Neutral Citation Number: [2017] EWHC 2539 (Comm)

Case No: CL-2017-000115

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN AN ARBITRATION CLAIM

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 13/10/2017

Before :

SIMON BRYAN QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between :

THE KYRGYZ REPUBLIC	**Claimant**
- and -	
(1) STANS ENERGY CORPORATION **(2) KUTISAY MINING LLC**	**Defendant**

- -
- -

Tom Montagu-Smith QC (instructed by **KWM Europe LLP**) for the **Claimant**
Ben Juratowitch QC and Belinda McRae
(instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Hearing dates: 24 and 25 July 2017

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Judgment Approved

MR SIMON BRYAN QC (Sitting as a Deputy Judge of the High Court) :

A. Introduction and Preliminary Observations

1. The parties appear before the Court on the hearing of an application on the part of the Kyrgyz Republic ("the Republic") under section 67 of the Arbitration Act 1996 to challenge the substantive jurisdiction of the arbitral tribunal and to set aside specific paragraphs of an arbitral award dated 25 January 2017 ("the Award"), rendered by Professor Karl-Heinz Böckstiegel (President), the Hon. Colin L. Campbell Q.C. and

Mr Stephen Jagusch Q.C. ("the Tribunal") under the 1976 UNCITRAL Arbitration Rules, so as to provide that the Tribunal has no substantive jurisdiction.

2. That Award was rendered in proceedings brought by Stans Energy Corp ("Stans") and Kutisay Mining LLC ("Kutisay") (together, "the Defendants") under Article 18(2) of Law No. 66 on investment in the Kyrgyz Republic of 27 March 2003 ("the 2003 Investment Law"), in which the Defendants seek compensation for the Republic's alleged violations of Kyrgyz and international law in respect of their investments in the Republic's mining sector. In that Award, the Tribunal dismissed each of the Republic's five objections to jurisdiction that the Tribunal had decided to resolve at that stage. This application concerns only the fifth of those objections.

3. This matter comes before the English courts because, after the arbitration had been commenced, the parties agreed that it be seated in London. In consequence this application is a re-hearing of an issue which turns entirely on the proper interpretation of the Kyrgyz statute on which the Tribunal founded its jurisdiction, the 2003 Investment Law, and whether the Tribunal has jurisdiction under the 2003 Investment Law.

4. It might be helpful to the reader to know what the 2003 Investment Law is concerned with. However, as will appear, even a general characterisation of the purpose of that law is not the subject of agreement between the parties, and (at least says the Republic) any reliance on the purpose of the law is fraught with danger for the Court tasked with finding, on the basis of the expert evidence that is before the Court, the meaning of the particular provision of the 2003 Investment Law upon which the Tribunal's jurisdiction is based.

5. At its most anodyne, however, (and hopefully at this level uncontroversially) the 2003 Investment law is a law on investments in the Kyrgyz Republic. Whilst the Republic objects to what an English lawyer would describe as the "preamble" to the 2003 Investment Law being used as an aid to interpretation (the merits or otherwise of such objection being addressed in due course below), an (informal) translation from Russian into English of the preamble is in these terms:

> *"This Law sets forth the main principles of the national investment policy aiming at improving the investment climate in the republic and promoting the flow of local and foreign investment by providing investors with a fair and equitable legal regime and guaranteeing protection of their investments made into the economy of the Kyrgyz Republic."*

6. Again (at its most anodyne), and not as part of the exercise of interpretation itself, the 2003 Investment Law is concerned with a wide variety of "investments" (defined in Article 1) with the aim of deriving a profit or achieving a beneficial result in the form of, amongst other matters, money, licences or other permits, concessions, and profits and income derived from investments. Chapter II provides for various types of investor protection including a right to repatriate income derived from investments (Article 5) and prohibiting unlawful expropriation (Article 6). Article 18 (the dispute resolution provision) is concerned with settlement of "investment disputes". It is

common ground that Article 18(2) permits investors to ask for an "investment dispute" to be referred to ad hoc arbitration under the 1976 UNCITRAL Rules.

7. "Investment dispute" is defined in Article 1(6). It is the proper interpretation of Article 18 and the definition in Article 1(6) as a matter of Kyrgyz law which is at the heart of the jurisdictional challenge. As is common ground between the experts on Kyrgyz law, the 2003 Investment Law was adopted and published in two languages, the "official" language, Russian, and the "state" language Kyrgyz, in accordance with Article 10 of the Kyrgyz Constitution.

8. The definitional provision in Article 1(6) reads as follows in Russian, "возникающий при реализации инвестиций". It is not in dispute between the parties that the meaning of these words in Russian, expressed in English, is a dispute, "arising in the course of the implementation of investments" or "arising in the process of investments" (on either form of words it is accepted the Tribunal has jurisdiction). The words in Kyrgyz are "инвестицияларды сатууда келип чыгуучу талаш-тартыштар". The Republic submits that the meaning of these words in Kyrgyz, expressed in English, is a dispute, "arising in the course of the sale of the investments" (the Republic submits that claim advanced in the arbitration does not include such a dispute so the Tribunal has no jurisdiction).

9. The dispute between the parties arises in the context of the use of the word "*реализация*" in Russian, which the Republic accepts can mean "implementation" though they say it can also mean "sale", and the use of the word "сатуу" in Kyrgyz which the Republic submits literally means, and is to be interpreted in Article 1(6), viewed in whatever context is permissible, as meaning "sale" so that it is only disputes "arising in the course of sale" to which Article 18(2) applies.

10. The Defendants' primary case is that on its true interpretation the Kyrgyz version of Article 1(6) means the same as the Russian version, and investment disputes are those "arising in the course of the implementation of investments". The Defendants' alternative case (if it is wrong in its primary case) is that the present dispute does arise "in the course of the sale of the investment."

11. The Republic submits that the Kyrgyz version (if it differs from the Russian version and means what it submits it means) prevails praying in aid a provision of Kyrgyz law, Article 6(3) of the Law on Normative Legal Acts 2009, which provides:

> *"… in the event of an inconsistency between the text of the Constitution and other normative legal acts of the Kyrgyz Republic in the state language and the text in the official language, the text in the state language shall be deemed to be original."*

For their part the Defendants submit that Article 6(3) is either not triggered or does not assist on the basis that it cannot replace or terminate the interpretative process applying applicable Kyrgyz principles of statutory interpretation.

12. In order to consider whether the Tribunal has jurisdiction, it is my task to make findings as to Kyrgyz law on the basis of the evidence that has been put before me on Kyrgyz law which includes the applicable Kyrgyz principles of statutory

interpretation. For such matters I am dependent on the expert reports as to Kyrgyz law that are before me, about which more in due course.

13. There is no authentic English version of the 2003 Investment Law. There has not been adduced in evidence before me, a translation into English, by a professionally qualified translator, of either the Russian or the Kyrgyz language versions of the 2003 Investment Law, still less one agreed between the parties. Nor has either party adduced expert evidence on linguistics from a suitably qualified expert on linguistics.

14. There are, however, no less than six translations into English of the 2003 Investment Law (or parts thereof) that are before me. Four originate from the Republic and two come from the Defendants. I asked the parties whether these translations were based on the Russian version or the Kyrgyz version. Mr. Montagu-Smith QC, who appears for the Republic, informed me that the answer, so far that he could see, was that there was no express statement based on the versions on which they were based, but he submitted that "there was nothing to suggest that they were translations of the Kyrgyz version". Two of the translations originating from the Republic were published on the websites of Kyrgyz Government Agencies, namely the State Agency for Investment Promotion under the Ministry of Economy of the Kyrgyz Republic (the "Investment Promotions Authority") and the Consul-General of the Kyrgyz Republic of Pakistan. All of these translations (i.e. including those published by Kyrgyz Government Agencies), translate an investment dispute as defined in Article 1(6), into English, as a dispute "arising in the course of the implementation [or process] of investments and not "arising in the course of the sale of investments".

15. However, it is to the expert evidence before me, and the identified principles of statutory interpretation under Kyrgyz law identified by those experts, that I have had regard, and only had regard, in the findings that I make in due course. Accordingly, I have put out of my mind any translations of Article 1(6) into English save to the extent that they reflect the expert evidence that is before me as to the meaning of the Russian and Kyrgyz versions of the 2003 Investment Law.

16. The Defendants' expert on Kyrgyz law, Ms Natalia Galliamova ("Ms Galliamova"), exhibits the full text of the Russian version of the 2003 Investment Law and her free translation thereof into English. That translation is not understood to be controversial, though I bear in mind that it is not a translation from a professionally qualified translator. In contrast there is no complete text of the Kyrgyz version of the 2003 Investment Law in evidence before me. The Republic's expert on Kyrgyz law, Ms Aicholpon Jorupbekova ("Ms Jorupbekova"), herself exhibits the Russian version rather than the Kyrgyz version to her report. She does not exhibit a translation (professional or free) of the Kyrgyz version to her report. She does, however, exhibit extracts from Articles 1(1), 1(2), 1(3), 1(6), 2, 3 and 18 of the 2003 Investment Law that she has translated into English, and she opines on the meaning, in Kyrgyz, of the words in Article 1(6) in the Kyrgyz version.

17. I would only add at this point that I consider it would have been preferable, in conjunction with the service of the expert evidence on Kyrgyz law that is before me, for one or other of the parties to have obtained, and exhibited in evidence, a professional translation of at least the whole of the Kyrgyz version of the 2003 Investment Law (in reality for the Republic to do so given that it is the Republic that

relies on the expression in English of words in Kyrgyz which it seeks to rely upon). Be that as it may the findings that I make in due course below are based on what available admissible evidence there is before me of the Russian and Kyrgyz versions of the 2003 Investment Law.

18. Foreign law is a matter of fact that must be proved to the satisfaction of the judge by expert evidence. The Kyrgyz law experts are not in entire agreement as to the applicable principles of Kyrgyz statutory interpretation, and are in dispute as to what may be considered on the basis of such principles when construing Article 18 and 1(6), and as to the application of such principles to the facts. The matter is complicated by the fact that the parties had agreed, it is said for reasons of proportionality, that the experts would not be called to give live evidence and so were not cross-examined. In consequence, where there is a conflict of factual evidence (as there is), it will be necessary for me to consider, and make findings, as to the evidence that I consider represents Kyrgyz law to the extent that the same has been demonstrated to my satisfaction, without having had the benefit of hearing oral expert evidence and cross-examination on areas of dispute.

B. Background

19. Witness statements from the parties' arbitration counsel have been put in evidence before me without the need to call the witnesses concerned. The statements consist of the first statement of Andrei Yakovlev ("Yakovlev 1") dated 22 February 2017 on behalf of the Republic in support of the Republic's arbitration claim that the Tribunal has no substantive jurisdiction, a statement in response from Noah Rubins ("Rubins 1") dated 9 June 2017 in defence to the Republic's section 67 application, and a statement in reply from Mr. Yakovlev ("Yakovlev 2") dated 5 July 2017. I have read those statements and bear their contents in mind. They do not contain, or give rise to, issues of disputed fact, and mainly assist in framing the issues as well as foreshadowing the legal arguments that have been developed in the skeleton arguments and oral submissions.

20. I take what follows as to the factual background from those statements as summarized in the respective skeleton arguments. It is not understood to be controversial, and such witness evidence does not give rise to disputed facts on which it is necessary to make any factual findings.

B.1 The Licences

21. The First Defendant, Stans Energy Corp ("Stans"), is a publicly-traded Canadian company that acquires and develops mineral deposits. It is the Defendants' case that Stans owns a Kyrgyz company called Stans Energy KG LLC ("Stans KG"), which in turn owns the Second Defendant, Kutisay Mining LLC ("Kutisay), a limited liability company also registered in the Republic.

22. The dispute between the parties arises out of the proposed development of two mineral deposits in the Kyrgyz Republic: a deposit of heavy rare earth elements known as Kutessay II; and a beryllium deposit known as Kalesay.

23. In December 2009, Stans invested in Kutessay and Kalesay. This occurred by way of what the Defendants describe as a two-step privatisation process. First, the then

government of the Republic incorporated a specific Government-owned entity, Kutisay (formerly known as Kutisay Mining JSC), and issued it with two twenty-year mining licences, as recorded in minutes of negotiations dated 21 December 2009 ("the Minutes"). Secondly, the Republic held an auction on the stock exchange at which Stans KG acquired all of the shares in Kutisay and thus the economic interest in the mining licences already issued to Kutisay.

24. More specifically, in 2009, Stans was in discussions with the Republic's then government for the issue of licences to exploit Kutessay II and Kalesay. The Republic's current position is that, under Kyrgyz law, subsoil licences for those deposits could only be issued after a competitive tender process. On 1 December 2009, the Republic's then government passed Resolution 725, purporting to amend the process by which licences could be issued. The Resolution purported to permit the relevant Ministry to issue subsoil licences to companies which were wholly managed by the Kyrgyz Republic Development Fund CJSC ("the Development Fund") for subsequent sale of those companies by auction. In the present arbitration the Republic's current position is that Resolution 725 was unlawful, could not supersede the requirements in legislation and was not, in any event, in force at the time when the licences were granted.

25. On 9 December 2009, Kutisay was incorporated. The sole shareholder of Kutisay appears to have been a New Zealand company, Vesatel United Limited ("Vesatel"). On 16 December 2009, Vesatel executed a Trust Management Agreement conferring certain management rights over Kutisay onto the Development Fund. On 21 December 2009, Kutisay applied to the State Agency for Geological and Mineral Resources ("SAGMR") for licences to exploit the deposits. At a meeting between Kutisay and SAGMR on the same day, SAGMR's Licencing Commission resolved to grant licences to Kutisay, and to grant the first periodic license agreements which set out the conditions to be fulfilled by Kutisay, as recorded in the Minutes.

