Arbitration
at the Moscow Chamber of Commerce and Industry

115088, the city of Moscow, Sharikopodshipnikovskaya str., 38, bldg.1
http://www.mostpp.ru/arb , e-mail arbitration.mtpp@gmail.com, tel. 8 (495) 675-54-28

AWARD

in the matter № A-2013/29

The city of Moscow June 30, 2014

Arbitration at the Moscow Chamber of Commerce and Industry

consisting of the Presiding Arbitrator M.Z. Pak and the arbitrators N.G. Vilkova and L.G. Balayan, in the presence of court secretaries L.B. Parchieva and D.V. Dedenkulova
has examined in court hearings on December 13, 2013, February 6, 2014, March 3, 2014, March 31, 2014 and April 29-30, 2014 the matter in the action of the company "Stans Energy Corp." (Canada, the Province of Ontario) and "Kutisay Mining" LLC (Kyrgyz Republic) against the Kyrgyz Republic for the recovery of damages in the amount of 117.853.000 USD.

Participants to the hearings were:

On December 13, 2013 - Claimants' representatives: I.V. Zenkin by proxy dated July 25, 2013 and N.G. Yakubova by proxy dated July 25, 2013;

On February 6, 2014 - Claimants' representatives: I.V. Zenkin by proxy dated July 25, 2013and N.G. Yakubova by proxy dated July 25, 2013;

On March 3, 2014 - Claimants' representatives: I.V. Zenkin by proxy dated July 25, 2013and N.G. Yakubova by proxy dated July 25, 2013;

On March 31, 2014 - Claimants' representatives: I.V. Zenkin by proxy dated July 25, 2013and N.G. Yakubova by proxy dated July 25, 2013;

On April 29-30, 2014 - Claimants' representatives: I.V. Zenkin by proxy dated July 25, 2013 and N.G. Yakubova by proxy dated July 25, 2013, General Director of "Kutisay Mining" LLC G.A. Savchenko and expert N.S. Ignatenko.

The Respondent duly notified of the date, time and venue of the hearing was not represented at the hearings.

Circumstances of the case

On October 30, 2013 the companies “Stans Energy Corp.” (the Province of Ontario, Canada) and “Kutisay Mining” LLC (Kyrgyz Republic) (hereinafter referred to as the Claimants) filed with the Arbitration at the Moscow Chamber of Commerce and Industry (hereinafter referred to as the MCCI Arbitration) the Statement of Claim against the Kyrgyz Republic (hereinafter referred to as the Respondent), which stated the following.

The dispute between the Claimants and the Respondent is an investment dispute; it arose out of the Convention for the Protection of Investor’s Rights signed on March 28, 1997 in Moscow, and in accordance with Article 11 of the said Convention it is a dispute related to investments made under this Convention; the dispute is also based on the Law of the Kyrgyz Republic “On Investments in the Kyrgyz Republic”.

Since 2010, the company “Stans Energy Corp.” had been making investments into research of potential and development of reserves of rare and rare-earth metals in Kemin region of Chui Oblast of the Kyrgyz Republic. Investments are made through two of its subsidiaries registered as legal entities of the Kyrgyz Republic “Stans Energy KG” LLC and “Kutisay Mining” LLC (earlier JSC “Kutisay Mining”).

JSC “Kutisay Mining” was set up on December 9, 2009 as a joint-stock company which sole founder was the company “Vesatel United Limited” (New Zealand).

According to the Resolution of the Government of the Kyrgyz Republic dated December 30, 2008 № 736, “Kutessay II” deposit was included into the List of mineral deposits allocated on a competitive basis. On December 01, 2009 the Resolution of the Government of the Kyrgyz Republic № 725 (hereinafter referred to as the Resolution № 725) was adopted amending this procedure. With para.1 of the Resolution № 725 competitive procedures for granting rights to certain objects of subsoil use (including “Kutessay II” deposit) were modified into the auction stock-exchange procedures. With para.2 of the Resolution № 725 the Ministry of Natural Resources was authorized to issue licenses for the objects of subsoil use to legal entities, whose 100% of shares were managed by ZAO “Fund of Development of the Kyrgyz Republic” (without holding a tender for a further auction sale of shares of the mentioned legal entities).

On December 10, 2009 by Decision of the State Service for Regulation and Supervision of Financial Markets under the Government of the Kyrgyz Republic state registration of the inaugural issue of 19 million ordinary registered shares of JSC “Kutisay Mining” at a face value of 1 som per share under No. KG 0101202214 was made. The authorized capital stock of the company made up

19 million som. The owner placed the said shares into trust of ZAO "Fund of Development of the Kyrgyz Republic".

On December 21, 2009 the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and JSC "Kutisay Mining" held negotiations formalized by the Minutes № 1736-N-09 and the decision was made to grant to JSC "Kutisay Mining" the License № 2488 ME for "Kutessay II" deposit.

On December 29, 2009 the company "Stans Energy KG" LLC - a subsidiary which sole participant is the company "Stans Energy Corp" – purchased from a public auction (held at the instruction of ZAO "Fund of Development of the Kyrgyz Republic" by the stock exchange "Central Asia Stock Exchange") 100% of shares of JSC "Kutisay Mining" (Contract № I 194), thus becoming its sole shareholder.

On January 25, 2010 the said sole shareholder of JSC "Kutisay Mining" made a decision on reorganization by way of transformation into a limited liability company ("Kutisay Mining" LLC). Reorganization took place and the certificate was issued. "Kutisay Mining" LLC became a legal successor of JSC "Kutisay Mining".

On June 26, 2012 the Committee for Development of Economic Industries of the Parliament of the Kyrgyz Republic (Zhogorku Kenesh) passed a resolution obligating the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic to cancel the license agreement with "Kutisay Mining" LLC in respect of "Kutessay II" deposit.

This resulted into the following acts of the State Agency and the General Prosecutor's Office.

(1) Refusal to consider the programs of works at the deposit

In its letter dated March 12, 2013 the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic addressed to "Kutisay Mining" LLC stated that "with a view to prevent violations of requirements of regulatory acts governing industrial safety Gosgeolagency repeatedly refrains from consideration of the submitted Program…".

(2) Refusal to conduct state ecological expert examination

In its letter dated March 12, 2013 the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic addressed to "Kutisay Mining" LLC set forth that "state ecological expert examination of the Project "Repair of the access road "Open pit – Existing works" at the deposit "Kutessay II" was suspended until the protest of the General Prosecutor's Office against the Resolution of the Government of the Kyrgyz Republic № 725 dated December 1, 2012 has been finally considered."

(3) Refusal to re-execute the license agreement

In its letter dated April 8, 2013 the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic addressed to "Kutisay Mining" LLC specifically emphasized that "…the General Prosecutor's Office of the Kyrgyz Republic has filed with the Inter-district court of Bishkek the statement of claim directly related to "Kutessay II" and "Kalessay" deposits. In light of the recent events…Gosgeolagency sees no rationale for re-execution of the license agreement … and approval of the program of works without expert examination …".

(4) Judicial recourse

On April 04, 2013 the General Prosecutor's Office of the Kyrgyz Republic filed an application with the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic for invalidation of the Minutes of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company "Kutisay Mining" dated December 21, 2009 №1736-N-09.

The Kyrgyz Republic declared that it was necessary to check to what extent the regulatory legal act on which basis it granted the right to JSC "Kutisay Mining" to obtain the license (Resolution № 725) before putting up its shares for sale at the auction complied with the Kyrgyz legislation at the moment of its adoption.

Over three years had passed from the date of adoption of this act (December 1, 2009) till the date of filing of the application.

(5)Interim measures

On the basis of the application of the General Prosecutor's Office of the Kyrgyz Republic for injunctive measures aimed at securing the claim the judge of the Inter-district court of the city of Bishkek Nurmanbetov E.B. ruled on April 15, 2013 that the following injunctive measures can be applied in respect of "Kutisay Mining" LLC: "To bar "Kutisay Mining" LLC, private persons, state bodies and their officials from making actions related to re-execution of the license agreement as the supplement; extension thereof, issue of the next license supplement; approval of projects, reports, work programs, feasibility studies; calculating the payment for withholding the Licenses № 2488 ME and № 2489ME for the right to use subsoil at the deposits "Kutessay II", as well as the actions aimed at transfer or alienation of the right of subsoil use at the deposit "Kutessay II" to third parties, including alienation of a share in the charter capital of the company".

The petition of "Kutisay Mining" LLC and Ak-Tyuz ajyil okmotu (rural administration) to repeal the interim measures for securing the claim was

completely dismissed by Decision of the Inter-district court of the city of Bishkek of May 29, 2013.

As became known in the course of the case hearings on April 29-30, 2014, on March 19, 2014 the Inter-district court of Bishkek (judge Nurmanbetov E.B.) satisfied the application of the General Prosecutor's Office of the Kyrgyz Republic and declared invalid the Minutes №1736-N-09 of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company "Kutisay Mining" dated December 21, 2009.

"Kutisay Mining" LLC disagreed with the decision of the Inter-district court of the city of Bishkek dated March 19, 2014 and filed an appeal against it which is currently pending in the court.

The Statement of Claim further sets forth that the Claimants are Investors making investments in the territory of the Kyrgyz Republic in accordance with the Convention for the Protection of Investor's Rights dated March 28, 1997 and the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic".

Investments of the Claimants are cash assets, purchased fixed assets and intangible assets as well as the rights to carry out subsoil use activity transferred under the license.

The actions of the Respondent described in the Statement of Claim (refusal to consider the programs of works at the deposit, refusal to conduct state ecological expert examination, refusal to re-execute the license agreement as supplement and subsequent interim measures aimed at securing the claim) constitute a wrongful act which resulted into unlawful expropriation of investments.

Besides in the course of making investments the Kyrgyz Republic permanently violated the standard of fair treatment of investments.

It is underlined in the Statement of Claim that unlawful expropriation and violation of a fair treatment of investments triggers international responsibility of a state in form of full compensation for damages on the basis of Chapter 2 Part 2 of the Articles "Responsibility of States for Internationally Wrongful Acts" adopted by the UN International Law Commission and approved by the UN General Assembly at its 56 session in 2001 – Document A/56/10.

According to provisions of part 4 Article 9 of the Convention for the Protection of Investor's Rights dated March 28,1997, the investor is entitled to be compensated for damages caused to him as a result of decisions or actions (omissions) of the state bodies or officials which contradict the legislation of the recipient country and the rules of international law. In line with Article 10 of this Convention, in the case described in part 4 Article 9 of the said Convention the

damages shall be compensated in accordance with the rules of national legislation of the recipient country.

Based on the foregoing the Claimants requested to obligate the Respondent:

- to compensate the Claimants for the value of investments in the amount specified in the Appraisal Report as a measure of liability for expropriation of investments as well as in connection with the fact that the investors and investments were not granted fair treatment and unconditional protection.

The amount of 117 853 000 USD determined in the Appraisal Report is a measure of liability for expropriation and at the same time the maximum amount of liability for violation of the fair treatment;

- to pay compound interests on the amount of damages determined by the arbitration, with monthly capitalization, as of the date of the award till the date of payment at a refinancing rate of the National Bank of the Kyrgyz Republic;

- to reimburse the Claimants for the arbitration costs, including the costs of legal representation of the Claimants' interests during examination of the present dispute in arbitration.

Documents submitted by the Claimants in support of their claims

In support of the above described circumstances the Claimants have submitted the copies of the following documents:

1. Resolution of the company "Stans Energy Corp." dated December 25, 2009;
2. Certificate of incorporation of the Limited liability company "Kutisay Mining", registration number 109254-3308-000;
3. Printout from the official site of the Embassy of the Kyrgyz Republic in the Russian Federation;
4. Convention for the Protection of Investor's Rights signed in Moscow on March 28, 1997 with enclosure of the Convention's status;
5. Resolution of the company "Stans Energy Corp." dated January 21, 2010;
6. License № 2488 ME dated September 20, 2010 together with License Agreement № 1 dated December 21, 2009, License Agreement № 2 dated September 20, 2010 and License Agreement № 3 dated June 15, 2012;
7. License № 2489 ME dated September 20, 2010 together with License Agreement № 1 dated December 21, 2009 and License Agreement № 2 dated September 20, 2010;

8. Minutes №1736-N-09 dated December 21, 2009;

9. Ruling of the Inter-district court of the city of Bishkek dated April 15, 2013;

10. Draft of the License Agreement № 3 to the License № 2488 ME;

11. Letter of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic addressed to “Kutisay Mining” LLC dated March 12, 2013;

12. Letter of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic addressed to “Kutisay Mining” LLC dated March 11, 2013;

13. Explanatory note of “Al-Star” Centre of Appraisal and Expert Examination of Property” LLC to Report № 01-09/13 dated September 5, 2013 (ref. № 05-09/13);

14. Report of the “Al-Star” Centre of Appraisal and Expert Examination of Property” LLC № 01-09/13 on determination of a market value of the rights to use the deposit of rare-earth elements “Kutessay II” as of the date of suspension of the License and of a total amount of costs incurred by the company under the project of development of “Kutessay II” deposit, together with Exhibits 1-3;

15. The 1985 Seoul Convention Establishing Multilateral Investment Guarantee Agency, Article 11;

16. Report of the UN International Law Commission (General Assembly of UN, Official Reports of the 56th Session, Addendum №10 (A/56/10), UN, New York, 2001 – P.37-38;

17. Rules of the Arbitration at the Moscow Chamber of Commerce and Industry approved by the Order of the President of the Moscow CCI on July 20, 2012 № 20;

18. Regulations on the Arbitration at the Moscow Chamber of Commerce and Industry approved by the Order of the President of the Moscow CCI on July 20, 2012 № 20;

19. Powers of attorney proving the authorities of attorneys I.V. Zenkin and N.G. Yakubova;

20. License № 2512 MR dated July 25, 2011, together with enclosure of License Agreements № 1-3;

21. The Law of the Kyrgyz Republic “On Subsoil” dated August 9, 2012 and the Law of the Kyrgyz Republic “On Subsoil” dated June 24, 1997;

22. Application of “Stans Energy KG” LLC dated November 29, 2011 (for extension of the license for Aktyuz licensed area);

23. Application of “Kutisay Mining” LLC dated December 16, 2011 (for conclusion of the License agreement №3 under the License № 2489 ME for “Kalesay” deposit);

24. Letter of “Kutisay Mining” LLC dated March 29, 2012 and June 20, 2012 addressed to the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic;

25. Document proving payment of the arbitration fee;

26. Certificate of a legal status of “Stans Energy Corp.” together with translation;

27. Resolution of the company “Stans Energy Corp.” dated February 10, 2006 on incorporation of a legal entity in the Kyrgyz Republic;

28. Certificate of state registration of a legal entity “Stans Energy KG” LLC dated March 3, 2006, series GR № 0042168;

29. Excerpt from the Register of legal entities of the Ministry of Justice of the Kyrgyz Republic dated November 21, 2013 in respect of “Stans Energy KG” LLC;

30. Certificate of state registration of a legal entity JSC “Kutisay Mining” dated December 9, 2009 series GR № 0065880;

31. Resolution № 1 of a sole participant of JSC “Kutisay Mining” dated December 9, 2009;

32. Resolution of the State Service for Regulation and Supervision of Financial Markets under the Government of the Kyrgyz Republic dated December 10, 2009 № 13-1/2414;

33. Contract № 2/09-DU of trust management in respect of shares of the Joint-Stock Company “Kutisay Mining” (Kutisay Mining) dated December 16, 2009;

34. Instrument of transfer dated December 16, 2009;

35. Announcement of the stock-exchange ZAO “Central Asia Stock Exchange” about the public auction of ordinary registered shares of JSC “Kutisay Mining” held on the instructions of ZAO “Fund of Development of the Kyrgyz Republic”;

36. Contract № I 194 for making a deal at ZAO “Central Asia Stock Exchange” dated December 29, 2009;

37. Report dated December 29, 2009 on the results of the held auction;

38. Extract №2953 from the register of shareholders of JSC “Kutisay Mining” dated January 19, 2010;

39. Resolution of the sole shareholder of JSC “Kutisay Mining” dated January 25, 2010;

40. Order №2379 of the Department of Justice of the city of Bishkek of the Kyrgyz Republic dated June 17, 2010 on state re-registration of JSC "Kutisay Mining" into "Kutisay Mining" LLC;

41. Certificate of state re-registration of the legal entity "Kutisay Mining" LLC dated June 17, 2010, series GR №0090487;

42. Resolution of the Government of the Kyrgyz Republic № 736 dated December 30, 2008 "On Measures for implementation of the provisions of the Tax Code of the Kyrgyz Republic" and the List of mineral deposits allocated on a competitive bases approved by it and the amount of bonuses (as amended by the Resolution of the Government of the Kyrgyz Republic dated June 25, 2009 № 410);

43. Resolution of the Government of the Kyrgyz Republic № 725 dated December 1, 2009 "On Improvement of Competitive Procedures for Granting the Rights to Use Subsoil";

44. Statement of claim of the General Prosecutor's Office of the Kyrgyz Republic for invalidation of the Minutes of direct negotiations №1736-N-09 between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company "Kutisay Mining" dated December 21, 2009;

45. Ruling of the Inter-district court of the city of Bishkek dated April 8, 2013;

46. Ruling of the Inter-district court of the city of Bishkek dated January 22, 2014;

47. Ruling of the Inter-district court of the city of Bishkek dated May 29, 2013;

48. Letter of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic addressed to "Kutisay Mining" LLC dated April 8, 2013;

49. Letter of "Kutisay Mining" LLC addressed to the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic dated April 15, 2013;

50. Energy Charter Treaty signed in Lisbon on December 17, 1994, together with the Annex EM "Energy Materials and Products" (in accordance with Article 1(4) of the ECT);

51. Award in the case Metalclad Corp. v. United Mexican States dated August 30, 2000, ICSID case No. ARB(AF)/97/l (abstracts), including translation of paragraphs 76, 85, 88-91, 99, 103 of the Award into Russian;

52. Award in the case Tecnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States dated May 29, 2003, ICSID case No. ARB(AF)/00/2

(abstracts), including translation of paragraphs 35-51, 113-117, 124, 138, 151, 153-154, 162, 172-175 of the Award into Russian;

53. Award in the case Middle East Cement Shipping and Handling Co. v. Egypt dated April 12, 2002, ICSID case No. ARB/99/6 (abstracts), including translation of paragraphs 97, 99, 100-101,103, 107,143 of the Award into Russian;

54. Sornarajah M. The International Law on Foreign Investment. Cambridge: Cambridge University Press, 2010, pages 237, 392-393 (including their translation into Russian);

55. Article 16 of the Law of the Kyrgyz Republic dated June 24, 1997 №42 “On Subsoil” as in force in the period from November 29, 2006 till October 28, 2011;

56. Article 408 of the Civil Code of the Kyrgyz Republic;

57. Article 38 of the Statute of the International Court of Justice of UN;

58. Article 6 of the 2010 Constitution of the Kyrgyz Republic;

59. Award in the case Benvenuti & Bonfant SARL v Congo dated August 8, 1980, (1993) 1 ICSID Reports 330 (abstracts), including translation of para. 4.95 of the Award into Russian;

60. Article 12 of the 1993 Constitution of the Kyrgyz Republic;

61. Official announcement from the site of the President of the Kyrgyz Republic entitled “President Almazbek Atambaev sent an objection to the Law “On International Treaties of the Kyrgyz Republic” to Zhogorku Kenesh// http://www.president.kg/ru/news/2206 Prezident almazbek atambaev napravil v iosorku kenesh vozraienie k zakonu o meidunarodnvih doeovorah kvirsvizskov respubliki/;

62. Article 31 of the 1969Vienna Convention on the Law of Treaties done at Vienna on May 23, 1969;

63. Award in the case American Manufacturing and Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, dated February 21, 1997 (abstracts), including translation of paragraphs 6.02-6.11 of the Award in Russian;

64. Award in the case Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, dated October 12, 2005 (abstracts), including translation of para. 166 of the Award into Russian;

65. Award in the case Wena Hotels Limited v. Arab Republic of Egypt Case No. ARB/98/4, dated December 8, 2000, 41 ILM 8(2002) (abstracts), including translation of paragraphs 84-95 of the Award into Russian;

66. Award in the case Asian Agricultural Products Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/8 7/3, dated June 27, 1990 (abstracts), including translation of paragraphs 45-48 of the Award into Russian;

67. Award in the case Еигеко B. V. v. Poland (Ad Hoc), dated August 19, 2005 (abstracts), including translation of paragraphs 36, 37, 38, 39, 40, 41, 132, 235, 236, 237 of the Award into Russian;

68. Partial Award in the case CME Czech Republic B. V. (Netherlands) v. Czech Republic, UNCITRAL dated September 13, 2001 (abstracts), including translation of paragraph 613 of the Award into Russian;

69. Arbitration Award in the case Azurix Corp v. Argentine Republic, ICSID Case No ARB/01/12, dated July 14, 2006 (abstracts), including translation of paragraphs 372, 408, 442 of the Award into Russian;

70. Award in the case Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22 dated July 24, 2008 (abstracts), including translation of paragraphs 602, 615, 729 of the Award into Russian;

71. Award in the case Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/08, dated February 6, 2007 (abstracts), including translation of paragraphs 293-300, 303, 318-319, of the Award into Russian;

72. Award in the case National Grid P.L.C.v. Argentine Republic, UNCITRAL, dated November 3, 2008 (abstracts), including translation of paragraphs 179, 187, 197 of the Award into Russian;

73. Award in the case Compania de Aguas del Aconquija and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, dated August 20, 2007 (abstracts), including translation of paragraphs 7.4.12, 7.4.15, 7.4.16 - 7.4.17, 7.4.37 of the Award into Russian;

74. Award on Liability in the case Suez and others v. Argentina, ICSID Case No. ARB/03/17 dated July 30, 2010 (abstracts), including translation of paragraphs 203 and 231 of the Award into Russian;

75. Award in the case Rumeli Telekom A. S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, dated July 29, 2008 (abstracts), including translation of paragraphs 609, 615, 679 of the Award into Russian;

76. Final Award in the case Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, dated October 5, 2012 (abstracts), including translation of paragraphs 183-185, 186, 190-1 of the Award into Russian;

77. Award in the case CMS Gas Transmission Co. v. The Argentine Republic, ICSID Case No. ARB/01/8, dated May 22, 2005 (abstracts), including translation of paragraphs 274-276, 280 of the Award into Russian;

78. Award in the case PSEG Global et al. v. Republic of Turkey, ICSID Case No. ARB/02/5, dated January 19, 2007 (abstracts), including translation of paragraph 240 into Russian;

79. Partial award in the case Saluka Investments BV v. Czech Republic, UNCITRAL, dated March 17, 2006 (abstracts), including translation of paragraphs 301-303, 407, 420, 460 of the Award into Russian;

80. Award in the case MID Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile (ICSID Case No. ARB/01/7), dated May 25, 2004 (abstracts), including translation of paragraphs 53-57, 80, 109, 113-115, 165 of the Award into Russian;

81. Award in the case Waste Management, Inc. v. Mexico, ICSID Case No. ARB(AF)/00/3 (NAFTA), dated April 30, 2004 (abstracts), including translation of paragraphs 98, 138 of the Award into Russian;

82. Award on Liability in the case LG&E Energy Corp. LG&E Capital Corp. LG&E International, Inc. v. Argentine Republic ICSID Case No. ARB/02/1, dated October 3, 2006 (abstracts), including translation of paragraphs 36, 39, 68, 124-125, 127-131, 157 of the Award into Russian;

83. Partial award in the case Enron Corporation Ponderosa Assets, L.P v. Argentine Republic ICSID Case No. ARB/01/3, dated May 22, 2007 (abstracts), including translation of paragraphs 259- 260, 262, 263, 266 of the Award into Russian;

84. Award in the case Sempra Energy International v. Argentina Republic, ICSID Case No. ARB/02/16, dated September 28, 2007 (abstracts), including translation of paragraphs 298-300 of the Award into Russian;

85. Award in the case ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID, Case № ARB/03/16, dated October 2, 2006 (abstracts), including translation of paragraphs 423-425, 445, 476 of the Award into Russian;

86. Award in the case BG Group Pic v. The Republic of Argentina, ЮНСИТРАЛ, dated December 24, 2007 (abstracts), including translation of paragraphs 294-301, 346 of the Award into Russian;

87. Award in the case Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, dated June 1, 2009 (abstracts), including translation of paragraph 450 of the Award into Russian;

88. Award in the case Mondev International Ltd. v. USA, ICSID Case No. ARB(AF)/99/2, dated October 11, 2002 (abstracts), including translation of paragraph 127 of the Award into Russian;

89. Award in the case Loewen Group, Inc., and Raymond L.Loewen v. US, ICSID Case No. ARB(AF)/98/3, dated June 26, 2003 (abstracts), including translation of paragraph 132 of the Award into Russian;

90. Award in the case Alpha Projektholding GMBH v. Ukraine ICSID Case No. ARB/07/16, dated November 8, 2010 (abstracts), including translation of paragraphs 420 and 422 of the Award into Russian;

91. Award in the case Pope & Talbot Inc v. The Government of Canada dated April 10, 2001 (abstracts), including translation of paragraphs 138, 181 of the Award into Russian;

92. Award in the case Elettronica Sicula S. P.A. (ELSI) (United States of America v. Italy) dated July 20, 1989 (abstracts), including translation of paragraph 128 of the Award into Russian;

93. Partial award in the case Mohammad Ammar Al-Bahloul v. Republic of Tajikistan, Case № V (064/2008), dated September 2, 2009 (abstracts), including translation of paragraph 248 of the Award into Russian;

94. Award in the case AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, dated September 23, 2010 (abstracts), including translation of paragraphs 10.3.7. - 10.3.9 of the Award into Russian;

95. Award in the case EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, dated October 8, 2009 (abstract), including translation of paragraph 303 of the Award into Russian;

96. Payment orders № 2 dated March 23, 2010, № 3 dated March 31, 2010, № 4 dated April 1, 2010, as well as the Receipt for cash down payment dated April 20, 2010;

97. Letter of the Department of State Tax Service for Leninsky district of Bishkek dated May 28, 2010 addressed to the Ministry of Natural Resources of the Kyrgyz Republic;

98. Article II of the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958;

99. Investment Arbitration and the Energy Charter Treaty, Edited by Clarisse Ribeiro, Juris Net, 2006, page 308 (including translation into Russian);

100. Award on Jurisdiction in Plama Consortium Limited v. Republic of Bulgaria (ICSID case No. ARB/03/24) dated February 8, 2005 (abstracts), including translation of paragraphs 133-142 into Russian.

