

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**JSC TASHKENT MECHANICAL PLANT
JSCB ASAKA
JSCB UZBEK INDUSTRIAL AND CONSTRUCTION BANK
NATIONAL BANK FOR FOREIGN ECONOMIC ACTIVITY
OF THE REPUBLIC OF UZBEKISTAN**

Claimants

and

KYRGYZ REPUBLIC

Respondent

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

**PARTIAL DISSENTING OPINION
PROF. ZACHARY DOUGLAS KC**

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A INTRODUCTION

1. I regret that I am compelled to dissent for the second time in these proceedings. My first dissent was in respect of the majority's Decision on Bifurcated Preliminary Objections dated 1 May 2019 to the extent that they upheld jurisdiction in respect of claims arising under the BIT. The investor/state dispute resolution provision in Article 10 of the BIT only makes reference to arbitration under the ICSID Convention, which was not in force for the Kyrgyz Republic at the time the proceedings commenced or indeed at the date of the Decision on Bifurcated Preliminary Objections. The majority held that a reference to arbitration under the ICSID Convention was equally a reference to arbitration under the ICSID Additional Facility Rules and hence this arbitration has proceeded under these rules despite that fact that there was no consent to this form of arbitration in Article 10 of the BIT. The Kyrgyz Republic later ratified the ICSID Convention on 21 April 2022 and it entered into force on 21 May 2022. Needless to say, this does not mean that the essential requirement of Article 10 of the BIT (both Contracting Parties being Member States of the ICSID Convention) has been fulfilled retroactively. I thus maintain that the Tribunal has no jurisdiction to adjudicate claims arising under the BIT.

2. The present dissent to the majority's final award is partial but is in respect of the following issues:
 - 2.1. Claimant TMP has not made a covered investment under the BIT because the alleged investment was made in 1951 during the Soviet period before the Republic of Kyrgyzstan and the Republic of Uzbekistan came into existence in 1991. This is a jurisdictional point.
 - 2.2. At the date of the alleged expropriation, Claimant TMP had no rights in respect of any assets in the Republic of Kyrgyzstan and thus had no covered investment. This is a jurisdictional point but it also extends to liability (the Republic of Kyrgyzstan cannot expropriate rights that Claimant TMP did not have at the time of the expropriation) and to quantum (no compensation is therefore owed).
 - 2.3. The other three Claimants did have some rights in respect of assets in the Republic of Kyrgyzstan at the time of the alleged expropriation, but not the full extent of the rights

that they have asserted. This has an impact on the scope of liability and, more importantly, on quantum, because the Claimants' valuation experts have been instructed to make some false assumptions about the nature and extent of the Claimants' rights over their investments for the purposes of undertaking their valuations.

- 2.4. The award of interest at a rate of LIBOR plus 4% implicitly carries a punitive element because it is not a commercially reasonable rate and therefore goes beyond the compensatory objective of an award of interest. The Tribunal has no competence to award punitive damages via a non-commercial interest rate on the basis that the expropriation is unlawful.
3. My dissent is organised into four sections (Jurisdiction, The Claimants' Investments, Liability, and Quantum) rather than following the outline of the issues set out above. That is because it is important to analyse in detail the four alleged investments of the four Claimants side-by-side. This analysis reveals that Claimant TMP was in a fundamentally different position to the other three Claimants: it had no validly registered property rights at the date of the expropriation, whereas the other Claimants did. The majority is wrong to treat the four Claimants as if they were in the same position.

B JURISDICTION

4. There are two separate reasons why the Tribunal has no jurisdiction over Claimant TMP's alleged investment in the Resort Zolotiye Peski. The first is that the BIT and the Foreign Investment Law ("FIL") do not apply to investments made before the Republic of Uzbekistan and the Republic of Kyrgyzstan came into existence. The second reason is that Claimant TMP had no covered investment in the Resort Zolotiye Peski at the time of the 2016 Order or otherwise: that second reason is dealt with in the section "The Claimants' Investments".

B1 Jurisdiction *ratione temporis* in respect of the BIT

5. Article 12 of the BIT reads as follows:

This Agreement shall apply to investments made on the territory of one Contracting Party in accordance with its legislation by investors of the state of the other Contracting Party, regardless of whether they were made before or after the entry into force of this Agreement.

6. The Kyrgyz Republic, as the “Contracting Party” for the alleged investment, did not come into existence until 1991. The Republic of Uzbekistan, as the “Contracting Party” of Claimant TMP, also did not come into existence until 1991. An investment made prior to 1991 cannot be (i) be made “on the territory” of a State at a time when such State did not yet exist or (ii) be “in accordance with its legislation” given that there were no legislative organs of that State in existence or (iii) be made by an investor of another State that also did not yet exist.
7. This is reinforced by Article 1(8) of the BIT, which defines “territory” as “*territory of one Contracting Party, over which the Contracting Party exercises its sovereign rights and jurisdiction in accordance with international law*”. The Kyrgyz Republic as a Contracting Party did not exercise sovereign rights and jurisdiction over any territory until after 1991.
8. The ordinary meaning of the terms of Article 12 is thus straightforward: investments made before either Contracting Party came into existence are not covered by the BIT. But Article 12 of the BIT clearly has an *effet utile*: it means that any investment made after the creation of the Kyrgyz Republic in 1991 but before the BIT came into force in 1997 will be protected by the BIT. The same goes for investments in the Republic of Uzbekistan.
9. The majority of the Tribunal says that Article 12 means that any investment made prior to the creation of the Kyrgyz Republic in 1991 is also protected by the BIT. They say this follows from the plain meaning of Article 12 and that a temporal limitation could have been included but was not: “*Some BITs do contain temporal limitations (for example, limiting the category of protected investments to investments made after the BIT came into force), but the BIT in this case does not.*”¹
10. I do not agree with this interpretative approach, which seeks to draw dispositive inferences from what other treaties say in other contexts. Pursuant to Article 31 of the VCLT¹, our task is to give meaning to Article 12 of the BIT in the circumstances pertaining to the Republic of Uzbekistan and the Kyrgyz Republic. The majority is correct that some treaties do contain explicit temporal limitations by which only investments made after the treaty comes into force are protected by the treaty. The majority is also correct that, as a general proposition, investments made prior to a treaty coming into force are protected by the treaty unless there is a stipulation to the contrary in the treaty itself. But both these propositions are irrelevant to the question that must be addressed here, which is whether the ordinary

¹ Award, §410.

meaning of the terms used in Article 12 of the BIT in their proper context and having regard to the object and purpose of the BIT should lead an interpreter in good faith to conclude that investments made at any time prior to the creation of either Contracting Party to the BIT are apt to be protected by the BIT.

11. The majority has to contort the ordinary meaning of the terms of Article 12 to arrive at an affirmative answer to this question. To take one example, to overcome the problem that investments have to be made in accordance with the legislation of the Contracting Party, the majority says:

[T]he investments in question were made on territory which is now Kyrgyz territory, in accordance with the legislation that was in force when the investments were initially made, and Kyrgyzstan succeeded to that territory upon its independence. Thereafter, the investments were owned, developed, and improved in accordance with the legislation of the Kyrgyz Republic. Again, this fully satisfies the requirements of Article 12.²

12. And in relation to the definition of “territory” in Article 1(8) of the BIT, which expressly links the Contracting Party’s sovereignty and jurisdiction under international law to the territory in question, the majority simply asserts that it “*does not contain any language indicating that the term ‘territory’ only applies to investment made before a certain point in time*”.³ But it does. Unless and until the Contracting Party has sovereignty over territory then it is not “territory” for the purposes of Article 12 in accordance with the express definition of “territory” in Article 1(8). The Kyrgyz Republic did not have sovereignty over any territory until 1991. By acquiring certain rights to the Resort Zolotiye Peski in 1959, Claimant TMP’s predecessor did not make an investment in the territory of the Kyrgyz Republic; it made an “investment” in the Soviet Union, although no one at the time of course would have labelled the gratuitous allocation of a holiday camp for workers in a State factory as an “investment”, let alone a foreign investment by an Uzbek national.
13. This leads to an obvious point concerning the object and purpose of the BIT, which the majority has overlooked entirely. What conceivable interest would the Kyrgyz Republic and the Republic of Uzbekistan have had in extending the BIT to “investments” made in the Soviet Union before those States came into existence? Apart from the fact that the Kyrgyz Republic and the Republic of Uzbekistan by definition had no sovereign say or control over laws and policies on foreign investment during the Soviet period, foreign investment in the

² Award, §416.

³ Award, §420.

Soviet Union was virtually prohibited and almost non-existent until the perestroika reforms in the late 1980s. Private ownership of land by anyone was prohibited throughout. The transaction leading to the alleged “investment” of the predecessor of Claimant TMP in Resort Zolotiye Peski was between different state organs from different constituent republics of the Soviet Union, which occurred a few years after the death of Stalin. It is difficult to fathom how the recharacterization of transactions such as this one as protected “investments” under the BIT would serve to promote the object and purpose of that treaty as set out in its preamble:

Desiring to promote greater economic cooperation between them for the mutual benefit of both countries on a long-term basis,

Recognizing the need for the promotion and protection of investments with the aim of creating and maintaining favorable conditions for investments by investors of one Contracting Party on the territory of the other Contracting Party,

Agreeing that a stable basis for investment will maximize the effective use of economic resources and the development of productive forces[.]