26. On 29 December 2009, the Central Asia Stock Exchange conducted an auction of the shares in Kutisay. Stans KG was the successful bidder. There was one other bidder, a Panamanian company, Gremar Assets SA ("Gremar"). The Republic's case in its recent defence in the arbitration is that the Gremar bid was a sham organised to lend legitimacy to the auction process. The Republic's case is that the price for the shares paid by Stans KG was double the tariff payable for the licences, and that the payment over and above the tariff was a bribe, which was then laundered through a series of bank transfers between other offshore companies.

27. The Defendants' case is that Stans then undertook preparatory work for the development of Kutessay II, whereas the Republic's case is that Kutisay did not comply with the terms of the licences.

28. The President of the Kyrgyz Republic was ousted in April 2010 and a new Government was formed. The Minister of Natural Resources was replaced. On 20 September 2010 the Republic issued fresh licences to Kutisay in respect of the deposits as Kutisay had changed its corporate form from a joint stock company to a limited liability company. The Republic also granted new license agreements, which provided for the extension of certain deadlines to the end of 2011. The Republic's case is that there was no lawful basis for issuing the licences, and that, in any event,

Kutisay failed to meet the extended deadline. On 12 and 30 December 2011, Kutisay requested a further extension of time.

29. Presidential elections were held in December 2011, resulting in the appointment of a new President, Prime Minister and Minister of Natural Resources. On 15 June 2012, SAGMR granted a third licence agreement to Kutisay in respect of Kutessay II. Deadlines were again extended. The Republic's case in the arbitration is that this new licence agreement was issued unlawfully and without authority and that Kutisay also failed to comply with its conditions. No further licence agreement was issued in respect of Kalesay.

B.2 Events leading to the termination of the licences

30. On 26 June 2012, a Kyrgyz Parliamentary Committee issued a resolution declaring that the third Kutessay II licence agreement had been issued in breach of Kyrgyz law. On 30 August 2012, SAGMR suspended the licence for 30 days. On 12 February 2013, Kutisay asked SAGMR to issue an addendum to the third Kutessay II licence agreement, extending time.

31. On 4 April 2013, the Prosecutor General of the Kyrgyz Republic commenced proceedings against Kutisay seeking to invalidate the minutes of SAGMR's meeting on 21 December 2009 (i.e. the Minutes) at which SAGMR had initially decided to grant the licenses to Kutisay. On 15 April 2013, on application by the Prosecutor General, the Inter-District Court of Bishkek issued an injunction prohibiting Kutisay or any other party from taking any action with respect to the various licences. Kutisay appealed, but its appeal was dismissed on 29 May 2013.

32. On 19 March 2014, the Inter-District Court of Bishkek granted the Prosecutor General's request to annul the minutes of SAGMR's meeting, and then on 17 October 2014, SAGMR's Licencing Commission resolved to terminate D2's licences. Kutisay applied to the Kyrgyz Courts to declare the minutes from that meeting invalid. It was unsuccessful.

33. The Defendants characterise the Republic's actions as taking a series of steps to deprive the Defendants' investments of their value. Chief among these was the Kyrgyz Prosecutor General's April 2013 challenge in the Kyrgyz courts to the validity of the Republic's grant of the two mining licences to Kutisay, which resulted, as identified above, in an injunction on 15 April 2013 prohibiting further work by Stans and Kutisay on the deposits and the annulment, on 19 March 2014, of the Minutes. It culminated in the Republic's revocation of the two mining licences on 17 October 2014, by which revocation (say the Defendants) they were formally deprived of the property rights that they had already ceased to enjoy.

B.3 The Moscow Arbitration

34. On 30 October 2013, the Defendants commenced arbitration at the Moscow Chamber of Commerce and Industry (the "MCCI") seeking compensation for the economic loss they say they had suffered as a result of the Republic having deprived them of their investments in Kutessay II and Kalesay deposits. This led to an award in favour of the Defendants in June 2014 in excess of US$118 million (in the Republic's absence). On the Republic's application, that award was set aside by the Arbitrazh Court of the City

of Moscow because, for reasons not in issue in this Court, the MCCI lacked jurisdiction. The Supreme Court ultimately upheld that decision on 11 January 2016. In the course of the Republic's application to set aside the MCCI award, and in contrast to the present arbitration proceedings where they chose not to advance any evidence from a linguistic expert, the Republic did adduce expert linguistic evidence in relation to the meaning of Article 18 of the 2003 Investment Law. That evidence, however, is not relied upon in the present arbitration proceedings.

B.4 The present UNICTRAL arbitration proceedings

35. On 13 May 2015 the Defendants commenced the present UNCITRAL arbitration proceedings, the subject matter of the present arbitration claim, serving a notice of arbitration under the UNCITRAL Rules. As I have already foreshadowed, the parties subsequently agreed that the seat should be London.

36. In the ongoing UNCITRAL arbitration, the Defendants allege that in breach of Kyrgyz and international law:

    (1) The Republic's cumulative measures amount to a *de facto* expropriation of their investments, comprised of Stans' ownership interest in Kutisay and its assets (including the licences), as well as Kutisay's own interest in its assets.

    (2) The Republic's conduct also breached the 'fair and equitable treatment standard', insofar as the Republic frustrated the legitimate expectations of the Defendants and acted arbitrarily.

37. The Republic has brought a number of challenges to the Tribunal's jurisdiction at various stages of the arbitration proceedings. In its Award, the Tribunal dealt with five of the Republic's jurisdictional objections, leaving two other jurisdictional objections that had been made by that time to be resolved alongside the merits. None of the preliminary jurisdictional objections was successful. Only one of them is before me.

38. The Defendants, in their witness evidence and in their Skeleton Argument, draw attention to the fact that the present arbitration is the first occasion on which the Republic has raised this jurisdictional objection, not having done so in the Moscow courts in relation to the challenge to the jurisdiction of the MCCI tribunal, or on this basis in entirely unconnected international arbitral proceedings brought under Article 18(2) with a different party, despite raising other jurisdictional objections (*Sistem Muĥendislik Inş aat Sanayi ve Ticaret AŞ v The Kyrgyz Republic* (ICSID Case No ARB(AF)/06/1), 9 September 2009). Further, the Defendants point out that the Republic formulated the present jurisdictional objection only 12 months after the start of the UNCITRAL arbitration and 9 months after first identifying its jurisdictional objections.

39. The matters identified in the previous paragraph are, however, entirely irrelevant on this application. It is not suggested that the Republic is precluded from advancing the argument on jurisdiction that it advances before me by reason of any of the above matters, and the present application stands or falls on its own merits, on the basis of the expert evidence before me.

40. In its Award dated 25 January 2017 the Tribunal dismissed five jurisdictional objections, including that which is the subject matter of this arbitration claim. On 22 February 2017 the Republic issued and served the present arbitration claim challenging the Tribunal's jurisdiction pursuant to section 67 of the Arbitration Act 1996.

41. On 15 March 2017 the Tribunal directed that the arbitration should continue in the interim. On 14 June 2017 the Republic filed its Statement of Defence in the arbitration (the "Defence"), after the evidence of Mr Rubins and Ms Galliamova, on behalf of the Defendants, was served in this arbitration claim. The Republic's defence in the arbitration, amongst other matters, is that

    (1) The licences were not granted in accordance with Kyrgyz law, and were procured by bribery;

    (2) The Republic was entitled to cancel the licences as a result of breaches by the Defendants of their terms; and

    (3) The licences were worthless in any event.

C. The nature of an application under section 67 of the Arbitration Act 1996

42. The Defendants accept, for the purpose of this hearing, that a section 67 application is a re-hearing, in the light of the consistent authority to that effect (see *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68, approved in *Dallah Real Estate v Pakistan* [2010] UKSC 46, [2011] 1 AC 763, paras 26 and 96), which the High Court should follow (*Tajik Aluminium Plant v Hydro Aluminium AS* [2006] EWHC 1135 (Comm), para. 37). The Defendants reserve the right to argue otherwise if this case is heard on appeal. In consequence, as the Republic identifies at paragraph 44 of their Skeleton Argument, the Tribunal's conclusion may be of interest, but it has no legal or evidential weight - see *Dallah Real Estate v Pakistan* [2010] UKSC 46; [2011] 1 AC 763 at [30], a principle I have noted, and followed, in this judgment.

D. The Award on Jurisdiction

43. The Tribunal addressed the issue on jurisdiction that forms the subject matter of the present claim at paragraphs 217 to 235 of the Award (footnotes omitted):-

> *"3. Tribunal's Analysis*
>
> *217. The Tribunal begins its analysis with the wording of Article 1 (6) of the 2003 Kyrgyz Investment Law. According to paragraph 48 of the Jorupbekova Report submitted by the Respondent, "[t]he Russian word "реализация" (literally, 'realization') used in this provision can mean either 'implementation' or 'sale'" By contrast, the corresponding Kyrgyz word "camyy" can only mean "sale".*
>
> *218. Even if one accepts, as stated by the Respondent's expert, that the literal approach is to be used in interpreting*

the phrase "arising in the course of sale of investments", that does not end the matter.

219. Statutory interpretation does not limit consideration of a word or words in isolation. The context of a phrase used in a definition in a statute must be taken into consideration.

220. In the view of this Tribunal, it is not inconsistent with the statutory references of the laws of Kyrgyzstan to which the Tribunal has been referred that they be read in statutory context and in their grammatical and ordinary sense harmoniously with the scheme of the 2003 Kyrgyz Investment Law.

221. The preamble to the 2003 Kyrgyz Investment Law reads as follows:

> *This Law sets forth the main principles of the national investment policy aiming at improving the investment climate in the republic and promoting the flow of local and foreign investment by providing investors with a fair and equitable legal regime and guaranteeing protection of their investments made into the economy of the Kyrgyz Republic.*

222. Article I of the 2003 Kyrgyz Investment Law includes in the definition of "investments":

> *any right to engage in activity based on a license or other permit issued by government bodies of the Kyrgyz Republic.*

223. The position of the Respondent based on its interpretation would result in an absurd situation, namely that a party has a right to engage in activity based on a license but cannot exercise a right to have access to the dispute resolution provided for in the statute unless a dispute regarding the license arises immediately as the license is issued.

224. In the view of this Tribunal, context would have regard to the derivation of the word which in this case would be to the Russian word (from which the Kyrgyz version was translated), which, according to the Respondent's expert, can mean both "implementation" and "sale", and which would then make both common and grammatical sense when read in the context of investment dispute.

225. Even if one were to accept the literal or plain meaning approach of the word "sale" within the definition of

"investment dispute", it can include ongoing or continuing activity as opposed to past activity.

226. A "sale" that has ongoing terms and conditions with continuing rights and obligations on the part of the parties can still be considered an investment within the 2003 Kyrgyz Investment Law.

227. The Tribunal does not accept the position advanced by the Respondent, which puts forward an unduly restrictive definition of the word "sale" that, when considered in context, is not in accord with the widely accepted norms of statutory interpretation even when literal meaning is considered.

228. If the words "arising in the course of sale" are interpreted in the same way in the context of the 2003 Kyrgyz Investment Law and in harmony with the provisions of the Arbitral Tribunals Law to provide a mechanism to resolve disputes as between investors and others, including the State, as provided for in Article 18(2), there is no need to involve the provisions of the Law on Normative Legal Acts to consider the priority or "originality" of the Kyrgyz version of Article 1(6).

229. In written submissions following the oral hearing in this matter on 23 September 2016, counsel for the Respondent elaborated on their position that the word "sale" is to prevail over the word "implementation" based on Article 6(3) of the Law on Normative Legal Acts.

230. The Tribunal has been provided with no authority for the proposition that, having regard to the meaning of a word in a statute even applying the plain or literal meaning, one is to ignore the context of the statute, particularly its stated purpose.

231. In the view of this Tribunal, the plain or a literal meaning of a single word in a statute should not be confined to the word itself in isolation.

232. In order to provide meaning, even plain or literal meaning, some context is appropriate. In this case context comes from:

l) the context of the preamble of the statute to be among other things facilitating equitable treatment as between investors in the State;

2) the context of the definition of "investment" in Article l, which can include a license;

> *3) the context of Article 1(6) as part of dispute resolution;*
>
> *4) the fact that, while there is no conclusive evidence on the point based on the material filed, it appears likely that the word as it appears in the Kyrgyz language version originated from translation from the Russian language where the original word encompassed both "implementation" and "sale", neither of which words necessarily requires a restricted meaning.With the benefit of these contextual considerations, the Tribunal concludes that it does not lack jurisdiction as a result of the application of Article 1(6) of the 2003 Kyrgyz Investment Law to consider the merits of the dispute.*

233. Given this conclusion, it is not necessary to review in detail the submissions of the Parties regarding various arbitral decisions involving the Kyrgyz Republic. Suffice it to say that the Tribunal has not been apprised of a previous decision consistent with the position now advanced by counsel for the Respondent in this case.

234. Given the conclusion above, it is not necessary to deal further with the submission regarding the role of provisions of the Law on Normative Legal Acts or indeed the provisions of the Arbitral Tribunals Law referred to.

235. As well, given the conclusion above, it is not necessary to find as submitted by the Claimants that the use of the word "sale" was either a drafting error or that the Russian or English versions of the 2003 Kyrgyz Investment Law are those that are more likely to be relied upon by foreign investors."

E. Applicable Principles – Issues of Foreign Law

44. It is well established that issues of foreign law (in the present case Kyrgyz law) are issues of fact. The applicable principles to be applied in relation to issues of foreign law are addressed in detail by the editors of Dicey, Morris and Collins, *The Conflict of Laws (15th Edn.)* in Chapter 9 to which I was referred by the parties, and to which I have had regard at all stages of this judgment.

