

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

JSC Tashkent Mechanical Plant and others

v.

Kyrgyz Republic

(ICSID Case No. ARB(AF)/16/4)

DECISION ON BIFURCATED PRELIMINARY OBJECTIONS

Members of the Tribunal

Professor Bernardo Cremades, President of the Tribunal

Mr. Gary Born, Arbitrator

Professor Zachary Douglas QC, Arbitrator

Secretary of the Tribunal

Mr. Alex B. Kaplan

1 May 2019

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I. INTRODUCTION

1. This Decision on Bifurcated Preliminary Objections concerns three of the Respondent's preliminary objections to the Tribunal's jurisdiction. They are whether: (i) the Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, signed on 24 December 1996 (the "**BIT**") provides the Kyrgyz Republic's consent to arbitrate under the ICSID Additional Facility Rules; (ii) the Tribunal has jurisdiction under the Investment Law of the Kyrgyz Republic and (iii) this proceeding is a State-to-State dispute that must only be resolved before the Commonwealth of Independent States ("**CIS**") Economic Court. A fourth preliminary objection, whether the BIT is currently in force, was raised by the Respondent during the written procedure, briefed by the Parties, and later abandoned by the Respondent before the hearing.

A. *The Parties*

1. The Claimants

2. The Claimants are collectively four Uzbek corporate entities, JSC Tashkent Mechanical Plant ("**Tashkent Mechanical Plant**"), the National Bank of Foreign Economic Activity of the Republic of Uzbekistan (the "**NBU**"), JSCB Asaka ("**Asaka Bank**"), and JSCB Uzbek Industrial and Construction Bank ("**Uzpromstroybank**") (collectively the "**Claimants**").
3. Each Claimant possesses, through wholly-owned Kyrgyz operating companies, the right to the long-term use and operation of one of the following four resort properties located in the Issyk-Kul Lake region in the Kyrgyz Republic: (1) Zolotiye Peski, (2) Rokhat-NBU, (3) Dilorom, and (4) Buston.

2. The Respondent

4. The Respondent is the Kyrgyz Republic.

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5. The Claimants and the Respondent shall be referred to jointly as the “**Parties.**”

B. The Origin of the Present Dispute

6. The Claimants submit that the Respondent issued nationalization decrees on 4 April 2016 and 13 April 2016 and expropriated—without compensation—four resorts located in the Issyk-Kul lake region of the Kyrgyz Republic that they owned, operated, and managed.
7. The Claimants explain that the four resorts at issue in this proceeding were constructed by Uzbek entities in the late 1950s pursuant to governmental decrees issued by the Kyrgyz Soviet Socialist Republic that allocated land to State agencies and enterprises of the Uzbek Soviet Socialist Republic. After the independence of both States, the Claimants’ legal rights to the four resorts (and their predecessors in interest) continued to be recognized, say the Claimants, via a multilateral treaty, bilateral protocols, long- and short-term lease agreements, certificates of land use, and Kyrgyz State acts on the use of land.
8. Since the April 2016 nationalization decrees, however, the Claimants submit that they have been deprived of the use and enjoyment of their investments in what they refer to as “a textbook example of an uncompensated taking” in violation of the BIT and the Kyrgyz Republic’s local investment law.
9. The submissions to date have dealt exclusively with the preliminary objections at issue in this bifurcated phase and this Decision will be limited to those objections.

C. The BIT

10. The present proceedings are brought, in part, based on the BIT.
11. The arbitration is commenced pursuant to Article 10 of the BIT, which provides as follows:

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*Each Contracting Party hereby consents to submit any legal dispute arising between one Contracting Party and an investor of the other Contracting Party in respect to investments carried out by them on the territory of the first Contracting Party to the International Centre for Settlement of Investment Disputes for consideration through conciliation or arbitration in accordance with the “Convention on the Settlement of investment disputes between States and nationals of other States”, which was opened for signature in Washington on March 18, 1965. Investors of one Contracting Party, who were controlled by an investor of the other Contracting Party before the beginning of the dispute, shall, in accordance with Article 25 (2 - b) of the Convention in pursuance of objectives of the Convention, have the same rights as investors of the other Contracting Party.*¹

D. The Foreign Investment Law

12. The present proceedings are also brought, in part, based on Law No. 66 of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” (the “**FIL**”).²
13. The arbitration is commenced pursuant to Article 18 of the FIL which provides as follows:

1. An investment dispute shall be settled in accordance with any applicable procedures previously agreed between the investor and government agencies of the Kyrgyz Republic, which shall not prevent the investor from seeking other legal remedies in accordance with the legislation of the Kyrgyz Republic.

2. In the absence of such an agreement, an investment dispute between authorized government agencies of the Kyrgyz Republic and an investor shall

¹ Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, Tashkent, signed 24 Dec. 1996, entered into force on 6 Feb. 1997 (C-0001) (resubmitted).

² Law No. 66 of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” dated 27 Mar. 2003, as last amended by Law No. 32 of 13 Feb. 2015, Art. 18 (C-0025) (resubmitted).

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be settled to the extent possible by means of consultations between the parties. If the parties fail to settle their controversy amicably within three months from the date of the first written request for such consultation, any investment dispute between the investor and government agencies of the Kyrgyz Republic shall be resolved by the judicial bodies of the Kyrgyz Republic, unless in case of a dispute between a foreign investor and government agencies of the Kyrgyz Republic one of the parties requests the dispute to be considered in accordance with one of the following procedures by submitting a request to:

a) the International Centre for Settlement of Investment Disputes (ICSID), established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States or in accordance with the Additional Facility Rules of the Centre's Secretariat; or to

b) Arbitration by an international ad hoc arbitration tribunal (commercial court) established in accordance with the arbitration rules of the United Nations Commission on International Trade Law.

3. If an investment dispute is submitted to arbitration as mentioned in subparagraphs a) and b) of paragraph 2 of this Article, the Kyrgyz Republic waives the right to claim prior application of all internal administrative or judicial procedures before submitting the dispute to international arbitration.

4. Any investment dispute between foreign and local investors shall be reviewed by judicial bodies of the Kyrgyz Republic unless the parties agree on any other dispute resolution procedure, including, but not limiting themselves to, internal and international arbitration.

5. Disputes between foreign investors and individuals or legal entities of the Kyrgyz Republic may be settled by agreement of the parties by an arbitral tribunal, including an arbitral tribunal located abroad. In the absence of such

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*agreement, disputes shall be settled according to the procedure set forth by the legislation of the Kyrgyz Republic.*³

II. PROCEDURAL HISTORY

14. On 20 July 2016, ICSID received a request for arbitration and application for access to the Additional Facility dated 20 July 2016 from the Claimants against the Kyrgyz Republic. In response to correspondence received from the Secretariat dated 2 August and 22 August 2016, the request was subsequently amended on 9 August 2016 and supplemented by letters of 9 August 2016 and 29 August 2016 (the “**Request**”).
15. On 6 September 2016, the Secretary-General of ICSID approved access to the Additional Facility in accordance with Article 4 of the Rules Governing the Additional Facility for the Administration of Proceedings and registered the Request, as amended and supplemented, in accordance with Article 4 of the Arbitration (Additional Facility) Rules.
16. The Parties agreed to constitute the Tribunal in accordance with Article 6(3) of the ICSID Arbitration (Additional Facility) Rules (the “**Additional Facility Rules**”) as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties.
17. The Tribunal is composed of Prof. Bernardo M. Cremades, a national of the Kingdom of Spain, President, appointed by agreement of the Parties; Mr. Gary B. Born, a national of the United States of America, appointed by the Claimants; and Professor Zachary Douglas QC, a national of Australia, appointed by the Respondent.
18. On 13 February 2017, the Secretary-General, in accordance with Article 13(1) of the Arbitration (Additional Facility) Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been

³ *Id.*

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constituted on that date. Mr. Alex B. Kaplan, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

19. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 27 April 2017 by video conference.
20. Following the first session, on 17 May 2017, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable arbitration rules would be the ICSID Additional Facility Rules and the Arbitration (Additional Facility) Rules (the “**Arbitration Rules**”), which are in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C.
21. Section 14.2 of Procedural Order No. 1 stated that the Respondent may notify the Claimants and the Tribunal whether it intended to file preliminary objections within one week of the date of Procedural Order No. 1. If the Respondent notified the Claimants and the Tribunal of its intent to file preliminary objections, it was to be presumed that the proceedings would be bifurcated to decide those preliminary objections.
22. On 24 May 2017, the Respondent duly notified the Tribunal of its intention to file bifurcated preliminary objections on Jurisdiction on or before 14 July 2017. The next day, on May 25, 2017 the Tribunal confirmed that it would decide the Respondent’s preliminary objections on a bifurcated basis, though the Respondent was not precluded from raising additional preliminary objections after the submission of the Claimants’ Memorial on the Merits.
23. On 12 July 2017, the Respondent submitted a request for a one-day extension of filing deadline for the Memorial on Preliminary Objections, which was subsequently granted by the Tribunal.

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24. On 16 July 2017, the Respondent filed its Memorial on Preliminary Objections, including the following documents:
 - Expert Report of Chynara Musabekova (both English and Russian versions);
 - Exhibits R-0001 through R-0050; and
 - Legal Authorities RL-0001 through RL-0051.
25. On 21 September 2017, the Claimants submitted a request for a two-day extension of the filing deadline for the Counter-Memorial. On the same day, the Respondent confirmed that it had no objection, provided that there is a corresponding extension for its Reply submission. Subsequently, the Tribunal granted the requests from both Parties.
26. On 25 September 2017, the Claimants filed their Counter-Memorial on Preliminary Objections, including the following documents:
 - Expert Opinion of Mr. Temerbek Kenenbaev (Russian and English versions);
 - Exhibits C-0027 through C-0100; and
 - Legal Authorities CL-0001 through CL-0078.
27. By letter of 26 September 2017, Mr. Gary B. Born disclosed that he had been approached by lawyers working at the law firm representing the Claimants to provide an independent expert report and asked whether any co-arbitrator or party had any objections before accepting this instruction. As requested by the Respondent, Mr. Born supplemented his disclosure by letter of 29 September 2017.
28. On 12 November 2017, the Respondent filed its Reply on Preliminary Objections, including the following documents:

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- Second Expert Report of Chynara Musabekova (both English and Russian versions);
 - Resubmitted Exhibits R-0003, R-0004, R-0008, R-0020, R-0028, R-0035, R-0037, R-0044;
 - Exhibits R-0051 through R-0089; and
 - Legal Authorities RL-0003, RL-0004, RL-0007, RL-0011, RL-0014, RL-0015 as well as Legal Authorities RL-0052 through RL-0084.
29. By letter of 12 December 2017, the Parties jointly requested that the Tribunal suspend the arbitral proceeding for a period of four months to facilitate settlement discussions.
30. On 14 December 2017, in consideration of the Parties' agreement, the Tribunal decided to suspend the arbitral proceeding for four months, i.e. until 14 April 2018. As a consequence of this suspension, the 21 December 2017 due date for the Claimants' Rejoinder on Preliminary Objections and the dates of the hearing on preliminary objections, i.e., 8-9 February 2018, in Paris were vacated.
31. By letter of 6 April 2018, the Parties jointly requested that the Tribunal extend the suspension of the arbitral proceeding for an additional period of three months to permit the Parties to continue settlement discussions.
32. On 12 April 2018, in consideration of the Parties' agreement, the Tribunal decided to suspend the arbitral proceeding for three months.
33. By letter of 11 July 2018, the Tribunal inquired with the Parties as to the status of the suspension, which was scheduled to end three days later, on 14 July 2018. On 13 July 2018, the Claimants indicated that efforts were underway to agree with the Respondent on whether the suspension would remain in force or conclude.
34. By letter of 21 July 2018, the Claimants stated that efforts to prolong the suspension were not successful, acknowledged that the proceeding would resume and requested an

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extension of time until 27 August 2018 to file their Rejoinder on Preliminary Objections.

35. On 23 July 2018, the Tribunal confirmed that the suspension noted in the Tribunal's correspondence dated 14 December 2018 and 12 April 2018 had concluded. Further, the Tribunal granted the Claimants' request for an extension of time to file their Rejoinder on Preliminary Objections.
36. On 24 July 2018, the Tribunal proposed a one-day hearing on preliminary objections on 20 September 2018 in Paris and invited the Parties to indicate their availability.
37. On 26 July 2018, the Respondent filed a request to the Tribunal for the suspension of the proceedings be extended by a further three months. On 31 July 2018, the Claimants notified the Tribunal that they did not consent to the Respondent's request for an additional three-month suspension.
38. On 31 July 2018, the Tribunal confirmed that this proceeding would not be suspended, and the Claimants were directed to file their Rejoinder on Preliminary Objections by 27 August 2018.
39. On 3 August 2018, the Respondent informed the Tribunal that it could not confirm its availability for a hearing on 20 September 2018 due to the length of time required to obtain travel visas for attendees traveling from the Kyrgyz Republic. On this basis, the Respondent requested the Tribunal to identify alternative dates for the hearing and suggested scheduling a two-day hearing instead of a one-day hearing.
40. On 9 August 2018, the Tribunal informed the Parties that the hearing would proceed as scheduled on 20 September 2018 in Paris, France with those witnesses who would be unable to obtain visas attending via video conference.
41. On 27 August 2018, the Claimants filed their Rejoinder on Preliminary Objections, including the following documents:

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- Second Expert Opinion of Mr. Temerbek Kenenbaev (Russian and English versions);
 - Expert Opinion of Dr. Gulchekhra Matkarimova (Russian and English versions);
 - Resubmitted Exhibits C-0001, C-0024, C-0025, C-0032, C-0036, C-0079, C-0080, C-0086, C-0087, C-0090 and C-0091;
 - Exhibits C-0101 through C-0134; and
 - Resubmitted Legal Authorities CL-0005 and CL-0064 and Legal Authorities CL-0079 through CL-0104.
42. On 1 September 2018, the Respondent filed a request to the Tribunal for an adjournment of the hearing scheduled on 20 September 2018. On 4 September 2018, the Claimants filed an objection to the Respondent's request for an adjournment.
43. On 5 September 2018, having considered the Respondent's request of 1 September 2018 and the Claimants' response of 4 September 2018, the Tribunal decided to adjourn the 20 September 2018 hearing and invited the Parties to confirm their availability for a two-day hearing in Paris in January 2019. On 7 September 2018, the Tribunal informed the Parties that it would be available for a two-day hearing any day of the week during the week of 7 January 2019. Subsequently, by letter of 13 September 2018, the Tribunal confirmed that the hearing would be held on 8-9 January 2019 in Paris.
44. On 5 December 2018, the Tribunal sent to the Parties a draft hearing protocol for their consideration. The Parties sent back agreed revisions to the hearing protocol on 10 December 2018, and, having agreed on all outstanding issues, suggested that there was no need for a pre-hearing telephone conference. The Tribunal agreed that no pre-hearing conference was necessary as the Parties agreed on all outstanding issues, and on 11 December 2018 issued Procedural Order No. 2 concerning the hearing organization.

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45. On 29 December 2018, the Respondent informed the Tribunal and the Claimants that—solely in the context of the above-captioned arbitration—it no longer intended to contest that the BIT is currently in force between the Republic of Uzbekistan and the Kyrgyz Republic. Prior to the submission of this letter, the Kyrgyz Republic had contended that the BIT was not currently in force and on this basis had objected to the jurisdiction of the Tribunal.
46. Also on 29 December 2018, and in reply to the Respondent’s letter of the same date, the Claimants submitted a letter urging the Tribunal to issue a costs award in their favour, as the abandonment of the “treaty in force” preliminary objection caused the Claimants and their expert witness to incur significant costs.
47. A hearing on preliminary objections was held in Paris from 8-9 January 2019 (the “**Hearing**”). The following persons were present at the Hearing:

Tribunal:

Prof. Bernardo M. Cremades	President
Mr. Gary B. Born	Arbitrator
Prof. Zachary Douglas QC	Arbitrator

ICSID Secretariat:

Mr. Alex B. Kaplan	Secretary of the Tribunal
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For the Claimants:

Ms. Carolyn B. Lamm	Partner, White & Case LLP
Ms. Andrea J. Menaker	Partner, White & Case LLP
Mr. Eckhard R. Hellbeck	Counsel, White & Case LLP

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Ms. Harpreet K. Dhillon	Associate, White & Case LLP
Ms. Hannelore Z. Sklar	Associate, White & Case LLP
Mr. Jeffrey Stellhorn	Practice Assistant Team Leader, White & Case LLP
Ms. Gulnara Ismailova	Claimant NBU (National Bank for Foreign Economic Activity of the Republic of Uzbekistan)
Ms. Munira Pulatova	Claimant Asaka Bank (JSCB Asaka)
Mr. Akram Saidov	Claimant Tashkent Mechanical Plant (JSC Tashkent Mechanical Plant)
Mr. Bakhritdin Norkhujaev	Claimant Uzpromstroybank (JSC Uzbek Industrial and Construction Bank)

For the Respondent:

Mr. Baiju Vasani	Partner, Jones Day
Ms. Tatiana Minaeva	Of Counsel, Jones Day
Mr. Ananda Burra	Associate, Jones Day
Mr. Anatoly Matveev	Associate, Jones Day
Ms. India Rand	Trainee, Jones Day

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49. At the Hearing, the Claimants introduced a diplomatic note marked as fact exhibit C-0135 ENG and C-0135 RUS into the record, and the Respondent submitted a bilateral investment treaty into the record as a legal authority marked as RL-0085.
50. At the conclusion of the Hearing, it was decided that the Parties need not file post-hearing briefs. However, the Parties sought leave of the Tribunal to submit letters regarding the waiver of the “treaty in force” issue and costs incurred as a result of the waiver. Such letters were ultimately submitted by the Respondent on 16 January 2019, by the Claimants on 23 January 2019 and the Respondent on 28 January 2019.
51. The Parties filed their submissions on costs on 7 February 2019.

III. ANALYSIS

A. *The Respondent’s Preliminary Objections*

52. In this section, the Tribunal will review and analyse the Respondent’s specific preliminary objections to the Claimants’ claim, in the following order:
 - 52.1. Whether the BIT has entered into force?
 - 52.2. Whether the Claimant meets the jurisdictional requirements of the FIL?
 - 52.3. Whether the Claimant meets the jurisdictional requirements of the BIT?
 - 52.4. Whether this is a State-State dispute that should be settled before the CIS Economic Court?
53. The Tribunal briefly summarizes the Parties’ respective positions below, which are further dealt with to the extent relevant in the sections of the Tribunal’s findings.

