

**ICSID TRIBUNAL CONSIDERS DEFINITION OF “INVESTOR” AND
“INVESTMENT”**

KT Asia Investment Group B.V. v Republic of Kazakhstan (ICSID Case No. ARB/09/8)

Introduction

On 17 October 2013, an ICSID tribunal released its decision in which it declined jurisdiction over the dispute in *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), on the grounds that there was no “investment” for the purposes of the ICSID Convention and the relevant bilateral investment treaty.

Background

The Claimant, *KT Asia Investment Group B.V.*, was a company incorporated in the Netherlands. The ultimate beneficial owner of the Claimant was Mr. Mukhtar Ablyazov, a private businessman and Kazakh national. The substance of the dispute concerned the Claimant’s allegations of a forced nationalisation by the Respondent, the Republic of Kazakhstan, of the Claimant’s minority interest in the BTA Bank.

On 1 August 2007, the Agreement on encouragement and reciprocal protection of investments between the Republic of Kazakhstan and the Kingdom of the Netherlands (the “BIT”) entered into force. The Claimant was incorporated in Rotterdam on 12 December 2007 as a shell company to hold Mr. Ablyazov’s shares in BTA pending a private placement with third party investors. On 14 December 2007, it purchased 808,321 shares in BTA from two BVI companies. The Claimant’s position was that during January and February of 2009, the FSA and the Kazakh government adopted a series of measures aimed at removing control over BTA from its shareholders, which eventually culminated in the forced nationalization of the Bank.

The Claimant filed a Request for Arbitration on 24 April 2009 pursuant to Article 36 of the ICSID Convention and the BIT. The hearing on jurisdiction was held from 1-3 February 2012.

Decision

The Tribunal (comprising Prof. Gabrielle Kaufmann-Kohler (as President), Ian Glick QC and Christopher Thomas QC) held that it lacked jurisdiction over the dispute.

“Investor”

The Claimant was an investor within the terms of the relevant BIT, which provided that a legal entity constituted under the laws of one country was an investor, without the need for any further requirements.

The Tribunal rejected the Respondent's argument that there were additional conditions (real and effective nationality).

"Investment"

However, the Tribunal found that there was no investment.

The Tribunal, having considered existing decisions, held that the objective definition of investment under the ICSID Convention and the BIT comprised of three elements - a contribution or allocation of resources, duration, and risk (which includes the expectation (albeit not necessarily fulfilled) of a commercial return).

The transaction did not satisfy the criteria of an investment, particularly when the following facts were considered:

- The Claimant had made no contribution with respect to its alleged investment, nor was there any evidence on record that it had the intention or the ability to do so in the future.
- The Claimant itself never had funds of any significance, other than a small amount to pay administrative expenses; and the only purpose for the incorporation of the Claimant was to hold some of the shares in BTA. Mr Ablyazov remained the true owner of the shares.
- The Claimant had purchased the BTA shares at an undervalue and had never actually paid even this price for the BTA shares. The payment of the BTA shares was financed through loans made by the vendors of the shares, no security was given for those loans, and eventually the loans were written off and the lenders liquidated.
- The investment was supposed to last a very short period of time – the business plan indicated that the shares were only to be held for a period of 3-4 weeks – the impact of the financial crisis hindered the financial placement, but this did not change the fact that the transaction was never intended to involve a longer term allocation of resources.

In line with recent ICSID cases, the Tribunal rejected the fifth element of an investment set out in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4) (Decision on Jurisdiction, 23 July 2001) – that a contribution to the host State's development or prosperity was a requirement for an investment. The Tribunal noted that while such a contribution may well be the consequence of a successful investment, if the investment fails, and thus makes no contribution at all to the host State's economy, that could mean that there has been no investment.

26th November 2013