45. In their Skeleton Argument at paragraphs 45 to 47 the Republic submits as follows:-

> *"45. Issues of foreign law are issues of fact. However, they are a special kind of fact. The Court is entitled to apply its own legal knowledge to determining the issue. However, it is confined to materials on foreign law which are exhibited to an expert report: Bumper Development Corporation v*

> *Commissioner of Police of the Metropolis [1991] 1 WLR 1362, 1369B.*
>
> *46. Where evidence of foreign law is uncontradicted, the Court should not reject it unless it is patently absurd: Bumper Development at 1369B.*
>
> *47. The Court may not ignore evidence of foreign law on the basis that a conclusion which is not supported by the evidence appears more coherent: Harley v Smith [2010] EWCA Civ 78."*

46. I address these authorities in due course below, after setting out extracts from *Dicey* on which particular reliance was placed by the parties. I have, however, had regard to the Chapter as a whole. Chapter 9 provides, amongst other matters (footnotes omitted):-

> *"(1) Foreign law a fact*
>
> *9-002*
>
> *The principle that, in an English court, foreign law is a matter of fact has long been well established: it must be pleaded, and it must be proved…*
>
> *…*
>
> *(3) Mode of proof*
>
> *Expert evidence*
>
> *9-013*
>
> *It is now well settled that foreign law must, in general, be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books of authority. Such materials can only be brought before the court as part of the evidence of an expert witness, since without his assistance the court cannot evaluate or interpret them…*
>
> *…*
>
> *Use of foreign sources*
>
> *9-015*
>
> *An English court will not conduct its own researches into foreign law; in the common law system, "the trial is not an inquisition into the content of relevant foreign law any more than it is an inquisition into other factual issues that the parties*

tender for decision by the court". But if an expert witness refers to foreign statutes, decisions or books, the court is entitled to look at them as part of his evidence. But the court is not entitled to go beyond this: thus if a witness cites a passage from a foreign law-book he does not put the whole book in evidence since he does not necessarily regard the whole book as accurate. Similarly, if the witness cites a section from a foreign code or a passage from a foreign decision the court will not look at other sections of the code or at other parts of the decision without the aid of the witness, since they may have been abrogated by subsequent legislation.

9-016

If the evidence of the expert witness as to the effect of the sources quoted by him is uncontradicted, "it has been repeatedly said that the court should be reluctant to reject it," and it has been held that where each party's expert witness agrees on the meaning and effect of the foreign law, the court is not entitled to reject such agreed evidence, at least on the basis of its own research into foreign law. But while the court will normally accept such evidence it will not do so if it is "obviously false," "obscure," "extravagant," lacking in obvious "objectivity and impartiality", or "patently absurd," or if "he never applied his mind to the real point of law", or if "the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning"; or if the relevant foreign court would not employ the reasoning of the expert even if it agreed with the conclusion. In such cases the court may reject the evidence and examine the foreign sources to form its own conclusion as to their effect. Or, in other words, a court is not inhibited from "using its own intelligence as on any other question of evidence". Similarly, the court may reject an expert's opinion as to the meaning of a foreign statute if it is inconsistent with the text or the English translation and is not justified by reference to any special rule of construction of the foreign law. It should, however, be noted in this connection that quite simple words may well be terms of art in a foreign statute.

9-017

If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony…

…

> *9-018*
>
> *Since the effect of foreign sources is primarily a matter for the expert witness, it is desirable, when proving a foreign statute, also to obtain evidence as to its interpretation...*
>
> *…*
>
> *9-019*
>
> *The function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with his function in relation to the construction of foreign documents. In the former case, the expert tells the court what the statute means, explaining his opinion, if necessary, by reference to foreign rules of construction. In the latter case, the expert merely proves the foreign rules of construction, and the court itself, in the light of these rules, determines the meaning of the documents…*
>
> *…*
>
> *(4) Burden of proof*
>
> *9-025*
>
> *The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the court applies English law. This principle is sometimes expressed in the form that foreign law is presumed to be the same as English law until the contrary is proved. But this mode of expression has given rise to uneasiness in certain cases. Thus in one case the court refused to apply the presumption of similarity where the foreign law was not based on the common law, and in others it has been doubted whether the court was entitled to presume that the foreign law was the same as the statute law of the forum. In view of these difficulties it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law."*

47. I have borne the above principles well in mind when addressing the arbitration claim that is before me. Difficulties can arise where there is a conflict of expert evidence. The position is even more acute where (as in the present case) the expert witnesses do not give live evidence and are not cross-examined.

48. In *Bumper Development Corporation v Commissioner of Police for the Metropolis* [1991] 1 WLR 1362 Purchase LJ (giving the judgment of the court) stated at 1369G-1370A (approving passages from *Dicey & Morris*):

> *"(2) "If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony:" Dicey & Morris , vol. 1, p. 223. See Earl Nelson v. Lord Bridport, 8 Beav. 527 , 537, per Lord Langdale M.R.:*
>
> > *"Such I conceive to be the general rule; but the cases to which it is applicable admit of great variety. Though a knowledge of foreign law is not to be imputed to the judge, you may impute to him such a knowledge of the general art of reasoning, as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness were required in every case, justice might often have to stand still; and I am not disposed to say, that there may not be cases, in which the judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially, if there should be a variance or want of clearness in the testimony." "*

49. What the court must not do is construe foreign legislation by applying principles of interpretation which have not been established by the evidence – see *Harley v Smith* [2010] EWCA Civ 78 at [50]. In fact, and as will be seen, there is some common ground as to the principles of statutory interpretation in Kyrgyz law between the experts in the present case, though not complete agreement, the lack of agreement most obviously manifesting itself in the context of the application of those principles, and what that entails generally, and in the context of the specific statutory provisions referred to by the experts. Ultimately, therefore, it will be necessary for me to consider the conflicting expert evidence and make findings based on the expert evidence I accept, and what that expert tells the court the relevant parts of the 2003 Investment Law means, by reference to Kyrgyz rules of statutory interpretation.

50. It is common ground between the parties that the task facing the Court is to interpret the 2003 Investment Law, a Kyrgyz domestic statute, in accordance with applicable Kyrgyz principles of statutory interpretation, and that is what I will do in due course in this judgment.

51. The Defendants referred me to particular English cases, not for the purpose of applying principles of English statutory interpretation, but as illustrations of how a court may consider approaching issues of interpretation in particular scenarios. Before considering these I would simply foreshadow that what is permissible by way of Kyrgyz statutory interpretation is to be found, and found only, in the expert evidence on Kyrgyz law.

52. First, the Defendants referred to *James Buchan & Co Ltd v Babco Forwarding & Shipping (U.K.) Ltd* [1978] AC 14. In that case the House of Lords was dealing with a question that arose under an international convention drafted with equal authenticity in English law. It was adopted into English law by way of statute, and only the

English version was implemented. The international convention in question was the Convention on the International Carriage of Goods by Road. In that case Lord Wilberforce, stated at page 152C-153B:-

> *"The Convention of 1956 is in two languages, English and French, each text being equally authentic. The English text alone appears in the Schedule to the Act of 1965 and is by that Act (section 1) given the force of law. Moreover the contract of carriage seems to have incorporated contractually this English text. It might therefore be arguable (though this was not in fact argued) - by distinction from a case where the authentic text is (for example) French and the enacted text an English translation - that only the English text ought to be looked at. In my opinion this would be too narrow a view to take, given the expressed objective of the Convention to produce uniformity in all contracting states. I think that the correct approach is to interpret the English text, which after all is likely to be used by many others than British businessmen, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation: Stag Line Ltd. v. Foscolo, Mango and Co. Ltd. [1932] A.C. 328, per Lord Macmillan, at p. 350. Moreover, it is perfectly legitimate in my opinion to look for assistance, if assistance is needed, to the French text. This is often put in the form that resort may be had to the foreign text if (and only if) the English text is ambiguous, but I think this states the rule too technically. As Lord Diplock recently said in this House the inherent flexibility of the English (and, one may add, any) language may make it necessary for the interpreter to have recourse to a variety of aids: Carter v. Bradbeer [1975] 1 W.L.R. 1204, 1206. There is no need to impose a preliminary test of ambiguity.*
>
> *My Lords, I would not lay down rules as to the manner in which reference to the French text is to be made. It was complained - by reference to the use of the French text made by Roskill L.J. and Lawton L.J. - that there was no evidence as to the meaning of the French text, and that the Lords Justices were not entitled to use their own knowledge of the language. There may certainly be cases when evidence is required to find the exact meaning of a word or a phrase; there may be other cases when even an untutored eye can see the crucial point (cf. Corocraft Ltd. v. Pan American Airways Inc. [1969] 1 Q.B. 616 (insertion of "and" in the English text)). There may be cases again where a simple reference to a good dictionary will supply the key (see per Kerr J. in Fothergill v. Monarch Airlines Ltd. [1978] Q.B. 108, on "avarie"). In a case, such as I think the present is, when one is dealing with a nuanced expression, a dictionary will not assist and reference to an*

> *expert might also be unhelpful, for the expert would have to direct his evidence to a two-text situation rather than simply to the meaning of words in his own language, so that he would be in the same difficulty as the court. But* ***I can see nothing illegitimate in the court looking at the two texts and reaching the conclusion that both are expressed in general or perhaps imprecise terms, so as to justify rejection of a narrow meaning****."*
>
> (my emphasis)

53. The Defendants pray in aid the above observations (in the context of the implementation of an international convention into domestic law, with two language versions and one authentic text) as a commonsense approach to documents written in multiple languages, though the Defendants accept that the words of the final sentence (highlighted in bold) must, in the present case, be subject to Article 6(3) of the Law on Normative Legal Acts 2009, though the Defendants submit that Article 6(3) would not impact on such approach unless, having gone through an interpretative exercise, one arrives at a true inconsistency.

54. The Republic submits that the *Buchanan* case and other English cases on international conventions, do not assist in the interpretation of a Kyrgyz statute, applying Kyrgyz principles of statutory interpretation. I do not consider it appropriate for me to opine in general terms on the validity or otherwise of the approach identified in *Buchanan*. What will be appropriate in any given case, based on the treaty or statute in question, will ultimately depend (in the case of foreign law) on the expert evidence before the court.

55. The point is academic in the present case as Mr. Montagu-Smith, on behalf of the Republic, (rightly in my view) accepted in the course of his oral submissions, *"I accept that one can - - when one is interpreting the Kyrgyz text - - look potentially at the Russian version and try to find a way of making them marry up"* (though he submitted that in the present case such an approach was not available in the light of Ms Galliamova's evidence as to the words in Kyrgyz).

56. I consider that Mr. Montagu-Smith is right to so accept that general proposition for a wider reason. Where (as in the present case) a law is adopted and published in two languages (here the "official" language Russian, and the "state" language Kyrgyz in accordance with Article 10 of the Kyrgyz Constitution) what is being interpreted is both the Russian version and the Kyrgyz version, so that logically and self-evidently both versions can and should be considered in the expert evidence and it is only in the event of an inconsistency between the two versions being found that it is necessary to consider the application, and consequences of Article 6(3) of the Law on Normative Legal Acts 2009 (where consideration would then also have to be given as to whether, even at that stage, regard could be had to the Russian version when construing the Kyrgyz version).

57. The Defendants also referred to the bilateral investment treaty case of *The Republic of Ecuador v Occidental Exploration & Production Co (No.2)* [2007] 2 Lloyd's Rep.

352 where the governing law was public international law, and in which Sir Anthony Clarke MR, giving the judgment of the Court, stated at paragraph [28]:

> *"28 We accept Mr Greenwood's submission that the object and purpose of a BIT (including this BIT) is to provide effective protection for investors of one state (here OEPC) in the territory of another state (here Ecuador) and that an important feature of that protection is the availability of recourse to international arbitration as a safeguard for the investor. In these circumstances it is permissible to resolve uncertainties in its interpretation in favour of the investor: see e.g. the views of the arbitrators in paragraph 116 of their award in SGS v Philippines (2004) 8 ICSID Reports 515."*

58. Similar sentiments were expressed by Simon J in *Czech Republic v European Media Ventures SA* [207] EWCA Civ 656 (another bilateral investment treaty where the governing law was public international law) where he stated at paragraph 23:-

> *"23 The Court of Appeal in Ecuador v. Occidental (No.1) [2006] QB 432 at §§14–20 and 32–35 described the nature of the legal relationship created and the rights generated by BITs. Under these treaties investors are given substantive and procedural rights, which may be pursued in their own right rather than by the State on their behalf. BITs give rise to consensual agreements to arbitrate between an investor and a State, arising out of (but distinct from) the treaty itself. In these circumstances it seems to me plain that in interpreting a BIT the Court is entitled to take into account that one of the objects of the treaty was to confer rights on an investor, including a valuable right to arbitrate. If the suggestion made in Ecuador v. Occidental (No.2) at §28, that it is permissible to resolve uncertainties in the interpretation of a BIT in favour of an investor, who is not a party to the treaty, is said to amount to a rule of interpretation, the suggestion goes rather further than appears to be justified in International law*."

59. For its part the Republic submitted that such sentiments, as expressed in bilateral investment treaty cases, are of no relevance. I do not find such general sentiments, said in such context, of any assistance. Where the Defendants would be on firmer ground in their submissions (if it is permissible to do so applying Kyrgyz principles of statutory interpretation) is if it is possible and appropriate to discern the purpose of the 2003 Investment Law and the arbitration provisions in Article 18 (together with the definition in Article 1(6)) having regard to those provisions and, if permissible, having regard to the preamble and other provisions of the statute. Such matters are addressed in due course below, upon a consideration of the expert evidence before me.

