

## **THE KAZAKHSTAN STORY**

**May 3, 2018**

Overview: In June 1996, World Wide Minerals Ltd. and its affiliates, Nuclear Fuel Resources Corp. and KazUran Corp. – now KazUran LLP (collectively, “World Wide”) were invited to tender for the management with option to purchase the uranium operations and assets of Tsellingy Gorno-Khimicheskii Kombinat (“TGK”) located at Stepnogorsk, Kazakhstan. World Wide successfully tendered for the rights. In the tender proposal, World Wide agreed to assume management of TGK and to assist in the reorganization of the enterprise. It also agreed to lend money to the Republic of Kazakhstan through the State Property Committee of the Republic of Kazakhstan (collectively, “Kazakhstan”) on a secured, interest-bearing, demand loan basis. The loan funds were advanced to TGK and were used for working capital purposes and to fund payment of certain unpaid obligations of TGK for past wages and pensions. Under the tender proposal and an October 1996 management agreement signed with Kazakhstan, World Wide had the option until the end of 1998 to purchase a 90% equity (100% voting) interest in TGK and to satisfy all or part of the purchase price with the amount of the loan advanced to Kazakhstan. The remaining 10% equity (non-voting) interest was to be set aside for the employees.

Background: TGK had been the second largest nuclear fuel mining and processing business in the former Soviet Union. However, in 1996 the TGK uranium mining operations on a standalone basis had become economically non-viable. For this reason, the northern mines, consisting of two underground mines and one undeveloped in situ recovery (ISR) deposit (*Semisbai*), had been shut down for several years. The TGK processing facilities operated part time to process uranium concentrates from ISR mines in southern Kazakhstan. Accordingly, the June 1996 tender proposal and the October 1996 management agreement provided that, in addition to the TGK uranium operations and assets, World Wide would have the right to obtain sufficient additional uranium resources in Kazakhstan so that the combined uranium operations would be economically viable for a period of at least 20 years.

As a result of this requirement, in February 1997, at the behest of Kazakhstan, World Wide entered into an agreement with Kazatomprom, the State-owned uranium producer, under which a 50/50 joint venture was to be formed to operate 3 additional operating uranium mines (MMU No. 6, *Stepnoye* and *Centralnoye*) and to develop 4 then-undeveloped ISR uranium deposits (*Kharassan*, *Akdala*, *Irkol* and *Zhalpak*). This agreement was never fulfilled by Kazatomprom. In 2005, interests in 2 of these 4 deposits, namely Kharassan and Akdala, were acquired by a new Canadian company, UrAsia Energy Ltd. (now Uranium One Inc.), for \$89 million and \$415 million, respectively, from opaque holding companies registered in the British Virgin Islands. How these property interests came to be held by these BVI companies is equally opaque and this is the subject of a current investigation being carried out by Kazakhstan and which so far has resulted in the conviction and imprisonment of the former CEO of Kazatomprom. In April 2007 UrAsia merged into Uranium One Inc. and prior to the merger UrAsia had reached a market capitalization of \$3.5 billion based on the value attributed to these 2 interests alone. Subsequently, Kazatomprom has entered into joint ventures on the other mines and deposits with entities based in China, Russia and Japan.

The 1996 tender proposal and management agreement provided that World Wide was to have the right freely to market its Kazakhstan-produced uranium in the international uranium market, subject to compliance with international nuclear safeguard agreements and treaties. There was not then, and is not now, any domestic market for uranium in Kazakhstan. It was and is all exported. Based on these agreements, in November 1996 World Wide assumed management of the TGK operations after completing extensive technical, financial and legal due diligence. Nothing in this due diligence indicated any material impediment to Kazakhstan carrying out its agreements.

Uranium Marketing: During the due diligence and contract negotiation period in 1996, Kazakhstan and Kazatomprom specifically advised World Wide that there were no impediments to World Wide having the right freely to market its Kazakhstan-produced uranium in the international uranium market, so long as it complied with the above-mentioned agreements, and treaties of general application. Based on these assurances, World Wide entered into formal loan and security agreements with Kazakhstan and TGK, assumed management of TGK, commenced funding the TGK operations and restarted production of uranium and marketing of uranium by its USA-based agent, Nuclear Fuel Resources.

