is that since there is no suggestion there was anything in Kazakh law inconsistent with the FIPA, the transitional constitution enacted the FIPA into Kazakh law rendering it entirely plausible that Kazakhstan might so communicate with Canada so as to convey consensus *inter partes* that Kazakhstan had succeeded.

84. More specifically than that general legal and political context, as between Canada and Kazakhstan the context was of course: the comments of Ms Sattarova in December 1992 that I have concluded already are capable of more than one understanding or interpretation; the draft for the Trade Agreement, referring as I have found to the FIPA and the 1985 DTA, and the draft or drafts as it or they then stood for the Mutual Relations Declaration, containing a provision that would have articulated explicitly that there had been succession; and finally, the comment of Mr Gizzatov in early April 1994 that most directly triggered the request for clarification of Kazakhstan's position.

85. In my judgment the exchange, and in particular the Kazakh response completing the exchange, could not be clearer. Kazakhstan was asked officially by way of diplomatic note to clarify its stance or position *vis-à-vis* Canada, given the apparent opinion of Mr Gizzatov that former Soviet treaties, to which Kazakhstan would be capable in principle of succeeding, were inapplicable or null and void. Kazakhstan's response was to confirm explicitly and in terms that its position on that matter was as stated in the provision it had provided at that stage to be a paragraph of the Mutual Relations Declaration under negotiation; and that was that treaties signed between Canada and the USSR remained in force until different provision was made between Canada and Kazakhstan.

86. Given my conclusion on the 1992 Declaration, in my judgment that was in fact no more than an accurate reconfirmation of the extant position. Had I concluded that the 1992 Declaration was

ambiguous, as submitted by Mr Malek QC, so as not to have involved an implied succession agreement, his secrecy point, if I can call it that, would have been a serious one at least to consider in this context, which it was not in relation to the very public 1992 Declaration. But even if the 1994 Exchange itself was within the privacy, as between Canadian and Kazakh representatives, of their discussions in the context of draft instruments eventually to be concluded just under a year later and a particular meeting with Mr Gizzatov, there is no basis for supposing that at the time of the exchange its effect was intended, let alone mutually agreed, to be kept secret, *viz.* that upon the official request by Canada for confirmation of the position, Kazakhstan had given explicit and unambiguous confirmation that involved the proposition that the FIPA, and for that matter the 1985 DTA, was in force and applicable between them.

87. The proper characterisation of such a confirmation given in response to such a request is, in my view, that it is a clear consensus, and thus, had this not previously been the case, an agreement by implication upon the succession of Kazakhstan to the FIPA. Once again, bearing fully in mind that that parties have, as it happens, chosen this level of informal formality (if that can be a phrase), by way of exchange of diplomatic notes, and did not more formally formalise it by way of a short succession treaty or Exchange of Notes.

The 1995 Recital

88. Firstly, there is nothing in a point taken by Mr Malek QC that the 1992 Declaration on the one hand and the 1976 Agreement and the FIPA on the other hand appeared in separate recitals. In his skeleton argument, the point Mr Malek took was a linguistic one based upon the difference or apparent difference in the text between ‘taking into consideration’ for the 1992 Declaration and merely, as he put it, ‘referring to’ for the 1976 Agreement and the FIPA. As I indicated when introducing the recitals, on exploring the oral argument and the point about the Kazakh text, Mr Malek QC fairly did not press the linguistic point. He rested instead, in that regard, upon a

submission in the alternative that it should be seen as significant that the 1976 Agreement and the FIPA were recited separately from the 1992 Declaration.

89. In my judgment, putting it negatively, there is nothing in that point; that is to say, whether or not Mr Dunning QC is correct, which he may be, that there was just seen to be a natural distinction between the 1992 Declaration, not itself a treaty, and the 1976 Agreement and the FIPA, which were treaties, the similarity in truth of the introductory language and therefore the terms in which the three documents are recited means there cannot be said to be any significance in the fact that the 1976 Agreement and the FIPA appear in one recital and the 1992 Declaration in the other.

90. If anything, put more affirmatively, the very point that Mr Malek QC made in writing is a point against Kazakhstan. The point he made linguistically was that the 1992 Declaration was naturally recited as being ‘taken into consideration, being an extant bilateral agreement current between the parties, the FIPA being merely ‘referred to’ suggested that it did not have that same status as an extant or current document between the parties. When the language is assimilated, as fairly it needs to be, that the FIPA, and likewise the 1976 Agreement, is in fact being ‘taken into account’, as the 1992 Declaration is being ‘taken into consideration’, one sees immediately the force of the observation that the linguistics, if anything, are against Kazakhstan.

