INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

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

V.

KYRGYZ REPUBLIC

(ICSID CASE NO. ARB(AF)/16/4)

I hereby certify that the attached documents are true copies of the Tribunal's Award dated May 17, 2023, and the Partial Dissenting Opinion of Prof. Zachary Douglas KC.

Meg Kinnear
Secretary-General

Washington, D.C., May 17, 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

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

Claimants

and

KYRGYZ REPUBLIC

Respondent

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

AWARD

Members of the Tribunal
Mr. Bernardo Cremades, President
Mr. Gary Born, Arbitrator
Mr. Zachary Douglas KC, Arbitrator

Secretary of the Tribunal
Mr. Alex B. Kaplan

Date of dispatch to the Parties: 17 May 2023

REPRESENTATION OF THE PARTIES

Representing JSC Tashkent Mechanical Plant:

Mr. Normurod Xafizov

Representing JSCB Asaka:

Mr. Navfal Pulatov
Ms. Anna Sukhankova
Mr. Azamat Suropov

Representing JSCB Uzbek Industrial and Construction Bank:

Mr. Bakhriddin Norkhujaev
Mr. Odil Sulaymonov
Mr. Bakhtiyor Usmanov

Representing National Bank for Foreign Economic Activity of the Republic of Uzbekistan:

Ms. Gulnara Ismailova
Mr. Erkinjon Turabov
Mr. Shukhrat Yuldashev

Representing JSC Tashkent Mechanical Plant; JSCB Asaka; JSCB Uzbek Industrial and Construction Bank; National Bank for Foreign Economic Activity of the Republic of Uzbekistan:

Ms. Carolyn B. Lamm
Ms. Andrea J. Menaker
Ms. Kristen M. Young
Mr. Eckhard R. Hellbeck
Ms. Jennifer A. Ivers
Ms. Hannelore Z. Sklar
White & Case LLP
701 Thirteenth Street NW
Washington, DC 20005
United States of America

Representing the Kyrgyz Republic:

Mr. Bakaikhan Dzhunusov
Center for Court Representation of the Kyrgyz Republic
Erkindik Avenue 58 "A"
720040, Bishkek City,
Kyrgyz Republic

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GLOSSARY

Arbitration Rules	ICSID Rules Governing the Additional Facility for the Administration of Proceedings and the Arbitration (Additional Facility) Rules of 2006
BIT	Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, signed on 24 December 1996
C-[#]	Claimants' Exhibit
Cl. Mem.	Claimants' Memorial on the Merits dated 15 July 2020
Cl. POC	Claimants' Points of Clarification dated 9 July 2021
CL-[#]	Claimants' Legal Authority
Cl. Rep.	Claimants' Reply to Respondent's Counter-Memorial dated 15 September 2022
Claimants	JSC Tashkent Mechanical Plant, JSCB Asaka, JSCB Uzbek Industrial and Construction Bank, and National Bank for Foreign Economic Activity of the Republic of Uzbekistan
Decision on Jurisdiction	Decision on Bifurcated Preliminary Objections of 1 May 2019
Decision on Provisional Measures	Procedural Order No. 3 on the Claimants' Request for Provisional Measures of 22 July 2020
Default Order	Procedural Order No. 4 of 24 March 2021
Foreign Investment Law or FIL	Law No. 66 of the Kyrgyz Republic "On Investments in the Kyrgyz Republic"; the "Foreign Investment Law"
Hearing	Hearing the Merits held 24-25 May 2021

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Respondent's Exhibit
Re. Mem.	Respondent's Memorial dated 6 May 2022
RL-[#]	Respondent's Legal Authority
Respondent	Kyrgyz Republic
Tr. Day [#] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 13 February 2017

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted pursuant to the Additional Facility of the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**"), and on the basis of the Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, signed on 24 December 1996 (the "**BIT**") and Law No. 66 of the Kyrgyz Republic "On Investments in the Kyrgyz Republic" (the "**FIL**").

2. The claimants are JSC Tashkent Mechanical Plant, JSCB Asaka, JSCB Uzbek Industrial and Construction Bank, and National Bank for Foreign Economic Activity of the Republic of Uzbekistan ("**NBU**") (together, the "**Claimants**"). They are all companies organized under the laws of the Republic of Uzbekistan.

3. The respondent is the Kyrgyz Republic (the "**Respondent**").

4. The Claimants and the Respondent are collectively referred to as the "**Parties**" and individually as a "**Party**." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to the Claimants' allegation that the Respondent issued nationalization decrees on 4 April 2016 and 13 April 2016 and expropriated—without compensation—four resorts located in the Issyk-Kul lake region of the Kyrgyz Republic that they owned, operated, and managed, namely Resort Zolotiye Peski, Resort Binakar (later Resort Rokhat-NBU), Resort Dolinka (later Resort Dilorom) and Resort Yubileyny (later Resort Buston), which are collectively referred to as the "**Resorts**." The Claimants seek compensation for the alleged taking of the properties at issue. The Claimants also allege that, by expropriating their properties, the Respondent has breached the Fair and Equitable Treatment, the Full and Legal Protection, and the National Treatment provisions of the BIT.

II. PROCEDURAL HISTORY

6. On 20 July 2016, ICSID received a request for arbitration and application for access to the Additional Facility dated 20 July 2016 from the Claimants against the Kyrgyz Republic. In response to correspondence received from the Secretariat dated 2 August and 22 August 2016, the request was subsequently amended on 9 August 2016 and supplemented by letters of 9 August 2016 and 29 August 2016 (the "**Request**").

7. On 6 September 2016, the Secretary-General of ICSID approved access to the Additional Facility in accordance with Article 4 of the 2006 ICSID Rules Governing the Additional Facility for the Administration of Proceedings (the "**Additional Facility Rules**") and registered the Request, as amended, and supplemented, in accordance with Article 4 of the 2006 ICSID Arbitration (Additional Facility) Rules (the "**Arbitration (Additional Facility) Rules**").

8. The Parties agreed to constitute the Tribunal in accordance with Article 6(3) of the Arbitration (Additional Facility) Rules as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties.

9. The Tribunal is composed of Mr. Bernardo M. Cremades, a national of the Kingdom of Spain, President, appointed by agreement of the Parties; Mr. Gary B. Born, a national of the United States of America, appointed by the Claimants; and Mr. Zachary Douglas KC, a national of Australia, appointed by the Respondent.

10. On 13 February 2017, the Secretary-General, in accordance with Article 13(1) of the Arbitration (Additional Facility) Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Alex B. Kaplan, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

11. In accordance with Rule 21(1) of the 2006 ICSID Arbitration (Additional Facility) Rules, the Tribunal held a first session with the Parties on 27 April 2017 by video conference.

12. Following the first session, on 17 May 2017, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable arbitration rules would be the Additional Facility Rules and the Arbitration (Additional Facility) Rules, together referred to as the "**Arbitration Rules**", which are in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C.

13. Section 14.2 of Procedural Order No. 1 indicated that the Respondent may notify the Claimants and the Tribunal whether it intended to file preliminary objections within one week of the date of Procedural Order No. 1. If the Respondent notified the Claimants and the Tribunal of its intent to file preliminary objections, it was to be presumed that the proceedings would be bifurcated to decide those preliminary objections.

14. On 24 May 2017, the Respondent duly notified the Tribunal of its intention to file bifurcated preliminary objections on jurisdiction on or before 14 July 2017. The next day, on 25 May 2017, the Tribunal confirmed that it would decide the Respondent's preliminary objections on a bifurcated basis, though the Respondent was not precluded from raising additional preliminary objections after the submission of the Claimants' Memorial on the Merits.

15. On 12 July 2017, the Respondent submitted a request for a one-day extension of filing deadline for the Memorial on Preliminary Objections, which was subsequently granted by the Tribunal.

16. On 16 July 2017, the Respondent filed its Memorial on Preliminary Objections, accompanied by the following documents:

- Expert Report of Chynara Musabekova (both English and Russian versions);
- Exhibits R-0001 through R-0050; and
- Legal Authorities RL-0001 through RL-0051.

17. On 21 September 2017, the Claimants submitted a request for a two-day extension of the filing deadline for the Counter-Memorial. On the same day, the Respondent confirmed that it had no objection, provided that there is a corresponding extension for its Reply submission. Subsequently, the Tribunal granted the requests of both Parties.

18. On 25 September 2017, the Claimants filed their Counter-Memorial on Preliminary Objections, accompanied by the following documents:

- Expert Opinion of Mr. Temerbek Kenenbaev (both Russian and English versions);
- Exhibits C-0027 through C-0100; and
- Legal Authorities CL-0001 through CL-0078.

19. By letter of 26 September 2017, Mr. Gary B. Born disclosed that he had been approached by lawyers working at the law firm representing the Claimants to provide an independent expert report and asked whether any co-arbitrator or party had any objections before accepting this instruction. As requested by the Respondent, Mr. Born supplemented his disclosure by letter of 29 September 2017.

20. On 12 November 2017, the Respondent filed its Reply on Preliminary Objections, accompanied by the following documents:

- Second Expert Report of Chynara Musabekova (both English and Russian versions);
- Resubmitted Exhibits R-0003, R-0004, R-0008, R-0020, R-0028, R-0035, R-0037, R-0044;
- Exhibits R-0051 through R-0089; and
- Legal Authorities RL-0003, RL-0004, RL-0007, RL-0011, RL-0014, RL-0015 as well as Legal Authorities RL-0052 through RL-0084.

21. By letter of 12 December 2017, the Parties jointly requested that the Tribunal suspend the arbitral proceeding for a period of four months to facilitate settlement discussions.

22. On 14 December 2017, in consideration of the Parties' agreement, the Tribunal decided to suspend the arbitral proceeding for four months, i.e., until 14 April 2018. As a consequence of this suspension, the 21 December 2017 due date for the Claimants' Rejoinder on Preliminary Objections and the dates of the hearing on preliminary objections, i.e., 8-9 February 2018, in Paris were vacated.

23. By letter of 6 April 2018, the Parties jointly requested that the Tribunal extend the suspension of the arbitral proceeding for an additional period of three months to permit the Parties to continue settlement discussions.

24. On 12 April 2018, in consideration of the Parties' agreement, the Tribunal decided to suspend the arbitral proceeding for an additional three months.

25. By letter of 11 July 2018, the Tribunal inquired from the Parties as to the status of the suspension, which was scheduled to end on 14 July 2018. On 13 July 2018, the Claimants indicated that efforts were underway to agree with the Respondent on whether the suspension would remain in force or conclude.

26. By letter of 21 July 2018, the Claimants stated that efforts to prolong the suspension were not successful, acknowledged that the proceeding would resume and requested an extension of time until 27 August 2018 to file their Rejoinder on Preliminary Objections.

27. On 23 July 2018, the Tribunal confirmed that the suspension noted in the Tribunal's correspondence dated 14 December 2018 and 12 April 2018 had concluded. Further, the Tribunal granted the Claimants' request for an extension of time to file their Rejoinder on Preliminary Objections.

28. On 24 July 2018, the Tribunal proposed a one-day hearing on preliminary objections to be held on 20 September 2018 in Paris and invited the Parties to indicate their availability.

29. On 26 July 2018, the Respondent filed a request to the Tribunal for the suspension of the proceedings to be extended by a further three months. On 31 July 2018, the Claimants notified the Tribunal that they did not consent to the Respondent's request for an additional three-month suspension.

30. On 31 July 2018, the Tribunal confirmed that this proceeding would not be suspended, and the Claimants were directed to file their Rejoinder on Preliminary Objections by 27 August 2018.

31. On 3 August 2018, the Respondent informed the Tribunal that it could not confirm its availability for a hearing on 20 September 2018 due to the length of time required to obtain travel visas for attendees traveling from the Kyrgyz Republic. On this basis, the Respondent requested the Tribunal to identify alternative dates for the hearing and suggested scheduling a two-day hearing instead of a one-day hearing.

32. On 9 August 2018, the Tribunal informed the Parties that the hearing would proceed as scheduled on 20 September 2018 in Paris, France, with those attendees who would be unable to obtain visas attending via video conference.

33. On 27 August 2018, the Claimants filed their Rejoinder on Preliminary Objections, accompanied by the following documents:

- Second Expert Opinion of Mr. Temerbek Kenenbaev (both Russian and English versions);
- Expert Opinion of Dr. Gulchekhra Matkarimova (both Russian and English versions);
- Resubmitted Exhibits C-0001, C-0024, C-0025, C-0032, C-0036, C-0079, C-0080, C-0086, C-0087, C-0090 and C-0091;
- Exhibits C-0101 through C-0134; and
- Resubmitted Legal Authorities CL-0005 and CL-0064 and Legal Authorities CL-0079 through CL-0104.

34. On 1 September 2018, the Respondent filed a request to the Tribunal for an adjournment of the hearing scheduled on 20 September 2018. On 4 September 2018, the Claimants filed an objection to the Respondent's request for an adjournment.

35. On 5 September 2018, having considered the Respondent's request of 1 September 2018 and the Claimants' response of 4 September 2018, the Tribunal decided to adjourn the 20 September 2018 hearing and invited the Parties to confirm their availability for a two-day hearing in January 2019. On 7 September 2018, the Tribunal informed the Parties that it would be available for a two-day hearing any day of the week during the week of 7 January 2019. Subsequently, by letter of 13 September 2018, the Tribunal confirmed that the hearing would be held on 8-9 January 2019 in Paris.

36. On 5 December 2018, the Tribunal sent to the Parties a draft hearing protocol for their consideration. The Parties sent back agreed revisions to the hearing protocol on 10 December 2018 and, having agreed on all outstanding issues, suggested that there was no need for a pre-hearing telephone conference. The Tribunal agreed that no pre-hearing conference was necessary as the Parties agreed on all outstanding issues, and on 11 December 2018 issued Procedural Order No. 2 concerning the hearing organization.

37. On 29 December 2018, the Respondent informed the Tribunal and the Claimants that—solely in the context of the above-captioned arbitration—it no longer intended to contest that the BIT is currently in force between the Republic of Uzbekistan and the Kyrgyz Republic. Prior to the submission of this letter, the Kyrgyz Republic had contended that the BIT was not currently in force and on this basis had objected to the jurisdiction of the Tribunal.

38. Also on 29 December 2018, and in reply to the Respondent's letter of the same date, the Claimants submitted a letter urging the Tribunal to issue a costs award in their favor, as the abandonment of the "treaty in force" preliminary objection caused the Claimants and their expert witnesses to incur significant costs.

39. A hearing on preliminary objections was held in Paris from 8-9 January 2019 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

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

ICSID Secretariat:	
Mr. Alex B. Kaplan	Secretary of the Tribunal
For the Claimants:	
Ms. Carolyn B. Lamm	Partner, White & Case LLP
Ms. Andrea J. Menaker	Partner, White & Case LLP
Mr. Eckhard R. Hellbeck	Counsel, White & Case LLP
Ms. Harpreet K. Dhillon	Associate, White & Case LLP
Ms. Hannelore Z. Sklar	Associate, White & Case LLP
Mr. Jeffrey Stellhorn	Practice Assistant Team Leader, White & Case LLP
Ms. Gulnara Ismailova	Claimant NBU (National Bank for Foreign Economic Activity of the Republic of Uzbekistan)
Ms. Munira Pulatova	Claimant Asaka Bank (JSCB Asaka)
Mr. Akram Saidov	Claimant Tashkent Mechanical Plant (JSC Tashkent Mechanical Plant)
Mr. Bakhritdin Norkhujaev	Claimant Uzpromstroybank (JSC Uzbek Industrial and Construction Bank)
For the Respondent:	
Mr. Baiju Vasani	Partner, Jones Day
Ms. Tatiana Minaeva	Of Counsel, Jones Day
Mr. Ananda Burra	Associate, Jones Day
Mr. Anatoly Matveev	Associate, Jones Day
Ms. India Rand	Trainee, Jones Day
Mr. Razak Ashimbaev	The Center of the Court Representation of the Government of the Kyrgyz Republic
Ms. Aigerim Jumalieva	The Center of the Court Representation of the Government of the Kyrgyz Republic
Court Reporter:	
Mr. Trevor McGowan	English Court Reporter
Interpreters:	
Ms. Julia Poger	English / Russian Simultaneous Interpretation
Ms. Elena Edwards	English / Russian Simultaneous Interpretation
Ms. Elena Khorishko	English / Russian Simultaneous Interpretation

40. During the Hearing, the following persons were examined:

On behalf of the Claimants:	
Mr. Temerbek Kenenbaev (by videoconference)	Kyrgyz law expert

On behalf of the Respondent:
Ms. Chynara Musabekova Kyrgyz law expert

41. At the Hearing, the Claimants introduced a diplomatic note marked as fact exhibit C-0135 ENG and C-0135 RUS into the record, and the Respondent submitted a bilateral investment treaty into the record as a legal authority marked as RL-0085.

42. At the conclusion of the Hearing, it was decided that the Parties need not file post-hearing briefs. However, the Parties sought leave of the Tribunal to submit letters regarding the waiver of the "treaty in force" issue and costs incurred as a result of the waiver. Such letters were ultimately submitted by the Respondent on 16 January 2019, by the Claimants on 23 January 2019 and the Respondent on 28 January 2019.

43. The Parties filed their submissions on costs on 7 February 2019.

44. On 1 May 2019, the Tribunal issued it Ruling on Bifurcated Preliminary Objections (the "**Decision on Jurisdiction**"), by majority, establishing jurisdiction over the dispute. The Decision on Jurisdiction and separate opinion is attached as Annex A and forms an integral part of this Award.

45. Following that Decision and on 14 June 2019, the Parties jointly communicated to the Tribunal an agreed procedural calendar for the merits phase of the proceeding. The procedural calendar indicated that the Memorial on the Merits would be filed by the Claimants on 5 December 2019 and the Counter-Memorial on the Merits would be filed by the Respondent on 12 June 2020.

46. The Tribunal, on 19 June 2019, approved of the agreed procedural calendar and proposed a hearing from 24 May 2021 through 28 May 2021, with 31 May and 1 June 2021 held in reserve. Both Parties indicated their availability to hold a hearing on these dates on 27 June 2019, and thus the Tribunal confirmed the hearing dates on that same day.

47. On 4 November 2019, the Respondent's counsel at the law firm Jones Day confirmed that it continued to represent the Respondent despite certain named counsel leaving the firm.

48. On 29 November 2019, the Claimants wrote to the Tribunal regarding the procedural calendar. They requested that the deadline for the Memorial on the Merits be extended to one week after ICSID confirms receipt of the Respondent's then-pending payment for its share of the advance on costs.

49. By letter of 3 December 2019, the Respondent, through counsel, informed the Tribunal that it would no longer be in a position to pay the advance on costs by January 2020, as previously indicated. Instead, it informed the Tribunal that the target date for the advance payment was 1 July 2020. The Respondent also indicated that it had no objection to the deferral of the date of filing of the Memorial on the Merits.

50. The Claimants thereafter indicated to the Tribunal that they wished to consult with the Respondent regarding the case finances and the procedural calendar in order to preserve the May 2021 hearing dates. The Tribunal then granted the Claimants' request regarding the filing date of the Memorial on the Merits.

51. On 19 December 2019, the Claimants informed the Tribunal that they would make the unpaid advance payment on the Respondent's behalf by 1 April 2020 and then consult with the Respondent regarding the procedural calendar to accommodate the hearing dates. The Tribunal indicated its approval of this arrangement on the same day.

52. Subsequently, the Secretariat acknowledged receipt of the Claimants' payment of the Respondent's share of the advance payment by letter of 1 April 2020. On that same day, the Claimants also requested a further extension of time, until at least 1 June 2020, to submit the Memorial on the Merits due to the COVID-19 pandemic. The Respondent having agreed to the extension, the Tribunal granted this extension of time.

53. On 5 May 2020, the Claimants filed a Request for Provisional Measures seeking to enjoin the Respondent from selling, transferring or otherwise alienating their alleged ownership rights in three of the four resort properties at issue in this proceeding—Resort Zolotiye Peski, Resort Rokhat-NBU, and Resort Dilorom. The following day, the Tribunal sought the Respondent's observations on the Request to be submitted by 18 May 2020.

54. The Respondent did not reply. On 8 May 2020, the Secretariat received correspondence from the Claimants forwarding email correspondence from the Director of the Center for Court Representation of the Government of the Kyrgyz Republic. The correspondence did not initially reach the Secretariat due to a typographical error in the email address used. It indicated that, "The Republic would be grateful if the distribution list in this arbitration be updated to exclude the Jones Day law firm from the correspondence in this case." It further directed all communications in this case to be sent to the Center's and the Director's email addresses.

55. Thereafter, and following the Claimant's request seeking clarity as to the Respondent's correspondence with respect to its representation, the Tribunal sought clarity from the Respondent regarding the above-referenced communication pursuant to Article 26(1) of the Arbitration (Additional Facility) Rules. This provision states that each party "shall" notify the Secretariat, of the "names and authority" of its "agents, counsel, or advocates." The Respondent was therefore requested to identify who represents it in this arbitration. The Tribunal also extended the time for the Respondent to respond to the pending request until 22 May 2020.

56. The Respondent did not respond, either to the Request for Provisional Measures or to the clarification sought regarding its representation. The Tribunal nevertheless further extended the deadline by which the Respondent could respond on these issues until 12 June 2020.

57. On 1 June 2020, the Secretariat received correspondence from Jones Day confirming that it no longer represents the Respondent in this proceeding.

58. On that same day, the Claimants sought an extension of time to file the Memorial on the Merits due to challenges posed by the COVID-19 pandemic. The Tribunal acceded to this request, and the Memorial was therefore due to be filed by 1 July 2020.

59. On 22 June 2020, having received no response from the Respondent regarding the pending Request for Provisional Measures, the Tribunal posed substantive questions to the Parties. The Claimants responded to these questions on 26 June 2020, but the Respondent did not.

60. Given the Respondent's continued lack of response, the Secretariat undertook to determine the identity of the Respondent's representative at the Tribunal's request. Thereafter, on 29 June 2020, the Secretariat informed the Parties of its understanding that Mr. Aibek Baltabaev, Expert, Center for Court Representation of the Kyrgyz Republic was the point of contact for the Respondent in this proceeding. Mr. Baltabaev was copied on this correspondence and added to the case email distribution list.

61. As directed by the Tribunal, the Secretariat sent to Mr. Baltabaev's attention the Request for Provisional Measures, the Tribunal's questions thereon, and the Claimants' answers indicating that the Respondent was invited to respond to these submissions by 3 July 2020. This was the third extension of time afforded to the Respondent with regard to the Request for Provisional Measures.

62. On 1 July 2020, the Claimants sought an extension of time until 15 July 2020 to file their Memorial on the Merits. The Tribunal invited the Respondent's comments on the extension of time, but none were received. The Claimants nevertheless filed their Memorial on the Merits on 15 July 2020, accompanied by the following documents:

- Witness Statement of Abdullo Kariev;
- Second Witness Statement of Saidumarhon Mamatov;
- Second Witness Statement of Akbar Elmurodov;
- Witness Statement of Dilbar Umarova;
- Witness Statement of Munira Pulatova;
- Witness Statement of Kabul Karimov;
- Witness Statement of Turabov Yakubjanovich;
- Witness Statement of Bahtiyor Usmanov;
- Witness Statement of Akram Saidov;

- Second Witness Statement of Shuhrat Yuldashev;
- Witness Statement of Bakhritdin Norkhhujaev;
- First Expert Report of Timothy Allen with Appendices;
- Selected resubmitted Fact Exhibits; Fact Exhibits C-0151 to C-0509; and
- Legal Authorities CL-0155 to CL-0289.

63. On 22 July 2020, the Tribunal issued its Procedural Order No. 3 on provisional measures in which it decided that the Respondent shall not sell the resorts at issue during the pendency of this proceeding.

64. The following day, the Tribunal invited the Parties to confer regarding the procedural calendar in order for the written procedure to conclude prior to the reserved hearing dates in May 2021.

65. The Claimants replied to the Tribunal on 6 August 2020 indicating that they sought to liaise with the Respondent, which was unsuccessful. The Claimants therefore proposed a procedural calendar to the Tribunal, and the Tribunal granted the Respondent until 14 August 2020 to provide its observations thereon. The Respondent never replied, and the Tribunal adopted the procedural calendar as proposed by the Claimants on 6 August 2020. This procedural calendar provided, *inter alia*, that the Respondent was to file its Counter-Memorial on the Merits by 23 October 2020.

66. The Respondent did not file the Counter-Memorial by the due date of 23 October 2020. The Claimants therefore requested on 4 November 2020 that the Tribunal asks the Respondent if it intends to participate in the proceeding given that it has not replied to any of the pending matters. The Claimants' correspondence proposed a way forward, if the Respondent does not reply: "[i]f Respondent does not reply with respect to its Counter-Memorial submission, or if Respondent confirms that it does not intend to participate in these proceedings, Claimants propose that they respond to the Tribunal's questions in writing, if any, and to proceed to a merits hearing, if needed."

67. The Tribunal thereafter invited the Respondent to indicate by 13 November 2020 whether it will participate in the proceeding. The Tribunal further instructed ICSID to attempt to contact the Respondent via telephone to determine whether it would participate. As a result of ICSID's outreach, ICSID inferred that Mr. Kutman Alblakimov is the Expert at the Center for Court Representation of the Kyrgyz Republic, who is the Respondent's point of contact for this case.

68. On 8 January 2021, the Claimants reiterated their proposed way forward for the proceeding given the Respondent's continued lack of response. They repeated their 4 November 2020 proposal to "respond to the Tribunal's questions in writing, if any, and proceed to a merits hearing, if needed." The Claimants observed that this approach "is consistent with that taken by other arbitral tribunals."

69. On 11 January 2021, having made initial contact with Mr. Ablakimov, ICSID conveyed its understanding to the Claimants and the Tribunal that Mr. Ablakimov is the point of contact for this proceeding. ICSID provided Mr. Ablakimov's contact details and further indicated its understanding that the Director, Mr. Derkimbaev is no longer affiliated with the Center for Court Representation of the Kyrgyz Republic and Mr. Baltabaev is no longer the point of contact for this case. This email correspondence was nevertheless sent to the above-mentioned individuals using Outlook email's delivery and read receipt functions.

70. Having observed that the Claimants' proposed way forward, as set out in their email correspondence of 4 November 2020 and 8 January 2021, is prescribed by Article 48 of the Arbitration (Additional Facility) Rules regulating the lack of participation of a party, the Tribunal by letter of 16 February 2021 invited the Claimants to indicate whether they intend to invoke this provision.

71. The next day, the Claimants invoked Article 48.

72. On 24 March 2021, the Tribunal issued Procedural Order No. 4 in which it concluded, pursuant to Article 48 of the Arbitration (Additional Facility) Rules, that the Respondent "does not intend to appear or to present its case in the proceeding." The Tribunal, therefore,

concluded that it would "deal with the questions submitted to it [by the Claimants] and render an award."

73. On 10 April 2021, the Tribunal indicated that it wished to call Mr. Bahtiyor Usmanov and Mr. Timothy Allen for cross-examination at the hearing.

74. On 21 April 2021, the Tribunal held a pre-hearing organizational meeting through videoconference. The Respondent was apprised of the date, time and connection details for the pre-hearing conference, but it did not attend. The following individuals participated in the pre-hearing conference:

Tribunal:	
Mr. Bernardo Cremades	President
Mr. Gary Born	Co-Arbitrator
Mr. Zachary Douglas	Co-Arbitrator
ICSID Secretariat:	
Mr. Alex B. Kaplan	Secretary of the Tribunal
Ms. Phoebe Ngan	ICSID Paralegal
For the Claimants:	
Mr. Navfal Pulatov	Head of the Legal Department, JSCB Asaka
Ms. Anna Sukhankova	Chief Legal Consultant of the Legal Department, JSCB Asaka
Mr. Erkinjon Turabov	Head of the Legal Department, National Bank for Foreign Economic Activity of the Republic of Uzbekistan
Ms. Carolyn B. Lamm	Partner, White & Case LLP
Ms. Andrea J. Menaker	Partner, White & Case LLP
Ms. Kristen M. Young	Partner, White & Case LLP
Ms. Jennifer A. Ivers	Associate, White & Case LLP
Ms. Hannelore Z. Sklar	Associate, White & Case LLP
Ms. Meghan Clark-Kevan	Contract Attorney, White & Case LLP

75. On 23 April 2021, the Tribunal issued Procedural Order No. 5, the hearing protocol.

76. On 24-25 May 2021, the Tribunal held the hearing via videoconference, just prior to which the Tribunal admitted new exhibits C-0510 to C-0512. Connection details for the videoconference were duly sent to the Parties—including the Respondent—on 18 May 2021. The active participants in the hearing were:

Tribunal	
Mr. Bernardo Cremades	President
Mr. Gary Born	Co-Arbitrator
Mr. Zachary Douglas	Co-Arbitrator
ICSID Secretariat	
Mr. Alex B. Kaplan	Secretary of the Tribunal
Ms. Phoebe Ngan	ICSID Paralegal
For the Claimants:	
Mr. Navfal Pulatov	Head of the Legal Department, JSCB Asaka
Ms. Anna Sukhankova	Chief Legal Consultant of the Legal Department, JSCB Asaka Bank
Mr. Erkinjon Turabov	Head of the Legal Department, JSC National Bank for Foreign Economic Activity of the Republic of Uzbekistan
Ms. Carolyn B. Lamm	Partner, White & Case LLP
Ms. Andrea J. Menaker	Partner, White & Case LLP
Ms. Kristen M. Young	Partner, White & Case LLP
Ms. Jennifer A. Ivers	Associate, White & Case LLP
Ms. Hannelore Z. Sklar	Associate, White & Case LLP
Ms. Meghan Clark-Kevan	Contract Attorney, White & Case LLP
Witnesses:	
Mr. Bakhtiyor Usmanov	Fact Witness
Mr. Timothy Allen	Expert Witness
Party Representatives:	
Mr. Akram Saidov	JSC Tashkent Mechanical Plant
Mr. Navfal Pulatov	JSCB Asaka
Mr. Erkinjon Turabov	National Bank for Foreign Economic Activity of the Republic of Uzbekistan
Mr. Odil Sulaymonov	JSC Uzbek Industrial and Construction Bank
Ms. Anna Sukhankova	JSCB Asaka

77. Following the hearing, on 9 July 2021, the Claimants filed a post-hearing brief, entitled "Claimants' Points of Clarification," together with:

- Amended hearing presentation of Mr. Tim Allen;
- Fact Exhibits C-0513 through C-0533;

- Legal Authorities CL-0290 through CL-0300; and
- Updated indices of Fact Exhibits and Legal Authorities.

78. On 31 August 2021, the Claimants filed an additional post-hearing submission entitled "Claimants' Points of Clarification on Issue 1". "Issue 1" refers to a question posed to the Claimants at the hearing. This submission as filed together with:

- A confidential expert legal opinion;
- Fact Exhibits C-0534 through C-0576;
- Legal Authorities CL-0301 through CL-0313;
- Updated indices of Fact Exhibits and Legal Authorities.

79. On 15 February 2022, the Claimants filed a submission on costs having been requested to do so by the Tribunal.

80. On 20 March 2022, the Respondent resumed participation in the arbitration. The ICSID Secretariat received a letter from the Center for Court Representation of the Kyrgyz Republic. In this letter, the Director, Mr. B. Dzhunusov, explained that the lack of the Respondent's participation "was due to several material circumstances and extraneous reasons (including force majeure, crisis processes of constitutional and institutional reorganization, etc.), in light of which the Kyrgyz Republic, as the Respondent, could not fully participate in the proceedings and present its arguments and position on the case."

81. The Respondent went on to explain in the letter that it does not "raise the issue of restoring the relevant deadlines in their entirety." Yet it requested that the Center "be allowed to present its arguments on the Claimants' submissions within the period set by the Arbitral Tribunal."

82. On the invitation of the Tribunal, the Claimants submitted on 24 March 2022 observations on the Respondent's request urging the Tribunal to deny the Respondent's request to participate at this late stage.

83. On 28 March 2022, the Tribunal proposed that the Respondent could make a submission within five weeks and the Claimants could respond two weeks thereafter. The Respondent accepted the Tribunal's proposal, but the Claimants objected. The Claimants sought costs from the Respondent and a more limited time for the Respondent's submission considering that more than 20 months had passed since the filing of the Claimants' Memorial. The Claimants also sought at least five weeks to respond to the Respondent's submission.

84. On 1 April 2022, the Tribunal confirmed that the Respondent should make its submission within five weeks and that the Claimants may respond thereto in two weeks but may apply for extra time if circumstances warrant.

85. On 7 May 2022, the Respondent filed a memorial on the merits, entitled "Respondent's Memorial," along with:

- Fact Exhibits R-0090 through R-0126;
- Legal Authorities RL-0085 through RL-0261; and
- Updated indices of Fact Exhibits and Legal Authorities.

86. On 6 June 2022, the Tribunal issued its Procedural Order No. 6. In this order, the Tribunal, *inter alia*, confirmed that the Respondent's Memorial was admitted into the record and set a date for the Claimants' Reply.

87. On 9 June 2022, the Respondent filed a witness statement from Mr. Bakaikhan Dzhunusov as ordered by Procedural Order No. 6.