Timeline of arbitration

On October 30, 2013 the company “Stans Energy Corp.”, a legal entity organized under the law of Canada (the Province of Ontario) and “Kutisay Mining” LLC, a legal entity organized under the law of the Kyrgyz Republic, filed with the Arbitration at the MCCI the Statement of Claim against the Kyrgyz Republic.

On October 29, 2013 the Claimants filed a Petition for reduction of the amount of the arbitration fee. In accordance with subpara.2 para.1 Article 5 of the Schedule of Arbitration Costs, the arbitration fee amounted to 176.253,00 USD. Due to the fact that the Claimants bear heavy costs in connection with pending arbitration proceedings they requested the Presidium of the Arbitration to reduce by 10% on the basis of para.3 Article 6 of the Schedule of Arbitration Costs the amount of the arbitration fee payable by the Claimants.

On November 01, 2013 the Executive Secretary of the MCCI Arbitration notified the Claimants of reduction by 10% of the arbitration fee on the basis o para.3 Article 6 of the Schedule of Arbitration Costs. The arbitration fee in the present case was paid by the Claimants on October 29, 2013 in the amount of 159.128,00 USD (bank transfer of October 29, 2013).

On October 31, 2013 the Executive Secretary of the MCCI Arbitration sent the notification of the filed Statement of Claim to the address of the Kyrgyz Republic (Ambassador Extraordinary and Plenipotentiary of the Kyrgyz Republic in the Russian Federation B. Djunusov, hereinafter referred to as Ambassador) offering to nominate an arbitrator on the part of the Kyrgyz Republic; the Statement of Claim with exhibits was also sent (ref. No.233). The same notification set forth that the Claimants have chosen on their part Vilkova N.G. as an arbitrator, and Avtonomov A.S. as a reserve arbitrator. The mentioned notification was delivered to the chancellery of the Embassy of the Kyrgyz Republic and received by the Respondent on October 31, 2013.

The mentioned notification and the Statement of Claim were sent: on October 31, 2013 – to the President of the Kyrgyz Republic Atambaev A.Sh. (ref. No. 234). The notification was sent by DHL, number of consignment note 7395219090 and was received on November 04, 2013.

On October 31, 2013 - to the Prime-Minister of the Kyrgyz Republic Satybaldiev Zh.Zh. (ref.No. 235). The notification was sent by DHL, number of consignment note 7395219101 and was received on November 04, 2013.

On October 31, 2013 – to the Minister of Foreign Affairs of the Kyrgyz Republic Abdylbaev E.B. (ref. No 236). The notification was sent by DHL, number of consignment note 7395219112 and was received on November 04, 2013.

On October 31, 2013 – to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic Zilaliev D.T. (ref № 237). The notification was sent by DHL, number of consignment note 7395219123 and was received on November 04, 2013.

On October 30, 2013 the Vice-President of the Arbitration at the MCCI passed a resolution on initiation of proceedings in the case.

On November 12, 2013 the MCCI Arbitration received per e-mail from the Embassy of the Kyrgyz Republic the Respondent's Motion dated November 12, 2013 with a request to extend the time limit for consideration of the received materials in the case, as well as to extend the deadline for nomination of an arbitrator. This motion was signed by the Ambassador Extraordinary and Plenipotentiary of the Kyrgyz Republic in the Russian Federation Mr. B. Djunusov. The copy thereof was sent to the Claimants' representatives per e-mail and received by them on November 12, 2013. The original motion was submitted to the MCCI Arbitration on November 13, 2013.

On November 12, 2013 the Executive Secretary of the MCCI Arbitration sent the answer to the Motion of November 12, 2013 addressed to the Ambassador Extraordinary and Plenipotentiary of the Kyrgyz Republic in the Russian Federation Mr. B. Djunusov (ref. № 244). The Respondent was offered to submit to the MCCI Arbitration by November 20, 2013 at the latest the information about nominated arbitrators on the part of the Respondent. The notification was sent by DHL, number of consignment note 7395219042 and was received on November 14, 2013.

On November 21, 2013 Vice-President of the MCCI Arbitration passed a ruling on nomination of an arbitrator for the Respondent. Balayan L.G. was nominated as principal arbitrator, Kabatova E.V. – as reserve arbitrator.

On November 21, 2013 arbitrators Vilkova N.G. and Balayan L.G. being guided by subpara.1 para.2 Article 18 of the Arbitration Rules elected Pak M.Z. to the Chairman of the Arbitral tribunal and Bezbakh V.V. as reserve chairman which is fixed in the Protocol of election of the presiding members of the Arbitral tribunal.

All arbitrators submitted their declarations of independence and of the absence of any impediments for participation in the arbitration proceedings. The parties made no comments regarding formation of the arbitral tribunal and the candidacies of arbitrators.

By resolution of the Vice-President of the MCCI Arbitration dated November 22, 2013 the hearing in the case was scheduled for December 13, 2013 at 12:00.

The notification of the date and time of the case hearing sent by the Secretariat of the MCCI Arbitration on November 22, 2013 to the Claimants' representatives per e-mail (ref. № 253) was received by them on November 22, 2013. The notification of the date and time of the case hearing was sent to the Respondent as well:

On November 22, 2013 - to the Embassy of the Kyrgyz Republic in Moscow (ref. № 254). The notification was sent by DHL, number of consignment note 7395218913 and was received on November 27, 2013.

On November 22, 2013 - to the President of the Kyrgyz Republic (ref. № 255, sent by DHL, number of consignment note 7395218946, received on November 28, 2013);

On November 22, 2013 – to the Prime-Minister of the Kyrgyz Republic (ref. № 256, sent by DHL, number of consignment note 7395218902, received on November 28, 2013);

On November 22, 2013 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 257), sent by DHL, number of consignment note 7395218935, received on November 28, 2013;

On November 22, 2013 - to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 258), sent by DHL, number of consignment note 7395218924, received on November 28, 2013.

On December 03, 2013 the MCCI Arbitration received the application from the Claimants requesting to postpone the examination of the case till the beginning of February 2014.

On December 03, 2013 the above mentioned application of the Claimants was sent to the Embassy of the Kyrgyz Republic in Moscow together with the notice that the decision on postponement of the proceedings will be passed by the Arbitral tribunal in the hearing on December 13, 2013 (ref. № 261). It was sent by DHL, number of consignment note 7395218810 and received on December 05, 2013.

The Claimants' application requesting to postpone the examination of the case till the beginning of February 2014 and the notice that the decision on postponement of the proceedings will be passed by the Arbitral tribunal in the hearing on December 13, 2013 was also sent by the Secretariat of the MCCI Arbitration:

On December 03, 2013 - to the President of the Kyrgyz Republic (ref. № 262), sent by DHL, number of consignment note 7395218821, received on December 06, 2013;

On December 03, 2013 – to the Prime-Minister of the Kyrgyz Republic (ref. № 263), sent by DHL, number of consignment note 7395218832, received on December 06, 2013;

On December 03, 2013 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 264), sent by DHL, number of consignment note 7395218843, received on December 06, 2013;

On December 03, 2013 - to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 265), sent by DHL, number of consignment note 7395218854, received on December 06, 2013.

On December 13, 2013 the Arbitral tribunal passed a Ruling which granted the motion of the Claimants for postponement of dispute resolution till the beginning of February 2014 in connection with negotiations between the parties on settlement of the dispute concerned. With this Ruling the case hearing was scheduled for February 06, 2014 at 11:00.

On December 16, 2013 the notice of postponement of the proceedings till February 06, 2014 was sent to the parties' representatives: to the Claimants' representatives by e-mail (ref. № 281), received on December 19, 2013; to the Respondent's representatives on December 16, 2013 to the Embassy of the Kyrgyz Republic in the Russian Federation (ref. № 282), sent by DHL, number of consignment note 7395218703, received on December 19, 2013.

On December 16, 2013 – to the President of the Kyrgyz Republic (ref. № 283), sent by DHL, number of consignment note 7395218692, received on December 20, 2013;

On December 16, 2013 – to the Prime-Minister of the Kyrgyz Republic (ref. № 284), sent by DHL, number of consignment note 7395218655, received on December 20, 2013;

On December 16, 2013 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 285), sent by DHL, number of consignment note 7395218644, received on December 20, 2013;

On December 16, 2013 - to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 286), sent by DHL, number of consignment note 7395218622, received on December 20, 2013.

On January 31, 2014 the Claimants filed with the MCCI Arbitration the extended statement of claim. This extended statement of claim was sent to the Respondent on February 03, 2014 (ref. № 18), delivered to the chancellery of the Embassy of the Kyrgyz Republic in the Russian Federation, received on February 03, 2014.

The extended statement of claim and exhibits thereto were also sent:

On February 03, 2014 – to the President of the Kyrgyz Republic (ref. № 19), sent by DHL, numbers of consignment notes 7472496124, 7472496113, 7472496102, received on February 05, 2014;

On February 03, 2014 – to the Prime-Minister of the Kyrgyz Republic (ref. № 20), sent by DHL, numbers of consignment notes 7472496150, 7472496146, 7472496135, received on February 06, 2014;

On February 03, 2014 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 21), sent by DHL, numbers of consignment notes 7472496183, 7472496172, 7472496161 received on February 05, 2014;

On February 03, 2014 - to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 22), sent by DHL, numbers of consignment notes 7472496205, 7472496216, 7472496194, received on February 06, 2014.

On February 05, 2014 the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic submitted the Declaration on the lack of jurisdiction and the Motion for postponement of the arbitration proceedings. In its Declaration the Respondent stated that the arbitral tribunal had no jurisdiction to examine the statement of claim filed by the Claimants and noted that it reserved the right to adduce detailed arguments and reasons. The Respondent requested to consider and resolve the issue of jurisdiction as a preliminary issue with rendering a respective ruling (decision), however only after the Respondent has been granted the opportunity to prepare and submit detailed arguments about the lack of jurisdiction.

In the Motion for postponement of the arbitration proceedings the Respondent requested to postpone the arbitration proceedings and, respectively, the proceedings in the case for at least three months. In the opinion of the Respondent, this would protect its right to proper representation and to a fair hearing in the arbitration and would secure proper conduct of arbitration proceedings, since the Respondent and its counsels wpuld be granted the opportunity to prepare its line of defense and submit to the arbitral tribunal written arguments, first of all on the issue of jurisdiction. The Respondent further requested (upon expiry of a respective time period) to consider as a preliminary issue the issue of jurisdiction taking into account the submitted arguments with rendering of a respective ruling (decision).

On February 06, 2014 the Claimants' representative acknowledged the receipt of the documents which were submitted by the Respondent to the MCCI Arbitration on February 05, 2014.

On February 06, 2014 the Arbitral tribunal passed Procedural Order № 1 and a respective Ruling with which it granted the Motion of the Respondent for postponement of the case hearing and its request to conduct a separate arbitration hearing on jurisdiction and scheduled this hearing for March 03, 2014, offering the

Respondent to produce the reasoning of its legal position on jurisdiction. The Arbitral tribunal also set the date of the hearing on the merits for March 31, 2014.

On February 13, 2014 the Claimants submitted the application requesting to treat the Statement of claim filed on January 31, 2014 as an extended statement of claim.

On February 17, 2014 the application of the Claimant received by the MCCI Arbitration on February 13, 2014 (ref. № 33) was sent to the Respondent by DHL, number of consignment note 7472496356, received on February 19, 2014.

The Claimants' application received by the MCCI Arbitration on February 13, 2014 was also sent by the Secretariat of the MCCI Arbitration:

On February 17, 2014 – to the President of the Kyrgyz Republic (ref. № 34), sent by DHL, number of consignment note 7472496345, received on February 19, 2014;

On February 17, 2014 – to the Prime-Minister of the Kyrgyz Republic (ref. № 35), sent by DHL, number of consignment note 7472496334, received on February 19, 2014;

On February 17, 2014 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 36), sent by DHL, number of consignment note 7472496323, received on February 19, 2014;

On February 17, 2014 - to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 37), sent by DHL, number of consignment note 7472496312, received on February 19, 2014.

On February 19, 2014 Procedural Order № 1 and Ruling dated February 06, 2014 were delivered personally to the Claimants' representative against written acknowledgement.

On February 19, 2014 Procedural Order № 1 and Ruling dated February 06, 2014 (ref. № 38) were sent to the Respondent by DHL, number of consignment note 7472496452, received on February 21, 2014.

Procedural Order № 1 and Ruling dated February 06, 2014 were also sent:

On February 19, 2014 – to the President of the Kyrgyz Republic (ref. № 39), sent by DHL, number of consignment note 7472496441, received on February 25, 2014;

On February 19, 2014 – to the Prime-Minister of the Kyrgyz Republic (ref. № 40), sent by DHL, number of consignment note 7472496430, received on February 25, 2014;

On February 19, 2014 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 41), sent by DHL, number of consignment note 7472496426, received on February 25, 2014;

On February 19, 2014 - to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 42), sent by DHL, number of consignment note 7472496415, received on February 25, 2014.

On February 19, 2014 the notice of the hearing on jurisdiction on March 03, 2014 (ref. № 43) was sent to the Claimants' representatives, which was received by the Claimants' representative on February 20, 2014 personally against written acknowledgment.

On February 19, 2014 the notice of the hearing on jurisdiction on March 03, 2014 (ref. № 44) was sent to the Respondent by DHL, number of consignment note 7472496404, received on February 21, 2014.

The notice of the hearing on jurisdiction on March 03, 2014 was also sent:

On February 19, 2014 - to the President of the Kyrgyz Republic (ref. № 45), sent by DHL, number of consignment note 7472496393, received on February 25, 2014.

On February 19, 2014 – to the Prime-Minister of the Kyrgyz Republic (ref. № 46), sent by DHL, number of consignment note 7472496382, received on February 25, 2014.

On February 19, 2014 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 47), sent by DHL, number of consignment note 7472496360, received on February 25, 2014.

On February 19, 2014 - to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 48), sent by DHL, number of consignment note 7472496371, received on February 25, 2014.

On February 24, 2014 the Claimants made a submission in which they presented their position in pursuance of Procedural Order № 1 in respect of duration of the Claimants' oral pleading on jurisdiction as well as in respect of the sequence of pleadings of the parties. No information in this respect was received from the Respondent.

On February 25, 2014 the Claimants' submission received on February 24, 2014 (ref. № 64) was sent to the Respondent by DHL, number of consignment note 7472496625, received on February 27, 2014.

The Claimants' submission received on February 24, 2014 was also sent:

On February 25, 2014 - to the President of the Kyrgyz Republic (ref. № 65), sent by DHL, number of consignment note 7472496614, received on February 28, 2014;

On February 25, 2014 – to the Prime-Minister of the Kyrgyz Republic (ref. № 66), sent by DHL, number of consignment note 7472496603, received on February 28, 2014;

On February 25, 2014 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 67), sent by DHL, number of consignment note 7472496570, received on February 28, 2014;

On February 25, 2014 - to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 68) sent by DHL, number of consignment note 7472496566, received on February 27, 2014.

On February 28, 2014 the MCCI Arbitration received from the Embassy of the Kyrgyz Republic in the RF the Motion of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic for postponement of the proceedings.

The Motion set forth that the Kyrgyz Republic "physically has not enough time to make any decision on arising procedural issues". The motion contained a request for postponement of the case hearing till rendering of the decision by the Economic Court of the CIS (to which the Kyrgyz Republic applied) on interpretation of Article 11 of the Moscow Convention and till rendering of the awards by the Moscow City Arbitration Court on the application of the Kyrgyz Republic for cancellation of the earlier passed decisions.

On March 03, 2014 the documents received by the MCCI Arbitration on February 28, 2014 were personally handed over to the Claimants' representatives against receipt.

The Arbitral tribunal considered this motion in the hearing on March 03, 2014 and passed the Ruling where it stated as follows:

- taking into account that one of the parties to the dispute is the Kyrgyz Republic which state sovereignty the Arbitral tribunal holds in high respect and which shows understanding for the issues covered in the mentioned Motion for postponement of the proceedings, in particular that on January 30, 2014 the work in respect of selection of a law firm for representation of the interests of the Kyrgyz Republic in the present case was completed,

- taking into account that the other party to the dispute is in particular a foreign investor which has the right to count on protection of its rights and on a fair examination of the dispute, which is a constituent part of investment climate,

- taking into account that according to Article 18 of the RF Law "On International Commercial Arbitration" dated July 07, 1993 (which is lex arbitrii in the present case, since the arbitration proceedings are conducted in the territory of

Russia) the parties should be treated equally and each party should be afforded every opportunity to state its case,

- taking into account the principle of equality of the parties which is anchored in Article 24 of the Rules of the MCCI Arbitration and that the generally acknowledged principle of international arbitration is that the parties should use their procedural rights in good-faith,

- upon consideration of the Motion filed on February 28, 2014 and signed by the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic D. Zilaliev for postponement of the proceedings in the case till conclusion of consultations and/or passing of a decision by the Economic Court of the CIS on interpretation of Article 11 of the Moscow Convention and till disposition of the cases in the Moscow City Arbitration Court in respect of revocation of the earlier adopted judicial acts of the MCCI Arbitration against the Kyrgyz Republic under the claims of “Central Asia FEZ “Bishkek” Development Corporation” LLC and the citizen of Korea Lee Jong Baek as well as “OKKV” LLC and 17 shared construction participants,

- and having heard the position of the Claimants’ representative,

the Arbitral tribunal rules as follows:

- to dismiss the Motion of the Respondent for postponement of the proceedings in the case till conclusion of consultations and/or passing of a decision of the Economic Court of the CIS on interpretation of Article 11 of the Moscow Convention and till disposition of the cases in the Moscow City Arbitration Court in respect of revocation of the earlier adopted judicial acts of the MCCI Arbitration against the Kyrgyz Republic under the claims of “Central Asia FEZ “Bishkek” Development Corporation” LLC and the citizen of Korea Lee Jong Baek as well as “OKKV” LLC and 17 shared construction participants and to continue the proceedings in the case;

- to offer the Respondent to submit till March 25, 2014 to the MCCI Arbitration and to the Claimant in copy its Statement of Defence;

- to set the date of the hearing for March 31, 2014 at 11:00.

On March 06, 2014 this Ruling of the MCCI Arbitration was sent to the Respondent at the following addresses:

On March 06, 2014 – to the Embassy of the Kyrgyz Republic in the Russian Federation (ref. № 72), sent by DHL, number of consignment note 7472496710, received on March 07, 2014;

On March 06, 2014 – to the President of the Kyrgyz Republic (ref. № 73), sent by DHL, number of consignment note 7472496706, received on March 11, 2014;

On March 06, 2014 – to the Prime-Minister of the Kyrgyz Republic (ref. 74), sent by DHL, number of consignment note 7472496651, received on March 11, 2014;

On March 06, 2014 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 75), sent by DHL, number of consignment note 7472496732, received on March 11, 2014;

On March 06, 2014 – to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 76), sent by DHL, number of consignment note 7472496754, received on March 11, 2014.

On March 06, 2014 the Ruling dated March 03, 2014 (ref. № 77) and the notice of the date of the hearing scheduled for March 31, 2014 (ref. № 78) were handed over personally to the Claimants' representative against receipt.

On March 06, 2014 the notice of the date of the hearing scheduled for March 31, 2014 was sent to the Embassy of the Kyrgyz Republic in the Russian Federation (ref. № 79) by DHL, number of consignment note 7472496721, received on March 07, 2014.

The notice of the date of the hearing scheduled for March 31, 2014 was also sent:

On March 06, 2014 – to the President of the Kyrgyz Republic (ref. № 80), sent by DHL, number of consignment note 7472496695, received on March 11, 2014;

On March 06, 2014 – to the Prime-Minister of the Kyrgyz Republic (ref. № 81), sent by DHL, number of consignment note 7472496673, received on March 11, 2014;

On March 06, 2014 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 82), sent by DHL, number of consignment note 7472496743, received on March 11, 2014;

On March 06, 2014 – to the Director of State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref. № 83), sent by DHL, number of consignment note 7472496684, received on March 11, 2014.

On March 13, 2014 the MCCI Arbitration received from the Claimants the linguistic opinion of experts L. Yu. Ivanov and M.F. Arkhipova dated March 6, 2014, the expert opinion of the Doctor of Law, Professor K.M. Ilyasova dated March 12, 2014 and the legal opinion of D.E. Ubyshev dated March 9, 2014.

In particular, experts L. Yu. Ivanov and M.F. Arkhipova were to answer the following questions:

- whether the term *"arbitration"* and the terminologically set phrase *"international ad hoc arbitration (commercial court) constituted under the Arbitration Rules of the UN Commission on International Trade Law"* in subpara.

(b) para.2 Article 18 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" dated February 07, 2003 (as amended and supplemented on 22.10.2009) are used as repetitions of one and the same notion or as different notions;

- how the term *"arbitration"* in subpara. (b) para.2 Article 18 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" should be interpreted from the linguistic point of view.

In answering the first question, the experts pointed out that in the syntactical structure of this sentence the term *"arbitration"* and the terminologically set phrase *"international ad hoc arbitration (commercial court) constituted under the Arbitration Rules of the UN Commission on International Trade Law"* are homogeneous members of the sentence conjunct with an alternative conjunction *or*. Russian grammar and explanatory dictionaries of the Russian language stipulate that the conjunction *or* formalizes the relationship of partitioning (mutual exclusion).