The first uranium sales contract was signed in March 1997, with Consumers Energy of the USA. A second sales contract was signed in 1997 with Taiwan Power. Following signing of the Consumers Energy contract, application was made to Kazakhstan for the requisite export license in accordance with applicable procedures, which should have been a perfunctory process. By this time, World Wide had advanced several millions of dollars under its loan and security agreements to be used for the reactivation of the TGK facilities and the payment of past wage and pension obligations.

After two months of attempts to obtain the export license to permit completion of the sale to Consumers Energy, World Wide was told by Kazakhstan for the first time that it would not issue the license, notwithstanding its express written agreement to do so, because an affiliate of Kazatomprom had granted a German-controlled, US company, RWE-Nukem, Inc., certain undefined rights to the USA market. The basis of any such alleged rights has not been demonstrated adequately to this day. A separate application for an export license to permit completion of the sale to Taiwan Power also was refused, with no explanation. To complete the Taiwan Power contract, World Wide was required to buy replacement uranium in the spot market and deliver it, which it did. This was not possible with Consumers Energy because its contract specified delivery of Kazakhstan-source uranium so this contract lapsed. RWE-Nukem subsequently delivered Kazakhstan-source uranium to Consumers Energy to complete this contract. World Wide received no compensation for this. Because of these refusals and breaches of agreement by Kazakhstan, World Wide suspended operations. In retaliation, Kazakhstan unilaterally and unlawfully terminated the management agreement and refused to compensate World Wide for its un-repaid loans and accrued interest and its loss of future profits from the lost business opportunity. Subsequently, World Wide demanded repayment of its loan to Kazakhstan, together with accrued interest and collection costs, which have not been paid.

World Wide's Investment: Under the 1996 management agreement and related loan and security agreements, World Wide's total cash investment was in the form of an interest-bearing sovereign debt owing to World Wide by Kazakhstan and TGK. To date, the aggregate of the World Wide cash loans used in the TGK uranium operations and the 50/50 joint venture, plus interest accrued thereon, and the legal recovery costs, are well in excess of US\$80 million. In addition, under these agreements the loans were secured on all of the assets of TGK. Despite this fact, in March 1999 Kazakhstan resold the TGK assets to an Israeli company without honouring the loan and security agreements and the TGK assets have since been re-sold to a British company, New Power Systems Ltd, again without honouring the loan and security agreements.

Initial Recovery Efforts: Initially, in late 1997 and early 1998, bona fide efforts were made by World Wide to resolve this dispute with Kazakhstan on a private, out-of-court settlement basis. These efforts were encouraged by Kazakhstan's then-Ambassador to the USA and Canada who advised World Wide in December 1997, on an official basis, that he had been advised by his Government that it would reimburse World Wide in full for its loan losses. Ultimately, these efforts at private resolution were unsuccessful. Accordingly, in May 1998 a lawsuit was commenced in the US Federal District Court in Washington D.C. against Kazakhstan and Kazatomprom. Commencement of the lawsuit resulted in another short spurt of settlement discussions, at the request of Kazakhstan, which ultimately were to no avail. In February 1999 the original lawsuit was amended to add RWE-Nukem as a defendant and to add further claims under the US *Racketeering Influenced and Corrupt*

*Organizations Act* (RICO). In July 1999, the defendants filed technical objections to the World Wide lawsuit and Kazakhstan offered to arbitrate. No substantive defence on the merits of the lawsuit had ever been filed by any defendant until September, 2016 when Kazakhstan finally commenced its defense on the merits in the current investor-State arbitration. The US lawsuit was ultimately dismissed, essentially because the US Court in Washington D.C. would not take jurisdiction over the defendants. The Court decision ignored the fact that the loan to Kazakhstan and TKG was a demand sovereign debt of Kazakhstan, the debt was demanded in 1997 and it had not been repaid, with interest and collection costs. Application to the US Supreme Court for certiorari was denied in February, 2003 leaving no further appeal alternatives.

Commencement of Initial Arbitration: The 1996 management agreement provided an option to arbitrate disputes in Stockholm, Sweden under the Arbitration Rules of the United Nations Commission on International Trade (UNCITRAL). In 2006, World Wide commenced an arbitration proceeding under the UNCITRAL rules. The issues in dispute were those outlined earlier in this summary. Arbitration was also provided for under agreements between World Wide and Kazatomprom entered into in 1997 to create a 50/50 joint venture to develop existing uranium mines and to develop undeveloped uranium deposits. Kazatomprom did not complete the joint venture or live up to the terms of the agreements.