14. At a basic level there is a fundamental mismatch in applying an instrument designed to encourage foreign investments in a market economy to historic transactions that occurred in a planned and centralized economy, which only recognized private property rights in very limited circumstances and shunned foreign capital altogether. The ordinary meaning of the terms used in Article 12 excludes the possibility of such a mismatch; and so does common sense when considering the object and purpose of the BIT.
15. The majority’s interpretation of Article 12 also means that there is no temporal limit at all to when protected investments can be made so long as they have a physical connection to what is now the national sovereign territory of the Kyrgyz Republic. The majority has found that “investments” made during the Soviet period qualify for protection without limitation. Does this principle extend to the period when “Kirghizia” was part of the Russian Empire in the late nineteenth century? As a stopover on the Silk Road, the Issyk Kul Lake region, which is the location of the alleged investments in this case, was coveted by many different rulers, and was ceded to the Russian Empire by the Manchurian Qing dynasty through the Treaty of Tarbagatai. How far back do we go?
16. The majority’s refusal to attribute any significance to the timing of statehood is also likely to pose difficulties in other cases. By way of example, the Kosovo/Switzerland BIT (2011)

contains virtually identical provisions to Article 12 and the definition of territory in Article 1(8) of the BIT in this case. Taking the majority's approach, it would have to be concluded that investments made in the territory of what is now Kosovo but prior to its independence from Serbia are protected under that treaty.

17. It is accepted by the Claimants that the predecessor to Claimant TMP made its alleged investment in Resort Zolotiye Peski before 1991.⁴ It follows from the foregoing analysis of Article 12 of the BIT that it is not a covered investment BIT and therefore the Tribunal has no jurisdiction to hear claims in relation to it.

B2 Jurisdiction *ratione temporis* in respect of the Foreign Investment Law

18. The same temporal limitation arises in respect of the FIL,⁵ albeit for different reasons. The FIL by its express terms regulates investments made in the Kyrgyz Republic, which came into existence in 1991. The definition of “Foreign investor”, for instance, reads: “*any natural or legal persons other than domestic investors, making an investment in the economic activity in the Kyrgyz Republic...*”. Article 3, which governs the scope of the FIL, states that: “*Relations connected to the direct investments in the Kyrgyz Republic are regulated by this Law and other normative legal acts of the Kyrgyz Republic adopted in accordance with this Law.*” Article 23 of the FIL is entitled: “*Application of the current law to foreign investments made before its adoption*” reads:

Foreign investors registered in the Kyrgyz Republic before the enactment of this Law shall be entitled to incentives provided by part one of Article 20 and Article 23 of Law of the Kyrgyz Republic “On Foreign Investments in the Republic of Kyrgyzstan” (Gazette of the Supreme Council of the Republic of Kyrgyzstan, 1991, No. 13, page 449) with the amendments and modifications dated 7 May 1993 and 28 July 1995 (Gazette of the Supreme Council of the Kyrgyz Republic, 1993, No. 9, page 181; 1995, No. 10, page 390) until their expiration date.

19. This provision regulates the transitional situation pertaining to foreign investors registered in the Kyrgyz Republic under the first law that allowed them to do so, which was enacted in 1991, the same year as the creation of the Kyrgyz Republic. The Kyrgyz legislature thus expressly regulated the position of foreign investors that had made investments between 1991 and the date of the FIL (2003). The notion that, by its silence, it also extended the protections of the FIL to any investments made during the Soviet period before 1991, is impossible to accept.

⁴ C's Reply, §320.

⁵ Legal Authority RL-116.

20. If the underlying purpose of the FIL is considered, it is obvious that the Kyrgyz legislature would have had no interest in extending investment privileges and protections to transfers of property that occurred during the Soviet period before the Kyrgyz Republic came into existence. That purpose is set out in the preamble of the FIL:

This Law establishes the basic principles of the state investment policy aimed at improving the investment climate in the Republic and stimulating attraction of domestic and foreign investments by providing fair, equitable legal treatment to investors and guarantees of protection of the investments attracted to the Kyrgyz Republic.

21. It is also the case that property transfers such as that which occurred with Claimant TMP's predecessor in respect of Resort Zolotiy Peski in 1959 would obviously not have been considered as foreign investments in any sense: this was a transfer between two state organs within the Soviet Union, a country that did not welcome foreign capital until the late 1980s.

B3 *Res judicata*

22. The majority concludes the section on jurisdiction in the Award with the troubling assertion that “*the Tribunal independently considers that the Respondent’s objections must be rejected pursuant to the doctrine of res judicata*” on the basis of the Tribunal’s prior Decision on Bifurcated Preliminary Objections dated 1 May 2019.⁶ The majority is mistaken to rely on *res judicata* in this context.
23. **First**, in the ICSID system, decisions do not have the force of *res judicata* until they are incorporated into an award. An essential feature of *res judicata* is that the judgment in question produces effects on the parties outside the proceedings in which it is rendered. But decisions of ICSID tribunals only have effect within the proceedings until they have been incorporated into the final award: Contracting States have an obligation to recognize only an award as binding (Art. 54(1)); recognition and enforcement is contemplated only in respect of an award (Art. 54(2)); only awards can be challenged through annulment proceedings (Art. 52). Indeed, if decisions were *res judicata* before incorporation in the final award, then the requirement of incorporation into the final award under Article 48(3) would be redundant. I refer to the extensive reasoning on this point in *Standard Chartered Bank v TANESCO*,⁷ which has been subsequently adopted in several other cases.
24. **Second**, the Tribunal expressly left open the possibility that the Respondent might raise jurisdictional objections after the Tribunal’s Decision on Bifurcated Preliminary Objections.

⁶ Award, §433.

⁷ ICSID Case No. ARB/10/20, Award of 12 September 2016, §§307-324.

In other words, neither the Tribunal nor the Parties operated under the assumption that the Respondent could only raise jurisdictional objections at one juncture in these proceedings, which was after receipt of the Claimants' Request for Arbitration but before receipt of the Claimants' Memorial on the merits.

25. Paragraph 14.2 of Procedural Order No. 1 reads:

Respondent shall file a Notice of Preliminary Objections, or a Notice that it does not intend to file any Preliminary Objections, within one week of the date of this Order. In the event that Respondent files a Notice of Preliminary Objections, it is presumed that the proceedings shall be bifurcated to have the Tribunal decide those preliminary objections and Option 1 in Annex A shall apply. The Respondent shall not be precluded from raising Preliminary Objections after Claimants' Memorial, but it is presumed that these Preliminary Objections would not be bifurcated.

26. If the Respondent were to raise jurisdictional objections after the Claimants' Memorial, then it had no right to insist that they should be determined in a bifurcated procedure. Instead, those objections would have to be dealt with in the next phase leading to a final award. What the majority is now saying is that the Tribunal's Decision on Bifurcated Preliminary Objections is *res judicata* in respect of objections that were not raised in the bifurcated procedure but were instead raised by the Respondent after the Claimants' Memorial as it was entitled to do in accordance with the express terms of Procedural Order No. 1. The doctrine of *res judicata* can have no application in these circumstances and a refusal to adjudicate the Respondent's objections would be a violation of due process.
27. It is standard practice in ICSID arbitration to reserve for the respondent party the right to raise jurisdictional objections after its receipt of the claimant's full pleading on the merits given that it is only upon receipt of that pleading and the evidence accompanying it that the respondent may have sufficient information to make certain types of jurisdictional objections. If the respondent party has been afforded an earlier opportunity to raise preliminary objections in a bifurcated procedure, then its right to raise further jurisdictional objections after receipt of the claimant's full pleading will typically not entail the further suspension of the proceedings on the merits. Instead, the tribunal will determine those further objections in a final award. There is no justification for departing from this standard practice, *a fortiori* when it is reflected in the Tribunal's own procedural order as agreed to by the Parties.

C THE CLAIMANTS' INVESTMENTS

C1 Introduction

28. In the Kyrgyz Republic, rights to immovable property are subject to state registration and registration is constitutive of such rights (i.e. the existence and validity of such rights are contingent upon their state registration). The same system applies in a great number of countries.
29. In the present case, three of the four Claimants had registered rights over immovable property in the Kyrgyz Republic. They undertook positive steps to secure those rights in the transitional period following the creation of the Kyrgyz Republic. Those rights were then expropriated in 2016 by the Order of the Government of the Kyrgyz Republic of 4 April 2016 (“**2016 Order**”).
30. The Claimant TMP, in contrast, did not take any steps to register rights in relation to the Zolotiye Peski Resort. That is not in dispute. As a result, as a matter of Kyrgyz law, it had no valid property rights in the Zolotiye Peski Resort in 2016.
31. Despite this fundamental difference in the situation of Claimant TMP, the majority has treated the four Claimants as if they were in the same position in 2016. I consider this to be a serious error that goes to jurisdiction, liability and quantum: jurisdiction, because Claimant TMP had no investment in the Kyrgyz Republic at the time of the alleged breach of the BIT; liability, because there cannot be an expropriation of rights to immovable property that do not exist under the *lex situs* (i.e. under Kyrgyz law); and quantum, because no hypothetical buyer would have paid anything to Claimant TMP for the Zolotiye Peski Resort in 2016 given it had no registered rights to that property. The idea that a hypothetical buyer would have overlooked this, and agreed to put a value on Zolotiye Peski Resort using the same methodology and assumptions as for the other resorts (over which the respective Claimants’ had registered rights), is not credible.
32. I will now provide an analysis of the property rights (or lack thereof) for each of the Claimants and their alleged investments by reference to the applicable Kyrgyz law. I will start with the three Claimants that did have valid property rights in 2016 (NBU, Asaka and Uzpromstroybank) and then conclude with the position of Claimant TMP in respect of the Zolotiye Peski Resort.

