Neutral Citation Number: [2020] EWHC 3068 (Comm)

Case No: CL-2019-000732

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 23/11/2020

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

THE REPUBLIC OF KAZAKHSTAN	**Claimant**
- and -	
(1) WORLD WIDE MINERALS LIMITED	
(2) PAUL A CARROLL QC	**Defendants**

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- -

Mr Joe Smouha QC, Mr Christopher Harris QC and Mr Paul Choon Kiat Wee (instructed by **Reed Smith LLP**) for the **Claimant**
Mr Vernon Flynn QC and Mr Edward Ho (instructed by **Jones Day**) for the **Defendants**

Hearing dates: 14-15 September 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the hearing of a challenge by the claimant ("TRK") under s.68 of the Arbitration Act 1996 ("AA") to an award entitled "*Final Award on Merits*" ("Award") founded on an assertion by TRK that the Tribunal awarded damages to the defendants by reference to an argument that the defendants had not advanced during the hearing or prior written procedure leading to the Award and in respect of which it did not have any or any fair opportunity to respond. TRK maintains that by acting in this manner the Tribunal breached its duty under AA, s.33 resulting in a serious irregularity within the meaning of AA, s.68(2)(a).

Background

2. Most of the relevant background is not in dispute. The first defendant is a publicly traded Canadian corporation whose primary business was to identify and demonstrate the viability of natural resource deposits, and the second defendant was at all material times a director of the first defendant and its President and Chief Executive Officer (together, "WWM" or "the defendants"). The arbitration with which this claim is concerned ("Arbitration") was a London arbitration instituted by a reference by WWM made pursuant to a bilateral investment treaty concluded between Canada and the USSR in 1989 ("BIT").

3. The Tribunal summarised the context in which the dispute arose at paragraphs 92-96 in these terms:

> "The principal events at issue in this case occurred between the summer of 1996 and autumn of 1997. At that time, Kazakhstan had recently regained independence following the December 1991 dissolution of the Soviet Union. Kazakhstan had been an important supplier of uranium to the Soviet Union prior to 1991, and by 1996 it was selling uranium on world markets, although sometimes at less than world market prices. It faced challenges both in developing its mineral resources and in gaining access to world markets on favourable terms.
>
> …
>
> In a series of Decrees between 1994 and 1996, President Nazarbayev announced Kazakhstan's intention to privatize many State industries with the goal of attracting domestic and foreign investors. Included among the industries to be privatized were the metallurgical and mining industries. Mining industries were particularly significant to the Kazakh economy because of large uranium deposits, previously under the control of the Soviet Union and now under control of the new Kazakh state. These were offered to potential investors through tenders for bids administered by GKI, a government agency …
>
> …

> The uranium deposits were divided into two main areas: the Northern Mines and the Southern Mines and other deposits in the southern region. Of these two areas, the southern region was believed to hold greater potential. Exploiting its deposits also used a more productive and cost-effective method of mining known as in-situ recovery (ISR), which made them significantly more economically valuable. The Southern Mines and other deposits in the region have in subsequent years turned out to be very productive and were described at the hearing as "*some of the most lucrative uranium mines in the world.*" The assets made available for privatization included the Southern Mines …
>
> Kazakhstan wished to attract foreign investors to increase production from the Southern Mines.
>
> …
>
> Other assets offered for privatization included TGK, a large, run-down, and inefficient mining and processing facility in the north-central part of the country. TGK included mines in the Akmola and Kokshetau oblasts, as well as a refinery and other large industrial facilities. The industrial facilities were located near the city of Stepnogorsk, a city whose very existence was a state secret during Soviet times. Respondent's expert described the complex in the mid-1990s as "*an absolute basket case*. Claimants agreed: "*In the summer of 1996, TGK was effectively bankrupt. Its debt included overdue wages for over 10,000 workers and pensions for thousands of retired employees. It was shut down, which . . . meant that 65,000 residents in the nearby town of Stepnogorsk were in danger*."

4. As the Award states at paragraph 12:

> "The relationship between the Parties began in June 1996, … WWM … submitted to the Kazakh State Committee on Management of State Property ("GKI") a Tender Proposal for Management and Acquisition of a large and run-down complex of uranium mining and processing facilities known as Tselinny Gorno-Khimicheskii Kombinat ("TGK" or "TGK Complex"). The Tender Proposal set out WWM's proposals to manage, develop, operate, and ultimately acquire TGK. Inter alia, the Tender Proposal called for WWM to enter into a Management Agreement pursuant to which it would determine a program for development, upgrading, and promotion of TGK's operations. On 12 June 1996, the Tender Commission of the Republic of Kazakhstan's accepted the Tender Proposal.
>
> 13. WWM subsequently concluded a Management Agreement with GKI … which gave WWM substantial rights and financial and other responsibilities for managing the TGK complex,

> including an option to purchase the complex in the future. Over the following months WWM, acting through its local subsidiary Kazuran, took steps to restore production at TGK, including providing loans of several millions of dollars. Claimants engaged in discussions with KATEP, a state-owned entity charged with managing Kazakhstan's uranium resources, regarding their ambitions to secure access to the production of the Southern Mines."