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1. Whether the BIT is in force?

54. The Respondent initially argued that the Tribunal lacks jurisdiction under the BIT because it never entered into force.⁴ Though the BIT was signed by the two Contracting States, the Parties had agreed that the treaty would come into force on “the date of receipt of the last note” exchanged between them “on the completion of the legal procedures required by the national laws of the states of the Contracting Parties.”⁵ The Respondent argued that “the BIT never came into effect under the law of either Contracting State, and thus cannot serve as a basis for Claimants’ claims against Respondent.”⁶
55. However, on 28 December 2018, the Respondent wrote to the Tribunal and the Claimants stating that “solely in the context of above-captioned arbitration—it no longer intends to contest that the BIT is currently in force between the Republic of Uzbekistan and the Kyrgyz Republic.”⁷ The Respondent expanded that “it maintains its preliminary objections in all other respects and that its decision to waive its objection regarding the entry into force of the BIT is solely for the purposes of this arbitration and is not a waiver of Respondent’s objection to the BIT’s entry into force in any subsequent arbitration brought by one or more of these claimants or by any other parties. Respondent’s position is thus not an admission to the merits or otherwise of Claimants’ position on the entry into force of the BIT or any other treaty for the purposes of Kyrgyz law. Respondents submission in this letter is equally not an admission for the purposes of any eventual determination on costs.”⁸

⁴ See Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, § II.A; Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2003, § II.A.

⁵ Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, Tashkent, signed 24 Dec. 1996, entered into force on 6 Feb. 1997, art. 14(1) (C-0001) (resubmitted).

⁶ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 5.

⁷ Respondent’s Letter to the Tribunal, dated 28 Dec. 2018, p. 1.

⁸ *Id.*, pp. 1-2.

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56. The Claimants have subsequently challenged the Respondent's late notification of its decision to withdraw its objection that the BIT is not in force and have requested that this be considered in the Tribunal's decision on costs.⁹
57. Given the withdrawal of this objection, the Tribunal shall not summarize any of the arguments presented by the Parties. It is therefore accepted that the BIT is presently in force between the Contracting States for the purposes of this arbitration. The Tribunal shall address the Respondent's withdrawal of this objection, to the extent necessary, in the section on costs.

2. Whether there is jurisdiction under the FIL?

58. The Respondent contends that there is no jurisdiction under the FIL. The Respondent argues that: (i) the FIL does not contain the Respondent's consent to arbitrate; (ii) even if the FIL did contain consent to arbitration, the present dispute does not fall within the FIL; and (iii) the Claimants have not met the FIL's requirements for negotiation and consultation. The Claimants challenge each of the Respondent's arguments on this point.

(a) *Does the FIL contain the Respondent's consent to arbitrate?*

(i) Respondent's position

59. The Respondent submits that in interpreting the provisions of the FIL, the Tribunal should take note of its "hybrid" nature in evaluating its competence.¹⁰ The Respondent states that the Tribunal's "ultimate conclusion on its jurisdiction under the FIL is one of international law," and that the starting point involves a "textual analysis of the document."¹¹ The Respondent continues that "[u]nder international law principles, a unilateral declaration must be interpreted 'as it stands, having regard to the words

⁹ Claimants' Letter to the Tribunal, dated 29 Dec. 2018.

¹⁰ Hearing Transcript, dated 8 Jan. 2019, p. 47, Ins. 2-6.

¹¹ Respondent's Memorial on Preliminary Objections, dated 15 July 2017, ¶ 32; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 Dec. 2010 (RL-0039), ¶ 90.

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actually used’ but with ‘due regard to the intention of the State concerned.’ The intention of the State must prevail and can only be ‘defeated or nullified’ by ‘a defect so fundamental that it vitiated the instrument.’”¹² To the extent that there exists any ambiguity in the text, it should be resolved in accordance with “national law guidance but always subject to ultimate governance by international law.”¹³

60. The Respondent submits that the “text of the FIL, Kyrgyz rules of interpretation, and the circumstances surrounding the FIL’s creation show that the FIL does not contain Respondent’s consent to arbitrate, and Respondent never intended it to do so.”¹⁴ Referring firstly to domestic Kyrgyz law, the Respondent states that an open offer is “a proposal containing all the essential terms of the contract, from which the will of the person making the offer is seen to conclude the contract on the conditions specified in the offer with anyone who responds.”¹⁵ The Respondent’s expert, Musabekova, interprets this to mean that “the open offer should be unambiguous and clearly express the intention of the person making the offer to bind himself.”¹⁶ The Respondent argues that if the Tribunal is in doubt as to whether the FIL embodies a unilateral offer to arbitrate from the Kyrgyz Republic, local law counsels against finding jurisdiction.¹⁷
61. Examining the text of Article 18 of the FIL, the Respondent submits that the “plain text of this clause shows that it does not contain the Respondent’s consent to arbitration, but at most provides potential arbitral regimes to which the Kyrgyz Republic’s State bodies are authorized to agree to arbitrate.”¹⁸ The Respondent emphasizes that Article 18(2) of the FIL states that either party can request consultation or negotiation to resolve a dispute, and if no amicable settlement is reached then the dispute shall be

¹² Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 32; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 Dec. 2010 (RL-0039), ¶¶ 85, 87.

¹³ *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 Jan. 2003, in 10 ICSID REP. 3, ¶ 339 (2005) (RL-0045).

¹⁴ Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 37.

¹⁵ Civil Code of the Kyrgyz Republic dated 8 May 1996 (R-0044), art. 398(1).

¹⁶ Expert Report of Professor Chynara Musabekova dated 16 July 2017 (“Musabekova”), ¶ 56.

¹⁷ Hearing Transcript, dated 8 Jan. 2019, pp. 47-48, Ins. 25, 1-6.

¹⁸ Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 38.

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resolved by Kyrgyz courts unless it involves a foreign investor and “one of the parties requests the dispute” to be resolved through arbitration. The Respondent argues that Article 18(2) “says nothing about the state’s consent to arbitration, and indeed the only imperative statement in the law is that: ‘...any investment dispute...shall be resolved by the judicial bodies of the Kyrgyz Republic...’ In other words, Article 18(2) enshrines the fundamental principle that disputes regarding investments are, by default, to be brought before Kyrgyz courts.”¹⁹ In support of its argued interpretation, the Respondent refers to Article 23 of the 1997 Foreign Investment Law (“**1997 Law**”), which provides in relevant part:

2. In absence of such agreement the investment dispute between the authorized state bodies of the Kyrgyz Republic and the investor is, if possible, resolved through consultations between the parties. If the parties thereto cannot come to a peaceful settlement of the dispute within three months from the day of the first written request for such consultations, the dispute shall be settled through arbitration in accordance with one of the following procedures:

[...]

*3. The Kyrgyz Republic through its authorized governmental body shall consent to the transfer of the investment dispute for arbitration by virtue of this law. A foreign investor’s agreement may be given at any time through a written notification to the State Body effectuating the attraction of investments or at the moment of resort to arbitration.*²⁰

62. The Respondent argues that the 1997 Law contains express, unequivocal consent to arbitration,²¹ as further supported by the Respondent’s expert.²² The Respondent argues that “[t]he inescapable conclusion, one Claimants cannot seriously contest, is that the Kyrgyz Republic is well aware of what constitutes express and unambiguous

¹⁹ Hearing Transcript, dated 8 Jan. 2019, p. 50, Ins. 6-14.

²⁰ Law of the Kyrgyz Republic No. 66 “On Foreign Investments in the Kyrgyz Republic” dated 24 Sept. 1997 (R-0035).

²¹ Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 41.

²² Musabekova ¶¶ 58-59.

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consent, and consciously and unequivocally withdrew that consent, as was its sovereign right in passing legislation.”²³ The Respondent refers to the case of *Mobil v. Venezuela* which held that “[i]f it had been the intention of Venezuela to give its advance consent to ICSID arbitration in general, it would have been easy for the drafters of Article 22 to express that intention clearly by using any of those well-known formulas.”²⁴ On this basis the Respondent argues that it was its intention to withdraw the express consent it had earlier advanced in the 1997 Law.

63. In further support of its argument that Article 18(2) of the FIL is not a unilateral and unambiguous offer to arbitrate, the Respondent states that the wording of said provision clearly stipulates that *either* party can resort to international arbitration.²⁵ The Respondent argues that this “would mean that an unknown and unknowable class of investors have given their advance consent to arbitrate disputes that the state seeks to arbitrate,”²⁶ and that there is no ambiguity that investors could not have given their consent to arbitrate by virtue of Article 18(2). The Respondent argues that the Claimants, and their expert, have been unable to provide an interpretation of the words “one of the Parties” in Article 18(2).²⁷ The Respondent submits that the only correct interpretation that can be given to Article 18(2) is that if there is a dispute it should be resolved in Kyrgyz courts, unless either party requests arbitration and the other party then agrees to proceed to arbitration. The Respondent argues that its reading of Article 18(2) is “consonant with the plain words of the law, and gives effect to all parts of it,” whereas the Claimant’s interpretation “transforms what is facially a bilateral alternative mechanism for dispute resolution into a unilateral offer to arbitrate all disputes.”²⁸
64. The Respondent argues that Article 18(3) neither provides its consent to arbitration, and that it “merely provides that if the foreign investor requests arbitration, the Kyrgyz

²³ Hearing Transcript, dated 8 Jan. 2019, p. 51, Ins. 4-9.

²⁴ *Mobil Corporation, Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (“**Mobil**”) (RL-0043), ¶ 139.

²⁵ The Respondent notes that no such bilateral language exists in the 1997 Law.

²⁶ Hearing Transcript, dated 8 Jan. 2019, p. 53, Ins. 13-16.

²⁷ Hearing Transcript, dated 9 Jan. 2019, p. 28, Ins. 14-23.

²⁸ Hearing Transcript, dated 8 Jan. 2019, p. 54, Ins. 16-22.

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Republic will not require the foreign investor to comply with in-State administrative or judicial procedures.”²⁹ The Respondent compares Article 18(3) of the FIL with Article 23(3) of the 1997 Law which provided that “[t]he Kyrgyz Republic through its authorised governmental body shall consent to the transfer of the investment dispute for arbitration by virtue of this law.”³⁰

65. The intent of the FIL, the Respondent submits, was to put domestic and international investors on equal footing. The Respondent argues that “[b]y removing automatic consent to arbitration with foreign investors, the [FIL] places foreign and domestic investors on a more equal footing. Equally, by permitting the State to arbitrate disputes against foreign investors, the [FIL] puts the State and foreign investors on a more equal footing, although as discussed, given that this is a unilateral declaration by the State that does not distinguish between the State and the foreign investors’ right to request arbitration, a request for arbitration from either party will still require the other to consent.”³¹
66. The Respondent argues that its decision to withdraw its unilateral consent to arbitration makes sense because “[i]n 2003 Respondent had already been involved in arbitration proceedings under the 1997 Law, and in 2000 found it necessary to issue a Foreign Investment Interpretation law to clarify the provisions of the 1997 Law.”³² The Respondent argues that after the *Petrobart* case in which it was “faced with its first ever investment dispute under the FIL, the legislature was concerned about its exposure to disputes with foreign investors” and therefore unsurprisingly sought to narrow Article 18 of the FIL.³³ The Respondent also points to neighbouring states’ revisiting of the issue of consent to arbitration in their local laws,³⁴ noting that Kazakhstan

²⁹ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 104.

³⁰ Law of the Kyrgyz Republic No. 66 “On Foreign Investments in the Kyrgyz Republic” dated 24 Sept. 1997 (R-0035), art. 23(3).

³¹ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 108.

³² Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 42; *See Petrobart Limited v. The Kyrgyz Republic*, SCC Arbitration No. 126/2003, Award, 29 Mar. 2005 (RL-0046), at 8-9.

³³ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 110.

³⁴ Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 43; Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 111.

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removed its standing consent to arbitration,³⁵ and the Uzbekistan Constitutional Court clarified that their foreign investment law does not provide consent to arbitrate.³⁶

(ii) Claimants' position

67. The Claimants submit that Article 18 of the FIL provides the Respondent's unilateral consent to arbitrate certain disputes with investors. In interpreting Article 18 the Claimants take note of its "hybrid" nature,³⁷ also referred to by the Respondent. They note that "[w]here the principles of interpretation under the State's domestic law conflict with international law principles, international law principles will ordinarily prevail..."³⁸ The Claimants argue that the domestic method of interpretation put forward by the Respondent is very similar to a Vienna Convention analysis in any event, and therefore agree that Article 18 should be given its ordinary meaning and interpreted in good faith.³⁹
68. Turning to the text of Article 18, the Claimants submit that "the text of Article 18(2) contains Respondent's advance consent to arbitration in this case because it indicates that a foreign investor may submit a dispute to arbitration."⁴⁰ The Claimants submit that Article 18(2) outlines a procedure for arbitration and that the words "shall be resolved" indicate that international arbitration is the mandatory consequence of the submission of a request for arbitration.⁴¹ The Claimants argue that the wording is similar to that used in other countries' national investment laws or bilateral investment treaties. For instance, the Claimants state that Article 15 of El Salvador's foreign investment law indicates that "in the case of controversies arising between foreign investors and the State regarding their investment in El Salvador, the investors may

³⁵ *Ruby Roz Agricol LLP v. The Republic of Kazakhstan*, UNCITRAL, Award on Jurisdiction, 1 Aug. 2013 (RL-0041), ¶¶ 70-71, 74.

³⁶ Tatiana Minaeva, *UZBEKISTAN: Planned reforms to foreign investment law*, GLOBAL ARB. REV., 10 July 2013 (RL-0047), at 3.

³⁷ Hearing Transcript, dated 8 Jan. 2019, p. 118, Ins. 4-7.

³⁸ *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015 ("PNG") (RL-0042).

³⁹ Hearing Transcript, dated 8 Jan. 2019, pp. 117-118, Ins. 21-25, 1-3.

⁴⁰ Claimants' Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 107.

⁴¹ Claimants' Rejoinder on Preliminary Objections, dated 27 Aug. 2018, ¶ 201.

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submit the controversy” to one of the arbitral regimes.⁴² Interpreting this provision, the tribunal in *Inceysa Vallisoletana v. El Salvador* found that such language “clearly indicates” that El Salvador “made to the foreign investors a unilateral offer of consent to submit . . . all ‘disputes referring to investments’” to arbitration.⁴³ The Claimants refer further to the case of *Biwater Gauff v. Tanzania* where the tribunal found that the relevant provision of the Tanzanian Investment Act did not provide a unilateral offer of consent to arbitrate.⁴⁴ The law provided that investment disputes “settled through negotiations may be submitted to arbitration in accordance with” one of three specified methods “as may be mutually agreed by the parties.”⁴⁵ The Claimants argue that the “language in [the Tanzanian law] is very distinguishable from [Article 18 of the FIL]” as the term “as mutually agreed by the parties” was clearly not an advance consent as there needs to be a mutual agreement after the fact.⁴⁶ In *Vigotop v. Hungary*, the tribunal interpreted the wording “may request arbitration of the dispute if it cannot be settled” as providing the respondent’s consent to arbitrate.⁴⁷ The Claimants rely on these cases to argue that terminology such as “request” and “may request” is frequently interpreted as providing a unilateral offer to arbitrate. The Claimants further cite academic authority in support of their argument.⁴⁸

69. In response to the Respondent’s argument that the text of Article 18(2) suggests that the Kyrgyz Republic can also request arbitration, the Claimants argue that this does not take away from the Respondent’s unilateral consent to arbitrate, and that this issue is not before the Tribunal in any event.⁴⁹ The Claimants point out that provisions in other laws and treaties can sometimes provide that either party can resort to arbitration but

⁴² *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award dated 2 Aug. 2006 ¶ 331 (CL-0029).

⁴³ *Id.*, at ¶ 332.

⁴⁴ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 ¶ 329 (CL-0014).

⁴⁵ *Id.*, at ¶ 326.

⁴⁶ Hearing Transcript, dated 8 Jan. 2019, p. 120, Ins. 14-23.

⁴⁷ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 Oct. 2014 ¶¶ 254, 634 (CL-0049).

⁴⁸ RUDOLPH DOLZER AND CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 256 (2d ed., 2012) (RL-0010).

⁴⁹ Hearing Transcript, dated 9 Jan. 2019, p. 85, Ins. 13-16.

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even if they are “less explicit” they “still indicate that they express the State’s consent to international arbitration.”⁵⁰ Referring to the France-Kyrgyz Republic BIT, the Claimants note that this treaty provides that a dispute can be submitted to arbitration at the request of either of the parties.⁵¹ The Claimants opine that while this “drafting technique” may not be “particularly precise,” it is “not indicative of any intention by the Kyrgyz Republic not to offer its consent to arbitrate with investors.”⁵² Ultimately the Claimants argue that any hypothetical argument concerning the consent of an investor should not take away from Article 18(2)’s clear intention to provide its unilateral offer to arbitrate.

70. The Claimants submit that Article 18(3) further bolsters their interpretation of Article 18(2). Article 18(3) precludes the Kyrgyz Republic from requiring the investor to first seek domestic judicial remedies if an investment dispute has been submitted to arbitration under Article 18(2). In this regard, the Claimants’ expert Mr. Kenenbaev states that Articles 18(2) and 18(3) operate “in conjunction” and that “paragraph 3 says that if the investor chooses one of the arbitration methods referred to in Paragraph 2(a) or 2(b), instead of the judicial bodies of the Kyrgyz Republic, then the Kyrgyz Republic will not require the investor first to submit the dispute to the authorized state bodies or courts of the Kyrgyz Republic.”⁵³ The Claimants state that “[w]hile paragraph (3) is drafted in a way that it appears to apply to either party to a dispute, it is clear from its substance that the Kyrgyz Republic’s waiver of the right to demand prior exhaustion of domestic procedures can only apply to the situation where an investor initiates the arbitration.”⁵⁴
71. Responding to the Respondent’s references to the laws in Kazakhstan and Uzbekistan, the Claimants argue that the Respondent “both misinterprets those laws and also fails

⁵⁰ Christoph Schreuer, Ch. 21 Consent to Arbitration, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 830, 846 (Peter Muchlinski et al. eds., 2008) (CL-0100).

⁵¹ Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of France on the Mutual Promotion and Protection of Investments, signed 2 June 1994 (C-0087 resubmitted).