Thus, in the present context the conjunction *or* formalizes the relationship of mutual exclusion of two notions, respectively expressed by the term *"arbitration"* and the terminologically set phrase *"international ad hoc arbitration (commercial court) constituted under the Arbitration Rules of the UN Commission on International Trade Law"*. Hence, the term "*arbitration*" and the terminologically set phrase *"international ad hoc arbitration (commercial court) constituted under the Arbitration Rules of the UN Commission on International Trade Law"* are used to denote not identical but different, mutually excluding notions. This conclusion is also confirmed by punctuation in this text (subpara. (b) para.2 Article 18 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic"). No comma is put in front of a single alternative conjunction *or*, which connects homogeneous members of the sentence related to each other as mutually excluding.

Answering the next question, the experts noted in particular that the term "arbitration" in para. 2(b) Article 18 of the Law means any international arbitration, save for the international ad hoc arbitration constituted under the Rules of the UN Commission on International Trade Law.

Para.2 Article 18 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" grants to investor the right to submit the dispute to:

1) international ad hoc arbitration constituted under the Rules of the UN Commission on International Trade Law;

2) any other international commercial arbitration.

In her Opinion Doctor of Law, Professor K.M. Ilyasova stated the following. She gave the following answer to the question: to which bodies for settlement of

investment disputes a foreign investor may have recourse on the basis of para. 2 Article 18 of the Kyrgyz Republic “On Investments in the Kyrgyz Republic”. The contents of para. 2 Article 18 of the said Law give rise to the question as to which bodies are competent to examine investment disputes between a foreign investor and state bodies of the Kyrgyz Republic according to subpara. “b”. In line with the mentioned subparagraph, such bodies include arbitration or international ad hoc arbitration (commercial court) set up in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law.

Such bodies for settlement of investment disputes as “arbitration” or “international ad hoc arbitration…” are denoted through the conjunctive “or”. In the Russian language “or” is a disjunctive conjunction which expresses an alternative. It connects homogeneous members of the sentence which are related to each other as mutually excluding.

Therefore, in respect of resolution of investment disputes the legislator provides in subpara. “b” para.2 Article 18 of the Law of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” dated March 27, 2003 for the two categories of arbitration as the bodies competent to settle investment disputes between a foreign investor and the state bodies of the Kyrgyz Republic: international ad hoc arbitration under the Rules of the UN Commission on International Trade Law (commonly, it is called ad hoc arbitration in accordance with the UNCITRAL Arbitration Rules) or any other arbitration. At the same time, in the opinion of the expert, the phrase “only in the case of a dispute between a foreign investor and a state body” included in para. 2 Article 18 is indicative of the fact that international arbitration is concerned.

The expert has arrived at a conclusion that para. 2 Article 18 of the Law of the Kyrgyz Republic dated March 27, 2003 “On Investments in the Kyrgyz Republic” stipulates the right of a foreign investor to have recourse to any international arbitration, along with the International Centre for Settlement of Investment Disputes (ICSID) and international ad hoc arbitration (commercial court) set up under the Arbitration Rules of the United Nations Commission on International Trade Law, for resolution of an investment dispute.

The expert gave the following answer to the question of whether Article 11 of the Convention for the Protection of Investor’s rights contains specific obligations or whether it is an “umbrella” clause containing blanket rules which are to be specified in future. According to Article 11 of the Convention for the Protection of Investor’s Rights, disputes related to investment making under the present Convention shall be settled by the courts or arbitration courts of the countries-parties to the disputes, by the Economic Court of the Commonwealth of

Independent States and/or other international courts or international arbitration courts.

Article 22 of the mentioned Convention stipulates that the Convention may serve as the basis for conclusion by the Parties of bilateral agreements protecting the investor's rights. If necessary, separate provisions of the Convention can be specified in bilateral agreements.

The expert noted that, in her opinion, taking into account the subject of regulation of this Article, provisions of Article 11 of the Convention for the Protection of Investor's rights need not be specified in bilateral agreements. Thus, the Convention for the Protection of Investor's rights does not cover disputes arising between the Contracting Party and the investor of the other Contracting Party in respect of investment (investor - state), whereas bilateral agreements on promotion and reciprocal protection of investments contain provisions regarding dispute settlement between the Contracting Party and the investor of the other Contracting Party in respect of investment.

Besides, the expert noted that Article 11 of the Convention for the Protection of Investor's Rights, contains mandatory provisions in respect of the bodies which are competent to examine investment disputes on the basis of the mentioned Convention, and does not require further specification through other international agreements or the agreement of the parties to a dispute. If, according to this article, the arbitration body not named in this article were be specified, there would have been a phrase "agreed by the parties to the dispute", "by agreement of the parties", etc.

From the legal viewpoint, the wording of Article 11 of the Convention for the Protection of Investor's Rights represents a unilateral obligation included into a multilateral international treaty of each state which applies this treaty. The core essence of such unilateral obligation is the following: in case of a dispute between the state applying this treaty and any investor falling under the requirements of the Convention, the state will consent to the jurisdiction of any of the bodies for settlement of investment disputes listed in Article 11.

The following answer was given to the question to which dispute settlement bodies Investor may refer on the basis of Article 11 of the Convention for the Protection of Investor's Rights. The Convention for the Protection of Investor's Rights provides for four alternative ways to settle the disputes arising in connection with making investments by two or more investors to which the states-participants to the Convention consent:

- a state court (arbitration court) of the country against which the claim is filed (in the state against which the investor files its claim there will be one state

court or state arbitration court competent and having jurisdiction over the case. Thus, a specific court is concerned);

- the Economic Court of the Commonwealth of Independent States (a specific court with its seat in Minsk);
- other (along with the Economic Court of the CIS) international courts;
- international arbitration courts.

Article 11 contains the consent of the state to the fact that the Investor may have recourse to any of the dispute settlement bodies listed in the article. It grants the right to the Investor to refer to any international arbitration court (in the RF this is an arbitration court to which the law on international arbitration will apply). However this does not mean that any international arbitration court will accept the statement of claim. In order for the application to be a success the investor may refer only to that arbitration court which is competent by virtue of its Rules to examine the disputes arising in the course of making investments and which will initiate proceedings in the case. Thus, for instance, according to Article 1 of the Law of the Kyrgyz Republic dated July 30, 2002 "On Arbitration Courts in the Kyrgyz Republic", the present Law will apply in the course of submission, by agreement of the parties, to an arbitration court of the disputes arising out of civil law relations, *including investment disputes,* falling within the jurisdiction of a competent court, except for the disputes indicated by the present Law.

The expert gave the following answer to the question of whether incorporation into Article 11 of the term "international arbitration court" means the right of the state to refer to any international arbitration court and whether the granting of such right is not "absurd". The term "international commercial arbitration" being incorporated into the treaty is subject to international law and shall be interpreted in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties. A treaty is interpreted in accordance with Article 31 and 32 of the mentioned Convention. The basic rule of interpretation stipulated in paragraph 1 Article 31 of the 1969 Vienna Convention on the Law of Treaties reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context as well as in view of the object and purpose of the treaty."

The meaning of the expression "disputes …shall be examined…by *international arbitration courts*" should be interpreted basing on the presence (or absence) of the qualifying, explanatory or otherwise specifying words related to this expression. If such words and structures are missing, the meaning of the expression shall be interpreted as including all components forming it (all international arbitration courts).

Article 11 of the Convention for the Protection of Investor's Rights reads as follows:

"Disputes related to investment making under the present Convention shall be examined by the courts or arbitration courts of the states-parties to the disputes, by the Economic Court of the Commonwealth of Independent States and/or other international courts *or international arbitration courts*".

There are no words or expressions in this text qualifying, explaining or otherwise specifying the meaning of the phrase "disputes…shall be examined …by *international arbitration courts*." This means that disputes arising in connection with investment making shall be examined by any international arbitration courts (without any restrictions).

At the same time there is a clear limitation of the term "arbitration court". Disputes may be settled only by those arbitration courts which are international.

In the preamble to the Convention for the Protection of Investor's Rights it is noted that effective protection of the rights of an investor is a prerequisite for the development of the Parties' economies.

According to Article 8 of the mentioned Convention, investments in the territory of the Parties shall enjoy "unconditional legal protection". Effective and unconditional legal protection can not be accorded to a foreign investor without granting to it the right of recourse to international mechanisms of dispute settlement, the most effective among which are international arbitration courts.

Article 24 of the Convention for the Protection of Investor's Rights sets forth that for the purpose of resolution of eventual disputes and claims, including pecuniary ones, the provisions of this Convention shall continue to apply in respect of the withdrawn Party till final settlement of all issues in dispute.

Herewith it is underlined that the Convention creates an effective mechanism of settlement of disputes and claims.

Basing on Article 32 of the 1969 Vienna Convention on the Law of Treaties, recourse may be had to supplementary means of interpretation, if determination of the meaning on the basis of a general rule of interpretation: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable.

On the basis of the foregoing the expert arrived at a conclusion that determination of the meaning of the term "international arbitration court" as a result of interpretation of Article 11 of the Convention for the Protection of Investor's Rights in accordance with which investor has an opportunity to choose any international arbitration court suitable to it for examination of an investment dispute may in no way be called absurd. Moreover, this method can be described

as the optimal and most efficient method of protection of investments for the investor.

On March 13, 2014 the Opinion of the Experts, Expert Opinion, Legal Opinion received from the Claimants on March 13, 2014 were sent to the Embassy of the Kyrgyz Republic (ref. № 85, delivered through the chancellery of the Embassy of the Kyrgyz Republic, received on March 13, 2014).

The Opinion of the Experts, Expert Opinion, Legal Opinion received from the Claimants on March 13, 2014 were also sent:

On March 13, 2014 – to the President of the Kyrgyz Republic (ref. № 86), sent by DHK, number of consignment note 7472496780, received on March 17, 2014;

On March 13, 2014 – to the Prime-Minister of the Kyrgyz Republic (ref.№ 87), sent by DHK, number of consignment note 7472496776, received on March 17, 2014;

On March 13, 2014 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 88), sent by DHK, number of consignment note 7472496765, received on March 17, 2014;

On March 13, 2014 – to the Director of State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref.№ 89), sent by DHK, number of consignment note 7472496662, received on March 17, 2014.

On March 20, 2014 the MCCI Arbitration received from the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic the Motion for postponement of the proceedings. It was stated therein that the time limits of dispute examination do not allow the Respondent to choose a law firm for protection of its rights, since they don't take into account long internal terms of approval of draft decisions related to selection of a law company with the government bodies of the Kyrgyz Republic.

On March 20, 2014 the Motion of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic was sent to the Claimants' representatives per e-mail (received on March 20, 2014).

Having considered the Motion the Arbitral tribunal rendered the following Ruling on March 25, 2014:

- after examination of the Motion submitted on March 20, 2014 and signed by the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic D.T. Zilaliev for postponement of the proceedings in the case for a later date (nor earlier than July 30, 2014), taking into account formation of the Government of the Kyrgyz Republic, responsibility for violation of the legislation of Kyrgyzstan as well as preparation of the Statement of Defence by the selected law firm,

- recognizing that the Statement of claim was filed with the MCCI Arbitration in October 2013 and that, according to the Kyrgyz party, the work related to selection of a law firm for representation of the interests of the Kyrgyz Republic in the present proceedings was completed on January 30, 2014; having understanding for the political situation in the Kyrgyz Republic as well as for the rule-making procedures related to selection of a law firm which are in effect in the Kyrgyz Republic, the Arbitral tribunal can not agree with the position expressed in the Motion dated March 20, 2014 to the effect that the time limits for examination and hearing in the case established by the MCCI Arbitration completely ignore the internal deadlines of approval of draft decisions of the Government of the Kyrgyz Republic, different degrees of responsibility for their violation and actually incite any public officer making a decision in connection with the present case to commit a violation of the rules of law in effect in the Kyrgyz Republic, since it is exactly at the request of the Kyrgyz Republic that the hearing in the case was repeatedly postponed in order to afford the opportunity to properly represent the interests. On the contrary, the Arbitral tribunal, basing on the requirement of a fair dispute resolution and on the need to grant to each party the opportunity to state its case, has repeatedly satisfied the motions of the Kyrgyz Republic and postponed the case hearing for three times,

- recognizing that the Motion dated February 5, 2014 signed by the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic D.T. Zilaliev contains a statement to the effect that the Arbitral tribunal has no jurisdiction to examine the statement of claim filed by the Claimants. It also sets forth as follows: for the purpose of saving the resources related to the hearing on the merits (including carrying out of expert examination, witness testimony and presentation of the case by the parties) we ask the Arbitral tribunal to examine and resolve the issue of its jurisdiction as a preliminary issue with rendering of respective ruling (decision), however, as we note and request below, only after granting to the Kyrgyz Republic – the Respondent in the case – the opportunity to prepare and submit detailed arguments proving that the Arbitral tribunal has no jurisdiction and the resulting consequences thereof,

- recognizing that the Motion for postponement of the hearing and examination of the issue of jurisdiction of the MCCI Arbitration to resolve this dispute was granted both in respect of resolution of the issue on jurisdiction as a preliminary issue and in respect of postponement of the case hearing,

- taking into account that the Respondent was granted the time for preparation of the position on this issue,

- taking into account the subjects of the dispute, one of which is the Kyrgyz Republic, which state sovereignty is greatly respected by the Arbitral tribunal and

which has deep understanding for the issues covered in the Motion filed on March 20, 2014, and that the other party to the dispute is in particular a foreign investor which referred to the MCCI Arbitration for protection of its rights,

- taking into account that in accordance with Article 18 of the Law of the RF "On International Commercial Arbitration" dated July 07, 1993 each party shall be granted every opportunity to state its case and taking into account that the hearing in the case was postponed three times at the request of the Kyrgyz Republic, the law firm for representation in the case was selected in January 2014, the Arbitral tribunal holds that the Kyrgyz Republic was afforded every opportunity to state its case,

- recognizing that about five months have elapsed since filing of the Statement of Claim by the Claimants with the MCCI Arbitration, having respect for the requirements of the legislation of the Kyrgyz Republic regarding execution of the contract with the chosen law firm and believing that for making any action reasonable time periods meeting the requirements of the legislation of the Kyrgyz Republic and at the same time not representing an insurmountable hindrance for the Claimants to protect their rights are necessary,

- taking into account that the principle of equality of the parties is anchored in Article 24 of the Arbitration Rules of the MCCI and that the generally recognized principle of international arbitration is that the parties use their procedural rights in good faith,

the arbitral tribunal ruled that the Motion of the Respondent for postponement of the proceedings in the case for a later date (not earlier than July 2014) should be dismissed and the proceedings should be continued.

On March 25, 2014 the above Ruling was sent to the Claimants' representatives per e-mail (received on March 26, 2014).

On March 25, 2014 the Ruling of March 25, 2014 was sent to the Respondent per e-mail (received on March 25, 2014). On March 25, 2014 the Ruling of March 25, 2014 was sent to the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (received on March 25, 2014).

On March 31, 2014 the Arbitral tribunal held a hearing on jurisdiction of the MCCI Arbitration to examine the dispute. Since the Respondent duly notified of the date and venue of the hearing was not represented in the hearing the Arbitral tribunal examined the possibility to conduct the hearing in its absence and heard the position of the Claimants' representatives.

Being guided by provisions of Articles 25 and 18 of the Law of the RF "On International Commercial Arbitration" and Article 46 of the Arbitration Rules of the MCCI, the Arbitral tribunal considered it possible to examine the issue of

jurisdiction of the MCCI Arbitration over the dispute in the absence of the Respondent's representatives.

The Arbitral tribunal examined the Claimants' Statement of Claim and the extended Statement of Claim and the above mentioned declarations made by the Respondent on the lack jurisdiction of the MCCI Arbitration to settle the dispute. The representatives of the Claimants were also heard.

On the basis of Article 16 of the RF Law "On International Commercial Arbitration" and paragraph 3 Article 3 of the MCCI Arbitration Rules the Ruling was passed. According to paragraph 1 of this Ruling, the jurisdiction of the MCCI Arbitration to examine the dispute was recognized. The Ruling set forth that the reasons related to the jurisdiction of the MCCI Arbitration will be put forward in the decision on the merits of the dispute.

The hearing on the merits was scheduled for April 29, 2014.

On April 10, 2014 the Ruling dated March 31, 2014 (ref. № 106) was delivered personally to the Claimants' representative on April 11, 2014.

The Ruling dated March 31, 2014 was sent to the Respondent:

On April 10, 2014 – to the Embassy of the Kyrgyz Republic in the Russian Federation (ref. № 107), sent by DHL, number of consignment note 7472496964, received on April 11, 2014;

On April 10, 2014 - to the President of the Kyrgyz Republic (ref. № 108), sent by DHL, number of consignment note 7472496953, received on April 14, 2014;

On April 10, 2014 – to the Prime-Minister of the Kyrgyz Republic (ref.№ 109), sent by DHL, number of consignment note 7472496942, received on April 14, 2014;

On April 10, 2014 – to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 110), sent by DHL, number of consignment note 7472496931, received on April 14, 2014;

On April 10, 2014 – to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref.№ 111), sent by DHL, number of consignment note 7472496920, received on April 14, 2014;

On April 10, 2014 – notice of the date of the hearing set for April 29, 2014 (ref. № 112) was delivered to the Claimants' representative personally on April 11, 2014.

The notice of the date of the hearing set for April 29, 2014 was sent to the Respondent:

On April 10, 2014 - to the Embassy of the Kyrgyz Republic in the Russian Federation (ref. № 113), sent by DHL, number of consignment note 7472496916, received on April 11, 2014;

On April 10, 2014 - to the President of the Kyrgyz Republic (ref. № 114), sent by DHL, number of consignment note 7472496905, received on April 14, 2014;

On April 10, 2014 - to the Prime-Minister of the Kyrgyz Republic (ref.№ 115), sent by DHL, number of consignment note 7472496894, received on April 14, 2014;

On April 10, 2014 - to the Minister of Foreign Affairs of the Kyrgyz Republic (ref. № 116), sent by DHL, number of consignment note 7472496883, received on April 14, 2014;

On April 10, 2014 - to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (ref.№ 117), sent by DHL, number of consignment note 7472496872, received on April 14, 2014.

On April 26, 2014 the MCCI Arbitration received from the Centre of judicial representation of the Government of the Kyrgyz Republic the Motion dated April 25, 2014 for postponement of dispute resolution, by which the Respondent informed the Arbitral tribunal that it had sent to the Moscow City Arbitration Court the application for revocation of the ruling of the MCCI Arbitration dated March 31, 2014. In connection with the abovementioned the Respondent requested to postpone the dispute resolution till examination by the Moscow City Arbitration Court of the declaration on the lack of jurisdiction of the Arbitration court. The original Motion was delivered to the MCCI Arbitration on April 28, 2014.

On April 28, 2014 the mentioned Motion for postponement of the arbitration proceedings was sent per e-mail to the Claimants' representatives. This motion was received by them on April 28, 2014.

Since this Motion is dated April 25, 2014, it was sent to the MCCI Arbitration on April 26, 2014 (in electronic form) and on April 28, 2014 (in paper form), it was therefore considered by the Arbitral tribunal in the hearing on April 29, 2014.

As far as the postponement of the dispute resolution till examination by the Moscow City Arbitration Court of the declaration on the lack of jurisdiction of the Arbitral tribunal is concerned, the Claimants' representatives told the following. The Ruling of the MCCI Arbitration dated March 31, 2014 in the matter № A-2013/09 is not "a ruling of the Arbitral tribunal on a preliminary issue". As provided for by paragraph 3 Article 16 of the Law of the RF "On International Commercial Arbitration", if the arbitral tribunal rules as a preliminary issue that it

has jurisdiction, any party may within 30 days upon receipt of the notice of such ruling request the arbitration court to pass a decision on this issue. In this case no such ruling was passed; on the contrary, the Ruling of March 31, 2014 stated that the issue of jurisdiction will be dealt with in the award on the merits of the dispute and the reasons related to jurisdiction of the MCCI Arbitration over this dispute will be set forth in the award of the MCCI Arbitration. They emphasized that according to para. 3 Article 16 of the RF Law “On International Commercial Arbitration”, if either party requests a decision of the arbitration court on this issue, “pending the decision over the request of the party, the arbitral tribunal may continue the proceedings and render an award.” Therefore, the Claimants' representatives insisted on examination of the dispute on the merits.

On jurisdiction of the MCCI Arbitration to examine the present dispute

Existence of an arbitration agreement in the present case and specificity of conclusion of an arbitration agreement in the State-Investor relations

In the Claimants' opinion, the procedure of conclusion of an arbitration agreement in investment arbitration, the parties to which are a state and an investor, shall be determined in a multilateral or bilateral agreement on the promotion and protection of investments or in the national legislation of the state.

A treaty or a national law contains a unilateral obligation of the state (consent of the state to the fact that investor may file a claim against it with any international body for settlement of investment disputes). Specific bodies or a certain category of bodies may be designated. This is a unilateral public law obligation of the state which is included into a treaty or a national law and is subject to international public law.

At the moment of filing the statement of claim with the body chosen by an investor the investor expresses its consent and in such a way concludes an arbitration agreement.

Obligations of the Kyrgyz Republic in respect of settlement of investment disputes in the Convention for the Protection of Investor's Rights dated March 28, 1997

Article 11 of the Convention for the Protection of Investor's Rights provides as follows:

“Disputes related to making investments under the present Convention shall be settled by courts or arbitration courts of the countries – participants to the

disputes, by the Economic Court of the Commonwealth of Independent States and/or other international courts or **international arbitration courts**."

Based on this Article, Investors are entitled to apply to "international arbitration courts". Article 11 of the Convention for the Protection of Investor's Rights dated March 28, 1997 contains no reservation to the effect that the courts which will be agreed upon by the states participating in the Convention are concerned.

Contemporary international law does not contain any limitation in respect of a degree of specification of the state's obligations.

Provisions of Article 11 of the Convention for the Protection of Investor's Rights entitle the Investor to apply to "international arbitration court".

The term "international arbitration court" should be interpreted in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties (Article 31): a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of a treaty.

The Claimants have submitted the Linguistic Opinion prepared by the candidate of philological sciences Ivanov L.Yu. and Master of Linguistics Arkhipova M.N. The Opinion contains the conclusion to the effect that the text of Article 11 of the Convention for the Protection of Investor's Rights dated March 28, 1997 contains no words or expressions qualifying, explaining or otherwise specifying the meaning of the expression (standardized cliche) "disputes…shall be settled…by international arbitration courts". This means that settlement of disputes arising out of investments shall be examined by any international arbitration courts (without any limitations).

The representative of the Claimants noted that this wording was not unusual and cited excerpts from some treaties:

1) Agreement between the Government of the USSR and the Government of the Republic of Korea on Promotion and Reciprocal Protection of Capital Investments dated December 14, 1990

Article 9

"2. In case if any dispute between one Contracting Party and an investor of the other Contracting Party in respect of investments of the latter, related either to compensation provided for by Articles 4 and 5 of the present Agreement or to any other issues resulting from the act of expropriation in accordance with Article 5 of the present Agreement, or related to the consequences of non-performance or undue performance of obligations under Article 6 of the present Agreement, can not be settled amicably within three (3) months of the date when either party has

offered an amicable settlement of the dispute, **it will be referred by the investor to arbitration**."

2) Convention on settlement in arbitration of civil law disputes arising out of relations of economic and scientific-technical cooperation dated May 26, 1972

Article II.1.

"Disputes specified in Article I shall be settled in **an arbitration court at the chamber of commerce in the respondent country** or, by agreement of the parties, in a third country which is a participant to the present Convention".

3) General terms of supply of goods between CMEA member countries 1968 / 1988 (1968 / 1988 CMEA GTS)

Chapter XIV. ARBITRATION.

"All disputes which may arise out of the contract or in connection therewith shall be subject, with the exclusion of the courts of general jurisdiction, to examination **by arbitration in an arbitration court set up for this purpose in the country of respondent** or, by agreement of the parties, in a third country-member of the Council for Mutual Economic Assistance".