C2 Resort Rokhat-NBU

33. The Claimants describe NBU's interest in Resort Rokhat-NBU as follows: "*at the time of the 4 April 2016 nationalization, NBU, through its Kyrgyz subsidiary, had the right to use 14.654 hectares of land for Resort Rokhat-NBU until 1 April 2054 and 4.4 hectares of beachfront land until 24 June 2015 with the priority right of renewal, as well as the facilities at the Resort, located on the northern shore of Lake Issyk-Kul in the Issyk-Kul District*".⁸ I will consider each of these elements in turn.
- (i) *Right of use of 14.654 hectares of land until 1 April 2054 and 4.4 hectares of beachfront land until 24 June 2015*
34. On 9 April 1965, the Ministers of the Kyrgyz SSR issued Resolution No. 173 by which it allocated a 15-ha land plot to the Ministry of Construction of the Uzbek SSR and the Ministry of Construction of the Kyrgyz SSR for the construction of a resort.⁹ A resort was subsequently constructed by the Uzbek SSR Ministry of Construction by August 1968.¹⁰ A State Act on the Right of Land Use was issued to the Ministry of Construction of the Uzbek SSR for "*17.5 hectares of land, including 10.0 ha of beach-park area within the boundaries*" for permanent use to the Resort Rokhat on 20 September 1979.
35. Following the dissolution of the Soviet Union, Motor Transport Territorial Production Association Uzstroytrans ("**Uzstroytrans**"), which was an entity subordinate to the Uzbek State Corporation on Industrial and Civil Construction, continued to operate the Resort through its Kyrgyz subsidiary, which was registered on 20 September 1992.¹¹ NBU acquired Resort Rokhat from Uzstroytrans on 17 February 1999.¹²
36. The Issyk-Kul District Government Administration issued Resolution No. 137 dated 12 March 1999 to approve the assignment of 20 hectares of land for the Rokhat Resort to the NBU and requested that "*[t]he district state administration on land should make the appropriate changes to the documentation and issue the state act for the right on land use to [NBU]*".¹³ The State Act for the Right of Use of the Land was then issued on 9 June 1999 for 19.7 hectares.¹⁴

⁸ C's Points of Clarification on Issue 1, §56.

⁹ Exhibit C-29.

¹⁰ Legal Authority CL-169.

¹¹ Exhibit C-42.

¹² Legal Authority CL-159.

¹³ Exhibit C-41.

¹⁴ Legal Authority CL-160.

37. The Issyk-Kul District Government Administration then re-registered rights to use the land by Resolution No. 145 of 1 April 2005 and accorded the following rights:

In accordance with the procedure of re-registration, the right of limited use of the Health-improvement boarding house shall be recognized over the land plot with total area of 19.05 hectares, out of that overall construction area – 7.5 hectares and park area 7.154 hectares for 49 years, beach zone with the area of 4.4 hectares for renting usage for the period of 5 years with the consequent prolongation...¹⁵

38. Certificate No. 0020798 for the Right of Temporary Use of Land was then issued on 1 April 2005 for 49 years (i.e. from 1 April 2005 until 1 April 2054) for a total area of 19.054 hectares.¹⁶ The Respondent accepts that the Claimants had such a right as of 4 April 2016.¹⁷
39. The 4.4 hectares of breach front land was subject to a separate regime under lease agreements that were successively concluded between Resort Rokhat-NBU and the Kara-Oy Village Administration for periods of one year.¹⁸ The final such lease was signed on 24 June 2015.¹⁹ Clause 3.2 of the lease required the lessee to inform the lessor three months before the expiry of the lease as to whether the lessee requests that the lease should be renewed, which remained within the discretion of the lessor.²⁰ According to the Respondent, in the absence of any evidence that Resort Rokhat-NBU had requested the renewal of the lease, it would have expired on 24 June 2016.²¹ The Claimants counter with the witness evidence of Mr Yuldashev (an NBU employee) who states that any documents relating to the lease renewal process would be located at the Resort and the Claimants do not have access to those documents.²² He says that: “*While I was not directly involved with the lease renewal process at the Resort, I understand that the Resort’s management previously had renewed the lease agreements for the beachfront property as required under the terms of those agreements, and would have done the same in 2016.*”²³ This is not a positive affirmation that the Resort’s management did in fact seek to renew the lease agreement, but rather a supposition that “*it would have done*” so. Nonetheless, it seems reasonable to assume that so long as NBU had a right to use the

¹⁵ Exhibit C-67.

¹⁶ Exhibit C-220.

¹⁷ R’s Memorial, §66.1.

¹⁸ Exhibits C-260, C-270.

¹⁹ Exhibit C-281.

²⁰ Exhibit C-281.

²¹ R’s Memorial, §66.2.

²² Yuldashev WS/3, §18.

²³ Yuldashev WS/3, §18.

adjacent land with the resort facilities, the Kara-Oy Village Administration would have continued to grant leases in relation to the beachfront land.

(ii) *Rights to the facilities at the Resort*

40. The Claimants rely upon Acts of Commissioning dated 17 December 1976,²⁴ 4 September 2001,²⁵ and 31 May 2002,²⁶ as well as the technical passports for the buildings, to establish that they have ownership rights in the facilities comprising the Resort.²⁷ As will be explained in more detail in relation to Resort Zolotiye Peski, these are technical documents recording in precise detail the surface area of every single room comprising the resort complex. It is a technical survey, as the Claimants say, “*of the technical characteristics of the buildings, structures, apartments or other real estate, as well as the actual boundaries of the land plot*”.²⁸ They are not documents evidencing title under Kyrgyz law (and the Claimants’ expert does not suggest otherwise). The fact that NBU or its predecessors are designated as the user of the premises is not probative as to what rights they had to the buildings and the land in question.
41. The Claimants further submit that the NBU acquired ownership rights from Uzstroytrans when the Resort was transferred to it on 17 February 1999.²⁹ The transfer document, however, is an Order of the State Committee of the Republic of Uzbekistan for Managing State Property and Supporting Entrepreneurs and simply effects a transfer from one Uzbek state entity to another. It does not purport to, and could not expect to, create or even transfer rights to immovable property situated in Kyrgyzstan. That could only be achieved by specific legal acts in Kyrgyzstan itself.
42. It follows that the Claimants have not established any separate property rights to the facilities of the Resort. They instead have a right to use those facilities so long as they have a right to use the land in accordance with Article 47 of the 1999 Land Code, entitled “*Buildings and structures upon termination of the right to a land plot*”, which provides:

Upon termination of the right to a land plot, the fate of the building and structure remaining on the land plot is determined by its owner.³⁰

²⁴ Exhibit C-360.

²⁵ Exhibits C-188, C-189.

²⁶ Exhibit C-198.

²⁷ Exhibits C-534, C-496, C-559.

²⁸ C’s Reply, §124.

²⁹ Legal Authority CL-159.

³⁰ Legal Authority RL-111.

(iii) The extract from the State Register of Immovable Property

43. The extract from the State Register of Immovable Property confirms the conclusions that have been reached. The certificate records the “*type of immovable property*” to be “*Land and building*”, thus confirming that rights to the land and facilities are linked.³¹ In the rubric on the history of rights over the property, it is recorded that State Enterprise “Health Resort Rokhat-NBU” had a right of use that was memorialised on 22 April 2005 by Certificate No. 0020798 for the Right of Temporary Use of Land. This document has been referred to above. It is recorded that this right terminated on 24 June 2016, which is the day when the right of “indefinite use” was granted to the Fund of State Property of the Kyrgyz Republic on the basis of the 2016 Order. This is also recorded in the extract from the State Register.

(iv) Conclusion

44. The conclusions largely confirm the Claimants’ submission in respect of the Rokhat-NBU Resort. At the date of the 2016 Order, NBU had a right of use of 14.654 hectares of land for Resort Rokhat-NBU until 1 April 2054 and 4.4 hectares of beachfront land until 24 June 2016. Claimant NBU would have had use of the facilities constructed on the land so long as its right to use the land subsisted. Claimant NBU has not, however, established a separate right of ownership to those facilities. It is likely that the Kara-Oy Village Administration would have continued to grant leases in relation to the beachfront land so long as NBU had a right of use to the adjacent land on which the facilities were constructed.

C3 The Dilorom Resort

45. The Claimants submit that “*Asaka, through its Kyrgyz subsidiary, had the right to use 27 hectares of land for Resort Dilorom, including 7 hectares of beachfront land, until 5 November 2049, as well as the facilities at the Resort, located on the northern shore of Lake Issyk-Kul*”.³²
46. The Council of Ministers of the Kyrgyz SSR issued a resolution permitting the allotment of 20 hectares of land to the Ministry of Agriculture of the Uzbek SSR for the construction of the resort on 13 February 1967.³³ A right of permanent use was then granted by an Act on the Right of Land Use for 35 hectares of land on 7 June 1967.³⁴ At some point, Asaka created a Kyrgyz subsidiary Resort Dilorom LLC to operate the resort after it acquired it

³¹ Exhibit R-94.

³² C’s Points of Clarification on Issue 1, §71.

³³ Legal Authority CL-184.

³⁴ Exhibit C-30.

from the Republic Production State Cooperative Construction Union Uzagrostroy. On 5 November 1999, the Issyk Kul District State Administration by Resolution No. 611 decided to “*allot to resort ‘Dilorom’ of Bank ‘Asaka’ of the Republic of Uzbekistan, for a rental period of 50 years, an occupied land area of 27.0 hectares, including 7.0 hectares of beach-park zone, built up with single-story buildings.*”³⁵ A State Act of Land Use was then granted on 11 November 1999.³⁶ It follows, and the Respondent accepts, that Asaka had a right to use the land and the facilities constructed upon it until 5 November 2049.

47. The Claimants once again rely on the technical passports for the buildings to establish additional rights to them³⁷ but they are not, as previously explained, documents of title under Kyrgyz law. In any event, the Claimants do not suggest that they have anything other than a right to use the buildings in question. That right, as for the other resorts, is bound up with the right to use the land. This is confirmed by the extract from the State Register of Rights to Immovable Property, which lists the “type of immovable property” as “land and building”.³⁸

(i) *Conclusion*

48. The Claimants’ submission is correct: at the time of the 2016 Order, Asaka had a right to use the land and the facilities constructed upon it in respect of Resort Dilorom until 5 November 2049.