5. WWM entered into the Management Agreement referred to above in October 1996. As is noted in Paragraph 116 of the Award, "… *several key points were not agreed and instead were listed in Schedule 2 of the Management Agreement as matters "to be addressed in good faith negotiations." Included in these deferred issues were the rights to the Southern Mines and the right to market and export uranium globally*". TRK (or the entity through which it contracted with WWM) terminated the Management Agreement on 1 August 1997 and WWM commenced the Arbitration claiming damages for alleged breach of various provisions in the BIT and Management Agreement. In substance, WWM alleged expropriation of its investment by breaches of both the BIT and the Management Agreement including alleged breaches arising out of the failure by TRK to agree to accord it access to the production of the Southern Mines, by failing or refusing to issue export licences in its favour in respect of a uranium sales contract and in relation to the conduct of TGK's bankruptcy.

6. Turning first to the Southern Mines issue, it was common ground before the Tribunal that the investment obligations imposed on WWM by the Management Agreement were such that WWM could afford to make them only if it could secure access to the production of the Southern Mines. As the Tribunal recorded in paragraph 225 of the Award, WWM "… *vigorously maintained throughout that access to the resources of the Southern Mines was critical to the profitability of their venture, and that they would never have invested without a sufficient guarantee of that access*". On the Tribunal's analysis, whether WWM had secured access to the production of the Southern Mines depended on the true meaning and effect of a document executed on 28 February 1997 entitled the "*Strategic Alliance Agreement*" ("SAA"). The Tribunal considered the SAA to be "… *an agreement to agree, opening an exclusive opportunity to negotiate a joint venture with Kazatomprom over aspects of the uranium production at the Southern Mines and New Deposits along the broad lines sketched out in the clauses of the Agreement; but a time-limited exclusive opportunity which would lapse after 90 days* …" and in consequence that it "… *could not have created vested property rights for the benefit of Claimants of a kind that could serve as the foundation for a claim (as here) for expropriation or the loss of future profits*". The Tribunal therefore rejected WWM's case that it had secured access to the production of the Southern Mines and its case based on expropriation by reference to that allegation. This was a and, perhaps the, major part of WWM's claim.

7. The other main event which it was alleged gave rise to a claim for breach concerned the refusal by TRK of an export licence to WWM or its local subsidiary for the export of uranium to a customer in the United States of America. The factual basis for this allegation was summarised at paragraph 16 of the Award in these terms:

> "In the early months of 1997, WWM … sought to export from Kazakhstan a quantity of uranium oxide refined from TGK's stockpile in order both to generate cash to meet their continuing payment obligations under the Management Agreement and to gain entry into and visibility in international uranium markets. A sales contract was concluded with a prospective purchaser in the USA. WWM contends that the Management Agreement and other documents provided for its own and its subsidiaries' right to export and sell freely in international markets uranium and uranium compounds produced by TGK. However, for reasons that are disputed, WWM did not secure the required export license. WWM … never exported any uranium oxide from Kazakhstan."

8. The defendants contended that the failure to grant a license violated their rights to fair and equitable treatment under the BIT. The Tribunal concluded at paragraph 400 of the Award that TRK had acted unjustly and arbitrarily in relation to WWM's application for export licenses and thereby in a manner that was not fair and equitable treatment under the BIT. As the Tribunal put it at paragraphs 422-423 of the Award:

> "422. Under the Management Agreement … WWM acquired the entitlement to export to world markets, subject to compliance with licensing requirements related to Kazakhstan's international obligations. Under the Management Agreement, the Licensing Law, and ultimately the BIT, it was entitled to expect that this process would proceed in a predictable fashion, utilizing the same procedures and standards applied in other cases. This did not occur. Instead, the application for an export license was treated in an ad hoc manner that allowed opponents of the sale to shape the process and to layer on repeated new obstructions and requirements, all as the time available to obtain the license drained away.
>
> 423. Claimants' investment did not receive the predictable and consistent treatment to which it was entitled under the treaty's guarantee of fair and equitable treatment."

9. Finally, in relation to the bankruptcy issue, again the Tribunal concluded that there had been a process failure that constituted a breach of the BIT. At paragraph 532 of the Award, the Tribunal held that:

> "… the BIT's obligation to accord fair and equitable treatment clearly required Respondent's authorities to assure that a foreign investor with a major financial stake in the pending bankruptcy received timely notice of the proceedings so that the investor could participate to protect its interests in the investment. This obligation is all the more clear and compelling where such notice is required both by law and by a contract binding a State organ.

> 533. There was no such notice here. Respondent's conduct in relation to the bankruptcy thus did not satisfy its obligation to accord fair and equitable treatment with respect to Claimants' investment."

10. Other than in the two respects noted above, the defendants' claims all failed. Its claim that TRK's conduct in relation to the Southern Mines issue constituted expropriation was rejected as was its claim that the termination of the Management Agreement constituted a breach of the terms of the BIT or the terms of the agreement itself. On the contrary, WWM was held to have materially breached the terms of the Management Agreement. This led the Tribunal to conclude that TRK had been entitled to terminate the agreement but had failed to follow the contractually mandated procedure for terminating the Management Agreement – see paragraph 478 of the Award. The defendants' case that this constituted a compensable violation of TRK's obligations under the BIT was however rejected – see paragraph 479-482 of the Award.

11. Having made these findings, the Tribunal next turned to quantum at section D of the Award. As will be appreciated from what I have said so far, any damages would have to be quantified by reference to the breaches in fact proved. Any claim based on the assertion that the sum of the conduct complained about amounted to expropriation had been rejected. But WWM had not advanced any alternative case. WWM had presented what was in effect a rolled up claim premised on the assumption that all its allegations would succeed and that the effect of them together amounted to expropriation. That led the defendants to argue that damages should be assessed initially on one of two bases and later on one of three bases, each premised on the theory that their investment had been expropriated and they were entitled to recover the value of the whole of that investment calculated on one of the three bases they had identified. In light of the Tribunal's conclusions on the liability issues, it was necessary for it to quantify what loss had been caused by the breaches proved in circumstances where no such alternative case had been advanced by the defendants.