4) General terms of supply of goods from the member countries of the Council for Mutual Economic Assistance to the Republic of Finland and from the Republic of Finland to the member countries of the Council for Mutual Economic Assistance (CMEA-Finland GTS)(November, 1978)

"16.1.2. In respect of arbitration the following procedure shall apply:

Where the seller is an organization of the CMEA member country, the dispute shall be examined **by an arbitration court at the chamber of commerce (and industry) of the seller's country**, moreover the arbitration rules of the court in which the dispute is examined shall apply".

Obligations of the Kyrgyz Republic in respect of examination of investment disputes fixed in the national legislation of the Kyrgyz Republic

Basing on para. 2 Article 18 of the Law of the Kyrgyz Republic dated March 27, 2003 "On Investments in the Kyrgyz Republic", "an investment dispute between an investor and state bodies of the Kyrgyz Republic shall be settled by judicial bodies of the Kyrgyz Republic, unless in case of a dispute between a foreign investor and a state body either party requests to examine the dispute in accordance with either of the following procedures **by referral**:

b) **to arbitration** or international ad hoc arbitration (commercial court) set up in accordance with the arbitration rules of the United Nations Commission on International Trade Law. The bodies for settlement of investment disputes, such as "arbitration" or "international ad hoc arbitration" are denoted through the conjunction or.

The Claimants' representative referred to the Linguistic Opinion prepared by the candidate of philological sciences Ivanov L.Yu. and Master of Linguistics Arkhipova M.N. In this Opinion the conclusion is made that the conjunction "or" is a disjunctive conjunction in the Russian language expressing an alternative. It connects homogeneous members of the sentence related to each other as mutually excluding. Hence, in the opinion of the Claimants, the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" provides for two categories of arbitrations as the bodies competent to examine investment disputes:

1) international ad hoc arbitration in accordance with the Rules of the UN Commission on International Trade Law (usually it is called *ad hoc* arbitration under the UNCITRAL Arbitration Rules), or

2) any other arbitration.

In the opinion of the Claimants, this paragraph allows to apply to any international arbitration.

A similar provision is contained in the Federal Law of the Russian Federation dated July 9, 1999 "On Foreign Investments in the Russian Federation". As stipulated in Article 10 of this Law, "a dispute of a foreign investor which arose in connection with carrying out investments and entrepreneurial activity in the territory of the Russian Federation shall be settled in accordance with international treaties of the Russian Federation and federal laws in the court or arbitration court or international arbitration court (court of referees)". In accordance with this article investors from the states with which there are no treaties have the right to refer to any international arbitration court "in accordance with the law".

The Claimants' representative noted that the MCCI Arbitration earlier rendered the awards in two investment disputes – in the action of Mr. Lee Jong Baek and "Central Asia FEZ Development Corporation" LLC, Kyrgyz Republic, and in the action of "O.K.K.V." LLC (developer) and participants of a shared-equity construction (shared construction participants), the Kyrgyz Republic, the Republic of Kazakhstan against the Kyrgyz Republic. In its awards in the above mentioned cases the MCCI Arbitration also examined the issue of jurisdiction, primarily proceeding from Article 11 of the Convention for the Protection of Investor's Rights dated March 28, 1997 and taking into account the provisions of Article 18 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz

Republic”. In these cases the jurisdiction of the MCCI Arbitration to examine the dispute was recognized.

In the opinion of the Claimants’ representatives, the investor is entitled to independently choose an international arbitration court bearing in mind that such court should have the right to settle international disputes (be an international one) and the right to settle investment disputes.

According to Article 1 of the Regulations approved by the Order of the President of the Moscow CCI dated July 20, 2012 № 20, the MCCI Arbitration is a permanent arbitration institution (court of referees) operating in accordance with the Federal Law “On Arbitration Courts in the Russian Federation“ and the Law of the Russian Federation “On International Commercial Arbitration”. In this case the Law of the Russian Federation “On International Commercial Arbitration” dated July 7, 1992 shall apply.

According to Article 1 of the Rules, the MCCI Arbitration is a permanent arbitration institution (court of referees) set up by the Moscow CCI for settlement of disputes out of contractual and other civil law relations in accordance with its jurisdiction. Basing on para. 1.3 Article 3 of the Rules disputes in the sphere of investment activity can be referred to the MCCI Arbitration.

Basing on para.2 Article 1 of the Rules of the MCCI Arbitration this arbitration court acts as “international commercial arbitration”. By virtue of Article 2 of the Regulations on the MCCI Arbitration, “any dispute arising out of contractual and civil law relations may be referred to arbitration by agreement of the parties to arbitration proceedings”, and by virtue of para. 1(3) Article 3 of the Rules of the MCCI Arbitration “civil law relations” disputes out of which may be referred to the court include “disputes in the sphere of investment activity”.

The documents which underlie the work of the MCCI Arbitration do not contain a prohibition to examine the disputes with participation of the state.

Definition of investor

Definition of investor under the Convention for the Protection of Investor’s Rights of March 28, 1997

In the Statement of Claim and explanations in the case the Claimants’ representative drew attention to the fact that according to Article 1 of the Convention for the Protection of Investor’s Rights: “investor is a state, legal or natural person investing its own, borrowed or raised funds in the form of investments”.

In accordance with Article 3 of the Convention as investors may act states, legal and natural persons of both the Parties and third states, unless otherwise provided for by national legislation of the Parties.

As set forth in Article 2 of the Convention for the Protection of Investor's Rights, rules and norms laid down by the Convention shall apply in the case when persons of law from two and more states participate in the investment process.

Thus, the Convention for the Protection of Investor's Rights is intended to regulate the relations in which the investors from two or more states participate, irrespective of whether they are persons of the parties-signatories to the Convention or third states.

According to Article 7 of the Convention for the Protection of Investor's Rights relations connected with making investments and the related activity of investors are governed by the Convention for the Protection of Investor's Rights dated March 28, 1997, national legislation of the states-participants to the Convention for the Protection of Investor's Rights as well as by international treaties parties to which are signatories to the Convention for the Protection of Investor's Rights.

Definition of Investor in the national legislation of the Kyrgyz Republic

The Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" recognizes as foreign investors natural persons – foreign citizens, legal entities incorporated abroad, Kyrgyz legal entities controlled by foreign persons, foreign organizations which are not legal entities and international organizations.

Para. 3 Article 1 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" reads as follows:

Investor is a subject of investment activity investing its own, borrowed or raised funds as direct investments.

Domestic investor means a legal entity or natural person of the Kyrgyz Republic, a foreign citizen and person without citizenship having the status of a resident in the Kyrgyz Republic and engaged in investment activity in the territory of the Kyrgyz Republic.

Foreign investor means any natural person or legal entity which is not a domestic investor investing into the economy of the Kyrgyz Republic, including:

1) a natural person who is a foreign citizen or person without citizenship, permanently living outside the Kyrgyz Republic;

2) a legal entity which is either:

founded and registered in accordance with the legislation of a foreign state; or

founded with foreign participation, i.e. established in compliance with the legislation of the Kyrgyz Republic:

a) entirely owned by one or more foreign natural, legal persons; or
b) controlled and managed by one or more foreign natural, legal persons on the basis of a written contract, by way of the right to dispose of the majority of shares, the right to appoint the majority of members of the executive or supervisory body, or
c) at least one third percent of shares or shareholders' votes of which is held by foreign citizens, persons without citizenship permanently living outside the Kyrgyz Republic or legal entities as referred to in this Article;

3) a legal entity set up on the basis of an international treaty of the Kyrgyz Republic;
4) a foreign organization which is not a legal entity;
5) an international organization.

More detailed definition of Investors in respect of the dispute concerned

In the dispute concerned the investment process was carried out with participation of the companies from Canada and the Kyrgyz Republic.

The company "Stans Energy Corp." is a legal entity under the legislation of Canada and a sole founder of "Stans Energy KG" LLC organized in the Kyrgyz Republic. The company "Kutisay Mining" LLC is a limited liability company under the legislation of the Kyrgyz Republic founded by "Stans Energy KG" LLC. Thus, we have here the subjects of civil law relations of the two states – Canada and the Kyrgyz Republic.

At the request of the Arbitral tribunal the Claimants have enquired into the relationship between the above mentioned companies and cleared up that for this reason the mentioned companies have no isolated claims.

There is a parent company ("Stans Energy Corp."), subsidiary ("daughter" company) ("Stans Energy KG" LLC) and a second-tier subsidiary ("granddaughter" company) "Kutisay Mining" LLC. The parent company makes investments. The "granddaughter" company owns assets in the Kyrgyz Republic acquired at the cost of the parent company. The "daughter" company is intended for redistribution of funds from the parent company to the "granddaughter" company (and other "granddaughter" companies).

All investments in the Kyrgyz Republic are owned by the parent company and "granddaughter" company, therefore only the parent and "granddaughter" companies appear in this case. At the same time their interests coincide and the parent company exercises full control over the "granddaughter" company.

The fact that the funds invested through the "daughter" company into the "granddaughter" company belong to the parent company was proved, at the request of the Arbitral tribunal, with publicly available documents (in particular, tax reporting of "Stans Energy Corp." publicly available in Internet). It was also evidenced by Mr. Savchenko G.A. who is the head of both the "daughter" and "granddaughter" companies and who attended the hearings held on April 29-30, 2014.

The Claimants' representative stressed that in the present case they act as one party, since their interests completely coincide. Therefore, they should be considered as a single party when rendering the award. Such approach is a common practice in the course of rendering decisions in investment disputes with participation of several investors with no separate claims. As an example the decisions of ICSID[1], of the Arbitration Court at the Stockholm Chamber of Commerce[2] and the MCCI Arbitration[3] were named.

Investments

The Claimants' representative noted that according to Article 1 of the Convention for the Protection of Investor's Rights dated March 28, 1997:

"Investments are financial and tangible assets invested into different objects of activity as well as the transferred rights to material and intellectual property with a view of gaining profit (income) or achieving a social effect, unless they are not withdrawn from the circulation or unless their circulation is not limited in accordance with the national legislation of the Parties".

According to para. 1 Article 1 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic":

"Investments mean tangible and intangible contributions of all kinds of assets owned or controlled, directly or indirectly, by investor into the objects of economic activity with a view of gaining profit and (or) achieving any other useful effect 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;

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[1] See Award in *Occidental Petroleum Corporation Occidental Exploration and Production Company v. The Republic of Ecuador*, October 5, 2012 (ICSID Case No. ARB/06/11).

[2] See Award in *Anatolie and Gabriel Stati, Ascom Group S.A., Terra Raf Trans Traiding Ltd v. The Republic of Kazakhstan*, December 19, 2013 (SCC Arbitration V (116/2010).

[3] See Award of the MCCI Arbitration in № A-2013/08 dated November 13, 2013in the action of Mr. Lee Jong Baek (the Republic of Korea) and "Central Asia FEZ Development Corporation", Kyrgyz Republic, against the Kyrgyz Republic.

- bonds and other debenture liabilities;
- non-property rights (inter alia, the right to intellectual property including goodwill, copyrights, patents, trade marks, industrial designs, technological processes, trade names and know-how);
- any right to activity based on a license or otherwise permitted by state bodies of the Kyrgyz Republic;
- concessions based on the legislation of the Kyrgyz Republic, including concessions for prospecting, development, mining or exploitation of natural resources of the Kyrgyz Republic;
- profit and revenue received from investments and re-invested in the territory of the Kyrgyz Republic;
- other forms of investments that are not prohibited by the legislation of the Kyrgyz Republic.

A form in which property is invested, or any change in this form shall not influence its nature as investments."

In his comments the representative of the Claimants explained that the Canadian company "Stans Energy Corp." invested funds into the shares of the JSC "Kutisay Mining" set up in the territory of the Kyrgyz Republic. This open joint-stock company was subsequently reorganized into the limited liability company – "Kutisay Mining" LLC. Acquisition of shares of this company meant acquisition of the company itself and at the same time acquisition of the license for mining of the rare-earth metals issued to this company.

The money was also invested into the property assets. Mr. Savchenko G.A. who was present at the hearing on April 29-30, 2014 confirmed that except for the license the acquired company had no other assets. The funds were invested into the activity of the company (salaries, etc.).

Thus, there were investments in monetary form as well as investments which changed their form and were transformed into the assets in a tangible form or in a form of the license. In line with para. 1 Article 1 of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" this does not change their legal characteristics as investments.

At the request of the Arbitral tribunal the Claimants paid special attention to the answer to the question about the international legal precedents of recognition of licenses as investments. In this connection the Claimants dwelled on the ICSID cases *Tecmed v Mexico*[4] and *Middle East Cement v Egypt*[5].

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[4] See Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

[5] See Award in *Middle East Cement Shipping and Handling Co. v. Egypt* dated April 12, 2002 (ICSID case No. ARB/99/6).

Upon examination of these cases the arbitrators which resolved the mentioned disputes arrived at a conclusion that the licenses were considered as investments and that termination of the license (de jure or de facto) was considered as expropriation and unfair treatment of foreign investments.

The total volume of investments of Investors - the Claimants - is assessed in the Appraisal Report (which is produced below in more detail).

The market value of the right to use the "Kutessay II" deposit as of the date of suspension of the license for mining of "Kutessay II" deposit (as of June 25, 2002) totaled to 5.087.042.000 som (equivalent of 107.781.000[6] USD):

After acquisition of the company together with the license investments in it made up:

- in the period from January 1, 2010 till June 25, 2012 (till the beginning of actual expropriation) 353.933.000 som (equivalent of 7.499.000 USD[7]);

- in the period from June 26, 2012 (after the beginning of actual expropriation) till September 1, 2013 125.383.000 som (equivalent of 2.573.000 USD[8]).

Thus, the total amount of Investments made up **117.853.000 USD**.

Expropriation

Timeline of expropriation

Expropriation of the Claimants' investments was carried out in the following way. The company "Kutisay Mining" was set up **on December 9, 2009** as an open joint-stock company which sole founder was the company "Vesatel United Limited" incorporated in New Zealand.

On December 10, 2009 by Decision of the State Service for Regulation and Supervision of Financial Markets under the Government of the Kyrgyz Republic state registration of the inaugural issue of 19 million ordinary registered shares of JSC "Kutisay Mining" at a face value of 1 som per share took place (the authorized capital stock of the company made up 19 million som). The owner placed the shares into trust of ZAO "Fund of Development of the Kyrgyz Republic".

On December 21, 2009 the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and JSC "Kutisay Mining" held negotiations formalized by the Minutes № 1736-N-09 and the

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[6] According to the data of the KR NB as of June 25, 2012 - 1 USD = 47, 198 som.
[7] According to the data of the KR NB as of June 25, 2012 - 1 USD = 47, 198 som.
[8] According to the data of the KR NB as of September 1, 2013 - 1 USD = 48,7243 som.

decision was made to grant to JSC “Kutisay Mining” the License № 2488 ME for “Kutessay II” deposit.

On December 29, 2009 the public auction held on the instructions of ZAO “Fund of Development of the Kyrgyz Republic” by the stock exchange "Central Asia Stock Exchange” for the sale of 100% of shares of JSC “Kutisay Mining” was held. The company “Stans Energy KG” LLC purchased the shares, thus becoming its sole shareholder.

On January 25, 2010 the sole shareholder of JSC “Kutisay Mining” made a decision on reorganization of the open joint-stock company by way of transformation into a limited liability company (“Kutisay Mining” LLC). Reorganization took place and the certificate was issued. “Kutisay Mining” LLC became a legal successor of JSC “Kutisay Mining”.

In such a way “Stans Energy KG” LLC purchased JSC “Kutisay Mining” together with the already issued license.

The Claimants believe that after the Claimants have invested substantial funds into the development of “Kutessay II” deposit the Kyrgyz Republic initiated the measures for expropriation.

On June 26, 2012 the Committee for Development of Economic Industries of the Parliament of the Kyrgyz Republic (Zhogorku Kenesh) passed a resolution obligating the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic to cancel the license agreement № 3 dated June 15, 2012 with “Kutisay Mining” LLC in respect of “Kutessay II” deposit.

Thereafter, the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic ceased to perform in violation of the rules of the Kyrgyz legislation its obligations towards “Kutisay Mining” LLC and in such a way paved the way for termination of operations of “Kutisay Mining” LLC in respect of mining of “Kutessay II” deposit.

This resulted in the following acts of the State Agency and the General Prosecutor’s Office.

Refusal to consider the programs of works at the deposit

In its letter dated March 12, 2013 addressed to “Kutisay Mining” LLC the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic stated that “with a view to prevent violations of requirements of regulatory acts governing industrial safety Gosgeolagency repeatedly refrains from consideration of the submitted Program…”.

Refusal to conduct state ecological expert examination

In its letter dated March 12, 2013 addressed to "Kutisay Mining" LLC the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic stated that "state ecological expert examination of the Project "Repair of the access road "Open pit – Existing works" at the deposit "Kutessay II"" was suspended until the protest of the General Prosecutor's Office against the Resolution of the Government of the Kyrgyz Republic № 725 dated December 1, 2012 has been finally considered."

Refusal to re-execute the license agreement

In its letter dated April 8, 2013 addressed to "Kutisay Mining" LLC the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic specifically emphasized that "…the General Prosecutor's Office of the Kyrgyz Republic has filed with the Inter-district court of Bishkek the statement of claim directly related to "Kutessay II" and "Kalessay" deposits. In light of the recent events…Gosgeolagency sees no rationale for re-execution of the license agreement … and approval of the program of works without expert examination

Judicial recourse

On April 04, 2013 the General Prosecutor's Office of the Kyrgyz Republic filed an application with the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic for invalidation of the Minutes of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company "Kutisay Mining" dated December 21, 2009 №1736-N-09.

The Kyrgyz Republic declared that it was necessary to check to what extent the regulatory legal act on which basis it granted the right to JSC "Kutisay Mining" to obtain the license (Resolution № 725) before putting up its shares for sale at the auction complied with the Kyrgyz legislation at the moment of its adoption.

Over three years had passed from the date of adoption of this act (1 December 2009) till the date of filing the application.

Interim measures

On the basis of the application of the General Prosecutor's Office of the Kyrgyz Republic for injunctive measures aimed at securing the claim the judge of the Inter-district court of the city of Bishkek Nurmanbetov E.B. ruled on April 15, 2013 that the following injunctive measures can be applied in respect of "Kutisay Mining" LLC: "To bar "Kutisay Mining" LLC, private persons, state bodies and

their officials from making actions related to re-execution of the license agreement as the supplement; extension thereof, issue of the next license supplement; approval of projects, reports, work programs, feasibility studies; calculating the payment for withholding the Licenses № 2488 ME and № 2489ME for the right to use subsoil at the deposits "Kutessay II", as well as the actions aimed at the transfer or alienation of the right of subsoil use at the deposit "Kutessay II" to third parties, including alienation of a share in the charter capital of the company".

The petition of "Kutisay Mining" LLC and Ak-Tyuz ajyil okmotu (rural administration) to repeal the interim measures for securing the claim was completely dismissed by Decision of the Inter-district court of the city of Bishkek of May 29, 2013.

In the opinion of the Claimants, prohibition to re-execute the license agreement as supplement, prohibition to extend it, to issue the next license agreement means nothing else than prohibition to carry out subsoil use operations which can not be carried out without these documents.

In the present case there is an actual deprivation of the Investor of the right to carry out subsoil use activity through factual denial to it of the license which gives the right to carry out such activity. What we have here is the Investor's loss of control over its investments and the loss of future revenues from its investments.

On March 19, 2014 the Inter-district court of Bishkek (judge Nurmanbetov E.B.) satisfied the application of the General Prosecutor's Office of the Kyrgyz Republic and declared invalid the Minutes №1736-N-09 of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company "Kutisay Mining" dated 21 December 2009.

"Kutisay Mining" LLC disagreed with the decision of the Inter-district court of the city of Bishkek of March 19, 2014 and filed an appeal against it which is currently pending in the court.

Illegality of actions of the Kyrgyz Republic

In the opinion of the Claimants, illegality of actions of the Kyrgyz Republic in the course of expropriation manifested itself in the following.

Biased behavior of the General Prosecutor's Office of the Kyrgyz Republic

As was already mentioned, on June 26, 2012 the Committee for Development of Economic Industries of the Parliament of the Kyrgyz Republic (Zhogorku Kenesh) passed a resolution obligating the State Agency for Geology

and Mineral Resources under the Government of the Kyrgyz Republic to cancel the license agreement № 3 dated June 15, 2012 with “Kutisay Mining” LLC in respect of the “Kutessay II” deposit.

Thereafter, the Kyrgyz Republic started searching for legal grounds for such cancellation. This fact in itself is evident of a biased and bad-faith conduct of the General Prosecutor’s Office of the Kyrgyz Republic.

The General Prosecutor’s Office of the Kyrgyz Republic applied to the court and requested to declare invalid the Minutes №1736-N-09 of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company “Kutisay Mining” dated December 21, 2009. The General Prosecutor’s Office proceeded from the fact that a regulatory legal act on which basis JSC “Kutisay Mining” was granted by way of the mentioned Minutes the right to obtain the license (Resolution № 725), before putting up for sale its shares in the auction, does not comply with the Kyrgyz legislation as of the moment of its adoption.

In reality:

1) The Minutes №1736-N-09 of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company “Kutisay Mining” dated December 21, 2009 was not the basis for issuance of the license. The license was issued on the basis of Resolution № 725 (paragraph 2 of this Resolution contains an instruction to the Ministry of Natural Resources to issue the license). This Resolution was invalidated by the Resolution of the Government of the Kyrgyz Republic № 337 dated June 10, 2013 in connection with drafting the Resolution of the Government of the Kyrgyz Republic № 350 dated June 13, 2013. It was in effect till that moment. Hence, all actions made on its basis were legal and should be recognized as valid.

2) Resolution № 725 was in full conformity with the Kyrgyz legislation

According to Article 16 of the Law of the № 42 “On Subsoil” dated June 24, 1997 (as in force in the period from November 29, 2006 till October 28, 2011), the right to use subsoil is granted by way of holing an auction and direct negotiations. The auctions are announced and held in respect of gold ore, oil, gas and other objects of general national importance by resolution of the Government of the Kyrgyz Republic.

A list of deposits of general national importance did not exist till adoption on June 13, 2013 of the Resolution of the Government of the Kyrgyz Republic № 350

"On the State of Affairs in the Mining Industry and its Development Outlook". Hence, till mid 2013 the auctions were to be held only in respect of gold ore, oil and gas deposits. Therefore, both as of the date of the decision on issuance of the license to use subsoil on "Kutessay II" deposit – December 21, 2009, and the date of issuance of the License № 2488 ME – September 20, 2010 in respect of other objects the right to use subsoil could be granted in the sense of Article 16 of the Law of the Kyrgyz Republic № 42 "On Subsoil" dated June 24, 1997 (as in force in the period from November 29, 2006 till October 28, 2011) by way of direct negotiations.

Thus, under the law concerned there was a possibility to grant the right to use subsoil in respect of deposits which were not gold ore, oil and gas deposits without holding an auction. At the same time a specific procedure of granting the rights to use subsoil was determined by the Government of the Kyrgyz Republic which was vested with authorities in the sphere of "development and improvement of the system of fee-based subsoil use", "development and implementation of investment policy in the sphere of subsoil use, raising of investments for geological study of subsurface and mining of minerals" (paragraphs 4 and 5 of Article 5 of the Law of the Kyrgyz Republic № 42 "On Subsoil" dated July 2, 1997).

