CASE COMMENT

KT Asia Investment Group BV v Republic of Kazakhstan: Ratione Personae and Ratione Materiae

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I. INTRODUCTION

The ICSID Convention was originally designed to facilitate the settlement of disputes between host States and foreign investors. Its preamble states that 'while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases'. The jurisdictional requirements are laid down in Article 25(1) of the ICSID Convention, which makes it clear that the settlement of investment disputes at the International Centre for Settlement of Investment Disputes (ICSID) is only available to disputes arising between contracting States and nationals of other contracting States arising out of investments. Therefore, what constitutes a 'national' (ratione personae) and what constitutes an 'investment' (ratione materiae) are critical to ICSID's jurisdiction.

However, the ICSID Convention is silent as to the definition of both of these concepts. Therefore, unless agreed by the parties, it is ultimately up to tribunals to determine their meaning and scope. This determination will involve an assessment of any definitions included in the applicable investment treaty under which a dispute has arisen. In a system that is not formally beholden to binding precedent, this has led to an interesting body of jurisprudence and continuing debate as to how widely these terms should be interpreted.

While the issues of ratione personae and ratione materiae are traditionally distinct questions that are usually considered separately by tribunals, in some circumstances separating them is primarily a conceptual exercise. This is particularly so in the realm of investments made by shell or holding companies—the question of...
nationality can also become a question of who actually made the investment or where the investment originated from.

Such investments also raise important policy questions. For example, tribunals have frequently had to consider whether they are able to look behind a particular legal structure in order to make a more holistic assessment. Such arguments rely on the purpose of the ICSID Convention, international investment law and investment treaties as opposed to confining the enquiry to the plain meaning of the words. Both of these issues were recently thrown into relief in the case of *KT Asia Investment Group BV v Republic of Kazakhstan*, which concerned a Dutch company’s shareholding in a Kazakh bank, the ultimate beneficiary of which was also a Kazakh national.5

II. BACKGROUND

The Claimant, KT Asia Investment Group BV, was a company incorporated in the Netherlands that owned a minority interest in BTA Bank (BTA), a bank listed on the Kazakhstan Stock Exchange. It brought claims under the Netherlands–Kazakhstan Bilateral Investment Treaty (BIT)6 alleging the expropriation of its shareholding in BTA following measures taken by the Kazakh government and authorities that it alleged were aimed at forced nationalisation.

The ultimate owner of the Claimant was Mukhtar Ablyazov, a private businessman and Kazakh national, who controlled 75 percent of BTA through various nominees and individuals and who openly admitted that he was funding the arbitration proceedings. It became plain during the course of proceedings that the Claimant was a shell company set up to hold Ablyazov’s shares in BTA, temporarily pending their private placement with third party investors. The initial intention had been to acquire shares in BTA from two British Virgin Island (BVI) companies, which were also owned by Ablyazov at well below market value. The shares were to be acquired by way of the grant of two unsecured loans, which the proceeds of the private placement would be used to repay, together with interest. Ultimately, however, the sale did not go through—the Claimant retained the shares, the loans were not repaid and the two BVI companies were wound up. Indeed, in the course of the proceedings, the Claimant referred to the eventual transaction as an ‘internal corporate restructuring’ and essentially an ‘accounting exercise’.

Unsurprisingly, Kazakhstan sought to rely on these facts in its advancement of a jurisdictional challenge. The thrust of Kazakhstan’s argument was that this was essentially a domestic dispute brought by a Claimant with no purpose or assets under the guise of its nominal nationality and in reliance on what appeared to be an incidental minority shareholding. In legal terms, Kazakhstan’s arguments fell under two distinct legal objections: on the basis of (i) *ratione personae* because the Claimant was not an ‘investor’ and (ii) *ratione materiae* because the Claimant had no ‘investment’.

5 *KT Asia* (n 1).
6 Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Kazakhstan and the Kingdom of the Netherlands (signed 27 November 2002, entered into force 1 August 2007) (Kazakhstan-Netherlands BIT).
III. RATIONE PERSONAE

Given that Ablyazov sat behind the corporate veil of the Claimant, Kazakhstan contended that this was not really a dispute brought by a foreign investor as envisaged by the BIT and the ICSID Convention, both of which were concerned with international flows of capital or technology and based on the fundamental presumption of diversity of nationality. Instead, the Claimant’s real and effective nationality was Kazakh: the Claimant had no connection with the Netherlands, no genuine business, no employees, no place of business there, no decisions were taken there and no funds were being generated there. Therefore, it argued that the corporate veil should be lifted to reveal the real claimant, Ablyazov, who was not entitled to bring a claim under the BIT.