60. During the course of the hearing I drew the parties' attention to observations in English cases on the approach to interpretation of words in statutes, not as a principle of English statutory interpretation, or to be applied in construing a foreign statute, but

as to how words may be understood, as a matter of language including in a statute in any language. Thus in *Arbuthnot v Fagan* [1996] L.R.L.R. 135 Steyn LJ (as he then was) stated at page 140:

> *"I readily accept Mr Eder's submission that the starting point of the process of interpretation must be the language of the contract. But Mr Eder went further and said that, if the meaning of the words is clear, as he submitted it is, the purpose of the contractual provisions cannot be allowed to influence the court's interpretation. That involves approaching the process of interpretation in the fashion of a black-letter man. The argument assumes that interpretation is a purely linguistic or semantic process until an ambiguity is revealed. That is wrong. Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context. And part of the contextual scene is the purpose of the provision. In the field of statutory interpretation the speeches of the House of Lords in Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436 showed that the purpose of a statute, or part of a statute, is something to be taken into account in ascertaining the ordinary meaning of words in the statute: see Viscount Simonds' speech, at p. 461, and Lord Somervill of Harrow's speech, at p. 473. It is true that such a purpose may also be called in aid at a later stage in the process of interpretation if the language of the statute is ambiguous but it is important to bear in mind that the purpose of the statute is a permissible aid at all stages in the process of interpretation. In this respect a similar approach is applicable to the interpretation of a contractual text. That is why in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 Lord Wilberforce, speaking for the majority of their Lordships, made plain that in construing a commercial contract it is always right that the court should take into account the purpose of a contract and that presupposes an appreciation of the contextual scene of the contract."*

61. In this regard, in the context of construing an English statute, in the case of *Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436* (referred to by Steyn J above in *Arbuthnott* v Fagan), Viscount Simonds stated at page 460-461:-

> *"My Lords, the contention of the Attorney-General was, in the first place, met by the bald general proposition that where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were said to support that proposition. I wish at the outset to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the*

> *meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."*

Whilst Lord Somervell stated at pages 473-474:-

> *"A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and the general scope of the Act constitute the background of the contest. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where Sir John Nicholl left it in 1826. "The key to the opening of every law is the reason and spirit of the law - it is the 'animus imponentis,' the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context - meaning by this as well the title and preamble as the purview or enacting part of the statute." (Sir John Nicholl in Brett v. Brett. He proceeds in the next sentence to attach in that case special importance to the preamble. We were referred to other statements minimizing the importance of the preamble."*

62. In the present case we are concerned, and concerned only, with a Kyrgyz statute, and Kyrgyz principles of statutory interpretation and the above sentiments do not apply save to the extent that they may happen to reflect principles of Kyrgyz statutory interpretation.

63. In that regard it so happens, as will be seen, that both experts recognize that a word in a Kyrgyz statute should not be read *"singularly, in isolation, as each word is part of a sentence, an article and a law"* (to quote the words of the Republic's own expert, Ms Jorupbekova, in paragraph 4.3 of her second report) which replies to that of Ms Galliamova, on behalf of the Defendants, who also identifies that a word should not be interpreted in isolation (paragraph 19(c) of her report)). Beyond that it is in issue between the experts, as I address in due course below, as to the extent to which the

statutory context and statutory purpose can be had regard to as a matter of Kyrgyz statutory interpretation, and I will need to make findings in that regard in the light of the expert evidence.

64. In the context of English principles of statutory interpretation, the Defendants also referred to the case of *Bloomsbury International Ltd v Sea Fish Industry Authority* [2011] 1 WLR 1546 in which Lord Mance JSC stated at paragraph [10]:-

> *"10 In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. In this area as in the area of contractual construction, "the notion of words having a natural meaning" is not always very helpful (Charter Reinsurance Co Ltd v Fagan [1997] AC 313, 391 c, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme."*

At the risk over over-repetition, however, what is permissible as a matter of Kyrgyz statutory interpretation is to be found from a consideration of the expert evidence on Kyrgyz law, and there is conflicting evidence from the experts as to the extent to which the statutory context and statutory purpose can be had regard to as a matter of Kyrgyz statutory interpretation. I will accordingly need to make findings on that.

65. For its part, the Republic also draws my attention to the case of *Ruby Roz v Kazakhstan* [2017] EWHC 439 (Comm). In that case a Kazakhstan law defined both "investments" and "foreign investor". Amendments were made which expanded the definition of "foreign investor" and narrowed the definition of "investments". The result was that not all investments by a "foreign investor" constituted "investments" within the meaning of the law. Knowles J recognised the "commercial thrust" of the claimant's position, but found that there was no ambiguity in the words of the legislation and therefore no scope to go behind the literal meaning of the words used. The words were "plain enough": see paragraphs [37] – [44]. That case turns on the applicable principles of statutory interpretation of Kazakhstan law and the expert evidence heard by Knowles J. In that case the investment never came within the protection of the statute (in contra-distinction to the present case) and no question of any ambiguity arose to be resolved. In any event, the issues of interpretation that arise in the present case are to be determined in accordance with the applicable principles of Kyrgyz statutory interpretation and the evidence before me in that regard.

F. The Expert Evidence on Kyrgyz law

66. For the Republic Ms Jorupbekova has provided an export report on Kyrgyz law dated 19 April 2017 ("AJ1") and a responsive second report dated 5 July 2017 ("AJ2"). For the Defendants Ms Galliamova has provided a report on Kyrgyz law dated 9 June ("NG1").

67. Ms Jorupbekova has a law degree from the Law Department of the American University in Central Asia and an LLM in International Legal Studies from the Washington College of Law of American University in Washington DC and is the head of the mineral resources practice of a Kyrgyz law firm. More detail of her

professional experience is set out in section 4 of AJ1 and her attached CV. Whilst she does mention having experience of dispute resolution, I consider the Defendants' description of her as having principally a transactional practice is an accurate characterisation of her practice. Whilst her CV describes her language skills as Kyrgyz (native), Russian and English (fluent), her experience, as identified in the main body of AJ1 and her CV, does not suggest that she has any particular expertise in statutory drafting or interpretation, nor any professional qualification, or expertise, in linguistics or translation.

68. I have already noted that Ms Jorupbekova does not exhibit the Kyrgyz text of the 2003 Investment Law to either of her reports and she exhibits only limited translations (seemingly made by her) of selected provisions of the 2003 Investment Law. I find this surprising for two reasons. First, the correct interpretation of Article 1(6) is at the heart of the Republic's case, and in circumstances where the Tribunal accept that the Russian version would confer jurisdiction on the Tribunal it is the Republic that seeks to establish a different conclusion on jurisdiction based on the alleged meaning of provisions in the Kyrgyz version (specifically Article 1(6)). Secondly, and even more fundamentally, Ms Jorupbekova herself ultimately recognises (in her second report AJ2 at para 4.4) that, *"I acknowledge that a word should not be considered in isolation when interpreting meaning. By this I meant that words should not be read singularly, in isolation, as each word is part of a sentence, an article and* ***a law"*** (my emphasis), yet she neither exhibits the Kyrgyz text, nor translates the Kyrgyz text as a whole. Nor does she seek to construe the words of Article 1(6), as part of the law (the 2003 Investment Law) as a whole (I address in due course below whether it is legitimate to do so as a matter of Kyrgyz statutory interpretation). It appears that all the Kyrgyz law materials appended to her report are in the Russian language. I have also noted that the Republic do not adduce in evidence a translation of the Kyrgyz version of Article 1(6) (or the 2003 Investment Law as a whole) by a qualified translator, or adduce evidence from a linguistics expert on the interpretation of Article 1(6) in the context of the Kyrgyz version of the 203 Investment Law.

69. Ms Galliamova has a law degree from the Kyrgyz National University in Bishkek (the capital and largest city in the Kyrgyz Republic), and has an advocate's licence granted by the Kyrgyz Ministry of Justice. She is the co-founder and a Senior Partner of Veritas Law Agency, a law firm carrying on its activities in Bishkek, since 1997. She is one of the founders of the International Arbitral Court at the Chamber of Commerce and Industry of the Kyrgyz Republic and one of the drafters of the Law on Arbitral Tribunals in the Kyrgyz Republic. She has taken part in drafting many other Kyrgyz laws, including the 2003 Investment Law under consideration in this arbitration claim. Her evidence (which I accept) is that the 2003 Investment Law was drafted in Russian, and only considered in Russian by the drafting committee (whether this fact is relevant or irrelevant to the issues before me is addressed in due course below). She is a Member of the Chartered Institute of Arbitrators (MCI.Arb), and as an arbitrator her practice is specialized in dispute resolution in Kyrgyz civil law matters.

70. Ms Galliamova exhibits the entirety of the Russian version of the 2003 Investment Law to her first report, and she has translated that version into English. Her CV identifies under "Languages" Russian, Belorussian and English. Whilst she would not appear to have any professional qualification as a translator no issue is taken by the Republic as to any of the various translations of the Russian version (including Ms

Galliamova's) that are in evidence before me. As I have already identified, the Republic also accepts that on the basis of the Russian version of Article 1(6) (a dispute "arising in the course of the realisation of investments") the Tribunal has jurisdiction and the arbitration claim would stand to be dismissed.

71. Ms Galliamova does not mention the Kyrgyz language in her CV under "Languages". The point arises in the context of paragraph 100 of her report in which she says, *"To the extent that the Kyrgyz version employs the word "sale", as Ms Jorupbekova and Mr. Yakovlev state, it seems to me that the Kyrgyz translation is apparently mistaken."* Mr. Montagu-Smith characterizes this as a "curious formulation". I do not agree. I consider it clear enough that in using the words "to the extent that" Ms Galliamova is indicating that she does not accept that the Kyrgyz version employs the word "sale". If the Republic had wished to explore with her whether she understood that the word had a particular meaning in Kyrgyz or (more seriously) if they wished to suggest that she knew it meant "sale" but had suppressed expressing that in her reports, then I agree with the Defendants' submission that they should have required her to be tendered for cross-examination. On the basis of the evidence in her report there is simply no evidence as to the extent of her proficiency in the Kyrgyz language. It has been suggested by the Defendants (but not put in evidence) that it is entirely possible that she is a native Kyrgyz speaker and so did not feel it necessary or appropriate to mention that in her report. On the basis of the evidence before me I am not in a position to make any adverse comment on the approach adopted by Ms Galliamova in her report in relation to the word under consideration. Ultimately it is something of an arid debate in circumstances where, as will be seen, both experts accept that a word (such as the word "sale") cannot be read singularly in isolation and without regard to other (admissible) parts of the statute, here the 2003 Investment Law.

72. In terms of their relative expertise on the issues that arise it is clear that Ms Galliamova has the greater expertise in the field of statutory drafting, and in that context considerable experience of statutory interpretation. I bear that distinction in mind. However that, in of itself, has not been the determinative factor as to whose evidence I accept and prefer where their evidence is in conflict, and it is necessary to make a finding on the point in question. Rather, where such a situation has arisen, I have identified the specific reasons why I prefer the evidence of one expert over the other.

G. The interpretation of Kyrgyz statutes

G.1 Applicable Kyrgyz principles of statutory interpretation

73. It is common ground between the parties (and the experts) that the 2003 Investment Law, as a Kyrgyz domestic statute, is to be interpreted in accordance with applicable Kyrgyz principles of statutory interpretation.

74. In her first report Ms Jorupbekova states that, *"In the Kyrgyz legal system, when interpreting legal acts one has to look to the literal meaning of the text"* (AJ1 para 8.2). In this regard she referred to cases and statements of state authorities where reference had been made as to the literal meaning or literal interpretation of a law. I do not consider that such matters are of any real assistance, as they do not shed any

light on what is meant by a literal meaning or identify what can be taken into account in that regard, and there appears to be no real analysis of what is meant by a literal interpretation or what may be had regard to when seeking the literal meaning or literal interpretation. In any event it should be borne in mind that the Kyrgyz legal system is a civil law system and in general terms, although there are exceptions (as addressed by Ms Galliamova in her evidence), court rulings are not a source of law in the Kyrgyz Republic.

75. Ms Jorupbekova also stated in her first report at paragraphs 8.5 and 8.6:

> *"8.5 Literal interpretation is widely used in Kyrgyz law not just for interpretation of legal provisions, but also for contracts as pursuant to Article 392 of the Civil Code while interpreting the terms of the contract the court shall take into account the literal meaning of the words and expressions.*
>
> *8.6 If the literal meaning of the contract is not clear, the Civil Code prescribes the courts to determine such meaning taking into account "all relevant circumstances". No such wider considerations are prescribed for or apply to interpretation of legal acts by the courts".*

76. At paragraph 9.10 of her first report she stated (referring to paragraph 231 of the Tribunal's reasoning where they stated, "the plain or a literal meaning of a single word in a statute should not be confined to the word itself in isolation"), *"I agree that a word should not be considered in isolation when interpreting meaning. However, I do not agree with the Tribunal's suggestion that context can be used to change a word in legislation to achieve a broader presumed purpose of the Law."*

77. Ms Jorupbekova also referred (AJ1 para 8.3) to Article 31 of the Law on Normative Acts which provided that, "in the event of ambiguity, incorrect or conflicting application of a legal provision" the Kyrgyz legal system provides for the official interpretation of such provision. There was an issue as to whether it is still possible to obtain an official interpretation. However even if it is, I do not consider that this fact is of any assistance, as one does not get to the stage of the application of any such provision (even if still available) until one has applied the applicable principles of Kyrgyz statutory interpretation to the provision in question.