In line with Article 408 of the Civil Code of the Kyrgyz Republic which provided for the possibility (but not obligation) to conclude a contract for transfer of subsoil use rights by way of bidding in the form of an auction or a tender, the Government of the Kyrgyz Republic passed separate decisions on granting the rights to use subsoil by way of bidding in the form of either an auction or a tender. At first the Government of the Kyrgyz Republic approved by Resolution № 736 dated December 30, 2008 the List of deposits allocated on a competitive basis and the amount of bonuses. "Kutessay II" deposit was included into this list under number "23". Thereafter, on December 1, 2009 the Government of the Kyrgyz Republic changed its decision adopting Resolution № 725:

"For the purpose of accelerated development of the mining industry in direction of prospecting and development of mineral deposits with introduction of effective methods of maximization of state revenues from their use;

In view of the need to implement the programs for promotion of development of the economy of the Kyrgyz Republic and its business environment through intensification of investment activity of the closed joint-stock company (ZAO) "Fund of Development of the Kyrgyz Republic" which requires increase of its equity capitalization;

With the intention to effectively use the tools of ZAO "Fund of Development of the Kyrgyz Republic" in respect of monetization of subsoil use

rights by way of application of stock exchange procedures and mechanisms, so that the state could get maximum benefit from such rights;

Taking into account the need to facilitate the development of the securities market of the Kyrgyz Republic in order to secure full access of the maximum number of potential investors to the process of acquisition of the rights for exploration and mining of minerals,

the Government of the Kyrgyz Republic resolves:

1. To accept the proposal of the Ministry of Natural Resources of the Kyrgyz Republic for transformation of tendering procedures for granting the rights to certain subsoil use objects according to Exhibit N3 (A list of mineral deposits allocated on a competitive basis and the amount of bonuses) to the Resolution of the Government of the Kyrgyz Republic N736 dated December 30, 2008 (as amended by the Resolution of the Government of the Kyrgyz Republic N410 dated June 25, 2009) into the auction stock exchange procedures of ZAO “Fund of Development of the Kyrgyz Republic”.

2. The Ministry of Natural Resources of the Kyrgyz Republic shall issue licenses for the objects of subsoil use listed in Exhibit №3 (List if mineral deposits allocated on a competitive basis and the amount of bonuses) to the Resolution of the Kyrgyz Republic N736 dated December 30, 2008 (as amended by the Resolution of the Government of the Kyrgyz Republic N410 dated June 25, 2009) to legal entities 100% of shares of which are managed by ZAO “Fund of Development of the Kyrgyz Republic”, without holding an auction for further sale from the auction of the shares of the mentioned legal entities on the stock-exchange (with payment by such legal entities of bonuses established by the legislation of the Kyrgyz Republic).

“Kutessay II” deposit fell under subpara. 2 of the Ruling № 725. It was indicated in Exhibit 3 to the Resolution №736. 100% of shares of JSC “Kutisay Mining” were placed in trust of ZAO “Fund of Development of the Kyrgyz Republic”.

In pursuance of para.2 of the Resolution № 725, the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and JSC “Kutisay Mining” held on December 21, 2009 direct negotiations which were formalized by the Minutes №1736-N-09 and the decision was passed to issue to JSC “Kutisay Mining” the Licenses №2488 ME and №2489 ME;

On December 29, 2009 the public auction held on the instructions of ZAO “Fund of Development of the Kyrgyz Republic” by the stock exchange "Central Asia Stock Exchange” for the sale of 100% of shares of JSC “Kutisay Mining” was held. The company “Stans Energy KG” LLC purchased the shares. In the

announcement of the auction it was indicated that JSC "Kutisay Mining" owns the license.

Thus, when issuing the License № 2488 ME dated September 20, 2010 to JSC "Kutisay Mining", the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic acted in strict compliance with the requirements of the legislation of the Kyrgyz Republic.

At the same time the Inter-district court of Bishkek (judge Nurmanbetov E.B.) satisfied on March 19, 2014 the application of the General Prosecutor's Office of the Kyrgyz Republic and declared invalid the Minutes №1736-N-09 of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company "Kutisay Mining" dated December 21, 2009.

The decision was based on the fact that a regulatory legal act on which basis the right to obtain the license was granted to JSC "Kutisay Mining" (Resolution № 725) before putting up for sale its shares did not comply with the Kyrgyz legislation at the moment of its adoption.

The decision of the court was rendered in favour of the General Prosecutor's Office of the Kyrgyz Republic (the Claimant) on that basis that the Respondent (the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic) admitted in full the claim of the General Prosecutor's Office.

Admission of the claim by the Respondent entails satisfaction of claims by the court (see page 5 of the Decision).

Attempt to gain profit from its own unlawful actions

The Claimants drew attention to the following. Even if one assumes that the license was issued contrary to law, such illegal actions were committed by the state body of the Kyrgyz Republic (the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic).

The Investor had nothing to do with such actions.

Being guided by a general principle of law "nobody has the right to derive benefit from its own unlawful actions", the Kyrgyz Republic has no right to deprive the Investor of the license on the ground that this license was unlawfully issued through its fault.

The above mentioned principle is included into the "general principles of law recognized by civilized nations" which, basing on Article 38 of the Statute of the International Court of Justice, are recognized as sources of international law. This principle found its reflection in particular in para.4 Article 1 of the Civil Code

of the Russian Federation “nobody has the right to derive benefit from its unlawful or bad-faith conduct”.

Investor as a bona fide purchaser

In their pleadings the Claimants noted that they acquired the company which already had the license (i.e. that they are bona fide purchasers).

On December 21, 2009 the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and JSC “Kutisay Mining” held negotiations formalized by the Minutes № 1736-N-09, and the decision was made to grant to JSC “Kutisay Mining” the License № 2488 ME for “Kutessay II” deposit.

On December 29, 2009 the public auction held on the instructions of ZAO “Fund of Development of the Kyrgyz Republic” by the stock exchange "Central Asia Stock Exchange” for the sale of 100% of shares of JSC “Kutisay Mining” was held. The company “Stans Energy KG” LLC purchased the share, thus becoming a sole shareholder.

Hence, the Investor is a bona fide purchaser.

The issues related to a bona fide purchaser are governed by Article 291 of the Civil Code of the Kyrgyz Republic. Basing on para.2 of this Article, “a bona fide purchaser is the owner of the property it acquired for value, unless the effective judicial act recognizes that such property was transferred out of possession of the initial owner or the person to whom such property was transferred into possession on grounds listed in paragraph 1 of the present Article”.

The following grounds are indicated in paragraph 1 of the Article: “when the property was lost by the owner or the person to whom the owner transferred the property into possession or was stolen from the either or was transferred out of their possession otherwise against their will”.

In purchasing the shares the Investor acquired the property complex of JSC “Kutisay Mining” which sole asset was the license. This license was neither lost nor stolen from the initial holder of the right to subsoil use – the Kyrgyz Republic as the state. It was neither transferred out of its possession against its will.

Legal characteristics of expropriation

Definition of expropriation under the Seoul Convention

As follows from Article 7 of the Convention for the Protection of Investor's Rights dated March 28, 1997, legal protection of investments is carried out, inter alia, based on international treaties of the parties and national legislation.

International law definition of the term "expropriation" in contemporary international law is found in Article 11(a) of the 1985 Seoul Convention Establishing the Multilateral Investment Guarantee Agency[9]:

"ii) Expropriation and similar measures

any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment… ."

Thus, expropriation means the measures which:

1) come from the host state;

2) may take the form both of a regulatory legal act (legislative measures) and an individual act (administrative measures);

3) deprive the Investor of his ownership of his investment, control over it or a substantial benefit therefrom.

Further the Claimants' representative drew the attention to the court practice in respect of definition of expropriation.

According to this arbitration practice, decisions of state bodies by which the licenses are directly or indirectly revoked and the permits necessary for a foreign investor to carry out business in the territory of the state are canceled are considered as expropriation

ICSID case *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States*[10] (hereinafter referred to as Tecmed).

The circumstances of this case are in many ways similar to the situation in the present case.

When examining the case, Tecmed Tribunal found that the refusal to extend the license constituted an act of expropriation. The company Tecmed incorporated under the law of Spain made investments in the territory of Mexico through the Mexican company Cytrar which shares were owned by its Mexican subsidiary

[9] The Kyrgyz Republic is a participant to the Convention since 1993

[10] See Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

Tecmed Mexico. In February 1996 Tecmed Mexico won the public auction and obtained the license for operation of the landfill for hazardous industrial waste. The license was issued for a period of one year with the possibility of its further extension every year.

Within the next two years the calls of a local non-governmental organization to shut down the landfill won political support. On November 25, 1998 the federal agency refused to extend the license anew and ordered Cytrar to prepare a plan for closing the landfill. The decision to refuse to extend the license was substantiated with alleged violations of the license terms.

As a result, the decision in that case became the subject-matter of examination by ISCID. In its award the Arbitral Tribunal noted that not only compulsory seizure of movable or immovable property of the investor but also the actions and conduct not directly purporting the deprivation of investor of its property or rights but having exactly such consequences in practice should be recognized as expropriation. In order to determine whether the refusal to extend the license was a measure equivalent to expropriation, it is necessary to answer first of all the question of whether the claimant was substantially deprived, as a result of such decision, of the possibility to use its investments, since the rights related to its investments, such as the right to derive revenue from the landfill operation ceased to exist. In other words, whether the respective property has lost its value for the investor as a result of actions of the state, and if so, to what extent then?[11]

The Arbitral tribunal in that case specifically emphasized that in accordance with international law the owner is considered to be deprived of its property also in that cases when its use or income generation from its use becomes impossible, even if in purely legal terms the ownership to such property remains inviolable.[12]

The arbitrators in that case arrived at a conclusion that the actions of the state resulted in refusal to extend the license and in the shutdown of the landfill (i.e. they led to impossibility of further use of the landfill for storage of hazardous waste). The company Cytrar was barred from continuation of its commercial activity, and the investor was deprived of the opportunity to gain income which it expected to get from the use of the landfill. Since in that case the landfill was concerned on which hazardous industrial waste was stored during 10 years, it could not be used for any other purposes and as a consequence the facilities located on that landfill could not be sold on the real estate market[13].

[11] See para.115 of the Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

[12] See para. 116 of the Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

[13] See para. 117 of the Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

When purchasing this land plot the investor did that with a single purpose – to carry out activity related to storage of hazardous waste and to get revenue from this activity. As a result of the decision to refuse to extend the license and termination of the landfill operation the economic and commercial value, which the investor, directly or indirectly, associated with this activity and the property it used to carry out this activity was irreversibly destroyed.

Based on the foregoing the Tecmed tribunal found that the decision to refuse to extend the license, taking into account its consequences, constitute the act of expropriation in accordance with international law.[14]

The investor invested funds into the buildings, structures, plant, etc. This was made for the purpose of carrying out economic activity for the sake of which all this was planned. Revocation of the license led to the fact that the economic activity became senseless and impossible. And since it became impossible all these buildings and structures became redundant. They are unmarketable, even at a residual value nobody needs them at the place on which they are located.

Another example is the ICSID award in the case *Middle East Cement Shipping and Handling Co. v. Egypt*[15]

By Order № 13 dated January 19, 1983 the Egyptian Agency for Investments and Free Economic Zones issued to the Claimant (***Middle East Cement***) the license for importation and storage of cement in bulk in floating silos erected in the free economic zone named Badr Cement Terminal (without customs clearance prior to sale).

On May 28, 1989 the Ministry for Construction of Egypt adopted Decree № 195 prohibiting import of cement which resulted in the termination of operations of the subsidiary Middle East Cement in the territory of Egypt. The company Middle East Cement retained the possibility to store cement in silos but lost the opportunity to import it to Egypt which made senseless the activity of the company.

The case was examined by ICSID. The Claimant declared that the Decree № 195 of the Ministry for Construction as well as the subsequent conduct of the Respondent constituted an actual revocation of the license.[16]

The Respondent, in its turn, objected that the Decree was issued only 4 months prior to the date of expiration of the license term (September 1989).

[14] See para. 151 of the Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

[15] See Award in *Middle East Cement Shipping and Handling Co. v. Egypt,* April 12, 2002 (ICSID case No. ARB/99/6).

[16] See para. 103 of the Award in *Middle East Cement Shipping and Handling Co. v. Egypt,* oApril 12, 2002 (ICSID case No. ARB/99/6).

However the Respondent did not contest that the investor was deprived of the rights granted to it by the license, even if for a short period of 4 months.

Having examined the issue of whether the Decree № 195 was a measure which effect was tantamount to expropriation, the arbitral panel in that case noted the following: in case of adoption by the state of the measures which result in deprivation of the investor of the possibility to gain profit from its investments, even if the investor remains pro forma their owner, these are the measures which consequences are similar to expropriation. In fact, as a result of adoption of such measures the investor lost the value of its investments. The arbitral panel held that this was exactly what had happened in the case Middle East Cement.[17]

Based on the foregoing, the Arbitral panel found that the effect from adoption of Decree №195 was equal to expropriation. The state adopted the measures which consequence was deprivation of the investor of the possibility to gain benefit from its investments. Even if the investor remains pro forma their owner, such measures are the measures which implications are tantamount to expropriation (measures similar to expropriation).

Expropriation and compensation for damages

As far as legal consequences of expropriation are concerned the Claimants noted as follows:

As provided in Article 9 of the Convention for the Protection of Investor's Rights dated March 28, 1997, "investments are not subject to nationalization and can not be exposed to requisition", except for the cases when such measures are permitted with payment of an adequate compensation. According to Article 7 of the Convention for the Protection of Investor's Rights dated March 28, 1997, legal regulation in this sphere takes place on the basis of international treaties of the parties and their national legislation.

According to Article 6 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic", investments shall not be subject to expropriation – nationalization, requisition or other equivalent measures, including action or omission on the part of the competent state bodies of the Kyrgyz Republic which resulted in compulsory seizure of the investor's funds or its deprivation of the possibility to use the results of investments. Expropriation of investments suggests "compensation for damages including lost profit".

In 2001 the UN Commission on International Trade Law adopted the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. This

[17] See para. 107 of the Award in *Middle East Cement Shipping and Handling Co. v. Egypt*, April 12, 2002 (ICSID case No. ARB/99/6).

document represents a codification of customary rules of law on international responsibility of states (which gained wide support in the doctrine of contemporary investment law[18]).

In accordance with Chapter 2 Part 2 of this document[19] the forms of compensation for harm are restitution (reinstatement), compensation and satisfaction. They are interrelated to a certain degree. Each of them can be used either independently or in combination with other forms.

In international investment law restitution is generally replaced in practice with an adequate compensation (compensation of the value of investments as of the date of expropriation). Additionally compensation may be required which allows for indemnification in full. Mainly the compensation for lost profit is meant here. Additional compensation should come second and be in place if an adequate compensation is not commensurate with the caused damage. This conclusion is confirmed by the practice of investment arbitration. The most widely cited judicial decision proving this conclusion is the Decision of the Permanent Court of International Justice in the case *Factory at Chorzow* dated September 13, 1928.[20]

Satisfaction in international investment law is compensation for moral harm. The issue of compensation for moral harm arises where the claim for compensation for damage in connection with the loss of goodwill, business opportunities, image, creditworthiness is filed. As the case in which the loss of business opportunities was recognized one can cite the ICSID case *Benvenuti & Bonfant v Congo,* where the claimant stated that it had lost investment opportunities in Italy in connection with the absence of capital which was invested in full volume in Congo, that he had lost credibility, etc.[21]

Fait treatment

As far as fair treatment of foreign investments and consequences of violation of this treatment are concerned, the Claimants have clarified as follows.

Obligation to accord fair and equitable treatment

The Convention for the Protection of Investor's Rights dated March 28, 1997 proceeds from the fact that the effective protection of investor's rights is a

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[18] See Karl-Heinz Bockstiegel. Applicable law to State responsibility under the Energy Charter Treaty and other Investment Protection Treaties. In the book Investment Arbitration and the Energy Charter Treaty, Clarisse Ribeiro, Juris Net, pp. 257-261.

[19] See Chapter 2 (Articles 34-39) Part 2 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Report of the Commission on International Trade Law. United Nations General Assembly, Official Records of the 56th session, supplement №10. A/56/10. UN, New York, 2001.p.37-38.

[20] See Decision in *Factory at Chorzow (Germany v. Poland)*, 1928 P.C.I.J (ser. A) № 17 (Sept.13) // http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow.htm

[21] See para. 4.95 of the Award in *Benvenuti & Bonfant SARL v People's Republic of the Congo,* August 8, 1980, ICSID.

necessary prerequisite for the development of the parties' economies. Article 8 of the Convention for the Protection of Investor's Rights dated March 28, 1997 sets forth that legal protection of investments shall be secured by national legislation and international treaties to which the parties are participants.

The Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" establishes in its preamble the basic principles of the state investment policy aimed at improvement of investment climate in the Republic and encouragement of domestic and foreign investments by according **fair, equitable treatment to the investors** and the guarantees of protection of the investments into the economy of the Kyrgyz Republic raised by them.

Para.1 Article 10 of the Energy Charter Treaty (hereinafter referred to as the ECT) to which the Kyrgyz Republic is a participant and which, in the opinion of the Claimants, is applicable in this case by virtue of the reference in the national legislation of the Kyrgyz Republic to international treaties, requires from the Kyrgyz Republic to grant to investments a fair treatment, to ensure their protection and security as well as prohibits to its participants, including the Kyrgyz Republic, to infringe upon investments by way of application of unreasonable measures.

Fair and equitable treatment: interpretation

Para.1 Article 10 of the ECT provides for that a "fair and equitable" treatment shall be accorded to investments.

It is evident that the term "fair" includes the term "equitable". So, if one removes this tautology, it will concern simply a fair treatment (which includes as its component the "equitable" treatment).

Equitable treatment means non-discriminatory. The investors from Canada should be granted the treatment not less favourable than foreign investors (MFN) and national investors (national treatment).

Basing on para.1 Article 10 of the ECT, along with equitable component a fair treatment also supposes stable and transparent treatment of foreign investments.

Para. 1 Article 10 of the ECT further sets forth the guarantees (standards) which are a part of fair treatment specifying this notion: investments shall "enjoy the most constant protection and security". The host party "shall not in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal."

Stability in respect of foreign investments

Stability suggests predictability of conditions for making investments in the country. In the ISCID award in Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States the Arbitral tribunal, having examined the issue of Mexico's violation of the standard of fair and equitable treatment, noted that the mentioned obligation was an expression of the bona fide principle which is generally recognized in international law.[22] This standard means that foreign investments should be accorded treatment not violating legitimate expectations which the foreign investor had when making a decision to invest.

A foreign investor expects that the actions of the state towards it will be consistent, unambiguous and completely transparent, so that it could know in advance all rules and procedures which would regulate the investments it makes as well as the purposes of adoption of any policy, administrative practice or regulatory acts in order for the investor to be able to plan its investments and comply with such rules. A foreign investor expects that the state will act consistently, that is without unreasonable revocation of the earlier made decisions or the earlier issued licenses, which were taken into account by investor when assuming the obligations as well as when planning and initiating its commercial operations. The investor also expects that the state will use legal instruments regulating the activity of the investor and its investments in accordance with the functions usually attributable to such instruments and not with a view to deprive the investor of its investments without payment of compensation.[23]

In the present case the Kyrgyz Republic acted contrary to legal expectations of the Investor. When acquiring the company with the license the Investor could not "legitimately expect" that after three years it would be actually deprived of the license.

Publicity (transparency)

In the course of examination of the case *Metalclad Corp. v. United Mexican States*[24] it was noted that the principle of transparency means that all necessary legal conditions for establishment, completion and successful operation of

[22] See para. 153 of the Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

[23] See para. 154 of the Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

[24] See the Award in *Metalclad Corp. v. United Mexican States,* August 30, 2000 (ICSID case No. ARB(AF)/97/1)// https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155

investments made in the state should be known in advance to investors. Moreover there should be no doubts or uncertainty in respect of such conditions.[25]

In the present case the state (Kyrgyz Republic) issued the License № 2488 ME for “Kutessay II” deposit on the basis of a legal act (Resolution №725) which consequently was declared in court by the state itself as contrary to law.

I.e. the state issued to a foreign investor the license on a fee-paid basis relying on the non-effective and illegal (in the opinion of the state) act which was officially presented as effective and legitimate.

Protection and security

The guarantee of maximum protection and security anchored in the Energy Charter Treaty is a reflection of this standard treatment under general international law. In the ICSID case Asian Agricultural Products Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka[26] the arbitral panel noted that “maximum protection and security” and “full protection and security” have been used in bilateral treaties since XIX century. The minimum standard of the treatment which arose already in those days includes ensuring physical security.[27]

The arbitral tribunal in the case PSEG Global et al. v. Republic of Turkey [28] concluded that this treatment should be primarily considered in the context of ensuring physical security, however in exceptional cases it can go beyond protection against physical violence and extend to obligations to secure safe investment environment. Some court decisions say that the state is concurrently obliged to take necessary measures for securing the protection of investments against any kind of illegal actions both on the part of private persons and state bodies, irrespective of whether such actions had a nature of physical violence. Thus, what is concerned here is protection against unlawful intervention of any kind of persons into investment activity as well as denial of justice.

As was already mentioned, in the course of examination of the case Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States it was held that the investor expects that the state will use legal instruments which regulate the activity of the investor and its investments in accordance with the functions usually

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[25] See para. 76 of the Award in *Metalclad Corp. v. United Mexican States,* August 30, 2000 (ICSID case No. ARB(AF)/97/1).

[26] See Final Award in the case *Asian Agricultural Products Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka,* June 27, 1990 (ICSID Case No. ARB/87/3) // http://italaw.com/documents/AsianAgriculture-Award.pdf

[27] See Sornarajah M. The International Law on Foreign Investment. Cambridge: Cambridge University Press, 2010, page 237.

[28] See Award in *PSEG Global et al. v. Republic of Turkey,* January 19, 2007 (ICSID Case No. ARB/02/5) // https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal= showDoc&docId= DC630_En&caseId=C212

attributable to such instruments and not with a view to deprive the investor of its investments without payment of compensation.[29]

The Claimants' representative drew attention to the fact that in the present case the Kyrgyz Republic did not use due process of law. As was already mentioned, on June 26, 2012 the Committee for Development of Economic Industries at the Parliament (Zhogorku Kenesh) of the Kyrgyz Republic passed a decision (which it was not authorized to pass in accordance with the Constitution of the Kyrgyz Republic, since the resolution of such issues does not fall within the competence of the Parliament) obligating the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic to cancel the license agreement with "Kutisay Mining" LLC for "Kutissay II" deposit.

On March 19, 2014 the Inter-district court of Bishkek (judge Nurmanbetov E.B.) satisfied the application of the General Prosecutor's Office of the Kyrgyz Republic and declared invalid the Minutes №1736-N-09 of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company "Kutisay Mining" dated 21 December 2009. The decision was based on that fact that the regulatory legal act on which basis the right to obtain the license (Resolution № 725) was granted to JSC "Kutisay Mining" before putting up its shares for sale at the auction did not comply with the Kyrgyz legislation at the time of its adoption. As was shown above, there was no incompliance.

The decision of the court was rendered in favour of the General Prosecutor's Office of the Kyrgyz Republic (the Claimant) on that basis that the Respondent (the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic) admitted in full the claim of the General Prosecutor's Office. And admission by the Respondent of the claim entails satisfaction of claims by court.

All these measures resulted in interim measures aimed at securing the claim which led to actual expropriation of the Claimants' investments.

The foregoing allowed the Claimants to conclude that there is a clear violation of a fair treatment in the present case:

1) actions of the Kyrgyz Republic violate legitimate expectations of the Investor;

2) actions of the Kyrgyz Republic are non-transparent;

[29] See para. 154 of the Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

3) the standard of maximum protection and security is also violated – legal security of Investments and protection from illegal interference of Zhogorku Kenesh, General Prosecutor's Office of the Kyrgyz Republic and the court was not ensured.

Thus, the interests of the Investor were infringed through unreasonable measures.

The Claimants proceed from the fact that responsibility of the state for violation of fair treatment (with due regard to proportionality) is similar to responsibility for expropriation.

Claims of the Claimants

The right to be compensated for damages in the legislation of the Kyrgyz Republic

The Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" contains Article 6 "Guarantees of protection from expropriation and compensation of investors for damages".

In accordance with para.1 Article 6 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic", in case of expropriation of investments a "timely, proper and real compensation for damages, including lost profit" shall be paid.