12. The Tribunal summarised its task at paragraph 572 of the Award however in these terms:

> "Having found breaches of FET[1] in certain specific respects, but having dismissed Claimants' claims of expropriation or breach of other articles of the BIT, the Tribunal now turns to the question of quantum. Arbitrations such as this one pose the challenge of valuing damages when a claimant no longer holds the investment but the tribunal does not make a finding of expropriation. Nonetheless, as the Tribunal has found Respondent to have breached its BIT obligations, an appropriate measure of damages is required in order to "make full reparation for the injury caused by the internationally wrongful act."

13. The difficulty that the Tribunal faced however was that no attempt whatsoever had been made by WWM to identify what losses were caused by each of the breaches alleged.

[1] Fair and Equitable Treatment under the BIT.

No attempt had been made to address causation either other than in the terms summarised by the Tribunal at paragraph 544 of the Award:

> "Claimants allege that there exists a clear causal link between their losses and Respondent's actions. They contend that, as the result of Respondent's breaches, they lost the rights: 1) to manage and later acquire TGK and the Northern Mines; 2) to profit from toll processing uranium solutions from the Southern Mines; 3) to partially own, develop, and operate the Southern Mines; 4) to be repaid for their multi-million dollar loan to TGK; and 5) to have repayment rights secured against TGK's shares and assets. Furthermore, Claimants argue that as several of these rights were intended to be on-going and long-term, they are entitled to the profits that would have accrued to them as these rights were exercised over time, thus requiring application of a DCF valuation."

14. No mention is made in this passage of the impact that the findings actually made by the Tribunal concerning breach might have on a damages claim formulated on this basis. On the basis summarised by the Tribunal in this passage the defendant claimed either US$1.653 billion by valuing their losses as at the date of the Award or US$371 million by valuing their losses at the date of the alleged breaches under the BIT which the Tribunal treated as being 1 August 1997 or on a wasted expenditure basis, which the Tribunal summarised as being:

> "The final valuation presented by Claimants contemplates a third scenario in which the Tribunal finds that Respondent's conduct involves violations of the BIT requiring compensation, but that Claimants' losses cannot be assessed on the basis of lost projected future profits. Claimants emphasize that, in their view, such an award would not adequately compensate them for the loss of their investment. Under this approach, Claimants would recover their invested capital with interest, as well as any other costs they incurred for the purpose of WWM's investment in Kazakhstan. Accuracy's[2] valuation of the amount invested took into account cash advances to TGK, direct payments to suppliers made on TGK's behalf, costs incurred in relation to creating Kazuran[3], due diligence costs for the Northern and Southern Mines, and the non-refundable deposit paid to GKI. In total, Accuracy calculated Claimants' sunk costs at the date of the breach to be US$16.5 million with an additional US$2.8 million in consequential losses, reflecting the costs of WWM's unsuccessful efforts to recover its investment in Kazakhstan, leading to a total of US$19.3 million in sunk costs."

15. However, each of these formulations was premised on the assumption that the Tribunal would find TRK to have expropriated their investment. Whilst it is possible that one or more of the breaches found proved might have caused loss that it was appropriate to

[2] One of WWM's quantum experts.
[3] WWM's locally based subsidiary

calculate using one of the bases contended for by the defendants, that such was the case was not inevitable and in the case of the bankruptcy issue improbable and in any event could not be assumed.

16. Although the Tribunal acknowledged that it had found breaches of FET in certain specific respects, but had dismissed WWM's claims of expropriation or breach of other articles of the BIT, it nonetheless proceeded with an analysis of quantum that appears to have had no regard to this point or to the point that the defendants had not attempted to demonstrate what loss had been caused severally by each of the alleged breaches. It did so even though it identified as the guiding principle:

> "As referenced by Claimants, the standard established in Chorzów Factory for damages is as follows:
>
> > "[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such principles which should serve to determine the amount of compensation due for an act contrary to international law." "

17. Ultimately the Tribunal rejected the submission that damages should be calculated by reference to either of the first two methods it had identified but concluded at paragraph 587 of the Award that:

> " … while Claimants' investment was not expropriated, Respondent did breach its FET obligations in ways that resulted in significant injury to Claimants. Whether or not Claimants' investment would have succeeded had they received a timely export license can never be determined. Nevertheless, the failure to grant a license clearly contributed to the demise of the investment. Respondent's subsequent failure to assure that Claimants learned of the bankruptcy proceeding denied them the opportunity to seek to protect their claimed security interests in TGK's assets. The Tribunal finds further that the resulting damage suffered by Claimants would be appropriately compensated by the recovery of their sunk costs." [Emphasis supplied]

18. Thus, the Tribunal appears to have approached what it had concluded amounted to the loss of a chance or opportunity on the basis that it entitled the defendants to recover the whole of its investment being the sunk costs. This resulted in an award of US$13.7 million calculated in the manner set out in paragraph 596 of the Award, together with interest and costs. It did so notwithstanding that is not what had been argued for by the defendants and ignored what its own counsel had said concerning the approach to be adopted in the event that the tribunal concluded some but not all the breaches alleged

had been proved, as explained below. It is this paragraph of the Award that TRK focusses on.