C4 The Buston Resort

(i) *Rights over the land and buildings*

49. The Claimants submit that “*Uzpromstroybank, through its Kyrgyz subsidiary, had the right to use 10.65 hectares of land until 9 February 2061, with the right of renewal, as well as the right to the facilities and structures at Resort Buston*”.³⁹
50. The Executive Committee of the Council People’s Deputies of the Ton District in the Kyrgyz SSR allocated a 5.9 hectare land plot for the construction of a resort to Uzbek Joint Stock Company Tashelmash (“**Tashelmash**”) on 17 August 1971.⁴⁰ Tashelmash was then issued an “*Act on Perpetual Use of Land by Collective Farms*” on 1 November 1971 for a 6 hectare

³⁵ Exhibit C-49.

³⁶ Exhibit C-50.

³⁷ C’s Points of Clarification on Issue 1, §76.

³⁸ Exhibit R-95.

³⁹ C’s Points of Clarification on Issue 1, §81.

⁴⁰ Exhibits C-357, C-358.

plot.⁴¹ Tashelmash then acquired additional land for the expansion of the resort and was issued State Certificate No. 000231 on 15 June 1981, recognizing the right to use 10.65 hectares of land.⁴²

51. These rights did not survive the transitional period by operation of Article 9 of the 1991 Law on Land Reform, which will be explained in detail in relation to Resort Zolotiye Peski, as it is undisputed that no steps were taken to re-register the land use rights acquired during the Soviet period. Tashelmash's right to the land therefore expired in April 1996 in accordance with Article 9. Any rights Tashelmash had over the facilities would have also expired with the right to use the land.
52. It follows that when Uzpromstroybank purported to acquire rights over the Buston Resort in a transaction with Tashelmash on 27 October 2003,⁴³ Tashelmash had no rights to transfer. Nor were any changes recorded in the State Register, which was mandatory in accordance with Articles 9(2) and 37(1) of the 1999 Land Code.⁴⁴ It also follows that the Inter-District Court of the Issyk-Kul Region had grounds to withdraw the land plot from the use of Buston LLC in favour of the local Kunchygysh self-governing body by its decision of 23 January 2007.⁴⁵
53. Then Buston LLC did acquire rights to the land. On 9 February 2012, Kunchygysh ayyil Okmotu (the local self-governing body) entered into lease agreement with Buston LLC in respect of 10.65 hectares of land as well as the buildings and structures "*on the territory of the former vacation resort 'Tashelmash'*".⁴⁶ The lease was to run until 9 February 2061. A land use certificate was issued to Buston LLC on 9 April 2012.⁴⁷
54. The extract from the State Register confirms that the "*land and structures*" form a single unit of immovable property. It does not, however, reflect Buston LLC's right to use this immovable property that had been duly certified prior to the 2016 Order.⁴⁸ This must be an error, although neither party has offered an explanation for it.

⁴¹ Exhibit C-31.

⁴² The State Certificate is referred to in Exhibit C-230.

⁴³ Exhibit C-205.

⁴⁴ Legal Authority RL-111.

⁴⁵ Exhibit C-230.

⁴⁶ Exhibit C-72.

⁴⁷ Exhibit C-269.

⁴⁸ Exhibit C-519.

(ii) Conclusion

55. As at the date of the 2016 Order, Uzpromstroybank, through its local subsidiary Buston LLC, held a lease over 10.65 hectares of land, which also entailed a right of use to the buildings and structures located on it. That lease was to run until 9 February 2061. The Claimants' submission is thus largely correct.

C5 Zolotiye Peski Resort

56. The Claimants maintain that “*TMP, through its registered Kyrgyz branch, had the right to use 25 hectares of land for Resort Zolotiye Peski, including 2.7 hectares of beachfront land until 27 April 2016, as well as the facilities at the Resort, located on the northern shore of Lake Issyk-Kul in the Issyk-Kul District*”.⁴⁹

57. In assessing this characterisation of Claimant TMP's alleged rights over the Zolotiye Peski Resort, it is critical to recall that, in relation to the other resorts (Rokhat-NBU Resort, Buston Resort and Dilorom Resort), the Claimants did seek to register rights of use that had been granted during the Soviet period and those rights were subsequently formalised in the system of property law of Kyrgyzstan and then recorded in the State Register. The difficulty for TMP is that it seeks to be put in exactly the same legal position as if it did have registered property rights over Zolotiye Peski Resort in circumstances where it is not in dispute that it never applied for and never obtained such rights.

58. The Claimants, and the majority of the Tribunal, assert that TMP can be treated in the same way as the other Claimants because of an intergovernmental agreement between Uzbekistan and Kyrgyzstan in 1992 and subsequent protocols entered into in 1994 and 1995. They say that these intergovernmental agreements “*preserved [the Claimants'] property rights*”⁵⁰ in the resorts that had been acquired in the Soviet Union.

59. As I will demonstrate below, these intergovernmental agreements did not and could not create or preserve property rights without further steps being taken under the applicable legal regime in Kyrgyzstan. The best evidence of this is that, after those agreements were signed, three out of the four Claimants applied for the registration of property rights over the respective resorts and were duly granted registration certificates from the competent

⁴⁹ C's Additional Points of Clarification on Issue 1, §40.

⁵⁰ Award, §518.

authorities. Why would three of the four Claimants have done so, and paid money for that privilege, if the intergovernmental agreements had already achieved the same result?

60. The truth is that none of the Claimants proceeded on the basis of a contemporaneous understanding that the intergovernmental agreements were self-executing and somehow created or preserved property rights in a legal system that only recognises registered property rights to be valid and enforceable.

61. I will now address each of Claimant TMP's alleged rights over Zolotiye Peski Resort.

(i) *Right to use the land*

62. By Resolution No. 619 of 25 November 1959, the Council of Ministers of the Kyrgyz SSR allocated 25 hectares of land to "Enterprise PO Box No. 116".⁵¹ There is no defined term for the allocation of this land in this Resolution. According to the Claimants: "*Enterprise PO Box No. 116*" was actually "*Tashkent Aviation Production Association named after V.P. Chkalov*" ("**TAPOiCh**"), which is a "*classified enterprise of union significance owned by the USSR*".⁵²

63. A "Certificate of Right to Use the Land" was then issued by the Executive Committee of Issyk-Kul District Council on 8 June 1978. The Certificate records that TAPOiCh was accorded 25 hectares "for permanent use".⁵³

64. Leaving to one side the question of whether TMP is the legal successor to TAPOiCh, the Respondent has submitted that this right to use the land was subsequently invalidated due to legal developments after Kyrgyzstan attained independence in 1991.

65. **First**, the Respondent relies upon Article 4 of the Resolution of the Supreme Council of the Kyrgyz Republic No. 429-XII "*On the Procedure for enactment of the Land Code of the Republic of Kyrgyzstan*" dated 19 April 1991, which reads:

Citizens who are not employees of agricultural enterprises, as well as legal entities, temporarily using land plots provided to them by agricultural enterprises before June 1, 1991, retain their rights until the re-registration of their rights to land possession or land use.⁵⁴

⁵¹ Exhibit C-28.

⁵² C's Additional Points of Clarification on Issue 1, FN 78.

⁵³ Exhibit C-363.

⁵⁴ Legal Authority RL-107.

66. The Claimants respond by stating that this provision relates only to temporary rights to use land, whereas TAPOiCh was granted a permanent right to use land.⁵⁵ The Claimants are clearly correct: the provision by its express terms only relates to rights to use land granted on a temporary basis and there is no doubt, based on the “*Certificate of Right to Use the Land*” issued by the Executive Committee of Issyk-Kul District Council on 8 June 1978, that TAPOiCh had a right of permanent use. The majority agrees with this analysis.⁵⁶
67. **Second**, the Respondent next relies on Article 9 of the Law of the Republic of Kyrgyzstan on the Land Reform of 19 April 1991 (“**1991 Land Reform Law**”), which reads:

Article 9. Re-issuance and issuance of documents for the right of possession and right to use land to legal entities

Re-issuance and issuance to legal entities of State acts for the right to possess (permanently use) land and certificates of the right of temporary use of land are issued to legal entities by local Soviets of people’s deputies and the land use planning service at the expense of the State budget.

Prior to the re-issuance of certificates of land possession or land use, the previously established right to the respective land plot shall be retained for a period of five years from the beginning of the land reform. Upon expiration of this period, the right to a land plot shall be lost.

68. The Claimants raise several defences to the application of this provision:
- 68.1. **First**, they say that Article 9 does not impose an obligation to re-register.⁵⁷ In a sense this correct: a legal entity with a right of permanent use over land is not obliged to re-register; but if it fails to do so then “*the right to a land plot shall be lost*”. This submission does not, therefore, assist the Claimants.
- 68.2. **Second**, the Claimants maintain that the “*beginning of the land reform*” as stipulated in Article 9 was actually in 1998 with the enactment of the Law on State Registration.⁵⁸ No authority is cited for this argument, which would result in a curious situation whereby there would be no certainty at the time when the 1991 Land Reform Law was enacted as to when the deadline in Article 9 and other provisions in that Law would take effect. In any event, the argument is refuted by the text of the 1991 Land Reform Law itself, which in Article 25 entitled “*Stages of Land Reform*”, refers to the

⁵⁵ C’s Reply, §94.

⁵⁶ Award, §525.

⁵⁷ C’s Reply, §95.

⁵⁸ C’s Reply, §95.

“first stage” as being from 1991-1993. It is clear, therefore, that the “beginning of the land reform” is the date that the 1991 Land Reform Law came into force, which is what one would expect given the importance of certainty in the regulation of legal relationships pertaining to land (and indeed what one would expect given the very title of the law in question).