88. The Claimants filed a Reply on the Merits on 16 September 2022, having received a brief extension of time to do so from the Tribunal, accompanied by following documents:

- Second Witness Statement of Bahtiyor Usmanov;
- Third Witness Statement of Saidumarhon Mamatov;
- Third Witness Statement of Akbar Elmurodov;

- Third Witness Statement of Shuhrat Yuldashev;
- Expert Opinion of Mr. Ulan Tilenbaev;
- A confidential expert legal opinion;
- Expert Legal Opinion of Professor Sean D. Murphy;
- Expert Report of Timothy Hart;
- Fact Exhibits C-0577 through C-0656, including certain resubmitted fact exhibits;
- Legal Authorities CL-0314 through CL-0379, including certain resubmitted legal authorities; and
- Updated indices of Fact Exhibits and Legal Authorities.

89. It is noted that the Respondent did not seek leave of the Tribunal to submit a rejoinder on the merits.

90. At the request of the Tribunal, each Party filed an updated submission on costs on 21 November 2022. The Respondent's cost submission was submitted together with legal authorities RL-262 to RL-265.

91. The proceeding was closed on 3 May 2023.

III. FACTUAL BACKGROUND

92. This section puts forth the factual background of the dispute that gave rise to this arbitration. It does not purport to be exhaustive and is meant to provide a general overview of the key facts and factual allegations put before the Tribunal in their proper context.

A. THE CLAIMANTS' CASE

93. The Claimants' contention is that the dispute arises out of a series of acts and omissions by the Respondent with respect to the Claimants' investments in four resort properties.[1]

(1) Beginning In The Late 1950s, Uzbek Entities Constructed, Developed, And Operated Four Resorts On The Shores Of Lake Issyk-Kul

94. The Claimants maintain that the Soviet Labor Code of 1922 formalized mandatory vacations.[2] The Claimants add that throughout the Soviet period, sanatoriums, a mix between medical institutions and spas, were built to provide rest and health treatments for Soviet workers, ultimately leading to the building of "*pansionats*," or resorts in picturesque locations with favorable climates, including along rivers and lakes.[3] The Claimants also submit that by 1979, over 1,200 of these resorts had been constructed and, like sanatoriums, access to them was a social benefit for Soviet workers.[4]

95. The Claimants further maintain that Soviet Socialist Republics ("**SSRs**") established several of these resorts in the Kyrgyz SSR along the shores of Lake Issyk-Kul, covering a surface of 6,236 square kilometers.[5] In 1970, the resorts along Lake Issyk-Kul were recognized by the Soviet Council of Ministers to be of all-Union significance. Four of the resorts– Resort Zolotiye Peski, Resort Dilorom, Resort Rokhat-NBU and Resort Buston– were constructed and established by entities of the Uzbek SSR on land allocated to them by the Kyrgyz SSR for permanent use, as follows:[6]

- By Resolution No. 619 dated 25 November 1959, the Council of Ministers of the Kyrgyz SSR allocated to Tashkent Aviation Production Association ("**TAPOiCh**") 25 hectares of land for the construction of a resort on the northern shore of Lake Issyk-Kul. TAPOiCh, now Tashkent Mechanical Plant ("**TMP**"), constructed the buildings and structures comprising Resort Zolotiye Peski and, on 5 August 1960, a commission

[1] Cl. Mem., ¶ 2.
[2] Cl. Mem., ¶ 12.
[3] Cl. Mem., ¶ 12.
[4] Cl. Mem., ¶ 12.
[5] Cl. Mem., ¶ 13.
[6] Cl. Mem., ¶ 14; Cl. Rep., ¶ 18.

including representatives of the Bosteri Village accepted them into operation, as reflected in the Act of Completion and Commissioning.[7]

- By Resolution No. 173 dated 9 April 1965, the Council of Ministers of the Kyrgyz SSR allocated to the Ministries of Construction of the Uzbek SSR and the Kyrgyz SSR 15 hectares of land for the construction of a resort on the northern shore of Lake Issyk-Kul. The Uzbek SSR Ministry of Construction constructed the buildings and structures comprising Resort Binakar (later Resort Rokhat-NBU), which was commissioned in 1968.[8]

- By Resolution No. 56 dated 13 February 1967, the Council of Ministers of the Kyrgyz SSR allocated to the Ministry of Rural Construction of the Uzbek SSR 20 hectares of land for the construction of a resort on the northern shore of Lake Issyk-Kul on the territory of Resort Dolinka. Enterprises under the Uzbek Ministry of Rural Construction renovated the existing buildings and structures comprising Resort Dolinka, and constructed new buildings and structures at the Resort, which subsequently was renamed Resort Dilorom.[9]

- By Resolution No. 192 dated 17 August 1971, the Council of People's Deputies of the Ton District of the Kyrgyz SSR allocated to Uzbek Joint Stock Company Tashselmash ("**Tashselmash**") 5.9 hectares of land for the construction of a resort on the southern shore of Lake Issyk-Kul. Tashselmash constructed the buildings and structures comprising Resort Yubileyny (later Resort Buston) and, on 23 July 1977, the State Commissioning Commission accepted the buildings and structures into operation, as reflected in the Act of Commissioning. Thereafter, Tashselmash was allocated additional land for the expansion of the Resort Buston, totalling 10.65 hectares.[10]

[7] Cl. Mem., ¶¶ 15-17; Cl. Rep., ¶ 18; Exh. C-0028; Exh. C-0352.
[8] Cl. Mem., ¶ 19; Cl. Rep., ¶ 18; Exh. C-0029; Exh. CL-0168.
[9] Cl. Mem., ¶¶ 21-22; Cl. Rep., ¶ 18; Exh. CL-0184; Exh. CL-0166; Exh. C-0167; Exh. CL-0175.
[10] Cl. Mem., ¶¶ 23-24; Cl. Rep., ¶ 18; Exh. C-0357; Exh. C-0361; Exh. C-0370.

96. Additionally, the Claimants contend that the land rights of the Uzbek entities in the four Resorts on Lake Issyk-Kul were each duly registered and certified by the Kyrgyz SSR as follows:

- TAPOiCh's right of "permanent use" of 25 hectares of land for Resort Zolotiye Peski "was recorded in the state book of land use registration under No[.] 284" dated 8 June 1978;[11]

- The Ministry of Construction of the Uzbek SSR's right of "continuous and free use" of 17.5 hectares of land for Resort Rokhat (later renamed Resort Rokhat-NBU) was "registered in records book of state acts for the right to use land No. 296 dated 20 September 1979;"[12]

- The Ministry of Rural Construction of the Uzbek SSR's right of "permanent use" of 35 hectares of land for Resort Dolinka (later renamed Resort Dilorom) was "recorded in the state register . . . under No. 197" dated 20 February 1967;[13]

- Tashselmash's right of "constant use" of 6 hectares of land for Resort Yubileyny (later renamed Resort Buston) was "recorded in the book of state registration of land use" under Act on Land Use dated 11 October 1971. The subsequent registration of Tashselmash's right of permanent use of 10.65 hectares of land was affirmed by State Act No. 000231 dated 15 July 1981.[14]

97. Finally, the Claimants also contend that following the dissolution of the Soviet Union in 1991, the newly independent Kyrgyz Republic expressly agreed in multilateral and bilateral agreements to recognize and preserve the ownership rights of the Uzbek entities in the four Resorts on Lake Issyk-Kul.[15]

[11] Cl. Rep., ¶ 19; Exh. C-0363.
[12] Cl. Rep., ¶ 19; Exh. C-0365.
[13] Cl. Rep., ¶ 19; Exh. C-0030.
[14] Cl. Mem., ¶ 23; Cl. Rep., ¶ 19; Exh. C-0031; Exh. C-0351.
[15] Cl. Mem., ¶¶ 25-31; Cl. Rep., ¶ 20.

98. The Respondent asserts that the "the ownership history and the legal status of the four Resorts [on Lake Issyk-Kul] are byzantine,"[16] and that, during the Soviet period, "land 'was in the exclusive property of the State' and could 'be provided for use' . . . 'on the basis of a resolution of the Council of Ministers of the Kyrgyz SSR or a decision of the executive committee of the relevant Council of Deputies of workers.'"[17] The Respondent further asserts that "a right of use over a land plot had to be certified by an appropriate State certificate."[18]

99. The Respondent, however, does not dispute that the Kyrgyz SSR, in fact, granted the Uzbek entities use of the land plots for the construction and operation of their four Resorts on Lake Issyk-Kul, or that these rights were certified by an appropriate State certificate, as required by Soviet law. Nor does the Respondent dispute that the four Resorts were constructed on those land plots at the expense of the Uzbek entities.[19]

100. Accordingly, the Claimants submit that there is no dispute between the Parties that the Kyrgyz SSR granted the Uzbek entities rights to use the land plots for the construction and operation of their four Resorts, each of which was duly registered during the Soviet period, as reflected and confirmed by their State certificates.[20]

(2) Following The Dissolution Of The Soviet Union In 1991, The Kyrgyz Republic Affirmed The Continuing Rights Of The Uzbek Entities In The Resorts

101. According to the Claimants, following the dissolution of the Soviet Union in 1991, the rights of the Uzbek entities that had constructed, developed, and operated the four Resorts on Lake Issyk-Kul on land plots allocated to them by the Kyrgyz SSR were specifically preserved through a series of multilateral and bilateral agreements concluded between the Kyrgyz Republic and the Republic of Uzbekistan.[21] These agreements include:

[16] Cl. Rep., ¶ 21¸ Re. Mem., ¶ 10.
[17] Cl. Rep., ¶ 21; Re. Mem., ¶ 46.1.
[18] Cl. Rep., ¶ 21; Re. Mem., ¶ 46.1.
[19] Cl. Rep., ¶ 22; Re. Mem., ¶¶ 46.1, 54, 63-64, 70, 76.
[20] Re. Mem., ¶ 46.1, Cl. Rep., ¶ 24.
[21] Cl. Mem., ¶¶ 25-31.

- The Agreement on the Mutual Recognition of the Rights and Regulation of Property Relations dated 9 October 1992 (the "**1992 Agreement**"), which addressed the mutual recognition of property rights and recognized in Article 4 that vacation resorts whose construction had been funded by the budgets of one party or by enterprises or organizations subordinate to that party or the Soviet Union, but were located on the territory of another party, remained the property of the party or the legal entities or individuals which had funded their construction;[22]

- The Protocol on Mutual Recognition of Property Rights to the Facilities of Social Sphere Established from the Funds of the Republic of Uzbekistan and Kyrgyz Republic dated 2 February 1994 (the "**1994 Protocol**"), which reaffirmed on a bilateral basis the obligation contained in Article 4 of the 1992 Agreement, namely, that vacation resorts whose establishment had been funded by the budgets of one party or by enterprises or organizations subordinate to that party or the Soviet Union, but were located on the territory of the other party, remained the property of the party or the legal entities or individuals which had funded their establishment;[23] and

- The Protocol on the Status of Implementation of the Intergovernmental Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic in 1994 dated 8 January 1995 (the "**1995 Protocol**"), which specifically preserved the right of ownership of the Republic of Uzbekistan in the four Resorts, whose construction and establishment had been funded by entities of the Uzbek SSR: Resorts Zolotiye Peski, Buston, Rokhat-NBU, and Dilorom.[24]

102. The Claimants argue that, under Kyrgyz law, all three agreements form an integral part of the legal system; are binding and in force; and subordinate only to the Constitution of the Kyrgyz Republic.[25]

[22] Cl. Rep., ¶ 25; Exh. C-0002.
[23] Cl. Rep., ¶ 25; Exh. C-0003.
[24] Cl. Rep., ¶ 25; Exh. C-0004.
[25] Cl. Rep., ¶ 26.

a. The 1992 Agreement Preserved The Property Rights of The Uzbek Entities In The Four Resorts On Lake Issyk-Kul

103. The Respondent asserts that the Claimants "jump too quickly to analyzing" the 1992 Agreement, which "has to be put in proper context and chronology of the formation of inter-State relations in the post-Soviet space."[26] The Respondent further asserts that the 1992 Agreement allegedly is a "*pactum de contrahendo*" or a "framework instrument requiring negotiations and entry into force of further, specific, and bilateral treaties," and thus "d[id] not [] itself preserve, affirm, maintain, or grant [the] Claimants any rights [to] the Resorts."[27] The Respondent also asserts that it allegedly "made a valid reservation to Article 4 of the [1992 Agreement] when signing it, ratifying it, and finally depositing the relevant Instrument of Ratification with the Depository,"[28] and that the English translation submitted by the Claimants of the decision of the CIS Economic Court is wrong.[29] The Claimants contend that the Respondent's assertions are incorrect, unsupported, and inconsistent with the contemporaneous documentary record.[30]

104. First, according to the Claimants, the Respondent fails to show how the purported "context and chronology of the formation of Inter-State relations in the post-Soviet space" undermines the relevance of the 1992 Agreement or the obligations contained therein.[31] The Claimants do not dispute the existence of the 1991 Treaty on Succession to the USSR's Debt and Assets to which the Respondent refers;[32] however, the Claimants contend that the 1991 Treaty did not govern or regulate rights in vacation resorts constructed by entities of one SSR on the territory of another SSR.[33]

105. Second, the Claimants argue that the 1992 Agreement, which did govern and regulate such rights, is not a *pactum de contrahendo* or an agreement to agree, as the Respondent

[26] Cl. Rep., ¶ 31: Re. Mem., ¶¶ 24-28.
[27] Cl. Rep., ¶ 31: Re. Mem., ¶¶ 40-42, 125.1, 130-131.
[28] Cl. Rep., ¶ 31: Re. Mem., ¶¶ 132-140.
[29] Cl. Rep., ¶ 31: Re. Mem., ¶¶ 137-138.
[30] Cl. Rep., ¶ 31.
[31] Cl. Rep., ¶ 32; Re. Mem., ¶¶ 24-27.
[32] Cl. Rep., ¶ 32; Re. Mem., ¶ 25; Exh. CL-0315.
[33] Cl. Rep., ¶ 32.

contends, but rather is a legally binding instrument that imposed binding obligations on the Parties.[34]

106. The Claimants submit that, while the Respondent now argues that the 1992 Agreement is merely an agreement to agree,[35] the Respondent previously argued the exact opposite in this arbitration. Specifically, in its Reply on Preliminary Objections dated 11 November 2017, the Respondent argued that the Parties to the 1992 Agreement "had already decided on a forum for disagreements involving both the interpretation and the implementation of that agreement" pursuant to its dispute resolution clause, *i.e.*, the CIS Economic Court,[36] and that "the documents that pre-date the 1992 Agreement are inapplicable to current property rights as they were concluded between the Soviet Republics, and were superseded by the independence of both States as well as the 1992 Property Agreement."[37] The Claimants therefore assert that having taken the position in the jurisdictional phase that the 1992 Agreement contains binding obligations, for example, with respect to dispute resolution and property rights, the Respondent is estopped from arguing now that the 1992 Agreement is merely a *pactum de contrahendo* that does not impose any binding obligations.[38]

107. Nevertheless, the Claimants maintain that the 1992 Agreement contains a series of binding obligations, including, *inter alia*, the following:

- In Article 2, "[e]ach Party recognizes the property right of the other Party, its citizens and legal entities in relation to the enterprises, institutions, organizations and other facilities located on its territory, which were, as of December 1, 1990[,] under the management of the state administration authorities of other former Soviet Republics within the Soviet Union, as well as the property of other legal entities and individuals[.]"[39]

[34] Cl. Rep., ¶ 33; Re. Mem., ¶¶ 125.1, 128-130; Exh. C-0002.
[35] Cl. Rep., ¶ 34; Re. Mem., ¶¶ 125.1, 130-131
[36] Cl. Rep., ¶ 34; Respondent's Reply on Preliminary Objections dated 11 Nov 2017, ¶ 134.
[37] Cl. Rep., ¶ 34; Respondent's Reply on Preliminary Objections dated 11 Nov 2017, ¶ 132.
[38] Cl. Rep., ¶ 34; Murphy, ¶ 85.
[39] Cl. Rep., ¶ 35; Exh. C-0002.

- In Article 4, "[t]he Parties mutually recognize that located on their territory facilities . . . of the social sphere[,] . . . construction of which was carried out from the funds of the Republican budgets of other Parties, as well as the funds of the enterprises and organizations of the Republican and former Soviet Union's subordination, located on the territory of the other Parties, are the property of these Parties or their legal entities and individuals."[40]

- In Article 17, the Parties agree that "[d]isputes between the Parties . . . shall be resolved through mutual consultations and negotiations . . . if the dispute cannot be settled in such way, then . . . it is transferred for resolution to the Economic Court of the Commonwealth of the Independent States."[41]

108. The Claimants submit that, with respect to Article 4 in particular, Professor Murphy notes:

> it is very clear and very specific as to the obligation of the Contracting Parties to recognize the rights of other Contracting Parties . . . [T]here is nothing tentative, uncertain or contingent about such language.[42]

109. Third, the Claimants argue that the Respondent's interpretation of Article 12 of the 1992 Agreement is incorrect. According to the Respondent, "an enterprise first has to be recognized . . . in bilateral form[] – as covered by the [1992] Agreement" and, if its legal status "remains unclear, the Parties' respective State authorities managing State Property . . . would then sign a protocol determining the legal status."[43] Without such bilateral agreements, the Respondent contends, there are no specific rights to recognize under the 1992 Agreement.[44] Claimants submit, however, that the Respondent's interpretation reverses Article 12 and renders the obligations set out in Articles 2 and 4 meaningless.[45]

[40] Cl. Rep., ¶ 35; Exh. C-0002.
[41] Cl. Rep., ¶ 35; Exh. C-0002.
[42] Cl. Rep., ¶ 36; Murphy ¶¶ 61, 64.
[43] Cl. Rep., ¶ 37; Re. Mem., ¶ 29 n. 11.
[44] Cl. Rep., ¶ 37; Re. Mem., ¶¶ 125.1, 130.
[45] Cl. Rep., ¶ 37.

110. The Claimants also argue that as Article 12 reflects, the parties agreed "that the legal status of the earlier created enterprises recognized under the present Agreement as the property of one Party and located on the territory of the other Party, is determined by the protocols between the authorities of the Parties, authorized to manage the state property."[46] The Claimants further assert that, while Articles 2 and 4 of the 1992 Agreement impose affirmative obligations, Article 12 provides for the conclusion of further protocols to determine a procedure for addressing the legal status of specific property, which already is "recognized" under Article 2 or 4 of the 1992 Agreement as the property of one Party, its legal entities, or individuals located on the territory of another Party.[47] In other words, the Claimants add that Article 12 envisages future agreements in the form of protocols that contain more detailed rules on existing obligations.[48]

111. The Claimants also maintain that the 5 April 2007 decision of the CIS Economic Court supports their interpretation of the1992 Agreement. Specifically, in its decision in Case No. 01-1/4-06, the Court was requested to interpret Article 4 of the 1992 Agreement. The Claimants submit that the Court (i) observed that the 1992 Agreement "is the main international legal act regulating the mutual recognition of the property rights of the participating States"[49]; (ii) observed that "each State Party has assumed the obligation to recognize the ownership right of another State Party, its legal entities and individuals to the objects of the social sphere listed in Article 4"[50]; and (iii) made clear that the "condition for recognizing the right of ownership of another state" is not the conclusion of bilateral agreements or protocols, but rather "the construction of social facilities at the expense of the republican budget of this other state."[51]

112. The Claimants further argue that in this case, there is no dispute that the construction of the four Resorts on Lake Issyk-Kul was funded at the expense of the Uzbek entities on land plots allocated to them by the Kyrgyz SSR. Accordingly, the Claimants submit that the

[46] Cl. Rep., ¶ 38; Exh. C-0002.
[47] Cl. Rep., ¶ 38; Exh. C-0002.
[48] Cl. Rep., ¶ 38; Murphy, ¶ 66; Exh. C-0002.
[49] Cl. Rep., ¶ 39: Exh. CL-0320, p. 4.
[50] Cl. Rep., ¶ 40; Exh. CL-0320, p. 2.
[51] Cl. Rep., ¶ 40; Exh. CL-0320, p. 2.

Kyrgyz Republic has assumed an obligation under the 1992 Agreement to recognize the ownership rights of the Uzbek entities in the four Resorts.[52] In any event, according to the Claimants and as addressed below, the Respondent and the Republic of Uzbekistan did conclude two bilateral protocols in which the rights of the Uzbek entities in the four Resorts were recognized and expressly affirmed.[53]

113. Fourth, the Claimants contend that the decision of the Plenum of the CIS Economic Court in Case No. 01-1/306/1 PL upon which the Respondent relies is factually inapposite, but again supports the Claimants' interpretation of Article 4. Specifically, the Claimants emphasize that in that case, Russia argued that "it has not breached its obligations under Article 4 of the [1992 Agreement]," because, as a factual matter, Kazakhstan had "failed to prove that it financed the construction of the Uzen sanatorium."[54] The Claimant further submits that, in ruling on this issue, the Plenum of the Court affirmed the obligation set out in Article 4, and held, "[t]he Government of the Russian Federation is obliged to recognize the right of ownership (share of participation) of the Republic of Kazakhstan [to] the property complex of the Uzen sanatorium in accordance with Article 4 of the Agreement of 9 October 1992," because "the fact of partial financing of construction of [the] property complex of the sanatorium 'Uzen' . . . at the expense of own funds of production association Mangyshlakneft [(Kazakhstan)]" was "recognized."[55]

114. The Claimants also cite Professor Murphy to argue that if the 1992 Agreement was a *pactum de contrahendo*, as the Respondent contends, Russia – the defendant in Case No. 01-1/306/1 PL – would have argued that the 1992 Agreement does not impose any obligations on it with respect to the sanatorium constructed by the Kazakh entity on its territory. The Claimants add that Russia did not do so, but rather asserted that it had not violated its "obligations" under the 1992 Agreement, because Kazakhstan had failed to

[52] Cl. Rep., ¶ 41; Exh. C-0002.
[53] Cl. Rep., ¶ 41; Exh. C-0003; Exh. C-0004.
[54] Cl. Rep., ¶ 42; Exh. CL-0321.
[55] Cl. Rep., ¶ 42; Exh. CL-0321, pp. 2, 7.

prove, as a factual matter, the partial financing by Mangyshlakneft of the sanatorium located on Russian territory.[56]

115. Furthermore, the Claimants rely on Professor Murphy and argue that the jurisdiction of the CIS Economic Court and the Plenum of the CIS Economic Court to address disputes relating to the 1992 Agreement arises precisely because the 1992 Agreement is a legally binding international agreement containing a compulsory dispute resolution clause set out in its Article 17, rather than a *pactum de contrahendo*. The Claimants assert that, indeed, if the 1992 Agreement was a *pactum de contrahendo*, these cases would have been dismissed. Citing Professor Murphy, the Claimants also argue that, neither the terms "*pactum de contrahendo*," nor any similar terms, appear anywhere in these decisions; to the contrary, they reflect that the 1992 Agreement establishes binding obligations on the parties to this agreement.[57]

116. Moreover, the Claimants maintain that the decision of the Economic Council of the CIS dated 9 September 2016 has no direct bearing on this case, because it relates to the CIS energy market and not to property rights in resorts.[58] Nevertheless, according to the Claimants, the Economic Council's finding that, "[w]ithin the CIS framework, the issues of recognition of property rights on objects built before December 1, 1990 are regulated by the [1992 Agreement] and by bilateral agreements," is fully consistent with the Claimants' position regarding the 1992 Agreement and the 1994 and 1995 Protocols.[59]

117. Fifth, the Claimants argue that contrary to the Respondent's contentions, the Kyrgyz Republic did not make a valid reservation to Article 4 and, in any event, cannot rely upon any such purported reservation in this arbitration.[60] In this respect, the Claimants submit that in its Advisory Opinion dated 15 May 1996, the CIS Economic Court – which is expressly authorized under the 1992 Agreement to resolve disputes thereunder[61] (the "**1996**

[56] Cl. Rep., ¶ 43; Murphy, ¶ 82; Exh. CL-0321.
[57] Cl. Rep., ¶ 44; Murphy, ¶¶ 77, 80; Exh. C-0002.
[58] Cl. Rep., ¶ 45; Exh. RL-0143.
[59] Cl. Rep., ¶ 45; Cl. Mem., ¶¶ 25-31; Exh. RL-0143.
[60] Cl. Rep., ¶ 46; Re. Mem., ¶¶ 132-143.
[61] Cl. Rep., ¶ 46; Exh. C-0002, Art. 17.

CIS Economic Court Advisory Opinion")– held that the Kyrgyz Republic's purported reservation to Article 4 failed to comply with the requirements of the 1969 Vienna Convention on the Law of Treaties (the "**VCLT**") and therefore was invalid.[62] Specifically, the Claimants submit that the Court held that, when the Kyrgyz Republic signed the 1992 Agreement, it had failed to confirm its reservation in accordance with Article 23(2) of the VCLT, which requires that the reservation be confirmed by the State at the time it expresses its consent to be bound by the treaty.[63] The reservation also did not comply with the VCLT's procedural requirements on the form of declaring a reservation.[64]

118. With respect to the Respondent's assertion that the English translation of the 1996 CIS Economic Court Advisory Opinion is "incorrect," because it translates the Russian word "*nedeystvuyushey*" as "invalid" rather than as "not in force," the Claimants note that the translation was authored by Professor William E. Butler, a distinguished legal expert with a particular focus on Russia and the CIS region. The Claimants contend that, in any event, whether the Respondent's reservation was found to be "invalid" or "not in force" by the Court is irrelevant since the latter found that the Respondent did not make a proper reservation to Article 4 of the 1992 Agreement.[65]

119. Moreover, the Claimants argue that the Respondent cannot rely upon such a reservation in the context of this arbitration. In this respect, the Claimants particularly submit that as the Court made clear, while "[t]he absence of objections to an unlawful reservation makes the State a participant of a treaty with the ensuing of those consequences with respect to the operation of the treaty as in the event of lawful reservations," unlawful reservations "may not be referred to when settling disputes in international agencies."[66]

120. Finally, the Claimants argue that the Respondent's assertion that it "formally confirmed" its purported reservation to Article 4 "by deposing the Instrument of Ratification in 1999, several years after the 1996 CIS Economic Court Advisory Opinion was rendered," is

[62] Cl. Rep., ¶ 46; Exh. C-0111.
[63] Cl. Rep., ¶ 46; Exh. C-0111.
[64] Cl. Rep., ¶ 46; Exh. C-0111.
[65] Cl. Rep., ¶ 47; Re. Mem., ¶¶ 137-138; Exh. C-0111.
[66] Cl. Rep., ¶ 48; Exh. C-0111.

wrong.[67] According to the Claimants, the 14 April 1999 letter "received by the Executive Committee of the CIS on April 23, 1999," *i.e.*, the 1999 Instrument of Ratification, does not confirm any purported reservation to Article 4. Rather, the Claimants maintain that, as the letter reflects, the then President of the Kyrgyz Republic Askar Akayev "declare[d] that the Kyrgyz Republic has ratified [the 1992 Agreement] based on Resolution of the Jogorku Kenesh No. 1404-XII dated January 12, 1994," and that "all of the foregoing will be rigorously and in good faith implemented."[68]

121. In its 28 May 2022 letter to the Tribunal, the Respondent submitted correspondence with the CIS Executive Committee from 2003, which the Respondent contends allegedly "confirms the validity of the Republic's reservation to Article 4."[69] The Claimants assert that these contentions are equally without basis. The Claimants argue that by 2003, the CIS Economic Court had ruled in 1996 that the Kyrgyz Republic's reservation to Article 4 was invalid and, in the 1999 Instrument of Ratification, the Kyrgyz President had affirmed that the 1992 Agreement in its entirety "will be rigorously and in good faith implemented," without any reservations.[70] The Claimants therefore maintain that the 2003 correspondence, which the Respondent submitted after it filed its Counter-Memorial, does not and cannot establish a valid reservation to Article 4, when such reservation was not properly made or affirmed at the time of expressing its consent to be bound.[71] The Claimants further argue that pursuant to Article 23 of the VCLT, a "reservation . . . must be formulated in writing and communicated to the contracting States" "when expressing [the reserving State's] consent to be bound by the treaty."[72]

122. The Claimants also contend that, in any event, by the time the Respondent wrote to the CIS Executive Committee in 2003, the Kyrgyz Republic and the Republic of Uzbekistan had already signed the 1994 and 1995 Protocols, which not only affirmed the obligation set out

[67] Cl. Rep., ¶ 49; Re. Mem., ¶¶ 139-140.
[68] Cl. Rep., ¶ 49.
[69] Cl. Rep., ¶ 50.
[70] Cl. Rep., ¶ 50.
[71] Cl. Rep., ¶ 50.
[72] Cl. Rep., ¶ 50; Exh. RL-0002, Art. 23.

in Article 4 on a bilateral basis, but also specifically preserved the rights of the Uzbek entities that had funded the construction of the four Resorts on Lake Issyk-Kul.[73]

123. Therefore, the Claimants submit that as also affirmed by Professor Murphy, the effect of the Respondent's alleged reservation, if any, was not ultimately pursued by the Kyrgyz Republic with respect to the Republic of Uzbekistan, as evidenced by the conclusion of the 1994 Protocol that replicated the obligations assumed in the 1992 Agreement with respect to the facilities of the social sphere on a bilateral basis. That is, as the Claimants submits and as Professor Murphy observes, the obligations arising from Article 4 of the 1992 Agreement accordingly became a feature of the Uzbek-Kyrgyz relationship by virtue of Article 3 of the 1994 Protocol.[74]

b. The 1994 And 1995 Protocols Affirmed The Continuing Rights Of The Uzbek Entities In The Resorts

124. The Claimants argue that in accordance with Article 12 of the 1992 Agreement, the Kyrgyz Republic and the Republic of Uzbekistan signed two bilateral protocols in 1994 and 1995, which addressed the property rights in facilities of the social sphere located on their territories, including specifically the four Resorts constructed and operated by entities of the Uzbek SSR on Lake Issyk-Kul.[75] The 1994 Protocol affirmed on a bilateral basis the obligation contained in Article 4 of the 1992 Agreement.[76] In addition, the 1995 Protocol specifically preserved the "right of ownership" of Uzbekistan in the four Resorts on Lake Issyk-Kul, whose construction had been funded by entities of the Uzbek SSR.[77] These Protocols form an integral part of the Kyrgyz legal system, are binding, and are in force.[78]

125. The Respondent asserts that the 1994 Protocol is yet "another *pactum de contrahendo*," which allegedly "does not create obligations for [the] Respondent to recognize [the] Claimants' rights over specific assets."[79] With respect to the 1995 Protocol, the Respondent

[73] Cl. Rep., ¶ 51; Cl. Mem., ¶¶ 28-30; Exh. C-0003; Exh. C-0004.
[74] Cl. Rep., ¶ 52; Murphy, ¶¶ 98-99; Exh. C-0002; Exh. C-0003.
[75] Cl. Rep., ¶ 53; Cl. Mem., ¶ 28; Exh. C-0003; Exh. C-0004.
[76] Cl. Rep., ¶ 53; Cl. Mem., ¶ 29; Exh. C-0003.
[77] Cl. Rep., ¶ 53; Cl. Mem., ¶ 30; Exh. C-0004.
[78] Cl. Rep., ¶ 53.
[79] Cl. Rep., ¶ 54; Re. Mem., ¶¶ 38, 125.2, 144.

asserts that it "was not adopted pursuant to or in furtherance of" the 1992 Agreement or the 1994 Protocol, because it "makes no reference" thereto; that it does not indicate that "proprietary interest in a particular assets [sic] shall be established" in accordance with national law; that it "does not constitute 'an international agreement,'" and therefore "does not create any legal obligations and enforceable rights;" and that it "is invalid under Kyrgyz law," because it purports to "preserve, govern[,] or establish rights that are regulated by the domain of private national law."[80] The Claimants assert that the Respondent's assertions are again incorrect and unavailing.[81]

126. First, the Claimants contend that the 1994 Protocol is not a *pactum de contrahendo*, nor does it simply record "a prospective undertaking," as the Respondent erroneously contends.[82] Rather, the Claimants submit that as the text of the 1994 Protocol makes clear, it reaffirms on a bilateral basis the obligations already assumed by the Respondent and the Republic of Uzbekistan in the 1992 Agreement with respect to the mutual recognition of property rights in "enterprises and facilities of the social sphere."[83]

127. The Claimants add that, specifically in the Preamble, the Parties "[r]eaffirm[ed] [their] desire to build economic relations based on mutual respect of the property rights of each of the Parties," as originally expressed in the 1992 Agreement.[84] Also, in Article 1, the Parties "agreed on the need to recognize the existence of enterprises and social sphere facilities owned by the States-Parties to this Protocol[] on their territories," and agreed that the Protocol governs the recognition of rights in such facilities, including "health and recreation centers [and] vacation resorts."[85]

128. The Claimants submit that the use of the term "the need to recognize" in Article 1 does not establish that the 1994 Protocol reflects "a prospective undertaking," as the Respondent

[80] Cl. Rep., ¶ 54. Re. Mem., ¶¶ 39, 146, 148-154.
[81] Cl. Rep., ¶ 54.
[82] Cl. Rep., ¶ 55; Re. Mem., ¶¶ 144-145.
[83] Cl. Rep., ¶ 55; Exh. C-0003.
[84] Cl. Rep., ¶ 56; Exh. C-0002; Exh. C-0003.
[85] Cl. Rep., ¶ 56; Exh. C-0003.

contends.[86] Rather, the Claimants argue that as Professor Murphy explains, the ordinary meaning of these terms is that each Party has accepted the necessity of recognizing and addressing the existence of the facilities of the social sphere on their territory that are owned by the other State.[87] There is nothing tentative, uncertain, or contingent about these terms. The Claimants therefore contend that the use of these terms reflects the fact that the obligation to mutually recognize rights in enterprises and facilities of the social sphere already had been agreed in the 1992 Agreement.[88]

129. The Claimants add that this is supported by other Articles of the 1994 Protocol. For example, in Article 3, the Parties expressly reaffirmed the obligation to mutually recognize rights as set out in Article 4 of the 1992 Agreement:

> [H]ave agreed on the need to recognize that the enterprises and the facilities . . . of the social sphere, located on the territory of the other states, that were previously established from the funds of the republican budgets, and funds of enterprises and organizations previously subordinate to the Republic and the former Soviet Union, are the property of the states or those who financed their establishment, or those who own the above-mentioned enterprises and the organizations previously subordinate to the Republic and the former Soviet Union.[89]

130. In addition, the Claimants maintain that the Respondent does not dispute that the 1994 Protocol implements the 1992 Agreement, nor does it dispute that, in 2017 – more than one year after the Respondent unlawfully nationalized the Claimants' Resorts in April 2016 – it expressly affirmed that the 1994 and 1995 Protocols remained "in force."[90] Specifically, as the Claimants have explained, on 5-6 July 2017, representatives of the Kyrgyz and Uzbek Ministries of Foreign Affairs held consultations "on preparing an inventory of and improving the legal-treaty framework of Uzbek-Kyrgyz relations."[91] Annex 2 to the Meeting Protocol contains "138 documents between the two countries [that] have been

[86] Cl. Rep., ¶ 57; Re. Mem., ¶¶ 144-145.
[87] Cl. Rep., ¶ 57; Murphy, ¶ 72.
[88] Cl. Rep., ¶ 57; Exh. C-0003.
[89] Cl. Rep., ¶ 58; Exh. C-0003.
[90] Cl. Rep., ¶ 60; Re. Mem., ¶¶ 38, 125.2, 144; Exh. C-0108.
[91] Cl. Rep., ¶ 60; Cl. Mem., 142; Exh. C-0108.

signed to date," comprising "interstate and intergovernmental documents," "interdepartmental documents," and "other documents that do not have the status of an international treaty."[92] The Claimants submit that the 1994 and 1995 Protocols are listed under "[i]nterstate and intergovernmental treaties," rather than under "[o]ther documents that do not have the status of an international treaty."[93] The Claimants assert that the Respondent does not contest this in any way.[94]

131. Second, the Claimants argue that the Respondent's assertion that the 1995 Protocol was "not adopted pursuant to or in furtherance" of the 1992 Agreement or the 1994 Protocol, because there is no indication in its text, is irrelevant.[95] The Claimants submit that there is no requirement under Kyrgyz law to include such an indication. In any event, the Claimants add that it is evident from their text that the 1992 Agreement and the 1994 and 1995 Protocols all cover the same subject matter, *i.e.*, the mutual recognition of property rights.[96] As Professor Murphy observes, Article 3 of the 1995 Protocol implements an aspect of the 1992 Agreement and the 1994 Protocol.[97]

132. The Claimants also contend that the Respondent's further assertion that the 1995 Protocol does not "indicate either expressly or implicitly that proprietary interest in a particular assets [sic] shall be established and duly registered in accordance with provisions of the law of a Contracting Party, on the territory of which the asset was located," is equally irrelevant.[98] The Claimants particularly submit that the property rights of the Uzbek entities in the four Resorts each were duly registered in accordance with Soviet law, as the documentary record confirms.[99] Moreover, at the time the 1995 Protocol was signed, the unified State register did not even exist in the Kyrgyz Republic.[100]

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[92] Cl. Rep., ¶ 60; Exh. C-0108.
[93] Cl. Rep., ¶ 60; Exh. C-0108.
[94] Cl. Rep., ¶ 60.
[95] Cl. Rep., ¶ 61; Re. Mem., ¶¶ 148-148.1.
[96] Cl. Rep., ¶ 61; Exh. C-0002-0004.
[97] Cl. Rep., ¶ 61; Murphy, ¶ 93.
[98] Cl. Rep., ¶ 62; Re. Mem., ¶¶ 148.2-148.4.
[99] Cl. Rep., ¶ 62; Exh. C-0363; Exh. C-0365; Exh. C-0030; Exh. C-0031.
[100] Cl. Rep., ¶ 62.