As provided for by para.2 Article 6 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic", such compensation includes:

1) a fair market value of expropriated investment;
2) a fairly calculated lost profit.

Claims of the Claimants related to compensation for damages

The Claimants claim compensation of a fair market value of their expropriated Investments.

The Investments were initially made in monetary form, however subsequently they substantially changed their form (a change in the form of investments does not affect their characteristic as investments).

The investor claims compensation of three types of Investments:

1) a fair market value of the right to use subsoil (formalized as the license) as of the date of expropriation;

2) a fair market value of the property of "Kutisay Mining" LLC (fixed assets – paragraphs 1-5 in the Table on page 2 of Exhibit №2 to Appraisal Report), as

well as of the investments into acquisition of a 100% shareholding in the authorized capital of "Kashkinsky Plant of Rare-Earth Elements" LLC (para. 12);

3) monetary funds which constituted expenses (industrial, general, administrative, charitable), including tax (bonus) on acquisition of the license (paragraphs 6-11 in the Table on page 2 of Exhibit № 2 to Appraisal Report). These costs were directed at carrying out the activity under the license for development of the deposit, i.e. they were invested.

The amount of the claimed compensation is determined in the Appraisal Report and is substantiated by the Claimants below.

Evaluation date

General approach in determining the evaluation date

Basing on para.2 Article 6 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" compensation shall be calculated as of the date of decision on expropriation. In order to determine the amount of the compensated damage it is necessary to establish the date on which such damage should be calculated.

"Creeping expropriation"

Article 6 of the mentioned Law does not answer the question about the date of expropriation if such expropriation was carried out on the basis of a series of actions (such expropriation is usually called "creeping expropriation"), like in the present case.

Starting point of the expropriation was the Resolution of the Committee of Zhogorku Kenesh of the Kyrgyz Republic for Development of Economic Industries dated July 26, 2012. In the first sentence the following is fixed: "The fact of unlawful issue of the license agreement to "Kutisay Mining" …was articulated by the deputy Badykeeva". I.e. no inspections were yet conducted, no court hearing was held, however the fact of illegal issue of the license was already articulated and the decision was made to obligate the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic to revoke the license agreement.

Thereafter there was a letter dated March 12, 2013 addressed to "Kutisay Mining" LLC in which the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic stated that "with a view to prevent violation of the requirements of regulatory acts Gosgeologagency refrains from

examination of the submitted program". The same letter said that state ecological expert examination of the project was suspended.

This was followed by the letter dated April 8, 2013 in which the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic informed that re-execution of the license agreement was unreasonable. And, finally, it came to application to the court and adoption of interim measures for securing the claim on April 15, 2013.

All this was taking place over a period of 9 months (from July 26, 2012 till April 15, 2013). After April 15, 2013 the de facto expropriation was launched which transformed into de jure expropriation (court decision in favour of the General Prosecutor's Office, appeal).

Date of the "creeping expropriation"

Considering the date of the "creeping expropriation", the Claimants' representative dwelled on Article 15 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, basing on which the breach of an international obligation by a state through a series of actions or omissions occurs when the first wrongful action or omission takes place. The state bears responsibility over the entire period starting with the first of the actions or omissions of the series for as long as these actions or omissions are repeated and remain not in conformity with the international obligations of states.

The international law doctrine acknowledges that the breach of international obligations occurs when the first wrongful act took place, though responsibility extends to all wrongful acts of the state. [30]

Commencement of the "creeping expropriation"

The Claimants believe that the starting point of the "creeping expropriation" was the Resolution of the Committee of the Parliament (Zhogorku Kenesh) of the Kyrgyz Republic for Development of Economic Industries dated July 26, 2012. In the first sentence of the Resolution the following is fixed: "The fact of unlawful issue of the license agreement to "Kutisay Mining" …was articulated by the deputy Badykeeva" (i.e. no inspections were yet conducted, no court hearing was held, however the fact of illegal issue of the license was already articulated). And the decision was made to obligate the State Agency for Geology and Mineral

[30] See Crawford, The International Law Commissions Articles on State Responsibility, above, n 132, 143-4.

Resources under the Government of the Kyrgyz Republic to revoke the license agreement.

Substantiation of the amount of compensation

Right to be compensated for damages

According to the Law of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” the right to compensation follows from Article 6.

In line with para. 1 of this Article, in case of expropriation of investments a “timely, proper and real compensation for damages, including lost profit” shall be paid.

As follows from para.2 Article 6 of the Law of the Kyrgyz Republic “On Investments in the Kyrgyz Republic”, such compensation includes:

1) a fair market value of expropriated investment;
2) a fairly calculated lost profit.

According to the Statement of Claim the Claimants request the MCCI Arbitration to examine the present dispute, to declare the Respondent’s conduct as internationally wrongful and to obligate the Respondent:

- to compensate the Claimants for the value of investments in the amount specified in the Appraisal Report;

- to pay compound interests on the amount of damages awarded by the court, with monthly capitalization, from the date of passing the award till the date of payment at a refinancing rate established in the Kyrgyz Republic by the National Bank of the Kyrgyz Republic;

- to compensate the Claimants for judicial costs, including the costs of legal representation of their interests in the course of dispute examination by the court.

The Claimants’ representative explained that the Claimants do not claim interests because the arbitration fee was not paid on that amount.

Compensation of the value of investments

The Claimants claim solely the compensation of a fair market value of the expropriated investments.

According to the Appraisal Report (with due regard to the exchange rate difference at different valuation dates in respect of different amounts and the admissible round-up) this amount totals to 117.853.000 USD and is made up of the following claims:

1) payment of compensation of a fair market value of the right to subsoil use (formalized as the license) as of the date of expropriation. In line with the Appraisal Report this amount totals to 107.781.000 USD.

2) payment of compensation of a fair market value of the property of "Kutisay Mining" LLC as of the date of expropriation (fixed assets – paragraphs 1-5 in the Table on page 2 of Exhibit №2 to Appraisal Report), as well as of the investments into acquisition of a 100% shareholding in the authorized capital of "Kashkinsky Plant of Rare-Earth Elements" LLC (para. 12);

3) compensation of monetary funds which constituted expenses (industrial, general, administrative, charitable), including tax (bonus) on acquisition of the license (paragraphs 6-11 in the Table on page 2 of Exhibit № 2 to Appraisal Report). These costs were directed at carrying out the activity under the license for development of the deposit, i.e. they were invested.

The amount of claimed compensation as per points 2 and 3 is determined in the Appraisal Report and itemized in Exhibit № 2 to the Report and made up:
- for a period from January 1, 2010 till June 25, 2012 – 7.499.000 USD;
- for a period from June 26, 2012 till September 1, 2013 –2.573.000 USD.

The reason for breaking down these investments into two phases is explained by the fact that theoretically the Arbitral tribunal may refuse to compensate for the costs incurred after the date of commencement of the creeping expropriation. Therefore, for the sake of convenience of the Arbitral tribunal these amounts were singled out.

Thus, the total amount of claims makes up 117.853.000 USD.

Currency of compensation

In line with the fourth part of Article 9 of the Convention for the Protection of Investor's Rights dated March 28, 1997, "*an investor is entitled to be compensated for damages caused to it by decisions or actions (omission) of state bodies or officials contradicting the legislation of the recipient country and the rules of international law*".

Basing on the second part of Article 10 of the Convention for the Protection of Investor's Rights dated March 28, 1997, "*compensation for damages in the case stipulated in the fourth part of Article 9 of the Convention shall be made in accordance with the rules of national legislation of the recipient country*".

Based on para. 3 Article 6 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic", *"compensation shall be paid in a freely convertible currency".*

Based on the above provisions of the Convention for the Protection of Investor's Rights and the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" the Claimants' claims are calculated in US dollars.

Expert opinion

The expert appraiser and General Director of the "Al-Star" Center of Property Appraisal and Expert Examination" LLC Ignatenko Nina Sergeevna took part in the hearings on April 29-30, 2014.

Representatives of the Claimants explained that expert Ignatenko Nina Sergeevna is the head of the best known national company in the territory of the Kyrgyz Republic in the sphere of appraisal - the "Al-Star" Center of Property Appraisal and Expert Examination" LLC. The appraisal submitted by the expert meets international standards and is absolutely independent.

Nina Sergeevna Ignatenko is a certified appraiser, expert appraiser of the first category, professor, author of the textbook "Course in "Real estate economics", which is the educational textbook in the educational institutions of the Kyrgyz Republic, including the Kyrgyz University. In the Exhibit № 1 to the Report of the "Al-Star" Center of Property Appraisal and Expert Examination" LLC respective documents were submitted, in particular: Certificate of State Registration of a Legal Entity, series GR № 029116, Certificate of the KR CCI № 003, Certificate of compliance № ON-004/12, Qualification Certificate № 002, Diploma № 30.

The expert Ignatenko Nina Sergeevna is a leading appraiser in the territory of the Kyrgyz Republic and works almost with all major companies. Since under the legislation of the Kyrgyz Republic no appraisal company has the right to give its own appraisal in the territory of the Kyrgyz Republic, the "Al-Star" Center of Property Appraisal and Expert Examination" LLC is the only company in the territory of the Kyrgyz Republic which verifies the appraisal of all major world appraisal companies. The expert Ignatenko Nina Sergeevna is the author of the textbook "Real estate economics" under which the appraisal practice is taught in the whole territory of the former Soviet Union. The "Al-Star" Center of Property Appraisal and Expert Examination" LLC has been awarded high distinctions from the Government of the Kyrgyz Republic.

The expert Ignatenko Nina Sergeevna stated the following.

Under the contract concluded between "Kutisay Mining" LLC and the "Al-Star" Center of Property Appraisal and Expert Examination" LLC dated August 16, 2013 the works in respect of appraisal of a market value of the right to use the

“Kutessay II” rare-earth elements deposit and direct costs incurred by the company in the course of implementation of the project of development of the “Kutessay II” deposit were carried out.

In the course of carrying out the appraisal regulatory documents in effect in the territory of the Kyrgyz Republic were applied. In particular, the Appraisal Standards binding for application by the entities of appraisal activity in the Kyrgyz Republic approved by the Resolution of the Government of the Kyrgyz Republic № 217 dated April 3, 2006. Besides, due to the absence in the Kyrgyz Republic of a national law on appraisal activity, Provisional regulations on the activity of appraisers and appraisal organizations in the Kyrgyz Republic approved by the Resolution of the Government of the Kyrgyz Republic № 537 dated August 21, 2003 apply.

The current standards of property evaluation in the Kyrgyz Republic are harmonized, they comply with international appraisal standards, inter alia, in terms of basic concepts, terminology and methodology of appraisal.

Based on the results of the work the following documents were submitted: Explanatory Note to the Report № 01-09/13 dated September 5, 2013 (ref. № 05-09/13) and summarized Report № 01-09/13 dated September 5, 2013, with Exhibits 1-3, where basic facts ascertained as a result of the appraisal are set forth.

Exhibit № 2 represents a complete report on evaluation and determination of a market value of direct costs incurred by the company “Kutisay Mining” LLC over the period of holding the license for the development of “Kutessay II” rare-earth elements deposit as well as for the period after the commencement of actions related to suspension of the license, i.e. for the period from June 26, 2012 till September 1, 2013.

Exhibit № 1 to this Report which is the principal exhibit contains a report on determination of the market value of the right to use “Kutessay II” rare-earth elements deposit.

As mentioned on pages 3 and 4 of Exhibit № 1 to the Report, the value of the right to use “Kutessay II” rare-earth elements deposit was calculated using the discounted cash flow technique with application of the model of cash flow calculation for the aggregate invested capital. The main point in this approach is to forecast cash flows which were to be received in the process of development of the deposit in the course of mining and ore processing into float concentrate. In order to determine the value of the right to use the deposit, the discounted cash flows were summed up in accordance with the appraisal methodology. The forecast was made on the basis of the analyzed available data about prices for this product in the period from 2010 till 2013 and on the basis of the forecast prepared by the Nordest Financial (Asian Metal) international information centre.

In the Exhibit № 3 the main information which was used, including financial documents of the company, is provided.

The calculations were performed in national currency, soms. Conversion into US Dollars was made at the exchange rate of the National Bank of the Kyrgyz Republic as of the respective evaluation date.

The market value of the right to use “Kutessay II” deposit as of the date of beginning of the creeping expropriation of “Kutessay II” (June 25, 2012) made up 5.087.042.000 (equivalent of 107.781.000 USD).

The value of direct costs incurred by “Kutisay Mining” LLC over the period of holding the license for the development of “Kutessay II” deposit (from January 1, 2010 till June 25, 2012) totaled to 353.933.000 som (equivalent of 7.499.000 USD), and for the period after commencement of actions related to suspension of the license for the development of “Kutessay II” deposit (from June 26, 2012 till September 1, 2013) 125.383.000 som (equivalent of 2.573.000 USD).

Thus, the total amount of investments made by the Investor totaled, according to the Appraisal Report (with due regard to the difference in exchange rates as of different evaluation dates in respect of different amounts and the admissible round-up) to 117.853.000 USD.

The Claimants’ representative explained that the evaluation method used by the expert in determining the market value of the right to use the “Kutessay II” rare-earth elements deposit is the method of discounted cash flow. Para. 26 of the Comments to Article 36 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts recognizes the discounted cash flow technique as an admissible method of evaluation:

“*Since 1945 there have been developed the methods of evaluation for a more systematic accounting for different elements of risk and probability. The method of discounted cash flow (DCF) is now rather widespread, especially in the context of calculations related with revenues over a limited period of time… although this method was developed as an instrument for evaluation of a commercial value, it can prove to be useful also in the context of calculation of value for the purposes of compensation*”[31].

Answering the issue of the arbitrators concerning determination of the evaluation date the expert noted the following.

When calculating the market value of the right to use “Kutessay II” deposit, the evaluation date was June 25, 2012 – the date of commencement of actions related to suspension of the license for the development of “Kutessay II” deposit.

[31] United Nations Organization. Report of the Commission on International Trade Law. Fifty third Session (April 23 – June 1 and July 2 – August 10, 2001). General Assembly, Official Records of the 56th session, supplement №10. A/56/10., see Internet site: http://www.un.org/law/ilc/reports/2001/2001report.htm

The value of direct costs incurred by “Kutisay Mining” LLC over the period of holding the license for the development of “Kutessay II” deposit was calculated from January 1, 2010 till June 25, 2012 (the date of creeping expropriation) and from June 26, 2012 till September 1, 2013 (the end of the last quarter preceding the filing of the statement of claim prior to submission of the Report). This was made for convenience of the Arbitral tribunal in case of the decision of the Arbitral Tribunal not to take into account the costs after the commencement of expropriation.

In answer to the question of arbitrators concerning the source of information about the costs of “Kutisay Mining” for the development of “Kutessay II” deposit the expert said that the information material she used in the course of calculations was in particular the feasibility study for the development of the deposit concerned from which she took capital expenditures for the development and mining volumes as well as the method of ore production.

Answering the question of the arbitrators, in which context the forecast for the period 2016-2021 was used for calculation of the market value of the right to use “Kutessay II” rare-earth elements deposit, the expert told as follows.

Discounted cash flow method used in the calculations is based on the evaluation of future revenues for each of several time intervals. When assessing the right to use “Kutessay II” rare-earth elements deposit by way of discounted cash flow method, the estimated future time period of operations related to the deposit development was divided into two periods: forecast and post-forecast period. “Kutisay Mining” LLC expected that the volumes of yearly ore production and processing would amount to 100 000 tons in the first year of completion of infrastructure construction with subsequent increase of up to 1 000 000 tons in 2012. “Kutisay Mining” LLC holds the license for the deposit development till December 21, 2029, i.e. its remaining term is 16 years. Duration of the forecast period was chosen as 10 years in order to build a sufficient number of cash flows (in order to get a most true picture of development of the company and its outlooks, which is not insignificant for formation of the value). The starting point for implementation of the project was chosen the year 2013 (the year of drafting the project documentation). In more details see pages 16 and 17 of Exhibit № 1 to the Report.

In answer to the question of the arbitrators of whether the calculations account not only for the revenues for the last 10 years but also for the revenues which could have been received till the end of the license term, the expert explained as follows. Notwithstanding the fact that the license term would be over in 2029, the forecast period for calculations was ending with the year 2023. The

chosen forecast period is sufficient, more lengthy forecasts are not used in the evaluation due to a low level of accuracy.

In respect of the applied standards the expert additionally explained that in the Kyrgyz Republic exists the standard of basic concepts and principles which is approved by the Resolution of the Government № 217. Five standards are distinguished: the standard of business evaluation, the standard of real estate evaluation, the standard of machinery evaluation, the standard of equipment evaluation, the standard of requirements to drafting an appraisal report. The mentioned standard of basic concepts contains in para.1 full interpretation of the terminology and key factors which are mentioned in the Report. In particular, this paragraph includes definitions of the terms "cash flow", "discounted cash flow", "income approach".

The expert gave the following additional explanations in respect of Exhibit № 2 to the Report in which the market value of direct costs incurred by the company was determined. In this case a specific contribution into the project implementation was concerned. In the course of preparation of this exhibit the expert used the submitted financial documents containing the information about costs. The market value of direct costs was calculated for two periods: (1) prior to the beginning of suspension of the license term; (2) after the beginning of suspension of the license term. At first calculation under each period was made. Thereafter the bottom line was derived, i.e. the market value of direct costs for the whole period of evaluation.

In answer to the question of the arbitrators concerning the correctness of use of the name of the company and the deposit the expert explained the following. The difference in the name of the company and of the deposit arose in connection with their different spelling and pronunciation in the Russian, Kyrgyz and English languages. Under the Company "Kutisay Mining" LLC is meant. Under the "Kutessay II" deposit the deposit is meant for which the license was issued to "Kutisay Mining" LLC.

Answering the question of the arbitrators concerning inclusion of point 11 "Charity" into the investment losses the expert elucidated that according to the submitted financial documents the charitable help was recorded on the books separately and included the company's costs for the site improvement of the settlement, school repair, purchasing of textbooks. These costs were formally considered as charity, but they were indispensible.

The Claimants' representative Savchenko G.A. added that from the very beginning the policy of the company included as its integral element the establishment of normal relations with the local community. Charitable assistance includes a comprehensive list of works, in particular, construction of water

conduits. Among all companies currently operating in the Kyrgyz Republic only "Kumtor" and "Kutisay Mining" LLC have no conflicts with local population due to such help.

Answering the question of the arbitrators in respect of legal substantiation of the Claimants' claim for recovery of the funds spent for charity the Claimants' representative Zenlin I.V. explained the following.

Subsoil legislation of the Kyrgyz Republic provides for the so-called social package for a foreign investor (investment of funds into the social and economic development of a local community as a mandatory condition for any kind of foreign investments). In this case the Kyrgyz legislation means charitable activity which is an indispensible part of an investment package. If there is no charitable activity there will be no investments, an investor will not be admitted.

In answer to the question of the arbitrators concerning a gratuitous character which the charitable activity should have the Claimants' representative Zenkin I.V. stated as follows.

There is a charity which is a charity as such, but there is also some related activity which is an essential activity for making investments. In this case the related activity which is a mandatory activity is concerned, i.e. if there were no investment project there would have been nobody who would carry out such activity, since this investment project suggests, just as all investment projects, basing on the Law on Subsoil of the Kyrgyz Republic the so-called contribution into the social and economic development of the community. Therefore, it is not quite the charity. If an investor is deprived of its investments, then the question automatically arises as to why did it make that contribution at all?

In answer to the question in respect of any benefits for the company from charitable help to the local population, for instance, in the form of reduction of a tax burden, the Claimants' representatives Savchenko G.A. and Zenkin I.V. explained that there was no such reduction. The benefits for the company consist in establishment of normal relations with the local population.

Answering the question of the arbitrators concerning the calculation of direct costs incurred by "Kutisay Mining" LLC the expert additionally explained that Exhibit № 2 to the Report contains a summary table which includes itemized accounts and costs. The result of produced calculations was that the value of direct costs incurred by "Kutisay Mining" LLC over the period of holding the license for the development of "Kutessay II" deposit (from January 1, 2010 till June 25, 2012) totaled to 353.933.000 som (equivalent of 7.499.000 USD), and for the period after commencement of actions related to suspension of the license for the development of "Kutessay II" deposit (from June 26, 2012 till September 1, 2013) – to 125.383.000 som (equivalent of 2.573.000 USD).

Answering the question of the arbitrators in respect of evaluation of buildings and structures the expert told as follows.

All real estate objects of “Kutisay Mining” LLC are located in the area of “Kutessay II” rare-earth elements deposit and were inspected in an unbiased manner by a group of specialists, including the expert personally. During the on-site visit the structural scheme of all buildings and constructions was inspected in particular.

For assessment of the value of the real estate property the cost method was used. The cost method is the approach to evaluation of the property under which the value of property is formed out of the costs for the acquisition and/or reconstruction of all constituent parts of the property (adjusted for wear and tear). In the present case the standards of evaluation of non-residential property were used. For calculation of the market value the cost of reconstruction or replacement value, as is it called, is evaluated at first.

The replacement value of buildings and structures is the current value of the costs determined as of the evaluation date for building a new object similar to the evaluated one, which may become its equivalent substitute. When determining the replacement value of buildings/structures the method of a unit indicator of a construction analogue is used.

In accordance with the standards of evaluation the aggregate wear and tear shall be defined as decrease in the reconstruction or replacement value of buildings and structures which may take place as a result of physical, functional and economic (external) wear and tear. Physical wear and tear is determined basing on the “Scale of expert evaluations for determination of physical wear and tear of the evaluated object”. External wear and tear depends on a region of the Kyrgyz Republic and is calculated on the basis of the market value decrease factor which is used in taxation. In more detail the answer to this question is given in particular on pages 6-7, 15-16 of Exhibit № 2 to the Report.

Answering the question of the arbitrators about the procedure of making calculations during appraisal of buildings and structures and their value, the expert explained as follows.

At first, the cost of a new construction will be calculated and after that depreciation is deducted. Depreciation is expressed by facts of physical, functional and external wear and tear.

In answer to the question of the arbitrators about the market value of the buildings and structures the expert said that this is the book-keeping account 2130, and that the total value of these objects in their present condition made up 78.119 USD.

Answering the question of the arbitrators as to why the value of these buildings should be compensated to the company “Kutisay Mining” LLC the Claimants’ representative I.V. Zenkin explained the following.

Without the license these objects as such are needless. This property had the designated use. These objects are a part of the production process which no longer exists in connection with de facto expropriation of the license. All this is a part of the closed production process. In other words, all this is useless if the main thing is missing – the right to develop the deposit. At present the company has found itself to be the owner of the useless property which had the designated use.

In answer to the question of the arbitrators concerning production costs the expert explained that production costs are the book-keeping account 7000. On page 19 of Exhibit № 2 to the Report there is a breakdown of production expenditures. These expenditures include labour costs, social fund contributions, expenditures for fixed assets repair and maintenance, as well as other operating expenditures.

In answer to the question of the arbitrators as to what is included into the costs under the item “other long-term liabilities” the expert explained that they include the costs of acquisition of the rare-earth elements plant (a copy of the contract of sale is enclosed in the Exhibit № 3 to the Report).

Answering the question of the arbitrators of whether the company “Kutisay Mining” LLC had undertaken measures for sale of the plant to third parties the Claimants’ representative Zenkin I.V. told that the plant is located in the area of the deposit, it represents a single production technological cycle of ore processing at the deposit and was purchased specifically for the purpose of processing of ore mined at the deposit.

When answering this question the Claimants’ representative Zenkin I.V. noted that a similar question was a subject-mater of examination under the investment dispute in the case Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States[32], handled by ICSID

In the award in that case the arbitral panel “arrived at a conclusion that the actions of the state resulted in the refusal to extend the license and in the shutdown of the landfill (i.e. they led to impossibility of further landfill use for storage of hazardous waste). The company Cytrar was barred from continuation of its commercial activity, and the investor was deprived of the opportunity to gain income which it expected to get from the use of the landfill. Since in that case the landfill was concerned where hazardous industrial waste was stored during 10 years, it could not be used for any other purposes and as a consequence the

[32] See Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

facilities located on that landfill could not be sold on the real estate market.[33] Extracts from that award together with the translation into Russian were enclosed by the Claimants to the Statement of Claim.