The Parties' Cases In Summary

19. TRK's case is that at no stage did WWM (a) allege that any particular loss or other consequence was caused by any specific breach and (b) at all times advanced a single case that the overall effect of all the breaches alleged by the defendants together resulted expropriation of and the total loss of WWM's investment. TRK submits that by "… *formulating its claim in that way, WWM made its entire claim dependent on the correctness of its case as to what the investment consisted of (because its Southern Mines rights case created value in the investment) and dependent on establishing all of the breaches and causation on a collective basis*" – see paragraph 6 of Mr Smouha QC's written opening submissions. It adds that no evidence was adduced before the Tribunal or submissions made as to what consequences should follow from a conclusion that some but not all the breaches alleged had been proved. This is unsurprising since to do so would have been either impossible or at least very difficult and expensive until it was known whether the Tribunal would find some but not all the alleged breaches proved and if it did which ones were found proved. It was no doubt for this reason that WWM's counsel before the Tribunal invited the Tribunal in that event "… *to render a further partial award on liability and to come back to the parties on damages for the part that the Tribunal finds liability on*" – see the oral submissions of the defendant's counsel at the hearing before the arbitrators at Transcript, Day 1, page 133, lines 10-13. TRK's submission had been that if the Tribunal came to such a conclusion then the claim should fail because from first to last the damages claim had been formulated by WWM on the premise that its entire claim would succeed. Neither party had submitted that in such an event the Tribunal could or should proceed to assess damages by reference to specific breaches on the material then available to it.

20. This leads Mr Smouha to submit that there has been a serious irregularity within the meaning of AA s.68(2) which has resulted in substantial injustice because damages have been awarded against TRK on a basis that was not contended for by the defendants at the hearing before the arbitrators and was not the subject of argument before the arbitrators from either party.

21. Mr Flynn QC on behalf of the defendants maintains that "…*the suggestion that the eminent and experienced Tribunal relied on points which Kazakhstan had no chance to address, is meritless*". He submits that on the facts relied on by TRK it comes nowhere near satisfying the high hurdle required for a challenge of this sort. He submits that TRK had every opportunity to address the issues on which they now rely but even if that is wrong the point on which TRK relies gives rise to no substantial injustice in essence because the Tribunal would have come to the same conclusion and the claim should be dismissed. Even if all that is wrong the correct course is to remit the parts of the Award under challenge to the Tribunal for further consideration.

The Applicable Principles

22. By AA s.33:

> "(1) The tribunal shall—

> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

By AA S.68:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
>
> (d) failure by the tribunal to deal with all the issues that were put to it;
>
> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
>
> (f) uncertainty or ambiguity as to the effect of the award;
>
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
>
> (h) failure to comply with the requirements as to the form of the award; or

> (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
>
> (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
>
> (a) remit the award to the tribunal, in whole or in part, for reconsideration,
>
> (b) set the award aside in whole or in part, or
>
> (c) declare the award to be of no effect, in whole or in part.
>
> The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

23. The principles applicable to challenges under AA s.68 were summarised by Popplewell J as he then was in Terna Bahrain Holding Company WLL v Al Shamsi [2012] EWHC 3283 (Comm); [2013] 1 Lloyd's Rep 86 at paragraph 85 in these terms:

> "(1) In order to make out a case for the court's intervention under section 68(2)(a), the applicant must show:
>
> (a) a breach of section 33 of the Act; ie that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;
>
> (b) amounting to a serious irregularity;
>
> (c) giving rise to substantial injustice.
>
> (2) The test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.
>
> (3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the court's intervention. Relief under section 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably be

> expected from the arbitral process, that justice calls out for it to be corrected.
>
> (4) There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.
>
> (5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of section 33 or a serious irregularity.
>
> (6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.
>
> (7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

24. As Carr J as she then was emphasised in Obrascon Huarte Lain SA (t/a OHL International) v Qatar Foundation for Education, Science and Community Development [2019] EWHC 2539; [2019] 2 Lloyd's Rep. 559 at paragraph 44

> "S. 68 imposes a high threshold for a successful challenge… It is not to be used simply because one of the parties is dissatisfied with the result, but rather as a longstop in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice "*calls out for it to be corrected*". "

25. Whilst almost all defendants to proceedings brought under AA s.68 tend to emphasise points (2), (3) and (5) in Popplewell J's summary of the applicable principles and the point made by Carr J for obvious forensic reasons, this should not be allowed to obscure or reduce the impact of point (4). The *rationale* for the approach identified in points (2), (3) and (5) of Popplewell J's summary is that identified by Carr J further on in paragraph 44 of her judgment in Obrascon Huarte Lain SA v Qatar Foundation for Education, Science and Community Development (ibid.):

> "As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults. The approach is to read an award in a reasonable and commercial

> way, expecting, as is usually the case, that there will be no substantial fault"

26. It is for that reason that:

> "It is enough if the point is "in play" or "in the arena" in the proceedings, even if it is not precisely articulated… a party will usually have had a sufficient opportunity if the "essential building blocks" of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under s. 33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case."

- See Reliance Industries Ltd & Anor v The Union of India [2018] EWHC 822; [2018] 1 Lloyd's Rep. 562 at paragraph 32.

27. The remaining authorities do not identify any other points of principle that are relevant to the determination of this claim. Whether or not (a) a tribunal decides the case on the basis of a point that one party has not had a fair opportunity to deal with; and if so (b) whether the tribunal might well have reached a different view and produced a significantly different outcome had that party had an opportunity to address the point in issue are questions of fact. Before turning to the facts it is however worth emphasising that AA s.68 is concerned exclusively with procedural unfairness and not with mistakes of either law or fact.