133. Third, the Claimants argue that even assuming, *arguendo*, that the 1995 Protocol does not implement the 1992 Agreement or the 1994 Protocol, which it does, it nonetheless does constitute a standalone international treaty.[101] In this respect, the Claimants submit that under the 1994 Law on International Treaties, international treaties can be concluded in any form, including "protocols." The Claimants add that as noted above, the Respondent not only affirmed in 2017 that the 1995 Protocol remained in force, but included the 1995 Protocol under "[i]nterstate and intergovernmental treaties" in the Meeting Protocol, which was signed by a representative of the Kyrgyz Ministry of Foreign Affairs.[102] In addition, the Claimants submit that as Professor Murphy affirms, the 1995 Protocol qualifies as an international treaty under Article 2 of the VCLT, because it is concluded between two States in writing and is governed by international law.[103]

134. Finally, according to the Claimants, the Respondent's assertion that the 1995 Protocol "is invalid under Kyrgyz law" as an international agreement that purports to govern rights that are "regulated by the domain of private national law," *i.e.*, property rights, is baseless.[104] The Claimants contend that Kyrgyz law does not prohibit the Government from concluding international agreements that regulate property rights. The Claimants submit that, indeed, as noted above, President Akayev expressly affirmed that the 1992 Agreement, which likewise regulates property rights, "will be rigorously and in good faith implemented."[105] In any event, the Claimants argue that if the Respondent's arguments were correct, the Respondent would not have affirmed in 2017 that the 1995 Protocol was a valid intergovernmental treaty.[106]

[101] Cl. Rep., ¶ 63; Re. Mem., ¶¶ 39, 146, 150-153, 148-149.
[102] Cl. Rep., ¶ 63; Exh. C-0108.
[103] Cl. Rep., ¶ 63; Murphy, ¶ 88.
[104] Cl. Rep., ¶ 64; Re. Mem., ¶¶ 39, 146, 154.
[105] Cl. Rep., ¶ 64.
[106] Cl. Rep., ¶ 64; Exh. C-0108.

c. The Bilateral Negotiations And Agreements With Other Former Soviet Republics Affirm, Rather Than Undermine, The Obligations Set Out In The 1992 Agreement And The 1994 And 1995 Protocols

135. The Respondent argues that, in accordance with Article 31(3)(b) of the VCLT, its negotiations and agreements with Kazakhstan, as well as certain bilateral agreements concluded by the Russian Federation, should "be taken into account when interpreting" the 1992 Agreement as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[107] According to the Respondent, this "subsequent practice" shows that its negotiations with Uzbekistan "did not result in an agreement as to the legal status of the Resorts."[108] The Claimants contend that the Respondent's assertions are erroneous, and, in any event, the "subsequent practice" upon which it relies confirms, rather than undermine, the obligations set out in the 1992 Agreement and the 1994 and 1995 Protocols.[109]

136. First, the Claimants assert that contrary to the Respondent's contentions, the "subsequent practice" of conducting negotiations and concluding bilateral agreements following the 1992 Agreement does not establish that the 1992 Agreement itself is a *pactum de contrahendo*.[110]

137. In this regard, the Claimants submit that as Professor Murphy observes, it is hazardous and inappropriate in treaty interpretation to assume the parties' intent in concluding an agreement based upon the "subsequent practice" of either party individually vis-à-vis third States, and even more so to place reliance on treaty practice involving exclusively third States.[111] The Claimants argue that the Respondent's interpretation of this "subsequent practice" is therefore inconsistent with international law, namely, the use of subsequent bilateral or multilateral agreements in relation to an initial agreement.[112]

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[107] Cl. Rep., ¶ 65; Re. Mem., ¶ 130.3.
[108] Cl. Rep., ¶ 65; Re. Mem., ¶¶ 37-42.
[109] Cl. Rep., ¶ 65.
[110] Cl. Rep., ¶ 66; Murphy, ¶ 84; Re. Mem., ¶ 130.3.
[111] Cl. Rep., ¶ 67; Murphy, ¶¶ 94-95.
[112] Cl. Rep., ¶ 67; Murphy, ¶ 84.

138. Also, the Claimants cite Professor Murphy to further explain that Contracting States to duly concluded international agreements with binding obligations and rights routinely enter into subsequent bilateral and multilateral agreements that implement those initial agreements.[113] The Claimants add that mere fact that some of the Contracting States to the initial agreement have chosen to enter into a subsequent agreement or protocol that implements the initial agreement does not render the initial agreement a *pactum de contrahendo*.[114] Rather, as the Claimants argue, the text of the initial agreement – in this case, the 1992 Agreement – should be reviewed applying the standard tools of treaty interpretation.[115] Accordingly and as explained above, the Claimants contend that the text of the 1992 Agreement reflects that the parties assumed binding obligations, including to recognize the ownership rights of the State, its individuals, or entities in resorts whose construction they had financed.[116]

d. Contrary to The Respondent's Contentions, The Bilateral Negotiations Between Respondent And The Republic Of Uzbekistan Affirmed That The Legal Status Of The Claimants' Resorts Had Been Settled

139. The Respondent asserts that, following the conclusion of the 1992 Agreement and 1994 and 1995 Protocols, the Kyrgyz and Uzbek Governments allegedly "attempted – without success – to determine the legal status of the four Resorts," and that Uzbekistan, as well as the Claimants, "considered" that the Resorts were "not regulated" and "existed in limbo."[117] As set forth below, the Claimants contend that the Respondent's assertions are unsupported and incorrect.[118]

140. The Claimants emphasize at the outset that the Respondent fails to present any agreements or protocols resulting from any bilateral negotiations – or any other evidence – that would amend or invalidate the terms of the 1992 Agreement or the 1994 and 1995 Protocols. The Claimants submit that, instead, the Respondent relies upon various correspondence taken

[113] Cl. Rep., ¶ 68; Murphy, ¶ 84.
[114] Cl. Rep., ¶ 68; Murphy, ¶ 84.
[115] Cl. Rep., ¶ 68; Murphy, ¶ 84.
[116] Cl. Rep., ¶ 68.
[117] Cl. Rep., ¶ 73; Re. Mem., ¶¶ 40.3, 130.4.
[118] Cl. Rep., ¶ 73.

out of context, which relates to unlawful actions taken by the Kyrgyz Republic in violation of its agreed obligations.[119]

141. First, the Respondent relies upon a Diplomatic Note from the Uzbek Ministry of Foreign Affairs to its Kyrgyz counterpart dated 12 April 2016, in which the Uzbek Ministry of Foreign Affairs protested the Respondent's unlawful nationalization of the Claimants' four Resorts without justification or compensation.[120] According to the Respondent, the Diplomatic Note allegedly shows that the legal status of the Resorts remained "unresolved."[121] The Respondent argues that, as the Diplomatic Note recognizes, "the Uzbek Government sent over a draft of the Agreement on Mutual Recognition of Rights and Regulation of Property Relations to the Kyrgyz Government," and that there were "follow-up inter-Governmental communications in August 2008 and July 2009," as well as in 2010-2015, "aimed at addressing the legal void that the four Resorts were operating in," but that those "communications did not result in an agreement as to the legal status of the Resorts."[122] The Claimants contend that these assertions are incorrect and misleading, for the following reasons:[123]

- As the Diplomatic Note reflects, the legal status of the Resorts was not "unresolved," as the Respondent erroneously contends.[124] Rather, the Uzbek Ministry of Foreign Affairs made clear in its Diplomatic Note that the "Kyrgyz side [had assumed] obligations" in "the framework of bilateral agreements," *i.e.*, the 1992 Agreement and the 1994 and 1995 Protocols.[125] Specifically, as the Uzbek Ministry of Foreign Affairs observed, the 1994 and 1995 Protocols "*stipulated the preservation of the Republic of Uzbekistan's ownership of the above objects*."[126] Despite these agreements, however,

[119] Cl. Rep., ¶ 74; Re. Mem., ¶¶ 40.1-40.3, 130.4.
[120] Cl. Rep., ¶ 75; Re. Mem., ¶¶ 40.1-40.3, 130.4.
[121] Cl. Rep., ¶ 75; Re. Mem., ¶ 130.4.
[122] Cl. Rep., ¶ 75; Re. Mem., ¶¶ 40.1-40.3, 130.4.
[123] Cl. Rep., ¶ 75.
[124] Cl. Rep., ¶ 76; Re. Mem., ¶ 130.4.
[125] Cl. Rep., ¶ 76; Exh. C-0026.
[126] Cl. Rep., ¶ 76; Exh. C-0026.

the Respondent had taken various unlawful acts against the Resorts over the years, culminating in the Respondent's unlawful nationalization.[127]

- As the Uzbek Ministry of Foreign Affairs explained, in 2008 and 2009, as well as "[d]uring 2010-2015, notes have repeatedly been addressed to the Kyrgyz Foreign Ministry about the impermissibility of the Kyrgyz party's unlawful acts against property of the Republic of Uzbekistan, on the territory of Kyrgyzstan."[128] Although the legal status of the Resorts was settled in "the framework of bilateral agreements," the Uzbek Ministry of Foreign Affairs noted that the Republic of Uzbekistan was forced to send "a draft intergovernmental agreement on mutual recognition of rights and regulation of property relations . . . for the consideration of the Kyrgyz side in February 2008;" "set up a bilateral working to address the parties' properties issues;" and repeatedly address diplomatic notes to the Kyrgyz Ministry of Foreign Affairs because of "the Kyrgyz party's unlawful acts against" the Resorts.[129]

- As the Diplomatic Note confirms, the subsequent bilateral negotiations between the Respondent and the Republic of Uzbekistan thus were not "aimed at addressing the legal void that the four Resorts were operating in," as the Respondent asserts, but rather were aimed at addressing the Respondent's "unlawful acts against the Resorts," which were in direct violation of the bilateral agreements concluded between the two States.[130]

142. Second, the Claimants submit that the Respondent relies upon a letter from Uzpromstroybank to the Uzbek Ministry of Foreign Affairs dated 23 August 2011, in which Uzpromstroybank complained about the unlawful taking of Resort Buston.[131] According to the Respondent, this letter allegedly shows that Uzpromstroybank "considered" that the Resort "existed in 'limbo' and urged the Uzbek State Authorities to

[127] Cl. Rep., ¶ 76; Exh. C-0026.
[128] Cl. Rep., ¶ 77; Exh. C-0026.
[129] Cl. Rep., ¶ 77; Exh. C-0026.
[130] Cl. Rep., ¶ 78; Re. Mem., ¶ 40.3; Exh. C-0026.
[131] Cl. Rep. ¶ 79; Exh. C-0261.

'solve this problem.'"[132] The Claimants contend that these assertions too are erroneous, because:[133]

- As Mr. Usmanov, the former Head of the Legal Department of Uzpromstroybank, confirms and as the text of the letter makes clear, the issue that remained "in limbo" was the local Government's unlawful taking of Uzpromstroybank's rights in Resort Buston in 2007, which Uzpromstroybank had lawfully acquired in 2003.[134] As Mr. Usmanov explains, because Resort Buston had been unlawfully transferred to the local Government in January 2007, Uzpromstroybank wrote to the Uzbek Ministry of Foreign Affairs on 23 August 2011, proposing to resolve the issue of Resort Buston through an inter-governmental agreement.

- As its 23 August 2011 letter reflects, Uzpromstroybank affirmed its legal rights in Resort Buston, noting that, "in accordance with the decisions of the Government Commission on Bankruptcy and Reorganization of Enterprises and on the basis of Resolution No. 81 of the Cabinet of Ministers of the Republic of Uzbekistan dated February 14, 2003, the 'Yubileyniy' resort located on Issyk-Kul Lake was transferred from the balance sheet of [Tashselmash] to the balance sheet of [Uzpromstroybank]."[135] Uzpromstroybank further explained that, "in accordance with the decisions of the Ton District Council of People's Deputies of the Kyrgyz SSR, a land plot . . . was allocated for eternal use for construction of the 'Yubileyniy Resort' [and] Resolution of the Council of Ministers of the Kyrgyz SSR No. 563 dated October 21, 1984 'On land allotment to 'Tashselmash' Plant for the construction of a resort' was adopted."[136]

[132] Cl. Rep. ¶ 79; Re. Mem., ¶ 40.3.
[133] Cl. Rep. ¶ 79.
[134] Cl. Rep. ¶ 80; Usmanov II, ¶¶ 20; Exh. C-0261.
[135] Cl. Rep. ¶ 81; Usmanov II, ¶ 18; Exh. C-0261.
[136] Cl. Rep. ¶ 81; Usmanov II, ¶ 18; Exh. C-0261.

143. Accordingly, the Claimants submit that Uzpromstroybank's letter reflects that the issue that remained "in limbo" was the Kunchygysh Government's unlawful taking of Uzpromstroybank's rights in Resort Buston.[137]

144. Third, the Claimants maintain that the Respondent relies upon a letter from Asaka to the Kyrgyz Fund for the Management of State Property dated 7 July 2016, in which Asaka objected to the Respondent's unlawful nationalization of Resort Dilorom.[138] According to the Respondent, this letter shows that Asaka allegedly "considered" that the "legal status" of Resort Dilorom was "not regulated."[139] The Claimants allege that this assertion is also incorrect and misleading, because:[140]

- As its 7 July 2016 letter reflects, Asaka affirmed its legal rights in Resort Dilorom.[234] Specifically, Asaka affirmed that Resort Dilorom had been constructed on land "in accordance with the Resolution of the Council of Ministers of [the] Kyrgyz SSR No. 56 dated February 13, 1967," and that the Resort had been acquired by Asaka pursuant to Resolution No. 126A of the Cabinet of Ministers of Uzbekistan dated 29 March 1999.[141] Asaka further affirmed that, under Resolution No. 611 of the Issyk-Kul District State Administration dated 5 November 1999, the land plot had been granted "for the period of 50 years to Resort 'Dilorom' of 'Asaka' Bank (Republic of Uzbekistan)" for use, which had been duly "registered in the book of records of state acts for the right to use land" as State Act No. 023117.[142]

- As Mr. Mamatov explains, despite Asaka's registered right to use the land and the buildings and structures located on the land for 50 years, the Respondent had taken various actions in violation of this right over the years, which Asaka was raising in its letter.[143] For example, as reflected in a letter from the State Agency for Registration of

[137] Cl. Rep. ¶ 83.
[138] Cl. Rep., ¶ 84; Re. Mem., ¶¶ 41, 130.4; Exh. C-0323.
[139] Cl. Rep., ¶ 84; Re. Mem., ¶¶ 41, 130.4; Exh. C-0323.
[140] Cl. Rep., ¶ 84; Exh. C-0323.
[141] Cl. Rep., ¶ 85; Exh. C-0323.
[142] Cl. Rep., ¶ 85; Exh. C-0323; Exh. C-0050.
[143] Cl. Rep., ¶ 86; Mamatov III, ¶ 21; Exh. C-0573.

Real Estate to Resort Dilorom dated 26 June 2008, the State Agency informed the Resort that "the actual area of the main zone is 21.77 ha," and that the Resort's "previously owned 2.11 ha of land with auxiliary facilities and 0.88 ha of land" were "transferred to the private resort 'Sayram' based on the court decision."[144] The State Agency further informed Resort Dilorom that "the court decision has not been registered."[145] No reasons or justifications were provided.[146]

- In addition, as Asaka explained in its 7 July 2016 letter, it "ha[d] information on nationalization of facilities of the resort area on the shore of Lake Issyk-Kul," pursuant to which the "buildings and facilities of Resort 'Dilorom' of 'Asaka' Bank became the property of the [Kyrgyz] Fund [for Management of State Property]."[147] Asaka thus requested "to settle the issue of the legal status of the Resort at the intergovernmental level in the shortest possible time."[148] As the letter reflects and as Mr. Mamatov affirms, the "legal status of the Resort" refers to the Respondent's unlawful nationalization of Resort Dilorom on 4 April 2016.[149]

145. In summary, the Claimants maintain that none of the correspondence that the Respondent relies upon demonstrates that the Claimants or Uzbekistan considered that the Resorts "existed in limbo." To the contrary, this correspondence reflects and records protests by the Claimants and Uzbekistan to actions taken by the Respondent against the Resorts in violation of its mutually agreed obligations.[150]

(3) Contrary To The Respondent's Contentions, The Uzbek Entities Did Not "Lose" Their Registered Rights In The Resorts, But Rather Maintained Them In Accordance With Kyrgyz Law

146. The Claimants submit that the 1999 Land Code (the "**1999 Land Code**") and the Law on State Registration of Rights to Immovable Property dated 22 December 1998 (the "**1998**

[144] Cl. Rep., ¶ 86; Exh. C-0573.
[145] Cl. Rep., ¶ 86; Exh. C-0573.
[146] Cl. Rep., ¶ 86.
[147] Cl. Rep., ¶ 87; Exh. C-0323.
[148] Cl. Rep., ¶ 87; Exh. C-0323.
[149] Cl. Rep., ¶ 87; Mamatov III, ¶ 24; Exh. C-0323.
[150] Cl. Rep., ¶ 88.

Law on State Registration") govern land relations in the Kyrgyz Republic, including the registration of property rights.[151] Specifically, the Claimants maintain that the 1999 Land Code provides for two types of rights to land plots: (i) the right to use a land plot; and (ii) the right of ownership to a land plot.[152] The Claimants also note that the 1999 Land Code establishes the relationship between the land plot and the buildings and structures located on it; specifically illustrating that the buildings and structures are inseparable from the right to the land plot.[153] Additionally, the Claimants explain that the 1998 Law on State Registration established the legal basis for a unified system of State registration of rights to real estate in the Kyrgyz Republic, but did not invalidate pre-existing property rights, including property rights granted and duly registered during the Soviet period.[154]

147. The Respondent asserts that, "during the transition of the country from being a Soviet republic to an independent sovereign state," it enacted legislation to "address[] the validity of rights over land plots granted during the Soviet time."[155] According to the Respondent, entities and individuals were required to "bring their rights over land in conformity with the law and to re-register" their rights, otherwise "those rights would be lost."[156] In addition, the Respondent contends that, under the Law on Enactment of the Land Code dated 2 June 1999, any right of permanent use granted during the Soviet period was valid only until 1 January 2000.[157] The Claimants contend that as set forth below, the Respondent's assertions are erroneous, unsupported, and inconsistent with Kyrgyz law.[158]

148. First, the Claimants submit that the Resolutions of the Council of Ministers of the Kyrgyz SSR and the People's Deputies of the Ton District that allocated land plots to entities of the Uzbek SSR for the construction of the four Resorts on Lake Issyk-Kul remained valid after the independence of the Kyrgyz Republic. The Claimants argue that this is affirmed

[151] Cl. Rep., ¶ 89; Cl. POC, ¶ 29; Exh. CL-0303; Exh. CL-0304.
[152] Cl. Rep., ¶ 89; Cl. POC, ¶ 30; Exh. CL-0304.
[153] Cl. Rep., ¶ 89; Cl. POC, ¶ 32; Exh. CL-0304.
[154] Cl. Rep., ¶ 89; Cl. POC, ¶¶ 33-34; Exh. CL-0303.
[155] Cl. Rep., ¶ 90; Re. Mem., ¶ 47.
[156] Cl. Rep., ¶ 90; Re. Mem., ¶¶ 47-50.
[157] Cl. Rep., ¶ 90; Re. Mem., ¶¶ 50.1-50.3.
[158] Cl. Rep., ¶ 90.

by Kyrgyz law. The Claimants specifically note the Law No. 1186-XII on Enactment of the Constitution of the Kyrgyz Republic dated 5 May 1993, which provides expressly that "[l]egal acts that were in force on the day of entry into force of the Constitution of the Kyrgyz Republic are valid until they are annulled" or otherwise amended.[159]

149. The Claimants also note Article 3 of Law No. 16 dated 8 May 1996, which enacted Part One of the Civil Code, and stipulates that "the laws and other legal acts of the Kyrgyz Republic shall apply insofar as they do not contradict the Part One of the Code."[160] The Claimants submit that the relevant Resolutions granting the land plots did not contradict any provisions in Part One of the Civil Code, and therefore remained valid after the independence of the Kyrgyz Republic.[161]

150. Second, the Claimants argue that neither Resolution No. 429-XII nor the Law on Land Reform requires users of land plots that had acquired their rights during the Soviet period to "promptly proceed with [the] re-registration" of their rights, "failing which those rights would be lost," as the Respondent contends.[162] Rather, the Claimants submit that Resolution No. 429-XII provides in Article 4 "legal entities, temporarily using land plots provided to them by agricultural enterprises before June 1, 1991, retain their rights until the re-registration of their rights to land possession or land use."[163] The Claimants contend that Article 4 thus preserves rights to land plots granted during the Soviet period; it does not invalidate them.[164]

151. In any event, the Claimants argue that Article 4 reflects the fact that Resolution No. 429-XII applies only to land plots provided by "agricultural enterprises" for "temporary use."[165] As the record confirms, none of the Claimants' land plots were granted by agricultural enterprises for temporary use; rather, the land plots each were granted by the Council of

[159] Cl. Rep., ¶ 91; Exh. R-0002.
[160] Cl. Rep., ¶ 92; Exh. C-0318.
[161] Cl. Rep., ¶ 92.
[162] Cl. Rep., ¶ 93; Re. Mem., ¶ 48.
[163] Cl. Rep., ¶ 93; Exh. RL-0107.
[164] Cl. Rep., ¶ 93; Exh. RL-0107.
[165] Cl. Rep., ¶ 94; Exh. RL-0107.

Ministers of the Kyrgyz SSR or the Council of People's Deputies of the Ton District for permanent use.[166]

152. The Claimants add that the Law on Land Reform likewise does not invalidate rights to land plots granted during the Soviet period.[167] Article 9 of the Law provides:

> Re-issuance and issuance to legal entities of State acts for the right to possess (permanently use) land and certificates of the right of temporary use of land are issued to legal entities by local [Councils] of people's deputies and the land use planning service at the expense of the State budget . . . [T]he previously established right to the respective land plot shall be retained for a period of five years from the beginning of the land reform . . . Upon expiration of this period, the right to a land plot shall be lost.[168]

153. The Claimants argue that Article 9 reflects the fact that the Law on Land Reform imposed an obligation on the State authorities to issue and re-issue State acts and certificates at the expense of the State budget within five years from "the beginning of land reform;" it did not impose an obligation to re-register.[169] The Claimant submits that, in any event, the beginning of land reform was in 1998. On 2 June 1999, the Kyrgyz Republic enacted a new Land Code.[170] As a result, the Law on Land Reform became invalid, including Article 9.[171] The Law on Land Reform thus did not and could not invalidate any rights to land plots five years from "the beginning of land reform," *i.e.*, in 2003.[172]

154. Third, the Claimants argue that the Respondent's assertion that, under Articles 7(2), 24(2), and 25(1) of the Civil Code, rights in land plots and other immovable property "do not exist" or are "invalid" without registration is unsupported by the text of those provisions.[173] In this regard, the Claimants submit that Articles 24(2) and 25(1) of the Civil Code provide that certain property rights are "subject to state registration," while Article 7(2) provides

[166] Cl. Rep., ¶ 94.
[167] Cl. Rep., ¶ 95; Re. Mem., ¶ 48.
[168] Cl. Rep., ¶ 95; Exh. RL-0108.
[169] Cl. Rep., ¶ 95; Exh. RL-0108.
[170] Cl. Rep., ¶ 95; Exh. CL-0304.
[171] Cl. Rep., ¶ 95; Exh. CL-0304; Exh. CL-0319.
[172] Cl. Rep., ¶ 95.
[173] Cl. Rep., ¶ 96; Re. Mem., ¶¶ 50.4, 51.1.

that such rights "arise from the moment of registration of this property or the corresponding rights to it, unless otherwise established by law," including, for example, in the case of universal succession.[174] The Claimants aver that nothing in these provisions invalidates pre-existing rights in land plots granted during the Soviet period, if they are not re-registered.[175]

155. Moreover, the Claimants add that Article 4 of the Law on the Enactment of the Civil Code provides that the Civil Code "applies to civil legal relations that have arisen after its entry into force, that is, from June 1, 1996."[176] Accordingly, Articles 7(2), 24(2) and 25(1) of the Civil Code in any event do not apply to property rights that arose prior to 1 June 1996, including the rights granted to the Uzbek entities for the construction of their four Resorts on Lake Issyk-Kul.[177]

156. Fourth, the Claimant contends that the 1998 Law on State Registration, which established the unified State register, likewise did not invalidate pre-existing rights, as the Respondent erroneously contends.[178] Article 53, provides that:

> Rights to the immovable property that existed prior to the opening of the local registration authority in the registration zone remain valid and shall be re-registered during the systemic registration.[179]

While Article 53 calls for the re-registration of rights to immovable property that existed prior to the opening of the local registration authority, it does not provide for the invalidation of such rights, if they are not re-registered; rather, it explicitly reaffirms that those rights "remain valid."[180]

157. The Claimants also submit that the Respondent's further assertion that under Article 9(2) of the 1999 Land Code, rights in land "are subject to registration with the unified State

[174] Cl. Rep., ¶ 96; Exh. CL-0302.
[175] Cl. Rep., ¶ 96.
[176] Cl. Rep., ¶ 97; Exh. C-0318.
[177] Cl. Rep., ¶ 97.
[178] Cl. Rep., ¶ 98; Re. Mem., ¶ 51.1; Exh. CL-0311.
[179] Cl. Rep., ¶ 98; Exh. CL-0305.
[180] Cl. Rep., ¶ 98; Tilenbaev, ¶ 9.

register, otherwise they simply do not exist," is equally unsupported.[181] Particularly, the Claimants argue that Article 9(2) provides that "the following shall be subject to state registration in the unified state register: the emergence of rights to a land plot, their transfer, conveyance, restrictions, servitude, mortgage and their termination."[182] The Claimants assert that nothing in Article 9(2) provides that pre-existing rights in a land plot cease to exist, if such rights are not re-registered in the unified State register.[183]

158. Finally, the Claimants contend that the Respondent's assertion that under Article 7(2) of the Law on the Enactment of the Land Code, any previously granted right of permanent use of land expired on 1 January 2000, unless it was re-registered, is incorrect.[184] The Claimants submit that while the Respondent refers only to Article 7(2), Article 7(1) makes clear that Article 7(2) applies to land plots granted "for agricultural purposes" to "individuals," as well as to "land provided for the organization of minifarms, farms, including dairy and meat mini-farms."[185] Accordingly, Article 7(2) does not apply to land plots granted for the construction of resorts and objects of the social sphere, such as the land plots at issue here.[186]

159. In summary, the Claimants argue that contrary to the Respondent's contentions, rights to land plots and immovable property granted and duly registered during the Soviet period remained valid following the land reforms instituted by the Kyrgyz Government in the 1990s. Moreover, the Claimants emphasize that, as set forth below, each Claimant, indirectly through its Kyrgyz branch or subsidiary, held a registered right to use the land and an ownership right in the buildings and structures comprising their respective Resorts at the time of the Respondent's unlawful nationalization in April 2016.[187]

[181] Cl. Rep., ¶ 99; Re. Mem., ¶ 50.4.
[182] Cl. Rep., ¶ 99; Exh. CL-0304.
[183] Cl. Rep., ¶ 99; Exh. CL-0304.
[184] Cl. Rep., ¶ 100; Re. Mem., ¶ 50.3.
[185] Cl. Rep., ¶ 100; Exh. C-0319.
[186] Cl. Rep., ¶ 100.
[187] Cl. Rep., ¶ 101.

(4) TMP, Through Its Registered Kyrgyz Branch, Continued To Operate Resort Zolotiye Peski Successfully Until The Respondent's Unlawful Nationalization Of The Resort In April 2016

a. TMP Had Registered Rights In The Land, Buildings, And Structures Comprising Resort Zolotiye Peski

160. The Claimants submit that, in October 1959, the Council of Ministers of the Kyrgyz SSR allocated 25 hectares of land on the northern shore of Lake Issyk-Kul in the village of Bosteri to TAPOiCh (now known as TMP) for the construction of Resort Zolotiye Peski.[188] The Claimants also submit that by August 1960, TAPOiCh had constructed 21 cottages, a dining facility, a power station, and other facilities on the 25 hectares of land.[189] The Claimants add that a commission including representatives of the Bosteri Village accepted the buildings and facilities into operation, as reflected in the Act of Completion and Commissioning dated 5 August 1960.[190] TAPOiCh's right to use the 25 hectares of land for Resort Zolotiye Peski was duly registered in 1978 in the State Book on Land Use, as confirmed by the Act on the Right of Land Use issued by the Council of People's Deputies of the Issyk-Kul District on 8 June 1978.[191]

161. The Claimants further note that, on 21 September 1992, TAPOiCh registered with the Kyrgyz Ministry of Justice a branch in the Kyrgyz Republic to manage and operate Resort Zolotiye Peski; TAPOiCh subsequently re-registered its Kyrgyz branch in December 1999 due to a change in TAPOiCh's corporate name and organizational form.[192] Through its registered Kyrgyz branch, TAPOiCh, which became TMP in 2015, continued to manage and operate Resort Zolotiye Peski continuously.[193] In 2014 and 2015, Resort Zolotiye Peski signed one-year lease agreements with the Bosteri Village Council for its 2.7 hectares of beachfront land, which were renewed annually.[194]

[188] Cl. Rep., ¶ 102; Cl. Mem., ¶¶ 15; Exh. C-0028; Elmudorov II, ¶ 4.
[189] Cl. Rep., ¶ 102; Cl. Mem., ¶ 16; Exh. C-0352.
[190] Cl. Rep., ¶ 102; Cl. Mem., ¶ 16; Exh. C-0352.
[191] Cl. Rep., ¶ 102; Cl. Mem., ¶ 17; Elmudorov II, ¶¶ 3-9; Exh. C-0363.
[192] Cl. Rep., ¶ 103; Exh. C-0363.
[193] Cl. Rep., ¶ 103; Exh. C-0442.
[194] Cl. Rep., ¶ 103; Exh. C-0075; Exh. C-0076.

