**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**THE KYRGYZ REPUBLIC**
c/o Center for Court Representation of the Kyrgyz Republic
Erkindik Avenue 58 "A"
720040 Bishkek City
Kyrgyz Republic,

*Petitioner,*

v.

**JSC TASHKENT MECHANICAL PLANT**
61 Elbek Street
Tashkent, 100016
Republic of Uzbekistan;

**JSCB ASAKA**
67 Nukus Street
Tashkent, 100015
Republic of Uzbekistan;

**JSCB UZBEK INDUSTRIAL AND CONSTRUCTION BANK**
3 Shakhrisabz Street, Yunusabad District
Tashkent, 100000
Republic of Uzbekistan;

**AND**

**NATIONAL BANK FOR FOREIGN ECONOMIC ACTIVITY OF THE REPUBLIC OF UZBEKISTAN**
101 Amir Temur Street
Tashkent, 100084
Republic of Uzbekistan;

*Respondents.*

CIVIL ACTION NO. 22-cv-02266

**PETITIONER THE KYRGYZ REPUBLIC's PETITION TO VACATE OR SET ASIDE AN ARBITRAL AWARD**

**ORAL HEARING REQUESTED**

Petitioner the Kyrgyz Republic ("Kyrgyz Republic"), by and through its undersigned counsel, hereby moves this Court for an order and judgment vacating or setting aside the arbitral award, dated May 17, 2023, in JSC Tashkent Mechanical Plant and others v. Kyrgyz Republic

(ICSID Case No. ARB(AF)/16/4) (the "Arbitration" and the "Award") pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10.

The Arbitration was commenced by Respondents (as defined below) against the Kyrgyz Republic pursuant to the December 24, 1996 Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Uzbekistan on the Mutual Promotion and Protection of Investments ("Kyrgyz Republic – Uzbekistan BIT") and the 2003 Law of the Kyrgyz Republic No. 66 "On Investments in the Kyrgyz Republic" (the "Foreign Investment Law"). The Award was rendered in the District of Columbia by an arbitral tribunal (the "Tribunal") in the Arbitration that was seated here. A duly certified copy of the Award with the partially dissenting opinion of Professor Zachary Douglas KC ("Dissent") is annexed as **Exhibit 1** to the accompanying Declaration of Kiran Nasir Gore, Esq., dated August 6, 2023 ("Gore Decl.").

Based on the applicable law and facts, this Court should vacate or set aside the Award, in whole or in part. In support of its Petition, the Kyrgyz Republic respectfully states as follows:

## THE PARTIES

1. Petitioner the Kyrgyz Republic is a foreign state as defined in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a).

2. Respondent JSC Tashkent Mechanical Plant ("TMP") is an Uzbek legal entity registered at 61 Elbek Street, Tashkent, 100016, Republic of Uzbekistan. TMP previously was known as the Tashkent Aviation Production Association in the name of V.P. Chkalov ("TAPOiCH").

3. Respondent JSCB ASAKA ("Asaka") was established in the Republic of Uzbekistan in 1995 as State Joint Stock Commercial Bank "Asaka," and in 2015 was re-named as

Joint Stock Commercial Bank "Asaka." Asaka is an Uzbek legal entity registered at 67 Nukus Street, Tashkent, 100015, Republic of Uzbekistan.

4. Respondent JSCB Uzbek Industrial and Construction Bank ("Uzpromstroybank") was established in the Republic of Uzbekistan in 1922 and is an Uzbek legal entity registered at 3 Shakhrisabz Street, Yunusabad District, Tashkent, 100000, Republic of Uzbekistan.

5. Respondent National Bank for Foreign Economic Activity of the Republic of Uzbekistan ("NBU") was established in the Republic of Uzbekistan in 1991 by Presidential Decree of the Republic of Uzbekistan. NBU is an Uzbek legal entity registered at 101 Amir Temur Street, Tashkent, 100084, Republic of Uzbekistan.

6. Collectively, TMP, Asaka, Uzpromstroybank, and NBU are referred to as "Respondents."

## JURISDICTION AND VENUE

7. The Kyrgyz Republic incorporates by reference paragraphs 1 through 6 above as if set forth fully herein.

8. The Kyrgyz Republic - Uzbekistan BIT provides that an investor from one Contracting State may bring an investment claim against the other Contracting State before the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, DC "in accordance with" the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention," also known as the "Washington Convention").

See Gore Decl., **Exhibit 2**, Article 10. However, at the time the Arbitration was commenced, the Kyrgyz Republic was not a party to the ICSID Convention.[1]

9. On May 17, 2017, the Tribunal issued Procedural Order No. 1 ("PO No. 1"), which provided *inter alia* that the Additional Facility (Arbitration) Rules of the International Centre for the Settlement of Investment Disputes as of April 2006 ("ICSID AF Rules") would apply to the Arbitration to provide its procedural rules and that the place of proceedings was designated as Washington, DC. See Gore Decl., **Exhibit 4**, ¶¶ 1, 10.1.