In answer to the question of the arbitrators as to why the company after the initiation of actions for suspension of the license (June 25, 2012) was incurring the costs, the expert explained that the company paid in particular for the earlier contracted works for elaboration of the concept of development of the rare-earth metals of “Kutessay-II” deposit. In more detail the information on the incurred costs is given on pages 18-19 of Exhibit № 2 to the Report.

Answering the question of the arbitrators as to whether the “Al-Star “Centre for Property Appraisal and Expert Examination” LLC has the practical experience of assessment of a market value of the right to use deposits, the expert pointed out that only in the recent time the “Al-Star “Centre for Property Appraisal and Expert Examination” LLC had carried out the works in respect of evaluation of four quartzite deposits which were used as the mineral resources base for the operating enterprise (cement plant). These works were accepted by international auditors, with no comments made.

The expert explained that for the protection of domestic market the standard of requirements governing the submission of the appraisal report was worked out which sets forth that a report drafted by a non-resident of the Kyrgyz Republic is not legitimate in the territory of the Republic. Therefore, the report of the “Big Four” should be re-attested or should be prepared with participation of an appraiser of the Kyrgyz Republic. The “Al-Star “Centre for Property Appraisal and Expert Examination” LLC is included into the register of reliable partners of the Chamber of Commerce and Industry of the Kyrgyz Republic as well as it is a supervisor of the European Bank under all contracts which are subject to financial monitoring.

[33] See para. 117 of the Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

Reasoning of the Arbitral Tribunal

1. On the possibility to hear the case in the hearings on March 31 and April 29-30, 2014 in the absence of the Respondent's representatives

On the possibility to hear the case in the hearing on March 31 in the absence of the Respondent's representatives

Having examined the issue of possibility to hear the case in the hearing on March 31, 2014 in the absence of the Respondent's representatives, the Arbitral tribunal found the following.

The notification of the Statement of Claim filed on October 30, 2013 with the MCCI Arbitration and the Statement of Claim with exhibits was sent on the same day to the Ambassador Extraordinary and Plenipotentiary of the Kyrgyz Republic in the Russian Federation B. Djunusov, to the President of the Kyrgyz Republic Atambaev A.Sh (the notification was sent by DHL, number of consignment note 7395219090 and was received on November 04, 2013);

On October 31, 2013 the Statement of Claim was sent to the Prime-Minister of the Kyrgyz Republic Satybaldiev Zh.Zh. (the notification was sent by DHL, number of consignment note 7395219101 and was received on November 01, 2013); to the Minister of Foreign Affairs of the Kyrgyz Republic Abdylbaev E.B. (the notification was sent by DHL, number of consignment note 7395219112 and was received on November 04, 2013); to the Director of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic Zilaliev D.T. (the notification was sent by DHL, number of consignment note 7395219123 and was received on November 04, 2013).

On November 12, 2013 the Arbitration at the MCCI received per e-mail from the Embassy of the Kyrgyz Republic the Respondent's Motion dated November 12, 2013, signed by the Ambassador Extraordinary and Plenipotentiary of the Kyrgyz Republic in the Russian Federation Djunusov B. with a request to extend the time limit for consideration of the received materials in the case, as well as to extend the deadline for nomination of an arbitrator.

On November 12, 2013 the Executive Secretary of the MCCI Arbitration sent the answer to this Motion addressed to the Ambassador Extraordinary and Plenipotentiary of the Kyrgyz Republic in the Russian Federation Mr. B. Djunusov (ref. № 244). The Respondent was offered to submit to the MCCI Arbitration by November 20, 2013 at the latest the information about nominated arbitrators on the part of the Respondent (the notification was sent by DHL, number of consignment note 7395219042 and was received on November 14, 2013).

Due to setting the date of the hearing for December 13, 2013 the Claimants filed the application dated December 03, 2013 requesting to postpone the examination of the case till the beginning of February 2014.

The above mentioned application was sent to the above mentioned addresses together with notification that the issue of postponement of the case examination shall be resolved in the case hearing. This notification was duly received, which is confirmed by DHL receipts on file.

On December 13, 2013 the Arbitral tribunal passed a Ruling which granted the motion of the Claimants for postponement of dispute resolution till February 06, 2014. This Ruling was sent to the above mentioned addresses and was duly received, which is confirmed by DHL receipts on file.

On February 05, 2014 the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic submitted to the MCCI Arbitration the Declaration on the lack of jurisdiction of the MCCI Arbitration to examine the present case and the Motion for postponement of the arbitration proceedings.

On February 06, 2014 the Arbitral tribunal passed Procedural Order № 1 and the Ruling with which it granted the Motion of the Respondent for postponement of the case hearing and its request to conduct a separate arbitration hearing on jurisdiction. The Respondent was offered to produce the reasoning of its legal position on jurisdiction of the MCCI Arbitration.

The hearing in the case on jurisdiction of the MCCI Arbitration to handle the dispute was set for March 03, 2014, and the hearing on the merits was scheduled for March 31, 2014. This Procedural Order was sent to the Respondent at all of the above mentioned addresses and was duly received by it.

On February 28, 2014 the MCCI Arbitration received from the Embassy of the Kyrgyz Republic in the RF the Motion of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic for postponement of the proceedings due to the reason that the Kyrgyz Republic physically had not enough time to make any decision on arising procedural issues. The motion contained a request for postponement of the case hearing till the decision of the Economic Court of the CIS to which the Kyrgyz Republic applied on interpretation of Article 11 of the Moscow Convention and till the decisions of the Moscow City Arbitration Court on the application of the Kyrgyz Republic for cancellation of the earlier passed decisions.

In the hearing on March 03, 2014 this Motion was examined and the Ruling was passed to dismiss the Respondent’s Motion for postponement of the proceedings in the case till the end of the consultation process and/or rendering of the decision by the Economic Court of the CIS on interpretation of Article 11 of the Moscow Convention and till resolution in the Moscow City Arbitration Court

of the cases in respect of revocation of the earlier passed awards of the MCCI Arbitration.

On March 20, 2014 the MCCI Arbitration received from the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic the Motion for postponement of the arbitration proceedings taking into account the breakdown of coalition of the majority in the Parliament (Zhogorku Kenesh) of the Kyrgyz Republic. It was stated therein that the time limits of dispute examination in the MCCI Arbitration do not allow choosing a law company for protection of its rights, since they don't take into account long internal terms of approval and adoption of decisions related to selection of a law company by the government bodies of the Kyrgyz Republic.

Having examined the submitted Motion, the Arbitral Tribunal passed on March 25, 2014 the Ruling to dismiss the Respondent's Motion for postponement of the proceedings in the case for a later date and to continue the arbitration proceedings. The hearing on jurisdiction was scheduled for March 31, 2014.

At the hearing on March 31, 2014 the Arbitral tribunal analyzed the possibility to hear the issue on jurisdiction of the MCCI Arbitration in the absence of the Respondent's representatives.

Being guided by provisions of Articles 25 and 18 of the Law of the RF "On International Commercial Arbitration" and para.1 Article 46 of the Arbitration Rules of the MCCI, the Arbitral tribunal considered it possible to examine the issue of jurisdiction of the MCCI Arbitration over the dispute in the hearing on March 31, 2014 in the absence of the Respondent's representatives.

In its Ruling the Arbitral tribunal declared that the Statement of Claim was filed with the MCCI Arbitration in October 2013 and that, according to the Kyrgyz party, the work related to selection of a law firm for representation of the interests of the Kyrgyz Republic in the present proceedings was completed on January 30, 2014. Further the Ruling set forth that the Arbitral tribunal, proceeding from the necessity of a fair dispute resolution and the necessity to grant to each party every opportunity to state its case, had repeatedly satisfied the motions of the Kyrgyz Republic and postponed the hearing in the case. Taking into account the subjects of the dispute, one of which is the Kyrgyz Republic, which state sovereignty is greatly respected by the Arbitral tribunal and which has deep understanding for the issues covered in the Motion filed on March 20, 2014, and that the other party to the dispute is in particular a foreign investor which referred to the MCCI Arbitration for protection of its rights, and taking into account that the principle of the equality of the parties is anchored in Article 24 of the Arbitration Rules of the MCCI, the Arbitral Tribunal rendered the Ruling on dismissal of the Respondent's

Motion for postponement of the case hearing for a later date and on continuation of the arbitration proceedings.

On the possibility to hear the case in the hearing on May 29-30, 2014 in the absence of the Respondent's representatives

On April 26, 2014 the MCCI Arbitration received from the Centre of judicial representation of the Government of the Kyrgyz Republic the Motion dated April 25, 2014 for postponement of dispute resolution till examination by the Moscow City Arbitration Court of the application in respect of the jurisdiction of the arbitration court. The original Motion was delivered to the MCCI Arbitration on April 28, 2014.

On April 28, 2014 the mentioned Motion was sent per e-mail to the Claimants' representatives and was received by them on the same date.

Since this Motion of the Respondent was dated April 25, 2014, it was sent to the MCCI Arbitration on April 26, 2014 (in electronic form) and on April 28, 2014 (in paper form), it was therefore considered by the Arbitral tribunal in the hearing on April 29, 2014.

As far as the issues covered by that Motion are concerned, the Claimants' representative told the following. The Ruling of the MCCI Arbitration dated March 31, 2014 in the matter № A-2013/09 is not "a ruling of the arbitral tribunal on a preliminary issue". As provided for by paragraph 3 Article 16 of the Law of the RF "On International Commercial Arbitration", if the arbitral tribunal rules on the issue of jurisdiction as a preliminary issue that it has jurisdiction, any party may within 30 days upon receipt of the notice of such ruling request the arbitration court to pass a decision on this issue. In this case no such ruling was passed; on the contrary, the Ruling of March 31, 2014 stated that the issue of jurisdiction will be dealt with in the decision on the merits of the dispute. This Ruling is not the ruling on a preliminary issue in which respect in accordance with para. 3 Article 16 of the RF Law "On International Commercial Arbitration", "either party may request a decision of the arbitration court on this issue". "Pending the decision under the request of the party, the arbitral tribunal may continue the proceedings and render an award." Therefore, the Claimants' representatives insisted on examination of the dispute on the merits.

The Claimants hold that the Respondent's application to the Moscow City Arbitration Court does not comply either with the provisions of Article 235 of the Arbitral Procedural Code of the RF governing revocation of a preliminary ruling of the arbitral tribunal on jurisdiction. There was no such ruling passed in the present

case. Therefore, the Claimants' representatives believed that the Respondent's Motion should not be granted.

The Arbitral tribunal has considered the Respondent's Motion dated April 25, 2014 for postponement of dispute resolution till examination by the Moscow City Arbitration Court of the declaration on the lack of jurisdiction of the Arbitral tribunal, has heard the explanations of the Claimants' representatives and found the following. At the hearing on March 31, 2014 the issue of jurisdiction of the MCCI Arbitration over the present dispute was examined. In para. 1 the Ruling recognizes the jurisdiction of the MCCI to settle the present dispute. The Ruling sets forth that the reasons related to the jurisdiction of the MCCI Arbitration will be laid down in the decision on the merits of the case. The arbitrators were guided by para.1 Article 16 of the Law of the RF "On International Commercial Arbitration" according to which the arbitral tribunal may independently pass a ruling on its jurisdiction, as well as by para.3 Article 3 of the MCCI Arbitration Rules according to which the arbitral tribunal independently decides on its jurisdiction over the dispute submitted for its examination, including where one of the parties objects to arbitration proceedings due to the lack or invalidity of an arbitration agreement.

Therefore, recourse of the Respondent to the Moscow City Arbitration Court does not prevent the MCCI Arbitration from resolution of the dispute on the merits. Moreover even if the ruling on the preliminary issue was rendered in the present situation (which is not the case), according to para.3 Article 16 of the RF Law "On International Commercial Arbitration", pending the decision under the party's request, the arbitral tribunal may continue the proceedings and pass an award. Thus, the Respondent's motion for postponement of the dispute resolution till examination by the Moscow City Arbitration Court of the declaration on the lack of jurisdiction of the arbitration court should not be satisfied and the arbitration proceedings can be conducted on the merits.

Analyzing the arguments of the Respondent concerning the choice of a law firm for protection of its interests, the Arbitral tribunal holds that the Statement of Claim which contains the entire claims of the Claimants with their legal and economic substantiation was sent to the Respondent on October 30, 2013 and that the Respondent had almost five months to prepare its Statement of Defence. The extended Statement of Claim was sent to the Respondent on February 03, 2014. In this statement additional evidence in support of the arguments adduced in the Statement of Claim was produced, legal grounds and economic evaluation of the

raised claims were not changed. At the request of the Respondent examination of the case was repeatedly postponed. The Arbitral tribunal stated that the Centre of judicial representation was functioning under the Government of the Kyrgyz Republic which was set up by Resolution of the Government of the Kyrgyz Republic dated February 12, 2014 № 89. The Centre is a single body which coordinates the issues of protection of interests of the Government of the Kyrgyz Republic as well as of the Kyrgyz Republic in international and local judicial bodies. The Centre is authorized to represent the interests of the Government of the Kyrgyz Republic and of the Kyrgyz Republic in international and local judicial bodies. Thus, beginning from February 12, 2014 the protection of interests of the Kyrgyz Republic could be carried out by the mentioned Centre and did not depend solely on the choice of the law firm.

Basing on the foregoing and being guided by para.1 Article 46 of the MCCI Arbitration Rules, the Arbitral tribunal considered it possible to examine the case on the merits in the hearings on April 29-30, 2014 in the absence of the Respondent's representatives.

2. The law applicable to establishment of the jurisdiction of the MCCI arbitration to settle this dispute – Lex arbitrii

In view of the specificity of disputed relations which arose between the parties to the present dispute and taking into account that the findings on the jurisdiction of the Arbitration at the Moscow CCI should be made on the basis of the Convention for the Protection of Investor's Rights dated March 28, 1997 (the Moscow Convention) and the Law of the Kyrgyz Republic dated March 27, 2003 the Arbitral tribunal considers it necessary to examine the issue of the law applicable to the disputed relations. This is especially important in the context of recourse of the Kyrgyz Republic to consultations between the states-parties to the Moscow Convention and filing of the application for interpretation of the Moscow Convention with the Economic Court of the CIS, as stated in the Respondent's Motion received by the Arbitration on February 28, 2014.

The Convention for the Protection of Investor's Rights has been ratified by the Kyrgyz Republic without any reservations or declarations which means that the sovereign will of the Kyrgyz Republic was to recognize this Convention as binding for it to the full extent. The Kyrgyz Republic has assumed the obligation to implement this Convention in the whole territory falling under its jurisdiction.

The dispute between the parties arose between the Claimants - the company “Stans Energy Corp.”, which commercial enterprise is located in Canada, and the subsidiary “Kutisay Mining” LLC set up by the above mentioned company, which commercial enterprise is located in the Kyrgyz Republic, - and the Respondent - the Kyrgyz Republic.

When qualifying the Claimants as investors the Arbitral tribunal was guided by the provisions of the Convention for the Protection of Investor’s Rights dated March 28, 1997 and the norms of the Law of the Kyrgyz Republic “On Investments in the Kyrgyz Republic” dated March 27, 2003 as subsequently amended and supplemented.

Definition of Investor under the Convention for the Protection of Investor’s Rights dated March 28, 1997

According to definitions contained in Article 1 of the Convention for the Protection of Investor’s Rights, investor is, at first, a state, legal or natural person investing its own, borrowed or raised funds in the form of investments. Second, investments are financial and tangible assets invested by investor into different objects of activity as well as the rights to material and intellectual property with a view to gain profit (income) or achieving a social effect, unless they are not withdrawn from the circulation or unless their circulation is not limited in accordance with the national legislation of the Parties. As defined in Article 3 of the same Convention, as investors may act states, legal and natural person of both the Parties and third countries, unless otherwise provided for by the national legislation of the Parties.

As stipulated in Article 2 of the Convention for the Protection of Investor’s Rights, the rules defined in the Convention shall apply in the case if the subjects of legal relations of two and more states participate in the investment process.

Thus, the Convention for the Protection of Investor’s Rights is intended to regulate the relations in which the investors from two or more states participate, irrespective of whether they are persons of the member states to the Convention or the persons of third countries.

Definition of Investor according to the Law of the Kyrgyz Republic “On Investments in the Kyrgyz Republic”

According to Article 1 of the Law of the Kyrgyz Republic, investor is a subject of investment activity investing its own, borrowed or raised funds in the form of investments.

Domestic investor means a legal entity or natural person of the Kyrgyz Republic, a foreign citizen and person without citizenship having the status of a resident in the Kyrgyz Republic and engaged in investment activity in the territory of the Kyrgyz Republic.

A foreign investor means any natural person or legal entity which is not a domestic investor investing into the economy of the Kyrgyz Republic, including: a legal entity set up and registered in accordance with the legislation of a foreign state or set up with foreign participation, i.e. incorporated under the legislation of the Kyrgyz Republic, entirely owned by one or more foreign natural, legal persons.

Claimants in the present case as foreign investors

The Claimants in the present case are the company "Stans Energy Corp." which is a legal entity under the legislation of Canada as well as the Limited Liability Company "Kutisay Mining" LLC which is a limited liability company under the legislation of the Kyrgyz Republic set up by a subsidiary of the first Claimant – "Stans Energy KG" LLC. Since "Kutisay Mining" LLC is established by the company "Stans Energy Corp." through "Stans Energy KG" LLC and is fully owned by the company "Stans Energy Corp.", therefore due to Article 1 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic", "Kutisay Mining" LLC is recognized as a foreign investor. In confirmation of ownership of "Kutisay Mining" LLC in the hearing dated April 29, 2014 the documents were submitted at the request of the Arbitral tribunal, in particular tax accounts of the company "Stans Energy Corp." publicly available in Internet, and this fact was attested by G.A. Savchenko who is the head of both the subsidiary and the granddaughter company.

According to Article 3 of the Convention for the Protection of Investor's Rights, as investors may act states, legal and natural person of both the Parties to the Convention and third countries, unless otherwise provided for by the national legislation of the Parties. Since according to the national legislation of the Kyrgyz Republic (Article 1 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic") the company "Stans Energy Corp." and the Limited Liability Company "Kutisay Mining" LLC are foreign investors, therefore the law applicable to determination of the jurisdiction of the MCCI Arbitration over the present dispute will be the Convention for the Protection of Investor's Rights and the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic".

The Claimants have applied to the MCCI Arbitration which, according to Article 1 of the Regulations approved by the Order of the President of the Moscow CCI dated July 20, 2012 № 20, is a permanent arbitration institution (court of referees) operating in accordance with the Federal Law "On Arbitration Courts in the Russian Federation" and the Law of the Russian Federation "On International Commercial Arbitration".

In this case the Law of the Russian Federation "On International Commercial Arbitration" dated July 1993 will be lex arbitrii.

3. The law applicable to resolution of the issues related to the merits of the case

Since the dispute which arose between the parties is the dispute about foreign investments, basic regulatory acts for its resolution are international conventions and national legislation. Applicable in the present case are the Convention for the Protection of Investor's Rights dated March 28, 1997 ratified by the Kyrgyz Republic, and the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" dated March 27, 2003 № 66 as subsequently amended and supplemented.

4. On the jurisdiction of the MCCI Arbitration to settle the present dispute

In respect of the jurisdiction of the MCCI Arbitration to resolve the dispute which arose between the Parties the Arbitral tribunal has concluded as follows.

According to Article 7 of the Convention for the Protection of Investor's Rights dated March 28, 1997, relations connected with making investments and the related activity of investors are governed by:

- the Convention for the Protection of Investor's Rights dated March 28, 1997,
- the national legislation of the states-participants to the Convention for the Protection of Investor's Rights dated March 28, 1997,
- international treaties parties to which are signatories to the Convention for the Protection of Investor's Rights dated March 28, 1997.

According to Article 11 of the Convention for the Protection of Investor's Rights disputes related to investment making under the present Convention shall be settled by the courts or arbitration courts of the countries – participants to the

disputes, by the Economic Court of the Commonwealth of Independent States and/or other international courts or **international arbitration courts**.

A similar procedure is provided for by the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic". According to Article 1 of the Law, an investment dispute shall be settled according to any applicable procedure agreed in advance between an investor and the state bodies of the Kyrgyz Republic which does not **exclude the use by the investor** of other remedies **in accordance with the legislation of the Kyrgyz Republic.** It follows from this provision that the investor has the right to use other remedies provided for by the legislation of the Kyrgyz Republic.

Para.2 Article 18 of this Law provides for the right of a party to the dispute **to have recourse to arbitration or international ad hoc arbitration** constituted under the Rules of the UN Commission on International Trade Law (literal text of para.2 Article 18: unless in the dispute between a foreign investor and a state body **either party requests to examine the dispute in accordance with one of the following procedures by way of application to**: …b) **arbitration** or international ad hoc arbitration (commercial court) set up in accordance with the arbitration rules of the UN Commission on International Trade Law).

I.e. according to Article 18 of the Law "On Investments in the Kyrgyz Republic" a party to the dispute may apply to arbitration or to the above mentioned international ad hoc arbitration.

When interpreting Article 11 of the Convention for the Protection of Investor's Rights and Article 18 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" the Arbitral tribunal took into account the Linguistic Opinion of the experts Ivanov L.Yu. and Arkhipova M.N. dated March 06, 2014 and the Expert Opinion of the Doctor of Law, Professor K.M. Ilyasova dated March 12, 2014, which were submitted by the Claimants.

In the Linguistic Opinion the experts distinguish between the terms "arbitration" and "international ad hoc arbitration (commercial court)" constituted under the arbitration rules of the United Nations Commission on International Trade Law and they arrive at the conclusion that the term "arbitration" used in para.2 Article 18 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" means any international arbitration with exception of international ad hoc arbitration set up in accordance with the arbitration rules of the UN Commission on International Trade Law.

In respect of interpretation of Article 18 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" in the Expert Opinion the conclusion is made that this article provides for the right of an investor to apply, along with the International Centre for Settlement of Investment Disputes (ICSID) and international ad hoc arbitration (commercial court) set up in accordance with the arbitration rules of the UN Commission on International Trade Law, to any international arbitration.

Concerning interpretation of Article 11 of the Convention for the Protection of Investor's Rights the Expert Opinion sets forth that the provisions of this Convention are formulated mandatory and do not require further specification through other international agreements or the agreement of the parties to a dispute. Should the arbitration body not named in this article be specified under the mentioned article, there would be a phrase "agreed by the parties to the dispute", "by agreement of the parties", etc.

Thus, the international treaty to which the Kyrgyz Republic is a participant – the Convention for the Protection of Investor's Rights – and the national legislation – the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" – provide for the possibility of recourse of an investor to international arbitration leaving at its discretion the choice of such arbitration. Therefore, the application of the Claimants to the Arbitration at the Moscow CCI is legitimate.

According to Article 1 of the Regulations approved by the Order of the President of the Moscow CCI dated July 20, 2012 № 20, the MCCI Arbitration is a permanent arbitration institution (court of referees) operating in accordance with the Federal Law "On Arbitration Courts in the Russian Federation" and the Law of the Russian Federation "On International Commercial Arbitration". The Arbitration is a legal successor of the Arbitration Court at the Moscow Chamber of Commerce and Industry established in 1993 and renamed from March 1, 1995 into the Commercial Arbitration at the Moscow Chamber of Commerce and Industry.

According to Article 1 of the Regulations of the MCCI Arbitration the MCCI arbitration is a permanent arbitration institution (court of referees) set up by the Moscow CCI for settlement of disputes out of contractual and other civil law relations in accordance with its competence.

The competence of the MCCI Arbitration is determined in para. 1.3 Article 3 of the Rules, according to which disputes in the sphere of investment activity can be referred to the MCCI Arbitration.