162. The Claimants also demonstrated that the Respondent repeatedly recognized TMP's rights in the Resort, including: (i) through the 2005 Government Commission, which concluded that Resort Zolotiye Peski "does not have a surplus [of land] and does not use the lands illegally;" (ii) the 2005 Technical Passport issued by the Department of Land Management and Registration of Rights to Real Estate of the State Register, which designated TAPOiCh as the "user" of all the buildings and structures comprising the Resort; (iii) the decisions of the Inter-District Court of the Issyk-Kul Region and the Issyk-Kul Regional Court in 2010 and 2011, which affirmed that Resort Zolotiye Peski "should occupy" 25 hectares of land; and (iv) Resort Zolotiye Peski's regular payment of land and real estate taxes to the Kyrgyz Government based on the 25 hectares of land, buildings, and structures comprising the Resort.[195]

163. The Respondent contends that, contrary to the findings of its own 2005 Government Commission and Courts, TMP operated Resort Zolotiye Peski "at a great risk," because it allegedly "had no rights whatsoever over the 25-ha land plot and immovable property comprising the Zolotiye Peski Resort."[196] Specifically, the Respondent asserts that TMP's right to use the land "bec[ame] invalid by mid-1996 at the latest," because it "had not undertaken any actions towards proper re-registration of its rights over the . . . land plot within the prescribed five-year period or at all," and that, "in any event, the right of permanent use . . . had become invalid under the provisions of the 1999 Land Code" and expired on 1 January 2000 at the latest.[197] In addition, the Respondent asserts that "any right that the Claimant TMP had had over the facilities of the Zolotiye Peski Resort . . . expired simultaneously with its right of use of the relevant land plot," and that the State register extract allegedly shows that, "the land and buildings comprising the Zolotiye Peski Resort have always been in State property."[198] The Claimants contend that the Respondent's allegations are wrong.

[195] Cl. Rep., ¶ 104; Exh. C-0257; Exh. C-0283; Exh. C-0495; Exh. C-0538; Exh. C-0550; Exh. C-0552; Exh. C-0553; Exh. C-0554; Exh. C-0556; Exh. C-0557.

[196] Cl. Rep., ¶ 106; Re. Mem., ¶¶ 12, 57.

[197] Cl. Rep., ¶ 106; Re. Mem., ¶¶ 56.1-56.2.

[198] Cl. Rep., ¶ 106; Re. Mem., ¶ 56.3.

164. First, the Claimants note that the Respondent's assertion that TMP, through its registered Kyrgyz branch, "had no rights whatsoever" in the land plot and immovable property comprising Resort Zolotiye Peski ignores the fact that TMP maintained a registered right to use the land, as well as an ownership right in the buildings and structures it constructed on the land, through the doctrine of universal succession. The Claimants submit that Article 37(1) of the 1999 Land Code codifies the doctrine of universal succession under Kyrgyz law as follows:

> The right to a land plot can be freely transferred from one individual and legal entity to another in the order of universal succession (inheritance, reorganization) in accordance with the civil legislation of the Kyrgyz Republic.[199]

165. Also, the Claimants state that Article 23 of the Civil Code likewise provides with respect to other immovable property that:

> Objects of civil rights may be freely alienated or transferred from one person to another by universal succession (inheritance, reorganization of a legal entity)[.][200]

166. The Claimants contend that the Respondent itself recognizes the doctrine of universal succession as an exception to any purported re-registration requirement. Specifically, the Respondent notes that "any transfer of rights over a land plot is subject to registration in the unified State register, save for instances of universal succession which are only possible in case of re-organization of a legal entity," or in case of inheritance.[201]

167. As such, the Claimants emphasize that although TMP went through several reorganizations, this same legal entity maintained the registered right to use the 25 hectares of land on which Resort Zolotiye Peski was located, as well as an ownership right in the buildings and structures it had constructed on the land, through the doctrine of universal

[199] Cl. Rep., ¶ 108; Exh. CL-0304.
[200] Cl. Rep., ¶ 108; Exh. CL-0302.
[201] Cl. Rep., ¶ 108; Re. Mem., ¶ 50.4.

succession, as codified in Article 37(1) of the 1999 Land Code and Article 23 of the Civil Code.[202]

168. Second, the Claimants assert that TMP's rights in the land plot did not "become invalid by mid-1996" due to its failure to re-register its rights "promptly."[203] As summarized above, the Claimants contend that the 1998 Law on State Registration did not invalidate pre-existing rights in land plots that were granted during the Soviet period; to the contrary, Article 54 – and later amended Article 53 – expressly preserved property rights that existed prior to 1998, including TMP's duly registered right to use the 25 hectares of land on which Resort Zolotiye Peski was located.[204]

169. The Claimants submit that, while the Respondent relies upon Resolution No. 429-XII and the Law on Land Reform for its contrary argument, neither of these laws invalidated pre-existing rights in land plots for the construction of resorts.[205] Specifically, the Claimants maintain that Article 4 of Resolution No. 429-XII applies only to land plots provided by agricultural enterprises for "temporary use."[206] TMP, by contrast, was granted 25 hectares of land by the Council of Ministers of the Kyrgyz SSR for the construction of a resort "[f]or permanent use."[207] In any event, the Claimants contend that Article 4 provides that legal entities "retain their rights until they reregister" them.[208]

170. Also, and as further discussed above, the Claimants contend that Article 9 of the Law on Land Reform was invalidated by the enactment of the 1999 Land Code, and nothing in the 1999 Land Code invalidates pre-existing rights to land plots where they are not re-registered.[209]

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[202] Cl. Rep., ¶ 113.
[203] Cl. Rep., ¶ 114; Re. Mem., ¶¶ 48, 56.1
[204] Cl. Rep., ¶ 114; Exh. CL-0303; Exh. CL-0305.
[205] Cl. Rep., ¶ 115; Re. Mem., ¶¶ 47-49, 56.1.
[206] Cl. Rep., ¶ 115; Exh. RL-0107.
[207] Cl. Rep., ¶ 115; Exh. C-0028; Exh. C-0363.
[208] Cl. Rep., ¶ 115; Exh. RL-0107.
[209] Cl. Rep., ¶ 116; Exh. CL-0304; Exh. CL-0319.

171. Third, the Claimants argue that TMP's right to use the land at Resort Zolotiye Peski did not expire by 1 January 2000 under Article 7 of the Law on the Enactment of the Land Code, as the Respondent argues.[210] Rather, as explained above, Article 7 applies only to land granted "for agricultural purposes" to "individuals," as well as to "land provided for the organization of mini-farms, farms, including dairy and meat mini-farms."[211] The Claimants note that Article 7 does not apply to the allocation of land for the construction of a resort, as was the case with TMP.[212]

172. Fourth, the Claimants assert that the Respondent's contention that the 1998 Law on State Registration cannot preserve the right of permanent use by a foreign entity such as TMP, because, under the 1999 Land Code, foreign entities may only have the right to use land for a fixed term, is also incorrect.[213] The Claimants rely on Tilenbaev, who observes that nothing in the 1998 Law on State Registration invalidates pre-existing property rights.[214] Likewise, while foreign entities may acquire the right to use land only for a fixed term, nothing in the 1999 Land Code provides that pre-existing rights to use land permanently cease to exist, where the holder of those rights is a foreign entity.[215]

173. In addition, the Claimants submit that under the Kyrgyz hierarchy of laws, the terms of the 1992 Agreement and 1994 and 1995 Protocols, which specifically preserved the rights of TMP in the Resort, prevail over the 1999 Land Code. This is because, as international agreements, the 1992 Agreement and the 1994 and 1995 Protocols are subordinate only to the Constitution. The Claimants add that the limitation contained in the 1999 Land Code, *i.e.*, that foreign entities may acquire the right to use land only for a fixed term, therefore cannot operate to invalidate the obligation assumed by the Kyrgyz Republic in the 1992

[210] Cl. Rep., ¶ 117; Re. Mem., ¶ 56.2.
[211] Cl. Rep., ¶ 117; Exh. CL-0319.
[212] Cl. Rep., ¶ 117.
[213] Cl. Rep., ¶ 118; Re. Mem., ¶ 58.1.
[214] Cl. Rep., ¶ 118; Tilenbaev, ¶¶ 7-9.
[215] Cl. Rep., ¶ 118; Exh. CL-0304.

Agreement and 1994 and 1995 Protocols to recognize the rights of the Uzbek entities which had funded the construction of the Resorts, including TMP.[216]

174. The Claimants contend that for these reasons, following the enactment of the 1999 Land Code, TMP's permanent use right would have converted into a fixed term use right of 49 years. Thus, the Claimants submit that, at the time of the Respondent's unlawful nationalization in 2016, TMP had the right to use the land, as the 49-year time period had not yet expired.[217]

175. Fifth, the Claimants submit that the Respondent's assertions that the "Claimants have not submitted any title documents attesting to the existence of any rights of [the] Claimant [TMP] (as opposed to its predecessors) over the facilities at Resort Zolotiye Peski," and that TMP's rights to the facilities "expired simultaneously with its right of use of the relevant land plot" are meritless.[218]

176. The Claimant emphasizes that PO Box 116, TAPOiCh, and TMP are all the same legal entity. PO Box 116 constructed the buildings and structures at Resort Zolotiye Peski on the 25 hectares of land granted to it by the Council of the Ministers of the Kyrgyz SSR in 1959.[219] The Resort thereafter was commissioned in 1960, as reflected in the Act of Completion and Commissioning dated 5 August 1960, and PO Box 116/TAPOiCh continued to expand the Resort with additional buildings and structures, as reflected in additional Acts of Completion and Commissioning from 1961 until 1989.[220] The Claimants argue that these Acts of Completion and Commissioning, which are duly signed by representatives of the Bosteri Village, confirm that TMP funded the construction of the buildings and structures on the 25 hectares of land comprising Resort Zolotiye Peski. TMP's ownership rights in the buildings and structures it had constructed on the land were

[216] Cl. Rep., ¶ 119.
[217] Cl. Rep., ¶ 120.
[218] Cl. Rep., ¶ 120; Re. Mem., ¶¶ 54, 56.3.
[219] Cl. Rep., ¶ 122; Exh. C-0028.
[220] Cl. Rep., ¶ 122; Exh. C-0352 Exh. C-0366; Exh. C-0367; Exh. C-0368; Exh. C-0369; Exh. C-0371; Exh. C-0374.

expressly recognized by the Kyrgyz Republic in the 1992 Agreement and in the 1994 and 1995 Protocols.[221]

177. The Claimants further contend that the Respondent's assertion that the "Technical Passport for the Resort's facilities issued to the Claimant TMP on October 6, 2005 [] designat[ing] TMP as 'User' of the resort's facilities" "is not a title document" and "cannot in and of itself attest to the existence of any rights whatsoever" is likewise misplaced.[222]

178. In this respect, the Claimants argue that the term "Technical Passport" is defined in Article 1(28) of the 1998 Law on State Registration as "a document of the established form, drawn up based on the results of a technical survey of a real estate unit," while a "[t]echnical survey" is defined as the "determination of the technical characteristics of buildings, structures, apartments or other real estate, as well as the actual boundaries of the land plot."[223] Further, the Claimants contend that in accordance with Article 25-1 of the 1998 Law on State Registration, "[b]ased on the results of the initial survey, a technical passport is compiled and issued to the right holder in the real estate."[224] Accordingly, the Claimants submit that by issuing the Technical Passport for the Resort's buildings and facilities to TMP on 6 October 2005, *i.e.*, well after the independence of the Kyrgyz Republic, the Respondent's Department of Land Management and Registration of Rights to Real Estate of the State Register reaffirmed that TMP was a "right holder in the real estate."[225]

179. Moreover, the Claimants argue that contrary to the Respondent's assertion, TMP's ownership right in the buildings and structures at the Resort it had constructed, which was expressly recognized by the Kyrgyz Republic in the 1992 Agreement and in the 1994 and 1995 Protocols, did not "expire[] simultaneously with its right of use of the relevant land plot."[226] As explained above, the Claimants submit that TMP's right to use the land at Resort Zolotiye Peski through its Kyrgyz branch was maintained through the doctrine of

[221] Cl. Rep., ¶ 122.
[222] Cl. Rep., ¶ 123; Re. Mem., ¶ 58.3.
[223] Cl. Rep., ¶ 124; Exh. CL-0311.
[224] Cl. Rep., ¶ 124; Exh. CL-0311.
[225] Cl. Rep., ¶ 124.
[226] Cl. Rep., ¶ 125; Re. Mem., ¶ 56.3.

universal succession and did not expire. TMP's ownership right in the buildings and structures at the Resort likewise was maintained through the doctrine universal succession and did not expire.[227]

180. Sixth, the Claimants argue that the Respondent's contentions that the "updated extract from the State[] Register of Immovable Property" confirms that TMP did not hold registered rights in the land, buildings, and structures comprising the Resort, and that the land and buildings comprising the Resort "have always been in State property" are wrong.[228]

181. According to the Respondent, the Cadastre extract for Resort Zolotiye Peski dated 22 April 2022 that it has submitted allegedly provides information on historic ownership rights, beneficial rights, and encumbrances, but does not contain any entries reflecting TMP's rights.[229] The Claimants argue that the Cadastre extract cannot be relied upon as the sole evidence of property rights; as confirmed by the Cadastre extract obtained by Mr. Tilenbaev for Resort Buston (discussed below), which the Respondent chose not to submit.[230]

182. Seventh, the Claimants maintain that while the Respondent does not dispute that Resort Zolotiye Peski regularly paid land and real estate taxes to the Kyrgyz Government based upon its 25 hectares of land, buildings, and structures comprising the Resort, the Respondent advances several arguments in an attempt to undermine documents in which the Respondent itself previously recognized TMP's rights in Resort Zolotiye Peski. The Claimants assert that these arguments are meritless.[231]

183. The Respondent first asserts that the 2005 Government Commission allegedly "did not have authority to confirm" that "the resort did not 'use the lands illegally.'"[232] The Claimants submit that this assertion is misplaced and disingenuous. In particular, the

[227] Cl. Rep., ¶ 125; Exh. CL-0302.

[228] Cl. Rep., ¶ 126; Re. Mem., ¶ 56.3.

[229] Cl. Rep., ¶ 126; Exh. R-0093.

[230] Cl. Rep., ¶ 126; Tilenbaev, ¶¶ 10-12.

[231] Cl. Rep., ¶ 128; Re. Mem., ¶¶ 58.2-58.5; Exh. C-0283; Exh. C-0402; Exh. C-0552; Exh. C-0553; Exh. C-0554; Exh. C-0555; Exh. C-0556; Exh. C-0557.

[232] Cl. Rep., ¶ 129; Re. Mem., ¶ 58.2.

Claimants contend that the 2005 Commission, which included the Head of the Village Council of Bosteri, was specifically responsible for "review[ing] the legal documents on the land use of Resort Zolotiye Peski in accordance with the current Land Code of the Republic of Kyrgyzstan," *i.e.*, the 1999 Land Code on which the Respondent itself now relies.[233] In its August 2005 Act, the Commission concluded that Resort Zolotiye Peski, "within existing boundaries secured by a fence – does not have a surplus [of land] and does not use the lands illegally." In so concluding, the Commission reviewed and relied upon Resolution No. 619, the Act on the Right of Land Use dated 8 June 1978, and the 1999 Kyrgyz Ministry of Justice Certificate on the Re-Registration of TAPOiCh's Kyrgyz branch, *i.e.*, the very same documents the Claimants rely upon in this arbitration. The Claimants argues that the Commission raised no issues or concerns whatsoever with respect to TMP's right to use the 25 hectares of land through its Kyrgyz branch under the 1959 Resolution and the 1978 Act on the Right of Land Use.[234]

184. The Claimants contend that the Respondent's attempt to minimize the role of the Head of the Village Council of Bosteri, who signed the Act of the Commission is also baseless. [235] The Head of the Aiyl Okmotu is the highest ranking official in the executive body of the local government on the territory where Resort Zolotiye Peski is located.[236]

185. The Respondent also asserts that the 2010 and 2011 decisions of the Inter-District Court of the Issyk-Kul Region and the Issyk-Kul Regional Court concerned only Zolotiye Peski Resort's "unlawful occupation of further 3.5ha of nearby land" and cannot "serve as confirmation of any rights that Claimant [TMP] had allegedly had in the resort."[237] The Claimants argue that this assertion too is misplaced and disingenuous. The Claimants add that it is notable that the claimants in that proceeding – *i.e.*, the State Administration of Issyk-Kul District and the social fund "Issyk Kul Kaganaty"– raised an issue regarding Resort Zolotiye Peski's right to use 3.5 hectares of adjacent land but did not raise any issues

[233] Cl. Rep., ¶ 129; Exh. C-0538.
[234] Cl. Rep., ¶ 129; Exh. C-0538.
[235] Cl. Rep., ¶ 130; Re. Mem., ¶ 58.2.
[236] Cl. Rep., ¶ 130.
[237] Cl. Rep., ¶ 131; Re. Mem., ¶ 58.4.

or concerns regarding the 25 hectares of land or buildings. Rather, the Claimants submit, at the 2010 hearing, a representative of the Issyk-Kul State Registrar and Department for Architecture and Urban Planning of the Issyk-Kul District confirmed that "it is a fact that according to legal documents the resort 'Zolotiye Peski' should occupy an area of 25 hectares, which includes the core zone, parking and beach zones."[238]

186. The Claimants contend that the Inter-District Court also expressly affirmed in its decision dated 18 November 2010 that, "[i]n accordance with [the] right stating documents," including Resolution No. 619 and the 1978 Act on the Right of the Use of Land, TAPOiCh "was granted with a plot of land in the area of 25 hectares south of Bosteri village of Issyk Kul District for construction of resort complex for 1000 seats at allocated territory."[239] The Claimants contend that neither the Court nor the local Government officials raised any issues or concerns regarding Resort Zolotiye Peski's right to use the 25 hectares of land or its alleged failure to re-register that right.[240]

187. Eight, the Claimants note that, while the Respondent does not dispute that TMP, through its Kyrgyz branch, had the right to use the 2.7 hectares of beachfront land under its lease agreement at the time of the nationalization with a priority right of renewal, the Respondent asserts that the lease agreement "did not bind the Bosteri Village Council to renew the Agreement if it no longer wanted to lease the land" upon its expiration on 27 April 2016.[241] The Respondent further asserts that the Claimants have failed to submit any documents showing that TMP "expressed its desire to extend the lease in written form" at least three months prior to the expiration of the lease agreement, as required under Clause 3.2.[242] The Claimants submit that the Respondent's assertions are again meritless.[243]

188. The Claimants maintain that as Mr. Elmurodov, the Acting Director of the Resort at the time, explains, he followed all procedures to ensure the orderly operations of the Resort,

[238] Cl. Rep., ¶ 131; Exh. C-0257.
[239] Cl. Rep., ¶ 132; Exh. C-0257.
[240] Cl. Rep., ¶ 132; Exh. C-0257.
[241] Cl. Rep., ¶ 133; Re. Mem., ¶ 59.
[242] Cl. Rep., ¶ 133; Re. Mem., ¶¶ 59-60.
[243] Cl. Rep., ¶ 133.

including renewal of its beachfront lease agreement. Before the expiration of the lease agreement, he therefore would have submitted a request to the Bosteri Village Council to renew the lease agreement. Such documentation, however, was maintained at the Resort, to which he does not currently have access.[244] Moreover, the Claimants submit that even if a renewal request had not been made before the three-month period under the lease agreement, the parties still could have agreed to extend the lease at any time prior to its expiration on 27 April 2016 or at any time thereafter.[245]

189. Furthermore, the Claimants note that under Article 7(5) of the 1999 Land Code as amended in 2015, a lease agreement may be renewed on the same terms through continued use:

> [I]f the lessee continues to use the land plot after the expiration of the contract period in the absence of written objections from the lessor within 15 calendar days, the contract is considered to be renewed on the same terms for the corresponding period, concluded in the previous contract.[246]

190. Accordingly, the Claimants contend that if Resort Zolotiye Peski had continued to use the beachfront land and if the local Government had not objected thereto in writing, the lease agreement would have renewed on the same terms for another year under Article 7(5) of the 1999 Land Code.[247]

191. In sum, the Claimants submit that the Tribunal should find that TMP held properly registered rights in the land, buildings and structures comprising Resort Zolotiye Peski.[248]

b. TMP Continued To Manage And Operate Resort Zolotiye Peski Successfully, Despite Repeated Challenges In The Kyrgyz Republic

192. The Claimants also argue that TMP operated and maintained Resort Zolotiye Peski from the 1960s until the Respondent's unlawful nationalization in April 2016.[249] The Claimants contend that, over the years, TMP upgraded and expanded the Resort with new guest

[244] Cl. Rep., ¶ 134; Elmurodov III, ¶ 18.
[245] Cl. Rep., ¶ 134.
[246] Cl. Rep., ¶ 135; Exh. CL-0323.
[247] Cl. Rep., ¶ 136.
[248] Cl. Rep., ¶ 141.
[249] Cl. Rep., ¶ 142.

accommodations, including more than 30 cottages, and developed new facilities and amenities.[250]

193. The Claimants further note that in the 2000s, the Resort faced significant challenges due to the unstable political and security situation in the Kyrgyz Republic. In particular, following Parliamentary elections in February and March 2005, thousands of protesters stormed the Presidential and other offices in the capital of Bishkek, leading to the resignation of then President Akayev.[251] Following the 2005 revolution, the Kyrgyz Republic saw a spike in violent and non-violent crime due to the poor economic situation in the country, including in the area around the village of Bosteri.[252] As a result of the political unrest and spike in crime, tourism declined sharply, causing Resort Zolotiye Peski to incur losses in 2005.[253] After the political unrest settled, the Resort earned profits in each year from 2006 to 2009.[254]

194. The Claimants contend that the Resort again suffered losses in 2010 as a result of a second revolution. Protests against then President Bakiev led to a second revolution and to the overthrow of the Bakiev regime in April 2010, as well additional unrest near the Kyrgyz-Uzbek border. The unstable political and security situation in the Kyrgyz Republic, with spikes in violent and non-violent crime, again led to significant declines in tourism. This, in turn, led to the closure of several resorts in the Lake Issyk-Kul region.[255]

195. Notwithstanding the challenges created by the Respondent, the Claimants emphasize that Resort Zolotiye Peski was profitable from 2006 to 2009, as well as from 2013 to 2015.[256]

[250] Cl. Rep., ¶ 142; Cl. Mem., ¶¶ 17-18.
[251] Cl. Rep., ¶ 143; Cl. Mem., ¶ 37.
[252] Cl. Rep., ¶ 143; Cl. Mem., ¶ 38; Elmurodov II, ¶ 7.
[253] Cl. Rep., ¶ 143; Cl. Mem., ¶ 38.
[254] Cl. Rep., ¶ 143; Cl. Mem., ¶ 40; Elmurodov III, ¶ 12; Elmurodov II, ¶¶ 8-9.
[255] Cl. Rep., ¶ 144; Cl. Mem., ¶¶ 41-44.
[256] Cl. Rep., ¶ 159; Cl. Mem., ¶¶ 40, 47; Elmurodov II, ¶¶ 8-9; Elmurodov III, ¶ 12.

(5) NBU Acquired Resort Rokhat-NBU In 1999 And, Through Its Registered Kyrgyz Subsidiary, Operated It Successfully Until The Respondent's Unlawful Nationalization Of The Resort In April 2016

a. NBU Had Registered Rights In The Land, Buildings, And Structures Comprising Resort Rokhat-NBU

196. The Claimants maintain that NBU had registered rights in the land, buildings, and structures comprising Resort Rokhat-NBU. Specifically, under Order No. 23k-PO of the Fund for the Management of State Property of the Republic of Uzbekistan dated 17 February 1999, NBU acquired Resort Rokhat from Uzstroytrans.[257] On 24 March 1999, NBU re-registered the Resort with the Kyrgyz Ministry of Justice as its Kyrgyz subsidiary, "[R]esort 'Rokhat-NBU.'"[258]

197. The Claimants submit that, following NBU's acquisition, the Issyk-Kul District Government Administration issued Resolution No. 137 dated 12 March 1999, which assigned "[R]esort 'Rokhat' with leased land of 20 hectares to [NBU]."[259] Pursuant to Resolution No. 137, the District Administration issued State Act No. 024517 on Land Use dated 9 June 1999, certifying the allocation of 19.7 hectares of land to Resort Rokhat-NBU for use, which was duly "registered in the book of records of the state acts on the right for using the lands no. 21, dated June 9, 1999."[260]

198. Further, the Claimants add that, by Resolution No. 145 dated 1 April 2005, the Issyk-Kul District Government Administration re-registered Resort Rokhat-NBU's rights to the 19.05 hectares of land as follows: 14.654 hectares of land were granted for a 49-year period, *i.e.*, from 1 April 2005 until 1 April 2054, and 4.4 hectares of beachfront land were granted for a five year period with a right of renewal, *i.e.*, from 1 April 2005 until 1 April 2010.[261] In accordance with Resolution No. 145, the Department for Land Management issued two

[257] Cl. Rep., ¶ 166; Cl. Mem., ¶¶ 54-55; Exh. CL-0159.
[258] Cl. Rep., ¶ 166; Cl. Mem., ¶¶ 54-55; Karimov, ¶¶ 9-10; Exh. C-0042.
[259] Cl. Rep., ¶ 167; Cl. Mem., ¶ 55; Exh. C-0041.
[260] Cl. Rep., ¶ 167; Cl. Mem., ¶ 55; Exh. C-0060, Exh. CL-0160.
[261] Cl. Rep., ¶ 168; Cl. Mem., ¶ 56; Yuldashev II, ¶ 4; Exh. C-0067.

new Certificates to Resort Rokhat-NBU on the Temporary Use of Land dated 1 April 2005.[262]

199. Moreover, the Claimants note that NBU, through its Kyrgyz subsidiary, concluded short-term lease agreements with the Kara-Oy Village Council for its 4.4 hectares of beachfront land.[263] At the time of the 4 April 2016 nationalization, Resort Rokhat-NBU had an annual lease agreement until 24 June 2016, which included the right of priority renewal.[264]

200. In addition, the Claimants assert that the Kyrgyz Government repeatedly recognized NBU's property rights in Resort Rokhat-NBU, including through: (i) Technical Passports approved by the Issyk-Kul Department for Land Management and Registration of Rights to Immovable Property between 2000 and 2013;[265] (ii) Acts on the acceptance into operation of completed facilities at the Resort issued by the local Government;[266] and (iii) Resort Rokhat-NBU's payment of land and real estate taxes to the Kyrgyz Government based upon its 14.654 hectares of land, 4.4 hectares of beachfront land, and buildings and structures comprising the Resort.[267]

201. Accordingly, the Claimants argue that the Tribunal should find that NBU held properly registered rights in Resort Rokhat-NBU.[268]

202. The Respondent acknowledges that "it is clear that starting from March 12, 1999, Kyrgyz State authorities had validly issued and re-issued to 'Resort Rokhat-NBU' various land use certificates and had concluded several land lease agreements, attesting 'Resort Rokhat-NBU's' rights to use the resort's land." The Respondent thus admits that NBU, through its Kyrgyz subsidiary, had the "right of temporary use over a 14.65-ha land plot together with

[262] Cl. Rep., ¶ 168; Cl. Mem., ¶ 57; Yuldashev II, ¶ 4; Exh. C-0220; Exh. C-0221.
[263] Cl. Rep., ¶ 169; Exh. C-0260; Exh. C-0270.
[264] Cl. Rep., ¶ 169; Cl. Mem., ¶ 59; Exh. C-0220; Exh. C-0281.
[265] Cl. Rep., ¶ 170; Exh. C-0559.
[266] Cl. Rep., ¶ 170; Exh. C-0537; Exh. C-0360; Exh. C-0164; Exh. C-0188.
[267] Cl. Rep., ¶ 170; Exh. C-0562.
[268] Cl. Rep., ¶ 171.

buildings and other structures situated on it, valid until April 1, 2054," as well as a "lease over a 4.4-ha of beachfront land valid until June 24, 2016."[269]

203. The Claimants submit that these rights are confirmed by the Cadastre extract submitted by the Respondent dated 22 April 2022. Specifically, the extract provides that NBU's Kyrgyz subsidiary – State enterprise "Health Resort Rokhat-NBU" – had the "usage" right to the "land and building[s]" at Resort Rokhat-NBU in accordance with Resolution No. 145 dated 1 April 2005 and Certificate 0020798 dated 22 April 2005. Notably, the extract confirms that this right was "terminat[ed]" in accordance with Order No. 138-[r] dated 4 April 2016, *i.e.*, the Respondent's unlawful nationalization order (the "**2016 Order**").[270]

204. The Claimants argue that there is accordingly no dispute between the Parties that, at the time of the Respondent's unlawful nationalization, NBU, through its Kyrgyz subsidiary, had the registered right to use the land at Resort Rokhat-NBU until 2054.[271] The Claimants contend that there also can be no dispute that the Respondent terminated this right without justification or compensation through its unlawful 2016 Order, as confirmed by the Respondent's own Cadastre extract.[272]

205. With respect to the beachfront land at Resort Rokhat-NBU, although the Respondent admits that NBU, through its Kyrgyz subsidiary, had the right to use the 4.4 hectares of beachfront land under the lease agreement with a priority right of renewal, the Respondent asserts that the lease agreement would have expired on 24 June 2016 "at the latest," and that the Claimants have failed to submit any documents evidencing that Resort NBU-Rokhat had "expressed its desire to extend the lease in written form" at least three months prior to the expiration of the lease agreement, as required under Clause 3.2.[273]

206. In addition, with respect to the buildings and structures at Resort Rokhat-NBU, the Respondent contends that the Claimants "have not provided any documents confirming

[269] Cl. Rep., ¶ 172; Re. Mem., ¶ 66.
[270] Cl. Rep., ¶ 173; Exh. R-0094.
[271] Cl. Rep., ¶ 174; Cl. Mem., ¶ 136; Re. Mem., ¶ 66.2; Exh. R-0094.
[272] Cl. Rep., ¶ 174; Exh. C-0009; Exh. R-0094.
[273] Cl. Rep., ¶ 175; Re. Mem., ¶ 66.2.

any separate ownership or other right in rem over" the buildings and structures, and that NBU's Kyrgyz subsidiary did not have "a separate ownership right over the facilities," because the facilities "have always been considered as an accessory to the Rokhat-NBU Resort's land plot."[274] The Respondent further asserts that technical passports and certificates of acceptance and commissioning are not title documents; that the Technical Passports designating Resort Rokhat-NBU as the owner "could only be explained [by] an inadvertent error of a State clerk;" that the Resort's rights with respect to immovable property had to be registered; and that documents showing that Resort Rokhat-NBU paid land and real estate taxes to the Kyrgyz Government have no evidentiary value.[275] The Claimants contend that the Respondent's assertions are erroneous, unsupported, and unavailing.[276]

207. First, with respect to the 4.4 hectares of beachfront land, the Claimants maintain that as Mr. Yuldashev, an NBU employee responsible for monitoring Resort Rokhat-NBU, explains, the lease agreement, which contained a priority right of renewal, would have been renewed in accordance with its terms before it expired on 24 June 2016.[277] In particular, the Claimants submit that, as Mr. Yuldashev notes, he does not recall any issues arising with respect to the renewal of the lease agreement in the spring of 2016, and any documents related to the lease renewal process would be located at the Resort in the Kyrgyz Republic, to which the Claimants do not have access.[278]

208. Moreover, the Claimants assert that, as summarized above, even if the renewal request had not been made more than three months before the expiration of the lease agreement, the parties still could have agreed to extend the lease at any time prior to its expiration on 24 June 2016 or at any time thereafter. In addition, the Claimants argue that under Article 7(5) of the 1999 Land Code as amended in 2015, the lease agreement would have renewed

[274] Cl. Rep., ¶ 176; Re. Mem., ¶ 66.2.
[275] Cl. Rep., ¶ 176; Re. Mem., ¶ 66.2.
[276] Cl. Rep., ¶ 176.
[277] Cl. Rep., ¶ 177; Exh. C-0281; Yuldashev III, ¶ 17.
[278] Cl. Rep., ¶ 177; Yuldashev III, ¶ 18.

automatically for an additional year, if Resort Rokhat-NBU had continued to use the beachfront land and if the local Government had not objected in writing.[279]

209. Second, the Claimants contend that NBU, through its registered Kyrgyz subsidiary, had an ownership right in the buildings and structures comprising Resort Rokhat-NBU.[280] According to the Claimants, NBU acquired from Uzstroytrans, an association under the Uzbek Ministry of Construction, the Resort's property, including the right to use the land and an ownership right in the buildings and structures, which had been constructed by enterprises under the Uzbek SSR Ministry of Construction, as affirmed by the Acts of Commissioning issued by the State Commission.[281] The Claimants contend that, as discussed above, these rights were expressly recognized and affirmed by the Respondent in the 1992 Agreement and in the 1994 and 1995 Protocols.[282]