The Issues

28. As will be apparent from the principle summarised above and as is common ground, the issues between the parties are:

(a) Whether there has been a serious irregularity within the meaning of AA s. 68(2); and if there has been

(b) Has it caused substantial injustice to TRK. This depends on whether TRK has proved that had it had an opportunity to address the point, the Tribunal might well have reached a different view and produced a significantly different outcome.

29. If each of these issues is resolved in favour of TRK, then it will be necessary to decide whether to remit or set aside the relevant parts of the Award.

Serious Irregularity

30. Whether there has been a serious irregularity depends on whether the Tribunal decided the case on the basis of a point that TRK had not had a fair opportunity to deal with. As Popplewell J warned in para (4) of his summary of the applicable principles, if a tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.

31. In my judgment TRK is entitled to succeed on this issue. My reasons for reaching that conclusion are as follows.

32. TRK had submitted that in the event that some but not all the breaches alleged were proved then the claim should fail because no alternative case had been advanced by WWM on the basis that it succeeded on some but not all the breaches alleged and had submitted only that it should recover damages on one of the three bases identified by the Tribunal in the event that it succeeded. WWM had submitted that if some but not all breaches were proved then the Tribunal should make a partial award on liability and "… *come back to the parties on damages for the part that the Tribunal finds liability on*." This submission reflects almost exactly the approach that Popplewell J has held should be adopted.

33. The Tribunal did not adopt either the course of rejecting WWM's damages claim on the basis contended for by TRK or acceding to the course contended for by WWM but instead concluded at paragraph 587 of the Award that (i) "… *the failure to grant a license clearly contributed to the demise of the investment …*", (ii) "… *Respondent's subsequent failure to assure that Claimants learned of the bankruptcy proceeding denied them the opportunity to seek to protect their claimed security interests in TGK's assets*…" and (iii) "… *the resulting damage suffered by Claimants would be appropriately compensated by the recovery of their sunk costs.*" In my judgment the Tribunal should have adopted the course suggested by counsel for WWM at the hearing before them and by failing to do so deprived TRK of addressing what losses had been caused by the breaches found proved – an issue that might have required additional or updating evidence on quantum and submissions.

34. The approach adopted by WWM's counsel referred to above was the appropriate one in the circumstances (unless the Tribunal had decided to dismiss the defendants' claim on the basis contended for by TRK) for at the least the following reasons. First, WWM's case before the Tribunal was that it was entitled to recover damages calculated on one of the three bases identified earlier on the assumption that it succeeded on all the breach allegations that it made. Secondly it did not advance a claim to damages quantified on any of the bases identified (including the sunk costs basis) as a specific loss caused by any particular breach and had not done so by reference to either the failure to grant an export licence or inform it properly about TGK's bankruptcy. Thirdly, its submission as to what should happen in the event that there was a finding that some but not all the breaches had been proved implicitly recognised that such findings would or at least might require additional or updating evidence on quantum and submissions and did so because a finding that some but not all of the breaches alleged had been proved would have involved a different enquiry from that which the Tribunal was being invited by WWM to undertake, namely the "… *three-stage enquiry, as explained in Pey Casado v. Chile:* "*the assessment of the reparation due under international law for the breach of an international obligation consists of three steps* – [i] *the establishment of the breach, followed by* [ii] *the ascertainment of the injury caused by the breach, followed by* [iii] *the determination of the appropriate compensation for that injury'*" – see paragraph 34 of TRK's opening submissions. As things turned out, this is an exercise that would have to be carried out on the basis that as found by the Tribunal (a) WWM did not have any rights to the Southern Mines, (b) TRK was entitled to terminate the Management Agreement and (c) (on the findings as they currently are set out in paragraph 587 of the Award) the consequence of the breaches found proved merely

contributed to the demise of the investment or denied the defendants an opportunity to protect its investment but without any argument having been advanced or invited as to how these causal consequences followed from the breaches found proved in light of the Tribunal's other conclusions.

35. I accept TRK's submission that damages had been sought on the basis that all the breaches alleged were proved and together amounted to an expropriation of the defendants' investment. As I have said it could only have been for this reason that counsel for WWM said what he said concerning the position in the event that some but not all breaches were found proved. That this was so is also apparent for example from paragraph 341 of the defendants' Memorial on Merits and Quantum dated 25 March 2016, where the defendant's set out their causation case on the basis that "*... Respondent's breaches of the Treaty caused catastrophic damages to Claimants …*" so that "*… Claimants are therefore entitled to compensation that would "wipe out all the consequences" of Respondent's multiple wrongful acts and place Claimants in the position they would have been "but for" these acts ...*" [Emphasis supplied]. To similar effect is paragraph 358 of the same document where WWM submit that "*... Having set out the breaches of the Canada-USSR BIT, the Claimants consider the causal link to be self-evident ...*" [Emphasis supplied].

36. Mr Flynn submitted that this was this was a misreading of what was being submitted. He advanced this submission by reference to paragraph 307 of the defendants' Memorial, the relevant part of which reads:

> "Respondent's actions and omissions in frustrating the Strategic Alliance Agreement and Claimants' access to the Southern Mines; in denying export licenses in violation of the Management Agreement, the Strategic Alliance Agreement, the Toll Processing Agreement and Kazakhstani law; in unlawfully terminating the Management Agreement and Claimants' rights under the Toll Processing Agreement; and in frustrating and ultimately breaching the Loan and Pledge Agreements, constitute a combination of conscious acts which both individually and taken as a whole, inflicted catastrophic damages upon Claimants and completely destroyed Claimants' investment in Kazakhstan." [Emphasis supplied]

The words underlined are the words that Mr Flynn relies on. I reject this submission for the following reasons.