78. Ms Jorupbekova also refers to the fact that there is a Parliamentary procedure for rectifying errors in Kyrgyz legislation (whether in both the Kyrgyz and Russian versions or one of them), whereby Parliament passes another law which legislates to bring the erroneous version of the law in accordance with the correct version of the law, and gives examples of where this has been done (correcting variously either the Kyrgyz or Russian texts). Whilst the Republic submits that this is the appropriate mechanism for rectifying errors in texts (including translation errors), the task for the experts in the present case is to construe the relevant provisions in accordance with the applicable principles of Kyrgyz statutory interpretation to ascertain the meaning to be placed on statutory provisions so far as this can be discerned. It does not follow that this will result in there being an erroneous translation (not least, as will appear, as words are not to be construed in isolation).

79. For her part, Ms Galliamova stated that Ms Jorupbekova's statement that, *"when interpreting legal acts, one has to look at the literal meaning of the text"*, was in her view, *"incomplete and possibly misleading"* (NG1 para 63). She identified what she says the applicable principles of Kyrgyz statutory interpretation in these terms at paragraphs 64 to 66 of her first report:

> *"64. I agree that the Kyrgyz practice in statutory interpretation is to use the plain (or literal) meaning to understand what the drafters intended by using that law. But the interpretation is not limited to identifying the plain or literal meaning. One further analyses it to identify the drafters' intentions.*
>
> *65. There are also other tools for identifying that intention: as Ms Jorupbekova further notes (para 9.10), "a word should not be considered in isolation when interpreting meaning". One must analyse the surrounding statutory context and the statutory purpose in order to understand the lawmaker's intentions.*
>
> *66. This might require interpreting a provision of a normative legal act consistently with a provision in another normative legal act, in order to ensure that the law is coherent and consistent. This is provided for in Article 31(5) of the 2009 Normative Legal Acts Law, which provides that normative legal acts should be interpreted "in accordance with the Constitution, constitutional laws, codes and laws."*
>
> (my emphasis)

80. It will be seen that although Ms Jorupbekova identified that one looked at the *"literal meaning of the text"* in her first report (AJ para 8.2), she recognised that a word should not be considered in isolation when interpreting meaning (para 9.10). That rather begged the question as to what other provisions were to be had regard to (so that the word was not considered in isolation), and the purpose for which one was looking at those other words especially as she was expressing the view that *"I do not agree with… the suggestion that context can be used to change a word in legislation to achieve a broader presumed purpose of the law"*. This latter view itself appeared to conflict with Ms Galliamova's evidence that one analyses the drafter's intention, and must analyse the surrounding context and the statutory purpose in order to understand the lawmaker's intention.

81. If the evidence had been left there I would have preferred the evidence of Ms Galliamova on the principles of Kyrgyz statutory interpretation. That evidence is based on her experience, and she is entitled to give evidence of that. There is no necessity that it be corroborated by (for example) case law, not least in circumstances where there is no doctrine of binding precedent in Kyrgyz law. However, it is supported by the fact that as a matter of language, and whatever that language may be, whether it be Kyrgyz, Russian or English, words cannot be viewed in isolation (as Ms Jorupbekova herself acknowledges) but can only derive meaning from their context. That is why it is always necessary to view any word in context to understand the

meaning to be conveyed (and that is itself so as a matter of language, and no less so as a matter of statutory interpretation in Kyrgyz as no doubt in any country). As Steyn LJ stated in *Arbuthnott v Fagan, "the meaning of words cannot be ascertained divorced from their context. And part of the contextual scene is the purpose of the provision"* (page 140). That is not a statement of English principles of statutory interpretation (albeit that it does reflect the principles of English statutory interpretation) but rather of the use and interpretation of language. However, to the extent that it is a statement of a principle of statutory interpretation, it accords with the evidence of Ms Jorupbekova that words cannot be construed in isolation in Kyrgyz law, and with the evidence of Ms Galliamova that one analyses the drafter's intention, and must analyse the surrounding context and the statutory purpose in order to understand the lawmaker's intention.

82. However, the expert evidence does not stop with the first report of Ms Jorupbekova and the report of Ms Galliamova. Ms Jorupbekova provided a responsive report in reply. After stating that she did not agree that the commercial sense of words is a relevant factor, and expressing the view that even if the literal meaning is absurd, this would not be a ground for departing from it (AJ2 para 4.3) she states as follows:-

> *"I acknowledge that a word should not be considered in isolation when interpreting meaning. By this I meant that words* ***should not be read singularly, in isolation****,* ***as each word is part of a sentence, and article and a law****"*
>
> (my emphasis)

83. Here Ms Jorupbekova is accepting (and indeed it is her evidence) that in construing a word in a Kyrgyz statute, and applying Kyrgyz principles of statutory interpretation:

(1) Words should not be read singularly in isolation, but rather

(2) as part of (a) a sentence, (b) an article, and (c) a law (which here must be the 2003 Investment Law).

84. That is an express acknowledgment, and evidence, that in construing the meaning of a word in a Kyrgyz statute it is legitimate (and indeed mandatory ("should")) to read the word as part of a sentence, an article and a law. Her evidence here only makes sense if the sentence, the article and the law are being had regard to in order to give context to the meaning of the word (entirely consistent with Ms Galliamova's evidence) so as to identify the statutory intention and part of that context is the statutory purpose (again entirely consistent with Ms Galliamova's evidence). If this were not so then this would beg the question what the purpose of looking at the sentence, the article and the law was. Any "literal meaning" (or perhaps better expressed as "plain meaning" per paragraph 64 of Ms Galliamova's report) can only be the meaning that it would bear having regard to the sentence, the article and the law. In this context (by way of example) a dictionary word (such as "sale") cannot mean "sale" unless that is the plain meaning it bears read as part of the sentence, the article and the law. No word can ever be interpreted in isolation.

85. I then have insurmountable difficulty seeking to square what Ms Jorupbekova has just clearly and unequivocally stated (namely, "I acknowledge that a word should not be considered in isolation when interpreting meaning. By this I meant that words should not be read singularly, in isolation, as each word is part of a sentence, and article and a law)" with what she then goes on to say immediately thereafter, namely:-

> *"However, a word shall be understood as it literally means and there shall not be attempts to interpret it differently than its literal meaning, or to negate its literal meeting, by reference to the law's perceived purpose or context. One must read the whole sentence and consider the literal meaning of the words used."*

86. The difficulty I have with the first of these two further sentences is that Ms Jorupbekova has already clearly and unequivocally stated (in the previous sentence) that regard must be had to the sentence, the article and the law when considering a word's meaning (which is entirely logical, is consistent with the use of words in any language, and with Ms Galliamova's evidence) and this inherently contemplates that the words meaning (after this exercise is done) may well be different to what the word (viewed in isolation) would mean, as a result of those other words, sentences and the law. Those words, sentences, the article and the law (the statute as a whole) provide the context which leads to the meaning of the word, read in isolation, potentially to change when read in the sentence, the article and the law. That potentially different meaning is the plain meaning of the word once the exercise of interpretation (placing the word in the sentence, article and law) has taken place.

87. The sentiments expressed in that sentence also appear to be inconsistent with what is said in the final sentence where Ms Jorupbekova expressly acknowledges that *"one must"* (mandatory) *"read the whole sentence and consider the literal meaning of the words used"* (my emphasis). One can only be reading the whole sentence, if there is the possibility that the meaning of the word may change having regard to the whole sentence – i.e. the sentence as a whole gives context to the meaning of the word. The same must be true having regard to the context of the article and the law (statute) as a whole given it is accepted that the word must not be read in isolation but as part of the article and the statute. This, I consider, is a further acknowledgment of the relevance of context albeit that Ms Jorupbekova seeks to disavow context as an aid to statutory interpretation.

88. It is therefore the evidence of both Ms Galliamova and Ms Jorupbekova that as a matter of Kyrgyz statutory interpretation a word is not to be construed in isolation but as part of a sentence, an article and a law, and I so find. It follows that regard can, and must, be had to the sentence, the article and the law when interpreting any word in a Kyrgyz statute, and I so find based on their evidence.

89. I also find, based on the evidence of Ms Galliamova, that the purpose of statutory interpretation in Kyrgyz law is to identify the statutory intention of the draftsman. This is done, by identifying the plain (or literal) meaning of words as they are to be understood in their surrounding statutory context and having regard to the statutory purpose, which involves having regard not only to the individual words in isolation, but the sentence, the article and the law (statute). To the extent that this is inconsistent

with the evidence of Ms Jorupbekova (and Ms Jorupbekova herself acknowledges that words should not be read singularly in isolation as each word is part of a sentence, an article and a law) I prefer the evidence of Ms Galliamova. First and foremost, it is consistent with the universal principle, as a matter of language, that the meaning of words cannot be ascertained divorced from their context, and part of the contextual scene is the purpose of the provision. Secondly, Ms Jorupbekova offers no explanation as to what the purpose of looking at the sentence, the article, and the law is unless it is to have the potential to impact upon the meaning the word or words might have borne had they been construed in isolation. Thirdly, I regard Ms Jorupbekova's evidence as internally inconsistent as the third sentence of paragraph 4.4 of her second report is not consistent with the second sentence of the same paragraph, nor, indeed, the fourth sentence. Both the second and fourth sentences contemplate that one can only discern the meaning of a word by reading the sentence as a whole (or indeed the article or law) and that can only be because the context, what is said in those other provisions, impacts upon the meaning of the word that would otherwise be viewed in isolation, and viewed in isolation might have borne a different meaning. Fourthly, Ms Galliamova has more experience of statutory drafting and as such her expertise in this area is greater than Ms Jorupbekova's and stands to be preferred in the event of conflict where there is no good reason to accept Ms Jorupbekova's evidence in preference.

90. In this regard I am also fortified in my conclusions by the fact that Mr. Montagu-Smith, on behalf of the Republic, expressly accepted, during the course of his oral submissions, that *"it must be right that one looks to some extent, as my expert accepts, to the context*" and in response to my suggestion that *"part of [the] context or purpose must include looking at the nature of the statute, what's its purpose or mischief",* he replied, *"Yes, I accept that."* He also accepted that he thought it was right that*, "you can never determine even the literal meaning of something just by looking at a single word, just as your experts say, you've always got to put a degree of purpose or context…to understand something".*

91. I also note, in passing, that similar points were made by the Tribunal at paragraphs 230-232 of the Award where they said:-

> *"230. The Tribunal has been provided with no authority for the proposition that, having regard to the meaning of a word in a statute even applying the plain or literal meaning, one is to ignore the context of the statute, particularly its stated purpose.*
>
> *231. In the view of this Tribunal, the plain or a literal meaning of a single word in a statute should not be confined to the word itself in isolation.*
>
> *232. In order to provide meaning, even plain or literal meaning, some context is appropriate…"*

G.2 The Preamble

92. It is common ground that the Preamble to the 2003 Investment Law is in evidence before me as it is translated, exhibited, and referred to, by Ms Galliamova. Nor is there any dispute as to the correctness of the translation of the words of the Preamble

into English. What is in issue is whether regard can be had to a preamble when interpreting provisions of a Kyrgyz statute.

93. Ms Jorupbekova opines as follows at paragraph 8.11 of her first report (AJ1):-

> *"8.11 In my opinion preambles to the normative legal acts shall not be taken into account when interpreting the normative legal act by the courts, unless the preamble itself is the subject of interpretation. Interpreting a provision of law based on the preamble or in the context of the preamble of the law will not meet the requirement of literal interpretation of the law, especially taking into account that the preamble to the law is "an independent, not binding, section of the normative legal act* ***containing information about reasons, conditions, and purpose of its adoption (issuance) sets out the position****. Inclusion of binding provisions in the preamble is prohibited."*

(my emphasis)

94. I have some difficulty with Ms Jorupbekova's expressed opinion in relation to a preamble even without the assistance of Ms Galliamova's expert evidence. First, it lies uneasily with Ms Jorupbekova's evidence that no word is to be construed in isolation as each word is part of the law (the statute) and the preamble of a statute is part of a statute even though it does not contain binding provisions. Secondly, the words I have highlighted show that its very purpose is to contain information "about reasons, conditions, and purpose of its adoption" which suggests it does provide context, and statutory purpose when considering any particular provision. Thirdly, the words she quotes from Article 12(2) of the Law on Normative Legal Acts do not support the proposition that the preamble shall not be taken into account, and indeed would appear to be inconsistent with such a conclusion. Fourthly whilst her opinion is itself evidence, she provides no corroborative evidence in support of a proposition which, if correct, might be expected to be supported by evidence.

95. Many of the points I have made are echoed in the expert evidence of Ms Galliamova, who disagrees with the opinion expressed by Ms Jorupbekova, addressing the matter at paragraphs 84 to 86 of her report:-

> *"84. I cannot agree with the assertion made by Ms Jorupbekova to the effect that "preambles shall not be taken into account in interpreting certain provisions of the law."*
>
> *85. As stated in Article 12(2) of the Law on Normative Acts, "The preamble (introduction) is an independent, non-mandatory part of the normative legal act, which contains information about the reasons, conditions, and purpose of adoption (publication). It is not allowed to include the legal prescriptions in the preamble."*
>
> *86. This provision means that the inclusion of the Preamble in a law is not mandatory, meaning that some laws include*

> *Preambles, but most laws do not. This provision also makes it clear that a Preamble must contain information about the reasons, conditions and purposes of the adopted law. Thus, if indeed there is a Preamble in the law, the lawmaker considers it necessary and important to identify and to emphasise the reasons and purposes of the law. On that basis, the norms contained in the law must correspond with the purposes of the laws and must be directed towards their achievement."*

96. I have no hesitation in preferring the evidence of Ms Galliamova to that of Ms Jorupbekova for the reasons I have identified, and for the reasons that Ms Galliamova identifies in expressing her above views. I find that as a matter of Kyrgyz law and Kyrgyz statutory interpretation, preambles to Kyrgyz statutes may be taken into account when construing words within that statute. Of course the words of a particular preamble may or may not assist when construing particular words in a particular Kyrgyz statute.