210. The Claimants also argue that NBU's investments in Resort Rokhat-NBU are confirmed by the Acts of Commissioning of the Working Commission and State Commissioning Commission, which were issued to Resort Rokhat-NBU, after NBU's renovation of the Resort.[283]

211. The Claimants submit that NBU's ownership rights in the buildings and structures are affirmed by the Technical Passports approved by the Issyk-Kul Department for Land Management and Registration of Rights to Immovable Property on 7 July 2000, 16 March 2009, and 23 August 2013. In particular, the Claimants argue that these Technical Passports reflect the fact that Resort Rokhat-NBU is recorded as the "owner" of the buildings, structures, and other objects comprising the Resort.[284] As explained above, a technical passport is compiled and issued to the "right[s] holder [in] real estate" based on the results of a survey. By issuing the Technical Passports to Resort Rokhat-NBU and by designating it as the "owner," the Respondent thus affirmed that Resort Rokhat-NBU was a "rights

[279] Cl. Rep., ¶ 178; Exh. CL-0323.
[280] Cl. Rep., ¶ 179; Re. Mem., ¶ 67.
[281] Cl. Rep., ¶ 179; Cl. Mem., ¶¶ 54-55; Karimov, ¶¶ 9-10.
[282] Cl. Rep., ¶ 179; Re. Mem., ¶ 67.4; Exh. CL-0160; Exh. R-0094.
[283] Cl. Rep., ¶ 180; Exh. C-0188; Exh. C-0189; Exh. C-0198; Exh. C-0537.
[284] Cl. Rep., ¶ 181; Exh. C-0496; Exh. C-0534; Exh. C-0559.

holder [in] real estate," specifically the "owner" of the buildings and structures at the Resort.[285]

212. Furthermore, the Claimants submit that as set forth above and as the Respondent's Cadastre extract reflects, the Respondent acknowledges that NBU had the right to use the buildings and structures at Resort Rokhat-NBU through its Kyrgyz subsidiary.[286] Accordingly, the Claimants maintain that even if the Tribunal were to find that NBU did not have an ownership right in the buildings and structures comprising the Resort, which it did, NBU at a minimum had the right to use the buildings and structures until 2054.[287]

213. Third, the Claimants assert that the Respondent's contention that the land and real estate taxes paid by Resort Rokhat-NBU to the Kyrgyz Government have no "evidentiary value" is wrong.[288] According to the Claimants, these documents affirm that, consistent with Resort Rokhat-NBU's registered right to use the land and ownership right in the buildings and structures, the Respondent treated Resort Rokhat-NBU as the lawful owner and user of the land, buildings, and structures by collecting land and real estate taxes, as well as social charges, for the State budget.[289]

b. Beginning In 1999, NBU Managed And Operated Resort Rokhat-NBU Successfully, Despite Repeated Challenges By The Kyrgyz Republic

214. The Claimants contend that, in 1999, following its acquisition of Resort Rokhat-NBU from Uzstroytrans, NBU invested approximately US$ 2.9 million to renovate, expand, and modernize the Resort.[290] As a result of these renovations, Resort Rokhat-NBU offered modern facilities, including cafes, restaurants, conference rooms, a billiard room, a tennis

[285] Cl. Rep., ¶ 181; Exh. CL-0311; Exh. C-0496; Exh. C-0559; Re. Mem., ¶ 67.2.
[286] Cl. Rep., ¶ 182; Re. Mem., ¶ 66.2.
[287] Cl. Rep., ¶ 182; Exh. R-0094; Re. Mem., ¶ 66.2.
[288] Cl. Rep., ¶ 183; Re. Mem., ¶ 67.3.
[289] Cl. Rep., ¶ 183; Exh. C-0094; Exh. C-0220; Exh. C-0562.
[290] Cl. Rep., ¶ 188; Cl. Mem., ¶ 60; Karimov, ¶ 11.

court, a cinema, and a pharmacy, which increased the number of guests and allowed the Resort to become self-sufficient.[291]

215. According to the Claimants, despite NBU's investments, the Resort suffered losses in certain years due to crime and political unrest in the Kyrgyz Republic. In 2004, for example, Resort Rokhat-NBU's director, Mr. Bakhrul Burkhanov, was shot six times in the head and chest in his car. The Resort also suffered losses due to the significant decline in tourism following the 2005 and 2010 Revolutions. Despite these challenges, the Resort was profitable from 2006 to 2008 and from 2011 to 2015.[292]

(6) Asaka Acquired Resort Dilorom In 1999 And, Through Its Registered Kyrgyz Subsidiary, Operated It Successfully Until The Respondent's Unlawful Nationalization Of The Resort In April 2016

a. Asaka Had Registered Rights In The Land, Buildings, And Structures Comprising Resort Dilorom

216. The Claimants also argue that Asaka had registered rights in the land, buildings, and structures comprising Resort Dilorom.[293] Specifically, the Claimants maintain that under Resolution No. 126-f of the Cabinet of Ministers of the Republic of Uzbekistan dated 29 March 1999, Asaka acquired Resort Dilorom from Uzagrostroy.[294] Thereafter, on 13 August 1999, Asaka re-registered Resort Dilorom with the Kyrgyz Ministry of Justice as its Kyrgyz subsidiary, Resort Dilorom LLC.[295]

217. The Claimants further submit that on 5 November 1999, the Issyk-Kul District Government Administration issued Resolution No. 611, granting Resort Dilorom "of Bank 'Asaka' of the Republic of Uzbekistan" the right to use 27 hectares of land, including seven hectares of beachfront land, for a period of 50 years, *i.e.*, until 5 November 2049.[296] In accordance with Resolution No. 611, the Issyk-Kul District Government Administration issued State Act No. 023117 for the Right of Land Use dated 11 November 1999, which certified the

[291] Cl. Rep., ¶ 188; Cl. Mem., ¶ 61.
[292] Cl. Rep., ¶ 189; Cl. Mem., ¶¶ 62-65; Yuldashev II, ¶ 5; Elmurodov, III ¶ 12.
[293] Cl. Rep., ¶ 209; Cl. Mem., ¶¶ 21, 70-75, 136.
[294] Cl. Rep., ¶ 209; Cl. Mem., ¶ 72; Umarova, ¶ 5; Exh. C-0113.
[295] Cl. Rep., ¶ 209; Cl. Mem., ¶ 73; Umarova, ¶ 6; Exh. C-0170.
[296] Cl. Rep., ¶ 210; Cl. Mem., ¶ 73; Umarova, ¶ 6; Exh. C-0049.

allocation of 27 hectares of land to Resort Dilorom for use for a period of 50 years.[297] As the State Act confirms, this right was "registered in the book of records of state acts for the right to use land [as] No. 54 on 11 November 1999."[298]

218. Further, the Claimants contend that the Kyrgyz Government repeatedly recognized Asaka's property rights in Resort Dilorom, including through: (i) the Technical Passport dated 12 August 2008, issued by the Issyk-Kul District Department for Land Management and Registration of Rights to Immovable Property based on the results of a technical survey; (ii) resolutions and acts of the State on the acceptance into operation of completed construction facilities; and (iii) Resort Dilorom's payment of land and real estate taxes to the Kyrgyz Government based on its 27 hectares of land, buildings, and structures comprising the Resort.[299]

219. The Respondent admits that "as of April 4, 2016, Asaka, through its Kyrgyz subsidiary, held a right to use a 27-ha land plot, together with buildings and other structures situated on it, valid until November 5, 2049."[300] Accordingly, the Claimants maintain that there is no dispute between the Parties that, at the time of the Respondent's unlawful nationalization, Asaka, through its Kyrgyz subsidiary, had the right to use the land at Resort Dilorom. There also can be no dispute that the Respondent terminated this right without justification or compensation through its unlawful nationalization Order on 4 April 2016.[301]

220. The Respondent asserts, however, that the Claimants have not provided "evidence of any title over the Resort's land or facilities that Uzagrostroy would have had at any relevant time," and that Asaka therefore could not have "acquired" Resort Dilorom from Uzagrostroy.[302] The Respondent further asserts that Asaka's Kyrgyz subsidiary did not have a separate ownership right over the buildings and structures at the Resort, because the

[297] Cl. Rep., ¶ 210; Cl. Mem., ¶ 74; Umarova, ¶ 6; Exh. C-0050.

[298] Cl. Rep., ¶ 210; Cl. Mem., ¶ 73; Umarova, ¶ 6; Exh. C-0050.

[299] Cl. Rep., ¶ 211; Exh.C-0249; Exh. C-0250; Exh. C-0292; Exh. C-0293; Exh. C-0297; Exh. C-0305; Exh. C-0312; Exh. C-0314; Exh. C-0497; Exh. C-0536; Exh. C-0539; Exh. C-0540; Exh. C-0543.

[300] Cl. Rep., ¶ 213; Re. Mem., ¶¶ 72-74.

[301] Cl. Rep., ¶ 213; Exh. C-0009.

[302] Cl. Rep., ¶ 214; Re. Mem., ¶ 71.

"buildings and other structures are accessories to the Dilorom Resort's land plot and form a single unit of immovable property which was granted to Resort Dilorom LLC for use pursuant to the Resolution No. 611" and, in any event, Asaka never registered its rights to the buildings and structures with the Kyrgyz authorities.[303] The Claimants contend that these assertions are meritless and unsupported.[304]

221. First, the Claimants argue that, on 22 September 1992, following the dissolution of the Soviet Union, "State Enterprise Resort Dilorom of Uzselavtotrest" was registered as a legal entity with the Kyrgyz Ministry of Justice.[305] Pursuant to Resolution No. 126-f of the Cabinet of Ministers of the Republic of Uzbekistan, Asaka acquired Resort Dilorom from Uzagrostroy.[306] The Claimants add that, shortly thereafter, Asaka re-registered Resort Dilorom with the Kyrgyz Ministry of Justice as its own Kyrgyz subsidiary, Resort Dilorom LLC.[307] Following this registration, the Issyk-Kul District Government Administration issued Resolution No. 611, granting Resort Dilorom "of Bank 'Asaka' of the Republic of Uzbekistan" the right to use 27 hectares of land, including seven hectares of beachfront land, for a period of 50 years, *i.e.*, until 5 November 2049.[308] This right, the Claimants note, was then registered and certified in State Act No. 023117 for the Right of Land Use dated 11 November 1999.[309]

222. The Claimants also argue that although the Respondent now contends nearly 23 years later that Asaka could not have "acquired" Resort Dilorom from Uzagrostroy, the Respondent has not submitted any evidence indicating that the Kyrgyz Ministry of Justice or the Issyk-Kul District Government Administration ever questioned Uzagrostroy's title or Asaka's acquisition of Resort Dilorom from Uzagrostroy.[310] Rather, as the Claimants argue, the Issyk-Kul District Government Administration granted and duly registered Resort

[303] Cl. Rep., ¶ 214; Re. Mem., ¶73.
[304] Cl. Rep., ¶ 214.
[305] Cl. Rep., ¶ 215; Cl. Mem., ¶ 70; Exh. C-0170.
[306] Cl. Rep., ¶ 215; Cl. Mem., ¶ 72; Umarova, ¶ 5; Exh. C-0113.
[307] Cl. Rep., ¶ 215; Cl. Mem., ¶ 73; Umarova, ¶ 6; Exh. C-0170.
[308] Cl. Rep., ¶ 215; Cl. Mem., ¶ 73; Umarova, ¶ 6; Exh. C-0049.
[309] Cl. Rep., ¶ 215; Exh. C-0050.
[310] Cl. Rep., ¶ 216; Re. Mem., ¶ 71.

Dilorom's right to use 27 hectares of land, including seven hectares of beachfront land, in November 1999.[311]

223. In addition, the Claimants maintain that the Respondent at all times treated Asaka and Resort Dilorom as the lawful user of the land and owner of the buildings and structures and collected land and real estate taxes for the State budget accordingly.[312] The Claimants add that the Government Administration raised no issues or concerns regarding the property rights of Asaka or its Kyrgyz subsidiary, Resort Dilorom.[313]

224. Second, the Claimants contend that contrary to the Respondent's assertions, Asaka, through its Kyrgyz subsidiary, had an ownership right in the buildings and structures comprising Resort Dilorom.[314] As noted above, in 1999, Asaka acquired Resort Dilorom from Uzagrostroy, including the right to use the land and an ownership right in the buildings and structures, which had been constructed by enterprises of the Uzbek SSR Ministry of Rural Construction. As also noted above, these rights were expressly recognized and affirmed by the Respondent in the 1992 Agreement and in the 1994 and 1995 Protocols.[315]

225. Specifically, the Claimants maintain that Asaka's investments in Resort Dilorom are confirmed by Acts of Commissioning of the State Commissioning Commission, which were issued to Resort Dilorom after Asaka's renovation of the Resort. These Acts, signed by local Government officials, including the First Deputy of State Administration of the Issyk-Kul District, confirm Asaka's construction and renovation of the buildings and structures at Resort Dilorom.[316]

226. Furthermore, the Claimants argue that Asaka's ownership right in the buildings and structures is confirmed by the Technical Passport approved by the Department of Land

[311] Cl. Rep., ¶ 216; Exh. C-0030; Exh. C-0049.

[312] Cl. Rep., ¶ 217; Exh, C-0239; Exh. C-0297; Exh. C-0305; Exh. C-0312; Exh. C-0314; Exh. C-0452; Exh. C-0543; Exh. C-0548.

[313] Cl. Rep., ¶ 217.

[314] Cl. Rep., ¶ 218; Re. Mem., ¶ 73.

[315] Cl. Rep., ¶ 218.

[316] Cl. Rep., ¶ 219; Exh. C-0535; Exh. C-0536; Exh. C-0187; Exh. C-0246; Exh. C-0250; Exh. C-0539; Exh. C-0574; Exh. C-0575.

Management and Registration of Rights to Real Estate of the State Register on 12 August 2008.[317] As detailed above, the Claimants submit that a technical passport is compiled and issued to the "right holder in the real estate" based on the results of a survey.[318] According to the Claimants, by issuing the Technical Passport to Resort Dilorom, the Respondent had affirmed that Resort Dilorom was a "right holder in the real estate," *i.e.*, in the buildings and structures comprising the Resort.[319]

227. Also, the Claimants argue that as noted above, the Respondent admits that Asaka had the right to use the buildings and structures at Resort Dilorom through its Kyrgyz subsidiary. Accordingly, it is the Claimants' position that even if the Tribunal were to find that Asaka did not have an ownership right in the buildings and structures comprising the Resort, which it did, Asaka at a minimum had the right to use the buildings and structures until 2049.[320]

b. Beginning In 1999, Asaka Managed and Operated Resort Dilorom Successfully, Despite Repeated Challenges In The Kyrgyz Republic

228. The Claimants contend that in 1999, following its acquisition of Resort Dilorom from Uzagrostroy, Asaka invested approximately US$ 2.9 million to renovate, expand, and modernize the Resort.[321] According to the Claimants, as a result of these renovations, the Resort was among the most modern and well-appointed in the Lake Issyk-Kul region, offering a variety of accommodations for its guests, together with numerous amenities and facilities, including a disco bar, tea house, sports and fitness center, swimming pool, billiards hall, reading hall, computer center, concert hall, health spa facilities, as well as boating.[322]

229. Nevertheless, the Claimants argue that, despite Asaka's investments, the Resort suffered losses in some years due to crime, instability, and political unrest in the Kyrgyz

[317] Cl. Rep., ¶ 220; Exh. C-0497.
[318] Cl. Rep., ¶ 220; Exh. CL-0311.
[319] Cl. Rep., ¶ 220; Exh. C-0497.
[320] Cl. Rep., ¶ 221; Re. Mem., ¶¶ 72-74.
[321] Cl. Rep., ¶ 225; Cl. Mem., ¶ 76; Umarova, ¶ 8.
[322] Cl. Rep., ¶ 225; Cl. Mem., ¶ 77; Mamatov III, ¶ 3.

Republic.[323]According to the Claimants, in 2004, approximately US$ 71,000 in cash was stolen from the Resort's Accounting Department.[324] The Claimants contend that the Resort also suffered losses due to the significant decline in tourism following the 2005 and 2010 revolutions.[325] Thus, according to the Claimants, following the 2010 revolution, the Resort faced serious problems with local trespassers, periodic road closures, and harassment by the local mafia.[326] According to the Claimants, these issues began to improve after Resort Dilorom increased security and installed surveillance cameras and a new fence, and after a new Government came to power in 2011.[327] Thus, according to the Claimants, from 2011 until 2015, the Resort earned an annual profit, which was reinvested in improvements to the Resort and its facilities.[328]

(7) Uzpromstroybank Acquired Resort Buston In 2003, But Was Prevented From Renovating And Operating It By The Unlawful Actions Of The Respondent

a. Uzpromstroybank Had Registered Rights In The Land, Buildings, And Structures Comprising Resort Buston

230. The Claimants argue that Uzpromstroybank had registered rights in the land, buildings, and structures comprising Resort Buston. Specifically, the Claimants maintain that on 14 February 2003, pursuant to Resolution No. 81 of the Cabinet of Ministers of the Republic of Uzbekistan, Uzpromstroybank acquired from Tashselmash the property of Resort Yubileyny, which it then contributed to a new Kyrgyz subsidiary, Resort Buston LLC.[329] The Claimants also submit that on 20 October 2004, the Kyrgyz Ministry of Justice registered Resort Buston LLC as a Kyrgyz legal entity and subsidiary of Uzpromstroybank.[330]

231. Further, the Claimants submit that in January 2007, the Inter-District Court of the Issyk-Kul Region ordered on pretextual grounds and without any compensation the transfer of

[323] Cl. Rep., ¶ 226; Cl. Mem., ¶¶ 80, 81, 184; Mamatov II, ¶ 5; Umarova, ¶ 12.
[324] Cl. Rep., ¶ 226; Cl. Mem., ¶ 79; Umarova, ¶ 11; Exh. C-0213.
[325] Cl. Rep., ¶ 226; Cl. Mem., ¶¶ 80-81; Mamatov II, ¶ 5.
[326] Cl. Rep., ¶ 226; Cl. Mem., ¶¶ 82-83; Mamatov II, ¶ 6.
[327] Cl. Rep., ¶ 226; Mamatov II, ¶ 6.
[328] Cl. Rep., ¶ 226; Cl. Mem., ¶¶ 84, 86; Mamatov II, ¶ 7.
[329] Cl. Rep., ¶ 241; Cl. Mem., ¶ 91; Usmanov II, ¶¶ 7-8; Exh. C-0060; Exh. C-0205.
[330] Cl. Rep., ¶ 241; Cl. Mem., ¶ 94; Usmanov II, ¶ 10; Exh. C-0066.

Resort Buston's 10.65 hectares of land to the local Kunchygysh Government, which subsequently leased the land to Brick Production LLC, a Kyrgyz company with ties to the then Kyrgyz President Bakiev.[331] Uzpromstroybank was unable to re-establish its rights to the Resort property until February 2012, after Brick Production LLC had defaulted on its lease agreement with the Kunchygysh Government and after President Bakiev had been removed from office.[332]

232. The Claimants also contend that on 9 February 2012, Uzpromstroybank's Kyrgyz subsidiary, Resort Buston, and the Kunchygysh Government signed an agreement for the lease of the 10.65 hectares of land for a 49-year period, *i.e.*, until 9 February 2061, with a right of renewal.[333] In accordance with the lease agreement, on 9 April 2012, the Department for Land Management issued Certificate No. 038625 for the Right of Temporary Use of Land, confirming Resort Buston's right to 10.65 hectares of land "for limited (temporary) use, for purpose of construction, for a period of 49 years [], starting from February 9, 2012 to February 9, 2061," which was "registered on April 9, 2012 under No. 2012/2827 in the Unified State Register of Rights to Immovable Property."[334]

233. In addition, the Claimants contend that the Kyrgyz Government repeatedly recognized Uzpromstroybank's rights in Resort Buston, including through Resort Buston's payment of land and real estate taxes based on its 10.65 hectares of land, buildings, and structures comprising the Resort.[335]

234. The Respondent admits that "as of April 4, 2016, Uzpromstroybank through its local subsidiary Resort Buston LLC held a lease over the 10.65 hectares land plot together with buildings and structures located on it, valid until February 9, 2061."[336] The Respondent also admits that this right was duly registered with the unified State registry, as affirmed

[331] Cl. Rep., ¶ 242; Cl. Mem., ¶¶ 97-108; Exh. C-0230.
[332] Cl. Rep., ¶ 242; Cl. Mem., ¶¶ 106-108; Usmanov, ¶¶ 21-23; Exh. C-0072; Exh. C-0255; Exh. C-0256.
[333] Cl. Rep., ¶ 243; Cl. Mem., ¶ 108; Usmanov, ¶ 23; Exh. C-0072.
[334] Cl. Rep., ¶ 243; Cl. Mem., ¶ 109; Usmanov, ¶ 23; Exh. C-0072.
[335] Cl. Rep., ¶ 244; Exh. C-0557; Exh. C-0558; Exh. C-0560; Exh. C-0565; Exh. C-0566.
[336] Cl. Rep., ¶ 246; Re. Mem., ¶¶ 82, 84.

by State Certificate No. 038625.[337] Accordingly, the Claimants argue that there is no dispute between the Parties that, at the time of the Respondent's unlawful nationalization, Uzpromstroybank, through its Kyrgyz subsidiary, held the registered right to use the land, buildings, and structures comprising Resort Buston.[338] The Claimants also submit that there can be no dispute that the Respondent terminated this right without justification or compensation through its nationalization Order on 4 April 2016.[339]

235. The Respondent, however, argues that Uzpromstroybank did not have any rights to the land, buildings, or structures comprising Resort Buston before the lease agreement was signed in 2012. Specifically, the Respondent asserts that the "rights that had been granted to Tashselmash during the Soviet period had become invalid as a matter of Kyrgyz law as of mid-1996," because "Tashselmash had not undertaken any action towards re-registration of its rights over the Buston Resort land plot" within five years, and that, "even assuming that Tashselmash's right of permanent use . . . had been properly re-registered, such right had in any event expired on January 1, 2000 pursuant to the provisions of the 1999 Land Code." The Respondent thus asserts that, at the time of the transfer, "Tashselmash no longer had any rights in the Buston Resort," and, in any event, it was not "followed by a proper re-registration." In addition, the Respondent asserts that Uzpromstroybank did not have any ownership right in the buildings and structures at Resort Buston.[340] The Claimants contend that the Respondent's arguments again are incorrect, unsupported, and unavailing.[341]

236. First, the Claimants argue that Tashselmash's rights in the land plot on which Resort Buston was located did not "become invalid by mid-1996," due to its failure to re-register its rights "promptly."[342] As explained above, the Claimants assert that the 1998 Law on State Registration did not invalidate Tashselmash's pre-existing rights; to the contrary, Article 54 and subsequently amended Article 53 expressly preserved property rights that

[337] Cl. Rep., ¶ 246; Re. Mem., ¶ 82; Exh. C-0269.
[338] Cl. Rep., ¶ 246; Cl. Mem., ¶ 136; Re. Mem., ¶¶ 82, 84.
[339] Cl. Rep., ¶ 246; Cl. Mem., ¶¶ 55-59, 112; Exh. C-0009.
[340] Cl. Rep., ¶ 247; Re. Mem., ¶¶ 78-83.
[341] Cl. Rep., ¶ 247.
[342] Cl. Rep., ¶ 248; Re. Mem., ¶ 78.1.

existed prior to 1998, such as Tashselmash's right to use the 10.65 hectares of land, which was duly registered in 1971.[343] According to the Claimants, the two Cadastre extracts reflect the fact that the Resort Buston in fact is located on "Tashselmash land parcel."[344]

237. Although the Respondent relies upon Resolution No. 429-XII and the Law on Land Reform for its contrary argument, the Claimants contend that neither of these laws invalidated Tashselmash's registered right to use the land plot.[345] Specifically, the Claimants argue that Article 4 of Resolution No. 429-XII applies only to land plots that were provided by agricultural enterprises for "temporar[y] us[e],"[346] while Tashselmash was granted 10.65 hectares of land by the Executive Committee of the Ton District Council of People's Deputies for the construction of a resort for "constant use."[347] The Claimants submit that, in any event, as explained above, Article 4 provides that legal entities "retain their rights until the re-registration" of those rights.[348]

238. The Claimants also submit that, as explained above, Article 9 of the Law on Land Reform was invalidated by the 1999 Land Code, and nothing in the 1999 Land Code invalidates pre-existing rights to land plots where they are not re-registered.[349]

239. Second, the Claimants argue that contrary to the Respondent's assertions, Tashselmash's right to use the land at Resort Buston did not expire by 1 January 2000 under Article 7 of the Law on the Enactment of the Land Code.[350] Specifically, the Claimants note that, as explained above, Article 7 applies only to land granted "for agricultural purposes" to "individuals," as well as to "land provided for the organization of mini-farms, farms, including dairy and meat mini-farms."[351] The Claimants submit that Article 7 does not

[343] Cl. Rep., ¶ 248; Exh. CL-0303; Exh. C-0031.
[344] Cl. Rep., ¶ 248; Exh. C-0519; Exh. C-0616.
[345] Cl. Rep., ¶ 249; Re. Mem., ¶¶ 47-48, 56.1.
[346] Cl. Rep., ¶ 249; Exh. RL-0107.
[347] Cl. Rep., ¶ 249; Exh. C-0031; Exh. C-0357; Exh. C-0358; Exh. CL-0176.
[348] Cl. Rep., ¶ 249; Exh. RL-0107.
[349] Cl. Rep., ¶ 250; Exh. CL-0319; Exh. RL-0108.
[350] Cl. Rep., ¶ 251; Re. Mem., ¶ 78.2; Exh. CL-0319.
[351] Cl. Rep., ¶ 251; Exh. CL-0319.

apply to the allocation of land for the purpose of construction of a resort, as was the case with Tashselmash.[352]

240. Third, the Claimants also maintain that Tashselmash's rights in the land likewise did not expire with the enactment of the 1999 Land Code. In this respect, the Claimants argue that as noted above, while foreign entities may acquire the right to use land only for a fixed term, nothing in the 1999 Land Code provides that pre-existing rights to use land permanently cease to exist, where the holder of those rights is a foreign entity.[353]

241. In addition, according to the Claimants, under the Kyrgyz hierarchy of laws, the terms of the 1992 Agreement and 1994 and 1995 Protocols, which specifically preserved the rights of Tashselmash, prevail over the 1999 Land Code. The Claimants submit that the limitation contained in the 1999 Land Code, *i.e.*, that foreign entities may acquire the right to use land only for a fixed term, cannot operate to invalidate the obligation assumed by the Kyrgyz Republic in the 1992 Agreement and 1994 and 1995 Protocols to recognize the rights of the Uzbek entities which had funded the construction of the Resorts, including Tashselmash.[354]

242. The Claimants assert that, for these reasons, following the enactment of the 1999 Land Code, Tashselmash's permanent use right would have converted into a fixed term use right of 49 years. Accordingly, the Claimants submit that at the time of Uzpromstroybank's acquisition of Resort Buston, Tashselmash had the right to use the land as the 49-year time period had not yet expired.[355]

243. Fourth, the Claimants argue that the Respondent's assertion that Uzpromstroybank's acquisition of Resort Buston in 2003 was invalid is meritless. According to the Claimants, pursuant to Resolution No. 81 of the Cabinet of Ministers of the Republic of Uzbekistan dated 14 February 2003, Tashselmash transferred on 27 October 2003 the Resort's assets to Uzpromstroybank, including all of the Resort's fixed assets and inventory, as well as all

[352] Cl. Rep., ¶ 252; Exh. CL-0319; Exh. C-0357; Exh. C-0358.
[353] Cl. Rep., ¶ 252; Re. Mem., ¶ 78.2; Exh. CL-0304.
[354] Cl. Rep., ¶ 253; Exh. C-0002; Exh. C-0003; Exh. C-0004.
[355] Cl. Rep., ¶ 254.

of its accounts payable. Further, the Claimants assert that on 17 November 2003, the Kyrgyz State Tax Inspectorate sent its bank account details directly to Uzpromstroybank for the purpose of paying Resort Yubileyny's outstanding tax debt, which Uzpromstroybank subsequently paid.[356]

244. According to the Claimants, Uzpromstroybank thereafter approved the Charter of Resort Buston as a Kyrgyz limited liability company, and contributed to it all of Resort Yubileyny's fixed assets and inventory.[357] The Claimants also contend that, on 20 October 2004, the Kyrgyz Ministry of Justice registered Resort Buston as a Kyrgyz legal entity and subsidiary of Uzpromstroybank, with "the right to carry out the activity types specified in the Charter," including "organization of hotel services" and "investments in . . . construction and operation of hotels, holiday houses, [and] restaurants."[358] The Claimants also assert that although the Respondent now contends that Uzpromstroybank's acquisition was invalid, the Respondent has not submitted any evidence that the Kyrgyz Ministry of Justice ever questioned the registration of Resort Buston as Uzpromstroybank's subsidiary, or that the State Tax Inspectorate ever objected to Uzpromstroybank paying the Resort's outstanding tax debt.[359]

245. Fifth, the Claimants argue that contrary to the Respondent's contentions, Uzpromstroybank had an ownership right in the buildings and structures comprising Resort Buston.[360] According to the Claimants and as explained above, in 2003, Uzpromstroybank acquired Resort Buston from Tashselmash, including its ownership right in the buildings and structures, which it had constructed, as affirmed by the Act of Commissioning dated 23 July 1977 issued by the State Commission.[361] The Claimants also contend that Tashselmash's ownership right in the buildings and structures it constructed on the land

[356] Cl. Rep., ¶ 255; Re. Mem., ¶¶ 79-81; Cl. Mem., ¶¶ 91-92; Usmanov, ¶ 8; Exh. C-0205; Exh. C-0206.
[357] Cl. Rep., ¶ 256; Exh. C-0211; Exh. C-0205.
[358] Cl. Rep., ¶ 256; Exh. C-0066; Exh. C-0211.
[359] Cl. Rep., ¶ 256; Re. Mem., ¶¶ 79-81.
[360] Cl. Rep., ¶ 257; Re. Mem., ¶ 83.
[361] Cl. Rep., ¶ 257; Exh. C-0361.

were expressly recognized by the Respondent in the 1992 Agreement and in the 1994 and 1995 Protocols.[362]

246. Further, according to the Claimants, the Respondent admits that Uzpromstroybank had the right to use the buildings and structures at Resort Buston through its Kyrgyz subsidiary. Accordingly, the Claimants argue that even if the Tribunal were to find that Uzpromstroybank did not have an ownership right in the buildings and structures comprising the Resort, which it did, Uzpromstroybank at a minimum had the right to use the buildings and structures until 2061.[363]

b. Uzpromstroybank Was Prevented From Renovating Resort Buston After Its Acquisition In 2003 Due To Political Unrest In The Kyrgyz Republic And Interference By The Kyrgyz Courts

247. The Claimants contend that following its acquisition of Resort Buston in 2003, Uzpromstroybank's intended investments in the Resort were delayed as a result of the 2005 revolution and the related political instability and unrest in the region, which led to a sharp decline in tourists.[364] In addition, according to the Claimants, Uzbek citizens had difficulties acquiring entry permits to the Kyrgyz Republic at that time.[365] The Claimants also contend that Uzpromstroybank's planned renovation and reconstruction of the Resort were further delayed in 2007 due to the unlawful transfer of the Resort property to the local Government administration.[366]

248. Specifically, according to the Claimants, on 23 January 2007, the Inter-District Court of the Issyk-Kul Region granted a claim by the Kunchygysh Government against the Ton District Administration for Land Management and Registration of Rights to Immovable Property for transfer of the 10.65 hectares of land from Resort Buston to the local Kunchygysh Government (the "**23 January 2007 Decision**").[367] The Claimants argue that neither Resort Buston nor Uzpromstroybank was notified of the claim, or invited to

[362] Cl. Rep., ¶ 257.
[363] Cl. Rep., ¶ 258; Re. Mem., ¶ 84.
[364] Cl. Rep., ¶ 261; Cl. Mem., ¶ 96; Usmanov, ¶ 12.
[365] Cl. Rep., ¶ 261; Cl. Mem., ¶ 96; Exh. C-0225; Exh. C-0226.
[366] Cl. Rep., ¶ 261; Cl. Mem., ¶ 97; Usmanov, ¶ 13.
[367] Cl. Rep., ¶ 262; Cl. Mem., ¶ 97; Usmanov, ¶¶ 13-18; Exh. C-0230.

participate in the Court hearing.[368] Instead, the Resort's staff learned of the Court's decision from a representative of the Kyrgyz State Registry in a nearby village.[369] The Claimants further assert that, before the Court's decision had even entered into force, the Kunchygysh Government leased the Resort to Brick Production, a Kyrgyz entity with ties to the family of then President Bakiev.[370] Moreover, the Claimants argue that although Uzpromstroybank and Resort Buston appealed the decision of the Court on multiple grounds, the appellate courts upheld the Court's decision.[371]

249. The Claimants further submit that on 9 February 2012, after the overthrow of President Bakiev and the termination of Brick Production's lease, Resort Buston and the Kunchygysh Government signed a 49-year lease agreement for the right to use the land until 2049.[372] Thereafter, Uzpromstroybank and Resort Buston continued to maintain the Resort property but, according to the Claimants, they were unable to renovate and reconstruct the Resort before it was nationalized by the Kyrgyz Republic in April 2016.[373]

(8) In April 2016, The Kyrgyz Republic Unlawfully Nationalized The Claimants' Four Resorts Without Any Justification Or Compensation

250. The Claimants argue that in the context of rising political tensions between the Kyrgyz Republic and the Republic of Uzbekistan over access to water in the Orto-Tokoi Reservoir, the Government of the Kyrgyz Republic issued the 2016 Order, directing the Kyrgyz Fund for the Management of State Property to "[a]ssume state ownership" over "resort and recreational facilities located on the territory of the Kyrgyz Republic and currently used by the legal entities of the Republic of Uzbekistan," *i.e.*, Resorts Zolotiye Peski, Rokhat-NBU, Dilorom, and Buston, without any justification, due process, evidence of the public interest, direct notice, or compensation.[374]

[368] Cl. Rep., ¶ 262; Cl. Mem., ¶ 98; Usmanov, ¶ 14.
[369] Cl. Rep., ¶ 262; Cl. Mem., ¶ 98; Usmanov, ¶ 14.
[370] Cl. Rep., ¶ 262; Cl. Mem., ¶¶ 99-100; Usmanov, ¶ 15.
[371] Cl. Rep., ¶ 262; Cl. Mem., ¶¶ 102-104; Usmanov, ¶ 17-19.
[372] Cl. Rep., ¶ 263; Cl. Mem., ¶ 108; Usmanov, ¶ 23.
[373] Cl. Rep., ¶ 263; Cl. Mem., ¶ 110.
[374] Cl. Rep., ¶ 277; Cl. Mem., ¶¶ 111-113; Usmanov, ¶ 20; Exh. C-0471; Exh. C-0009.