⁵² Hearing Transcript, dated 9 Jan. 2019, p. 88, Ins. 15-25.

⁵³ Expert Opinion of Mr. Temerbek Kenenbaev dated 24 Sept. 2017 (“**Kenenbaev I**”), ¶ 65.

⁵⁴ Claimants’ Rejoinder on Preliminary Objections, dated 27 Aug. 2018, ¶ 207.

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to offer any explanation as to how developments in those countries purportedly influenced the Kyrgyz Republic.”⁵⁵ The Claimants acknowledge that the text of Kazakhstan’s 2003 investment law expressly requires an additional agreement between the parties in order for a dispute to proceed to arbitration.⁵⁶ This, they argue, is therefore clearly distinguishable from Article 18 of the FIL. As to the decision of the Constitutional Court of Uzbekistan, the Claimants argue that the underlying investment law also differs from the FIL, in that Uzbekistan’s law requires a specific agreement to arbitrate.⁵⁷

72. Turning next to the legislative history of Article 18 of the FIL, the Claimants submit that this indicates that in enacting the FIL, “legislators were focused on equalizing protections for domestic and foreign investors, and not on eliminating Respondent’s unilateral consent to the arbitration of investment disputes.”⁵⁸ The Claimants seek to refute the Respondent’s contention that the change in language of the consent provision between the 1997 Law and the FIL demonstrates that the Respondent was removing its consent from this legislation. Mr. Kenenbaev refers to transcripts from the legislative sessions discussing the FIL and states that these do not mention any intent to use the FIL to revoke the Respondent’s consent to arbitration.⁵⁹ In fact, one of the Congresspersons criticised the draft version of the FIL for still giving an advantage to foreign investors.⁶⁰ Mr. Kenenbaev explains that the term “foreign investment” in the title of the FIL was changed to “investment,” as well as other changes to make the law applicable to both domestic and foreign investors.⁶¹ The Claimants further note that “correspondence with the Presidential Administration regarding the draft [FIL], in particular the message from the Head of Legal Affairs notifying the President that the

⁵⁵ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 122.

⁵⁶ *Id.*

⁵⁷ *Id.*, at ¶ 125.

⁵⁸ *Id.*, ¶ 115.

⁵⁹ Kenenbaev ¶ 74.

⁶⁰ Transcript from the Plenary Session of the Jogorku Kenesh Legislative Assembly dated 4 Feb. 2003 (C-0058), at 30.

⁶¹ Kenenbaev ¶ 75.

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[FIL] was ready for signature, likewise contain no mention of removing the Kyrgyz Republic’s unilateral consent to arbitration of disputes with foreign investors.”⁶²

73. The Claimants also refer to the Law No. 135 of the Kyrgyz Republic “On Arbitration Courts in the Kyrgyz Republic” (“**Law on Arbitration Courts**”).⁶³ Whilst the Claimants are not seeking jurisdiction under this instrument,⁶⁴ they argue that it directly contradicts the Respondent’s argument that the FIL excludes unilateral consent to arbitration.⁶⁵ Article 46 of the Law on Arbitration Courts provides that a “foreign investor is entitled to initiate arbitration proceedings for the settlement of the dispute, and the consent of the Kyrgyz Republic is assumed. In this case, the foreign investor is entitled to choose, for the consideration of the dispute, anybody referred to in Article 18 of the [FIL].”⁶⁶ The Law on Arbitration Courts also refers to the three-month consultation and negotiation period.⁶⁷ The Claimants note that the Law on Arbitration Courts was amended in 2004, after the passing of the FIL. The Claimants argue that it does not make sense that the Respondent would maintain an “open-ended consent to arbitrate” in the Law on Arbitration Courts, and expressly reference Article 18 of the FIL therein, when they had removed the unilateral consent contained in Article 18 of the FIL.⁶⁸
74. Concerning the Respondent’s reference to the Foreign Investment Interpretation Law and *Petrobart*, the Claimants submit that the actual text of the Foreign Investment Interpretation Law addresses “an issue that arose in the *Petrobart* arbitration, but does not restrict the Kyrgyz Republic’s consent to arbitrate.”⁶⁹ The Claimants argue that the

⁶² Claimants’ Rejoinder on Preliminary Objections, dated 27 Aug. 2018, ¶ 212; Letter from Economic Policy Department Head K. Kanimetov to the Head of Legal Affairs of the Presidential Administration of the Kyrgyz Republic dated 18 Mar. 2003 (C-0062); Letter from Legal Department Head A. Ismailov to the President of the Kyrgyz Republic dated 27 Mar. 2003 (C-0063).

⁶³ Law No. 135 of the Kyrgyz Republic “On Arbitration Courts in the Kyrgyz Republic” dated 30 July 2002, as amended by Law No. 73 dated 11 June 2004 (C-0065).

⁶⁴ Hearing Transcript, dated 8 Jan. 2019, p. 128, Ins. 15-25.

⁶⁵ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 119.

⁶⁶ Law No. 135 of the Kyrgyz Republic “On Arbitration Courts in the Kyrgyz Republic” dated 30 July 2002, as amended by Law No. 73 dated 11 June 2004 (C-0065), art. 46.

⁶⁷ *Id.*

⁶⁸ Hearing Transcript, dated 8 Jan. 2019, p. 129, Ins. 5-18.

⁶⁹ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 120.

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Foreign Investment Interpretation Law clarifies that the term “foreign investment” under the 1997 Law does not include contracts for the supply of goods or services.⁷⁰

The Claimants argue that *Petrobart* simply noted that the reason for the Foreign Investment Interpretation Law was the claimant’s initiation of the arbitration in that case.⁷¹

75. Lastly on this point, the Claimants argue that the World Bank commented on the FIL, noting that it was “more ‘investor friendly’ and ‘aimed at improving the investment climate in the country and promoting attraction of domestic and foreign investment by providing a fair, equal legal regime to all investors and a guarantee of protection of their investments.”⁷²

(iii) Tribunal’s findings

76. The Parties do not disagree as to the methods of interpretation that the Tribunal should use in its analysis of Article 18 of the FIL. The Tribunal notes that other tribunals such as the tribunal in *PNG* have found that legislative provisions, such as the FIL, are of a “hybrid” nature and should therefore be interpreted “taking account both that State’s domestic law on statutory construction and international law. Where the principles of interpretation under the State’s domestic law conflict with international law principles, international law principles will ordinarily prevail...”⁷³ In this case, however, no such conflict is apparent. Domestic and international methods of interpretation appear to be

⁷⁰ Law No. 53 of the Kyrgyz Republic “On the Interpretation of the Term ‘Foreign Investment’ in Article 1 of the Law of the Kyrgyz Republic ‘On Foreign Investments in the Kyrgyz Republic’” dated 30 May 2000, as amended on 11 June 2004, art. 1 (C-0053) (“Foreign investment is a long-term material and non-material investment in objects of the economic activities for profit in the forms provided for by the legislation of the Kyrgyz Republic: cash, movable and immovable property, property rights, shares and other forms of participation in a legal entity, profits or income received from foreign investment, concessions based on law; that is, a contribution to generate income in some enterprise, into socio-economic programs, innovative projects, etc. Civil-law transaction between two subjects of economic activity on the supply of goods (services) with the obligation of the buyer to pay for the delivered goods (services) does not fall under the concept of ‘Foreign Investment.’”)

⁷¹ *Petrobart Limited v. Kyrgyz Republic*, SCC, Award dated 13 Feb. 2003, at 23 (CL-0055).

⁷² World Bank Report No. 29150-KG, *Kyrgyz Republic Country Economic Memorandum: Enhancing the Prospects for Growth and Trade* dated 24 Jan. 2005, at 77 (C-0093).

⁷³ *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015, ¶ 265 (RL-0042).

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similar in substance, both requiring this Tribunal to interpret the FIL in good faith and in accordance with its ordinary meaning.

77. For ease of reference the text of subsections 2 and 3 of Article 18 is repeated below:

2. In the absence of such an agreement, an investment dispute between authorized government agencies of the Kyrgyz Republic and an investor shall be settled to the extent possible by means of consultations between the parties. If the parties fail to settle their controversy amicably within three months from the date of the first written request for such consultation, any investment dispute between the investor and government agencies of the Kyrgyz Republic shall be resolved by the judicial bodies of the Kyrgyz Republic, unless in case of a dispute between a foreign investor and government agencies of the Kyrgyz Republic one of the parties requests the dispute to be considered in accordance with one of the following procedures by submitting a request to:

a) the International Centre for Settlement of Investment Disputes (ICSID), established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States or in accordance with the Additional Facility Rules of the Centre's Secretariat; or to

b) Arbitration by an international ad hoc arbitration tribunal (commercial court) established in accordance with the arbitration rules of the United Nations Commission on International Trade Law.

3. If an investment dispute is submitted to arbitration as mentioned in subparagraphs a) and b) of paragraph 2 of this Article, the Kyrgyz Republic waives the right to claim prior application of all internal administrative or judicial procedures before submitting the dispute to international arbitration.

78. The question this Tribunal is tasked with deciding is whether Article 18 contains the Respondent's unilateral offer to arbitrate, which the Claimants have sought to accept by filing their Request for Arbitration.

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79. Firstly, examining the text of Article 18(2), it is clear that the ordinary route to settle disputes between the investor and government agencies of the Kyrgyz Republic is through “the judicial bodies of the Kyrgyz Republic.” Access to arbitration therefore operates as an exception to the ordinary rule and where “one of the parties requests the dispute to be considered in accordance with one of the following procedures by submitting a request to” one of the available arbitral fora. The Tribunal is satisfied that this wording, on its face, includes the Respondent’s unilateral offer to arbitrate disputes where requested by the investor. Once the investor has elected arbitration as the means of resolving the dispute, the investor has thereby accepted the Respondent’s offer to arbitrate and this cannot be withdrawn. “Request[ing] the dispute” to be submitted to arbitration is clear, mandatory language and does not indicate that any subsequent agreement by the parties is necessary. In *Inceysa Vallisoletana v. El Salvador*, a provision providing that investors “may submit the controversy” to arbitration was determined by the tribunal to amount to a unilateral offer to consent to arbitration.⁷⁴ The use of the word “request” cannot be interpreted to mean that the referral of the dispute to arbitration is something that the Respondent has the option of rejecting. It has been accepted by many other arbitral tribunals,⁷⁵ as well as legal scholars,⁷⁶ that wording similar to “may submit” to arbitration or “request” arbitration (as is used in Article 18(2)) amounts to the giving of consent. The Respondent seeks to compare Article 18(2) with the Tanzanian Investment Act at issue in *Biwater*,⁷⁷ however, the Tanzanian law is clearly distinguishable. Section 23.2 of the Tanzanian Investment Act provided that the investor could resort to arbitration “as may be mutually agreed by the parties.”⁷⁸ This therefore requires a subsequent agreement between the parties and is

⁷⁴ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award dated 2 Aug. 2006 ¶¶ 331-332 (CL-0029).

⁷⁵ See *Vigotop Ltd. v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 Oct. 2014 ¶¶ 254 (CL-0049); *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction dated 11 Sept. 2009 ¶¶ 24, 203 (CL-0047).

⁷⁶ See RUDOLPH DOLZER AND CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 256 (2d ed., 2012) (RL-0010).

⁷⁷ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 103.

⁷⁸ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 ¶ 329 (CL-0014).

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not the same as the unilateral offer to arbitrate contained in the FIL.⁷⁹ Nothing in the text of Article 18(2) suggests that any further action is required beyond the investor submitting its dispute to arbitration under any of the available fora.

80. The above interpretation of Article 18(2) is further confirmed when read in tandem with Article 18(3). Article 18(3) provides that if one of the parties requests arbitration pursuant to Article 18(2), “the Kyrgyz Republic waives the right to claim prior application of all internal administrative or judicial procedures before submitting the dispute to international arbitration.” Hence, Article 18(3) prevents the Respondent from seeking to force an investor to resort to local courts where they have already requested arbitration pursuant to Article 18(2). The Respondent is correct in that Article 18(3) does not provide its consent to arbitration. As the Tribunal has already established, the Respondent’s consent is provided in Article 18(2). However, Article 18(3) confirms that the Tribunal’s interpretation of Article 18(2) amounting to unilateral consent is correct. The waiver applies after the investor has submitted the dispute to arbitration, accepting the Respondent’s offer to arbitrate.
81. The legislative history of the FIL further confirms that it was the Respondent’s intention to provide its unilateral consent to arbitrate in Article 18(2). The parliamentary debates indicate that the primary purpose for passing the FIL was to place domestic and foreign investors on an equal footing. The Tribunal believes that if it were the Respondent’s intention to revoke its unilateral consent, this would have been clearly communicated to the Presidential Administration. The Respondent is unable to point to any contemporary interpretation that confirms the revocation of the consent to arbitrate. To the contrary, the legislative debates reveal that some parliamentarians were critical of the draft text of Article 18 precisely because it did not abrogate the unilateral consent to arbitration that was a feature of the 1997 Law. In these circumstances, the fact that the wording in Article 18 differs from its predecessor in the 1997 Law is not indicative of an intention to revoke consent to arbitration. This is

⁷⁹ *Id.*

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especially so where the wording of Article 18(2), on its face, does not require a subsequent agreement between the parties to arbitrate.

82. The Respondent makes the argument that Article 18(2) gives either party (i.e. the investor *or* the Kyrgyz Republic) the right to submit the dispute to arbitration. The Respondent contends that it is not possible for an investor to consent to arbitration through the FIL, and that this therefore demonstrates that what is required is a request to arbitrate followed by a subsequent consent. This issue was considered by the Parties at the Hearing and different theories were put forward as to its correct interpretation. While this poses a number of interesting questions, ultimately it is not for this Tribunal to decide on what would happen if the Kyrgyz Republic were to seek to initiate an arbitration against an investor. In any event, it is obvious that the FIL, as a law enacted by the legislature of the Kyrgyz Republic, cannot itself contain the consent of foreign investors to arbitration. If the Kyrgyz Republic were to commence an arbitration against a foreign investor, then it is clear that the foreign investor would have to give its consent at that point in time to the proposed recourse to an arbitral forum. There is nothing contradictory about that reality and the wording of Article 18(2): it is simply a recognition of the fact that the parties are in an asymmetrical relationship because the Kyrgyz Republic, through its domestic legislation, is able to make a public offer to arbitrate unilaterally, whereas that is not in the gift of the foreign investor.

(b) *Does the FIL cover the present type of dispute?*

(i) Respondent's position

83. The Respondent submits that even if Article 18 of the FIL contains its consent to arbitrate, the Claimants' case is not covered by the definition of "investment" contained within the FIL in any event. The Respondent argues that an "investment dispute" in accordance with Article 18(2) of the FIL must be related to the sale of an investment.⁸⁰ The Respondent refers to Article 1(6) of the FIL, which provides:

⁸⁰ Respondent's Memorial on Preliminary Objections, dated 15 July 2017, ¶ 49.

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*“Investment dispute - a dispute between an investor and state bodies, officials of the Kyrgyz Republic and other participants in investment activities arising from sale of investments.”*⁸¹

84. The Respondent’s expert explains that in the Kyrgyz Republic laws are published in Russian (the official language) and Kyrgyz (the State language), and that in the case of a discrepancy between the two the Kyrgyz version governs.⁸² The Respondent argues that Claimants have provided a translation of the Russian definition of “investment dispute” which contains the word “реализации,” which can mean either “implementation” or “sale.” However, the Respondent notes that the Kyrgyz version of the FIL contains the word “сатууда,” which can only be translated as “sale.” Therefore, the Respondent argues that the only interpretation of the FIL that would be consistent both with the Kyrgyz text and the Russian text is that it must concern the sale of an investment. In any event, the Respondent submits that if the Tribunal determined there to be a conflict between the two texts, the Kyrgyz text should prevail. The Respondent notes that this is similar to Article 33(3) of the Vienna Convention which provides that “[t]he terms of the treaty are presumed to have the same meaning in each authentic text.”
85. In response to the Claimants’ argument concerning a translation error, the Respondent states that even if this were the case the Tribunal would still be required to apply the Kyrgyz text.⁸³ The Respondent’s expert states that the only way for a translation error to be corrected is through a change in legislation.⁸⁴ Looking further at the legislative history, the Respondent argues that the Claimants are unable to point to any

⁸¹ Law of the Kyrgyz Republic No. 66 “On Investments in the Kyrgyz Republic” as last amended by Law No. 32 of 13 Feb. 2015 dated 27 Mar. 2003 (R-0037), article 1(6).

⁸² Musabekova ¶ 17; See Law of the Kyrgyz Republic No. 241 “On Normative Legal Acts of the Kyrgyz Republic” dated 20 July 2009, Art. 6(3) (the “NLA”) (C-0071).

⁸³ Musabekova, n. 99.

⁸⁴ Second Expert Report of Chynara Abdybakasovna Musabekova, (“Musabekova II”) dated 11 Nov. 2017, ¶ 34.

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contemporary or subsequent parliamentary statement, or any statement from the Kyrgyz establishment, that there has been a mistake in the translation of this word.⁸⁵

86. In response to the Claimants' reliance on the case of *Stans Energy*,⁸⁶ the Respondent submits that the English High Court erroneously translated Article 1(6) of the FIL to mean "sale."⁸⁷ The Respondent argues that the court erred in using a purposive interpretation as opposed to a literal one, and that the experts presented before the court were practitioners whose testimony is not as authoritative as the experts presented in this arbitration.⁸⁸
87. As to the objectives of the FIL, which were to equalize the legal regime for foreign and domestic investors, the Respondent argues that Article 18(2) only permits arbitration for "investment disputes" with foreign investors, and therefore requiring domestic investors to go to local court would not provide an equal playing field. The Respondent submits that the playing field is more level between foreign and domestic investors if disputes related to expropriation are generally submitted to the courts, with only certain types of disputes permitted to go to arbitration.⁸⁹
88. Article 6(4) of the FIL provides as follows:

*"In case of expropriation, judicial authority or other competent state authority of the Kyrgyz Republic with the proper legal procedure shall provide investor with the right to a speedy trial, including an assessment of its investment and payment of compensation in accordance with the provisions of this Article, without violating the procedure for compensation foreign investors under Article 18 of this Law."*⁹⁰

⁸⁵ Hearing Transcript, dated 8 Jan. 2019, p. 63, Ins. 18-24.

⁸⁶ *Kyrgyz Republic v. Stans Energy Corp. & Kutisay Mining LLC*, [2017] EWHC 2539 (Comm), Judgment dated 13 Oct. 2017 (RL-0075).