68.3. **Third**, the Claimants say that “*Article 9 of the Law on Land Reform was invalidated by the enactment of the 1999 Land Code and nothing in the 1999 Land Code invalidates pre-existing rights to land plots where they are not re-registered*”.⁵⁹ This is true but is beside the point. It is not suggested that the 1999 Land Code retroactively repealed Article 9 of the 1991 Land Reform Law. Article 9 of the 1991 Land Reform Law by its terms applied to TAPOiCh’s right to permanent use of the 25 hectares of land. The Claimants have not suggested otherwise. By application of that provision, that right of permanent use would expire after five years unless a certificate was reissued. It is not in dispute that TAPOiCh/TMP never applied for a certificate under the 1991 Land Reform Law. Its right under the Certificate of 8 June 1978 therefore must have expired by 1996. There was no right subsisting by the time the 1999 Land Code came into force. For this reason, the Claimants are mistaken that “*TMP’s permanent use right would have converted into a fixed term use right of 49 years*” following the enactment of the 1999 Land Code⁶⁰ because TMP did not have a subsisting permanent use right at the time of that enactment.

68.4. **Fourth**, the Claimants argue that TMP “*maintained a registered right to use the land, as well as an ownership right in the buildings and structures it constructed on the land, through the doctrine of universal succession*” as codified in Article 37(1) of the 1999 Land Code and Article 23 of the Civil Code.⁶¹ The Claimants described the succession as follows:

On 21 September 1992, following the independence of the Kyrgyz Republic, TAPOiCh registered with the Kyrgyz Ministry of Justice a branch in the Kyrgyz Republic to manage and operate Resort Zolotiy Peski. In 1996, TAPOiCh changed its corporate name and form to State Joint-Stock Company Tashkent Aviation Production Corporation named after V.P. Chkalov. Following that reorganization, TAPOiCh re-registered its Kyrgyz branch in December 1999. In May 2015, State Joint-Stock Company Tashkent Aviation Production Corporation named after

⁵⁹ C’s Reply, §§95, 116.

⁶⁰ C’s Reply, §120.

⁶¹ C’s Reply, §108, §113.

V.P. Chkalov changed its name and organizational form again to Joint-Stock Company Tashkent Mechanical Plant, i.e., TMP.⁶²

- 68.5. The problem with the Claimants' argument is that TAPOiCh cannot pass better title than it had to the land and buildings to TMP by the operation of universal succession. This is the *nemo dat quod non habet* principle. On the facts of the present case, if TAPOiCh's right to use the land had expired in 1996, any changes of corporate form or name can somehow reinstate that right of use to a successor entity. The same goes for any rights to the buildings on that land.
69. The majority of the Tribunal has accepted some of these defences and also relied on additional points to conclude that Article 9 of the 1991 Land Reform Law had no impact on Claimant TMP's rights over Zolotiye Peski:
- 69.1. **First**, the majority asserts, like the Claimants, that “[t]he land reform began in 1998”,⁶³ but without citing any authority for this statement, such that the Claimants' rights would have been retained until 2003 in accordance with the five-year expiration period established in Article 9 of the 1991 Land Reform Law (which begins to run from the “beginning of the land reform”). As I have already pointed out, Article 25 of the 1991 Land Reform Law expressly refers to the “first stage” of the land reform as being from 1991-1993. And it would be a contradiction of sorts to pass a law in 1991 entitled “Law on Land Reform” against the understanding that land reform would only begin in 1998. There is simply no basis for saying that land reform began only in 1998.
- 69.2. **Second**, the majority, as an alternative argument, says that the 1992 Agreement (as well as the 1994 Protocol and the 1995 Protocol) established a special regime for “land reform” in relation to the Claimants' Resorts, which was “*different from whatever the generally-applicable ‘land reform’ might be for the other properties*”.⁶⁴ This argument does not appear to have been made by the Claimants, and for good reason. There is no reference in the 1992 Agreement or the subsequent protocols to any carve out from the normal operation of the 1991 Land Reform Law, nor is there any authority in support of it. To the contrary, Article 3 of the 1992 Agreement says, in relation to property rights that are “recognized” under Article 2: “*The property right to the land and other natural resources are regulated by the legislation of the Party, on whose territory the property is*

⁶² C's Reply, §112.

⁶³ Award, §526.

⁶⁴ Award, §528.

located, unless provided otherwise by the other agreements of the Parties.”⁶⁵ The majority’s alternative argument that “land reform”, in relation to the Claimants’ Resorts only, actually began in 1995 because that is the date of the 1995 Protocol to the 1992 Agreement, is in direct contradiction with Article 25 of the 1991 Land Reform Law, and therefore does not sit very easily with Article 3 of the 1992 Agreement.

69.3. **Third**, the majority relies on the fact that the 1999 Law on Enactment of the Land Code repealed Article 9 of the 1991 Land Reform Law. Their argument is entirely circular:

In the Tribunal’s view, the issue is not whether Article 9 of the 1991 Law was “retroactively” invalidated, but instead what the effect of the 1999 Land Code was on property rights that had not been registered. On that, the Tribunal sees nothing in the 1999 Land Code or otherwise that leads to, much less requires, a conclusion that those rights did not benefit from the Land Code’s prospective provisions.⁶⁶

69.4. The point is that, by operation of Article 9 of the 1991 Land Reform Law, any rights that TMP did have to Zolotiye Peski had expired by 1996. That was the effect of the 1991 Land Reform Law “*on property rights that had not been registered*”. Thus, by the time the 1999 Land Code was enacted, there were no rights left that could “*benefit from the Land Code’s prospective provisions*”. The only way to escape that conclusion is to say that the 1999 Land Code retroactively invalidated Article 9 of the 1991 Land Reform Law, which of course is a nonsense.

70. I will address the proper interpretation of the 1992 Agreement and the 1994 and 1995 Protocols in due course.

(ii) *The beachfront land*

71. The Claimants maintain that Zolotiye Peski had rights to 2.7 hectares of beachfront land on the basis of one-year lease agreements signed with the Bosteri Village Council. Two lease contracts have been submitted that evidence these rights: the first was signed on 17 December 2014 and expired on 1 January 2015;⁶⁷ the second was signed on 27 April 2015 and expired on 27 April 2016.⁶⁸ The Respondent accepts the Claimants’ position that these lease agreements did not need to be registered because their term was for less than three

⁶⁵ Exhibit C-2.

⁶⁶ Award, §530.

⁶⁷ Exhibit C-75.

⁶⁸ Exhibit C-76.

years and that such agreements included a right of renewal.⁶⁹ The Respondent points out, however, that pursuant to clause 3.2 of the lease agreements, the Lease Provider was not obliged to accept the Leasholder's request for renewal and there is, moreover, no evidence that Zolotiyie Peski applied for the renewal of the second lease.⁷⁰ The Claimants do not dispute that the Bosteri Village Council was not obliged to renew the lease. They maintain, however, by reference to the witness evidence of Mr Elmurodov, the Acting Director of the Resort at the time, that a request for renewal was made but that the Claimants do not have access to the documentation at the resort. Alternatively, they say that under Article 7(5) of the 1999 Land Code, a lease agreement may be renewed on the same terms through continued use.⁷¹ The fact remains, however, that the Bosteri Village Council had the discretion to renew or not to renew the second lease when it was due to expire on 27 April 2016.

(iii) *The resort facilities on the land*

72. According to the Claimants, “by August 1960, TAPOiCh had constructed 21 cottages, a dining facility, a power station, and other facilities on the 25 hectares of land”.⁷² This is confirmed by the “Act of Completion and Commissioning” dated 5 August 1960,⁷³ which provides a detailed inventory of all the buildings and fixtures on the land. The Respondent submits that, as a result of TAPOiCh's right to use the land having expired, it would then be for the owner of the land to determine the fate of the buildings. It relies on Article 47 of the 1999 Land Code, entitled “Buildings and structures upon termination of the right to a land plot”, which provides:

Upon termination of the right to a land plot, the fate of the building and structure remaining on the land plot is determined by its owner.⁷⁴

73. The Claimants have not addressed this provision in their Reply.

(iv) *The extract from the State Register of Immovable Property*

74. The Respondent submitted an “Extract on Previously Registered Rights to Immovable Property” from the State Register of Immovable Property in relation to the Zolotiyie Peski Resort, which was issued on 22 April 2022.⁷⁵ The Respondent notes that there is no record of TMP

⁶⁹ R's Memorial, §59.

⁷⁰ R's Memorial, §59.

⁷¹ C's Reply, §134.

⁷² C's Reply, §102.

⁷³ Exhibit C-352.

⁷⁴ Legal Authority RL-111.

⁷⁵ Exhibit R-93.

or TAPOiCh having any rights to the “land and buildings” at the site of Zolotiyie Peski before the Fund of State Property of the Kyrgyz Republic acquired it in 2016 in the rubric entitled “*History of ownership rights concerning the immovable property*”,⁷⁶ which they say is consistent with their submission on the loss of those rights by operation of law after the Respondent acquired statehood.

75. The extract from the State Register of Immovable Property is obviously of paramount importance in determining the identity of anyone claiming rights over immovable property. As is the case in a large number of countries, rights over immovable property (including land) are subject to mandatory state registration in Kyrgyzstan and such rights are only deemed to be valid from the moment of state registration.⁷⁷
76. The Claimants do not dispute that the extract from the State Register purports to show the historical chain of rights to particular immovable property but instead argues that it “*cannot be relied upon as the sole evidence of property rights*” because the Soviet-era rights that were granted to TAPOiCh are not recorded in the extract.⁷⁸ But that is hardly surprising: one of the principal purposes of the land reforms that began in 1991 was regularize rights to use over property that had been granted during the Soviet era. Article 9 of the Law on Land Reform required that any rights of permanent use needed to be re-registered so as to be recognised under the law of the new Republic of Kyrgyzstan or they would expire. It is perfectly understandable that only rights of use over land that are validly registered under the law of the Republic of Kyrgyzstan (as opposed to the law of the Soviet Union) would be recorded in the State Register of the Republic of Kyrgyzstan.
77. Another important point to bear in mind is that the very purpose of having a state registry for rights over immovable property and a rule that the validity of such rights depends upon their registration in that registry is to ensure that registration in the registry is “*the sole evidence of property rights*”. It is designed to avoid expensive and time-consuming inquiries concerning competing historical claims to immovable property.