91. Secondly, but conversely, there is nothing in the reliance by Mr Dunning QC upon Article XVII.4 of the Trade Agreement. Ultimately it begs the question to rely upon a provision preserving agreements that are presently in force to say that that indicates that the FIPA referred to in the recital is being treated as an agreement presently in force if, contrary to Mr Dunning’s argument, that would not be the tenor or sense or implication of the recital on its own terms. It was not the case that the Trade Agreement itself was the only new Canada-Kazakhstan treaty, that is to say a treaty entered into since the dissolution of the USSR, leaving aside any question of implied successions. In my judgment, contrary to a particular submission advanced by Mr Dunning, Article XVII.4 cannot

really be read as limited to bilateral treaties, and there had by the time of the trade agreement been accession or succession to, or entry into by Kazakhstan of, multilateral treaties done formally.

92. In any event, as it seems to me, Article XVII.4 is in the nature of a catch-all or savings clause into which it reads somewhat too much to assume that the parties must have been in agreement that there was a treaty or there were treaties then extant that they were making sure they saved rather than that they were including the treaty saving provision out of an abundance of caution.

93. Thirdly, the omission of the 1985 DTA from the 1995 Recital is somewhat enigmatic. I agree with Mr Dunning QC that it is not readily explicable, as Mr Malek QC sought to suggest, by the fact that the 1985 DTA is a taxation treaty. The Trade Agreement is not a tax treaty as such, but it does include provisions concerning taxation; and more generally, in the context of trade links and the related priority of attracting inwards investment, investor protection and the avoidance of double taxation are well recognised as going hand in hand, and had been treated between the parties previously as going somewhat hand in hand.

94. Further, the Memorandum of Intent executed along with the Trade Agreement treated the FIPA and the 1985 DTA identically in the sense that it memorialised Canada and Kazakhstan's joint intention expeditiously to conclude an investment protection treaty and a double taxation agreement without saying anything as to whether there was in either respect any arrangement then current.

95. On balance, I agree with Mr Dunning QC that the best explanation is probably that the 1985 DTA was shortly to be terminated, whereas there was no plan to terminate the FIPA. I have no evidence for a finding that that had been communicated expressly to Canada, even if I am right to think that probably it was the thinking on the Kazakh side, although it would have been a reasonable inference for Canada to draw, if not given it expressly as explanation, since Kazakhstan had notified Canada at the end of 1994 of the legislation compelling, it said, a termination of the 1985 DTA, and had

linked its consequent intention to terminate that treaty with its desire, now publicly minuted by the Memorandum of Intent, to negotiate a replacement.

96. Overall, to my mind the better reading of the 1995 Recital is that the 1976 Agreement and the FIPA were being treated as applicable between the signatories just as much as was the 1992 Declaration. Although one commentator, as I shall mention, has suggested that it does not support as strong an inference of accepted succession as does an explicit determination of a prior treaty, treating it as in force and requiring to be terminated, in my judgment the inference is strong enough. More properly, that is to say, since it is not in truth a matter of inferential fact-finding rather than interpretation, although less immediately obviously so than with an explicit termination or an express confirmation like the 1994 Exchange, upon serious consideration the 1995 Recital is also reasonably capable of having conveyed *inter partes* only one message, namely that the 1976 Agreement and the FIPA were agreed to be in force and effective between them.

Supposed Contraindications

97. Kazakhstan relied upon a wide range of subsequent materials, more or less clearly, it was submitted, indicating a view held by some individual or institution to the effect that there had not been or may not have been a succession by implication in the manner that I have been considering.

98. In short, as regards all of them, it is a sufficient answer to say that they indeed come after the fact and are not part or parcel of any articulated consensus created by the 1992 Declaration, the 1994 Exchange or the 1995 Recital respectively.

99. I will not lengthen this already long *ex tempore* judgment by taking each of them specifically in turn. I will, however, mention a few that were most clearly pressed.