10. The Award was rendered in May 2023 under the ICSID AF Rules. Article 3 of the ICSID AF Rules expressly states that the ICSID Convention does not apply to awards rendered under them. See Gore Decl. **Exhibit 5**, Article 3 ("Since the proceedings envisaged by Article 2 are outside the jurisdiction of [ICSID], none of the provisions of the [ICSID] Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein."). Thus, the Award is not governed by 22 U.S.C. § 1650a, the statute implementing the ICSID Convention.

11. Rather, the Arbitration and the Award fall within the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). The Arbitration and Award concern an international dispute between the Kyrgyz Republic, a sovereign state that has ratified the New York Convention, and Respondents, nationals of the

[1] The Kyrgyz Republic deposited with the World Bank its instrument of ratification of the ICSID Convention on April 21, 2022, whereby it officially entered into force for the State on May 21, 2022 - 27 years after the Republic had signed the ICSID Convention in 1995. See "The Kyrgyz Republic Ratifies the ICSID Convention," ICSID Website (Apr. 21, 2022), available at: https://icsid.worldbank.org/news-and-events/news-releases/kyrgyz-republic-ratifies-icsid-convention (last accessed: Aug. 4, 2023). It entered into force for the Kyrgyz Republic on May 21, 2022, in accordance with Article 68(2) of the ICSID Convention. Id.

Republic of Uzbekistan, which has also ratified the New York Convention. The United States has ratified the New York Convention and incorporated it into the FAA, 9 U.S.C. § 201, *et seq*.[2]

12. The FAA generally directs the parties in the method for seeking vacatur or set aside of an arbitral award. "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." 9 U.S.C. § 6. As such, this Petition is properly before this Court.

13. This Court has jurisdiction over the subject matter of this proceeding under 28 U.S.C. § 1332(a)(4) because the Kyrgyz Republic is a foreign state as defined in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603(a).

14. As mentioned, the Kyrgyz Republic, the Republic of Uzbekistan, and the United States have each ratified the New York Convention. As an action falling under the New York Convention, it arises under the treaties and laws of the United States, and the district courts of the United States have original jurisdiction, regardless of the amount in controversy. See 9 U.S.C. § 203.

15. The agreement to Washington, DC as the legal seat of the Arbitration, as memorialized in PO No. 1, has several consequences which apply to this Petition. See Gore Decl., **Exhibit 4**, ¶ 10.1.

16. *First*, because the Arbitration was seated in the District of Columbia and the Award was rendered here, this Court has primary supervisory jurisdiction over both the Arbitration and the Award under the New York Convention and thus is the only competent authority to vacate or

[2] See United Nations Commission on International Trade Law, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards Website, listing the Kyrgyz Republic, Republic of Uzbekistan, and the United States as Contracting States, available at: https://www.newyorkconvention.org/countries (last accessed: Aug. 4, 2023).

set aside the Award. See e.g. Termorio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 935 (D.C. Cir. 2007); Alghanim v. Toys "R" Us, 126 F.3d 15, 22-23 (2d Cir. 1997).

17. *Second*, because the Arbitration was seated in the District of Columbia and the Award was rendered here, this Court has personal jurisdiction over Respondents. See e.g. Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 352 (2d Cir. 1999) (recognizing personal jurisdiction over parties to an arbitration at the place they arbitrate). Respondents accordingly submitted to this Court's supervisory jurisdiction under the New York Convention.

18. *Third and finally*, because the Arbitration was seated in the District of Columbia and the Award was rendered here, venue is proper in this Court pursuant to 9 U.S.C. §§ 10, 204 and 28 U.S.C. § 1391.

## FACTUAL AND PROCEDURAL BACKGROUND

19. The Kyrgyz Republic incorporates by reference paragraphs 7 through 18 above as if set forth fully herein.

20. This case concerns an Arbitration that was conducted in Washington, DC before ICSID under ICSID AF Rules based on the Kyrgyz Republic – Uzbekistan BIT and the Foreign Investment Law.

21. The Arbitration purported to resolve an international investment dispute between Respondents, who are four Uzbek legal entities, and the Kyrgyz Republic over rights in several Soviet-era recreational facilities located on the shores of Lake Issyk-Kul in the northern part of the Kyrgyz Republic (the "Resorts"). But much has changed since the Soviet era.