The Tribunal first turned to the question of whether the Claimant was an investor for the purposes of the BIT and the ICSID Convention. This involved ascertaining whether the Claimant’s true nationality was Dutch or Kazakh. Relying on the definition contained in Article 25 of the ICSID Convention and the BIT, both of which defined ‘nationals’ as legal persons constituted under the law of that contracting party, it concluded that the Claimant was a Dutch national, as it had been properly incorporated in the Netherlands. The Tribunal considered that, by contending that the true nationality of the Claimant was Kazakh based on its ultimate beneficial owner, Kazakhstan was effectively asking the Tribunal to disregard the ordinary meaning of the BIT and to supplement it with the rules of diplomatic protection.

However, the Tribunal was not prepared to look beyond this ordinary meaning. It reasoned that as there was no obligatory test for the nationality of corporations in international law, it fell to contracting States to define the parameters of nationality as they saw fit in their BITs. In this particular BIT, Kazakhstan had accepted that the nationality of Dutch legal persons would be determined by their place of incorporation. If Kazakhstan had intended to include a more demanding test, it could have done so. Indeed, in 10 other treaties, Kazakhstan had added a requirement that the siege social or place of business or ‘real economic activities’ be conducted at the place of incorporation, which was omitted from this BIT.7 Therefore, to require the Claimant to conduct business activities in the Netherlands would be to erode the difference between the various nationality tests that Kazakhstan had agreed. The Tribunal also referred to the wide consensus of case law on this subject that had held that the rules in the context of

diplomatic protection did not apply in the context of an investment treaty. In summary, as the Tribunal acknowledged, its approach was based upon ‘simply reading [the] provision’\(^8\) of the treaty. Since the treaty meaning was clear, there was no place to adopt any of the Vienna Convention on the Law of Treaties’ interpretative provisions.\(^9\)

IV. RATIONE MATERIAE

Kazakhstan argued that in order for the Tribunal to have jurisdiction, the Claimant had to establish that it had made an investment that was protected by both the BIT and the ICSID Convention.\(^10\) Before turning to the facts, the Tribunal considered how an ‘investment’ should be defined, noting that while the BIT provided a definition of the term, the ICSID Convention did not. However, it considered that inherent in the ICSID Convention and the BIT, there is also an objective definition of the term that presupposes a commitment of resources. Therefore, it was insufficient to simply consider whether a person had made an investment that fell within the precise scope of the BIT. In its view, the objective definition of investment under the ICSID Convention and the BIT comprised the elements of: (i) contribution or allocation of resources, (ii) duration and (iii) risk. In this case, both parties were content to advance their respective positions by reference to the so-called Salini principles.\(^11\) These are the criteria commonly adopted for the recognition of a particular economic transaction as an investment for the purposes of the ICSID Convention.

Turning to the issue of ‘contribution’, the Tribunal framed the question as whether the Claimant had made any injection of capital or other original or subsequent contribution during or after the acquisition of the BTA shares. Noting that Ablyazov had made the first contribution when he acquired the shares (though there was no evidence or paper trail of this transaction), the Tribunal identified the real issue as whether the Claimant could rely on Ablyazov’s contribution in support of an argument that it itself had made an investment. In this regard, the Claimant argued that there should be no requirement of capital injection given that the transaction essentially had become an internal group restructuring.

Without expressly determining the question of whether a new contribution is required when an investment is transferred from one group affiliate to another, the Tribunal found that the arrangements here could not be considered a group—Ablyazov was never himself a shareholder of any of the companies, and, consequently, there was no holding company and no single individual shareholder directly or indirectly connecting all of the companies of which he was a beneficial owner.

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\(^8\) KT Asia (n 1) para 114.


\(^10\) Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco, ICSID Case No AR/00/4, Decision on Jurisdiction (31 July 2001). The criteria commonly have regard to an investor’s contributions, the duration of performance, the risks assumed and the contribution to the economic development of the host state. Different tribunals pay differing levels of regard to these criteria with some rejecting them altogether.

\(^11\) KT Asia (n 1) para 164.
This conclusion led the Tribunal to consider, by extension, the price paid for the investment. The fact that the Claimant paid nothing for the shares, having agreed to buy them at an undervalue, led the Tribunal to question the existence of the investment. Finally, the Tribunal commented that ‘in a sense, by seeking credit for Mr. Ablyazov’s initial contribution, the Claimant disavows the separate personality which it invoked previously for purposes of nationality’. As a result of these findings, the Tribunal ruled that there had been no contribution and therefore declined jurisdiction over the dispute.

V. COMMENT

In some respects, this Decision is unexceptional. In particular, the Tribunal’s ratiocinatio personae analysis is consistent with generally accepted ICSID jurisprudence, which has taken a reliably formalistic approach to this issue, focusing on the place of incorporation rather than the place of control. The Tribunal squarely applied the majority decision in Tokios Tokelés v Ukraine, whose interpretation of ‘investor’ was also based on a plain reading of the parameters of the Tribunal’s jurisdiction. Both cases demonstrate a reluctance to look beyond the corporate veil unless the parties had made provision for such an enquiry in the BITS itself.