37. First, had the position been as Mr Flynn submits, WWM's counsel would not have said what he did in relation to the possible conclusion that some but not all the breaches alleged were found to be proved. He would have said that the same sum is claimed by way of damages for each alleged breach severally as well as jointly.

38. Secondly, whilst it is possible that the same loss could have flowed from different but individual breaches, it is not inevitable that such is the case. It depends on the breaches found to have occurred, the other findings made by the Tribunal and its conclusions as to what losses could be said to have been caused by the breaches found proved in the light of these other conclusions. It is improbable that the whole of the loss claimed

could be attributed to the bankruptcy breach or for that matter the export breach, particularly given the Tribunal's conclusions concerning the right of TRK to terminate the Management Agreement. It is noteworthy as I have said that the Tribunal concluded in relation to the first that it deprived the defendants of an opportunity and that the latter was a contributory factor in the loss of the defendants' investment. However none of these issues were the subject of submissions from either party and nor could they have been until all the liability findings were to hand. That is why WWM's counsel's submission to the Tribunal was self-evidently correct unless the consequence of WWM's approach was that the whole claim should be dismissed unless it proved all its alleged breaches. If that was not the outcome then the only other tenable alternative was that contended for by WWM's counsel before the Tribunal.

39. Thirdly, the paragraph relied on by Mr. Flynn appears under the sub-sub-heading "*Respondent Destroyed Claimants' Investment Through A "Creeping" Violation Of The FET Obligation*" and not under the sub-heading

> "V. RESPONDENT'S TREATY BREACHES CAUSED SUBSTANTIAL DAMAGE FOR WHICH CLAIMANTS ARE ENTITLED TO FULL REPARATION".

The former sub-sub-heading is in lower case and numbered "5". It comes within Section C within Part IV of the defendants' Memorial and is entitled "*Respondent Failed To Accord Fair and Equitable Treatment To Claimants' Investment*". Part IV of the Memorial is entitled "*RESPONDENT HAS REPEATEDLY BREACHED ITS TREATY OBLIGATIONS TO CLAIMANTS AND THEIR INVESTMENT*". The short point is that Part IV is concerned with breach whereas Part V is concerned with causation. Part V sets out WWM's case as to causation and does so on the basis that all the breaches alleged have been made out and damages are to be calculated on that assumption on one of the three bases identified earlier. Part IV is concerned with breach and is not relevant to WWM's causation case.

40. Finally, this submission ignores the final sentence of paragraph 307 of the Memorial:

> "these coordinated acts were, in short, an exercise of resource nationalism in the hands of the newly created National Atomic Company Kazatomprom. Viewed as a holistic endeavour to achieve that end (which it eventually did), the creeping breach cumulatively becomes a single one, all in violation of Article III(1) of the Treaty."

In my judgment this is consistent with the general point I have made already – that WWM's case before the Tribunal was that all the breaches should be found proved as part of an overarching breach amounting to expropriation of their investment, which entitled them to damages to be assessed on one of the three bases to which I have referred earlier.

41. This approach continued in WWM's Reply Memorial – see paragraph 453 where it was submitted that:

> "453. As explained above and in Claimants' Memorial, Respondent's acts and omissions caused catastrophic damages

> to Claimants. This was not a so-called lawful expropriation, where the Treaty sets the standard for compensation. Because Respondent's wrongdoing constitutes a breach of the Treaty and of international law, Claimants are entitled to "full reparation" and compensation that would "wipe out all the consequences" of Respondent's multiple wrongful acts and place Claimants in the position they would have been "but for" those acts. The actual events of the past 20 years, as proven by the evidence presented in these proceedings, demonstrate that, but for Respondent's wrongful conduct, WWM would still be owning and operating "some of the best producing and lowest-cost uranium projects in the world today." The only remedy that would wipe out the consequences of Respondent's illegal acts and provide WWM with the reparation to which it is entitled under customary international law is payment of compensation in an amount computed as of the date of the award (Section VI(A)(1)). But even if that valuation is completed at the date of the breach, as Respondent urges, Claimants are still owed the fair market value of their investment (Section VI(A)(2)), as calculated through an appropriate DCF model (Section VI(A)(3)).". [Emphasis supplied]

42. This led to the submission by WWM at paragraph 454 of its Reply Memorial:

> "454. In the end, the Tribunal is left with a range of valuations. If Claimants' damages are calculated at the date of the award (as they should be), Accuracy has provided an updated valuation of US$1.661 billion (Section VI(B)(1)). If Claimants' damages are calculated at the date of the breach (as Respondent argues), the appropriate valuation is US$436 million (Section VI(B)(2)). And should this Tribunal choose to deny Claimants full reparation (which it absolutely should not), Claimants are at minimum entitled to their sunk costs plus interest, which amounts to US$54.3 million (Section VI(C)). Respondent's contentions that Claimants are entitled to no compensation are simply untenable (Section VI(D))."

43. No attempt was made to spell out a claim to damages said to have been caused by each individual breach. The range of valuations referred to in paragraph 454 of the Reply Memorial were each put forward as remedies for the conduct referred to in paragraph 453 – that is "… *Respondent's multiple wrongful acts …*". It was this approach that led to the submissions to the Tribunal being focussed on which of the three bases should be adopted in the event that the Tribunal found the whole of WWM's claim proved. In summary, WWM continued in its Reply Memorial as it had in its initial Memorial with advancing a global claim to damages for expropriation of its investment brought about by the totality of the breaches alleged on the assumption that each breach alleged would be found proved.