251. The Claimants argue that thereafter, on 9 April 2016, the Kyrgyz Ministry of Foreign Affairs sent a Diplomatic Note to its Uzbek counterpart "to notify the Uzbek side of the decision of the Government of the Kyrgyz Republic to accept transfer of ownership to the Kyrgyz Republic of" the Claimants' four Resorts.[375] In response, the Uzbek Ministry of Foreign Affairs "officially declared a protest and express[ed] deep concern at the unjustified decision of the Government of the Kyrgyz Republic."[376] The Claimants contend that the Respondent never notified them nor their Kyrgyz branches or subsidiaries directly of the unlawful nationalization, nor was compensation ever paid.[377]

252. Further, the Claimants contend that on 13 April 2016, in accordance with Order No. 138-r, the Chairman for the Kyrgyz Fund for the Management of State Property proceeded to "accept into the state ownership the [] facilities of resort and recreational sector, located on the territory of Kyrgyz Republic, under the use of the legal entities of the Republic of Uzbekistan," namely, Resorts Zolotiye Peski, Dilorom, Rokhat-NBU, and Buston.[378] The Kyrgyz Fund for the Management of State Property also created an Inter-Agency Commission and a Working Commission to conduct an inventory of the properties' facilities, including the buildings and structures.[379] Shortly thereafter, according to the Claimants, the Fund conducted inventories of the Resorts, appointed temporary managers, and registered Resorts Dilorom, Rokhat-NBU, and Zolotiye Peski as branches of the State Enterprise Vityaz under the Fund for the Management of State Property.[380]

253. The Claimants further contend that the 2016 Order, as an order of the Kyrgyz Government, is not a normative legal act. Accordingly, the Claimants argue that under the Law on Normative Legal Acts, the 2016 Order is superseded by the provisions of the 1992 Agreement and the 1994 and 1995 Protocols. The Claimants also argue that the 2016 Order is directly inconsistent with multiple Kyrgyz laws, which guarantee the implementation of

[375] Cl. Rep., ¶ 278; Cl. Mem., ¶ 115; Exh. C-0135.
[376] Cl. Rep., ¶ 278; Cl. Mem., ¶ 116; Exh. C-0026.
[377] Cl. Rep., ¶ 278; Cl. Mem., ¶ 117; Kariev, ¶ 6; Usmanov, ¶ 25.
[378] Cl. Rep., ¶ 279; Cl. Mem., ¶ 114; Exh. C-0010.
[379] Cl. Rep., ¶ 279; Cl. Mem., ¶ 114; Exh. C-0010.
[380] Cl. Rep., ¶ 279; Cl. Mem., ¶¶ 120-121.

international agreements to which the Kyrgyz Republic is a party, protect foreign investments, and prohibit unlawful nationalization.[381]

254. The Respondent contends that the 2016 Order did not expropriate or nationalize the Claimants' Resorts, because the land, buildings, and structures comprising the Resorts allegedly "were not in [the] Claimants' property prior to the Order[,] but were merely 'used' by them," and the 2016 Order therefore "was not an act of nationalization or expropriation," because there was "nothing to expropriate or nationalize."[382] The Respondent also contends that Order No. 138-r "merely confirmed the legal reality," *i.e.*, that the Kyrgyz Republic had ownership rights over the Resorts, "but resulted in a side effect of withdrawing the limited rights of use that some of [the] Claimants had still enjoyed in the Resorts."[383] In addition, the Respondent asserts that Order No. 138-r was "[i]n line with the Kyrgyz Republic's long-standing policy" that "resorts and recreational facilities in the Republic had been and remained its property."[384] The Claimants submit that the Respondent's assertions are meritless and wrong.

255. First, the Claimants argue that the Respondent's assertion that there was "nothing to expropriate or nationalize," because the Resorts allegedly "were not in [the] Claimants' property," but merely "occupied by [the] Claimants on the basis of limited rights of use or without any rights whatsoever," is wrong. In this regard, the Claimants contend that, as explained above, through their respective registered branch or subsidiary in the Kyrgyz Republic, each Claimant held the right to use the land plot and an ownership right in the buildings and structures of their respective Resort. Specifically, according to the Claimants, as of 4 April 2016, they held the following rights:

- TMP, through its registered branch in the Kyrgyz Republic, had the right to use 25 hectares of land, including 2.7 hectares of beachfront land, on which Resort Zolotiye

[381] Cl. Rep., ¶ 280.
[382] Cl. Rep., ¶ 281; Re. Mem., ¶¶ 97-99.
[383] Cl. Rep., ¶ 281; Re. Mem., ¶ 99.
[384] Cl. Rep., ¶ 281; Re. Mem., ¶¶ 10, 99.

Peski was located; TMP through its registered Kyrgyz branch, also had an ownership right in the buildings and structures at Resort Zolotiye Peski;[385]

- NBU, through its registered branch in the Kyrgyz Republic, had the right to use 14.654 hectares of land until 1 April 2054, as well as 4.4 hectares of beachfront land until 24 June 2016 with a priority of renewal; NBU, through its registered Kyrgyz branch, also had an ownership right in the buildings and structures at Resort Rokhat-NBU;[386]

- Asaka, through its registered subsidiary in the Kyrgyz Republic, had the right to use 20 hectares of land and 7 hectares of beachfront land until 5 November 2049; Asaka, through its registered Kyrgyz subsidiary, also had an ownership right in the buildings and structures at Resort Dilorom;[387]

- Uzpromstroybank, through its registered subsidiary in the Kyrgyz Republic, had the right to use 10.65 hectares of land on which Resort Buston was located until 9 February 2061, with a right of renewal; Uzpromstroybank, through its registered Kyrgyz subsidiary, also had an ownership right in the buildings and structures at Resort Buston.[388]

256. The Claimants further argue that their "rights to use" the land and ownership rights over the buildings and structures located on the land are property rights duly recognized under Kyrgyz law, the lawful taking of which requires, among other things, compensation for the value of the property rights and other losses caused by the taking.[389]

257. The Claimants submit that the 1999 Land Code recognizes and protects the right to use land. Specifically, Article 1(18) defines the "[r]ight to a land plot" as "the right of ownership to a land plot or the right to an unlimited (without specifying a period) or term

[385] Cl. Rep., ¶ 284; Exh. C-0002; Exh. C-0003; Exh. C-0004; Exh. C-0028; Exh. C-0076; Exh. C-0363; Exh. CL-0304; Exh. CL-0302; Exh. C-0495.

[386] Cl. Rep., ¶ 284; Exh. C-0002; Exh. C-0003; Exh. C-0004; Exh. C-0067; Exh. C-0220; Exh. C-0281; Exh. C-0534; Exh. C-0559.

[387] Cl. Rep., ¶ 284; Exh. C-0002; Exh. C-0003; Exh. C-0004; Exh. C-0049; Exh. C-0050; Exh. C-0497.

[388] Cl. Rep., ¶ 284; Exh. C-0002; Exh. C-0003; Exh. C-0004; Exh. C-0072; Exh. C-0296.

[389] Cl. Rep., ¶ 285; Exh. CL-0302; Exh. CL-0304; Exh. CL-0313.

(temporary) use of a land plot." Article 1(20) further defines "the right to use a land plot" as a "right in rem of individuals and legal entities that are not the owner of the land plot."[390]

258. In addition, the Claimants argue that the 1999 Land Code protects the right to use land and expressly prohibits interference with that right, including by State and municipal bodies. For instance, Article 6 of the 1999 Land Code provides:

> No one can be deprived of the right to a land plot other than on the grounds specified in the law [and] [i]nterference of state bodies and local self-government bodies in the activities of . . . land users in the use of land plots is not allowed, except in cases of violation of land legislation by them.[391]

Moreover, Article 49 provides that a land user "has the right [to] stop any attempts to violate [its] right to a land plot," and that "[v]iolated rights are subject to restoration in the manner prescribed by the legislation of the Kyrgyz Republic."[392]

259. The Claimants also argue that their ownership rights in the buildings and structures are likewise recognized and protected under Kyrgyz law. Specifically, the Claimants contend that the 2010 Kyrgyz Constitution, in effect in April 2016, "recognizes the diversity of forms of ownership and guarantees equal legal protection of private, state, municipal and other forms of ownership." According to the Claimants, the Constitution protects ownership rights by establishing that "property is inviolable" and that "[n]o one shall be arbitrarily deprived of his or her property." In addition, the Claimants contend that "[t]he removal of property [against] the will of the owner is allowed only by court decision," "with a fair and prior provision for the recovery of the value of that property and other damages caused by the alienation."[393]

260. The Claimant also assert that the Civil Code likewise provides that "conversion of property belonging to citizens and legal entities into state ownership through its nationalization is allowed only on the basis of the law on the nationalization of this property and with

[390] Cl. Rep., ¶ 286; Exh. CL-0304.
[391] Cl. Rep., ¶ 287; Exh. CL-0304.
[392] Cl. Rep., ¶ 287; Exh. CL-0304.
[393] Cl. Rep., ¶ 288; Exh. CL-0079.

compensation to the person whose property is nationalized, the value of this property and other losses caused by its seizure." In addition, the Claimants maintain that the 1999 Land Code provides that the "[r]ight of ownership to a land plot . . . [is] recognized and protected by the Constitution of the Kyrgyz Republic, this Code and other legislative acts."[394]

261. Second, the Claimants argue that the Respondent's assertion that its 2016 Order "merely confirmed the legal reality" that the Kyrgyz Government already had ownership rights over the Resorts is also incorrect and unsupported.[395]

262. According to the Claimants, the Respondent's 2016 Order does not provide that the Resorts were "not in [the] Claimants' property," or that the Order was merely confirming the "legal reality" that the Kyrgyz Government already had ownership rights over the Resorts; indeed, there is no mention of the Kyrgyz Government's alleged ownership rights at all. Rather, the Claimants contend that the 2016 Order expressly instructed the State Property Fund to "[a]ssume state ownership over [] resort and recreational facilities located on the territory of the Kyrgyz Republic and currently used by the legal entities of the Republic of Uzbekistan."[396] In its Diplomatic Note, the Respondent further notified the Uzbek Government of the "transfer" of ownership to the Kyrgyz Republic.[397]

263. Notably, the Claimants submit that if the Kyrgyz Government already had ownership rights over these Resorts, as Respondent now asserts, it would not have been required to "transfer" their ownership and "accept" them into "state ownership," nor would the Respondent have notified the Uzbek Government of its actions.[398]

264. The Claimants contend that this is confirmed by the Cadastre extract for Resort Rokhat-NBU. The Claimants submit that, as noted above, the extract provides that the "usage" right to the "land and building[s]" at Resort Rokhat-NBU was "terminat[ed]" in accordance with Order No. 138-r, *i.e.*, the 2016 Order. The extract further states that the "ownership" right

[394] Cl. Rep., ¶ 289; Exh. CL-0304.
[395] Cl. Rep., ¶ 290; Re. Mem., ¶ 99.
[396] Cl. Rep., ¶ 291; Re. Mem., ¶¶ 97-99; Exh. C-0009; Exh. CL-0302; Exh. CL-0304.
[397] Cl. Rep., ¶ 291; Exh. C-0135.
[398] Cl. Rep., ¶ 292; Exh. C-0009; Exh. C-0135.

of the "Fund of State Property of the Kyrgyz Republic" was registered only on 24 June 2016, *i.e.*, the same date that Resort Rokhat-NBU's right to use was terminated based on Order No. 138-r, showing that the Kyrgyz Government did not have any registered ownership rights before that date.[399]

265. The Claimants also contend that the Cadastre extracts for Resorts Zolotiye Peski, Dilorom, and Buston likewise show that the "ownership" rights of the State Property Fund in the "land and building[s]" were registered only on 24 June 2016 (with respect to Resorts Zolotiye Peski and Dilorom) and on 4 August 2016 (with respect to Resort Buston), in accordance with Order No. 138-r.[400] According to the Claimants, if Order No. 138-r merely "confirmed the legal reality," as the Respondent asserts, there would have been no need to rely upon the 2016 Order in the Cadastre records.[401]

266. Third, the Claimants argue that the Respondent's assertion that the 2016 Order was "[i]n line with the Kyrgyz Republic's long-standing policy" that recreational facilities remained the property of the Kyrgyz Republic is baseless.[402]

267. The Respondent relies upon Resolution No. 1080 dated 16 December 1992, which ordered the State Property Fund to "[t]ake . . . [in] the Kyrgyz Republic ownership [of] the resorts and recreational facilities located within the territory of the Republic and used by the legal entities of the other CIS countries." The Claimants maintain that Resolution No. 1080 was never implemented and lost legal force in accordance with its own terms.[403] Specifically, the Claimants submit that under Article 1, the Government was required to implement Resolution No. 1080 by 10 January 1993; it did not do so, but rather concluded with the Republic of Uzbekistan the 1994 and 1995 Protocols, which, contrary to Resolution No. 1080, specifically preserved the rights of the Uzbek entities in the four Resorts. The

[399] Cl. Rep., ¶ 293; Exh. R-0094.
[400] Cl. Rep., ¶ 294; Exh. R-0093; Exh. R-0095; Exh. C-0519.
[401] Cl. Rep., ¶ 294; Re. Mem., ¶ 99.
[402] Cl. Rep., ¶ 297; Re. Mem., ¶ 99.
[403] Cl. Rep., ¶ 298; Exh. R-0089.

Claimants contend that these Protocols remain in force, as affirmed by the Respondent itself in 2017.[404]

268. The Claimants also contend that while the Respondent relies upon its purported reservation to Article 4 of the 1992 Agreement, as explained above, the Respondent's reservation was neither valid nor in force. The Claimants argue that, in any event, the 1994 and 1995 Protocols, which were signed after the Respondent's purported reservation was made, specifically preserved the rights of the Uzbek entities in the four Resorts on a bilateral basis.[405]

B. THE RESPONDENT'S CASE

269. The Respondent's principal contention in this arbitration is that this dispute concerns four Soviet-era resorts to which the Claimants did not have valid rights and operated them for decades in what can only be described as a state of legal limbo.[406]

(1) Soviet Public Resorts

270. The Respondent maintains that during the Soviet period, Soviet State-owned enterprises were engaged in the construction of recreational facilities with the goal of expanding the State-funded social recreational sphere to benefit the workforce. The Respondent adds that the premise of these facilities, in line with the rights guaranteed by the 1936 Soviet Constitution, was that they were social, and not commercial. The Respondent further submits that by the 2000's and 2010's most of such Soviet-era recreational facilities, including the Claimants' Resorts, were in a dilapidated state.[407]

(2) The Dissolution Of The Soviet Union Raised Complex Issues Of State Succession, Including With Respect To Property

271. The Respondent maintains that, on 4 December 1991, even before the formal dissolution of the Soviet Union, most of the Soviet Republics (including the Kyrgyz Republic and the

[404] Cl. Rep., ¶ 298; Exh. R-0089; Exh. C-0003; Exh. C-0004; Exh. C-0108.
[405] Cl. Rep., ¶ 299; Exh. C-0003; Exh. C-0004; Exh. C-0111.
[406] Re. Mem., ¶¶ 6-9.
[407] Re. Mem., ¶ 23; Exh. RL-0085.

Republic of Uzbekistan) had signed the Treaty on Succession to the USSR's Debt and Assets.[408]

272. The Respondent further submits that, shortly thereafter, on 21 December 1991, eleven Heads of State (including then-Presidents Akaev and Karimov of the Kyrgyz Republic and the Republic of Uzbekistan, respectively) signed the Alma-Ata Declaration which proclaimed that "[w]ith the formation of the Commonwealth of Independent States the USSR ceases to exists."[409]

273. The Respondent also adds that, on 20 March 1992, the Council of Heads of State Members of the newly established Commonwealth of Independent States ("**CIS**") adopted a Decision on issues of State succession to treaties, State property, State archives and the debts of the former Soviet Union, whereby a Commission of representatives was established to negotiate and prepare propositions on those issues.[410]

274. On 9 October 1992, however, the Heads of the CIS Member States suspended the work of the Commission, deciding that "issues on State succession concerning debts and assets of the former Soviet Union shall be decided on a bilateral basis."[411]

275. That same day (9 October 1992), most of the CIS Member States (including the Kyrgyz Republic and the Republic of Uzbekistan) concluded the 1992 Agreement. Notably, the Respondent argues that the Kyrgyz Republic signed the Agreement with a reservation pertaining to its Article 4 dealing specifically with the recognition of property rights with respect to resorts and similar recreational facilities.[412]

[408] Re. Mem., ¶ 25; Exh. RL-0086.
[409] Re. Mem., ¶ 26; Exh. CL-0177.
[410] Re. Mem., ¶ 27; Exh. RL-0087.
[411] Re. Mem., ¶ 27; Exh. RL-0087.
[412] Re. Mem., ¶ 28; Exh. C-0002.

276. The Respondent submits that, crucially, the 1992 Agreement was followed by numerous bilateral instruments spelling out the mechanics of the recognition of transborder property rights in the post-Soviet space.[413]

(3) After Nearly A Decade Of Bilateral Negotiations, The Respondent And The Republic Of Kazakhstan Settled The Status Of Four Similar Soviet-Era Resorts Located On The Issyk-Kul Lake

277. The Respondent notes that the Kyrgyz Republic ratified the 1992 Agreement in January 1994, and deposited its Instrument of Ratification in April 1999, when it finally entered into force for the Republic.[414]

278. The Respondent submits that in October 2003, the Kyrgyz Government sent an expert group to the neighboring Republic of Kazakhstan to "settle the ownership rights concerning the recreational objects located on the territory of the Issyk-Kul Region."[415]

279. Shortly thereafter, in December 2003, a Protocol on the Recognition of Ownership Rights of the Republic of Kazakhstan on Real Estate Objects Located on the Territory of the Kyrgyz Republic was executed between the two States.[416]

280. The Respondent adds that, following prolonged negotiations, in June 2006, a draft bilateral Agreement on Settlement of Ownership Rights Concerning the Recreational Objects Located on the Territory of the Issyk-Kul Region (the "**Issyk-Kul Settlement Agreement**") was tabled before the Parliaments and designated State organs of both States.[417]

281. While the Issyk-Kul Settlement Agreement was promptly signed in July 2006, the internal ratification process in the Kyrgyz Republic took until May 2008 to complete. In fact, the Kyrgyz law on ratification of the Issyk-Kul Settlement Agreement instructed the Kyrgyz Government to enter into another Inter-State Agreement with the Kazakh Government, this

[413] Re. Mem., ¶¶ 29-29.6; Exh. C-0002; Exh. RL-0089; Exh. RL-0090; Exh. RL-0091; Exh. RL-0092; Exh. RL-0093; Exh. RL-0094; Exh. RL-0095.

[414] Re. Mem., ¶ 31; Exh. R-0030; Exh. C-0002.

[415] Re. Mem., ¶ 32; Exh. RL-0097.

[416] Re. Mem., ¶ 32; Exh. RL-0098.

[417] Re. Mem., ¶ 33; Exh. RL-0099.

time regulating the rental of the land plots occupied by the four resorts. By December 2009, a detailed bilateral Treaty on Renting Land Plots in the Issyk-Kul Region was signed, and then finally ratified by February 2010.[418]

282. In all, the Respondent notes that it took nearly seven years of inter-State negotiations to advance from a protocol on intentions concerning Kazakhstan's Soviet-era resorts located on the Issyk-Kul lake to a detailed, mutually beneficial arrangement on their continued operation by the Kazakh side.[419]

(4) In Contrast, The Kyrgyz-Uzbek Efforts To Settle The Status Of The Four Resorts In Dispute Were In Vain, The Claimants Operated In Legal Limbo

283. The Respondent notes that on 2 February 1994, the representatives of the Kyrgyz and Uzbek Governments signed the 1994 Protocol. Thereafter, on 8 January 1995, the 'representatives' of the Kyrgyz and Uzbek Governments signed the 1995 Protocol.[420]

284. The Respondent adds that in February 2008, expressly pursuant to the 1994 Protocol, the Uzbek Government transmitted a draft of the Agreement on Mutual Recognition of Rights and Regulations of Property Relations to the Kyrgyz Government. There were follow-up inter-Governmental communications in August 2008 and July 2009, but no agreement was reached.[421]

285. The Respondent also contends that, as reflected in the December 2009 Minutes of the 7th Session of the Kyrgyz-Uzbek Inter-Governmental Commission on Bilateral Cooperation, the parties agreed to establish a working group to address "property questions" pending between them. The Respondent submits that following that Session, the First Deputy Prime Minister of the Republic of Uzbekistan announced to the mass media that "legal issues between Kyrgyzstan and Uzbekistan with respect to the recreational facilities on Issyk-Kul remain unresolved."[422]

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[418] Re. Mem., ¶ 34; Exh. CL-0161; Exh. RL-0100; Exh. RL-0101; Exh. RL-0102; Exh. RL-0103.
[419] Re. Mem., ¶ 35.
[420] Re. Mem., ¶¶ 38-39; Exh. C-0003.
[421] Re. Mem., ¶ 40.1; Exh. C-0026.
[422] Re. Mem., ¶ 40.2; Exh. R-0091; Exh. R-0092.

286. According to the Respondent, between 2010 and 2015, there were further inter-Governmental communications aimed at addressing the legal void that the four Resorts were operating in, but again, no agreement was reached. The Respondent asserts that the Claimants' own documents demonstrate that they themselves considered that the Resorts existed in limbo and urged the Uzbek State authorities to solve this problem by concluding a bilateral Agreement with the Respondent.[423]

(5) Neither The 1992 Agreement, Nor The 1994 and 1995 Protocols Preserve, Affirm, Maintain Or Grant The Claimants Any Rights To The Resorts

287. The Respondent contends that the Claimants' case is built on the premise that following the dissolution of the Soviet Union, the Respondent and the Republic of Uzbekistan concluded several multilateral and bilateral agreements that purportedly "affirmed," "preserved and maintained [. . .] the continuing rights of [Claimants] in the [R]esorts," which the Respondent asserts is false.[424]

a. The 1992 Agreement Is A* Pactum De Contrahendo*, To Which The Kyrgyz Republic Made A Valid Reservation

288. The Respondent argues that it is uncontroversial that a *pactum de contrahendo* is a well-established concept in public international law, defined as "an agreement between parties creating a binding obligation to conclude a future agreement on a particular subject."[425]

289. The Respondent submits that there is ample evidence that the 1992 Agreement is a *pactum de contrahendo*, or a framework instrument requiring negotiations and entry into force of further, specific, and bilateral treaties:

- The Economic Court of the CIS, empowered by virtue of Article 17 of the 1992 Agreement to interpret it, has recognized that: (i) the Agreement is a "framework public international legal act, regulating the mutual recognition of property rights of the Parties to the Agreement, [that] does not contain specific requirements to the procedure of mutual consultations and negotiations"; and (ii) "the order of recognition of the

[423] Re. Mem., ¶¶ 40.3-41; Exh. C-0026; Exh. C-0261.
[424] Re. Mem., ¶ 126; Cl. Mem., ¶¶ 25-31.
[425] Re. Mem., ¶ 129; Exh. RL-0139.

property right on a specific object of the social sphere [under Article 4 of the Agreement] is to be determined by mutual consent of the Parties to the Agreement."[426]

- Similarly, the Economic Council of the CIS has recently confirmed that "[w]ithin the CIS framework, the issues of recognition of property rights on objects built before December 1, 1990 are regulated by the [1992 Agreement] and bilateral agreements."[427]

- There is extensive subsequent practice of the Parties to the 1992 Agreement in concluding bilateral agreements regulating specific property rights of Soviet-era infrastructure. This is a textbook example of application of Article 31(3)(b) of the VCLT, stipulating that "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account when interpreting the treaty.[428] Crucially, this is not a case of one party to an international agreement applying it in a certain unorthodox way – both the Respondent and the Republic of Uzbekistan have followed the very same path with respect to other Soviet-era infrastructure.[429]

- Lastly, the Republic of Uzbekistan itself recognized both prior and after the 2016 Order that the legal status of the Resorts remains "unresolved" and "not regulated," and the Resorts exited in "limbo."[430]

290. To conclude, the Respondent argues that the 1992 Agreement cannot – and does not – itself preserve, affirm, maintain, or grant the Claimants any rights to the Resorts. Rather, it requires conclusion of a specific bilateral agreement between the Uzbek Republic and the Kyrgyz Republic. This is, as the Respondent contends, something that both the Uzbek Republic and the Kyrgyz Republic have previously successfully achieved in bilateral

[426] Re. Mem., ¶ 130.1; Exh. C-0002; Exh. RL-0132.
[427] Re. Mem., ¶ 130.2; Exh. RL-0143.
[428] Re. Mem., ¶ 130.3; Exh. RL-0002.
[429] Re. Mem., ¶ 130.3; Exh. RL-0092; Exh. RL-0098; Exh. RL-0099.
[430] Re. Mem., ¶ 130.4; Exh. C-0026; Exh. C-0323; Exh. C-0261.

relations with other CIS States, but that they are, to date, unable to achieve with respect to the Resorts.[431]

b. In Any Event, The Kyrgyz Republic Made A Valid Reservation To Article 4 Of The 1992 Agreement

291. The Claimants' own argument is that Article 4 of the 1992 Agreement is applicable to the Resorts and preserves, affirms, maintains, or grants the Claimants rights on those Resorts.[432] However, the Respondent argues that the Kyrgyz Republic has made a valid reservation to Article 4 of the 1992 Agreement when signing it, ratifying it, and finally depositing the relevant Instrument of Ratification with the Depository.[433] The Claimants object to the Republic's reservation to Article 4 of the Agreement; however, according to the Respondent, their arguments ring hollow.[434]

292. The Claimants rely on the 1996 CIS Economic Court Advisory Opinion, alleging that the Respondent's reservation to the 1992 Agreement is "invalid" since: (i) it was not formally confirmed by the Republic at the time of expressing consent to be bound by the Agreement, as required under Article 23(2) VCLT; and (ii) it was not in compliance with the requirements of VCLT "regarding the form of declaring reservations."[435]

293. The Respondent contends that, in reality, the 1996 CIS Economic Court Advisory Opinion does not say anything about the purported 'invalidity' of the Respondent's reservation to Article 4 of the Agreement. In fact, according to the Respondent, the Claimants have attempted to mislead the Tribunal by exhibiting an incorrect translation of the authentic Russian text of the Advisory Opinion to claim otherwise. In this respect, the Respondent submits that while the Russian text uses the word "not in force," the Claimants conveniently translate this word as "invalid," which on its face is materially different. The Respondent further contends that this is not only incorrect as a matter of translation from Russian into English, but is also plainly contrary to the text of the 1996 CIS Economic

[431] Re. Mem., ¶ 131.
[432] Re. Mem., ¶ 133; Cl. Mem., ¶ 27.
[433] Re. Mem., ¶ 134; Exh. C-0002; Exh. R-0030.
[434] Re. Mem., ¶ 135.
[435] Re. Mem., ¶ 136; Cl. Mem., ¶ 139.

Court Advisory Opinion itself, according to which "violations of the procedural norms affecting the forms of declaring a reservation do not make such a reservation invalid." According to the Respondent, what the Economic Court of the CIS in fact observed, is that the Kyrgyz Republic – along with several other CIS States – allegedly failed to adopt a ratification act recording the reservation, as required by Article 23(2) of the VCLT and the 1992 Agreement itself. The Respondent further argues that the Court dubbed such shortcomings as procedural, but noted that it does not render the reservation invalid.[436]

294. Furthermore, the Respondent asserts that the Court's observation that the Respondent's reservation to the 1992 Agreement has not been "formally confirmed [. . .] [by the Republic] when expressing its consent to be bound by the treaty"[437] as it allegedly has not adopted an appropriate ratification act[438] is no longer correct. In particular, the Respondent contends that Article 23(2) of the VCLT applies to reservations "made at a later stage: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval,"[439] which, as the Respondent submits, requires (i) a formal confirmation of a reservation to a treaty to be made in writing[440]; (ii) when expressing consent to be bound by the treaty, *i.e.*, upon ratification for treaties subject to ratification.[441] The Respondent also argues that, as pointed out by the Special Rapporteur on the law of treaties Sir H. Waldock, "[such] reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained."[442]

295. The Respondent therefore argues that, in the present case, the Kyrgyz Republic did in fact give a clear indication that it agrees to be bound by the 1992 Agreement except its Article 4 by depositing the Instrument of Ratification in 1999. Importantly, the Respondent asserts that: (i) the date of deposit of the Kyrgyz Republic's Instrument of Ratification (with reservation to Article 4) is recorded after the text of the 1992 Agreement; and (ii) the

[436] Re. Mem., ¶ 137; Exh. C-0111.
[437] Re. Mem., ¶ 139; Exh. RL-0002.
[438] Re. Mem., ¶ 139; Exh. C-0111.
[439] Re. Mem., ¶ 139; Exh. CL-0021.
[440] Re. Mem., ¶ 139; Exh. RL-0146.
[441] Re. Mem., ¶ 139; Exh. RL-0002.
[442] Re. Mem., ¶ 139; Exh. CL-0183.

Instrument of Ratification has been contemporaneously communicated by the depository to other parties to the 1992 Agreement, including the republic of Uzbekistan. According to the Respondent, the Kyrgyz Republic's reservation to the 1992 Agreement is, therefore, in compliance with Article 23(2) of the VCLT.[443]

296. The Claimants, moreover, argue that the Kyrgyz Republic's reservation to Article 4 of the 1992 Agreement is incompatible with its object and purpose, and therefore invalid under Article 19(c) of the VCLT. The Respondent contends that this argument is also incorrect.[444]

297. The Respondent submits that Article 19(c) of the VCLT serves to preserve the "raison d'être" of a treaty, to which the Claimants refer, by preventing reservations which would impede effectiveness of the treaty as a whole by limiting operation of its essential clauses.[445] According to the Respondent, Article 4 of the 1992 Agreement is not an essential clause for the Agreement in light of Article 19(c) of the VCLT because it does not pertain to mutual recognition of property rights and the pivotal role of national legislation in the regulation of such rights.[446] Accordingly, the Respondent argues that the Kyrgyz Republic's reservation to Article 4 of the 1992 Agreement is compatible with its object and purpose and therefore valid under Article 19(c) VCLT.[447]

c. Similarly, The 1994 Protocol Is A Pactum De Contrahendo

298. The Respondent also contends that on its face, the 1994 Protocol is another *pactum de contrahendo* between the Respondent and the Republic of Uzbekistan, since the Protocol: (i) records the Parties' agreement "on the need to recognize . . ." certain rights; and, more importantly, (ii) stipulates that parties envisaged to enter into an Inter-Governmental Agreement on the Mutual Recognition of Rights and Regulation of Property Relations

[443] Re. Mem., ¶ 140.
[444] Re. Mem., ¶ 140; Cl. Mem., ¶ 140.
[445] Re. Mem., ¶ 142.1; Exh. CL-0183; Exh. RL-0147.
[446] Re. Mem., ¶ 142.2.
[447] Re. Mem., ¶ 143.

within one month. The Respondent asserts that it is not disputed that no such Inter-Governmental Agreement was ever signed.[448]

299. According to the Respondent, the 1994 Protocol is in line with the practice of both the Respondent and other former Soviet States of particularizing property rights with respect to Soviet-era facilities based on the 1992 Agreement by way of bilateral instruments.[449]

d. The 1995 Protocol Does Not Preserve, Affirm, Maintain, Or Grant The Claimants Any Rights To The Resorts

300. The Claimants argue that together with the 1994 Protocol, the 1995 Protocol "govern[s] property rights and relations between the two States, including specifically with respect to the [Resorts]."[450] The Claimants also insist that the 1995 Protocol implemented the 1992 Agreement.[451]

301. The Respondent contends that this argument is incorrect due to three independent reasons: (i) the 1995 Protocol did not implement the 1992 Agreement or, for that matter, any other agreement that is or was in force for the Kyrgyz Republic; (ii) in and of itself, the 1995 Protocol does not qualify as an international treaty containing any obligations binding the Respondent; and (iii) alternatively, and in any event, the 1995 Protocol does not create a binding obligation for the Respondent to recognize the Claimants' alleged property rights in the Resorts and does not serve as a basis for the recognition of the Claimants' alleged title in those Resorts since the Claimants never acquired and registered (or re-registered) such Resorts under the Kyrgyz domestic law.[452]

(i) The 1995 Protocol Did Not Implement The 1992 Agreement

302. The Respondent maintains that the 1995 Protocol was not adopted pursuant to or in furtherance of the 1992 Agreement or the 1994 Protocol, and is completely unrelated

[448] Re. Mem., ¶ 144; Exh. C-0003.
[449] Re. Mem., ¶ 145; Exh. RL-0099; Exh. RL-0090; Exh. RL-0091.
[450] Re. Mem., ¶ 146; Cl. Mem., ¶ 28.
[451] Re. Mem., ¶ 146; Cl. POC on Issue 1, ¶ 25.
[452] Re. Mem., ¶ 146.

thereto, be it in substance or in form. According to the Respondent, this clearly follows from the text of the 1995 Protocol, which refers to the "Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on [transformation of] technical loans as of the year end 1992 and January – August 1993 into the governmental loan of the Government of the Kyrgyz Republic, dated June 14, 1994," and the acknowledgement of the existing debts of the Kyrgyz Republic.[453]

303. The Respondent argues that legal instruments implementing provisions of the 1992 Agreement indicate in the preamble that they are adopted "on the basis of," "pursuant to," or "bearing in mind" that Agreement. The 1995 Protocol makes no such reference.[454]

304. Further, the Respondent contends that legal instruments which confirmed or recognized property rights of the Contracting Parties to the 1992 Agreement in assets located in territories of other Contracting Parties indicate either expressly or implicitly that proprietary interests in a particular asset shall be established and duly registered in accordance with provisions of the law of a contracting party, on the territory of which the asset was located.[455]

305. According to the Respondent, the requirement that the property rights be first properly established under the Contracting Parties' national law is further supported by the interpretation of Article 4 of the 1992 Agreement by the CIS Economic Court in 2007, which found that the 1992 Agreement did not establish procedures for proving property rights and was, therefore, a framework agreement.[456]

306. The Respondent argues that in analysing Article 4, the Court found that since the 1992 Agreement "does not establish the procedure for proving the fact of construction of a [real estate] object of social sphere with funds of entities indicated in Article 4(1), [and] does not list evidence [required to prove construction of an object with one's own funds] [. . .]