⁷⁶ R’s Memorial, §56.3.

⁷⁷ 1999 Land Code, Art. 9 (RL-111); 1996 Civil Code, Arts. 24(2), 25(1), 252 (RL-109).

⁷⁸ C’s Reply, §127.

- (v) *Arguments and documents relied upon by the Claimants and the majority of the Tribunal to evidence TMP's rights over the Zolotiskye Peski Resort*
78. The Claimants make seven arguments in countering the Respondent's submission on TMP's rights over the Zolotiskye Peski Resort. The majority has only considered and adopted one of these arguments, which is the reliance on the 1992 Agreement and 1994 and 1995 Protocols.
79. **First**, the Claimants affirm that a right to use the 25 hectares of land was duly recorded in the Act on the Right of the Use of Land dated 8 June 1978.⁷⁹ This is true but the question is whether that right survived the transitional legal regime introduced in 1991 when the Respondent acquired statehood. Obviously the original legal act issued during the Soviet period does not address that question.
80. **Second**, the Claimants say that "*representatives of the Bosteri Village signed numerous Acts of Completion and Commissioning, accepting the buildings and structures constructed by TMP*".⁸⁰ All those acts of commissioning and completion, however, were issued during the Soviet period from 1960 to 1989.⁸¹ For the same reason, they cannot be dispositive of the question of whether any rights to the land or buildings on Zolotiyie Peski survived the transitional legal regime.
81. **Third**, the Claimants rely on Article 4 of the 1992 Agreement, Article 3 of the 1994 Protocol and Article 3 of the 1995 Protocol.⁸² It is this argument that was accepted by the majority of the Tribunal.
82. Article 4 of the Agreement on Mutual Recognition of Rights and Regulation of Property Relations dated 9 October 1992 between Armenia, Belorussia, Kazakhstan, Kirgizia, Moldavia, Russia, Tajikistan and Uzbekistan (the "**1992 Agreement**") reads as follows:

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

⁷⁹ C's Reply, §127.

⁸⁰ C's Reply, §127.

⁸¹ C's Reply, FN 363.

⁸² C's Reply, §127.

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.⁸³

83. The text of the 1992 Agreement, including Article 4, does not support the Respondent's contention that it is a *pactum de contrahendo* (an agreement to agree). What is clear, however, is that many of the provisions are general and abstract in nature and require further legal acts for their implementation. Article 4 is no exception. It does and cannot purport to create new property rights in "facilities" which does not otherwise exist under the law of Kyrgyzstan. It rather requires the "Parties" (the newly independent States created after the demise of the Soviet Union) to recognise property rights, and that might oblige each Party to take various steps to ensure that such rights are duly recognised by the system of property law in force. Whether or not international treaties have direct effect in Kyrgyzstan, it is clear that such an obligation cannot be self-executing in relation to specific property holdings. Article 4 does not, for example, have the effect of creating and registering property rights in the official state registry. Furthermore, the obligation in Article 4 as it relates to land plots is less exacting still than as for "facilities". The "Parties" record that they "*consider it appropriate to provide land plots*" upon which the "*facilities*" are located "*on general terms, determined by the legislation of the Party, where the facility is located*". Once again, the implementation of this part of the obligation in Article 4 requires specific acts to be undertaken in accordance with the system of property law in force. This is confirmed by Article 3 of the same 1992 Agreement, which records that: "*The property right to the land and other natural resources are regulated by the legislation of the Party, on whose territory the property is located, unless otherwise provided by the other agreements of the Parties.*"
84. The Respondent is, therefore, correct to note that "*a right of property to a piece of land for instance cannot simply be 'recognized' on an international level without such 'right' being then properly granted and formalized within the domestic legal order.*"⁸⁴
85. The Parties have referred to decisions of the Economic Court of the Commonwealth of Independent States on the interpretation of Article 4 of the 1992 Agreement. In accordance

⁸³ Exhibit C-2.

⁸⁴ R's Memorial, §43.

with Article 17 of the 1992 Agreement, this is the Court with exclusive jurisdiction over disputes arising from the 1992 Agreement.

86. The first is Decision No. 01-1/4-06 of 5 April 2007. The Court gave the following clarifications in relation to Article 4 of the 1992 Agreement:

The Agreement dated October 9, 1992, does not establish a procedure for proving the fact of the construction of an object of a social sphere with funds of entities indicated in Article 4(1), it does not list evidence, nor indicate that the Contracting Parties may independently establish [the above] in accordance with their national legislation.

In this regard, the CIS Economic Court considers that the procedure for recognition of proprietary interest in a particular object of the social sphere shall be determined by a mutual agreement of the Contracting Parties to the Agreement. An example of this is the Protocol on Implementation of the 9 October 1992 Agreement on Mutual Recognition of the Rights and Regulation of Property Relations between the Russian Federation and the Republic of Armenia dated July 01, 1997.⁸⁵

87. This confirms that Article 4 of the 1992 Agreement is not self-executing in the sense that further agreements between the State Parties would be necessary to give effect to Article 4 in relation to specific property holdings. Decision No. 01-1/3-06/1 P1 of the Plenum of the Economic Court of the Commonwealth of Independent States of 14 April 2010 is to the same effect. The case concerned a complaint by the Republic of Kazakhstan that the Russian Federation had failed to recognise the ownership of the former to the “Uzen” sanatorium in Russia in accordance with Article 4 of the 1992 Agreement. The Plenum of the Economic Court disposed of the case by recommending that both Governments enter into a bilateral agreement to resolve the question of rights to the “Uzen” sanatorium.⁸⁶
88. Finally, this interpretation of Article 4 is also consistent with Article 12 of the 1992 Agreement, which envisages that subsequent bilateral protocols would need to regulate questions relevant to the subject matter of Article 4: *“Parties agreed that the legal status of the earlier created enterprises recognized under the present Agreement as the property of one Party and located on the territory of the other Party, is determined by the protocols between the authorities of the Parties, authorized to manage the state property.”*
89. The majority of the Tribunal states that it *“finds that following the dissolution of the Soviet Union, the Uzbek entities preserved their property rights in the Resorts through the 1992 Agreement. Moreover, the*

⁸⁵ Legal Authority RL-132.

⁸⁶ Legal Authority RL-142.

*Tribunal is convinced that the 1992 Agreement, on its own, sufficed to preserve such rights. In other words, its conclusion would remain unchanged regardless of whether the 1994 and 1995 Protocols affirmed or maintained the rights of the Uzbek entities in the Resorts.”*⁸⁷ The majority offers no analysis or authority for its conclusion that the 1992 Agreement “*on its own, sufficed to preserve [the Claimants’ rights]*”.

90. The next instrument relied upon by the Claimants is the “*Protocol on Mutual Recognition of Property Rights to the Facilities of Social Sphere Established from the Funds of the Republic of Uzbekistan and Kyrgyz Republic*” of 2 February 1994 (the “**1994 Protocol**”).

91. Article 3 of the 1994 Protocol reads:

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.⁸⁸

92. This provision renders moot the Respondent’s argument that it made a valid reservation to Article 4 of the 1992 Agreement⁸⁹ because Article 3 of the 1994 Protocol is a clear affirmation of the principles set out in Article 4.

93. Article 3 is, however, a general and abstract provision that sets out the basic principles for regulating the particular property relationships in question and thus, like Article 4 of the 1992 Agreement, it is clear that further steps would need to be taken in relation to specific property holdings. This is reinforced by Article 8 of the 1994 Protocol, which reads:

Parties have agreed on the need to conclude an intergovernmental agreement on mutual recognition of rights and regulation of the property relations of legal entities and individuals of the States Parties to this Protocol before March 1, 1994.

94. That deadline was evidently not complied with. What followed, however, was the “*Protocol on the Status of the Implementation of the Intergovernmental Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic in 1994*” dated 8 January 1995

⁸⁷ Award, §518.

⁸⁸ Exhibit C-3.

⁸⁹ R’s Memorial, §§132-143.

(the “1995 Protocol”). This is the third and final instrument relied upon by the Claimants.

Article 3 of the 1995 Protocol reads:

The governmental delegations of the Republic of Uzbekistan and the Kyrgyz Republic reviewed the status of implementation of the Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic in 1994 and agreed as follows:

[...]

3. To preserve for the Republic of Uzbekistan the right of ownership to the objects of the resort- recreational facilities located on the territory of the Kyrgyz Republic on Lake Issyk-Kul: "Zolotye Peski", "Yubileyny", "Roxat", "Dilorom", with priority right of hiring of service personnel from among local residents. To provide calculations for the services from the clearing.⁹⁰

95. This is a clear statement of principle that the Republic of Uzbekistan should have the right of ownership over the facilities comprising the four resorts, including Zolotiye Peski. But several points arise from the text:

95.1. It is an abstract statement in a protocol between Governments that conveyed an agreement on the principle but no more than that. For instance, it was obviously not the “Republic of Uzbekistan” that was to have the right of ownership but rather the successor to TAPOiCh: this would have to be concretised in specific legal acts, as would the precise objects comprising the facilities in each of the resorts. Any rights would also have to be duly registered to take effect under the law of Kyrgyzstan. This is obvious as a general principle but is also confirmed by the Respondent’s practice in relation to other resorts in the Issyk-Kul Region that had been constructed with funds of other former Soviet Republics. For instance, the Protocol between the Government of the Republic of Kazakhstan and the Government of the Kyrgyz Republic on the Recognition of Ownership Rights of the Republic of Kazakhstan on Real Estate Objects Located in the Territory of the Kyrgyz Republic dated 25 December 2003 refers to the 1992 Agreement and then states that the two Governments have agreed: “1. *Within one month of signing this Protocol, to conduct the necessary legal procedures and recognize as the property of the Republic of Kazakhstan the property complexes of objects located in the Issyk-Kul Region of the Kyrgyz Republic and constructed at the expense of the Republic of Kazakhstan.*”⁹¹ This is recognition of the fact that agreements of principle at the intergovernmental

⁹⁰ Exhibit C-4.