44. It was not suggested at any stage to the Tribunal that the "*sunk costs*" formulation was a basis for assessing damages in the event that some but not all the alleged breaches

were found proved but only as an alternative basis for assessing damages if the other two bases contended for in its opening Memorial could not be accepted - see Mr Coffey's statement at paragraph 30.1 where he states:

> "The sunk costs claim was a claim which sought to compensate the WWM Parties for RoK's breach of the USSR-Canada BIT, including RoK's failure to issue an export license and to give notice of the bankruptcy proceeding, by awarding damages. to "fully reparate" the WWM Parties for those breaches and to "wipe out all the consequences" of those breaches"

45. This simply reflects what WWM had said in paragraph 483 of its Reply Memorial, where it stated that:

> "Claimants are aware of the existence of arbitral precedent which declares that, in the event a tribunal declines to award damages under a claimant's particular damages theory, and no alternative damages theory has been pled (in response to arguments by the respondent), the claimants must 'bear the risks of having based their claims on a single assumption.' While Claimants disagree with this authority, they have nonetheless – out of an abundance of caution – instructed Accuracy to undertake a valuation of their investment based only on their sunk costs plus interest."

46. The "*damages theory*" referred to here was to the two other bases which WWM had invited the Tribunal to adopt and which I have described earlier. This third "*sunk costs*" basis was introduced at the Reply Memorial stage in order to meet submissions made on behalf of TRK challenging each of the other two bases as an appropriate method for the quantification of damages even assuming that otherwise WWM's case succeeded. Although Mr Coffey contends in paragraph 37.1 of his witness statement that the sunk costs claim was advanced on the basis that some or all of the sunk costs could be recovered for whatever breaches were found proved, that is mistaken as the material set out above demonstrates.

47. Mr Flynn submitted that TRK had addressed causation extensively and that some of these submissions carried through into the Award because some of the constituent elements of the sunk costs were rejected by the Tribunal in arriving at its quantification of the sunk costs. In my judgment this is beside the point. Submitting successfully that an element of the sums claimed by the defendants to be part of the sunk costs should not be included is different from the question whether the or any part of the sunk costs should be recoverable as damages for a particular breach when the party seeking damages (here the defendants) had not advanced such a claim.

48. In summary, there were only two fair alternatives open to the Tribunal in the light of its conclusions concerning breach given the way the damages claim had been advanced by the defendants at the hearing and in the prior written procedure and that was either (a) to accede to TRK's submission that the defendants' damages claim should fail applying the reasoning in Rompetrol Group NV v. Romania, ICSID Case No. ARB/06/03, Award, 6 May 2013 as explained in paragraphs 35 and 58-60 of TRK's opening submissions or (b) to publish an Interim Award setting out the Tribunal's breach

findings and inviting further submissions concerning the quantification of damages in light of those findings. What it could not do without breaching the AA s.33 duty was to proceed to assess damages in the manner set out in paragraph 587 of the Award without having published an Award setting out its findings in relation to the breach issues and giving both parties the opportunity to adduce evidence and/or advance submissions as to what damages could be held recoverable for those breaches found proved. This was so because the award of damages for loss alleged to have been caused by particular breaches simply were not "*in play*" in the sense that phrase is used in Reliance Industries Ltd & Anor v The Union of India (ibid.) particularly when considered in light of the other findings made by the Tribunal that are or may be relevant to the determination of these issues, summarised above. Although in theory it might have been possible for the Tribunal to indicate provisionally what it was minded to find and invite further submissions before publishing its final award, this would have been difficult to do fairly given the complex findings made and the impact they may have on the assessment of loss caused by the breaches found proved.

49. By proceeding as it did, the Tribunal decided the case on the basis of a point that TRK has not had a fair opportunity to deal with. That it submitted that the damages claim should fail in the event that only some of the alleged breaches were made good is not to the point because the only basis on which WWM had argued the claim was the global all or nothing basis referred to above. There was no alternative claim for damages caused by each individual breach relied on and so nothing in respect of which alternative submissions could be made. It is not for a defendant to set up or attempt to answer an alternative claim in damages that is not being advanced by the claimant. Although the defendants relied on Weldon Plant Ltd v. The Commission for the New Towns [2001] 1 All E.R. (Comm) 264, in my judgment that case provides no assistance in the circumstances of this case. As HHJ Humphrey Lloyd QC said in that case: "… *Obviously the tribunal should inform the parties and invite submissions and further evidence before making an award if the finding is novel and was not part of the cases presented to the arbitral tribunal …*".

Substantial Injustice

50. TRK must show that had it had the opportunity of addressing the assessment of damages caused by each of the breaches found proved, the Tribunal might well have reached a different conclusion from that which it reached in paragraph 587 of the Award and so produce a significantly different outcome. This issue can be taken rather more shortly than that concerning serious irregularity. In my judgment TRK has satisfied this test. My reasons for reaching that conclusion are as follows.

51. Had TRK had the opportunity of addressing this issue, it would have first submitted that it would be necessary for WWM to prove (a) what loss was caused by each of the breaches found proved and (b) to determine what compensation was appropriate for the loss and damage found to have been caused by the breaches that the Tribunal had found proved applying or at least by analogy with decisions such as Victor Pey Casado & Foundation "Presidente Allende" v. The Republic of Chile, ICSID Case No. ARB/98/2 (Resubmission Proceeding), Award, 13 September 2016. Whilst I accept that there is no precedent doctrine that applies in international investment arbitrations, the point is one that is so obvious as not to require precedent to support it.