⁸⁷ Respondent's Reply on Preliminary Objections, dated 11 Nov. 2017, n. 307.

⁸⁸ *Id.*; Hearing Transcript, dated 8 Jan. 2019, pp. 70-72.

⁸⁹ Respondent's Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 117.

⁹⁰ See Law No. 66 of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" dated 27 Mar. 2003, as last amended by Law No. 32 of 13 Feb. 2015, Art. 6(4) (C-0025) (resubmitted).

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89. In response to the Claimants' argument that Article 6(4) broadens the scope of an investment dispute, the Respondent argues that this provision does not mention "investment dispute,"⁹¹ and that this is a substantive protection guaranteeing the right to a speedy trial that cannot be interpreted as expanding the definition in Article 1(6).⁹²

(ii) Claimants' position

90. The Claimants disagree with the Respondent in its interpretation of Article 1(6) of the FIL. The Claimants submit that Article 1(6) should be interpreted as follows:

*"Investment dispute – a dispute between an investor and state authorities, state officials of the Kyrgyz Republic and other members of the investment activity that arises in the implementation of investment."*⁹³

91. The Claimants argue that "investment dispute" is not limited to the sale of investments, and that this is supported both by the language of this provision and the context of other articles in the FIL, as well as the legislative intent behind the FIL's development.⁹⁴

92. As to the text of Article 1(6) of the FIL, the Claimants submit that the Russian word "реализация" was mistakenly translated into Kyrgyz as "сатууда."⁹⁵ The Claimants' expert states that "реализация" can be interpreted broadly to mean "realization" or "implementation," or more narrowly to mean "sale."⁹⁶ The Claimants argue that "реализация" is not generally translated into Kyrgyz as "sale" in other pieces of legislation.⁹⁷ The Claimants further contend that even though the Kyrgyz text is regarded as authoritative, the focus should be placed on the Russian text because the Legislature drafted and adopted the FIL in Russian before it was translated into Kyrgyz,

⁹¹ Hearing Transcript, dated 8 Jan. 2019, p. 69, Ins. 14-16.

⁹² Respondent's Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 118.

⁹³ See Law No. 66 of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" dated 27 Mar. 2003, as last amended by Law No. 32 of 13 Feb. 2015, Art. 1(6) (C-0025) (resubmitted).

⁹⁴ Claimants' Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 128.

⁹⁵ *Id.*, ¶ 129.

⁹⁶ Kenenbaev I ¶ 99.

⁹⁷ Claimants' Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 130.

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and the Legislature relied on the Russian text during the plenary sessions.⁹⁸ The Claimants argue that “[b]ecause the statute was drafted, debated, and confirmed in Russian, and only later translated into Kyrgyz, the Russian term which translates as ‘implementation’ should be elevated over the Kyrgyz term, which translates as ‘sale,’ particularly where none of the drafts, debates, or intra-governmental correspondence indicate any intention to restrict the coverage of expropriation protection to instances arising out of the sale of an investment.”⁹⁹

93. The Claimants submit that Articles 1(6) and 6(4) of the FIL have previously been interpreted by the English High Court which concluded that Article 1(6) “includes all disputes that arise between the Kyrgyz Republic and a foreign investor during the process of that foreign investor’s implementation of its investment.”¹⁰⁰ This decision confirmed the interpretation that had been given to Article 1(6) by the tribunal in the underlying arbitration.¹⁰¹ The Claimants argue that this Tribunal must interpret Article 1(6) in the “context” of the FIL as a whole such that it does not conflict with other articles therein.¹⁰² The Claimants submit that the rules of Kyrgyz statutory interpretation require that the “entirety of the Article,” including its relationship with all other portions of the statute, be considered.¹⁰³ Looking at other definitions contained within Article 1, the Claimants argue that “investment” is defined very broadly and, as the English High Court held, it would be surprising if these disputes were not covered by Article 1(6).¹⁰⁴

⁹⁸ *Id.*, ¶ 131; See November 2002 Plenary Session (C-0056).

⁹⁹ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 132.

¹⁰⁰ *Kyrgyz Republic v. Stans Energy Corp. & Kutisay Mining LLC*, [2017] EWHC 2539 (Comm), Judgment dated 13 Oct. 2017 ¶¶ 118, 130 (RL-0075).

¹⁰¹ *Kyrgyz Republic v. Stans Energy Corp. & Kutisay Mining LLC*, [2017] EWHC 2539 (Comm), Judgment dated 13 Oct. 2017 ¶ 43.

¹⁰² *Kyrgyz Republic v. Stans Energy Corp. & Kutisay Mining LLC*, [2017] EWHC 2539 (Comm), Judgment dated 13 Oct. 2017 ¶¶ 63, 66-91, 118 (RL-0075); Claimants’ Rejoinder on Preliminary Objections, dated 27 Aug. 2018, ¶ 241.

¹⁰³ Claimants’ Rejoinder on Preliminary Objections, dated 27 Aug. 2018, ¶ 241; *Kyrgyz Republic v. Stans Energy Corp. & Kutisay Mining LLC*, [2017] EWHC 2539 (Comm), Judgment dated 13 Oct. 2017 ¶ 104, 118.

¹⁰⁴ *Kyrgyz Republic v. Stans Energy Corp. & Kutisay Mining LLC*, [2017] EWHC 2539 (Comm), Judgment dated 13 Oct. 2017 ¶ 127; Claimants’ Rejoinder on Preliminary Objections, dated 27 Aug. 2018, ¶ 243.

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94. Turning to the legislative intent, the Claimants argue that adopting a narrow definition of the term “investment dispute” would obstruct achievement of the objectives of the FIL,¹⁰⁵ which were to improve the investment climate in the Kyrgyz Republic and promote investor protections through a fair legal regime.¹⁰⁶ The Claimants note that the communications with the Presidential Administration do not exhibit any intention to narrow the types of investment disputes that could be referred to international arbitration.¹⁰⁷ The Claimants argue that the Respondent itself has acknowledged the broader definition of “investment dispute” as something that arises in the “process of investment.”¹⁰⁸
95. Lastly, the Claimants submit that even if the Tribunal were to interpret Article 1(6) of the FIL as relating strictly to the sale of an investment, the Claimants’ claims would still fall within this definition. The Claimants refer again to the English High Court decision in *Stans Energy*, where the court said that even if one were to interpret “investment dispute” to mean sale, this should be given a broad meaning.¹⁰⁹ The Claimants urge the Tribunal to adopt a similarly broad meaning.¹¹⁰

(iii) Tribunal’s findings

96. The Parties’ disagreement boils down to whether the Tribunal should apply a strictly literal interpretation of “investment dispute” as defined in Article 1(6) of the FIL, or should follow a more purposive approach taking account of other factors expanded

¹⁰⁵ Claimants’ Rejoinder on Preliminary Objections, dated 27 Aug.2018, ¶ 244.

¹⁰⁶ *Id.*, ¶ 247; Law No. 66 of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” dated 27 Mar. 2003, as last amended by Law No. 32 dated 13 Feb. 2015, Preamble (C-0025 resubmitted).

¹⁰⁷ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 133; *See* Letter from Legal Department Head A. Ismailov to the President of the Kyrgyz Republic dated 27 Mar. 2003 (C-0063); *see also* Letter from Economic Policy Department Head K. Kanimetov to the Head of Legal Affairs of the Presidential Administration of the Kyrgyz Republic dated 18 Mar. 2003 (C-0062).

¹⁰⁸ Law No. 66 of the Kyrgyz Republic “On Investments in the Kyrgyz Republic,” Consul-General of the Kyrgyz Republic in Karachi Pakistan, available at <http://kyrgyzconsulate.com/investment-laws.php> (accessed on 20 Aug. 2018) (C-0119) (translating the definition of “investment dispute” under Article 1(6) as “any dispute between an investor and governmental bodies, officials of the Kyrgyz Republic and other participants of investment activity, arising in process of investment realization”).

¹⁰⁹ *Kyrgyz Republic v. Stans Energy Corp. & Kutisay Mining LLC*, [2017] EWHC 2539 (Comm), Judgment dated 13 Oct. 2017 ¶¶ 134, 143.

¹¹⁰ Hearing Transcript, dated 8 Jan. 2019, pp. 151-152, lns. 12-25, 1-14.

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upon by the Claimants. The Parties are in agreement that the Kyrgyz word “сатууда” contained within Article 1(6) can only be translated as “sale,” however, the Russian word “реализации” contained within Article 1(6) may be interpreted more broadly to mean either “sale” or “implementation.”

97. Article 6(3) of the NLA provides:

“In case of discrepancy between the text of the Constitution and other normative legal acts of the Kyrgyz Republic in the state language with the text in the official language, the text in the state language is considered to be the original, with exception of cases provided for in part 4 of this article.”

98. The Respondent argues that the above law compels this Tribunal to interpret Article 1(6) in a literal way, i.e. to mean that only investment disputes related to the “sale” of an investment fall within the FIL. The Tribunal considers that such a reading of Article 1(6) would be incorrect. Article 6(3) of the NLA refers to the “text” of the official language and the state language – it does not give prevalence to a word when a conflict exists. Adopting a simple dictionary approach does not allow the Tribunal to give effect to the true and intended meaning of the law. As the Respondent correctly notes, in interpreting a law “[t]he intention of the State must prevail” and this “can be deduced from looking at the ‘context’ and ‘evidence regarding the circumstances of [the law’s] preparation and the purposes it intended to serve.”¹¹¹ While the Tribunal can still regard the Kyrgyz language text as the original, it can use the Russian text, as well as other interpretative tools, in order to fully understand the Legislature’s intent.

99. The Tribunal accepts that it was the Legislature’s intent for Article 1(6) of the FIL to include the “implementation” or “realization” of investments within its definition, as opposed to only “sales.” This is confirmed by the fact that the FIL was drafted and debated in Russian, before it was eventually translated and passed into law in Kyrgyz.¹¹² If it had been the Kyrgyz Legislature’s intention to define “investment

¹¹¹ Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 35.

¹¹² Kenenbaev I ¶ 86.

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dispute” in such a narrow, and unexplainable manner, this would have been something that would have been flagged during the drafting or implementation stages of the FIL. It does not appear to be typical for the Kyrgyz Legislature to use the Kyrgyz word “сатууда” and the Russian word “реализации” synonymously. This can be seen in the title of Article 24 of the FIL which uses the Russian word “реализации,” but is translated into Kyrgyz as “jüzögö aşıruuga,” meaning “the implementation of.”¹¹³ It would be unusual for the Legislature to translate this same Russian word into Kyrgyz in a different manner.

100. While the Respondent has gone to some lengths to explain that the purpose of the FIL was to give domestic and foreign investors equal protection, the Tribunal is not persuaded that the route to achieving this was to define “investment disputes” in an arbitrarily narrow manner. In any event, there still would be a difference between domestic and foreign investors if foreign investors could refer disputes concerning the sale of an investment to arbitration. The Tribunal believes that a large part of the motivation behind the FIL was to create more favourable conditions for investors, and in particular foreign investors – which is served, in part, by allowing them resort to international arbitration in particular circumstances. This is confirmed by a World Bank Report describing the FIL as “providing a fair, equal legal regime of all investors and a guarantee of protection of their investments.”¹¹⁴ Furthermore, the Preamble of the FIL provides that the purpose of the law is to “improve the investment climate in the country and to attract domestic and foreign investments by providing fair, equal legal treatment to investors and by guarantee to protect attracting investments in the Kyrgyz Republic.”¹¹⁵ In light of this backdrop the Tribunal considers it improbable that it was the Kyrgyz Legislature’s intention to restrict “investment disputes” to those involving a sale.

¹¹³ Law No. 66 of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” dated 27 Mar. 2003, as last amended by Law No. 32 dated 13 Feb. 2015, Art. 24 (C-0025) re-submitted; Kenenbaev I ¶ 100.

¹¹⁴ World Bank Report No. 29150-KG, *Kyrgyz Republic Country Economic Memorandum: Enhancing the Prospects for Growth and Trade* dated 24 Jan. 2005, at 77 (C-0093).

¹¹⁵ Law No. 66 of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” dated 27 Mar. 2003, as last amended by Law No. 32 of 13 Feb. 2015, Preamble (C-0025) (resubmitted).

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101. Reading Article 1(6) along with other articles of the FIL further convinces the Tribunal that “investment disputes” is intended to cover the implementation or realization of investments. Article 6(4) of the FIL provides that in cases of expropriation the investor is entitled to a speedy trial which includes an assessment of its investment and payment of compensation in Kyrgyz courts “without violating the procedure for compensation foreign investors under Article 18 of this Law.” The Respondent’s expert opines that Article 6(4) provides a separate dispute resolution mechanism for all claims related to expropriation.¹¹⁶ However, Article 6(4) makes direct reference to Article 18 of the FIL, thereby requiring that Article 18 continue to have full effect in the case of an investment dispute involving an expropriation being referred to arbitration. Reading these Articles together it would not make sense for the FIL to limit investment disputes in Article 1(6) to those involving only sales, while referring at the same time in Article 6(4) to expropriations more broadly. Examining the definition of “investment” in Article 1(1) of the FIL, it includes “tangible and intangible investments of all forms of assets owned or controlled directly or indirectly by the investor,” which covers cash, movable and immovable property, stocks, bonds, intellectual property, licenses, concessions, and profit or income received from investments.¹¹⁷ It would be entirely inconsistent for the Kyrgyz Legislature to define “investments” in such a broad manner and at the same time limit “investment dispute” to cases involving only the sale of those investments. In some instances, this may not even be capable of practical application. For example, it is hard to imagine how a dispute would arise in the *sale* of “profit or income.”
102. Taking account of the above considerations, the Tribunal decides that Article 1(6) of the FIL must be read to cover the implementation of an investment, and should not be restricted to extend only to the sale of an investment. Only this interpretation ensures that the intention of the Kyrgyz Republic prevails.

¹¹⁶ Musabekova ¶ 52.

¹¹⁷ Law No. 66 of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” dated 27 Mar. 2003, as last amended by Law No. 32 of 13 Feb. 2015, Article 1(1) (C-0025) (resubmitted).

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(c) *Have the Claimants met the FIL's requirements for negotiation and consultation?*

(i) Respondent's position

103. The Respondent submits that even if the FIL contains the Respondent's consent and the scope of that consent includes the Claimants' investment, the Tribunal has no jurisdiction because the Claimants have not satisfied the necessary prerequisites to refer a dispute to arbitration.¹¹⁸ The Respondent argues that Article 18(2) of the FIL requires that one of the parties must send a written request for consultation and then, after three months, one of the parties may submit a request for arbitration.¹¹⁹ The Respondent's expert opines that notice and consultation are required precursors to any dispute resolution proceedings under the FIL.¹²⁰

104. As to the matter of consultation, the Respondent contends that none of the Claimants have ever communicated a request to the Kyrgyz authorities seeking consultation.¹²¹ The Respondent submits that a diplomatic note sent from the Uzbek Ministry of Foreign Affairs to the Kyrgyz Ministry of Foreign Affairs (the "**Diplomatic Note**")¹²² does not fulfil the requirements of the FIL. The Respondent argues that the Diplomatic Note does not come from one of the Claimants, but rather comes from the Republic of Uzbekistan. In response to the Claimants' argument that the Republic of Uzbekistan was acting on behalf of the Claimants, the Respondent states that the Diplomatic Note makes no mention of any of the Claimants and instead states that the properties in question belong to the Republic of Uzbekistan and refers to the State-to-State diplomatic consultations and negotiations.¹²³ The Respondent also argues that under

¹¹⁸ Respondent's Memorial on Preliminary Objections, dated 15 July 2017, ¶ 53.

¹¹⁹ *Id.*, ¶ 54.

¹²⁰ Musabekova ¶ 53, Musabekova II ¶¶ 38-39.

¹²¹ Hearing Transcript, dated 8 Jan. 2019, pp. 73-74, lns. 22-25, 1-5.

¹²² Diplomatic Note No. 12/10169 dated 12 Apr. 2016 from the Ministry of Foreign Affairs of the Republic of Uzbekistan to the Ministry of Foreign Affairs of the Kyrgyz Republic (C-0026).

¹²³ Respondent's Memorial on Preliminary Objections, dated 15 July 2017, ¶ 56.

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international law an investor must “invoke its own right in instituting an investment treaty arbitration.”¹²⁴

105. In response to the Claimants’ reliance on cases suggesting that notice from the Republic of Uzbekistan could satisfy the requirements of Article 18(2), the Respondent argues that these cases are inapposite to the present dispute and are not applicable authority.¹²⁵ Concerning the *Khan Resources* case,¹²⁶ the Respondent argues that this related to notice given by a parent company on behalf of a subsidiary, which cannot be compared with a State providing notice in the present dispute.¹²⁷ Concerning the *Aucoven* case,¹²⁸ the Respondent argues that the issue addressed was whether Mexico’s diplomatic notes to Venezuela qualified as diplomatic espousal in violation of the ICSID Convention, not whether Mexico’s notes qualified as proper notice pursuant to the applicable dispute resolution clause, and that in any event the claimant in that case provided Venezuela with its own notice.¹²⁹
106. The Respondent further contends that there is no evidence of attempts at an “amicable settlement of a dispute” between the Claimants and the Respondent,¹³⁰ or that such attempts would have been futile.¹³¹ The Respondent argues that the Claimants never informed Respondent that they wished to negotiate with it. In the case of *Lauder v. Czech Republic*, the tribunal stated that “the purpose of the waiting period is... to allow the parties to enter into good-faith negotiations before initiating arbitration.”¹³²
107. In response to the Claimants’ reliance on cases stating that provisions similar to Article 18(2) of the FIL are procedural in nature and capable of being waived or cured, the

¹²⁴ *Id.*

¹²⁵ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 124.

¹²⁶ *Khan Resources Inc. v. Mongolia*, UNCITRAL, Decision on Jurisdiction, 25 July 2012 (“**Khan Resources**”) (CL-0030), ¶ 407.

¹²⁷ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 124.

¹²⁸ *Autopista Concesionada de Venezuela, C.A. (Aucoven) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 Sept. 2001 (“**Aucoven**”) (CL-0010).

¹²⁹ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 125.

¹³⁰ Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 57.

¹³¹ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 126.

¹³² *Lauder v. Czech Republic*, UNCITRAL, Award, 3 Sept. 2001 (“**Lauder**”) (CL-0031), ¶ 185.