22. In the intervening decades, the Kyrgyz Republic and the Republic of Uzbekistan have come into existence. They have unraveled themselves from the former and broader USSR regime and, for its part, the Kyrgyz Republic has established its own laws, including ones that

regulate property rights. Many of these laws impact the rights claimed by Respondents. The Tribunal was asked to consider these facts, circumstances, and laws. The Tribunal was first to determine whether it had jurisdiction over the dispute based upon the agreement to arbitrate and definitions of qualified "investments" in the Kyrgyz Republic – Uzbekistan BIT and the Foreign Investment Law. Then, should it find in favor of jurisdiction, as a next step, the Tribunal was to determine the scope of liability and damages owed to Respondents, if any.

23. Following seven years of arbitral proceedings, ultimately, in its Award, the Majority awarded $32,846,159.60 in damages to all four Respondents, with a pre- and post-award interest at LIBOR plus 4% (plus costs exceeding $10 million), on the assumption that all Respondents held ownership rights in the Resorts. However, the Majority exceeded its powers and acted in manifest disregard of the law, and the resulting Award is fatally flawed.

24. *First*, the Award overlooked that the predecessor in law of one of the Respondents, TMP, had an obligation under the Kyrgyz law to re-register the rights it had in one of the Resorts, namely Resort Zolotiye Peski. It failed to do so. By the time that TMP commenced the Arbitration, its rights to use Resort Zolotiye Peski had become invalid. The Tribunal simply did not have jurisdiction to address TMP's claims on the merits due to a lack of any rights of TMP that could constitute a covered investment under the Kyrgyz Republic – Uzbekistan BIT and the Foreign Investment Law and therefore exceeded its powers.

25. *Second*, the Majority consequently failed to observe that, as TMP's predecessor had not re-registered its claimed rights in Resort Zolotiye Peski, which date back to 1959, it cannot be said to have made an investment in the Kyrgyz Republic. Under the Kyrgyz Republic – Uzbekistan BIT and the Foreign Investment Law, the Tribunal was only empowered to address claims that were pursued by qualified "investors" having made qualified "investments" in the Kyrgyz

Republic. The record of the Arbitration reveals that TMP had not made a qualified "investment" **in the Kyrgyz Republic** (but rather, at best, in the Soviet Union). As the Tribunal was not presented with a dispute concerning a qualified "investment" of TMP, it was required to find that it lacked jurisdiction over its claims. Its rulings to the contrary also constitute an excess of powers.

26. *Third*, the Majority exceeded its powers by invoking the doctrine of *res judicata* to justify its wrongful dismissal of the jurisdictional objections of the Kyrgyz Republic submitted on May 7, 2022. According to the Majority, the Decision on Preliminary Objections issued in May 2019 already had *res judicata* effect, precluding consideration of the Kyrgyz Republic's May 2022 jurisdictional objections. However, the Decision on Preliminary Objections did not assume the status of *res judicata* until it became an integral part of the Award when it was issued on May 17, 2023 – approximately **one year after** the Kyrgyz Republic submitted the disregarded jurisdictional objections. Further, the application of *res judicata* at this earlier stage contravenes the **express directions** of the Tribunal as reflected in its May 17, 2017 PO No. 1, which authorized the Kyrgyz Republic to file further jurisdictional objections at the merits stage of the Arbitration. By invoking the *res judicata* doctrine to dismiss the Kyrgyz Republic's jurisdictional objections in this case, the Majority exceeded its powers.

27. *Fourth*, the Majority ruled on the merits of the three other Respondents' claims in disregard of the true extent of the rights they held in the Resorts under the Kyrgyz law. The record of the Arbitration reveals that none of the Respondents held ownership rights in the Resorts. They merely held various rights of use – and not ownership – because the Kyrgyz law firmly states that foreign entities could not hold such ownership rights and, in any event, the Resorts were State property. Yet the Majority ruled that the Kyrgyz Republic expropriated a broader scope of rights

than any of the Respondents in fact held, thereby awarding them substantially higher amounts in damages and, hence, acting in manifest disregard of the applicable law.

28. *Fifth*, putting aside the Majority's erroneous decisions on jurisdiction, from which flow erroneous conclusions on liability and damages, the Majority acted in manifest disregard of recognized approaches to awarding interest in arbitrations like this one. As stated in the Dissent, the interest rate awarded was unjustified and is "tantamount to awarding punitive damages," "which is also not recognised as a remedy in international law." Dissent ¶¶ 115 – 116.

29. Indeed, in the 40-page partial Dissent, Professor Zachary Douglas KC traces the mistaken facts, false reasoning, and disregard of applicable law that led the Majority to issue the flawed Award. The Kyrgyz Republic now asks this Court to exercise its supervisory powers under the FAA to cure these errors by vacating or setting aside the Award, in whole or part.