⁹¹ Legal Authority RL-98.

level do not create or alter property rights; specific actions must be taken to do so under the law at the place where the property is found (i.e. the *lex situs* rule). Such agreements are not, in other words, self-executing.

- 95.2. In the same way that Article 3 could not possibly be self-executing in the sense of vesting property rights in the “Republic of Uzbekistan”, the requirement to give “*priority right of hiring of service personnel from among local residents*” would also require specific acts for implementation within the employment system in Kyrgyzstan.
- 95.3. Article 3 does not address any rights to the land plots upon which the resort facilities were constructed. Any entitlements to the land plots would, therefore, continued to be regulated exclusively by the relevant laws of Kyrgyzstan.
96. In deciding what rights TMP had immediately prior to the 2016 Order, the Tribunal can only take cognisance of valid property rights persisting under the law of Kyrgyzstan. It cannot assume that the Respondent did give effect to its obligation in Article 3 of the 1995 Protocol by taking the necessary steps to implement that obligation within the system of property law in Kyrgyzstan if an analysis of that law and the documents of title reveals that such steps were not in fact taken. In such a scenario, the Republic of Uzbekistan would have cause to insist upon further negotiations with the Republic of Kazakhstan to address this omission in accordance with Article 9 of the 1994 Protocol⁹² (the 1995 Protocol is stated to be related to the “implementation” of the 1994 Protocol and does not contain any separate provision on the resolution of disputes). The present Tribunal has no jurisdiction to compel the Republic of Kazakhstan to take steps to give effect to its obligation in the 1995 Protocol towards the Republic of Uzbekistan, who is not, moreover, a party to this arbitration.
97. There is, moreover, substantial evidence that both the Republic of Uzbekistan and the Republic of Kyrgyzstan both acknowledged long after the 1995 Protocol that property issues relating to the resorts had not yet been settled:
- 97.1. In the Republic of Uzbekistan’s diplomatic note of 12 April 2016 to the Republic of Kyrgyzstan, the Republic of Uzbekistan stated in relation to the 1994 Protocol and the 1995 Protocol that “[t]he Kyrgyz side without explanation has to this day unduly delayed the

⁹² Which reads: “Disputes concerning the interpretation or application of this Protocol shall be considered through negotiations between the relevant authorities of the Parties.” Exhibit C-3.

settlement of the process and its legal regulation.”⁹³ The Republic of Uzbekistan recalled that a draft intergovernmental agreement dealing with the property issues was sent to the Republic of Kyrgyzstan in February 2008 to give effect to the 1995 Protocol.⁹⁴ The Republic of Uzbekistan further made repeated follow-up requests in respect of this draft agreement but “*a response from the Kyrgyz side has not yet been received*”.⁹⁵ On 28 December 2009, a bilateral working group was then set up “*to address the parties’ property issues*”⁹⁶ but no resolution had evidently been reached. Obviously if the 1994 Protocol or the 1995 Protocol were somehow self-executing there would have been no need for any of these steps to be taken over the ten years that followed.

97.2. The Claimant Uzpromstroybank wrote to the Ministry of Foreign Affairs of the Republic of Uzbekistan on 23 August 2011 referring to problems relating to the Claimants’ resorts and cited the agreement between the Republic of Kazakhstan and the Republic of Kyrgyzstan on the regulation of property issues relating the “*resort and recreation facilities located in the Issyk-Kul Region of the Kyrgyz Republic*”. The Claimant concluded its letter with the following proposal: “*Based on the foregoing, we propose to solve this problem by concluding an Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on settlement of the title of the Republic of Uzbekistan to resort and recreation facilities located in the Issyk-Kul Region of the Kyrgyz Republic*”.⁹⁷

97.3. The Claimant Asaka likewise wrote to the State Property Fund of the Republic of Kyrgyzstan on 7 July 2016 and stated that:

For many years, the Bank, together with the relevant competent authorities of the Republic of Uzbekistan, is trying futilely to settle the issues of the legal status of resorts of the Republic of Uzbekistan in the territory of Kyrgyz Republic. Repeatedly talks were held as well as intergovernmental meetings. On behalf of the Bank, the Resort “Dilorom” also repeatedly appealed to the local public administration authorities.

However, despite the fact that the decision to acquire the Resort “Dilorom” by “Asaka” Bank was made, including by the Issyk-Kul regional administration, the legal status of buildings and structures of the Resort are still not regulated.⁹⁸

⁹³ Exhibit C-26.

⁹⁴ Exhibit C-26.

⁹⁵ Exhibit C-26.

⁹⁶ Exhibits C-26, R-91.

⁹⁷ Exhibit C-261.

⁹⁸ Exhibit C-323 (emphasis added).

98. It is critical to recall that, in relation to the other resorts (Rokhat-NBU Resort, Buston Resort and Dilorom Resort), the relevant Kyrgyz authorities did in fact re-register rights of use that had been granted during the Soviet period and those rights were formalised in the system of property law of Kyrgyzstan long after the 1995 Protocol at the insistence of the Claimants. Moreover, such rights were recorded in the State Register. If the Claimants' submissions and the majority's position were to be accepted in respect of Resort Zolotye Peski, then it would follow that all these steps (which were examined in detail above) would have been pointless.
99. The majority of the Tribunal have not commented on any of the foregoing points relating to the 1994 Protocol and the 1995 Protocol or the contemporaneous evidence just cited. They simply assert the following without analysis or authority: "*Again, as with the 1992 Agreement and the 1994 Protocol, the 1995 Protocol makes clear that the Claimants' investments retained their status in Kyrgyz territory, under Kyrgyz law.*"⁹⁹
100. **Fourth**, the Claimants rely upon a report of a "Government Commission" in 2005.¹⁰⁰ In fact this commission only included the Head of the Bosteri Village Council; the other two members of the commission were representatives of the Claimants.¹⁰¹ Obviously the Head of the Bosteri Village Council has no competence to determine or adjudicate upon rights to property. In the report itself, dated 12 August 2005 and not appearing on official letterhead, it is recorded that the "*legal documents for the use of the land plot of the "Zolotye Peski" are the following...*". Three documents are then listed: the Soviet-era certificates dated 25 November 1959 and 8 June 1978, which have already been addressed, and a certificate of re-registration of a branch, which apparently "*states that the resort 'Zolotye Peski' is a private property of SJSC 'TAPOICH'*". That document, which is on the record, actually says no such thing (and the Claimants have never argued to the contrary). It merely records that the main activities of the branch of TAPOiCh are "*Zototie Peski*".¹⁰² That such a glaring error is made in the description of an official document makes it difficult to accord much weight to the report of this "Government Commission". Finally, it is interesting that no reference is made to the 1992 Agreement, the 1994 Protocol or the 1995 Protocol in the report.

⁹⁹ Award, §521.

¹⁰⁰ C's Reply, §104.

¹⁰¹ Exhibit C-538.

¹⁰² Exhibit C-51.

101. **Fifth**, the Claimants refer to the Technical Passport issued by the Issyk-Kul Department of Land Management and Registration of Rights to Real Estate of the State Register in 2005,¹⁰³ which, they say, “*designated TAPOiCh as the ‘user’ of all the buildings and structures comprising the Resort*”.¹⁰⁴ As the name suggests, however, this is a technical document recording in precise detail over 60-pages the surface area of every single room comprising the resort complex. It is a technical survey, as the Claimants say, “*of the technical characteristics of the buildings, structures, apartments or other real estate, as well as the actual boundaries of the land plot*”.¹⁰⁵ It is not a document evidencing title under Kyrgyz law (and the Claimants’ expert does not suggest otherwise). The fact that, on the cover page of the document, TAPOiCh is designated as the user of the premises is not probative as to what rights TAPOiCh has to the buildings and the land in question.
102. **Sixth**, the Claimants refer to decisions of the Inter-District Court of the Issyk Kul Region and the Issyk Kul Regional Court in 2010 and 2011.¹⁰⁶ The first decision relates to a claim by the State Administration of Issyk Kul District to put an end to TAPOiCh’s occupation of 3.5 hectares of land that was over and above the 25 hectares of land that had been recorded in the legal acts of the Soviet era that have already been referred to. The Court is not, therefore, asked to make any finding about the continued validity of those Soviet-era legal acts and does not do so.¹⁰⁷ The second decision is an appeal against the first decision and the appeal was dismissed.¹⁰⁸
103. **Seventh**, the Claimants maintain that they can all alternatively rely on the doctrine of adverse possession to claim ownership rights (as opposed to rights of use) in respect of the land and buildings/facilities. This argument was raised for the first time in the Claimants’ Points of Clarification on Issue 1 in response to the Tribunal’s questions after the hearing. It is an argument without legal foundation for the reasons that follow.
104. Both Parties agree¹⁰⁹ that Article 265 of the Kyrgyz Civil Code sets out the criteria for acquisition of property by adverse possession:

1. A citizen or a legal entity that is not the holder of property rights, but in good faith, openly and continuously possesses real estate property as if

¹⁰³ Exhibit C-495.