100. In 1997, as commercial relations were deteriorating towards what became the commercial dispute that many years later resulted in the investor protection claim, representatives of Gold Pool sought support or assistance from Canadian officials, in particular Ambassador Mann, who in various ways

expressed, as one might expect, official support so far as it could be given for Gold Pool in its asserted difficulties. But it seems that he did not point Gold Pool in the direction of the FIPA as a possible means of recourse should the commercial venture fail in circumstances where it might be that a claim could be presented under such a treaty.

101. Without meaning any disrespect to Ambassador Mann or diminishing the submission made as to his involvement, expertise and experience and therefore the position he may have been in to take an informed view on such matters, it seems to me an exercise in speculation to infer from that even that he himself had a particular opinion that Kazakhstan had not, by the materials I have considered, impliedly agreed to succeed to the FIPA. It is stretching it yet further to propose, even if one could conclude that his individual opinion was that there had not been succession, that that was in some sense the state opinion of Canada, not least in circumstances where at about that time, in June 1997, a formal departmental review of Canada's treaty relations in this field concluded and stated that the FIPA was in force with Kazakhstan, which review indeed was at some stage, possibly in August 1997, provided to Kazakhstan.

102. A little later, namely on 6 March 1998, in response to an inquiry from Mr A T Griffis, chairman of Gold Pool's parent company, Kazakhstan Goldfields Corporation, the Hon. Sergio Marchi, then Canadian Minister for International Trade, stated:

> "*In your letter you asked about the application of the [FIPA]. This agreement has no application in Kazakhstan. We are currently negotiating a foreign investment agreement to complement the bilateral trade agreement and double taxation agreement which we have already signed. Unfortunately the terms of this agreement would not however apply retroactively*."

103. Save that I imagine Mr Marchi's observation is correct that the proposed new investment protection agreement was not envisaged, if concluded, to apply retroactively, there is little for me to say in response to that letter other than that, on my analysis of the 1992 Declaration and the 1994

Exchange and the 1995 Recital, and with respect, Mr Marchi was wrong to hold the view that the FIPA then had no application in Kazakhstan.

104. There is some, albeit weak, indication in the factual materials, to the extent that submissions made to the arbitrators who have been considering this matter by Canada have, or can be taken to have, included factual evidence and not merely argument, that it is not now possible to identify any substantial consideration of the underlying materials by Mr Marchi, or basis upon which he had formed and expressed that view. But even if the record showed that he, for his own part, or with legal advisers, had engaged in a substantial review of the materials, his letter amounts to no more than the expression of a view, nearly three years after the last of the material instances, as have I held them to be, of implied succession agreement, that there had been no succession. It seems to me that view, then expressed by Mr Marchi, takes Kazakhstan nowhere.

105. In 2012, so very much later again, an opinion provided by the then legal adviser to the Canadian department of foreign affairs and international trade, Mr A H Kessel, was included in the Canadian Yearbook of International Law of 2012, in which he discussed Canada's practice and understanding as regards what constituted or did not constitute a succession of new and continuing states to existing treaties. His is the commentary to which I referred earlier suggesting that the 1995 Recital, or recitals like it, offered a less strong inference as to succession than an act such as terminating in accordance with its terms a treaty that would only have been in force had there been a succession.

106. It seems to me that Mr Kessel's article is a somewhat nuanced piece. Certainly it does not articulate in clear and unequivocal terms a view that the FIPA, or for that matter the 1985 DTA, had not been succeeded to by Kazakhstan by any of the bilateral materials to which I have referred and which I have concluded did involve an implied succession agreement. If anything his view appears to have been, certainly as regards the 1985 DTA, that it was treated by both parties as having been succeeded to by Kazakhstan and applicable, and it is difficult to identify any reason why that might

have been the case if it were not that it was jointly referred to, with the FIPA, in the 1992 Declaration.

107. Even if Mr Kessel's opinion had expressed more unequivocally a view that would now be favourable to Kazakhstan, it would be only that. It would be a view of no doubt a very distinguished and experienced gentleman in a position to hold a view, but a view on the very question that it is for this court to decide by reference to the primary materials and not by reference to the opinions of others more than 15, and up to 20, years later as to what they meant or conveyed.