The Arbitral tribunal was constituted in accordance with the Rules, in accordance with Article 16 of the Rules all arbitrators submitted their declarations

of consent, impartiality and independence. The parties made no comments in respect of formation of the Arbitral tribunal and the candidacies of arbitrators.

With this in view and being guided by Article 2 of the Regulations on the MCCI Arbitration, the Arbitral tribunal concludes that the MCCI Arbitration has jurisdiction to examine the present dispute.

5. Claimants' claim for compensation of the investment value

Having examined the Claimants' claim for compensation of the value of investments, the Arbitral tribunal found the following:

The Claimants have made investments into the economy of the Republic of Kyrgyzstan.

Investments are defined in Article 1 of the Convention for the Protection of Investor's Rights dated March 28, 1997:

Investments are financial and tangible assets invested by investor into different objects of activity as well as the transferred rights to material and intellectual property with a view of gaining profit (income) or achieving a social effect, unless they are not withdrawn from the circulation or unless their circulation is not limited in accordance with the national legislation of the Parties.

According to Article 7 of the mentioned Convention, relations connected with making investments and the related activity of investors are governed also by the national legislation of the member states of the Convention.

According to para. 1 Article 1 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic":

"Investments mean tangible and intangible contributions of all kinds of assets owned or controlled, directly or indirectly, by investor into the objects of economic activity with a view of gaining profit and (or) achieving any other useful effect 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 debenture liabilities;
- non-property rights (inter alia, the right to intellectual property including goodwill, copyrights, patents, trade marks, industrial designs, technological processes, trade names and know-how);
- any right to activity based on a license or otherwise permitted by state bodies of the Kyrgyz Republic;

- concessions based on the legislation of the Kyrgyz Republic, including concessions for prospecting, development, mining or exploitation of natural resources of the Kyrgyz Republic;
- profit and revenue received from investments and re-invested in the territory of the Kyrgyz Republic;
- other forms of investments that are not prohibited by the legislation of the Kyrgyz Republic.

A form in which property is invested, or any change in this form shall not influence its nature as investments."

In the present case the Canadian company "Stans Energy Corp." invested funds into:

1) the shares of JSC "Kutisay Mining" set up in the territory of the Kyrgyz Republic. This open joint-stock company was reorganized into the limited liability company – "Kutisay Mining" LLC. Acquisition of shares of this company meant acquisition of the company itself and at the same time acquisition of the license for mining of the rare-earth metals issued to this company.

The monetary funds were per se transformed into the license – the only asset of "Kutisay Mining" LLC after its acquisition and reorganization.

The world law enforcement practice qualifies licenses as investments which is evidenced by the ICSID cases *Tecmed v Mexico*[34] and *Middle East Cement v Egypt*[35].

2) into the property. General Director of "Kutisay Mining" LLC Savchenko G.A. confirmed that except for the license the acquired company had no other assets.

3) into the activity of the company (salaries, etc.).

Thus, there were investments in monetary form as well as investments which changed their form and were transformed into the assets in a tangible form or in a form of the license, which does not change their legal characteristics as investments.

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[34] See Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States, May 29, 2003* (ICSID case No. ARB(AF)/00/2).

[35] See Award in *Middle East Cement Shipping and Handling Co. v. Egypt*, April 12, 2002 (ICSID case No. ARB/99/6).

Expropriation

Having examined the materials submitted by the Claimants and having heard the explanations of the Claimants' representatives, the Arbitral tribunal held as follows.

Definition of expropriation

As provided for in Article 7 of the Convention for the Protection of Investor's Rights dated March 28, 1997, the relations in connection with making investments and the related activity of investors are governed by this Convention, the national legislation of the Parties and international treaties to which they are the parties.

International law definition of the term "expropriation" is found in Article 11(a) of the 1985 Seoul Convention Establishing the Multilateral Investment Guarantee Agency:

"ii) Expropriation and similar measures

any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment… ."

Thus, expropriation means the measures which:

1) come from the host state;

2) deprive the Investor of the ownership of its investment, control over it or a substantial benefit therefrom.

According to Article 6 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic", expropriation means nationalization, requisition or other equivalent measures, including action or omission on the part of the competent state bodies of the Kyrgyz Republic which resulted in compulsory seizure of the investor's funds or its deprivation of the possibility to use the results of investments.

Actions of the Kyrgyz Republic

On June 26, 2012 the Committee for Development of Economic Industries of the Parliament of the Kyrgyz Republic (Zhogorku Kenesh) passed a resolution obligating the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic to cancel the license agreement № 3 dated June 15, 2012 with "Kutisay Mining" LLC in respect of "Kutessay II" deposit.

Thereafter, the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic ceased to perform its obligations towards "Kutisay Mining" LLC and in such a way paved the way for termination of operations of "Kutisay Mining" LLC in respect of mining of "Kutessay II" deposit.

This resulted into the following acts of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the General Prosecutor's Office of the Kyrgyz Republic.

(1) Refusal to consider the programs of works at the deposit

(the letter dated March 12, 2013 of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic addressed to "Kutisay Mining" LLC);

(2) Refusal to conduct state ecological expert examination

(the letter dated March 12, 2013 of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic addressed to "Kutisay Mining" LLC);

(3) Refusal to re-execute the license agreement

(the letter dated April 8, 2013 of the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic addressed to "Kutisay Mining" LLC);

(4) Judicial recourse

On April 04, 2013 the General Prosecutor's Office of the Kyrgyz Republic filed an application with the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic for invalidation of the Minutes of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company "Kutisay Mining" dated December 21, 2009 №1736-N-09.

The Kyrgyz Republic declared that it was necessary to check to what extent the regulatory legal act on which basis it granted the right to JSC "Kutisay Mining" to obtain the license (Resolution № 725) before putting up its shares for sale at the auction complied with the Kyrgyz legislation at the moment of its adoption.[36]

5) Interim measures

On the basis of the application of the General Prosecutor's Office of the Kyrgyz Republic for injunctive measures aimed at securing the claim the judge of

[36] On March 19, 2014 the Inter-district court of Bishkek (judge Nurmanbetov E.B.) satisfied the application of the General Prosecutor's Office of the Kyrgyz Republic and declared invalid the Minutes №1736-N-09 of direct negotiations between the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic and the Open Joint-Stock Company "Kutisay Mining" dated December 21, 2009.

"Kutisay Mining" LLC disagreed with the decision of the Inter-district court of the city of Bishkek of March 19, 2014 and filed an appeal against it which is currently pending in the court.

the Inter-district court of the city of Bishkek Nurmanbetov E.B. ruled on April 15, 2013 that the following injunctive measures can be applied in respect of “Kutisay Mining” LLC: “To bar “Kutisay Mining” LLC, private persons, state bodies and their officials from making actions related to re-execution of the license agreement as the supplement; extension thereof, issue of the next license supplement; approval of projects, reports, work programs, feasibility studies; calculating the payment for withholding the Licenses № 2488 ME and № 2489ME for the right to use subsoil at the deposit “Kutessay II”, as well as the actions aimed at transfer or alienation of the right of subsoil use at the deposit “Kutessay II” to third parties, including alienation of a share in the charter capital of the company”.

The petition of “Kutisay Mining” LLC and Ak-Tyuz ajyil okmotu (rural administration) to repeal the interim measures for securing the claim was completely dismissed by Decision of the Inter-district court of the city of Bishkek of May 29, 2013.

Legal qualification of the actions of the Kyrgyz Republic

As provided for in Article 8 of the Convention for Protection of Investor’s Rights, investments in the territory of the Parties shall enjoy “unconditional legal protection” which shall be secured by the present Convention, national legislation of the parties and international treaties to which they are the participants. In Article 9 of the Convention the guarantees of protection of investments against nationalization, requisition, decisions and actions (omission) of the state bodies and officials infringing upon the rights of investors are fixed.

According to Article 6 of the Law of the Kyrgyz Republic “On Investments in the Kyrgyz Republic”, investments shall not be subject to expropriation - nationalization, requisition or other equivalent measures, including action or omission on the part of the competent state bodies of the Kyrgyz Republic which resulted in compulsory seizure of the investor’s funds or its deprivation of the possibility to use the results of investments.

Having analyzed the above mentioned acts and taking into account the practice of international investment arbitration, the Arbitral tribunal has found that prohibition to re-execute the license agreement as supplement, prohibition to extend it, to issue the next license agreement means a prohibition to carry out subsoil use operations which can not be carried out without these documents. In other words, the mentioned actions mean an actual deprivation of the Claimants of the right to carry out subsoil use activity, the Investor’s loss of control over its investments and the loss of future revenues from its investments.

Thus, there is a violation of the guarantees of protection against expropriation granted by the national legislation of the Kyrgyz Republic (Article 6 of the Law "On Investments in the Kyrgyz Republic").

This conclusion is confirmed by the investment arbitration practice according to which the decisions of state bodies by which the licenses are directly or indirectly withdrawn and the permits are cancelled which are necessary for a foreign investor to do business in the territory of the state shall be considered as expropriation.

The Arbitral tribunal considers reasonable to look at the case Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States[37], in which it was found that a refusal to extend the license constituted an act of expropriation. The arbitrators in that case noted that not only compulsory seizure by a state of movable or immovable property of the investor but also the actions or conduct not directly purporting the deprivation of the investor of its property or rights but having exactly such consequences in practice should be recognized as expropriation. In order to determine, whether the refusal to extend the license was a measure equivalent to expropriation, it is necessary to answer first of all the question of whether the claimant was substantially deprived, as a result of such decision, of the possibility to use its investments, since the rights related to its investments, such as the right to derive revenue from the landfill operation, ceased to exist. In other words, whether the respective property had lost its value for the investor as a result of actions of the state, and if so, to what extent then?[38] The arbitrators specifically emphasized that in accordance with international law the owner is considered to be deprived of its property also in that cases when its use or income generation from its use becomes impossible, even if in purely legal terms the ownership to such property remains inviolable. (para. 115 of the Award).

When examining the case Middle East Cement Shipping and Handling Co. v. Egypt [39] the arbitral panel noted: in case of adoption by the state of the measures which result in deprivation of the investor of the possibility to gain profit from its investments, even if the investor nominally remains their owner, these are the measures which consequences are equal to expropriation. In fact, the investor is deprived of the value of its investments as a result of such measures.[40]

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[37] See Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States*, May 29, 2003 (ICSID case No. ARB(AF)/00/2).

[38] See para.115 of the Award in *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States,* May 29, 2003 (ICSID case No. ARB(AF)/00/2).

[39] See Award in *Middle East Cement Shipping and Handling Co. v. Egypt*, April 12, 2002 (ICSID case No. ARB/99/6).

[40] See para.107 of the Award in *Middle East Cement Shipping and Handling Co. v. Egypt,* April 12, 2002 (ICSID case No. ARB/99/6).

Actions of the Kyrgyz Republic as violation of fair treatment

In the preamble to the Convention for the Protection of Investor's Rights dated March 28, 1997 it is emphasized that effective protection of the rights of an investor is a prerequisite for the development of the Parties' economies.

Similarly, the preamble to the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" defines the basic principles of the state investment policy aimed at improvement of the investment climate in the Republic and encouragement of domestic and foreign investments by according fair, equitable treatment to the investors and the guarantees of protection of the investments into the economy of the Kyrgyz Republic raised by them.

Having analyzed the above mentioned actions of the state bodies and officials of the Kyrgyz Republic, the Arbitral Tribunal concluded that the principles laid down in the Law "On Investments in the Kyrgyz Republic" were not complied with, which found its reflection in violation through the above mentioned actions of legitimate expectations of the Claimants as Investors and in the failure to secure fair treatment for the Claimants' investments.

Claim for an adequate compensation of the investment value

Legal grounds of the claim for payment an adequate compensation of the investment value

The principal legal basis for compensation of damages to investors are the rules fixed in Article 9 of the Convention for the Protection of Investor's Rights dated March 28, 1997 which stipulate that investments are not subject to nationalization and can not be exposed to requisition, except for the cases where such measures are permitted with payment of an adequate compensation. According to Article 7 of the mentioned Convention, legal regulation in this sphere takes place on the basis of international treaties of the parties and their national legislation.

According to paragraphs 1-2 Article 6 of the Law of the Kyrgyz Republic "On Investments in the Kyrgyz Republic", investments shall not be subject to expropriation – nationalization, requisition or other equivalent measures, including actions or omission on the part of the competent state bodies of the Kyrgyz Republic which resulted in compulsory seizure of the investor's funds or its deprivation of the possibility to use the results of investments with observation of a

due process of law and payment of a timely, proper and real compensation for damages, including the lost profit.

Compensation should be equivalent to a fair market value of the expropriated investment or a part thereof, including the lost profit, directly as of the date of the decision on expropriation.

In 2001 the UN Commission on International Trade Law adopted the Draft Articles on the Responsibility of States for Internationally Wrongful Acts which represent a codification of customary rules of law on international responsibility of states (which gained wide support in the doctrine of contemporary investment law[41]).

In accordance with Chapter 2 Part 2 of this document[42] the forms of compensation for harm are restitution (reinstatement), payment of compensation equal to the value of investments as of the date of expropriation (adequate compensation), payment of additional compensation (reimbursement for the lost profit) and satisfaction (compensation for moral damages).

Basing on the provisions of the Convention for the Protection of Investor's Rights and the Law "On Investments in the Kyrgyz Republic" and taking into account the available evidence on file, the Arbitral tribunal considers legitimate the claim of the Claimants for compensation of damages as a result of the actions committed by the Kyrgyz Republic in respect of the Claimants.

Pecuniary valuation of the Claimants' claims

In the Statement of Claim the Claimants request the MCCI Arbitration to examine the present dispute, to declare the conduct of the Respondent as internationally wrongful and to obligate the Respondent:

- to compensate the Claimants for the value of investments in the amount specified in the Appraisal Report as a measure of liability for expropriation of investments as well as in connection with the fact that the fair treatment of investments was violated.

The specified amount is a measure of liability for expropriation and at the same time the maximum amount of liability for refusal of "unconditional

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[41] See Karl-Heinz Bockstiegel. Applicable law to State responsibility under the Energy Charter Treaty and other Investment Protection Treaties. In the book Investment Arbitration and the Energy Charter Treaty, Clarisse Ribeiro, Juris Net, pp. 257-261.

[42] See Chapter 2 (Articles 34-39) Part 2 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Report of the Commission on International Trade Law. United Nations General Assembly, Official Records of the 56th session, supplement №10. A/56/10. UN, New York, 2001.p.37-38.

protection”. It should be recovered in case of establishment by the Arbitral tribunal of any of the above mentioned facts or their totality;

- to pay compound interests on the amount of damages determined by the Arbitral tribunal, with monthly capitalization, as of the date of the award till the date of payment at a refinancing rate of the National Bank of the Kyrgyz Republic;

- to reimburse the Claimants for the arbitration costs, including the costs of legal representation of the Claimants’ interests during examination of the present dispute in arbitration.

The Claimants did not raise the claim for payment of interests in the course of arbitration proceedings due to fact that the arbitration fee was not paid on that amount.

It follows from the materials of the case that initially investments were made in a monetary form, however subsequently they substantially changed their form. As provided for by para.1 Article 1 of the Law of the Republic “On Investments in the Kyrgyz Republic”, “a form in which the assets are invested or a change of this form does not affect the character as investments”.

Definition of the value of investments

The Arbitral tribunal found that according to Article 10 of the Convention for the Protection of Investor’s Rights dated March 28, 1997 the procedure of determination of the amount of compensation and its payment shall be established by the national legislation of the recipient country.

As provided for by paragraphs 2 and 3 of Article 6 of the Law of the Kyrgyz Republic “On Investments in the Kyrgyz Republic”, compensation shall be equivalent to a fair market value of the expropriated investment or a part thereof, including the lost profit, immediately as of the date of the decision on expropriation. The compensation should be actually realizable and paid within the time limits agreed upon by the parties and in a freely convertible currency.

As follows from the materials of the case, the Claimants claim compensation of the following types of Investments:

1) a fair market value of the right to use subsoil (formalized as the license) as of the date of expropriation. According to the Appraisal Report this amount made up 107.781.000 USD.

2) a fair market value of the property of “Kutisay Mining” LLC as of the date of expropriation (fixed assets – paragraphs 1-5 in the Table on page 2 of Exhibit №2 to Appraisal Report), as well as of the investments into acquisition of a 100% shareholding in the authorized capital of “Kashkinsky Plant of Rare-Earth Elements” LLC (para. 12);

3) monetary funds which constituted expenses (industrial, general, administrative, charitable), including tax (bonus) on acquisition of the license (paragraphs 6-11 in the Table on page 2 of Exhibit № 2 to Appraisal Report). These costs were directed at carrying out the activity under the license for development of the deposit, i.e. they were invested.

The amount of the claimed compensation under the second and third points is determined in the Appraisal Report and is given in more detail in the Exhibit № 2 to the Report and made up: for the period from January 1, 2010 till June 25, 2012 - 7.499.000 USD; for the period from June 26, 2012 till September 1, 2013 - 2.573.000 USD.

Thus, the total amount of claims makes up 117.853.000 USD.

The market value of the right to use the “Kutessay II” rare-earth elements deposit as of the date of the license suspension and of a total amount of direct costs incurred by the company in the course of implementation of the project of development of the “Kutessay II” deposit was determined by the “Al-Star” Center of Property Appraisal and Expert Examination” LLC (the city of Bishkek) and signed by the General Director N.S. Ignatenko.

In the course of carrying out their work the appraisers were guided by the requirements of the following regulatory documents: the Appraisal Standards binding for application by the entities of appraisal activity in the Kyrgyz Republic approved by the Resolution of the Government of the Kyrgyz Republic № 217 dated April 3, 2006, Provisional regulations on the activity of appraisers and appraisal organizations in the Kyrgyz Republic approved by the Resolution of the Government of the Kyrgyz Republic № 537 dated August 21, 2003, and International Appraisal Standards (IAS), 8th edition, 2007.

The Report № 01-0913 dated September 05, 2013 is drafted in accordance with the requirements of the mentioned regulatory documents, on a high professional level and does not raise any doubts as to reliability of the conclusions contained therein.

However, in the opinion of the Arbitral tribunal, charity is a voluntary gratuitous contribution and the charity related costs of “Kutisay Mining” LLC in the amount of 114.059,70 USD can not be considered as investments into the objects of economic activity and their value shall not be compensated.

Thus, 117.738.940, 30 USD should be paid to the Claimants as compensation.

6. Claimants' claim for compensation of costs related to arbitration fee

The Arbitral tribunal held that when filing the Statement of Claim the Claimants paid the arbitration fee (including registration fee) in the amount of 159.128,00 USD.

Since in connection with violation by the Respondent of its obligations the Claimants were forced to apply to the MCCI Arbitration for protection of the violated right and since the claims of the Claimants are satisfied only partially, the Arbitral tribunal is guided by para.1 Article 23 of the Rules, according to which the arbitration costs shall be distributed between the Parties in proportion to the satisfied and dismissed claims. Since the claims of the Claimants are satisfied not in the amount claimed in the Statement of claim but in the amount of 117.853.000 USD, the Respondent shall pay the Claimants 158.975,24 as compensation for the arbitration fee costs.

7. Claimants' claim for compensation of costs related to payment for the services of legal representatives

As far as the Claimants' claim for compensation of costs related to payment for the services of legal representatives in the present case in the amount 308.142,50 USD is concerned, the Arbitral tribunal found as follows.

As proof of the costs incurred by the Claimants for payment for the services of legal representatives they have submitted the invoice and the acceptance certificate dated September 19, 2013, payment order dated September 30, 2013; the invoice and the acceptance certificate dated November 27, 2013, payment order dated November 28, 2013; the invoice and the acceptance certificate dated December 27, 2013, payment order dated January 22, 2014; invoice dated January 24, 2014, acceptance certificate dated January 27, 2014, payment order dated January 29, 2014; the invoice and the acceptance certificate dated February 28, 2014, payment order dated March 3, 2014; the invoice and the acceptance certificate dated April 17, 2014, payment order dated April 21, 2014; the invoice and the acceptance certificate dated May 2, 2014, payment order dated May 7, 2014; other costs – the invoice of the "Al-Star "Centre of Property Appraisal and

Expert Examination" LLC № 0000052 dated October 23, 2013, acceptance certificate dated October 23, 2013, payment order № 120 dated October 28, 2013; invoice of the "Al-Star "Centre of Property Appraisal and Expert Examination" LLC № 0000030/1 dated May 22, 2014, certificate dated May 5, 2014, cash payment voucher № C0000000206 dated May 22, 2014; receipt № 0000373 dated October 12, 2013, bill from the hotel "Silk Road Lodge" dated October 16, 2013, receipt from the hotel "Silk Road Lodge" № 013829 dated October 18, 2013, cheque № 1565325 dated October 18, 2013; receipt № 0002529 dated July 19, 2013, bill from the hotel "Mandarin" № 161336, cheque № 018424 dated July 24, 2013; receipt to cash receipt voucher № 0124 dated March 28, 2014, cheque № 00155315 dated March 28, 2014, bill from the hotel "Mandarin" № 172936, cheque № 019482 dated April 8, 2014; invoice № 15926 dated April 22, 2014, bill from the hotel "Mandarin" № 174204 and № 174205; invoice № 574 dated May 27, 2014 and payment order.

The right of a party in which favour the award was passed to claim that the costs it incurred in connection with payment for the services of legal representatives be imposed on the other party is provided for in para.2 Article 23 of the MCCI Arbitration Rules and in para.4 Article 8 of the Schedule of Arbitration Costs.

Having assessed the activity of legal representatives of the Claimants and the volume of submitted materials in support of the raised claims, the Arbitral tribunal, taking account of the complexity of the case, holds that basing on the criterion of reasonableness and proportionality the Claimants' claim for reimbursement of costs, including those related to protection of its interests by legal representatives, raised on the basis of Article 23 of the Rules and para.4 Article 8 of the Schedule of Arbitration Costs, is reasonable and substantiated and should be satisfied in full in the amount of 308.142,50 USD.

Within the time period fixed by the Arbitral tribunal the Respondent did not submit any comments regarding the Claimants' claim for reimbursement of costs, including the costs for payment for the services of legal representatives.

In view of the foregoing and being guided by Articles 50 and 51 of the Rules the MCCI Arbitration resolves:

Operative part of the award:

1. To dismiss the Motion dated April 25, 2014 for postponement of dispute resolution till examination by the Moscow City Arbitration Court of the declaration on the lack of jurisdiction of the arbitration court.

2. To acknowledge the jurisdiction of the MCCI Arbitration to examine the dispute in the action of the company "Stans Energy Corp." (Canada) and "Kutisay Mining" LLC (the Kyrgyz Republic) against the Kyrgyz Republic for compensation for the damages in the amount of 117.853.000 USD. In connection with this award to consider void para.1 of the Ruling of the MCCI Arbitration dated March 31, 2014.

3. To recover from the Kyrgyz Republic in favour of the company "Stans Energy Corp." (Province of Ontario, Canada) and "Kutisay Mining" LLC (the Kyrgyz Republic) 117.738.940,30 (one hundred seventeen million seven hundred thirty eight thousand nine hundred forty USD and thirty cents) in satisfaction of the principal claim, 158.975,24 USD (one hundred fifty eight thousand nine hundred seventy five USD and twenty four cents) as reimbursement for the Claimants' costs related to payment of the arbitration fee and 308.142,50 USD (three hundred eight thousand one hundred forty two USD and fifty cents) as reimbursement of the Claimants' costs for administration of the case. To dismiss the rest of the claim.

4. To dismiss the Claimants' claim for recovery of compound interests without hearing on the merits.

This award is executed and singed in four authentic counterparts, one of which is to be stored on file in the MCCI Arbitration, one is for the Claimants, one – for the Respondent.

Presiding Arbitrator **M.Z. Pak**

Arbitrators

N.G. Vilkova **L.G. Balayan**

Total bound, numbered and sealed
109 pages
Executive secretary of the MCCI Arbitration
Dedenkulova D.V.