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Respondent argues that the notice requirement is a precursor to consent and jurisdictional in nature.¹³³ The Respondent argues that it has been deprived of the opportunity to negotiate with the Claimants prior to the commencement of the arbitration and that the mandatory requirements of consultation and negotiation within Article 18(2) have not been satisfied.

(ii) Claimants' position

108. The Claimants submit that they have followed the consultation and negotiation process set out in Article 18(2) of the FIL. The Claimants state that the Respondent issued the first nationalization decree assuming ownership and control over the Claimants' properties on 4 April 2016.¹³⁴ The Ministry of Foreign Affairs of the Republic of Uzbekistan then sent the Diplomatic Note on 12 April 2016. After more than three months had passed, and with "no reply or attempts at discussion of an amicable resolution from Respondent," the Claimants filed their Request for Arbitration on 20 July 2016.¹³⁵
109. In the first instance, the Claimants argue that Article 18(2) is "directory and procedural rather than [] mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction."¹³⁶ The Claimants point to other authorities finding that these provisions exist in order to "allow amicable settlement where such settlement is wanted and supported by both Parties," and consequently are "not to be considered of a mandatory nature but as the expression of the good will of the Parties to try firstly to settle any dispute in an amicable way."¹³⁷ In *Stati v. Republic of Kazakhstan*, the tribunal stated that the three month negotiation period was a "procedural requirement

¹³³ Respondent's Memorial on Preliminary Objections, dated 15 July 2017, ¶ 62.

¹³⁴ Order No. 138-r of the Kyrgyz Government dated 4 Apr. 2016, Art. 1(1) (C-0009).

¹³⁵ Claimants' Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 142.

¹³⁶ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID No. ARB/01/13, Decision on Objections to Jurisdiction dated 6 Aug. 2003 ¶ 184 (CL-0040).

¹³⁷ *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated 4 Aug. 2011 ¶ 564 (CL-0001).

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rather than one of jurisdiction.”¹³⁸ The Claimants contend that the Respondent has not provided any evidence to support its argument that this provision acts as a precursor to the Respondent’s consent.¹³⁹

110. In any event, the Claimants argue that they did in fact comply with this notice requirement. The Claimants submit that the Diplomatic Note sent by the Uzbek Ministry of Foreign Affairs initiated the consultation and negotiation period described in Article 18 of the FIL.¹⁴⁰ The Claimants state that the Diplomatic Note was an attempt by the Republic of Uzbekistan to assist in settling the dispute, and was not done to espouse the Claimants’ claims.¹⁴¹ They argue that Article 18 does not specify who is to give the notice of the dispute. The Claimants point to the *Aucoven* case which they argue demonstrates that an investor’s home State can take actions to facilitate the settlement of the dispute.¹⁴² They also rely on the case of *Khan Resources* in which notice by a parent company on behalf of its subsidiary was found to be sufficient in order to start the negotiation period.¹⁴³
111. The Claimants argue that the Diplomatic Note was sufficiently detailed to identify the dispute. The Claimants highlight the language used therein:

*“The Uzbek side has officially declared a protest and expresses deep concern at the unjustified decision of the Government of the Kyrgyz Republic on the adoption of four boarding houses (“Golden Sands”, “Buston”, “Rohat” and “Dilorom”) of Uzbekistan, located on the shores of lake Issyk-Kul, to the balance sheet of Kyrgyzstan.”*¹⁴⁴

112. The Claimants contend that it is not necessary that they each be specifically named in the Diplomatic Note in order to give notice of the dispute. They point out that in the

¹³⁸ *Stati v. Republic of Kazakhstan*, SCC, Award dated 19 Dec. 2013 ¶ 829 (CL-0044).

¹³⁹ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 144.

¹⁴⁰ *Id.*, ¶ 147.

¹⁴¹ *Id.*

¹⁴² *Aucoven* ¶ 139 (CL-0010).

¹⁴³ *Khan Resources* ¶ 407 (CL-0030).

¹⁴⁴ Diplomatic Note No. 12/10169 dated 12 Apr. 2016 from the Ministry of Foreign Affairs of the Republic of Uzbekistan to the Ministry of Foreign Affairs of the Kyrgyz Republic (C-0026).

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case of *Khan Resources* the notice did not specifically mention the subsidiary-claimant but that this was nonetheless acceptable to trigger the waiting period.¹⁴⁵ Furthermore, the Claimants argue that the Respondent ignores the fact that the Claimants are majority owned by the Republic of Uzbekistan, which further gives it the right to send the Diplomatic Note on the Claimants' behalf.¹⁴⁶ The Claimants also point to a diplomatic note received from the Ministry of Foreign Affairs for the Kyrgyz Republic which identifies the four properties in question that were assertedly expropriated.¹⁴⁷ It was in response to this diplomatic note, the Claimants contend, that the Uzbek Government sent its Diplomatic Note. On this basis they argue that it is clear that the Diplomatic Notice was in protest to the Respondent's decision, and was thereby providing notice of the dispute.

113. The Claimants argue that after providing notice of the dispute through the Diplomatic Note, their efforts to negotiate were futile. The Claimants state that the Respondent "has not deigned to give any indication that it is willing to consider amicable resolution of this dispute."¹⁴⁸ The Claimants rely on the case of *Abaclat* where the tribunal held that "[w]here one or both Parties did not have the good will to resort to consultation as an amicable means of settlement, it would be futile to force the parties to enter into a consultation exercise which is deemed to fail from the outset."¹⁴⁹ The Claimants point to the series of events that took place since the Claimants first filed their Request for Arbitration to show that the Parties have spent some time trying to engage in settlement discussions.¹⁵⁰ On this basis the Claimants argue that they have in fact complied with the consultation and notice requirements of Article 18(2) of the FIL.

¹⁴⁵ *Khan Resources* ¶ 407 (CL-0030).

¹⁴⁶ Claimants' Rejoinder on Preliminary Objections, dated 27 Aug. 2018, ¶ 259.

¹⁴⁷ Diplomatic Note dated 9 Apr. 2016 from the Ministry of Foreign Affairs of the Kyrgyz Republic to the Ministry of Foreign Affairs of the Republic of Uzbekistan (C-0135).

¹⁴⁸ Claimants' Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 145.

¹⁴⁹ *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated 4 Aug. 2011 ¶ 564 (CL-0001).

¹⁵⁰ Claimants' Opening Statement, dated 8 Jan. 2019, pp. 65-67.

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(iii) Tribunal's findings

114. Article 18(2) of the FIL provides, in relevant part:

*“In the absence of such an agreement, an investment dispute between authorized government agencies of the Kyrgyz Republic and an investor shall be settled to the extent possible by means of consultations between the parties. If the parties fail to settle their controversy amicably within three months from the date of the first written request for such consultation, any investment dispute between the investor and government agencies of the Kyrgyz Republic shall be resolved by the judicial bodies of the Kyrgyz Republic, unless in case of a dispute between a foreign investor and government agencies of the Kyrgyz Republic one of the parties requests the dispute to be considered in accordance with one of the following procedures by submitting a request to...”*¹⁵¹

115. Article 18(2) requires that the parties shall attempt to settle their dispute by means of consultations, and if this cannot be done within three months from “the date of the first written request for consultation,” then the dispute can be referred to arbitration.

116. Article 18(2) does not specify who is to provide the “written request for consultation.” It simply requires that such request is made. The Claimants point to the Diplomatic Note as evidence of this written request for consultation. The Tribunal is persuaded that the Diplomatic Note satisfies the requirements of Article 18(2) by acting as the “written request for consultation.” It is not necessary that the communication have been signed by each of the individual Claimants, or even that it refers to any of the Claimants expressly. This has been confirmed in other cases such as *Khan Resources*, where the notice was provided by the parent company without explicitly mentioning the underlying subsidiary that was the party to the dispute.¹⁵² The Diplomatic Note

¹⁵¹ Law No. 66 of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” dated 27 Mar. 2003, as last amended by Law No. 32 of 13 Feb. 2015, Art. 18 (C-0025) (resubmitted).

¹⁵² *Khan Resources* ¶ 407 (CL-0030).

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references the four properties which form the basis for the dispute thereby giving the Respondent adequate notice of the dispute.

117. The purpose of Article 18(2) is to put the Respondent on notice of the dispute. Article 18(2) does not require that all of the facts and legal allegations be summarized or fully laid out. The Diplomatic Note provided the Respondent with sufficient notice that the Republic of Uzbekistan, a majority shareholder of the Claimants, was objecting to the measures that were being taken by the Respondent against the underlying four properties. This is established by the fact that the Diplomatic Note was sent in response to a diplomatic note from the Ministry of Foreign Affairs for the Kyrgyz Republic which notified the Republic of Uzbekistan that the ownership in the four properties was being transferred.¹⁵³ In its response, i.e. the Diplomatic Note, the Uzbek Ministry of Foreign Affairs states that it declares “a protest and expresses deep concern” at the decision to take ownership of the four properties, thereby putting the Respondent on notice of the nature of the dispute. The Diplomatic Note acted as the triggering letter which started the negotiation process. The Tribunal is satisfied that the Claimants did make efforts to engage in negotiations, which were not fruitful, and that after the three-month period for negotiations had elapsed the Claimants then filed their Request for Arbitration on 20 July 2016.
118. On the basis of these established facts, the Tribunal finds that the Claimants have complied with the consultation and negotiation requirements of Article 18(2) of the FIL.

3. Whether there is jurisdiction under the BIT?

(a) Respondent’s position

119. The Respondent submits that the BIT does not contain its consent to ICSID Additional Facility arbitration. The Respondent argues that Article 18 of the BIT only contains

¹⁵³ Diplomatic Note dated 9 Apr. 2016 from the Ministry of Foreign Affairs of the Kyrgyz Republic to the Ministry of Foreign Affairs of the Republic of Uzbekistan (C-0135).

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consent to proceedings conducted under the ICSID Convention. Article 10 of the BIT provides:

*Each Contracting Party hereby consents to submit any legal dispute arising between one Contracting Party and an investor of the other Contracting Party in respect to investments carried out by them on the territory of the first Contracting Party to the International Centre for Settlement of Investment Disputes for consideration through conciliation or arbitration in accordance with the “Convention on the Settlement of investment disputes between States and nationals of other States”, which was opened for signature in Washington on March 18, 1965.*¹⁵⁴

120. The Respondent submits that Article 10 does not refer to the Additional Facility Rules and the Respondent’s consent therefore cannot be established.¹⁵⁵
121. Responding firstly to the Claimants’ argument that this matter has already been decided by way of the ICSID Secretary-General’s approval of Claimants’ access to the Additional Facility Rules, the Respondent submits that that the Tribunal has the authority to determine its own jurisdiction. Referring to the principle of *kompetenz-kompetenz*, the Respondent argues that “every arbitral tribunal, regardless of the rules under which it is constituted, has the authority, and indeed the duty, to ensure that the dispute before it is within the contours of its jurisdiction.”¹⁵⁶ The Respondent highlights the importance of the Tribunal’s authority to decide on its own jurisdiction and notes that this is confirmed by the Additional Facility Rules which provide the Tribunal with “power to rule on its competence” and grant the Tribunal the authority “on its own initiative [to] consider, at any stage of the proceeding, whether the dispute before it is within its competence.”¹⁵⁷ The Respondent argues that the Secretary-

¹⁵⁴ Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, Tashkent, signed 24 Dec. 1996, entered into force on 6 Feb. 1997, art. 10 (C-0001) (resubmitted).

¹⁵⁵ Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 22.

¹⁵⁶ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 50.

¹⁵⁷ Additional Facility Rules, Schedule C, arts. 45(1), 45(3).

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General in her communication dated 6 September 2016 stated that the registration was “without prejudice to the powers and functions of the Tribunal with regard to jurisdiction, competence and the merits.” The Respondent argues that the Secretary-General saw no distinction between registration and approval, and that this is further confirmed by the Additional Facility Rules.¹⁵⁸ The Respondent further argues that it has not been heard on this point until now as the Secretary-General never asked the Respondent for its position on registration. On this basis, the Respondent argues that it would be a violation of its due process rights not to allow the Tribunal to consider its own competence in these circumstances.¹⁵⁹

122. The Respondent draws attention to Article 14 of the BIT, which provides in part:

“Executed in two originals, each in the Uzbek, Kyrgyz and Russian languages, all texts being equally authentic, on December 24, 1996 in Tashkent.

*For the purposes of interpretation of this Agreement, the Russian text shall prevail.”*¹⁶⁰

123. The Respondent therefore notes that while submissions have been made using an English version of the BIT, “the Tribunal either has to use the Russian original text or be certain that it is employing an English translation or range of translations that capture, to the greatest extent possible, the true meaning of the words of the BIT in their Russian original.”¹⁶¹ The Respondent states that there are two relevant English translations in this regard: (i) the version resubmitted by the Claimants¹⁶²; and (ii) the Indonesia-Kyrgyz BIT.¹⁶³ The Respondent notes that the Russian versions of Article

¹⁵⁸ Hearing Transcript, dated 8 Jan. 2019, pp. 9-10, lns. 16-25, 1-7.

¹⁵⁹ *Id.*, p. 11, lns. 12-20.

¹⁶⁰ Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, Tashkent, signed 24 Dec. 1996, entered into force on 6 Feb. 1997, art 14 (C-0001) (resubmitted).

¹⁶¹ Hearing Transcript, dated 8 Jan. 2019, pp. 12-13, lns. 19-25, 1.

¹⁶² Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, Tashkent, signed 24 Dec. 1996, entered into force on 6 Feb. 1997, art 14 (C-0001) (resubmitted).

¹⁶³ Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Indonesia Concerning the Promotion and Protection of Investments, signed 19 July 1995, entered into force 23 Apr. 1997 (“**Indonesia-Kyrgyz BIT**”) (RL-0063), art. 8(3).

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10 of the BIT and Article 8(3) of the Indonesia-Kyrgyz BIT are almost identical and for that reason the Tribunal should take note of the English translation of the Indonesia-Kyrgyz BIT. The only difference between the two interpretations is that the Claimants' interpretation provides that arbitration shall be "in accordance with the" ICSID Convention, while the Indonesia-Kyrgyz BIT provides that arbitration shall be "under the Convention." The Respondent argues that whichever wording the Tribunal relies on the meaning is exactly the same because "in accordance with" and "under" are synonyms.¹⁶⁴

124. The Respondent next argues that arbitration under the Additional Facility Rules does not act as a default to failed consent to arbitration under the ICSID Convention. The Respondent refers to Article 4(1) of the Additional Facility Rules, which provides:

*Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General. The parties may apply for such approval at any time prior to the institution of proceedings by submitting to the Secretariat a copy of the agreement concluded or proposed to be concluded between them together with other relevant documentation and such additional information as the Secretariat may reasonably request.*¹⁶⁵

125. In this regard, the Respondent notes that there has not been any "agreement" to arbitrate under the Additional Facility Rules and argues that there needs to be a separate consent aside from a consent to arbitrate in accordance with the ICSID Convention. The Respondent points to a number of other bilateral investment treaties that use similar language in order to require specific consent to the Additional Facility Rules. For example, the Barbados-Venezuela BIT allows for arbitration "under" the ICSID Convention, but also contains consent to arbitration "under" the Additional Facility

¹⁶⁴ CONCISE OXFORD ENGLISH DICTIONARY 1560 (10th ed., 2002) (RL-0061); WORDS AND PHRASES LEGALLY DEFINED 1209 (David Hay ed., 4th ed., 2007) (RL-0062).

¹⁶⁵ Additional Facility Rules, art. 4(1).

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Rules as long as Venezuela has not become a contracting State to the ICSID Convention.¹⁶⁶

126. The Respondent takes note of circumstances where reference to the ICSID Centre may constitute consent to arbitrate under the Additional Facility Rules,¹⁶⁷ but submits that this is not the case here where Article 10 expressly refers to the ICSID Convention. Referring to the *Sistem* case cited by the Claimants,¹⁶⁸ the Respondent argues that Article VII(2)(a) of the Kyrgyzstan-Turkey BIT referred only to the ICSID Centre “set up by” the ICSID Convention, which must be distinguished from Article 10 which provides for arbitration “in accordance with” the ICSID Convention.¹⁶⁹
127. The Respondent submits that Article 10 must be given its “ordinary meaning” in accordance with the Vienna Convention. The Respondent notes that Article 10 begins in a broad manner referring to the “International Centre for Settlement of Investment Disputes,” but that it then becomes narrow when it uses the preposition “through” to provide that arbitration must be “in accordance with” the ICSID Convention.¹⁷⁰ The Respondent argues that the only type of arbitration that can be administered in accordance with the ICSID Convention is arbitration under the ICSID Convention and the ICSID Arbitration Rules.
128. The Respondent argues that even though the Additional Facility Rules were established by ICSID, and are administered by the ICSID Centre, the Additional Facility Rules make clear that they are wholly separate from the ICSID Convention. Article 3 of the Additional Facility Rules provides:

¹⁶⁶ *Venezuela U.S., S.R.L. v. Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction, 26 July 2016 (RL-0066), ¶¶ 74, 78.

¹⁶⁷ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 61.

¹⁶⁸ *Sistem Mühendislik Insaat Sanayi ve Ticaret A.S v. Kyrgyz Republic*, ICSID Case No. ARB/(AF)/06/1, Decision on Jurisdiction dated 13 Sept. 2007 (CL-0042).

¹⁶⁹ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 64; Hearing Transcript, dated 8 Jan. 2019, pp. 21-22, lns. 25, 1-21.

¹⁷⁰ Hearing Transcript, dated 8 Jan. 2019, pp. 26-27, lns. 18-25, 1-10.

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*“Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.”*¹⁷¹

129. In response to the Claimants’ argument that the Tribunal should employ the principle of *effet utile*, the Respondent submits that this principle “is a tool used to interpret the text of a treaty in order to ensure that ‘a meaning can be attributed to every part of the text,’ and does not require ‘maximum effect’ be given to the text, but merely ‘excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible.’”¹⁷² The Respondent argues that the Claimants are attempting to use this tool to rewrite the BIT because there is no more than one interpretation to Article 10.¹⁷³ Furthermore, the Respondent argues that the fact that it did not accede to the ICSID Convention does not rob Article 10 of meaning.
130. On the context, object, and purpose of the BIT, the Respondent submits that the BIT contains no contra-indications that the Contracting States consented to submit their disputes to non-ICSID Convention arbitration.¹⁷⁴ Concerning the Preamble, which speaks of the “promotion and protection of investments with the aim of creating and maintaining favourable conditions for investments,” the Respondent cautions that “reliance on the object and purpose of a treaty ‘must not produce an outcome that goes beyond what is expressed in the text. If such care is not exercised, interpretation may turn into law-making.’”¹⁷⁵ The Respondent notes that “[a]dditional objects and purposes of the BIT include the mutual benefit of Uzbekistan and the Kyrgyz Republic, and the effective use of State funds and thus limiting the types of costly dispute resolution procedures to which the States consent is also within the objects and

¹⁷¹ Additional Facility Rules, Art. 3.