Since this decision was published, however, one Tribunal has looked behind the literal wording of a treaty and considered the control and ownership of a duly incorporated legal entity. In the case of Vénoklim Holding BV v Republic Bolivariana of Venezuela, a dispute was brought by a Dutch company that was ultimately controlled by Venezuelan nationals. While its consideration of Article 25 of the ICSID Convention was obiter, the majority of the Tribunal declined jurisdiction on the basis that the Claimants were not international investors. In its decision, the Tribunal emphasized the guiding principle that only nationals controlled by foreign persons should be able to avail themselves of the dispute resolution procedures in the ICSID Convention. Referring to Justice Prosper Weil’s dissent in Tokios, it stated that to consider the claimant as a foreign investor would be to allow formalism to prevail over reality and betray the object and purpose of the ICSID Convention.

On the issue of ratiocinatio materiae, the Tribunal’s approach seemed to be influenced by the conflict between the positions taken by the Claimant in relation to ratiocinatio personae, on the one hand, and ratiocinatio materiae, on the other. The Tribunal was not able to overlook the fact that the contribution originated from Ablyazov rather than from the Claimant. Arguably, this distinguishes this case from the Tokios Decision, in which the majority dismissed Ukraine’s argument that

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12 In particular, the Tribunal referred to the cases of Caratube International Oil Company LLP v Republic of Kazakhstan, ICSID Case No ARB/08/12, Award (5 June 2012) and Phoenix Action Ltd v Czech Republic, ICSID ARB/06/5, Award (15 April 2009).
13 KT Asia (n 1) para 205.
14 Tokios Tokelés v Ukraine, ICSID Case No ARB/02/18, Award (26 July 2007).
15 Vénoklim Holding BV v Republic Bolivariana of Venezuela, ICSID Case No ARB/12/22, Award (3 April 2015). At the date of publication, this award is only available in Spanish.
16 The arbitration was filed on the basis of art 22 of Venezuela’s Law for the Promotion and Protection of Investments, which included the criteria of ‘control’ in its definition of ‘investor’ and ‘investment’.
17 Tokios Tokelés v Ukraine, ICSID Case No ARB/02/18, Dissenting Opinion of Decision on Jurisdiction (29 April 2004).
the capital used for the investment had to originate from non-Ukrainian sources. They deemed that an ‘origin of capital’ requirement was irrelevant as it was inconsistent with the object and purpose of the treaty, which was to provide broad protection in the territory of either party. In his critique of this Decision, Justice Weil vehemently objected to this ruling, stating that it flew in the face of the purpose and object of the ICSID Convention.  

In *KT Asia*, although the issue was assessed under the guise of corporate structure, clearly the Tribunal was heavily influenced by the fact that even if there had been a capital contribution, it would not have been contributed by the Claimant. Therefore, while the Tribunal did not appear to take into account the fact that the contribution came from a domestic investor, it is difficult to disaggregate that factor from the factual matrix or to say that the ‘origin of capital’ requirement was dismissed as irrelevant. Moreover, this is not the only echo of Justice Weil’s dissent in *Tokios*. Arguably, the Tribunal’s approach to the question of ‘investment’ and ultimate conclusion are consistent with his view that economic and political reality should prevail over legal structure. Justice Weil stated in his dissent:

> Insofar as business law and issues of business liability are involved, there is no reason for denying effect to the corporate structure chosen by the economic agents. When it comes to mechanisms and procedures involving States and implying, therefore, issues of public international law, economic and political reality is to prevail over legal structure, so much so that the application of the basic principles and rules of public international law should not be frustrated by legal concepts and rules prevailing in the relations between private economic and juridical players.

The Tribunal’s remark that Ablyazov could not treat the assets of companies formally owned by others as his personal property and, at the same time, argue that those companies should be treated as a conventional group for the purposes of treaty protection is reminiscent of Justice Weil’s subrogation of form to substance. In this case, there was no holding company and no single shareholder connecting all of the companies Ablyazov claimed to beneficially own. This fact alone takes the case out of the concept of a corporate group as commonly understood and as found in previous decisions such as *Mobil* and *Aguas del Tunari*. Having elected to distance himself from the Claimant in order to benefit from its distinct nationality, it was not credible for Ablyazov to seek to come back into the picture as the beneficial owner of an otherwise unconnected entity.

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18 *KT Asia* (n 1) para 6 (Justice Weil’s Dissenting Opinion).
19 *KT Asia* (n 1) para 24 (Justice Weil’s Dissenting Opinion).
20 *Venezuela Holdings BV and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010).
21 *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (21 October 2005).