G.3 Other aids to statutory interpretation

97. It is in issue between the experts as to whether a variety of other matters can be taken into account when interpreting a Kyrgyz statute, including the methods of interpretation identified by Ms Galliamova at paragraph 78 of her report, the fact that the 2003 Investment Law was drafted in Russian and only considered by the Working Group in Russian, the drafting process itself, the alleged intentions of the Working Group, the Parliamentary debate, and the allegation that not all of the provisions of the 2003 Investment Law are addressed by the experts or put in evidence.

98. As will become apparent, I do not consider that it is necessary for me to make any findings on these matters as a pre-cursor to addressing, and making findings upon, the issue of interpretation that determines the jurisdiction or otherwise of the Tribunal, which can be done without regard to such matters and which renders such matters academic. It also means that the findings I make on interpretation are made without regard to any such matters. Though academic I will, however, briefly address such matters after addressing the issue of interpretation that arises.

H. Provisions of the 2003 Investment Law

99. As is common ground between the experts on Kyrgyz law, the 2003 Investment Law was adopted and published in two languages, the "official" language, Russian, and the "state" language Kyrgyz, in accordance with Article 10 of the Kyrgyz Constitution.

100. Any jurisdiction of the Tribunal derives from Article 18 of the 2003 Investment Law. It is accordingly Article 18 that is to be interpreted, together with such other parts of the 2003 Investment Law that regard may be had to on the applicable principles of Kyrgyz statutory interpretation that I have found. There is no dispute between the experts that Article 18 is in play. Equally no dispute has been taken as to the English translation of Article 18 (from the Russian) that is before the Court, and is put in evidence by being exhibited to Ms Galliamova's expert report:-

> *"Article 18. Settlement of* ***Investment Disputes***

*1. The **investment dispute** shall be settled in accordance with any applicable procedure preliminarily agreed upon by an investor and the authorized government bodies of the Kyrgyz Republic which does not preclude the investor from seeking other legal remedies in accordance with Kyrgyz laws.*

*2. Failing such agreement, the **investment dispute** between the authorized government bodies of the Kyrgyz Republic and the investor shall be settled by consultations between the parties. If the parties do not settle amicably within 3-month period from the day of the first written request for such consultation, any **investment dispute** between the investor and the government bodies of the Kyrgyz Republic shall be settled in judicial bodies of the Kyrgyz Republic, unless in case of a dispute between the foreign investor and the government body, one of the parties requests the dispute to be considered in accordance with one of the following procedures by submitting the dispute to:*

a) the International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Citizens of Other States or the rules regulating the use of additional remedies for conducting the hearings by the Secretariat of the Center; or

b) arbitration or an international temporary arbitral tribunal (commercial court) formed in accordance with the arbitration rules of the UN Commission on International Trade Law.

*3. In the event that an **investment dispute** is submitted to arbitration mentioned in sub-points "a" and "b" of point 2 of this Article, the Kyrgyz Republic shall waive its right to invoke internal administrative procedures or judicial proceedings prior to submitting the dispute to international arbitration.*

*4. Any **investment dispute** between the foreign and domestic investors shall be considered by the judicial bodies of the Kyrgyz Republic unless the parties agree on any other dispute settlement procedure, including national and international arbitration.*

5. Disputes between foreign investors and individuals and legal entities of the Kyrgyz Republic may be settled by an arbitral tribunal of the Kyrgyz Republic, as well as a foreign arbitral tribunal, by agreement of the parties. Failing such agreement, the disputes will be settled in a manner provided by Kyrgyz laws."

(my emphasis)

The Kyrgyz version of Article 18 is not in evidence, and no point is taken by the Republic by reference to it.

101. Article 1(6) is relevant given that it contains a definition of "investment dispute". Article 1(6) reads as follows in Russian, "возникающий при реализации инвестиций". It is not in dispute between the parties that the meaning of these words in Russian, expressed in English, is a dispute, "arising in the course of the implementation of investments" or "arising in the process of investments" (on either form of words it is accepted the Tribunal has jurisdiction). The Republic point out that the word "*реализация*" in Russian can mean "implementation" or "sale".

102. The words in Kyrgyz are "инвестицияларды сатууда келип чыгуучу талаш-тартыштар". The Republic submits that the meaning of these words in Kyrgyz, expressed in English, is a dispute, "arising in the course of the sale of the investments" (the Republic submits that the matters in issue in the arbitration do not include such a dispute so the Tribunal has no jurisdiction).

103. As already noted, the Republic has not put in evidence the Kyrgyz version of the 2003 Investment Law. Nor has it put in evidence a translation of Article 1(6) from Kyrgyz to English undertaken by a qualified translator, nor has it adduced linguistic expert evidence in relation to the Kyrgyz version of Article 1(6). Instead it relies on the evidence of Ms Jorupbekova who states that in the Kyrgyz text the word used is "sale" not "implementation" (first report paragraph 9.5). She does not herself exhibit the Kyrgyz version, and the version she exhibits is the Russian version.

104. In the light of the findings I have made as to the applicable principles of Kyrgyz statutory interpretation, and indeed the evidence of Ms Jorupbekova that a word should not be construed in isolation, as each word is "part of a sentence, an article and a law" (AJ2 para 4.4), regard should also be had to the entirety of the Article, that is Article 1. Ms Jorupbekova herself exhibits selectively a translation of parts of Article 1. The entirety of Article 1 (from the Russian version) is, in any event, in evidence being exhibited to Ms Galliamova's first report.

105. Article 1 provides (in the translation from Russian to English), amongst other matters, as follows:-

> *"1. "Investments" means tangible and intangible contributions of all kinds of assets, owned or controlled directly or indirectly by an investor, into objects of economic activity with the aim of deriving a profit and (or) achieving another beneficial result in the form of:*
>
> – *money;*
>
> – *movable and immovable property;*
>
> – *property rights (mortgages, liens, pledges and others);*

> – *stock and other forms of participation in a legal entity;*
>
> – *bonds and other debt obligations;*
>
> – *non-property rights (including intellectual property rights including goodwill, copyrights, patents, trade marks, industrial designs, technological processes, trade names and know-how);*
>
> – *any right to engage in activity based on a license or other permit issued by government bodies of the Kyrgyz Republic.*
>
> – *Concessions based on laws of the Kyrgyz Republic including concessions to prospect for, explore, develop or exploit natural resources of the Kyrgyz Republic;*
>
> – *profit or income derived from investments and re-invested in the Kyrgyz Republic;*
>
> – *other forms of investment not prohibited by the laws of the Kyrgyz Republic.*
>
> *…*
>
> *3. "Foreign investor" means any individual or legal entity, other than domestic investor, investing in the economy of the Kyrgyz Republic."*
>
> *The Kyrgyz version of Article 1 is not in evidence, and no point is taken by the Republic by reference to it.*

106. In the light of the finding that I have made that as a matter of Kyrgyz law and Kyrgyz statutory interpretation, preambles to Kyrgyz statutes may be taken into account when construing words within that statute, regard may also be had to the Preamble when construing provisions of the 2003 Investment Law including the words in Article 1(6).

107. As will be recalled, the Preamble translated into English from the Russian version provides as follows:-

> *"This Law sets forth the main principles of the national investment policy aiming at improving the investment climate in the republic and promoting the flow of local and foreign investment by providing investors with a fair and equitable legal regime and guaranteeing protection of their investments made into the economy of the Kyrgyz Republic."*

I. The word in Article 1(6) in Kyrgyz

108. The Republic approaches the issue of interpretation by reference to what it says is the literal meaning of one word in Kyrgyz, the word "сатуу", and submits that once the literal meaning of the word is ascertained it cannot be departed from (Republic's Skeleton Argument paragraph 79(2)). The Republic submits that the word means, and can only mean, "sale" in Kyrgyz. It is essential for the Republic's jurisdictional challenge that the Republic proves this on balance of probabilities like any other fact. It is essential because the Republic accepts that the definition of investment dispute in the Russian version is a dispute arising in the course of the realization/implementation of investments, and the Tribunal has jurisdiction on that basis, and if the Republic cannot establish an inconsistency between the Russian and Kyrgyz versions then there is no scope for the application of Article 6(3) of the Normative Acts Law (which would deem the Kyrgyz language original – though it would still have to be interpreted applying principles of Kyrgyz statutory interpretation).

109. It is an inherently artificial exercise to construe one word in any language in isolation – and, as has been seen, Ms Jorupbekova ultimately accepted in her second report that a word should not be considered in isolation (read singularly) but as part of a sentence, an article and a law (though, as will appear, she never undertakes that exercise herself by reference to other provisions of the 2003 Investment Law, for example Article 18 and Article 1(6) in the context of Article 1, the Preamble, and the law as a whole).

110. However, the starting point for the Republic's approach must be to adduce evidence, and prove, what the word means in Kyrgyz. Given that the Republic stresses that the present hearing is a re-hearing, it was for the Republic to adduce evidence to prove that meaning. They could have, but have not, introduced into evidence a translation of the word by a professional qualified translator of the Kyrgyz language. They could, but have not, adduced expert evidence on linguistics to prove the meaning of the word in the context of the Kyrgyz text. The likelihood is that any professional translator or linguistics expert would never translate or interpret a word in isolation, but only having regard to the words that surround the word in question. Furthermore, one only has to consider the infelicities of translation that often arise if an unqualified person simply looks up words in a foreign language in a foreign language dictionary or resorts to an on-line translation software, to recognize that a word should not be translated in isolation and indeed this will be so even if the person undertaking the translation is professionally qualified – they will wish to look at the word in situ, at the very least in the context of the sentence in which it is found and forms part of, not least as words have the potential to bear more than one meaning, or different words may be used to convey a particular meaning depending on the context.

111. But the Republic has adduced no such evidence from a professional translator of a linguistics expert. This is all the more surprising given that it is their jurisdictional challenge and their argument necessitates that the word in Kyrgyz means, and can only mean, "sale" (whether in isolation or in context), and that the Defendants have not admitted at this hearing (which is a re-hearing) that the word can only mean "sale" and indeed submit that, on its true interpretation, the Kyrgyz text means the same as the Russian version so that investment disputes are those "arising in the course of the implementation of investments".

112. All that the Republic has adduced are statements from Ms Jorupbekova and Mr Yakovlev that the Kyrgyz word "сатуу", means, and can only mean, "sale". That is evidence but I consider the evidence to be unsatisfactory and lacking in weight. First there is no evidence that either person is a qualified translator or linguist. Secondly, neither of them makes any detailed attempt to construe the meaning of the word not in isolation, but as part of a sentence, an article and a law (despite Ms Jorupbekova's acknowledgement, in her second report, that such an approach is appropriate). Thirdly, the context in which they do not do so is Ms Jorupbekova's rejection of context or purpose impacting upon the meaning of a word, yet I have found that context and purpose are relevant as a matter of Kyrgyz statutory interpretation when seeking to identify statutory intention. Fourthly, their evidence is uncorroborated by any evidence from a qualified translator or expert on linguistics despite (one would have thought) such evidence being readily capable of being obtained. In such circumstances the Republic have not discharged the burden upon them of proving that the Kyrgyz word "сатуу", means, and can only mean, "sale" and I find that the Republic has not proved, on balance of probabilities, as a fact, that the Kyrgyz word "сатуу", means, and can only mean, "sale". The Republic's failure to do so is fatal to the jurisdictional challenge.

113. However, my finding in this regard is academic, and ultimately, on the facts as addressed below, makes no difference. Even if it was appropriate first to identify the meaning of the word "сатуу" in isolation, and the Republic had proved that, in isolation, it meant "sale" it is common ground that the word should not be read singularly but as part of a sentence, an article and a law (AJ 2 para 4.4). At the very least, on the principles of Kyrgyz statutory interpretation that I have found, this must include having regard to Article 1(6) in the context of Article 1 (of which Article 1(6) is a part), Article 18 (which contains the arbitration provision) and, for the reasons I have given, the Preamble. I have also found that the purpose of statutory interpretation in Kyrgyz law is to identify the statutory intention of the draftsman. This is done, by identifying the plain (or literal) meaning of words as they are to be understood in their surrounding statutory context and having regard to the statutory purpose, which involves having regard not only to the individual words in isolation, but in the context of the sentence, the article and the law. The expert evidence in relation to this is addressed in the next section of this judgment.

J. The interpretation of Article 1(6) Russian and Kyrgyz versions

114. This exercise is undertaken by Ms Jorupbekova and Ms Galliamova. There is no dispute between them that on the basis of the Russian version of Article 1(6) an investment dispute is a dispute arising in the course of the realisation/implementation of investments (and so the Tribunal has jurisdiction as the present dispute before the Tribunal is one that falls within Article 1(6) for the purpose of Article 18). I have already identified their different approaches to statutory interpretation in Kyrgyz law, and expressed my findings in that regard (preferring the expert opinion evidence of Ms Galliamova to the extent that there is a conflict for the reasons I have given), and I will not repeat such evidence, or the findings that I have made, in that regard. However, the conclusions that each expert has reached on the issues of statutory interpretation are coloured by their differing approach to statutory interpretation.