108. Finally, having indicated that I do not propose to go through each and every one of these supposed contraindications arising after the fact, reliance was placed on quite a range of material, albeit most of it internal only to either Canada or Kazakhstan, in the context of the protracted negotiations that even now are yet to reach fruition, for a new bilateral investor protection treaty. It was said to indicate more or less strongly at any given time a view held by either one party or an individual, or occasionally being communicated *inter partes*, that the treaty being negotiated would fill a void rather than be by way of update of and replacement for the FIPA. Overall, as it seems to me, that material does not paint anything like a clear or consistent picture in one direction or the other, not least because as Mr Dunning QC emphasises, in the course of the negotiations in 2012 and 2013 on the Kazakh side it was proposed to include an express termination provision confirming that with the entry into force of the new treaty the FIPA would cease to apply.

109. Were it material to a consideration of what the 1992 Declaration, the 1994 Exchange or the 1995 Recital meant or implied when executed to take account of this much later material, my conclusion would be that it did not sufficiently or unequivocally push the balance in one direction or the other to affect what would otherwise be the tenor, meaning and effect of those communicated consensuses. As I indicated at the outset of this section of my judgment, my primary conclusion is in

fact that all of this material says nothing as to that original, and therefore continuing having never been changed, effect of those 1992, 1994 and 1995 events.

110. I therefore take up no time at all over a number of other after-the-fact pieces of evidence which for his part Mr Dunning QC pointed to as indicating opinions supportive of Gold Pool's position, held or indicated over the years, on both sides.

Conclusion

111. Since this is a rehearing *de novo* and not a review, and I have given immediate judgment having come to a clear conclusion upon the argument, I shall not take up time commenting at length on the reasoning of the arbitrators that led them to their conclusion that Kazakhstan did not succeed to the FIPA, let alone take up time commenting on the reasoning of the arbitrators in the World Wide Minerals matter that led them to conclude, as I have done, that Kazakhstan did. No disrespect to the arbitrators is intended by the principle, or my application of it here, that I must make up my own mind on the point and if my view differs from that of the arbitrators then by operation of the 1996 Act my view prevails.

112. However, and stating matters broadly and concisely so as to give an indication out of respect to the arbitrators of why I have differed from them:

(1) Generally, in my respectful view, the arbitrators were distracted by a substantial body of irrelevant material, in particular evidence of uncommunicated views internal to Canada or Kazakhstan, or evidence of subsequent events not capable of bearing upon the meaning and effect assessed objectively of the consensuses set out in writing *inter partes* in 1992 to 1995.

(2) As regards the 1992 Declaration, the arbitrators regarded it as ambiguous and fairly open to multiple meanings, although without identifying the other meanings they thought it reasonably capable of conveying, whereas I regard its material tenor as clear and unambiguous.

(3) As regards the 1994 Exchange, the arbitrators felt there was nothing more there than "*preparatory statements confirming succession [a reference to the language of paragraph 9 of the Kazakh draft for the Mutual Relations Declaration] and a final declaration that omits such confirmation*", whereas I see the then draft language together with Mr Gizzatov's potentially concerning observation as the trigger for the 1994 Exchange, which on its own terms was not a drafting exchange about whether to include paragraph 9 or something like it, but an official request for specific confirmation, which was given, that what as it happens then appeared in that draft paragraph was Kazakhstan's official position, bearing in mind Mr Gizzatov's apparently contradictory comment.

(4) As regards the 1995 Recital, the arbitrators accepted that it was "*compatible with succession to the Treaty*" and "*indicative of succession*", but felt it did not compel them to the view that there had been a succession, or was not conclusive as to whether there had been, whereas to my mind the relevant question is whether the 1995 Recital, like the immediately preceding recital referencing the 1992 Declaration, is an unambiguous recognition *inter partes* that the instruments recited are in force between them, and in my view, read in its context, it is.

113. My conclusion, for the reasons I have given, is that Canada and Kazakhstan impliedly agreed that the FIPA was in force and applicable between them, that is to say they impliedly agreed to the succession of Kazakhstan to the FIPA as successor state of the USSR for its territory, by the 1992 Declaration, and they reconfirmed as much to each other by both the 1994 Exchange and the 1995 Recital.

114. Subject to the assistance of counsel, I envisage it will be appropriate in those circumstances to set aside the arbitrators' award dated 30 July 2020, to recite or declare that they did and do have jurisdiction *ratione voluntatis* over Gold Pool's substantive claims, and that they are bound now to

proceed on that basis, and to remit the case to them to determine Gold Pool's substantive claims, and to consider all issues of costs anew, by and through a fresh award.