[453] Re. Mem., ¶ 148; Exh. RL-0104.

[454] Re. Mem., ¶ 148.1; Exh. RL-0098; Exh. RL-0148; Exh. RL-0149; Exh. RL-0150; Exh. RL-0151; Exh. RL-0095; Exh. RL-0090; Exh. RL-0104.

[455] Re. Mem., ¶ 148.2; Exh. RL-0098; Exh. RL-0148; Exh. RL-0095; Exh. RL-0150.

[456] Re. Mem., ¶ 148.3; Exh. RL-0132.

the procedure for recognition of proprietary interest in a particular [real estate] object of social sphere shall be determined by a mutual agreement of the Contracting Parties to the Agreement."[457]

307. The Respondent also asserts that, unlike agreements and protocols implemented pursuant to the 1992 Agreement, the 1995 Protocol does not state that the Republic of Uzbekistan's property rights in the Resorts were properly recognized and established under the Respondent's legislation. Further, the Respondent contends that the 1995 Protocol also makes no reference to any other legal instrument that would properly recognize proprietary interest of the Republic of Uzbekistan in the Resorts. Finally, the Respondent submits that the 1995 Protocol does not refer to registration of the Republic of Uzbekistan's title or acknowledgment that such registration is due or exists at all. Therefore, according to the Respondent, the 1995 Protocol was not adopted pursuant to or in furtherance of the 1992 Agreement.[458]

(ii) The 1995 Protocol Does Not Qualify As An International Treaty Containing Any Obligations Binding The Respondent

308. The Respondent also maintains that in any event, the 1995 Protocol does not constitute "an international agreement" pursuant to Article 2(1)(a) of the VCLT and does not create binding obligations for the Respondent.[459]

309. The Respondent specifically argues that while the said provision of the VCLT makes it clear that a treaty is considered as such irrespective of its particular designation, it does not define the term "agreement." The Respondent adds that the context and the object and purpose of the VCLT, which are found in the preamble and provisions of the Convention, indicate that the term "agreement" (as defining treaty) was intended to encompass agreements that create legal rights and obligations.[460]

[457] Re. Mem., ¶ 148.3; Exh. RL-0135.
[458] Re. Mem., ¶ 148.4.
[459] Re. Mem., ¶ 150; Exh. RL-0104.
[460] Re. Mem., ¶ 151; Exh. RL-0002.

310. Furthermore, the Respondent argues that the 1953 Report of a Special Rapporteur on the law of treaties indicates that the drafters of the Convention envisioned the term "treaty" as an agreement intended "to create legal rights and obligations."[461] According to the Respondent, the scope of the term was not supposed to include "formal international instruments solemnly declared or signed by representatives of States […] [which] are in the nature of statements of policy rather than instruments intended to lay down legal rights and obligations."[462]

311. The Respondent further maintains that the report also emphasizes that, "[t]he legal nature of assurances given in an instrument may be problematical notwithstanding the fact that it is couched in the form usually given to binding agreements," and concludes that absence of a true treaty relationship created by a legal instrument may be evident not only in the lack of legal obligations of parties, but also in the terms of the instrument.[463]

312. Therefore, the Respondent contends that the 1995 Protocol does not create any legal obligations and enforceable rights as follows from its provisions. The Protocol states that the parties agreed to "preserve" the property rights of the Republic of Uzbekistan in the Resorts.[464] This does not encompass any legal obligations or rights.[465]

313. Further, the Respondent submits that the 1995 Protocol does not evidence "intention of the parties to create international legal obligations."[466] Specifically, the Respondent argues that the Protocol contains acknowledgements by the parties related to the inter-governmental loans and alleged property rights of Uzbekistan in the Resorts – subjects falling outside of the scope of public international law.[467]

[461] Re. Mem., ¶ 151; Exh. RL-0154.
[462] Re. Mem., ¶ 151; Exh. RL-0154.
[463] Re. Mem., ¶ 151; RL-0154.
[464] Re. Mem., ¶ 152; Exh. RL-0104.
[465] Re. Mem., ¶ 152.
[466] Re. Mem., ¶ 153; Exh. RL-0146.
[467] Re. Mem., ¶ 153; Exh. RL-0146.

(iii) The 1995 Protocol Does Not Create A Binding Obligation For The Respondent To Recognize The Claimants' Alleged Property Rights In The Resorts Since The Claimants Never Acquired Nor Registered (Or Re-Registered) Those Rights Under The Kyrgyz Domestic Law

314. Lastly, the Respondent argues that in any event, the 1995 Protocol is invalid under the Kyrgyz law to the extent that it is alleged to "preserve" or "govern property rights" over real estate objects located in the Kyrgyz Republic. The Respondent particularly submits that pursuant to paragraph 3 of the 1995 Protocol, the parties agreed "to preserve property rights of the Republic of Uzbekistan" over the Resorts on Issyk-Kul Lake.[468] The Respondent also contends that as was indicated in paragraph 132 of its Reply on Preliminary Objections, property rights in the Kyrgyz Republic must first be determined under the Kyrgyz law. According to the Respondent, a public international law agreement cannot preserve, govern, or establish rights that are regulated by the domain of private national law.[469]

315. Hence, the Respondent asserts that while an international agreement may recognize property rights in the Kyrgyz Republic, it can do so only where they were first properly established under the national law. Consequently, the Respondent contends that to extend that the 1995 Protocol purports to "preserve" any property rights in the Kyrgyz Republic without a valid basis for preservation of such property rights established under the laws of the Kyrgyz Republic or to "govern" proprietary interest in the assets located in the Kyrgyz Republic, it is invalid under the Kyrgyz law.[470]

316. Accordingly, the Respondent submits that neither the 1992 Agreement, nor the 1994 and 1995 Protocols preserve, affirm, maintain, or grant the Claimants any rights to the Resorts.[471]

[468] Re. Mem., ¶ 154; Exh. RL-0104.
[469] Re. Mem., ¶ 154.
[470] Re. Mem., ¶ 154.
[471] Re. Mem., ¶ 155.

(6) By April 2016, The Claimants Were Holding From Little To No Legal Rights In The Resorts

317. The Respondent argues that it is well-established that property rights and rights *in rem* more generally are subject to the domestic law of the State where such property is located. The Respondent particularly maintains that this is evident for example from Article 3 of the 1922 Agreement, which unequivocally states that "[t]he property right to the land and other natural resources are regulated by the legislation of the Party, on whose territory the property is located [. . .]."[472]

a. Legal Regime Of Rights In Rem *Over Land And Immovable Property In The Kyrgyz Republic*

318. The Respondent submits that during the Soviet period, issues of property and other rights *in rem* over land and immovable property were regulated by provisions of the 2 July 1971 Land Code of the Kyrgyz SSR (the "**1971 Land Code**") and the 30 July 1964 Civil Code of the Kyrgyz SSR (the "**1964 Civil Code**").[473]

319. With respect to land, the Respondent notes that Article 4 of the 1971 Land Code posed a cornerstone principle according to which land was in "exclusive property of the State" and could "be provided for use only." Article 12 of the Code further explained that the provision of land plots for use was to be carried out by way of "allotment [. . .] on the basis of a resolution of the Council of Ministers of the Kyrgyz SSR or a decision of the executive committee of the relevant Council of Deputies of workers [. . .]." According to the Respondent, re-allocation of a land plot to another entity was only possible after a formal withdrawal of the land plot from its current user by a decision of the authority that had originally granted the right of use. Finally, the Respondent alleges that a right of use over a land plot had to be certified by an appropriate State certificate.[474]

320. With respect to buildings and other immovable property, the Respondent argues that their legal regime followed the general regime of property and other *in rem* rights set by the

[472] Re. Mem., ¶ 43; Exh. C-0002.
[473] Re. Mem., ¶ 46; Exh. RL-0105; Exh. RL-0106.
[474] Re. Mem., ¶ 46.1; Exh. RL-0105.

1964 Civil Code. Specifically, the Respondent notes that according to Article 94 of the Civil Code, the only two types of property recognized in the Kyrgyz SSR were the socialist and limited personal property. With regard to socialist property, the Respondent contends that it comprised State property, property of collective farms and cooperatives, as well as property of labor unions and other public organizations. In turn, personal property was that of citizens and was limited to "items of household, personal consumption, convenience, auxiliary household items, a residential house and labor savings."[475]

321. The Respondent submits that on 19 April 1991, during the period of transition of the country from a Soviet republic to an independent sovereign State, the Supreme Council of the Kyrgyz Republic adopted a resolution "On the enactment of the [new] Land Code of the Kyrgyz Republic" which was to replace the 1971 Land Code (the "**19 April 1991 Resolution of the Supreme Council**"). On the same day, the Supreme Council enacted the Law of the Kyrgyz Republic "On the Land Reform" (the "**1991 Law on Land Reform**").[476] The Respondent submits that both acts addressed the validity of rights over land plots granted during the Soviet time:

- Pursuant to Articles 2 and 4 of the 19 April 1991 Resolution of the Supreme Council, "[p]ending the harmonization of the legislation of the Republic of Kyrgyzstan with the Land Code of the Republic of Kyrgyzstan, the current acts of land legislation of the Republic of Kyrgyzstan shall be applied if they do not contradict the Land Code of the Republic of Kyrgyzstan" while "legal entities, temporarily using land plots provided to them by agricultural enterprises before June 1, 1991, retain their rights until the re-registration of their rights to land possession or land use."[477]

- Further, pursuant to Article 9 of the 1991 Law on Land Reform:

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

[475] Re. Mem., ¶ 46.2; Exh. RL-0106.
[476] Re. Mem., ¶ 47; Exh. RL-0107; Exh. RL-0108.
[477] Re. Mem., ¶ 47.1; Exh. RL-0107.

> Re-issuance and issuance to legal entities of State acts for the right to possess (permanently use) land and certificates of the right of temporary use of land are issued to legal entities by local Soviets of people's deputies and the land use planning service at the expense of the State budget.
>
> Prior to the re-issuance of certificates of land possession or land use, the previously established right to the respective land plot shall be retained for a period of five years from the beginning of the land reform. Upon expiration of this period, the right to a land plot shall be lost.[478]

322. Finally, the Respondent maintains that on 8 May 1996, 22 December 1998, and 2 June 1999, respectively, the Kyrgyz Republic enacted the new Civil Code (the "**1996 Civil Code**"), the 1998 Law on State Registration, and the 1999 Land Code, which established the legal regime of rights over land and other immovable property that had remained in force through April 4, 2016.[479]

323. Specifically, the Respondent argues that with respect to land:

- First, the 1999 Land Code laid down the notion of private property over land for Kyrgyz natural and legal persons: unless a land plot is subject to a right of private property, granted in accordance with the provisions of Kyrgyz law, by default, land in the Kyrgyz Republic constitutes either State or municipal property.[480]

- Second, pursuant to Articles 5 and 7(3) of the 1999 Land Code, foreign entities cannot have any property right or any right of permanent (perpetual) use over land in the Kyrgyz Republic, but only right of temporary use.[481]

- Third, with respect to rights of permanent use of land plots that had been granted to foreign entities prior to entering into force of the 1999 Land Code, the Law of the Kyrgyz Republic "On enactment of the [1999] Land Code of the Kyrgyz Republic"

[478] Re. Mem., ¶ 47.2; Exh. RL-0108.
[479] Re. Mem., ¶ 49; Exh. RL-0109; Exh. RL-0110; Exh. RL-0111.
[480] Re. Mem., ¶ 50.1; Exh. RL-0111.
[481] Re. Mem., ¶ 50.2; Exh. RL-0111.

provided that "[i]f the time period of the use was not specified when granting the land plots, the right to use the land plots shall be deemed to have been granted until 1 January 2000." Simply put, with the enactment of the 1999 Land Code, foreign entities had to bring their rights over land in conformity with the law and to re-register any right of permanent use as a right of temporary use before 1 January 2020.[482]

- Fourth, pursuant to Article 9(2) of the 1999 Land Code and Article 24(2) of the 1996 Civil Code, land constitutes immovable property and therefore the right of property, the right of use, and any other rights *in rem* over land plots, their creation, transfer, or termination are subject to registration with the unified State register, otherwise they simply do not exist. A right of temporary use over a land plot is attested by a State certificate of the right of temporary use or by a lease agreement concluded by the land user with the State authority that grants the land plot.[483]

- Fifth, a user of a land plot can, upon authorization of the owner of the land plot, erect buildings and other constructions on it. Upon expiration of the right of use over the land plot, "the fate of the building and structure, remaining on the land plot is determined by its owner."[484]

324. Further, with respect to immovable property other than land, the Respondent contends that:

- First, similar to land, pursuant to Articles 7(2), 24(2), and 25(1) of the 1996 Civil Code, rights to objects of immovable property are subject to registration in the unified State register. Without registration, such rights are invalid. As set out in Article 6 of the 1998 Law on State Registration, only a small number of rights over immovable property can be valid without their registration, such as a right of temporary use for less than 3 years. Furthermore, failure to register a right over immovable property stemming from a

[482] Re. Mem., ¶ 50.3; Exh. RL-0112.
[483] Re. Mem., ¶ 50.4; Exh. RL-0109; Exh. RL-0111.
[484] Re. Mem., ¶ 50.5; Exh. RL-0111.

contract entails invalidity of such right, as well as the contract, which produces no legal effects under Kyrgyz law.[485]

- Second, pursuant to Article 53 of the 1998 Law on State Registration, "rights to immovable property that [validly] existed prior to the opening of the local registration authority in the registration area remain legally valid and are subject to re-registration in the case of systemic registration."[486]

- Third, a land plot and objects of immovable property located on such land plot, can form part of the same unit of immovable property for the purposes of State registration. Pursuant to Article 20-1 of the 1998 Law on State Registration, "[i]f there are several buildings, structures or other objects of immovable property located on the same land plot, and are all owned by the same owner, these objects and the land plot together constitute one unit of immovable property." Each individual unit of immovable property is assigned an identification code, which is preserved through each registration of various rights over such unit.[487]

325. Accordingly, the Respondent argues that, in light of the above, in order to establish the existence of any protected right over land plots and buildings comprising the Resorts as of 4 April 2016, the Claimants have to demonstrate that they had validly obtained such rights in accordance with the provisions of Kyrgyz law in force at the relevant time, that such rights had been validly preserved throughout the changes in the Kyrgyz legal system, and that such rights had been properly registered as of 4 April 2016.[488]

b. The Zolotiye Peski Resort

326. The Respondent contends that after the dissolution of the USSR and the creation of the independent Kyrgyz Republic, TMP's right of use over the 25-hectare land plot and

[485] Re. Mem., ¶ 51.1; Exh. RL-0109; Exh. RL-0110.
[486] Re. Mem., ¶ 51.2; Exh. RL-0110.
[487] Re. Mem., ¶ 51.3; Exh. RL-0110.
[488] Re. Mem., ¶ 52.

immovable property comprising the Zolotiye Peski Resort was not preserved through 4 April 2016:

- First, the 8 June 1978 land use certificate issued to one of TMP's predecessors had become invalid by mid-1996 at the latest. Indeed, pursuant to Article 4 of the 19 April 1991 Resolution of the Supreme Council, "legal entities, temporarily using land plots provided to them by agricultural enterprises before June 1, 1991, retain their rights until the re-registration of their rights to land possession or land use." In turn, pursuant to Article 9 of the 1991 Law on Land Reform "[p]rior to the re-issuance of certificates of land possession or land use, the previously established right to the respective land plot shall be retained for a period of five years from the beginning of the land reform. Upon expiration of this period, the right to a land plot shall be lost." It is not disputed that TMP had not undertaken any actions towards proper re-registration of its rights over the Zolotiye Peski Resort's land plot within the prescribed five-year period or at all.[489]

- Second, and in any event, the right of permanent use granted to one of TMP's predecessors under the 8 June 1978 land use certificate had become invalid under the provisions of the 1999 Land Code, expiring on 1 January 2000 at the latest. Pursuant to Article 7(2) of the Law of the Kyrgyz Republic "On enactment of the [1999] Land Code of the Kyrgyz Republic," any right of use over a land plot that did not specify its validity period were deemed to have been granted until 1 January 2000.[490]

- Third, any right that TMP had had over the facilities of the Zolotiye Peski Resort had expired simultaneously with its right of use of the relevant land plot. In accordance with the provisions of the 1999 Land Code, upon expiration of the right of use over a land plot, "the fate of the building and structure, remaining on the land plot is determined by its owner [i.e., the Kyrgyz Republic]." The Kyrgyz State Register of Immovable Property identified the Zolotiye Peski Resort as "State-owned," confirming that from as early as the time of the State register's creation pursuant to the 1998 Law on State Registration, the land and building comprising the Zolotiye Peski Resort have

[489] Re. Mem., ¶ 56.1; Exh. RL-0108.

[490] Re. Mem., ¶ 56.2; Exh. RL-0111; Exh. RL-0112.

always been in State property, and that no other entity had any property rights over them.[491]

327. The Respondent also contends that the Claimants advance various arguments aimed at contesting this reality, but none of them succeed:

- First, the Claimants argue that TMP's purported right over the Zolotiye Peski Resort's 25-hectare land plot and real estate had been preserved because the 1998 Law on State Registration "expressly preserved rights that existed prior to 1998." This is not true, and in any case, the 1998 Law on State Registration cannot preserve rights that are contrary to the provisions of the 1999 Land Code.[492]

- Second, the Claimants allege that TMP's rights over the Zolotiye Peski Resort's 25-hectare land plot "were expressly confirmed by the Kyrgyz Government, including by a 2005 Government Commission." The members of this so-called "Commission," however, did not have the authority to confirm anything under the provisions of the 1999 Land Code.[493]

- Third, the Claimants maintain that TMP's rights over the Zolotiye Peski Resort would have been confirmed by a 'Technical Passport' for the resort's facilities issued to TMP on 6 October 2005, and which designated TMP as "User" of the resort's facilities. A 'Technical Passport' is not a title document under either the 1999 Land Code or the 1998 Law on State Registration and cannot in and of itself attest to the existence of any rights whatsoever.[494]

- Fourth, the Claimants argue that TMP's rights over the Zolotiye Peski Resort would have been further confirmed by the 18 November 2010 decision of the Inter-District Court of the Issyk-Kul Region and the 5 July 2011 appeal ruling by the Issyk-Kul Court. These documents, however, cannot serve as confirmation given that the relevant

[491] Re. Mem., ¶ 56.3; Exh. R-0093; Exh. RL-0111.
[492] Re. Mem., ¶ 58.1.
[493] Re. Mem., ¶ 58.2.
[494] Re. Mem., ¶ 58.3; Exh. C-0495.

court proceedings did not concern TMP's alleged rights over the Zolotiye Peski Resort's 25-hectare land plot or the Resort's facilities, but rather the Resort's unlawful occupation of 3.5 hectares of nearby land, as reflected in the operative parts of the court judgments.[495]

- Fifth, the Claimants further argue that TMP had a separate right to use the Zolotiye Peski Resort's facilities based on various acts of completion and commissioning issued during the Soviet period. Acts of completion and commissioning, however, are not title documents. Moreover, those acts had all been issued during the Soviet period when TMP could not have had any property rights whatsoever.[496]

- Finally, the Claimants argue that on 28 April 2015, TMP had (through its local branch) signed a one-year lease agreement, with a priority of renewal, with the Bosteri village administration for 2.7 hectares of beachfront land adjacent to the Zolotiye Peski Resort, which did not require registration because its term was less than three years. A "priority of renewal" merely means that TMP's local branch had priority before any other third party to conclude a new lease agreement, and it did not bind the Bosteri village administration to renew the agreement if it no longer wanted to. Moreover, as per Clause 3.2 of the lease agreement, TMP had to express its desire to extend the lease, in written form, at least three months prior to its termination, which it failed to do.[497]

328. To sum up, the Respondent contends that the only right that TMP had possessed as of 4 April 2016 is a lease over 2.7 hectares of beachfront land that would have been in force for another 23 days under the 27 April 2015 lease agreement.[498]

c. The Rokhat-NBU Resort

329. The Respondent also maintains that on 9 April 1965, the Council of Ministers of the Kyrgyz SSR issued Resolution No. 173 by which it allocated a 15-hectare land plot to the

[495] Re. Mem., ¶ 58.4; Exh. C-0250; Exh. C-0550.
[496] Re. Mem., ¶ 58.5.
[497] Re. Mem., ¶¶ 59-60; Exh. C-0076.
[498] Re. Mem., ¶ 61.

Ministry of Construction of the Uzbek SSR and the Ministry of Construction of the Kyrgyz SSR for the construction of a resort.[499]

330. The Respondent notes that on 20 September 1979, the Executive Committee of the Council of People's Deputies of the Issyk-Kul District issued to the Ministry of Construction of the Uzbek SSR an act of use of land No. 152 certifying the right of use over a 17.5-hectare land plot "to Resort "Rokhat."[500]

331. The Respondent adds that starting from 12 March 1999, Kyrgyz State authorities had validly issued and re-issued to "Resort Rokhat-NBU" various land use certificates and had concluded several land lease agreements, attesting "Resort Rokhat-NBU"'s rights to use the Resort's land.[501]

332. The Respondent submits that as of 4 April 2016, NBU's rights in Rokhat-NBU Resort consisted of:

- A right of temporary use over a 14.65-hectare land plot to be used for capital construction and park zone, confirmed by a State certificate for the right of use of a land plot No. 20798, issued by the Issyk Kul District Administration on 1 April 2005, for the period of 49 years (until 1 April 2054);[502] and

- A right of temporary use over 4.4 hectares of beachfront land pursuant to a lease agreement concluded on 24 June 2015 between Resort Rokhat-NBU and the Kara-Oy village administration for a period of one year, which expired before 24 March 2016. Pursuant to Clause 3.2 of the lease agreement, "Lessee must inform Lessor in writing on his will to conclude lease agreement for a new term 3(three) month before the end of this agreement," *i.e.*, by 24 March 2016 at the latest. The lease expired as there is no

[499] Re. Mem., ¶ 63; Exh. C-0029.
[500] Re. Mem., ¶ 64; Exh. C-0365.
[501] Re. Mem., ¶ 66.
[502] Re. Mem., ¶ 66.1; Exh. C-0220.

evidence that Resort Rokhat-NBU expressed its desire to extend the lease in written form before 24 March 2016.[503]

333. The Respondent argues that NBU's subsidiary did not have a separate ownership right over the facilities of the Rokhat-NBU Resort – Specifically, the Respondent contends that:

- First, there are no documents confirming that NBU (and its predecessors) had any separate ownership or other *in rem* rights over the immovable property situated on the Rokhat-NBU Resort, meaning that NBU only had the same rights to the said building as it had over the plot land, *i.e.*, the right of use.[504]

- Second, 'Technical Passports' and certificates of acceptance are not a substitute for the title documents, which with respect to immovable property have to be duly registered in accordance with the 1998 Law on State Registration. In this regard, the fact that some of those 'Technical Passports' designate "Resort Rokhat-NBU" as the owner of the relevant immovable property is irrelevant and could only be explained as an inadvertent error of a State clerk.[505]

- Third, the fact that "Resort Rokhat-NBU" paid land and property taxes to Kyrgyz authorities is similarly irrelevant. The State tax authority that signed and stamped the tax calculation sheets filled in by "Resort Rokhat-NBU" did not have an obligation to verify their veracity, and tellingly, the conclusion of the auditors specifically states that the values of the "Main assets" set out in the tax calculation sheets "are estimated by you [*i.e.*, the Resort] without confirming documents and conclusion of the licenses appraisers."[506]

- Finally, the purported acquisition by NBU of the assets of the Rokhat-NBU Resort from Association Uzstroytrans that had taken place in 1997-1999, does not establish any property rights over the resort's real estate assets under Kyrgyz law given that there

[503] Re. Mem., ¶ 66.2; Exh. C-0281.
[504] Re. Mem., ¶ 67.1.
[505] Re. Mem., ¶ 67.2; Exh. C-0220.
[506] Re. Mem., ¶ 67.3; Exh. C-0562.

is no proof that Association Uzstroytrans had at any moment any separate title to the immovable property comprising the Rokhat-NBU Resort facilities. Moreover, the purported transaction between Association Uzstroytrans and NBU did not have any effect under Kyrgyz law since the transfer was not duly registered.[507]

334. To sum up, the Respondent submits that as of 4 April 2016, NBU held a right of temporary use over a 14.65-hectare land plot together with buildings and other structures situated on it, valid until 1 April 2054, and a lease over 4.4 hectares of beachfront land valid until 24 June 2016.[508]

d. The Dilorom Resort

335. The Respondent further maintains that on 13 February 1967, the Council of Ministers of the Kyrgyz SSR issued a resolution allowing the allotment of 20 hectares of land to the Ministry of Rural Construction of the Uzbek SSR for the construction of a resort. On 7 June 1967, the Executive Committee of the Council of People's Deputies of the Issyk-Kul District issued an Act on the Right of Land Use to the Ministry of Rural Construction of the Uzbek SSR, confirming the Ministry's right of "permanent use" to 35 hectares of land for the construction of a resort. In this respect, the Respondent asserts that while the Claimants contend that entities under the Uzbek SSR Ministry of Rural Construction had maintained and operated the Resort throughout the Soviet period, they do not provide any title documents over the buildings of the Resort.[509]

336. The Respondent adds that on 5 November 1999, the Issyk-Kul District State Administration adopted Resolution No. 611 ordering to "allot to resort 'Dilorom' of Bank 'Asaka' of the Republic of Uzbekistan, for a rental period of 50 years, an occupied land area of 27.0 hectares, including 7.0 hectares of beach-park zone, built up with single-story buildings." On 11 November 1999, the Issyk-Kul District State Administration issued to Resort Dilorom LLC a State Act of Land Use over the said land plot.[510]

[507] Re. Mem., ¶ 67.4; Exh. C-0152; Exh. C-0155; Exh. C-0160; Exh. RL-0110.
[508] Re. Mem., ¶ 68; Exh. C-0220; Exh. C-0281.
[509] Re. Mem., ¶ 70; Exh. C-0184; Exh. C-0030.
[510] Re. Mem., ¶ 72.

337. Moreover, according to the Respondent, there is no evidence that an entity called the Republican Production State Cooperative Construction Union Uzagrostroy, under the Uzbek Ministry, had any title over Dilorom Resort's land or facilities for Asaka to acquire.[511]

338. To sum up, the Respondent asserts that, as of 4 April 2016, Asaka, through its Kyrgyz subsidiary, held a right to use a 27-hectare land plot, together with buildings and other structures situated on it, valid until 5 November 2049.[512]

e. The Buston Resort

339. The Respondent contends that, on 17 August 1971, the Executive Committee of the Council of People's Deputies of the Ton District in the Kyrgyz SSR allocated a 5.9-hectare land plot for the construction of a resort to Tashselmash, which was further approved by the 30 September 1971 Decision of the Executive Committee of the Council of People's Deputies of the Issyk-Kul region.[513]

340. The Respondent argues that on 11 October 1971, Tashselmash was issued State Act for the permanent use of a 6-hectare land plot. Thereafter, Tashselmash obtained additional land plots for the expansion of the Resort. Eventually, pursuant to the State Certificate No. 000231 dated 15 June 1981, and the Resolution of the Executive Committee of Tonski district Council of people's deputies No. 21 dated 24 January 1984, Tashselmash had been granted rights of permanent use over 10.65 hectares of land. According to the Respondent, of these two documents, only the State Certificate No. 000231 could have been considered a proper title document over land, as the Resolution of the Executive Committee of Tonski district Council of people's deputies No. 21 was not accompanied by any corresponding land use certificate.[514]

341. The Respondent asserts that Tashselmash was an "agricultural machinery factory" and an "Joint Stock Company," rather than a part of the Soviet State. Accordingly, as the

[511] Re. Mem., ¶ 71, 73; Exh. R-0095.
[512] Re. Mem., ¶ 74; Exh. C-0049; Exh. C-0165; Exh. C-0156; Exh. RL-0110.
[513] Re. Mem., ¶ 76; Exh. C-0357; Exh. C-0358.
[514] Re. Mem., ¶ 76; Exh. C-0031; Exh. C-0230; Exh. C-0351; Exh. C-0370; Exh. CL-0176.

Respondent contends, pursuant to the 1964 Civil Code, Tashselmash could not have any separate ownership rights over the property it operated, and the facilities of the Buston Resort that Tashselmash had erected on the land plot, had remained the property of the Soviet State.[515]

342. Further, according to the Respondent, after the dissolution of the USSR and the creation of the independent Kyrgyz Republic, Tashselmash's rights of use over the Buston Resort's land plot and facilities were not preserved through 14 February 2003, when the Resort was purportedly acquired by Uzpromstroybank – Specifically, the Respondent contends that:

- First, rights that had been granted to Tashselmash during the Soviet period had become invalid as a matter of Kyrgyz law as of mid-April 1996, specifically, pursuant to the 19 April 1991 Resolution of the Supreme Council, and Article 9 of the 1991 Law on Land Reform. It is undisputed that Tashselmash had not undertaken any action towards re-registration of its rights over the Buston Resort land plot.[516]

- Second, even assuming that Tashselmash's right of permanent use over the Buston Resort land plot had been properly re-registered, such right had in any event expired on 1 January 2000, pursuant to the provisions of the 1999 Land Code.[517]

- Third, any right that Tashselmash had had over the facilities of the Buston Resort had expired simultaneously with its right of use of the relevant land plot, pursuant to Article 47 of the 1999 Land Code.[518]

343. The Respondent further contends that Tashselmash's transfer of its purported rights over the Buston Resort's land and real estate objects to Uzpromstroybank for no consideration by virtue of an act of transfer and acceptance on 27 October 2003, and Uzpromstroybank's transfer of those rights to the newly created entity Resort Buston LLC were not valid given that when the purported acquisition by Uzpromstroybank took place, Tashselmash no

[515] Re. Mem., ¶ 77.
[516] Re. Mem., ¶ 78.1; Exh. RL-0108.
[517] Re. Mem., ¶ 78.2; Exh. RL-0111; Exh. RL-0112.
[518] Re. Mem., ¶ 78.3; Exh. RL-0111.

longer hand any rights in the Buston Resort.[519] The Respondent maintains that in any event, neither of the transfers was followed by a proper re-registration of Tashselmash's purported rights by Uzpromstroybank or Resort Buston LLC over the Buston Resort land plot with the Kyrgyz State, as required under Articles 9(2) and 37(1) of the 1999 Land Code, making Uzpromstroybank's operation of the Buston Resort through its local subsidiary Resort Buston LLC illegal.[520]

344. The Respondent further maintains that by the 23 January 2007 Decision, the land plot was withdrawn from the use of Resort Buston LLC in favor of the local Kunchygysh self-governing body.[521]

345. The Respondent also notes that on 9 February 2012, Resort Buston LLC and the local Kunchygysh self-governing body entered into an agreement for the lease of the previously occupied 10.65-hectare land plot, together with buildings and structures located on it, for a 49-year period, *i.e.*, until 9 February 2061. A corresponding land use certificate was issued to Resort Buston LLC on 9 April 2012.[522] Before then, according to the Respondent and as reflected in the State Register of Rights to Immovable Property, land was provided in use together with the buildings and neither Uzpromstroybank, nor Resort Buston LLC, had ever had any property rights over the Resort Buston's land plot or facilities.[523]

346. To sum up, the Respondent asserts that, as of 4 April 2016, Uzpromstroybank through its local subsidiary Resort Buston LLC held a lease over the 10.65-hectare land plot, together with buildings and structures located on it, valid until 6 February 2061.[524]

f. The State Of The Resorts Ahead Of The 4 April 2016 Order

347. The Respondent argues that by the time the 2016 Order was issued, the Resorts were underfunded, not profitable, had problems with the law and not exactly popular with the

[519] Re. Mem., ¶ 79; Exh. C-0060; Exh. C-0205; Exh. C-0207.
[520] Re. Mem., ¶¶ 80-81; Exh. RL-0111.
[521] Re. Mem., ¶ 81; Exh. C-0230.
[522] Re. Mem., ¶ 82; Exh. C-0072; Exh. C-0269.
[523] Re. Mem., ¶ 83; Exh. C-0519.
[524] Re. Mem., ¶ 84; Exh. C-0072.

visitors. According to the Respondent, the Claimants had failed to invest any substantial amount of money to modernize, maintain and operate the Zolotiye Peski Resort and the Buston Resort.