¹⁰⁴ C’s Reply, §104.

¹⁰⁵ C’s Reply, §124.

¹⁰⁶ C’s Reply, §104.

¹⁰⁷ Exhibit C-257.

¹⁰⁸ Exhibit C-550.

¹⁰⁹ C’s 4th Redacted Legal Opinion, §160; R’s Memorial, §87.

it was his own for fifteen years or other property for five years, acquires property rights over this property (adverse possession).

Property rights to real estate and other property subject to state registration arise for the person who acquired this property by adverse possession from the moment of such registration.

2. Prior to the acquisition of the property rights by adverse possession a person who possesses the property as one's own shall have the right to protect his possession against third parties who are not the holders of property rights, as well as those who do not hold the right of possession to it on the basis of other grounds provided for by law or contract.

3. A person relying on adverse possession can add all the time during which this property was in possession of the person, whose legal successor the former person is, to the time of his possession.

4. The adverse possession limitation period in respect of property held by a person from whose possession they could be claimed in accordance with Articles 289-291, 294 of this Code, begins no earlier than the expiration of the limitation period for the relevant claims.

5. Recognition of property rights by adverse possession is done by the court.

105. In accordance with this provision, adverse possession can only give rise to property rights if they are recognised by a court and are then registered in the State Registry. The Claimants do not suggest that either of these requirements were satisfied and hence their argument based upon the application of Article 265 of the Civil Code must fail.

106. It is also obvious that the conduct of the three Claimants who did manage to secure rights of use of the land and buildings/facilities at the respective resorts is totally at odds with the notion that they have treated that property "as their own" for the purposes of Article 265. An entity would not enter into a lease agreement with the owner of the property, for instance, if it was treating the property as its own.

(vi) Conclusion

107. At the date of the 2016 Order, the only rights TMP had over the Resort Zolotiye Peski was under a lease in respect of the 2.7 hectares of beach front land that was due to expire on 27 April 2016.

C6 Conclusions on the Claimants' investments

108. It follows from the foregoing analysis that, at the date of the 2016 Order (4 April 2016), the Claimants had the following rights over assets in the Kyrgyz Republic:

- 108.1. NBU through its local subsidiary had a right of use of 14.654 hectares of land for Resort Rokhat-NBU until 1 April 2054 and 4.4 hectares of beachfront land until 24 June 2016. NBU would have had use of the facilities constructed on the land so long as its right to use the land subsisted. It is likely that the Kara-Oy Village Administration would have continued to grant leases in relation to the beachfront land so long as NBU had a right of use to the adjacent land on which the facilities were constructed;
- 108.2. Asaka through its local subsidiary had a right to use the land and the facilities constructed upon it in respect of Resort Dilorom until 5 November 2049;
- 108.3. Uzpromstroybank through its local subsidiary held a lease over 10.65 hectares of land for Resort Buston, which also entailed a right of use to the buildings and structures located on it. That lease was to run until 9 February 2061;
- 108.4. TMP through its local subsidiary had a lease in respect of the 2.7 hectares of beach front land for Resort Zolotiye Peski that was due to expire on 27 April 2016.
109. The majority of the Tribunal has not conducted an analysis of the specific rights held by each of the Claimants in respect of their alleged investments at the date of the 2016 Order. Instead they devote a single paragraph to each Claimant in which they record their conclusion that they had “valid rights” without elaborating what those rights actually were. In relation to Claimants NBU, Asaka and Uzpromstroybank, the majority records (correctly) that those claimants had registered rights under various official instruments (they refer to land certificates issued by the Kyrgyz authorities). But in relation to Claimant TMP, the majority says: “*the Tribunal finds that it maintained registered rights in Resort Zolotiye Peski until 4 April 2016 pursuant to the doctrine of universal succession. The fact that TMP did not re-register its rights in the Resort after its reorganization is irrelevant since the doctrine of universal succession is an exception to any purported re-registration requirement.*”¹¹⁰ The doctrine of universal succession, however, cannot be an independent basis for acquiring rights to immovable property where none otherwise existed. If TAPOiCh had valid rights to the assets comprising Resort Zolotiye Peski, then those rights could have passed to TMP after the reorganization of TAPOiCh by virtue of the doctrine of universal succession. But if TAPOiCh did not have valid rights,

¹¹⁰ Award, §538.

which is the case here, the doctrine of universal succession does not operate to vest TMP with something that TAPOiCh did not have in the first place.

D LIABILITY

110. The 2016 Order had the effect of expropriating any property rights that the Claimants held in respect of the Resorts immediately before the 2016 Order came into effect (i.e. before 4 April 2016). Claimant TMP had no valid property rights in respect of Zolotoyie Peski Resort on the date of the 2016 Order and hence the Respondent has not breached the BIT and/or the FIL as Claimant TMP had no investment that could be expropriated. The Respondent is, however, liable to compensate the other Claimants for the loss of their property rights as enumerated above.
111. The text of the 2016 Order is consistent with the foregoing conclusions on the nature and extent of the Claimants' property rights. It refers to the four resorts as "*currently being used by the legal entities of the Republic of Uzbekistan*" rather than being owned by them:

For the purposes of effective use of the state property in accordance with the provisions of the Agreement "On mutual recognition of rights and regulations of property ownership relations" dated 9 October 1992 and ratified by the Resolution No. 1404-XII of Jogorku Kenesh of the Kyrgyz Republic dated January 12, 1994, and taking into consideration the Resolution No. 1080 of the Supreme Council of the Republic of Kyrgyzstan "On assumption of ownership of the Republic of Kyrgyzstan over the resort and recreational facilities being used by the legal entities of other CIS countries" dated by December 16, 1992, as well as guided by Articles 10 and 17 of the constitutional Law of the Kyrgyz Republic "On the Government of the Kyrgyz Republic":

1. The Fund for Management of State Property under the Government of the Kyrgyz Republic shall, in the established manner:

1) Assume state ownership over the following resort and recreational facilities located on the territory of the Kyrgyz Republic and currently used by the legal entities of the Republic of Uzbekistan:

- Resort "Zolotiye Peski," [...]

- Resort "Dilorom," [...]

- Resort "Rokhat-NBU," [...]

- Resort “Buston,” [...]”¹¹¹

112. The majority of the Tribunal refers to text in paragraph 1(1) as evidence that the Claimants must have owned the Resorts on the date of the 2016 Order.¹¹² The majority omits to refer to the contrasting language between the reference to the Resorts being “currently used” by the Claimants and the direction to the Fund for Management of State Property to “assume state ownership” over the Resorts.

E QUANTUM

113. The precise identification of the rights comprising the investments is essential for quantum as well. The majority has endorsed the valuation of each resort proffered by the Claimants’ quantum expert, Mr Timothy Allen of PwC, who states that he has “*valued losses as the market value of the expropriated assets, that is, the Claimants’ property rights in the facilities (which they own) and in the land (for which they have a right of use for a certain amount of time)*”.¹¹³

113.1. **First**, Claimant TMP had no property rights at all in respect of the Zolotiye Peski Resort as at the date of the 2016 Order.

113.2. **Second**, none of the Claimants owned the facilities. For the reasons set out above, they had a right to use the facilities that was conterminous with the right to use the land. Neither the Claimants, nor the majority of the Tribunal, have established any basis for ownership rights to the facilities.

113.3. **Third**, the leasehold rights held by the Claimants NBU, Asaka and Uzpromstroybank through their local subsidiaries expired at different times (the difference was more than ten years). There is no recognition of this in the Claimants’ expert reports.

114. It follows that a core assumption relied upon by the Claimants’ valuation experts was wrong. In relation to Claimant TMP and Zolotiye Peski Resort in particular, the Claimant had no property rights to which a value could be properly attributed at the date of the expropriation.

115. Finally, the interest rate prescribed for a lawful expropriation in Article 6(3) of the Law on Investments is the twelve-month LIBOR rate. Mr Allen, on instruction, has applied LIBOR

¹¹¹ Exhibit C-9.

¹¹² Award, §547.

¹¹³ Allen’s Report, §2.13. Mr Hart of Credibility adopted the same assumption in his report filed with the Claimants’ Reply: Hart’s Report, §§52-53.

plus 4%.¹¹⁴ This addition of 4%, when compounded annually, obviously makes an enormous difference to the compensation to be awarded to the Claimants: the amounts claimed in interest represent a little less than half the values assigned to the properties.¹¹⁵ I accept that the rate specified in Article 6(3) of the FIL may not be applicable, but this would be a question of Kyrgyz law upon which we have had no submissions or expert evidence. In any event, whether Kyrgyz law or international law were to apply to the question of the appropriate interest rate, the rate that is to be applied must be a commercially reasonable rate. If it is more than a commercially reasonable rate, then it introduces a punitive component that goes beyond the compensatory objective of interest. It may be inferred from the fact that Mr Allen was instructed to apply LIBOR plus 4% that he was not able to justify that rate on a commercial basis.

116. The majority of the Tribunal concludes that the addition of 4% to the LIBOR rate is justified in order to distinguish an unlawful expropriation from a lawful expropriation.¹¹⁶ That is tantamount to awarding punitive damages: it represents an additional punitive element on top of the compensation that would make the Claimants whole. The Tribunal has no jurisdiction to award punitive damages, which is also not recognised as a remedy in international law.¹¹⁷

¹¹⁴ Allen Report, §5.63. Mr Hart was also instructed by the Claimants to apply a 4% uplift but pointed out that LIBOR is being phased out and is not appropriate.

¹¹⁵ Allen Report, Table 18.

¹¹⁶ Award, §784.

¹¹⁷ J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 19, 36, 219.



Professor Zachary Douglas KC
Arbitrator

16 MAY 2023

Date