¹⁷² Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 69.

¹⁷³ Hearing Transcript, dated 8 Jan. 2019, p. 33, lns. 2-11.

¹⁷⁴ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 77.

¹⁷⁵ Maximilian Clasmeier, Chapter 1: *Treaty Interpretation in Public International Law*, in *ARBITRAL AWARDS AS INVESTMENTS: TREATY INTERPRETATION AND THE DYNAMICS OF INTERNATIONAL INVESTMENT LAW* 5, 12-13 (2017) at 19 (RL-0065).

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purposes of the BIT.”¹⁷⁶ In any event, the Respondent argues that there is no need to use such other tools to interpret the BIT when the wording and its application are clear, and that this is not a case like *Al-Warrag*¹⁷⁷ where there was “ambiguously drafted” language.¹⁷⁸

131. The Respondent therefore argues that there is no jurisdiction under Article 10 of the BIT for this dispute to be heard in accordance with the Additional Facility Rules.

(b) Claimants’ position

132. The Claimants submit that Article 10 of the BIT provides the Respondent’s consent to arbitrate under the Additional Facility Rules.

133. The Claimants firstly submit that the ICSID Secretary-General’s approval of the Claimants’ access to the Additional Facility Rules is not subject to review by the Tribunal. The Claimants argue that on 6 September 2016, the Secretary-General both approved access to the Additional Facility Rules,¹⁷⁹ and separately registered the Claimants’ Request for Arbitration pursuant to Article 4 of the Additional Facility Rules.¹⁸⁰ The Claimants submit that while the Notice of Registration states that registration “is without prejudice to the powers and functions of the Tribunal with regard to jurisdiction, competence and the merits,”¹⁸¹ the purpose of the separate and distinct approval requirement is “to prevent access to the Additional Facility beyond its intended scope.”¹⁸² The Claimants point to Articles 4(1) and 4(6) of the Additional Facility Rules which provide:

¹⁷⁶ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 82.

¹⁷⁷ *Hesham Talaat M. Al-Warrag v. The Republic of Indonesia*, UNCITRAL, Award on Respondent’s Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012 (CL-0028), ¶ 75.

¹⁷⁸ Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 83.

¹⁷⁹ Letter from the ICSID Secretary-General to the Parties dated 6 Sept. 2016.

¹⁸⁰ Notice of Registration dated 6 Sept. 2016; Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 59.

¹⁸¹ Notice of Registration dated 6 Sept. 2016.

¹⁸² Aron Broches, *The ‘Additional Facility’ of the International Centre for Settlement of Investment Disputes - (ICSID)*, IV YEARBOOK COM. ARB. 373, 376 (1979) (CL-0007).

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“Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General. The parties may apply for such approval at any time prior to the institution of proceedings by submitting to the Secretariat a copy of the agreement concluded or proposed to be concluded between them together with other relevant documentation and such additional information as the Secretariat may reasonably request.

[...]

*The Secretary-General shall record his approval of an agreement pursuant to this Article together with the names and addresses of the parties in a register to be maintained at the Secretariat for that purpose.”*¹⁸³

134. The Claimants rely on a statement by Mr. Aron Broches that “[a]pproval once obtained is a conclusive determination that the proceedings contemplated by the agreements come within the scope of the Additional Facility, thus barring jurisdictional objections on this issue once proceedings have been instituted.”¹⁸⁴ The Claimants note that they do not challenge the Tribunal’s authority to determine whether the Parties have consented to arbitrate under the BIT (such as whether a claimant is an investor or whether there is an investment),¹⁸⁵ but argue that the Secretary-General’s determination that the Parties have chosen to arbitrate using the Additional Facility Rules cannot be revisited.¹⁸⁶ The Claimants state that “[t]his explains why the ICSID Secretary-General separately issues a notice of registration and an approval of access to the Additional Facility: the issuance of the former does not preclude a tribunal’s examination of its jurisdiction, but the issuance of the latter does preclude a tribunal’s questioning of the parties’ selection of the” Additional Facility Rules.¹⁸⁷

¹⁸³ Additional Facility Rules, Arts. 4(1), 4(6).

¹⁸⁴ Aron Broches, *The ‘Additional Facility’ of the International Centre for Settlement of Investment Disputes - (ICSID)*, IV YEARBOOK COM. ARB. 373, 376 (1979) (CL-0007).

¹⁸⁵ Hearing Transcript, dated 8 Jan. 2019, p. 158, lns. 20-25.

¹⁸⁶ Claimants’ Rejoinder on Preliminary Objections, dated 27 Aug. 2018, ¶ 131.

¹⁸⁷ *Id.*

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135. Turning next to the proper translation of Article 10 of the BIT, the Claimants argue that the Respondent has not previously contested the Claimants' translation of the BIT. The Claimants explain that the terms "in accordance with" and "under" can sometimes act as synonyms, but that it very much depends on the context in which the words are used.¹⁸⁸
136. The Claimants also argue that the plain language of Article 10 of the BIT provides the Respondent's consent to arbitration under the Additional Facility Rules. The Claimants refer to Article 31(1) of the Vienna Convention which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." The Claimants submit that Article 10 refers to arbitration in accordance with the ICSID Convention, and that the Additional Facility Rules were promulgated pursuant to the ICSID Convention. The Claimants refer to Article 6(1) of the ICSID Convention which gives the Administrative Council certain powers including the adopting of "administrative and financial regulations of the Centre." The Claimants argue that because the Additional Facility Rules were established by the Administrative Council, they therefore fall within the meaning of a reference to the ICSID Convention.
137. The Claimants rely on a number of decisions in support of its interpretation of Article 10. The Claimants argue that in the *Sistem* case, the clause at issue provided for dispute resolution before "the International Centre for the Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and Nationals of other States.'"¹⁸⁹ The tribunal determined that it had jurisdiction under the Additional Facility Rules. In the *Lemire* case, the Claimants argue that the tribunal focused on the intent of the parties, which they found was to

¹⁸⁸ Hearing Transcript, dated 8 Jan. 2019, p. 160, lns. 7-25.

¹⁸⁹ *Sistem Mühendislik Insaat Sanayi ve Ticaret A.S v. Kyrgyz Republic*, ICSID Case No. ARB/(AF)/06/1, Decision on Jurisdiction dated 13 Sept. 2007, ¶ 99 (CL-0042).

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have their dispute resolved through arbitration before ICSID using whichever set of arbitration rules was applicable.¹⁹⁰ The tribunal stated:

“Where the parties were unclear is not in the description of the dispute settlement mechanism which they preferred, but in an ancillary point: the precise rules which the institution entrusted with the administration of the arbitration should apply.

[...]

The ambiguity elided by the parties when they recorded the Settlement Agreement as an award is purely technical and ancillary, and cannot distort the real intent: that any dispute arising from or in connection with the Settlement Agreement be settled by arbitration administered by ICSID, and governed by the appropriate rules approved by the Centre...”¹⁹¹

138. The Claimants argue that this “decision shows that, for a dispute resolution clause such as Article 10, the Contracting Parties are considered to have intended to agree upon an available procedure, and, in the event that procedure is unavailable due to the actions of one Party, the tribunal ought to implement the Parties’ common intention in interpreting the arbitration clause.”¹⁹²
139. In further support of their argument that Article 10 must be interpreted in good faith and in order to give effect to the contracting states’ intentions, the Claimants rely on *Al-Warraq* which referred to the preamble of the bilateral investment treaty and stated that “[t]he object and purpose of the OIC Agreement is investment, promotion and protection by conferring a broad range of rights on investors, and Article 17 must be interpreted in good faith in light of this object and purpose.”¹⁹³

¹⁹⁰ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 Jan. 2010 ¶¶ 76-83 (CL-0072).

¹⁹¹ *Id.*, ¶¶ 82-83.

¹⁹² Claimants’ Rejoinder on Preliminary Objections, dated 27 Aug. 2018, ¶ 173.

¹⁹³ *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Award on Respondent’s Objections to Jurisdiction and Admissibility of the Claims dated 21 June 2012 ¶ 73 (CL-0028).

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140. Referring to the timeline of events, the Claimants note that the Kyrgyz Republic signed the BIT on 24 December 1996 and ratified the ICSID Convention on 5 July 1997.¹⁹⁴ The Claimants argue that it was the Contracting States' intention to provide for dispute resolution through ICSID and that the Kyrgyz Republic's failure to deposit the instrument of ratification amounts to bad faith or a misrepresentation.¹⁹⁵ The Claimants submit that because of this failure to deposit the instrument "if you were to interpret the BIT in accordance with Respondent's position, you would render Article 10 completely ineffective for Claimant," and that is why it would need to be interpreted to give it effectiveness and full effect.¹⁹⁶ In *Murphy v. Ecuador*, the tribunal held that "the principle of *effet utile* mandates not just that treaty terms be given weight and effect, but also that they be accorded 'their fullest weight and effect consistent with the normal sense of the words and other parts of the text, and in such a way that a meaning can be attributed to every part of the text'... [and that] [o]ne of the objectives of the Treaty is to give the investor access to meaningful arbitration."¹⁹⁷

(c) *Tribunal's findings*

141. The Tribunal firstly notes that it has already established the applicability of the Additional Facility Rules in accordance with the FIL. The below analysis therefore addresses an alternative basis for jurisdiction. This part of the Tribunal's Decision is by majority; Arbitrator Douglas has dissented from it for the reasons set out in a separate opinion.

142. The first issue to be determined is whether this Tribunal is precluded from considering the applicability of the Additional Facility Rules by virtue of the ICSID Secretary-General's registration and approval of the Claimants' Request for Arbitration.

¹⁹⁴ Claimants' Opening Statements Slide, p. 117.

¹⁹⁵ Hearing Transcript, dated 8 Jan. 2019, p. 170, Ins. 9-22.

¹⁹⁶ *Id.*, p. 172, Ins. 10-16.

¹⁹⁷ *Murphy Exploration & Prod. Co. – Int'l v. The Republic of Ecuador*, UNCITRAL, Partial Award on Jurisdiction dated 13 Nov. 2013 ¶¶ 180, 188 (CL-0034).

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143. The Tribunal is not persuaded by the Claimants' argument that the ICSID Secretary-General has already determined the applicability of the Additional Facility Rules. While Aron Broches states that "approval shall be a conclusive determination that the proceedings contemplated by the agreement come within the scope of" the Additional Facility Rules, this must be interpreted in conjunction with other relevant sections of the Additional Facility Rules. In particular, Article 45(1) of Schedule C of the Additional Facility Rules states that "[t]he Tribunal shall have the power to rule on its competence." Article 45(3) further provides that "[t]he Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within its competence." Furthermore, the ICSID Secretary-General stated in the Notice of Registration, dated 6 September 2016, that the registration "is without prejudice to the powers and functions of the Tribunal with regard to jurisdiction, competence and the merits." Whether or not the Parties have consented to arbitrate this dispute under the Additional Facility Rules is a question that falls squarely within the competence of this Tribunal and is, at its very heart, a matter of jurisdiction. If the Additional Facility Rules were to take away the Tribunal's power to decide this question, this would run contrary to the well-established principle of *kompetenz-kompetenz*.¹⁹⁸ The Secretary-General's approval envisaged by Article 4 of the Additional Facility Rules is a preliminary hurdle, referred to by ICSID as a "screening,"¹⁹⁹ that prevents "access to the Additional Facility beyond its intended scope."²⁰⁰ The Secretary-General's approval cannot be revisited by ICSID once it has been given. The ICSID Secretary-General further did not specify whether registration was made pursuant to the FIL, the BIT, or both. It would be odd for the registration to amount to a definitive decision

¹⁹⁸ CHARLES T. KOTUBY & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS 130-131 (2017) (RL-0052), at 159 ("Whether a tribunal or court derives its authority from the parties' consent . . . a treaty . . . or positive law . . . is largely beside the point. In every case, there exists an external limit on the scope of jurisdiction, so questions of competence over particular parties or issues can be raised by motion or proprio motu. And when those questions are raised, the tribunal seised of the matter has the authority to answer them in the first instance. The competence to decide one's own competence . . . is inherent in the very nature of adjudicatory authority and universally expressed in the institutional rules governing international arbitration.").

¹⁹⁹ See <https://icsid.worldbank.org/en/Pages/process/Overview-ICSID-Additional-Facility-Arbitration.aspx>

²⁰⁰ Aron Broches, *The 'Additional Facility' of the International Centre for Settlement of Investment Disputes - (ICSID)*, IV YEARBOOK COM. ARB. 373, 376 (1979) (CL-0007).

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without even mentioning the basis for jurisdiction. The ICSID Secretary-General's registration therefore cannot take away from the Tribunal's power to decide on any matter of jurisdiction, including whether access to the Additional Facility Rules is proper and whether the "agreement" referred to in Article 4(1) of the Additional Facility Rules exists.

144. Article 10 of the BIT provides:

*"Each Contracting Party hereby consents to submit any legal dispute arising between one Contracting Party and an investor of the other Contracting Party in respect to investments carried out by them on the territory of the first Contracting Party to the International Centre for Settlement of Investment Disputes for consideration through conciliation or arbitration in accordance with the "Convention on the Settlement of investment disputes between States and nationals of other States", which was opened for signature in Washington on March 18, 1965. Investors of one Contracting Party, who were controlled by an investor of the other Contracting Party before the beginning of the dispute, shall, in accordance with Article 25 (2 - b) of the Convention in pursuance of objectives of the Convention, have the same rights as investors of the other Contracting Party."*²⁰¹

145. The Tribunal considers that the Parties' translation dispute over the use of "in accordance with" or "under" does not alter its interpretation.

146. The Tribunal firstly takes note of Article 31(1) of the Vienna Convention which requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Therefore, Article 10 should not simply be given a literal

²⁰¹ Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, Tashkent, signed 24 Dec. 1996, entered into force on 6 Feb. 1997, art 10 (C-0001) (resubmitted).

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dictionary interpretation. It is necessary to look at the context of Article 10 and the object and purpose of the BIT in order to interpret Article 10 in a meaningful way.

147. Article 10 provides the Contracting Parties' consent to submit certain investment disputes to "the International Centre for Settlement of Investment Disputes for consideration through conciliation or arbitration in accordance with the 'Convention on the Settlement of investment disputes between States and nationals of other States.'" On a plain reading of the text the Contracting Parties provide their consent to submit investment disputes to the ICSID Centre "in accordance with" the ICSID Convention (or "under" the ICSID Convention using the Respondent's preferred translation). Thus, while Article 10 opens in a broad way by reference to the ICSID Centre, it arguably then becomes narrower by its reference to the ICSID Convention, as opposed to the ICSID Centre more generally.
148. The Tribunal considers that Article 10 cannot be compared so easily with some of the cases and arbitration clauses cited by the Parties. In *Sistem*, the relevant wording referred arbitration to the ICSID Centre "set up by" the ICSID Convention. Therefore, the consent is to arbitration (of any kind) that is provided by the ICSID Centre which has been "set up" or established by the ICSID Convention. In *Lemire* the arbitration clause expressly provided for Additional Facility arbitration, though within the Additional Facility Rules is contained additional consent to the ICSID Convention.²⁰² In many of the other treaties referred to by the Parties, the wording follows the pattern of referring disputes to arbitration administered by the ICSID Centre, and specifies that the ICSID Centre has come into existence as a result of the ICSID Convention. However, Article 10 appears to be worded slightly more narrowly as it submits disputes to the ICSID Centre for arbitration "in accordance with" the ICSID Convention. Giving this a purely literal reading, Article 10 might be understood to imply that the ICSID Convention is the only permissible set of rules under which arbitration may be conducted. "In accordance with" or "under" does not necessarily have the same

²⁰² Additional Facility Rules, Art. 4(2).

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meaning as “set up by,” “established by,” or a reference to the ICSID Centre more generally.

149. However, despite the difference in wording between Article 10 and other treaties presented by the Parties, it is necessary in interpreting Article 10 to look at the structure of ICSID and the source of the Additional Facility Rules. The ICSID Convention established the ICSID Centre²⁰³ and the ICSID Administrative Council.²⁰⁴ The Administrative Council, in turn, created the Additional Facility Rules to deal with certain types of disputes not covered by the jurisdiction of the ICSID Convention.²⁰⁵ Therefore, ICSID’s authority to administer arbitration using the Additional Facility Rules is derived from the ICSID Convention. Though Article 3 of the Additional Facility Rules is clear that “none of the provisions of the [ICSID] Convention shall be applicable to [Additional Facility proceedings],” this simply means that the substantive provisions and requirements contained in the ICSID Convention are not applicable to an arbitration conducted under the Additional Facility Rules. It does not alter the fact that the Additional Facility Rules are derived from and operate within the system established by the ICSID Convention and administered by the ICSID Centre. The text of Article 10 can therefore be interpreted to mean that arbitration “in accordance with” the ICSID Convention includes arbitration under the Additional Facility Rules.
150. The Tribunal is mindful of the Respondent’s contention that it is precluded from “rewriting” the BIT in that it cannot give Article 10’s terms a meaning that the Contracting Parties excluded. Had the Contracting Parties expressly excluded arbitration under the Additional Facility Rules in the text of Article 10, the Tribunal would have no jurisdiction under the BIT. However, this is not case. The language chosen by the Contracting Parties in the BIT’s dispute resolution clause – “in accordance with the ‘Convention on the Settlement of investment disputes between States and nationals of other States’” – does not expressly exclude the Additional

²⁰³ ICSID Convention, Art. 1(1).

²⁰⁴ ICSID Convention, Art. 3.

²⁰⁵ Additional Facility Rules, Introduction.

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Facility Rules. Rather, there is room for diverging interpretations as to whether Article 10 encompasses the Additional Facility Rules or not. The Tribunal's view is that Article 10 does allow for arbitration under the Additional Facility Rules. To come to this conclusion, the Tribunal is not required to disregard or distort the wording in Article 10, and instead need only give due consideration to the Contracting Parties' intentions as reflected by Article 10's language, in its context and in light of its objects and purposes.