In accordance with the provisions of the *Foreign Investment Law* of Kazakhstan in March 2007 World Wide offered to enter into settlement negotiations with Kazakhstan and Kazatomprom. Failing any meaningful response from the respondents, in June 2007 World Wide commenced a new arbitration proceeding. The long-standing issues in dispute remained the same. The new arbitration proceeding also was commenced in Stockholm, Sweden, under the UNCITRAL (United Nations) Arbitration Rules in accordance with the provisions of World Wide's agreements with Kazakhstan and Kazatomprom and in accordance with the *Foreign Investment Law* of Kazakhstan. While this process is based upon many of the same facts as in the 2006 arbitration, it named Kazatomprom as a party and took into account important new facts concerning the unlawful conduct of the defendant parties.

Kazatomprom is the sole uranium agency of Kazakhstan and is now the largest producer of uranium in the World, as a result in part of Kazakhstan having breached its agreements with World Wide. Its success as a commercial entity relies on its ability to market uranium in the world nuclear industry. In addition to producing and marketing uranium for its own account, Kazatomprom has vended to various parties interests in certain uranium projects in Kazakhstan which, in 1996 and 1997, had been dedicated to World Wide. The Company also is considering with its legal counsel its rights with respect to these transactions and its rights to the disposition of proceeds of sale and exploitation of these projects by Kazatomprom and these other parties.

Renewal of Initial Arbitration: In October, 2008, World Wide took a fresh step in the arbitration by appointing the initial arbitrator in a panel of three. The ROK and Kazatomprom then jointly appointed a second arbitrator. The two arbitrators were to appoint a third arbitrator before the end of 2008. In the meantime World Wide and its legal counsel were assembling evidence for the commencement of the substantive arbitration itself. In September, 2009 the initial arbitration was put on hold when World Wide and the ROK agreed to simplify the process by appointing a mutually agreed, sole arbitrator to determine certain preliminary and substantive issues in connection with the November, 1996 Loan Agreement. This was done. Written submissions were made and hearings held in December, 2009 and July, 2010. The arbitrator's decision on the issues debated at the hearings was delivered to the parties at the end of 2010 to the effect that he had jurisdiction over all of the claims related to the Loan Agreement, including claims for breach of the *Foreign Investment Law* and for breach of customary international law, but he decided that all of the claims were time-barred under the general three-year limitation period under Kazakh law. On this basis, the arbitrator dismissed all of World Wide's claims. Since 1998, World Wide has invested millions of dollars of its own capital in an attempt to recover its investment and damages for lost opportunity. It also entered into agreements with unrelated parties, including law firms, to pay costs contingent upon recovery of the claims.

Commencement of Investor-State Arbitration: On December 12, 2013 World Wide again initiated arbitration proceedings against Kazakhstan, this time under the 1989 Agreement between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (the “Canada/USSR Bilateral Investment Treaty” or “Canada/USSR BIT”). Prior to December 1991 the Republic of Kazakhstan had been one of the constituent Republics of the USSR.

Based upon its multi-million dollar investment in 1996-1997 World Wide managed and operated one of the largest uranium-processing facilities in the former Soviet state. It entered into numerous agreements with Kazakhstan whereby the Government of Kazakhstan promised its full cooperation in the venture, and World Wide poured millions of dollars of capital investment into the country to repair and modernize the country’s uranium processing facilities and to finance mineral production.

Soon thereafter, however, Kazakhstan breached its contractual obligations to World Wide and imposed upon it bureaucratic restrictions aimed solely at frustrating the object and purpose of those contracts - ultimately leading to the suspension of operations at the TGK facility, and the bankruptcy, confiscation, and forced sale of its assets by Kazakhstan. World Wide’s position is that the arbitral claim seeks to hold Kazakhstan accountable for its deliberate acts and omissions that deprived World Wide of its substantial investment in the country.