115. Thus Ms Jorupbekova concludes (largely if not exclusively by reference to the word itself, and without regard to the remainder of Article 1, Article 18 or the Preamble) that in the Kyrgyz version of Article 1(6) the word used is "sale" (AJ1 para 9.5), that this is gives rise to an inconsistency with the Russian version within the meaning of Article 6(3) of the Normative Law Acts, that the Kyrgyz version prevails over the Russian version, and that the dispute before the Tribunal does not "arise in the course of the sale of the investments" but out of revocation of subsoil use licenses granted to Kutisay, so that the dispute resolution mechanism and arbitration provisions in Article 18(2) are not applicable to the present dispute.

116. In contrast, Ms Galliamova concludes that the term "investment dispute", as defined in Article 1(6), includes all disputes that arise between the Kyrgyz Republic and a foreign investor during the process of that foreign investor's implementation of its investment and is not limited to disputes arising in the course of sale of investments (NG1 para 19(d)). Her evidence, in the context of statutory intention, and by express reference to the Preamble (NG1 paras 84-86), is that the 2003 Investment Law encapsulated the fundamental principles of the State's investment policy and was intended to improve the Republic's investment climate and stimulate the flow of domestic and foreign investments by providing a fair and equal legal regime for investors, and guaranteeing the protection of the investments made in the economy of the Kyrgyz Republic (NG 1 para 93). She identifies that the purpose of the law was to promote domestic and foreign investment by guaranteeing that any investments made in the Kyrgyz Republic would be protected, and an important part of this is the dispute resolution provision in Article 18 (NG1 para 97). To restrict potential investment disputes to the sale of investments would be absurd (NG1 para 98).

117. I have no hesitation in accepting the conclusions of Ms Galliamova, based on her identification of applicable principles of Kyrgyz statutory interpretation, and their application to Article 1(6) of the 2003 Investment Law (in Russian and Kyrgyz), in preference to those of Ms Jorupbekova for a number of reasons.

(1) First, and despite acknowledging in her second report that a word is not to be construed in isolation but as part of a sentence, an article and a statute, Ms Jorupbekova fails so to construe the words of Article 1(6) in the context of Article 1, Article 18 and the Preamble (on both the Russian and Kyrgyz versions of Article 1(6)), yet on her own evidence she should have construed the word as part of a sentence, an article and a statute. Indeed, she does not go beyond reading the word in the Kyrgyz version singularly, in isolation (an approach she herself disavows at paragraph 4.3 of her second report). This undermines fundamentally the weight to be given to her evidence, as all relevant principles of Kyrgyz statutory interpretation identified by her, were not considered, and applied by her.

(2) If Ms Jorupbekova had done so, it would have been readily apparent from the Russian version, and the Kyrgyz version viewed in the context of the 2003 Investment Law (in particular the Preamble and Article 18) and from the discernable statutory intention based on the purpose of the statutory provisions, as identified by Ms Galliamova from the Russian text, Article 18 and the Preamble, that "investment dispute", whether in Russian or Kyrgyz is

to be interpreted as a dispute arising in the course of the implementation of investments (as Ms Galliamova concludes, and I so find).

(3) Thirdly, and for the reasons that I have already given, I have rejected Ms Jorupbekova's evidence that regard may not be had to context or purpose when interpreting what a word or phrase within a statute means as a matter of Kyrgyz statutory interpretation. Not only does this undermine Ms Jorupbekova's evidence, and her relative credibility in consequence, but it means that she has never undertaken the exercise of statutory interpretation that I have found should have been undertaken as a matter of Kyrgyz statutory interpretation by reference to the context of purpose of the statute (as identified by Ms Galliamova).

(4) Fourthly, Ms Jorupbekova's approach to interpretation is purely grammatical, and whatever language one is concerned with, as Steyn LJ rightly said in *Arbuthnott v Fagan "Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context. And part of the contextual scene is the purpose of the provision."* This has nothing to do with English principles of statutory interpretation, it is part of the exercise performed by any qualified translator or linguist, and for the reasons I have found it also reflects Kyrgyz principles of statutory interpretation which do have regard to context and purpose in identifying statutory intent.

(5) Fifthly, Ms Galliamova has greater experience of statutory drafting, and with that, no doubt great experience of Kyrgyz statutory interpretation. I found her evidence to be credible, and her conclusions to be justified by reference to the principles of Kyrgyz statutory interpretation that she has identified and applied, having regard to the translations that are before me of the 2003 Investment Law, and its apparent purpose by reference to the Preamble, Article 1 and Article 18.

(6) As a reality check (and only as a reality check) the conclusions of Ms Galliamova and the meaning of Article 1(6) identified by Ms Galliamova, give Article 1(6) a meaning and effect which results in all investment disputes within the scope of the 2003 Investment Law being subject to the dispute resolution regime in Article 18 (for both foreign and domestic investors) in relation to all investments (within Article 1) whereas on Ms Jorupbekova's interpretation the scope of Article 18 would be very narrow indeed, and would only be available in a very small number of scenarios, which could be contrasted with the breadth of the Preamble, and the width of range of investments in Article 1, which would seem an unlikely statutory intent (having regard to admissible context and purpose). As Mr. Montagu-Smith candidly acknowledged in the context of the Republic's interpretation of the Kyrgyz text compared to the Russian text, *"it's an oddity and it's a curiosity, and in the sense that something has gone wrong on my case"* though he pointed out that this would not be the first or last time this has happened in Kyrgyz law. I bear his qualification well in mind, but I consider that one starts from the proposition that one would expect, as a matter of statutory intent, that two language texts of a statute are intended to have the same meaning. Expert

evidence which leads to the conclusion that they do is consistent with that expectation, and readily accepted if justified by the applicable principles of statutory interpretation and their application to the facts (as it is in the present case by reference to the evidence of Ms Galliamova).

118. In such circumstances I accept the evidence of Ms Galliamova, and the conclusion she expresses, and find that the term "investment dispute", which is defined in Article 1(6) of the Russian and Kyrgyz versions of the 2003 Investment law, includes all disputes that arise between the Kyrgyz Republic and a foreign investor during the process of that foreign investor's implementation of its investment.

119. I would only add at this point that if I had been unable to resolve the conflict of evidence between Ms Jorupbekova and Ms Galliamova in favour of that given by Ms Galliamova, I would not have considered that Ms Jorupbekova's evidence established, on balance of probabilities, that the Kyrgyz text was inconsistent with the Russian text, not least because Ms Jorupbekova never attempts to interpret the word in Article 1(6) with regard to the sentence it is in, or the article, or the statute (and indeed does not even exhibit or refer to the Kyrgyz version of the 2003 Investment Law in that context, or have regard to the Russian version as part of the exercise of interpretation). Accordingly, in such a scenario, I would not have considered that the Republic had established that Article 6(3) of the Law on Normative Legal Acts 2009 applied.

120. Thus far I have considered the exercise of statutory interpretation by reference to the expert evidence and the conclusions expressed by the experts. The parties are in dispute as to whether, once I have made findings as to the applicable principles of Kyrgyz statutory interpretation, it is legitimate for me to apply those principles of statutory interpretation to the words of the statute myself in a situation where there is a conflict of evidence between the experts not only on the principles of Kyrgyz statutory interpretation, but also their application to the facts.

121. I have already identified the relevant principles. Thus, in *Bumper Development Corporation v Commissioner of Police for the Metropolis* [1991] 1 WLR 1362 Purchase LJ (giving the judgment of the court) stated at 1369G-1370A (approving passages from *Dicey & Morris*):

> *"(2) "If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony:" Dicey & Morris , vol. 1, p. 223. See Earl Nelson v. Lord Bridport, 8 Beav. 527 , 537, per Lord Langdale M.R.:*
>
> > *"Such I conceive to be the general rule; but the cases to which it is applicable admit of great variety. Though a knowledge of foreign law is not to be imputed to the judge, you may impute to him such a knowledge of the general art of reasoning, as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness were required in every case,*

> *justice might often have to stand still; and I am not disposed to say, that there may not be cases, in which the judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially, if there should be a variance or want of clearness in the testimony." "*

122. In the present case there is a conflict in relation to the evidence of Ms Jorupbekova and Ms Galliamova as to the applicable principles of Kyrgyz statutory interpretation, and the application of those principles to the 2003 Investment Law even applying what is common ground between them that a provision cannot be construed in isolation and without regard to the relevant sentences, articles, and statute as a whole, and the witnesses were not called to give evidence or cross-examined so as to narrow or resolve the differences between them which would have been desirable. In circumstances where, as here, there is such a conflict I consider the court is entitled to have regard to the sources themselves with a view to resolving that conflict. As Mr. Montagu-Smith himself said to me in relation to the experts, "*if they say different things, then the court will need to resolve the disputes between them by looking at those materials on which those experts rely and make a decision."*

123. Lest, however, it be regarded as inappropriate for me to do so, notwithstanding the principles identified above, and what was said by Mr. Montagu-Smith on behalf of the Republic above, I have first set out my findings above as to why, where there is a conflict of evidence between Ms Jorupbekova and Ms Galliamova I accept the evidence of Ms Galliamova in preference to that of Ms Jorupbekova, in the first instance without seeking myself to apply the principles of Kyrgyz statutory interpretation that I have found, to the provisions of the 2003 Investment Law itself. However, having done so, I will now consider the 2003 Investment Law, applying the principles of Kyrgyz statutory interpretation that I have found, as an aid further to resolve the conflict between Ms Jorupbekova and Ms Galliamova and which, in the event, reinforces my conclusion that the evidence of Ms Galliamova as to the interpretation of Article 1(6) of the 2003 Investment Law is to be preferred to that of Ms Jorupbekova.

124. The purpose of the 2003 Investment Law, and the context in which Articles 18 and 1(6) stand to be construed, is readily apparent from the Preamble, which expressly provides that, *"[t]his Law sets forth the main principles of the national investment policy aiming at improving the investment climate in the republic and promoting the flow of local and foreign investment by providing investors with a fair and equitable legal regime and guaranteeing protection of their investments made into the economy of the Kyrgyz Republic".* It is plain from these express words of the law itself that the purpose of the 2003 Investment Law is to set out the main principles of the national investment policy, that the aim of that policy is to improve the investment climate in the Republic and to promote the flow of local and foreign investment. This is done by providing investors with a fair and equitable legal regime and by guaranteeing protection of their investments made in the economy of the Kyrgyz Republic. The Preamble therefore identifies that it applies to both domestic and foreign investment and that it guarantees protection of investments. There is no qualification as to the investments that are protected or how they are protected. To identify what the

investments are, and how they are protected it is necessary to proceed to the Articles of the 2003 Investment Law.

125. "Investments", as has already been quoted above, is given a wide meaning in Article 1 consisting of tangible and intangible contributions of all kinds of assets owned or controlled directly or indirectly by an investor into objects of economic activity with the aim of deriving a profit or achieving another beneficial result in many forms as set out in Article 1 including *"money", "any right to engage in activity based on a license or other permit issued by the Republic"* (i.e. licences), *"concessions"* and *"profit or income derived from investments and reinvested"* in the Republic.

126. I note in passing that Chapter III (headed "legislative guarantees to investors") contains various provisions with the apparent objective of protecting investments (consistent with the Preamble) including Article 6 guarantee from expropriation of assets. I will return to Article 6 in due course below, but say no more about it at this point.

127. Article 18 contains the provisions as to settlement of investment disputes that I have already set out above. It first provides for settlement of an investment dispute in accordance with any procedure agreed upon by the investor and authorized government bodies of the Republic (Article 18(1)). In the absence of agreement, the investment dispute shall, to the extent possible, be settled by consultations between the parties. If the parties do not reach an amicable settlement within three months "any investment dispute" (my emphasis) shall be settled by judicial bodies of the Republic (i.e. this applies to both domestic and foreign investors), and appears to be unqualified as to the type of investment dispute (subject, of course, to the definition of "investment dispute"), unless in case of a dispute between a foreign investor and a government body, one of the parties requests the dispute to be considered in accordance with one of two specified procedures by applying to ICSID or arbitration in accordance with UNCITRAL arbitration rules. No other dispute regime is provided for in Article 18 – i.e. if there are investments within Article 1 (and so within the scope of the 2003 Investment Law), but a dispute in relation to them is not an "investment dispute" then any such dispute would fall outwith both the specified court regime and potential arbitration procedures there identified. Given that recourse to arbitration is an archetypal protection for a foreign investor (and the Preamble identifies that investors are guaranteed protection) it would, perhaps, be surprising (and an unlikely statutory intent) if many types of investments were not covered, in the event of a dispute. It is thus necessary to consider the definition of "investment dispute" in Article 1(6).

128. The many translations of Article 1(6) from the Russian that are before me (including those published by the Republic themselves as identified earlier in my judgment) all speak with one voice and are in materially identical terms. They cover any investment dispute between an investor and government bodies, officials of the Kyrgyz Republic and other participants of "investment activity" arising in the course of the implementation of investments, which would therefore cover all investments, and the implementation of investments are broad words which are sufficiently wide to cover disputes occurring at all stages of an investment, and all forms of dispute in relation to the investment. In this regard Article 1(4) makes clear that "investment activity" means "practical operations" of an investor relating to its investment which is in itself

a wide meaning and is not limited (for example) to any sale or initial acquisition of an asset.

129. This interpretation, based on the Russian version of the statute, accords with the literal meaning of the words used even had it been appropriate to consider them in isolation. However, this meaning is reinforced, when considered in the context of Article 1 and the Preamble, and accords entirely with the purpose and statutory intention that is apparent from the Preamble (applying the principles of Kyrgyz statutory interpretation that I have found) – all investments are protected in respect of all investment disputes by the provisions of Article 18. The literal meaning remains the same when viewed in context and having regard to the statutory purpose and intent.