52. As things stand at present all that the Tribunal has said on these issues is to be found in paragraph 587 of the Award. In the first sentence, although the Tribunal has concluded that the breaches that it has found proved "*… resulted in significant injury to claimants …*" it has not attempted to explain or make findings about what "*injury*" or, more pertinently loss has been caused by each of the breaches found proved. It is improbable that the same injury or loss could have been caused by each of the breaches found proved.

53. Secondly, in considering the causation issue, it would be necessary for WWM to prove what loss had been caused on the basis of the findings made by the Tribunal in relation to breach including in particular that WWM did not have any rights to the Southern Mines and TRK was entitled to terminate the Management Agreement. Had this exercise been carried out the Tribunal might well have reached a different conclusion from that it reached in paragraph 587 of the Award, particularly in light of the defendants' stance concerning the importance of the Southern Mines to the overall viability of the investment as a whole as summarised earlier in this judgment. That WWM did not have any rights in relation to the Southern Mines may well have a substantial impact given that it was WWM's own case that without access to the Southern Mines the whole project was fundamentally loss making. It may well have been loss making whether or not the export licence sought had been granted as and when it should have been granted.

54. As things stand at present the Tribunal has concluded that whether WWM's "… *investment would have succeeded had they received a timely export license can never be determined …*". This suggests that at best the appropriate compensation would reflect the loss of the chance of success – something supported by the conclusion in the following sentence. If that is correct then had TRK been afforded an opportunity to make further submissions the Tribunal might well have reached a different conclusion concerning the amount of damages that should be ordered. This may involve a careful investigation into what profits might have been made had an export licence been granted as sought. How those profits would have impacted on the losses apparently being made would involve some complexity as would the impact of such profits on WWM's breach of the Management Agreement and TRK's ability to terminate the Management Agreement. Had TRK been given the opportunity to consider and make submissions about these points, the Tribunal might well have reached a different conclusion from that which it reached, perhaps after giving further directions for the preparation of evidence and submissions focussing on such issues.

55. Although Mr Flynn argues that the Tribunal rejected at least implicitly TRK's submission that no loss had been suffered because the defendants lacked the means to perform WWM's obligations under the Management Agreement, this is a different point from that which TRK would have relied on had it been invited to make submissions as to the losses flowing from the export licence breach – which is that its termination of the Management Agreement has been found by the Tribunal to be lawful. That is material to the conclusion reached in paragraph 587 of the Award that the failure to grant a licence contributed to the demise of the investment and possibly also to the conclusion that whether the investment would have succeeded had WWM received a timely export licence "…*can never be determined …*". These were issues that TRK did not have an opportunity to advance arguments about for the reasons set out earlier. I am

satisfied that had it had such an opportunity, the Tribunal might well have reached a different conclusion and produced a significantly different outcome.

56. The fourth sentence refers to the denial of an opportunity for WWM to protect its interests in TGK's assets but again that begs a series of questions – what assets are in issue, what was their value and whether those assets would have been realised but for the failure to notify WWM of the bankruptcy in the manner required. Again it seems unlikely that the recovery of the whole of the "*sunk costs*" represents the appropriate compensation for loss of the opportunity identified. Whether that is right or wrong does not matter for present purposes. What matters is that the Tribunal might well have reached a different conclusion from that which it reached had it adopted the suggestion made by WWM's own counsel at the outset of the hearing before the Tribunal.

Set Aside or Set Aside and Remission to Tribunal

57. In my judgment this issue can be taken even more shortly. For the reasons that I have identified, I am satisfied that TRK has proved its case and that in consequence either the relevant parts of the Award should be set aside (as TRK submits should be the outcome) or set aside and the issue that remains to be decided as a result remitted to be resolved by the Tribunal (as WWM submits should be the outcome).

58. As Mr Flynn submits, the default position is to remit (as WWM submit should be the outcome) unless it is inappropriate to do so – see The Secretary of State for the Home Department v Raytheon Systems Limited [2015] 1 Lloyd's Rep. 493 per Akenhead J. at paragraph 3. As Mr Flynn also correctly submits, had the Tribunal acted in accordance with WWM's counsel's suggestion made at the hearing before the Tribunal leading to the Award, the result would have been that TRK would have been given a chance to address the issues concerning causation and loss caused by the two breaches found proved. Remitting achieves this result. I also agree with Mr Flynn that it follows from this that the correct course is to remit this issue for determination by the Tribunal.

59. Although Mr Smouha argues that I can safely simply set aside the relevant paragraph or paragraphs of the Award so as in effect to overturn the damages award, by reference to the reasoning in Rompetrol v. Romania (ibid.), I do not accept that this leads to the conclusion that I should simply set the relevant paragraphs aside. First, the decision of the Tribunal in that case is not binding on the Tribunal in this case. The extent to which it finds the reasoning in that case helpful is a matter ultimately for the Tribunal. Secondly, if the Tribunal considers the reasoning persuasive and if and to the extent this point remains available to TRK, it is one that can be considered by the Tribunal and ruled upon when considering the issues remitted. It does not justify not remitting the issues that remain to be decided by the tribunal that the parties have agreed should decide them – that is the Tribunal.

Disposal

60. For the reasons set out above (a) the relevant paragraphs of the Award relating to the quantification of loss will be set aside and (b) the determination of all issues concerning causation and the quantification of loss will be remitted to the Tribunal for determination by it.

61. At the end of the hearing it was left that following hand down of this judgment the parties would make further submission as to which paragraphs of the Award should be set aside in order to give effect to this judgment. I will hear those submissions after hand down for the purpose of settling the form of order that should follow.