151. While the Claimants and the Respondent have put forward strong arguments concerning a literal interpretation of Article 10, the Tribunal emphasizes that it must seek to interpret the BIT "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." The Tribunal notes that one of the purposes of the BIT, as stated in its Preamble, is to recognize "the need for the promotion and protection of investments with the aim of creating and maintaining favourable conditions for investments by investors of one Contracting Party on the territory of the other Contracting Party."²⁰⁶ The clear, dominant intention of the Contracting Parties was therefore to provide not only for investment promotion but also investment protection. The protections provided by the BIT are, however, enforceable principally through its dispute resolution mechanism. As the tribunal in *Murphy v. Ecuador* stated, "[o]ne of the objectives of the Treaty is to give the investor access to a meaningful arbitration."²⁰⁷ To apply Article 10 in the manner advocated by the Respondent would mean that there is no path open for resolution of investment disputes under the BIT, and that the BIT, while in force, would in fact be without any significant effect. It is difficult to imagine that this was the Contracting States' genuine intention when they negotiated the BIT, especially since the Respondent ratified the ICSID Convention not long after it had signed the BIT.

²⁰⁶ Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, Tashkent, signed 24 Dec. 1996, entered into force on 6 Feb. 1997, Preamble (C-0001) (resubmitted).

²⁰⁷ *Murphy Exploration & Prod. Co. – Int'l v. The Republic of Ecuador*, UNCITRAL, Partial Award on Jurisdiction dated 13 Nov. 2013 ¶ 188 (CL-0034).

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152. The Tribunal believes that this was also an essential object of the Republic of Uzbekistan and the Kyrgyz Republic when they negotiated and entered into the BIT. The BIT would be devoid of much of its effect if it were to be interpreted to include arbitration under the ICSID Convention only. The Tribunal does not agree with the Respondent that to interpret Article 10 in order to give it its desired effect would be to effectively rewrite the BIT. The Contracting States' genuine intention and clear object was to provide a recourse to investors to settle their disputes before ICSID arbitration. The fact that arbitration using the ICSID Convention and the ICSID Arbitration Rules is unavailable does not mean that this objective cannot be achieved.
153. The Tribunal is ultimately faced with differing interpretations of the text of Article 10: one that would allow for the settlement of investment disputes, and another that would close off all access to dispute resolution for such disputes unless and until the Kyrgyz Republic deposits its instrument of ratification of the ICSID Convention. Article 10 has more than one possible interpretation and the Tribunal is persuaded that either interpretation would be in line with the ordinary meaning of the text. However, interpreting the ordinary meaning of the text *in good faith and in light of its object and purpose*, giving effect to the Contracting Parties' true intentions, leads the Tribunal to the conclusion that the Additional Facility Rules are encompassed by the text and intended meaning of Article 10. The question of Article 10's literal meaning is "purely technical and ancillary" and the Tribunal is concerned with the Contracting States' "true intent."²⁰⁸ Here, the Contracting States' true or genuine intention was to provide a means of dispute settlement by arbitration administered by ICSID within the framework of the ICSID Convention. The unavailability of arbitration conducted pursuant to the ICSID Convention and ICSID Arbitration Rules therefore leads to the applicability of the Additional Facility Rules.
154. It is of course correct that consent to arbitration pursuant to the ICSID Convention and ICSID Arbitration Rules, on the one hand, and arbitration pursuant to the Additional

²⁰⁸ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 Jan. 2010 ¶ 83 (CL-0072).

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Facility Rules, on the other hand, are mutually exclusive. Critically, however, the text of Article 10 is drafted in sufficiently broad terms to encompass both types of arbitration — using a general reference to the submission of disputes to the ICSID Centre for arbitration “in accordance with” or “under” the ICSID Convention. Although Article 10 only contemplates arbitration of an investment dispute pursuant to one of these alternatives, its text is sufficiently broad to encompass either mechanism that is available. The Contracting States could have provided only for arbitration pursuant to the ICSID Convention and ICSID Arbitration Rules. Instead, they provided more generally for arbitration administered by ICSID “in accordance with” or “under” the ICSID Convention — a formulation that includes arbitration pursuant to the ICSID Convention and ICSID Arbitration Rules, if available, and pursuant to the Additional Facility Rules, if the ICSID Convention and Arbitration Rules are not available.²⁰⁹

155. Separately, the Tribunal also concludes that, even if Article 10 were (contrary to the Tribunal’s conclusions above) intended to provide for arbitration only under the ICSID Convention, then, in circumstances where that means of dispute resolution unforeseeably became unavailable, the Contracting States’ true intention was to permit arbitration administered by ICSID under the Additional Facility Rules. In circumstances where the Contracting States had clearly intended to provide for dispute resolution under Article 10, through the mechanism of arbitration administered by ICSID under the ICSID Convention, which both States intended to ratify, but then one State failed to do so, the Tribunal is unwilling to conclude that the intended object of Article 10 has been irreparably frustrated. Rather, Article 10 was a binding

²⁰⁹ It is true that many bilateral investment treaties expressly provide for arbitration under the Additional Facility Rules if arbitration under the ICSID Convention and Arbitration Rules is unavailable or impossible. That does not, however, mean that Article 10 does not arrive at the same result through different language. There is nothing in the text, history or object of Article 10 that excludes arbitration pursuant to the Additional Facility Rules. On the contrary, the text of Article 10 interpreted in light of its purposes, is sufficiently broad to include arbitration pursuant to the Additional Facility Rules. It is also true that there are important differences (as well as similarities) between arbitration pursuant to the ICSID Convention and Arbitration Rules and Arbitration pursuant to the Additional Facility Rules. Importantly, however, both are administered by the ICSID Centre, created and operating within the framework of the ICSID Convention, and encompassed by Article 10. It is unsurprising that, if Article 10 provides alternative forms of dispute resolution, there would be differences between these alternatives.

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commitment by the two Contracting States, to be performed in good faith. When the specific mechanism envisaged by the States became unattainable, through one State's unilateral and unforeseen inaction, in violation of the mutual commitments and objects of Article 10 of the BIT, then the Tribunal believes that the States' true intention and agreement was to permit arbitration under the alternative means of arbitration under the Additional Facility Rules. That is particularly appropriate, in the Tribunal's view, because the Additional Facility Rules were intended to function in precisely circumstances such as those here (where one Contracting State is not a party to the ICSID Convention). In the Tribunal's view, it would elevate form over substance, and conflict with the Contracting States' obligation to perform their treaty obligations in good faith, to read Article 10 as precluding arbitration under the Additional Facility Rules in the current circumstances.

156. The Tribunal, by a majority, decides that Article 10 of the BIT does include arbitration under the Additional Facility Rules.

4. Whether this a State-State dispute that should be settled before the CIS Economic Court?

157. The Respondent submits that the dispute is a State-to-State dispute that should be resolved by the Economic Court of the Commonwealth of the Independent States ("**CIS Economic Court**"), while the Claimants contend that they are the interested parties to this dispute and that access to the CIS Economic Court is not available.

(a) Respondent's position

158. The Respondent submits that the question of whether the Claimants have made a qualifying investment under the BIT or the FIL hinges upon the interpretation and application of the 1992 Agreement on Mutual Recognition of Rights and Regulation of Property Relations ("**1992 Property Agreement**").²¹⁰ The Respondent references the

²¹⁰ Agreement on Mutual Recognition of the Rights and Regulation of Property Relations dated 9 Oct. 1992 (C-0002).

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Claimants' Request for Arbitration, in which they state that "the former Soviet Socialist Republics concluded a multilateral treaty that addressed the ownership of property that had been developed by an enterprise of one State, but which was located in the territory of another State, such as the four Uzbek resorts located in the Kyrgyz Republic. The former Soviet Republics, including the Republic of Uzbekistan and the Kyrgyz Republic, thus agreed that facilities in the social sphere, such as resorts, which had been established using funds of a State agency or State owned enterprise, constitute the property of the State or enterprise that funded the construction of those facilities, including when that property was located on the territory of another State party to the Agreement."²¹¹

159. The Respondent refers to Article 4 of the 1992 Property Agreement, which provides:

"The Parties mutually recognize that located on their territory facilities (or corresponding shares of participants) of the social sphere - sanatoriums, sanatorium-dispensaries, health and recreation centers, vacation resorts, hotels and camping sites, tourist facilities, children's healthcare institutions, construction of which was carried out from the funds of the Republican budgets of other Parties, as well as the funds of the enterprises and organizations of the Republican and former Soviet Union's subordination, located on the territory of the other Parties, are the property of these Parties or their legal entities and individuals. Other social sphere facilities may become subject to the present Agreement by the mutual agreement of the Parties. Parties consider it appropriate to provide land plots for use, ownership and administration on their territory both for existing facilities as well as for the newly established social sphere facilities to the other Parties, their legal entities and individuals. Provision of the land plots to the other Party, as well as payment for their use shall be carried out on general terms, determined by the legislation of the Party, where the facility is located."

²¹¹ Claimants' Amended Request for Arbitration, dated 9 Aug. 2016, ¶ 20.

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160. The Respondent argues that Article 4 covers the properties at the centre of this arbitration and that its assumption of State ownership over the resorts was exercised in reliance on its interpretation of the 1992 Property Agreement.²¹² The Respondent notes that it submitted a reservation to Article 4,²¹³ which the Claimants argue is invalid. The Respondent argues that any documents that pre-date the 1992 Property Agreement are inapplicable because they were superseded by the independence of both States and the 1992 Property Agreement.
161. The Respondent argues that since the Claimants' claim is based on the 1992 Property Agreement, including the Respondent's reservation to Article 4, the dispute is covered by the dispute resolution clause contained in Article 17, which provides:
- “Disputes between the Parties regarding interpretation and application of the provisions of the present Agreement shall be resolved through mutual consultations and negotiations at the various levels. In case if the dispute cannot be settled in such way, then, in accordance with the claim of one of the Parties, it is transferred for resolution to the Economic Court of the Commonwealth of the Independent States.”*²¹⁴
162. On the basis of Article 17 the Respondent submits that the present dispute is inadmissible and should instead be properly brought before the CIS Economic Court.
163. In support of its argument that the dispute is inadmissible the Respondent states that: (i) the Republic of Uzbekistan is the real party in interest here; and (ii) the dispute hinges on the interpretation of the 1992 Property Agreement.
164. As to point (i), the Respondent submits that the Claimants are acting as puppets to a dispute that actually involves the Republic of Uzbekistan.²¹⁵ The Respondent notes that

²¹² Respondent's Memorial on Preliminary Objections, dated 15 July 2017, ¶ 64.

²¹³ *Id.*; Musabekova, ¶ 37; Resolution of the Jogorku Kenesh of the KR “On Ratification of the agreement on mutual recognition of rights and regulation of property relations” No. 1404-XII 12 Jan. 1994 (R-0030).

²¹⁴ Agreement on Mutual Recognition of the Rights and Regulation of Property Relations dated 9 Oct. 1992, Art. 17 (C-0002).

²¹⁵ Hearing Transcript, dated 8 Jan. 2019, p. 39, Ins. 15-19.

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the Claimants are majority owned by the Republic of Uzbekistan. The Respondent further refers to the Diplomatic Note sent by the Republic of Uzbekistan,²¹⁶ and argues that the Claimants are not mentioned therein and that the Uzbek State refers to the properties as its own.²¹⁷ On this point the Respondent distinguishes the authorities relied on by the Claimants, being *Auconven*²¹⁸ and *Funnekotter v. Zimbabwe*.²¹⁹ The Respondent argues that these cases involved espousal which is unlike the present dispute where the Republic of Uzbekistan is the owner of the properties and is bringing the claim on its own behalf. The Respondent accepts that a State-owned entity is not barred from bringing an investor-State dispute,²²⁰ and that the use of diplomatic channels on behalf of an investor does not automatically transform an investor-State dispute into a State-to-State dispute,²²¹ however it argues that the present case is distinguishable because the Republic of Uzbekistan is the real party to the dispute for the aforementioned reasons.

165. As to point (ii), the Respondent argues that the dispute is covered by the 1992 Property Agreement because the Claimants' basis for having any rights in the properties stems from the 1992 Property Agreement, and not from any open private purchases or a direct relationship between these investors and the State.²²² The Respondent references a number of protocols concluded between the Kyrgyz Republic and the Republic of Uzbekistan and notes that these discuss "preserv[ing] for the Republic of Uzbekistan the right of ownership."²²³ The Respondent contends that the Claimants' own evidence

²¹⁶ Diplomatic Note No. 12/10169 dated 12 Apr. 2016 from the Ministry of Foreign Affairs of the Republic of Uzbekistan to the Ministry of Foreign Affairs of the Kyrgyz Republic (C-0026).

²¹⁷ Hearing Transcript, dated 8 Jan. 2019, pp. 39-40, lns. 25, 1-8.

²¹⁸ *Autopista Concesionada de Venezuela, C.A. (Auconven) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 Sept. 2001 (CL-0010).

²¹⁹ *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 Apr. 2009 (CL-0013).

²²⁰ Respondent's Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 139.

²²¹ *Id.*, ¶ 141.

²²² Hearing Transcript, dated 8 Jan. 2019, p. 42, lns. 8-22.

²²³ See Protocol on the Status of Implementation of the Intergovernmental Agreement in 1994 between the Kyrgyz Republic and the Government of Uzbekistan dated 8 Jan. 1995 ("**1995 Protocol**") (C-0004), art. 3 ("To preserve for the Republic of Uzbekistan the right of ownership . . ."). See also Protocol on the Mutual Recognition of the Property Rights to the Objects of the Social Sphere Created at the Expense of the Means of the Republic of Uzbekistan and the Kyrgyz Republic dated 2 Feb. 1994 (C-0003), art. 3 (claiming that the social sphere enterprises are "the property of the states or those who financed their establishment").

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“shows that their alleged interests in the resort properties do not originate from private transactions taken in a commercial capacity, but from official governmental resolutions and decrees enacted in order to preserve Uzbek state-owned assets located abroad.”²²⁴

166. Furthermore, the Respondent notes that the Claimants rely on the Diplomatic Note as the basis for their written request in compliance with Article 18 of the FIL.

167. The Respondent refers to the case of *MOX Plant*,²²⁵ which it argues presents a set of analogous circumstances.²²⁶ In that case the tribunal, while determining that it had jurisdiction to interpret the UNCLOS Convention, stayed the arbitration until the European Court of Justice could issue a ruling on “matters which essentially concern the internal operation of a separate legal order,” in that case the European Community, “to which both of the Parties to the present proceedings are subject.”²²⁷

168. The Respondent therefore argues that the Tribunal should decline to hear this claim as the dispute must be heard before the proper forum: the CIS Economic Court.

(b) *Claimants’ position*

169. The Claimants argue that this is not a State-to-State dispute as they are the interested parties in the case, that their rights do not derive from the 1992 Property Agreement, and that this dispute should not and cannot be heard before the CIS Economic Court.

170. Firstly, the Claimants submit that they are the interested parties to this dispute because it was their property interests that were assertedly expropriated through the 4 April

²²⁴ Resolution No. 81 of the Cabinet of Ministers of the Republic of Uzbekistan dated 14 Feb. 2003 (C-0060) (ordering that resort Jubileyniy be transferred to Uzpromstroybank). See also Decree No. 95k-50 of the State Property Committee of the Republic of Uzbekistan dated 27 May 1999 (C-0044) (stating that resort Dilorom is to be sold to Asaka Bank “[o]n the basis of the Resolution of the Cabinet of Ministers of the Republic of Uzbekistan” and an “order of the State Property Committee” and ordering Dilorom to transfer funds to the State Property Committee).

²²⁵ *The MOX Plant Case (Ireland v. United Kingdom)*, PCA Order No. 3, Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures, 24 June 2003 (RL-0051).

²²⁶ Respondent’s Memorial on Preliminary Objections, dated 15 July 2017, ¶ 68.

²²⁷ *The MOX Plant Case (Ireland v. United Kingdom)*, PCA Order No. 3, Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures, 24 June 2003 (RL-0051), ¶¶ 20-28.

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2016 decree.²²⁸ The Claimants state that “[e]ach Claimant had authorized use of the properties through Respondent’s official state acts, as well as lease agreements concluded with local governmental administrations in the Kyrgyz Republic, and were registered as legal entities in the Kyrgyz Republic through the established procedures.”²²⁹ The Claimants argue that the fact that the Republic of Uzbekistan owns shares in each of the Claimants does not affect their rights in this regard.²³⁰ The Claimants add that there is no evidence that the Claimants are acting in a governmental capacity in this case, and that “[r]unning resorts and health resorts in another country for profit, or for the use of your employees, is not a government activity.”²³¹

171. The Claimants argue that it is well established that State-owned entities are not precluded from bringing claims as foreign investors in their own right,²³² and that a tribunal cannot look beyond a party’s corporate structure, absent extraordinary circumstances. As to the latter point, the Claimants argue that tribunals cannot seek to pierce the corporate veil in the absence of a showing of some sort of wrongdoing, and refer to the case of *Rumeli Telekom v. Kazakhstan*, where the tribunal held that “[t]he principle of piercing the corporate veil only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability.”²³³ As to the former point, the Claimants refer to the case of *Beijing Urban Construction Group v. Yemen*, where the tribunal exercised jurisdiction over a dispute involving a claimant that was a “publicly funded

²²⁸ Order No. 138-r of the Kyrgyz Government dated 4 Apr. 2016, Art. 1(1) (C-0009).

²²⁹ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 153; See Issyk-Kul District Administration State Act for Right of Land Use No. 54 dated 11 Nov. 1999 (confirming allocation of lease dated 5 Nov. 1999 to Resort Dilorom) (C-0050); Issyk-Kul District Administration Resolution No. 145 dated 1 Apr. 2005 (C-0067) (authorizing forty-nine year land lease of resort property to Resort Rokhat); Certificate for the Right of Temporary Use of Land dated 9 Apr. 2012 (C-0073) (certifying forty-nine year land lease agreement for Resort Buston dated 9 Feb. 2012); Certificate No. 20037258 “On State Re-registration of the Legal Entity” dated 29 Dec. 1999 (C-0051) (re-registering Resort Zolotiy Peski as a legal entity); Kenenbaev ¶¶ 51-58.

²³⁰ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 153.

²³¹ Hearing Transcript, dated 8 Jan. 2019, p. 92, Ins. 9-11.

²³² Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 154.

²³³ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 ¶ 328 (CL-0039).