130. The words of Article 1(6) in the Kyrgyz version (whatever they mean) also cannot be construed in isolation (as Ms Jorupbekova also confirms). They have to be construed with regard to the Article itself (Article 1), and the statute including (as I have found) the Preamble, as well as the Russian text. I have found that the Republic has not proved, on balance of probabilities, that the relevant word in the Kyrgyz version means "sale" so there is nothing in Kyrgyz version to justify an interpretation of Article 1(6) in the Kyrgyz version as differing from the Russian version. But even assuming for present purposes, that the word, in isolation, would mean "sale", then one has, on the applicable principles of Kyrgyz statutory interpretation, to have regard to the entirety of the sentence in Article 1(6), Article 1, the Preamble and the law. There is no evidence before me that the Kyrgyz text of these provisions is any different to the Russian version, and regard could in any event be had to the Russian version when construing the Kyrgyz version. Placing the Kyrgyz version of Article 1(6) in the context of Article 1 and the Preamble, the statutory intention that I have identified, which is discernable from the Preamble, is reflected in the Kyrgyz version of Article 1(6) being interpreted as any dispute "arising in the course of the implementation (realisation) of investments" and that is the plain meaning. The Republic's meaning simply fails to have regard to the context of the provision, and the purpose of Article 18 which is to provide protection for all investors in respect of all disputes, including UNCITRAL arbitration for foreign investors. That context and purpose gives Article 1(6) its meaning in whatever language version is examined.

131. The contrary interpretation, that Article 1(6) defines an investment dispute as a dispute "arising in the course of the sale of investments", is contrary to the clear statutory intent as reflected in the Preamble having regard to the breadth of investments, and investment activity as identified in Article 1, and the guaranteed protection identified in the Preamble as carried through into Article 18, and as such is to be rejected. On such interpretation the scope of the protection in Article 18 would be limited in the extreme and only arise where there was a dispute arising in the course of the "sale" itself of investments (and would not apply at all to investments where it would not be apt to talk of those investments being sold), and as such the vast majority of investors would not have the guaranteed protection that was identified in the Preamble. Indeed (as Mr. Montagu-Smith accepted on behalf of the Republic) on such an interpretation the investor would be taken out of the specified court route just as much as the investor would be taken out of the arbitration route, with the result, it would seem (though this was not conceded by Mr. Montagu-Smith) that within the 2003 Investment Law there would be no jurisdictional regime provided at all for the

resolution of all forms of investment dispute other than sale. It is inherently implausible that this reflected statutory intent.

132. The conclusions I have reached above, applying the applicable principles of Kyrgyz statutory interpretation, reinforce my conclusion that the evidence of Ms Galliamova is to be preferred to that of Ms Jorupbekova (and are further reasons for my doing so) in circumstances where the conclusions I have reached accord with the evidence of Ms Galliamova, which I accept. I also note in passing that the Tribunal reached similar conclusions, and for similar reasons at paragraphs 232(1)-(3) of the Award.

133. To date I have avoided going beyond the provisions clearly addressed by the experts (Articles 1, 18 and the Preamble), though I consider at least the whole of the Russian text to be in evidence, a translation thereof being exhibited to Ms Galliamova's report. If it were appropriate to have regard to the remainder of the 2003 Investment Law, and I consider it is (given that Ms Jorupbekova's evidence is that any word is to be construed not in isolation but having regard to the sentence, the article and the statute), then I note that Article 6 (which is entitled, "Guarantees of Protection from Expropriation of Investments and Compensation of Damages to Investors") provides at Article 6(4) as follows:

> *"4. A proper legal procedure means that investors shall have a right to prompt consideration of the case based on the complaint about the impact of the expropriation, including the evaluation of their investments and payment of compensation in accordance with the provisions of this Article, by a judicial body or any other competent authority of the Kyrgyz Republic without prejudice to the procedure for compensation of damages to investors pursuant to Article 18 hereof"*

(my emphasis)

134. It is accordingly expressly contemplated that as part of the protection from expropriation of investments, the procedures under Article 18 (including recourse to UNCITRAL arbitration) shall be available, express cross-reference being made to Article 18. The clear statutory intent is that recourse may be had to Article 18 in an expropriation of investment situation (whenever that expropriation takes place). It is conceptually extremely unlikely that there would be expropriation in the course of a sale (even if theoretical examples could be contrived), and an interpretation of Article 18 and Article 1(6) that facilitates a dispute in respect of expropriation of any investment at any time is the (only) interpretation that is consistent with the statutory intent identified in the Preamble.

135. The Defendants also produced an Appendix to their Skeleton Argument identifying many other provisions of the 2003 Investment Law which it was submitted would be distorted by the interpretation of Article 1(6) advocated by the Republic and Ms Jorupbekova. I do not consider it necessary to have regard to such matters in the light of the findings I have made. Suffice it to say that the provisions identified by the Defendants would have supported the interpretation that the Defendants advocated, and which I have found.

136. Equally there are other matters that the Defendants invited me to have regard to including the history of the drafting of the 2003 Investment Law, the Parliamentary history, and the (subjective) intentions of the drafting Working Party. The evidence of Ms Galliamova supports the first two of these being aids to interpretation in Kyrgyz law although this is disputed by Ms Jorupbekova, whilst Ms Galliamova also expresses her views on the third as a member of the Working Group (at paragraph 96 of her report). In the light of the findings that I have made I do not consider it necessary or appropriate to make a finding as to the admissibility of the first two matters in Kyrgyz law, given the conflict of evidence and the limited material before me as to the approach in Kyrgyz law. In any event I note that such matters, if admissible, would have shed little further light on the issue of interpretation that arises. I have not had regard to the subjective intentions of the Working Group, as I do not consider it to have been established that this is an aid to statutory interpretation in Kyrgyz law.

K. Article 6(3) of the Normative Acts Law

137. The Republic submits that the Kyrgyz version of Article 1(6) (if it differs from the Russian version and means what the Republic submits it means) prevails over the Russian version, praying in aid Article 6(3) of the Law on Normative Legal Acts 2009, which provides:

> *"… in the event of an inconsistency between the text of the Constitution and other normative legal acts of the Kyrgyz Republic in the state language and the text in the official language, the text in the state language shall be deemed to be original."*

138. Article 6(3) does not assist the Republic in the present case. First, I have found that the Republic has not proved, on balance of probabilities that the Kyrgyz word (viewed in isolation) means "sale". Secondly, the Republic accepts that Article 6(3) is only engaged where there is an "inconsistency" between the two language versions of the texts. This requires something more than a linguistic "difference" or "discrepancy" in respect of a single word. It requires an incompatibility in the legal meaning of the provision as a whole (viewed as part of a sentence, and article and a statute having regard to both language versions and applicable principles of Kyrgyz statutory interpretation), and there is no such incompatibility in the present case.

139. Thirdly, and fundamentally, and again as the Republic accepts, the exercise of statutory interpretation applying applicable principles of Kyrgyz statutory interpretation to both language versions is considered first to see whether there is any inconsistency on the application of those principles. If, as I have found, the statutory intent can be identified having regard to both language versions, and all applicable principles of Kyrgyz statutory interpretation, namely that the term "investment dispute", which is defined in Article 1(6) of the Russian and Kyrgyz versions of the 2003 Investment law, includes all disputes that arise between the Kyrgyz Republic and a foreign investor during the process of that foreign investor's implementation of its investment, then there is no inconsistency, and no scope for the application of Article 6(3) of the Normative Acts Law, and I so find.

140. Fourthly, even if there was an inconsistency (contrary to my findings) that triggered Article 6(3), the effect of Article 6(3) would simply be to make the Kyrgyz version the "original". As Ms Jorupbekova acknowledges, in those circumstances *"the court is directed to apply the Kyrgyz version but as that version is properly to be interpreted"* (AJ 2 para 3.4). When doing so the court applies the applicable principles of Kyrgyz statutory interpretation that I have found, which include considering the words in Kyrgyz in the context of the sentence, the article and the statute. Doing so the same conclusion would be reached, and I so find, namely that the term "investment dispute" includes all disputes that arise between the Kyrgyz Republic and a foreign investor during the process of that foreign investor's implementation of its investment, and for the same reasons that I have already given.

141. In the above circumstances the Tribunal has jurisdiction and the Republic's arbitration claim is dismissed.

L. Does the dispute in the arbitration arise, "in the course of the sale of investments"

142. In the light of my findings as aforesaid the Defendants' alternative case does not arise. That case is that even if an "investment dispute" is a dispute "arising in the course of the sale of the investment" (contrary to the findings that I have made), as a matter of fact the dispute concerns facts occurring, "in the course of sale of investments" so that the Tribunal would have jurisdiction in any event. Though the Defendants alternative case does not arise given the findings I have made as to the meaning of "investment dispute", I will briefly address that case as it was argued before me.

143. The Defendants' first point is to adopt the view expressed by the Tribunal in its Award that a "sale" may have "ongoing terms and conditions with continuing rights and obligations" (Award paragraph 226). In this regard the Defendants also note that the Republic accepts that "sale" may be "continuous" and may "take several weeks, months or years". I consider that if (contrary to my findings) an "investment dispute" was limited to one arising in the course of the sale of investments, then having regard to the Preamble, Article 1 and Article 18 itself, "in the course of" and "the sale of investments" ought to be given a broad meaning, otherwise the dispute resolution provisions in Article18 would have a vanishingly small scope for their operation, which would be contrary to the statutory intention to be derived from the Preamble, Article 1 and Article 18 (albeit that even a broad meaning of "sale" would not reflect statutory intent for the reasons I have given).

144. The Defendants rely upon the evidence of Ms Galliamova who states at paragraphs 101 and 102 of her report:

> *"101. I have also been asked to give my opinion on the meaning of the words "in the course of" which are contained in Article 1(6) of the 2003 Investment Law.*
>
> *102. In my understanding, the preposition "in the course of" in the definition of "investment dispute" must be considered in the context of the phrase, "arising in the course of realisation of investments", which, in my view, means "connected to the implementation of investments". This reflects the essence of the*

> *definition of "investment dispute" which was assigned to the term during the drafting stage of the law."*

The Defendants' case is that if the words "in the course of" mean, "connected to" they are wide enough to encompass the events the subject matter of the arbitration.

145. In contrast, it appears Ms Jorupbekova adopts a narrow interpretation of "in the course of" for she says at paragraph 9.18 of her first report that*, "Stans's and Kutisay's Arbitration claim does not "arise in the course of the sale of the investments" but out of the revocation of subsoil use licenses granted to Kutisay."* As for the Republic, they criticize Ms Galliamova for aligning "in the course of" with the Russian version "realisation/implementation" of investments, rather than addressing the meaning of the words "in the course of" to what the Republic submits is the Kyrgyz word "sale" (which I have not found proved). There is, once again, therefore, a difference in the views expressed by Ms Jorupbekova and Ms Galliamova as to the correct interpretation of a phrase in a Kyrgyz law provision.

146. Even assuming that the word in Kyrgyz is "sale", I can see nothing inappropriate in Ms Galliamova interpreting the words "in the course of" having regard to the Russian version (which both parties accept is clear in its meaning) on the principles of Kyrgyz statutory interpretation that I have found, even if one is in the scenario where one is construing the phrase also in the Kyrgyz version. It would be bizarre if the very same words "in the course of" had different meanings attached to them depending on the meaning to be ascribed to the different language versions of the word that follows. In such circumstances I accept Ms Galliamova's evidence on Kyrgyz law that "in the course of" in the phrase "arising in the course of realization of investments" means "connected to the implementation of investments" (my emphasis), a broad meaning, which is entirely consistent with the statutory intent in the Preamble, Article 1 and Article 18 that I have found. Equally if the words "in the course of" in the Russian version mean "connected to", then the meaning ought to be the same in the Kyrgyz version so that the question would be whether the dispute was "connected to" the "sale of investments".

147. Whilst it was also alleged in the Defendants' Skeleton Argument that the issue of the licences was a "sale", in their oral submissions the Defendants focussed more on the sale of the shares in the Second Defendant. The Defendants submitted as follows. There is now a dispute as to the legality of the Republic's sale of Kutisay's shareholding to Stans KG in December 2009. The Republic has recently claimed that the Defendants' acquisition of Kutisay and its mining licences from the Republic was effected through payment of a bribe (as pleaded in its Statement of Defence in the Arbitration, and referred to at paragraphs 17, 18 and 37(1) of the Republic's Skeleton Argument). This sale was the means by which the Defendants acquired their investments. The parties are thus in dispute concerning the Defendants' acquisition of their investment, which, on the Republic's case, goes to the merits of the Defendants' claims. In such circumstances the dispute in the arbitration would be an investment dispute arising in the course of the sale of investments, as it is connected to the sale of investments, and the Tribunal would have jurisdiction.

148. The Republic denies that "in the course of sale" means "connected to", but I would have held against the Republic on that for the reasons set out above. That leaves the

Republic's argument (reiterated in its oral reply) that even if "in the course of sale of investments" means "connected to" then as the Defence is attacking the issue of the licences not the sale of the shares, the dispute is not connected to the sale. I consider that to be an unduly narrow application of the facts to the wide words "connected to". The Republic's characterisation of the facts is artificial (in its separation of the licences from the sale) and does not take account of the economic realities of the transaction which proceeded on a multiple step basis of which the sale of the shares was an integral part, and the dispute is connected to the sale of the shares which formed part of the structure of the transaction, which is now attacked on the basis of alleged illegality. In such circumstances the dispute in the arbitration would be an investment dispute arising in the course of the sale of investments, as it is sufficiently connected to the sale of investments, and the Tribunal would have jurisdiction on that basis. However the point is academic, as the Tribunal has jurisdiction based on my findings on the Defendants primary case.

149. I would hope that the parties will be in a position to agree an Order reflecting my judgment, but if any matters remain outstanding I will hear argument from the parties on the handing down of judgment.