30. The Kyrgyz Republic now asks this Court to exercise its supervisory powers under the FAA to cure these errors by vacating or setting aside the Award, in whole or part.

**COUNT ONE**
**(Vacatur or Set Aside of the Award under 9 U.S.C. § 10)**

31. The Kyrgyz Republic incorporates by reference paragraphs 19 through 30 above as if set forth fully herein.

32. Article V(1)(e) of the New York Convention states that an award may be "set aside … by a competent authority of the country in which, or under the law of which, that award was made." In other words, the "Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." TermoRio, 487 F.3d at 928(quoting Alghanim, 126 F.3d at 23).

33. "Here, the arbitration award was issued in the United States, and thus U.S. law—namely the FAA […] applies." Mesa Power Grp., LLC v. Gov't of Can., 255 F. Supp. 3d 175, 182 (D.D.C. 2017). The FAA incorporates the vacatur and set aside bases of the New York Convention and enumerates several grounds for vacating awards. 9 U.S.C. § 10(a). Courts may vacate an arbitration award where *inter alia* "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Id.

34. "Those enumerated grounds do not include 'manifest disregard,' but [the D.C. Circuit Court has] said in the past that 'court inquiry may be undertaken' 'where it appears that the arbitrator manifestly disregarded the law.'" C.R. Calderon Constr., Inc. v. Grunley Constr. Co., Inc., 257 A.3d 1046, 1058 (D.C. Cir. 2021)(cleaned up).

35. The Award must be vacated or set aside, in whole or part, because at various decisional points the Majority exceeded its powers and acted in manifest disregard of the applicable law.

36. Under Section 10(a)(4) of the FAA, an arbitral award may be vacated or set aside where the arbitrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10 (a)(4). "[T]he courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators. […] They can and do decline enforcement of awards if an arbitrator exceeds his authority by arbitrating issues not submitted by the parties." Madison Hotel v. Hotel & Rest. Emps., Loc. 25, AFL-CIO, 128 F.3d 743, 749 (D.C. Cir. 1997), on reh'g en banc, 144 F.3d 855 (D.C. Cir. 1998)(cleaned up).

37. The Majority exceeded its powers in at least three respects: (1) by concluding that it had jurisdiction over TMP's claims because TMP held valid rights in Resort Zolotiye Peski, (2) by further concluding it had jurisdiction over TMP's claims because TMP's investment did not fall outside of temporal scope of application of the Kyrgyz Republic – Uzbekistan BIT and the Foreign Investment Law, and (3) by invoking the doctrine of *res judicata* to dismiss the jurisdictional objections of the Kyrgyz Republic.

38. "[I]n some circuits, including this one, an arbitrator's 'manifest disregard of the law' can compel a court to vacate an award." Mala Geoscience AB v. Witten Techs., Inc., No. CIVA 06-1343 RMC, 2007 WL 1576318, at *3 (D.D.C. May 30, 2007)(citing LaPrade v. Kidder Peabody & Co., 246 F.3d 702, 706 (D.C. Cir. 2001). To vacate an arbitration award due to the arbitrators' manifest disregard of law, the court must find that (1) the tribunal knew the governing legal principle yet refused to apply it or ignored it altogether, and (2) law ignored by the tribunals was well defined, explicit, and clearly applicable to the case. LaPrade, 246 F.3d at 706; see also Comedy Club, Inc. v. Improv West Associates, 553 F.3d 1277, 1292-93 (9th Cir. 2009) (partially vacating an award where the tribunal acknowledged and ultimately disregarded California law).

39. The Tribunal acted in manifest disregard of the law in at least two ways: (1) by concluding that the 2016 Order amounted to unlawful direct expropriation of ownership rights of Respondents where no such rights existed under the Kyrgyz law and (2) by applying an interest rate to the damages that is excessive and not recognized under international law.

**REQUEST FOR ORAL HEARING**

40. Due to the importance of the matters raised in this Petition, pursuant to LCvR 7(f), the Kyrgyz Republic requests an oral hearing.

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41. For the reasons stated above, and as elaborated in the accompanying Memorandum of Points and Authorities, Gore Decl. and exhibits thereto, this Court should vacate or set aside the Award, in whole or part, pursuant to 9 U.S.C. § 10 because the Majority exceeded its powers and acted in manifest disregard of the applicable law.

## PRAYER FOR RELIEF

WHEREFORE, Petitioner the Kyrgyz Republic respectfully requests this Court to enter an order vacating or setting aside the Award, in whole or in part, pursuant to 9 U.S.C. § 10. Petitioner the Kyrgyz Republic further requests that this Court award any other relief that it, in the interests of justice, deems necessary and proper.

Dated: Washington, D.C.
August 7, 2023

Respectfully submitted,

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