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and wholly state-owned entity established by the Chinese government.”²³⁴ The Claimants also refer to the case of *ČSOB v. The Slovak Republic* where the tribunal held that it had jurisdiction, even when the claimant had “act[ed] on behalf of the State in facilitating or executing” transactions related to the dispute, because it also found that the claimant had not exercised any governmental functions, in that “the nature of [the claimant’s] activities . . . w[as] essentially commercial rather than governmental in nature.”²³⁵ The Claimants argue that there is no evidence that they performed any governmental functions.²³⁶

172. The Claimants further submit that there is no evidence of an agency relationship between the Claimants and the Republic of Uzbekistan.²³⁷ The Claimants argue that there is no evidence of: financial contributions from the Republic of Uzbekistan; the delegation of governmental acts; or, the operation or direction of the investments by the Republic of Uzbekistan.²³⁸ In fact, the Claimants note that they are registered commercial entities in the Kyrgyz Republic. As for the Diplomatic Note, the Claimants argue that the use of diplomatic notes at the start of an investor-State dispute does not transform the dispute into a State-to-State case, and that it is not uncommon for the home State of an investor to engage in an effort to resolve the dispute diplomatically.²³⁹ The Claimants refer to the case, amongst others, of *Funnekotter v. Zimbabwe*, where the tribunal determined that it had jurisdiction even though there had been a number of communications from the Dutch embassy to the respondent.²⁴⁰ On this basis the Claimants submit that the Diplomatic Note from the Republic of Uzbekistan does not establish that the State is the interested party in the dispute.

²³⁴ *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction dated 31 May 2017 ¶¶ 39, 41-42 (CL-0012).

²³⁵ *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction dated 24 May 1999 ¶ 20 (CL-0017).

²³⁶ Hearing Transcript, dated 8 Jan. 2019, p. 94, lns. 14-17.

²³⁷ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶¶ 154-158.

²³⁸ Hearing Transcript, dated 8 Jan. 2019, pp. 94-95, lns. 18-25, 1-8.

²³⁹ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 157.

²⁴⁰ *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 Apr. 2009, ¶ 31 (CL-0013).

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173. The Claimants also submit that the BIT does not preclude State-to-State disputes. The Claimants refer to Article 1 of the BIT, which defines “investor” to include “the states of the Contracting Parties.” On this basis the Claimants argue that the Republic of Uzbekistan could bring an investment dispute under Article 9 or Article 10 of the BIT. The Claimants state that “there is no doubt that there is some jurisdiction, whether it’s under Article 10, under Article 9 or...under the [FIL]. There is jurisdiction of this Tribunal to enquire further, and it would be a manifest excess to disregard that jurisdiction and refuse to go further.”²⁴¹
174. Responding to the Respondent’s arguments concerning the 1992 Property Agreement, the Claimants submit that only state claims are admissible thereunder. The Claimants highlight the language of Article 17 of the 1992 Property Agreement which provides that “[d]isputes between the Parties” can be transferred for resolution to the CIS Economic Court. The Claimants argue that the “parties” are the Kyrgyz Republic and the Republic of Uzbekistan, and that since the Claimants are plainly not parties to the 1992 Property Agreement, Article 17 is inapplicable. The Claimants comment that it could potentially be a parallel claim if the Republic of Uzbekistan chose to dispute the properties.²⁴²
175. The Claimants further argue that their leases and licenses do not solely derive from the 1992 Property Agreement.²⁴³ In response to the Respondent’s reliance on protocols as evidence of State activity, the Claimants argue that these protocols, in particular the 1995 Protocol,²⁴⁴ do not diminish the property interests that subsequently were

²⁴¹ Hearing Transcript, dated 8 Jan. 2019, p. 98, lns. 7-13.

²⁴² *Id.*, pp. 98-99, lns. 25, 1-2.

²⁴³ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 166; *See, e.g.*, Resolution No. 619 of the Council of Ministers of Kyrgyz SSR dated 25 Nov. 1959 (C-0028); Resolution No. 173 of the Council of Ministers of Kyrgyz SSR dated 9 Apr. 1965 (C-0029); Act on Land Use by the Executive Committee of Issyk-Kul District Council of People’s Deputies dated 7 June 1967 (C-0030); Act on Land Use by the Executive Committee of Ton District Council of People’s Deputies dated 11 Oct. 1971 (C-0031); Issyk-Kul District Administration Resolution No. 611 dated 5 Nov. 1999 (C-0049); Issyk-Kul District Administration Resolution No. 145 dated 1 Apr. 2005 (C-0067); Agreement for Lease of a Plot of Land dated 9 Feb. 2012 (C-0072); Land Lease Agreement No. 38 dated 27 Apr. 2015 (C-0076).

²⁴⁴ Protocol on the Status of Implementation of the Intergovernmental Agreement in 1994 between the Kyrgyz Republic and the Government of Uzbekistan dated 8 Jan. 1995 (C-0004).

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conveyed to the Claimants in 1999.²⁴⁵ The Claimants also refer to a protocol from 1994, and Article 3 therein which provides that:

*“Parties have agreed on the need to recognize that the enterprises and the facilities (or their corresponding shares in interest) of the social sphere, located on the territory of the other states, that were previously established from the funds of the republican budgets, and funds of enterprises and organizations previously subordinate to the Republic and the former Soviet Union, are the property of the states or those who financed their establishment, or those who own the above-mentioned enterprises and the organizations previously subordinate to the Republic and the former Soviet Union.”*²⁴⁶

176. The Claimants argue that the Respondent approved each of the individual Claimants’ rights to contribute funds and develop their resorts and therefore the investments “are the property” of the Claimants, i.e. “those who financed their establishment.”²⁴⁷ Because these various property rights are owned by the Claimants, and are not held by the Republic of Uzbekistan, the Claimants submit that the dispute cannot be put before the CIS Economic Court.²⁴⁸
177. Even if the 1992 Property Agreement does affect the Claimants’ property rights, they submit that a stay of this proceeding pending a ruling from the CIS Economic Court is neither necessary nor appropriate.²⁴⁹ The Claimants argue that the Tribunal has a broad

²⁴⁵ Hearing Transcript, dated 9 Jan. 2019, p. 70, lns. 14-19; See Certificate No. 4990181 “On State Re-registration of the Legal Entity” dated 24 Mar. 1999 (C-0042); Issyk-Kul District Administration Resolution No. 145 dated 1 Apr. 2005 (C-0067); Order No. 2397 of the Department of Justice of the Kyrgyz Republic dated 13 Aug. 1999 (C-0048); Issyk-Kul District Administration Resolution No. 611 dated 5 Nov. 1999 (C-0049).

²⁴⁶ Protocol on Mutual Recognition of Property Rights to the Facilities of the Social Sphere Established from the Funds of the Republic of Uzbekistan and the Kyrgyz Republic, signed 2 Feb. 1994, Art. 3 (C-0003).

²⁴⁷ Issyk-Kul District Administration Resolution No. 611 dated 5 Nov. 1999 (C-0049); Certificate No. 20037258 “Of Account Re-registration of the Legal Entity” dated 29 Dec. 1999 (C-0051); Certificate No. 23414164 “On State Registration of Legal Entity” dated 20 Oct. 2004 (C-0066); Issyk-Kul District Administration Resolution No. 145 dated 1 Apr. 2005 (C-0067).

²⁴⁸ Hearing Transcript, dated 8 Jan. 2019, p. 99, lns. 5-14.

²⁴⁹ Claimants’ Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 167.

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jurisdiction to determine the dispute before it, stemming from both Kyrgyz law and the BIT.²⁵⁰ The Claimants rely on the case of *Eureko v. Slovak Republic* in which the tribunal upheld jurisdiction, rejecting the respondent's request to stay the proceedings pending a referral to the European Court of Justice concerning a dispute arising under the Netherlands-Slovakia BIT.²⁵¹ The tribunal noted that "the proper framework for its analysis of these arguments is, in the first place, the framework applicable to the legal instrument from which the Tribunal derives its prima facie jurisdiction."²⁵² Responding to the Respondent's reliance on *MOX Plant*, the Claimants argue that this case involved obligations under the Euratom Treaty, implicating the European Court of Justice's specific regulatory jurisdiction.²⁵³ Furthermore, they argue that *MOX Plant* was undisputedly a State-to-State proceeding between the United Kingdom and Ireland, while the present dispute is not between the Kyrgyz Republic and the Republic of Uzbekistan.²⁵⁴

(c) *Tribunal's findings*

178. The Respondent argues that this dispute is inadmissible because it falls within Article 17 of the 1992 Property Agreement, and therefore the most appropriate forum for this dispute to be determined is the CIS Economic Court. Examining Article 17 it is apparent that it allows for the jurisdiction of the CIS Economic Court where there is a "[d]ispute[] between the Parties regarding interpretation and application of the provisions of the present Agreement..."²⁵⁵ The inquiry is therefore two pronged: (i) is there a dispute between the parties to the 1992 Property Agreement; and (ii) does such dispute concern the interpretation and application of the provisions of the 1992 Property Agreement. If both of these questions are answered in the affirmative, the

²⁵⁰ *Id.*, ¶¶ 168-169.

²⁵¹ *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension dated 26 Oct. 2010 ¶¶ 148, 278-79, 283, 292 (CL-0053).

²⁵² *Id.*, ¶ 228.

²⁵³ Claimants' Counter-Memorial on Preliminary Objections, dated 23 Sept. 2017, ¶ 172.

²⁵⁴ *Id.*

²⁵⁵ Agreement on Mutual Recognition of the Rights and Regulation of Property Relations dated 9 Oct. 1992, Art. 17 (C-0002).

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Tribunal must then consider whether it is appropriate to stay, or dismiss, these arbitration proceedings pending a decision by the CIS Economic Court.

179. Examining the first part of Article 17, the “Parties” to the 1992 Property Agreement are the Kyrgyz Republic and the Republic of Uzbekistan. The Parties in this arbitration, as pleaded, are the Kyrgyz Republic and the Claimants (who are four separate legal entities incorporated in the Republic of Uzbekistan). The Respondent urges, however, that because the Claimants are majority owned by the Republic of Uzbekistan, and because of various actions that have been taken by the Republic of Uzbekistan in demonstrating its interest in this case, the Republic of Uzbekistan is in fact the real claimant. On this basis, the Respondent contends that this dispute comes within Article 17 as it concerns the two “parties” to the 1992 Property Agreement.
180. The Tribunal firstly notes that the doctrine of piercing of the corporate veil is irrelevant in this context. As the tribunal in *Rumeli Telekom v. Kazakhstan* noted, “the principle of piercing the corporate veil only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability.”²⁵⁶ There is no allegation that there has been any misuse of corporate formalities in this case.
181. The Tribunal is concerned with a different question: is the Republic of Uzbekistan the real party in interest such that, for jurisdictional purposes, it should in substance be considered to be the claimant in these proceedings? The Claimants are legal entities established under the laws of Uzbekistan, and their nature as State-owned entities does not prevent them from commencing this arbitration in their own capacity. This has been recognized in authorities discussed by the Parties. The tribunal in *Beijing Urban Construction Group v. Yemen* stated that “the issue is not the corporate framework of the State-owned enterprise, but whether it functions as an agent of the State in the fact-

²⁵⁶ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 ¶ 328 (CL-0039).

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specific context.”²⁵⁷ The tribunal in *ČSOB v. The Slovak Republic* held that it had jurisdiction when the claimant had “act[ed] on behalf of the State in facilitating or executing” transactions related to the dispute, but that “the nature of [the claimant’s] activities . . . w[as] essentially commercial rather than governmental in nature.”²⁵⁸ There is nothing in the record to suggest that the Claimants have acted as agents of the Republic of Uzbekistan in their management of the relevant properties, and the Tribunal does not understand, based on the evidence before it, that the Claimants have carried out any acts of a governmental rather than a purely commercial nature.

182. The Respondent relies on the Diplomatic Note as evidence of the Republic of Uzbekistan’s interest in this dispute and it notes that the Claimants are not mentioned therein and that the Republic of Uzbekistan refers to the properties as its own.²⁵⁹ The Tribunal has already examined the Diplomatic Note in the context of the consultation and negotiation provision contained within the FIL and has decided that the Republic of Uzbekistan was capable of providing diplomatic assistance to put the Respondent on notice of a dispute.
183. The Tribunal is persuaded that the Republic of Uzbekistan’s actions did not extend beyond attempting to assist the Claimants in finding an amicable resolution to the dispute. The Tribunal takes note of the case of *Funnekotter v. Zimbabwe* where there had been a number of communications from the Dutch embassy to the respondent advising it of its obligations under a bilateral investment treaty.²⁶⁰ A State is capable of seeking to assist in the resolving of a dispute concerning one of its nationals. The fact that the State is also a majority shareholder in the relevant entity does not, in and of itself, make that entity an agent of the State. The inquiry that must be made is whether the State, by way of its assistance, espoused the underlying claims thereby

²⁵⁷ *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction dated 31 May 2017 ¶ 39 (CL-0012).

²⁵⁸ *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction dated 24 May 1999 ¶ 20 (CL-0017).

²⁵⁹ Diplomatic Note No. 12/10169 dated 12 Apr. 2016 from the Ministry of Foreign Affairs of the Republic of Uzbekistan to the Ministry of Foreign Affairs of the Kyrgyz Republic (C-0026).

²⁶⁰ *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 Apr. 2009, ¶ 31 (CL-0013).

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making it a State-to-State dispute. In *Aucoven* the tribunal held that “the purpose of Mexico’s efforts has been to facilitate the settlement of the dispute between Aucoven and Venezuela. There is no indication that Mexico has espoused Aucoven’s claim.”²⁶¹ The Respondent refers to *Aucoven* as an instance where “a State with no ownership interest in the investment attempts to facilitate meetings to discuss settlement and refrains from asserting a claim in its own right.”²⁶² The Tribunal does not agree, however, that having an ownership interest in the underlying entity should prohibit the State from offering the same services to that entity that it offers to non-State owned entities. The efforts by a State to assist in the resolution of a dispute, even where it has an interest (direct or indirect) in the dispute, do not automatically transform the matter into a State-to-State dispute.

184. The Tribunal is satisfied that the Diplomatic Note was sent in an effort to reach an amicable settlement to the dispute. The fact that the Claimants were not individually named is irrelevant because the four specific properties that form the basis for the dispute were referenced. The Diplomatic Note was a first attempt at opening a discussion on the relevant matters and it was not necessary for it to provide a detailed description of the dispute including all the corporations involved and their respective interests.
185. For the abovementioned reasons, the Tribunal decides that the Republic of Uzbekistan is not the real party in interest in these proceedings. There is no allegation that the Claimants were exercising sovereign powers in pursuing their investments in the Kyrgyz Republic and in that sense were acting as the agents of the Republic of Uzbekistan as a sovereign entity, which is the only capacity that is relevant in determining whether the Claimants are a “Party” for the purposes of Article 17 of the 1992 Property Agreement. Therefore, this arbitration is not a dispute between the Kyrgyz Republic and Republic of Uzbekistan and Article 17 is inapplicable. Based on

²⁶¹ *Aucoven* ¶ 139.

²⁶² Respondent’s Reply on Preliminary Objections, dated 11 Nov. 2017, ¶ 141.

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this finding it is unnecessary to consider whether this dispute concerns the interpretation and application of the provisions of the 1992 Property Agreement.

B. Costs

1. Respondent's costs

186. The Respondent submits that its costs for these arbitration proceedings so far total USD 1,335,376.90 for legal fees, USD 93,871.85 for disbursements and USD 150,000 for its advance on costs to ICSID.
187. On the issue of the Respondent's withdrawn BIT-in-force objection, the Respondent argues that it withdrew this argument at the earliest practicable moment without any legal obligation to do so.²⁶³

2. Claimants' costs

188. The Claimants submit that their costs for these arbitration proceedings so far total USD 3,324,118.38 plus EUR 5,522.00 in fees and expenses. The Claimants attribute USD 447,763.16 plus EUR 1,200.00 to the Respondent's withdrawn BIT-in-force objection.
189. The Claimants submit that the Respondent should be compelled to pay all of its costs on the basis of "loser pays," but argue in particular that the Respondent must pay for the costs incurred in its now abandoned BIT-in-force objection.²⁶⁴ The Claimants highlight that the objection was withdrawn only a week before the hearing and over a holiday weekend.

3. Tribunal's findings

190. Article 58 of Schedule C to the Additional Facility Rules provides:

²⁶³ Respondent's Letter to the Tribunal dated 7 Feb. 2019, p. 5.

²⁶⁴ Claimants' Submission on Costs, dated 7 Feb. 2019, ¶ 5.

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“(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.

(2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.”

191. Given the early stage of the proceedings, and the fact that the Parties have raised the prospect of further jurisdictional objections, the Tribunal decides to defer its decision on costs until a later point in time.
192. Having so decided, the Tribunal wishes to point out that the Tribunal and the Parties have spent significant time considering the entry into force of the BIT objection, which was abandoned at the last minute by the Respondent. The Tribunal does not find much merit in the Respondent’s explanations for the timing of its withdrawal of this objection and is concerned that this has resulted in wasted costs. The Tribunal shall consider this factor when it comes to making its future decision on costs.

IV. DECISION

193. For the reasons set forth above, the Tribunal:
 - 193.1. REJECTS the Respondent’s arguments that the Tribunal lacks jurisdiction under the FIL;
 - 193.2. REJECTS, by majority, the Respondent’s arguments that the Tribunal lacks jurisdiction under the BIT;

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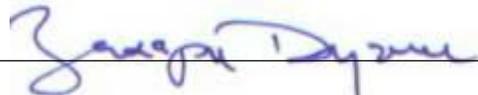
193.3. REJECTS the Respondent's arguments that the Tribunal should stay the proceedings, or declare them inadmissible, until the CIS Economic Court has ruled upon the interpretation and application of the 1992 Property Agreement:

193.4. RESERVES its decision on costs until a later time in these proceedings.



Mr. Gary B. Born

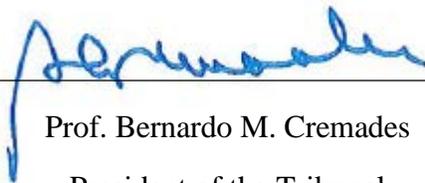
Arbitrator



Prof. Zachary Douglas QC

Arbitrator

(subject to the attached Partial Dissenting
Opinion)



Prof. Bernardo M. Cremades

President of the Tribunal