World Wide is being represented in the Investor-State arbitration by senior lawyers in Jones Day’s Global Disputes practice in Washington, D.C. and London, England, including Thomas F. Cullen, Baiju S. Vasani, Melissa Stear Gorsline and Charles Kotuby Jr. Co-counsel for World Wide in the jurisdiction phase was Judge Stephen M. Schwebel, former President of the International Court of Justice in The Hague, and Professor Malcolm Shaw QC, a professor of international law at the Universities of Cambridge and Leicester. According to Jones Day, World Wide was encouraged by the Government of Kazakhstan to invest in the country’s mineral resources at a time when it desperately needed foreign investment and know-how, and was subsequently deprived of its investment by Kazakhstan’s unlawful acts. This is precisely the conduct that Kazakhstan pledged to avoid when it succeeded to the obligations of the Canada/USSR BIT.

World Wide appointed Sir Franklin Berman KCMG QC of Essex Court Chambers, London, as its party-appointed arbitrator. The three member arbitral Tribunal subsequently was fully constituted by the appointment by Kazakhstan of Professor John R. Crook of Potomac, Maryland as its party-appointed arbitrator and their joint appointment of Professor William W. Park of Boston University Law School as President of the arbitration Tribunal.

Status of Investor-State Arbitration: Since the constitution of the Tribunal the parties have submitted voluminous written pleadings and exhibits. The Government of Canada also intervened in the matter with an *amicus* submission, supporting the conclusion that Kazakhstan succeeded to the Canada/USSR BIT. The Tribunal held a two-day hearing in London (UK) on February 10-11, 2015 at which the parties summarized their respective positions on the applicability of the Canada/USSR BIT and the investment by World Wide. A decision by the Tribunal was reserved pending consideration of the pleadings submitted and the legal arguments made and the receipt by the Tribunal of summary statements from each party which was completed by March 18, 2015. There then ensued a lengthy period of deliberation by the Tribunal.

On October 19, 2015 the Tribunal released its Award fully sustaining its jurisdiction under the 1989 Canada/USSR BIT. While the Award itself is confidential, the Tribunal dismissed all of Kazakhstan’s objections that the Canada/USSR BIT was not in force between Canada and Kazakhstan and that World Wide had made no Treaty-protected investments in Kazakhstan.

Current Status: The arbitral claims were jointly brought by World Wide, a public Canadian corporation, and its President and CEO, Paul A. Carroll, QC, a citizen and resident of Canada. World Wide's claims are based upon a multi-million dollar investment into Kazakhstan in 1996-1997 whereby it managed and operated the second largest uranium-processing facilities in the former USSR and had the option to acquire the facilities and to develop additional uranium mines and deposits. World Wide and its subsidiaries entered into numerous agreements with the Kazakhstan Government whereby the State promised its full cooperation in the venture, and World Wide poured millions of dollars of capital investment into the country to repair and modernize the country's uranium processing facilities and to finance uranium production and expansion. Soon thereafter, however, Kazakhstan breached its contractual obligations to World Wide and imposed upon it bureaucratic restrictions aimed at frustrating the object and purpose of those contracts - ultimately leading to the suspension of operations at World Wide's facility, and the bankruptcy, confiscation and forced sale of its Kazakhstan assets by the State. According to Mr. Carroll, the decision of the Tribunal to recognize its jurisdiction in the investor-State arbitration and the hearing of World Wide's claim on the merits represent "the last hurdle in 21 years of persistent effort by World Wide, its officers and its lawyers, to recover the damages it suffered in Kazakhstan."

The matter was finally concluded at a hearing on January 31, 2018 in London (UK) based on extensive oral and documentary evidence produced by World Wide in the case and in support of the monetary direct damage claims of World Wide and its damages for lost business opportunity aggregating US\$1.7 billion. At the conclusion of the hearing the Tribunal once more reserved its decision on the merits and the Claimant's claim for costs and a decision is anticipated in the next few months.

According to Baiju S. Vasani of Jones Day, London and Washington, lead legal counsel for the Claimants, "This is a historic decision in the field of public international law. It is the first time any State other than Russia has been held to be a legal successor to the international investment treaty obligations of the USSR. It is also a watershed moment for our clients. Twenty-one years after Kazakhstan's illegal expropriation of their assets and opportunity, World Wide and Mr. Carroll have finally had their day in court on the merits of their dispute. Finally, for any other Canadian investors whose investments in Kazakhstan have been harmed by the State since the dissolution of the USSR, this decision provides a clear international avenue for monetary redress."

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