348. Moreover, the Respondent contends that the Resorts that had been in operation prior to the 2016 Order (namely, Zolotiye Peski, Rokhat-NBU and Dilorom), as admitted by the Claimants in this arbitration, had not been profitable.

349. Furthermore, the Respondent submits that some of the Resorts had been known as persistent defaulters on their tax, social and utilities payments. For instance, in a press article dated 7 November 2014, the Zolotiye Peski Resort was reported to have had tax indebtedness of some KGS 2.1 million, and the Rokhat-NBU, as of 4 April 2016, had a KGS 15.4 million debt recognized by Kyrgyz courts towards the Vostokelektro electricity supplier for electricity consumed by the resort via unauthorized connection to Vostokelektro's power lines.

350. Finally, the Respondent argues that the Resorts that had been in operation prior to the 2016 Order had received some obliterating reviews from their visitors, describing them as, among other things, "terrible," "disgusting," "deplorable," and "awful."[525]

g. The 4 April 2016 Order

351. The Respondent maintains that, by 4 April 2016, the Republic of Uzbekistan and the Respondent had failed to reach any agreement formally clarifying the legal status of the Resorts, therefore, the Government of the Kyrgyz Republic issued an Order, which read as follows:

> For the purposes of effective use of the state property in accordance with the provisions of the Agreement "On mutual recognition of rights and regulations of property ownership relations" dated 9 October 1992 and ratified by the Resolution No. 1404-XII of Jogorku Kenesh of the Kyrgyz Republic dated January 12, 1994, and taking into consideration the Resolution No. 1080 of the Supreme Council of the Republic of Kyrgyzstan "On assumption of

[525] Re. Mem., ¶¶ 91-96; Exh. C-0211; Exh. C-0273; Exh. C-0276; Exh. R-0096; Exh. R-0097; Exh. R-0098; Exh. R-0099; Exh. R-0100; Exh. R-0101; Exh. R-0102; Exh. R-0103; Exh. R-0104.

> ownership of the Republic of Kyrgyzstan over the resort and recreational facilities being used by the legal entities of other CIS countries" dated by December 16, 1992, as well as guided by Articles 10 and 17 of the constitutional Law of the Kyrgyz Republic "On the Government of the Kyrgyz Republic":
>
> [. . .]
>
> 1) [to] [a]ssume state ownership over the following resort and recreational facilities located on the territory of the Kyrgyz Republic and currently used by the legal entities of the Republic of Uzbekistan:
>
> Resort "Zolotiye Peski," [. . .]
>
> Resort "Dilorom," [. . .]
>
> Resort "Rokhat-NBU," [. . .]
>
> Resort "Buston," [. . .][526]

352. The Respondent contends that the2016 Order was not an act of nationalization or expropriation. According to the Respondent, the 2016 Order merely confirmed the legal reality that had already existed at the time– property rights over the Resorts had belonged to the Kyrgyz State– but resulted in a side effect of withdrawing the limited rights of use that some of the Claimants had still enjoyed in the Resorts. Moreover, the Respondent submits that the 2016 Order was consistent with its stance on the 1992 Agreement, and its reservation to Article 4 thereof.[527]

IV. REQUESTS FOR RELIEF

A. THE CLAIMANTS' REQUEST FOR RELIEF

353. The Claimants' Reply to Respondent's Counter Memorial set out the relief requested at Section VII. The Claimants have requested the Tribunal to:

[526] Re. Mem., ¶¶ 97-98; Exh. C-0009.

[527] Re. Mem., ¶ 99.

- Reject the Respondent's objections to the Tribunal's jurisdiction under the BIT and the FIL in their entirety;

- Reject the Respondent's request to appoint an independent quantum expert;

- Declare that the Respondent has:

  - Unlawfully expropriated Claimants' investments in breach of Respondent's obligations under Article 6 of the BIT and Article 6 of the FIL;

  - Breached its obligation to provide Claimants' investments fair and equitable treatment under Article 3.1 of the BIT and the FIL;

  - Breached its obligation to provide Claimants' investments full and unconditional legal protection under Article 2.1 of the BIT;

  - Breached its obligations to provide Claimants' investments national and most-favored nation treatment under Article 3.1 of the BIT and Article 4.1 of the FIL.

- Order the Respondent to pay the following:

  - In respect of Claimant TMP, monetary compensation based on the current market value of its rights in Resort Zolotiye Peski as of the date of the taking (USD 20,311,202), plus post-Award interest on that amount, compounded annually up through the date of payment of the Award;

  - In respect of Claimant NBU, monetary compensation based on the current market value of its rights in Resort Rokhat-NBU as of the date of the taking (USD 15,140,711), plus post-Award interest on that amount, compounded annually up through the date of payment of the Award;

  - In respect of Claimant Asaka, monetary compensation based on the current market value of its rights in Resort Dilorom as of the date of the taking (USD 11,038,588), plus post-Award interest on that amount, compounded annually up through the date of payment of the Award;

- In respect of Claimant Uzpromstroybank, monetary compensation based on the current market value of its rights in Resort Dilorom as of the date of the taking (USD 1,230,729), plus post-Award interest on that amount, compounded annually up through the date of payment of the Award; and

- Cost of proceedings, including expert fees and costs and travel expenses, and attorneys' fees for all Claimants.[528]

B. THE RESPONDENT'S REQUEST FOR RELIEF

354. The Respondent's Memorial on the Merits set out the relief requested at Section VIII. The Respondent has requested the Tribunal to:

- Declare that it lacks jurisdiction over the Claimants' alleged investments made prior to 21 December 1991;

- Reject the Claimants' claims on the merits in full;

- Declare that the Claimants are not entitled to any remedies they seek or in the alternative; (i) declare that the only remedy the Claimants are entitled to is satisfaction as the appropriate form of reparation for the wrongful act, such satisfaction taking the form of a simple declaration by the Tribunal; (ii) as a further alternative, declare that the appropriate form of reparation is an order for specific performance for the Claimants and the Respondent to agree on the legal status of the Resorts; (iii) as yet another alternative, declare that the appropriate form of reparation is restitution limited to the rights that each of the Claimants had actually legally held with respect to the Resorts as of 4 April 2016; or (iv) only as the last alternative, declare that the appropriate form of reparation is monetary compensation in the form of sunk costs to be determined by a Tribunal-appointed damages expert, or in the alternative following the sunk costs calculations made by Respondent in Section V.D.3 of its Memorial;

[528] Cl. Rep., ¶ 522.

- Award the Respondent the costs associated with this arbitration, including, but not limited to, fees and expenses of the Tribunal, costs of expert advice, costs of legal representation, fees and expenses of ICSID, and all other professional fees, disbursements, and expenses, plus interests thereon; and

- Award the Republic such further or other relief as the Tribunal sees fit.[529]

V. JURISDICTION

A. THE CLAIMANTS' CASE

355. The Claimants submit that in its Decision on Bifurcated Preliminary Objections dated 1 May 2019, the Tribunal upheld its jurisdiction to consider and resolve this dispute under both the BIT and the FIL. The Claimants add that more than three years after the Tribunal issued its Decision, the Respondent has raised what they characterize as a series of belated jurisdictional objections, which not only are time barred, but also are devoid of any legal merit.[530]

356. In this regard, the Claimants argue that Article 45(2) of the Arbitration (Additional Facility) Rules makes clear that the Respondent was required to raise its jurisdictional objections "as soon as possible [. . .] and in any event no later than the expiration of the time limit for the filing of the counter-memorial." The time limit for the filing of the Respondent's Counter-Memorial was 23 October 2020. The Claimants also argue that despite numerous inquiries from the Tribunal, ICSID, and the Claimants, the Respondent never submitted its Counter-Memorial and never responded to any of these numerous inquiries, leading the Tribunal to declare the Respondent in default under Article 48 of the Arbitration (Additional Facility) Rules in its Procedural Order No. 4 dated 24 March 2021.[531]

[529] Re. Mem., ¶ 399.
[530] Cl. Rep., ¶ 301.
[531] Cl. Rep., ¶ 302.

357. Although the Tribunal has declined to strike the Respondent's belated jurisdictional objections from its Counter-Memorial, the Claimants maintain and do not waive their objections under Article 34 of the Arbitration (Additional Facility) Rules.[532]

358. In its Counter-Memorial, the Respondent contends that the Tribunal does not have jurisdiction *ratione materiae*, *ratione tempore*, and/or *ratione voluntatis* over the present dispute under the BIT or the FIL. Specifically, according to the Respondent, the Tribunal does not have jurisdiction over the Claimants' investments made prior to 21 December 1991, because those investments were made in the territory of the Soviet Union by State-owned entities or State organs of the Soviet Union, and not by investors of a Contacting Party in the territory of the other Contracting Party.[533] The Respondent further contends that investments made before 21 December 1991 "were not made, but already existing" when the Contracting Parties came into existence, and that any transfer of these investments to the Claimants was "made domestically [. . .] at almost no cost."[534] The Respondent also contends that the BIT does not cover investments that were "inherited," because an investment must be made in an "active manner."[535] The Claimants contend that, as elaborated below, the Respondent's jurisdictional objections are meritless and inconsistent not only with the explicit terms of the BIT and the FIL, but also with the documentary records in the present case.[536]

(1) The Tribunal Has Jurisdiction Over Investment Made Before 1991

359. The Respondent argues that "any pre-1991 investments pertaining to the Resorts were made in the territory of the USSR by State-owned entities incorporated in the USSR / State organs of the USSR and thus fall outside the scope of the BIT and the [FIL]."[537] In support of this argument, the Respondent contends that Article 12 of the BIT cannot be interpreted to "evidence the intent of the Contracting Parties to extend the application of the BIT to

[532] Cl. Rep., ¶ 303.
[533] Cl. Rep., ¶ 304; Re. Mem., ¶ 101.1.
[534] Cl. Rep., ¶ 304; Re. Mem., ¶¶ 101.2-105.2.
[535] Cl. Rep., ¶ 304; Re. Mem., ¶¶ 117-118.
[536] Cl. Rep., ¶ 304.
[537] Cl. Rep., ¶ 305; Re. Mem., ¶ 114.

investments made in the Soviet era," because it does not ascribe any special meaning to the terms "territory" and "Contracting Party."[538]

360. The Respondent further contends that the ordinary meaning of the references to "territory of" a Contracting Party in Articles 1(2), 1(8) and 10 of the BIT indicates that "the two Contracting Parties intended to limit the application of the Treaty to investments made in the Republic of Uzbekistan or the Kyrgyz Republic . . . in their sovereign territory."[539] In addition, the Respondent contends that the doctrine of State succession does not extend the application of the BIT to Soviet-era investments.[540]

361. With respect to the FIL, the Respondent contends that the Preamble and Article 1(3), together with Article 9(1) of the Law on Normative Legal Acts, support its argument that the Claimants' pre-1991 investments fall outside the scope of the FIL.[541] The Claimants contend that as set forth below, the Respondent's arguments are erroneous and find no support in the terms of the BIT or the FIL.[542]

362. First, the Claimants argue that contrary to the Respondent's contentions, the plain language of Article 12 of the BIT is explicitly retroactive and cannot be interpreted as imposing any temporal limitation. Article 12 provides that the BIT "shall apply to investments made on the territory of one Contracting Party in accordance with its legislation by investors of the state of the other Contracting Party, regardless of whether they were made before or after the entry into force of this Agreement." Accordingly, the Claimants submit that Article 12 does not limit in any way the temporal application of the BIT, nor does it provide that covered investments had to have been made by a certain date in order to enjoy the BIT's substantive protections.[543]

363. The Claimants further argue that, according to Professor Murphy, it would have been natural for the Contracting Parties to indicate expressly that investments made prior to a

[538] Cl. Rep., ¶ 305; Re. Mem., ¶ 112.
[539] Cl. Rep., ¶ 305; Re. Mem., ¶ 110.
[540] Cl. Rep., ¶ 305; Re. Mem., ¶ 113.
[541] Cl. Rep., ¶ 306; Re. Mem., ¶¶ 108-108.3.
[542] Cl. Rep., ¶ 306.
[543] Cl. Rep., ¶ 307; Exh. C-0001.

particular point in time were not protected, if that were their intention; yet "no such intention is discernible."[544] Instead, as the Claimants note, the BIT provides expressly that investments made before its entry into force are to be protected without any limitation. Given this express language in Article 12, the Claimants argue that there is no basis to limit the BIT's coverage to investments made after 1991.[545]

364. Moreover, the Claimants contend that where former Soviet Republics have sought to exclude pre-1991 or pre-1992 investments, they have done so explicitly.[546] For example, Article 12 of the Russia-Ukraine BIT provides that "[t]his Agreement shall apply to all investments carried out by the investors of one Contracting Party in the territory of the other Contracting Party, as of January 1, 1992." The Claimants observe that there is no such language in the Uzbek-Kyrgyz BIT.[547]

365. Second, the Claimants submit that the Respondent's contention that "special meaning" under Article 31(4) of the VCLT should have been given to the terms "territory" and "Contracting Party," if the Contracting Parties had "intend[ed] to extend the application of the BIT to investments made in the Soviet era," is misguided and incorrect.[548] According to the Claimants, it would require "special meaning" to read in a temporal restriction, when the BIT itself indicates that it applies retroactively without restriction.[549]

366. Specifically, the Claimants argue that the legal concept of "Contracting Party" becomes meaningful only as of the date of entry into force of the BIT. The Claimants further note that, as Professor Murphy explains, "if that term is implicitly signaling some temporal restriction, then the date of entry into force of the BIT is the most likely date for such an implicit restriction." However, the Claimants contend that Article 12 does not indicate any such temporal restriction, but instead expressly extends the BIT's protections to investments made before the date of the BIT's entry into force. Thus, the Claimants submit

[544] Cl. Rep., ¶ 307; Murphy, ¶ 15.
[545] Cl. Rep., ¶ 308; Murphy, ¶¶ 15-16.
[546] Cl. Rep., ¶ 309; Exh. C-0132; Exh. C-0325; Exh. C-0326; Exh. C-0327; Exh. C-0328; Exh. C-0329; Exh. C-0330.
[547] Cl. Rep., ¶ 309; Exh. C-0327.
[548] Cl. Rep., ¶ 311; Re. Mem., ¶ 112.
[549] Cl. Rep., ¶ 311; Murphy, ¶¶ 14-19.

that the Respondent's interpretation of the term "Contracting Party" as implicitly signaling a start date for the protection of investments is inconsistent with the ordinary meaning of Article 12, without any need to consider Article 31(4) of the VCLT.[550]

367. Third, the Respondent asserts that three BIT provisions justify a temporal restriction whereby the BIT applies only to investments made after 21 December 1991: Articles 1(2), 1(8), and 10 of the BIT.[551] The Claimants argue that contrary to the Respondent's assertions, none of these articles restrict the BIT's protections to investments made after 21 December 1991.[552] In particular, the Claimants argue that:

- Article 1(2) appears in the "General Definitions" provision of the BIT and defines the term "investment."[553] As Professor Murphy notes, the definition of the term "investment" is broad, without any temporal reference or restriction, and is comprised of two clauses, an initial clause, and a supplemental clause. The initial clause sets forth the types of assets and rights covered by the definition of "investment," and does not contain any temporal restriction. The supplemental clause, is limited in scope to "intellectual property rights," which are not at issue in this arbitration.[554] In any event neither clause expressly nor implicitly indicates anything about the date on which the "investment" must have been made.[555]

- Article 1(8) defines the term "territory" as part of the BIT's "General Definitions."[556] Specifically, "territory" refers to "the territory of one Contracting Party, over which the Contracting Party exercises sovereign rights and jurisdiction in accordance with international law."[557] As Professor Murphy observes, the ordinary meaning of this provision expresses "more precisely the geographic scope where each Contracting

[550] Cl. Rep., ¶ 312; Murphy, ¶ 18.
[551] Cl. Rep., ¶ 313; Re. Mem., ¶ 107.
[552] Cl. Rep., ¶ 313.
[553] Cl. Rep., ¶ 314; Exh. C-0001.
[554] Cl. Rep., ¶ 314; Exh. C-0001; Murphy, ¶¶ 10-11, 30.
[555] Cl. Rep., ¶ 314; Murphy, ¶ 11.
[556] Cl. Rep., ¶ 316; Murphy, ¶ 12.
[557] Cl. Rep., ¶ 316; Exh. C-0001.

Party's obligations will operate."[558] This definition "contains no express limitation indicating that the term 'territory' only applies in relation to investments that were made at a particular point in time."[559] Article 1(8) thus neither expressly nor implicitly indicates anything about the date on which investments in that territory must have been made.[560]

- Moreover, with respect to territorial changes, the Claimants cite the award in *Everest Estate v. Russia* in which the tribunal held that the requirements of (i) making an investment (ii) in the territory of the "other Contracting State" do not need to be satisfied simultaneously, and that the relevant date for assessing whether an investment is located in the "other Contracting State" is the date of the treaty violation.[561]

- Article 10 of the BIT addresses the scope of disputes that may be submitted for conciliation or arbitration, not the scope of investments protected under the BIT.[562] Article 10 refers to "any legal dispute" arising between one "Contracting Party" and "an investor of another Contracting Party," which are the circumstances at issue in this case. This Article does not address when the investment at issue in the dispute must first have been acquired, but instead suggests that ongoing investments are protected.[563]

368. The Claimants also argue that, in any event, the question of whether the BIT's application extends to pre-1991 investments is relevant only for Claimant TMP, which made its investment during the Soviet period. The three other Claimants all made their investments after 1991.[564]

369. Fourth, the Claimants argue that contrary to the Respondent's assertion, the doctrine of State succession is not relevant in this case because "the claim here is not that the Kyrgyz Republic is succeeding to any responsibility or obligation incurred by the USSR" but rather

[558] Cl. Rep., ¶ 316; Murphy, ¶ 12.
[559] Cl. Rep., ¶ 316; Murphy, ¶ 12.
[560] Cl. Rep., ¶ 316.
[561] Cl. Rep., ¶¶ 317-318; Exh. CL-0947.
[562] Cl. Rep., ¶ 319; Exh. C-0001.
[563] Cl. Rep., ¶ 319; Murphy, ¶ 13.
[564] Cl. Rep., ¶ 320.

whether investments existing in the Kyrgyz Republic today, which were made during the time of the Soviet Union, are protected under the BIT. Thus, the Claimants submit that, as Professor Murphy observes, issues of State succession "simply do not arise" in the present dispute.[565] Alternatively, the Claimant argues that even if State succession was at issue, tribunals have focused on the date of initiation of the proceeding to address issues with respect to State succession.[566] It is undisputed that the Kyrgyz Republic existed as of the date when this arbitration was commenced, *i.e.*, on 20 July 2016.[567]

370. Fifth, the Claimants submit that the Respondent fails to elaborate on its argument that the FIL does not cover pre-1991 investments, which, in any event, is erroneous. The Respondent refers to three provisions of the FIL, which allegedly justify a temporal restriction: (i) the Preamble; (ii) Article 1(3) defining "foreign investor"; and (iii) Article 1(6) defining "investment dispute."[568] The Respondent also refers to Article 9(1) of the Law on Normative Legal Acts.[569] According to the Claimants, none of these provisions contemplates any temporal restriction.[570] In particular, the Claimants contend that:

- The Preamble "is not an operative part of the treaty and, standing alone, should not be viewed as expressing rights or obligations."[571] Further, the Preamble expressly indicates a desire to "improve the investment climate," a phrase that is addressing not only future investments, but also an objective of protecting investments generally. Moreover, if the Preamble were to be interpreted the way Respondent argues, it would be directed to investments made after 2003, the date of adoption of the Law, and not to post-1991 investments.[572]

- The Respondent's reliance on Articles 1(3) and 1(6) of the FIL likewise is misplaced. Article 1(3) contains no language that explicitly or implicitly precludes coverage of

[565] Cl. Rep., ¶ 321; Murphy, ¶ 22.
[566] Cl. Rep., ¶ 322; Exh. CL-0335.
[567] Cl. Rep., ¶ 322.
[568] Cl. Rep., ¶ 323: Re. Mem., ¶ 27.
[569] Cl. Rep., ¶ 323: Re. Mem., ¶ 108.3.
[570] Cl. Rep., ¶ 323.
[571] Cl. Rep., ¶ 324; Exh. CL-0336.
[572] Cl. Rep., ¶¶ 324-326; Murphy, ¶ 27.

investments made prior to 21 December 1991. Rather, it simply indicates the type of person (natural or legal, bur non-domestic) that qualifies as a "foreign investor."[573]

- Article 1(6), in turn, defines "Investment disputes" as "a dispute between an investor and state authorities, state officials of the Kyrgyz Republic and other members of the investment activity that arises in the implementation of investment." Importantly, Article 1(6) addresses what constitutes an "investment dispute," not an "investment."[574] To the extent this Article is interpreted as containing a temporal restriction, that restriction relates only to when the dispute "arises." Yet, even here, as Professor Murphy observes, "there does not appear to be a temporal restriction, given that the language 'in the implementation of investment' is best understood as referring to the lifetime of the investment, not to the point at which it is established."[575]

- The Respondent's reliance on Article 9(1) of the Law on Normative Legal Acts to assert that the "Respondent can only legislate within its territory" is also irrelevant.[576] Article 9(1) does not discuss investments, much less pre-1991 investments. In any event, there can be no dispute that the Claimants' claims under the FIL relate to property rights within the territory of the Kyrgyz Republic. Indeed, the Respondent's own unlawful 2016 Order affirms this.[577]

371. In sum, according to the Claimants, there is no basis in either the BIT or the FIL to import any temporal restriction; rather, as their texts make clear, the Kyrgyz Republic consented to arbitrate disputes arising out of investments located in the Kyrgyz Republic, regardless of whether those investments were established before or after December 1991.[578]

[573] Cl. Rep., ¶ 327; Murphy, ¶¶ 29-30; Exh. C-0025; Exh. RL-0116.
[574] Cl. Rep., ¶ 328; Exh. C-0025.
[575] Cl. Rep., ¶ 328; Murphy, ¶ 31.
[576] Cl. Rep., ¶ 330; Re. Mem., ¶ 103.
[577] Cl. Rep., ¶ 330; Exh. C-0009.
[578] Cl. Rep., ¶ 331.

(2) The Claimants Made Their Investments in Accordance With The BIT And The FIL

372. The Respondent argues that Articles 1(2), 10, and 1(4)-1(6) of the BIT require investors to "make" investments in an "active manner," and do not cover investments that were "inherited" when the Republic of Uzbekistan and the Kyrgyz Republic became independent, or "pre-1991 investments that were transferred from one Uzbek State owned entity to another for a giveaway price."[579] Moreover, with respect to the FIL, the Respondent contends that the phrase "implementation of investments" in Article 1(6) allegedly imposes the same requirements as the BIT.[580] The Claimants assert that the Respondent's contentions again are erroneous and unsupported by the text of the BIT or the FIL.[581]

373. First, with respect to the Respondent's "passive inheritance" argument, the Claimants submit that the BIT does not contain any provision excluding investments on the basis of inheritance.[582] Rather, the Claimants note that as noted above, Article 1(2) defines "investments" as "all kinds of assets and rights to them [. . .]."[583] As such, the Claimants argue that as Professor Murphy observes, there is no requirement that the asset or right be acquired or "made" in any particular way.[584] The Claimants contend that, in any event, even if the BIT did contain such requirement, the Claimants' investments were not "passively inherited." Rather, the Claimants "made" their investments when they built or acquired their respective Resorts for consideration.[585]

374. Second, the Claimants argue that the two cases the Respondent relies upon in support of its "passive investment" argument – *Clorox Spain SL v. Bolivarian Republic of Venezuela* and *Standard Chartered Bank v. United Republic of Tanzania* – are inapposite.

[579] Cl. Rep., ¶ 332; Re. Mem., ¶¶ 115, 117-118.
[580] Cl. Rep., ¶ 333; Re. Mem., ¶ 116.
[581] Cl. Rep., ¶ 333.
[582] Cl. Rep., ¶ 334; Exh. C-0001; Exh. C-0025.
[583] Cl. Rep., ¶ 334; Exh. C-0001.
[584] Cl. Rep., ¶ 334; Murphy, ¶ 39.
[585] Cl. Rep., ¶ 335.

375. With respect to *Clorox*, the Claimants argue that the tribunal determined that it did not have jurisdiction over the claimant's dispute with Venezuela because its alleged investment was a share, transfer that did not involve any payment whatsoever.[586] The Claimants contend that in the present case, unlike in *Clorox*, the Claimants either built their Resort at their own expense (TMP), or acquired their Resort for consideration (NBU, Asaka, and Uzpromstroybank).[587] NBU and Asaka, moreover, invested significant sums in the renovation and modernization of the Resorts following their acquisition.[588]

376. Moreover, the Claimants note that on 25 March 2020 (*i.e.*, two years before the filing of the Respondent's Counter-Memorial), the Swiss Federal Tribunal set aside the *Clorox* award, emphasizing that the Spain-Venezuela BIT did not contain any origin of funds requirement.[589]

377. With respect to *Standard Chartered Bank*, the Claimants contend that the Respondent's reliance on *Standard Chartered Bank* is also misplaced. In that case, Tanzania objected to the tribunal's jurisdiction, asserting that the claimant's Hong Kong subsidiary was not entitled to protection under the UK-Tanzania BIT, because the UK claimant had played no active role in the investment, apart from passively owning the shares of the Hong Kong subsidiary. On this basis, the tribunal held that the UK claimant's attenuated and passive relationship to the Hong Kong subsidiary's investments in Tanzania was not eligible for protection under the BIT.[590] The Claimants argue that, unlike *Standard Chartered Bank*, the Claimants are not seeking to vindicate rights obtained by a third country subsidiary. Rather, the Claimants assert that they played an active role in their investments by directing, funding, and controlling their Resorts until the Kyrgyz Republic nationalized them in 2016.[591]

[586] Cl. Rep., ¶ 337; Exh. RL-0135.
[587] Cl. Rep., ¶ 337; Murphy, ¶ 41.
[588] Cl. Rep., ¶ 337.
[589] Cl. Rep., ¶ 338; Exh. CL-0369.
[590] Cl. Rep., ¶ 339; Exh. RL-0136.
[591] Cl. Rep., ¶ 339; Murphy, ¶ 43.

378. Third, the Claimants argue that contrary to the Respondent's contentions, they did not obtain the property rights at issue in exchange for nothing or for a "nominal" price.[592] In this respect, the Claimants emphasize that: (i) the original construction of Resort Zolotiye Peski required an outlay of funds; (ii) NBU acquired Resort Rokhat in 1999 from Uzstroytrans for approximately USD 372,350, and subsequently invested approximately USD 2.9 million to expand, modernize, and upgrade the Resort;[593] (iii) Asaka acquired Resort Dilorom in 1999 from Uzagrostroy for USD 157,756, and subsequently invested approximately USD 2.9 million to expand, modernize, and upgrade the Resort; and[594] (iv) Uzpromstroybank acquired Resort Yubileyny in 2003 from Tashselmash, paid off the Resort's debts totaling approximately USD 10,605, and planned the Resort's renovation, which was prevented by the Respondent's unlawful taking.[595]

379. In addition, the Claimants submit that they expended funds for maintenance and improvements made to the Resorts, for the payment of fees for leases, licenses, and associated renewals regarding the rights to use the land, and for taxes, which are as Professor Murphy also observes, in no sense "nominal."[596]

380. Fourth, the Claimants note that as Professor Murphy affirms, asset transfers, even if for "nominal" consideration, qualify as protected investments under the BIT.[597] In its Counter-Memorial, the Respondent cites *Caratube v. Kazakhstan I* for the proposition that payment of a nominal price "is an indication that the investment [. . .] is an arrangement not protected by the BIT."[598] However, the Claimants contend that *Caratube I* concerned the application of Article 25(2)(b) of the ICSID Convention, which is not at issue in the present case.[599] Moreover, according to the Claimants, the Respondent omits parts of the *Caratube I* tribunal's analysis of what constitutes an investment, which explains that "payment of only

[592] Cl. Rep., ¶ 340; Re. Mem., ¶ 121; Murphy, ¶ 44.
[593] Cl. Rep., ¶ 340; Exh. C-0159; Exh. C-0162; Exh. C-0163; Exh. C-0408; Exh. C-0481.
[594] Cl. Rep., ¶ 340; Umarova, ¶ 5; Mamatov II, ¶ 3; Exh. C-0113; Exh. C-0165.
[595] Cl. Rep., ¶ 340; Usmanov, ¶ 8; Exh. C-0205.
[596] Cl. Rep., ¶ 341; Murphy, ¶ 44.
[597] Cl. Rep., ¶ 342; Murphy, ¶ 44.
[598] Cl. Rep., ¶ 342; Murphy, ¶ 44.
[599] Cl. Rep., ¶ 343; Exh. RL-0138.

a nominal price and lack of any other contribution by the purported investor must be seen as an indication that the investment was not an economic arrangement, is not covered by the term 'investment' as used in the BIT, and thus is an arrangement not protected by the BIT."[600] Thus, the Claimants submit that even the *Caratube I* tribunal concluded that payment of a nominal price, when accompanied by another contribution, constitutes a protected investment.[601]

381. Fifth, the Claimants argue that the tribunal in *Sistem v. Kyrgyz Republic*, which also concerned a hotel property in the Kyrgyz Republic, found that operation of the investment serves as additional evidence of the claimant's status as an investor.[602] The Claimants contend that like the claimant in *Sistem*, the Claimants in the present case operated their Resorts in the Kyrgyz Republic and were treated by the Kyrgyz authorities as owners of their Resorts for many years up until the moment when Respondent unlawfully nationalized them.[603]

382. Finally, the Claimants maintain that the Respondent's reliance on Article 1(6) of the FIL for the proposition that the phrase "implementation of investments" imposes the same requirements as the relevant BIT provisions is baseless.[604] The Claimants particularly assert that ss Professor Murphy observes, contrary to the Respondent's suggestion, the phrase "implementation of investments" refers to the lifetime of investments, not to the manner in which investments are made.[605]

383. In sum, the Claimants contend that the Respondent's argument that the Tribunal lacks jurisdiction because the Claimants allegedly obtained their investments through "passive inheritance" or for "nominal" consideration fail. Both the BIT and the FIL define investments broadly, and neither requires covered investments to be made in any particular way. The Claimants submit that in any event, the facts before the Tribunal do not indicate

[600] Cl. Rep., ¶ 344; Exh. RL-0138.
[601] Cl. Rep., ¶ 344.
[602] Cl. Rep., ¶ 345; Exh. CL-0042.
[603] Cl. Rep., ¶ 346.
[604] Cl. Rep., ¶ 347; Re. Mem., ¶ 116.
[605] Cl. Rep., ¶ 347; Murphy, ¶¶ 31, 34.

any such passive inheritance or nominal consideration. Rather, the Claimants expended significant funds either to build or to acquire their Resorts, as well as to modernize, expand, and maintain the Resorts and their facilities over many years until the Respondent's unlawful nationalization in April 2016.[606]

B. THE RESPONDENT'S CASE

384. The Respondent's jurisdictional objections are twofold:

- First, the Tribunal does not have *ratione materiae* and/or *ratione voluntatis* jurisdiction over the present dispute under the BIT and FIL to the extent that it relates to pre-1991 investments (Soviet-era facilities) made in the territory of the Kyrgyz SSR by the Soviet investors, as opposed to the territory of a Contracting Party by investors of the other Contracting Party.[607]

- Second, the Tribunal does not have *ratione materiae* and/or *ratione voluntatis* jurisdiction over pre-1991 investments since they were already existing investments, and not investments made when the Contracting Parties came into existence, involving no economic contribution to the Republic.[608]

385. By way of preliminary remark, the Respondent notes that it is not precluded from raising this jurisdictional objection at this stage, as this was specifically contemplated in Procedural Order No. 1 dealing with bifurcation of proceedings.[609]

386. Pertaining to the Kyrgyz Republic, the Respondent argues that both the Kyrgyz-Uzbek BIT and the FIL apply only to investments made "in the territory of" the Kyrgyz Republic.[610] Such investments have to be "made" (or 'implemented,' in the case of the FIL).[611] Further,

[606] Cl. Rep., ¶ 348.
[607] Re. Mem., ¶ 101.1.
[608] Re. Mem., ¶ 101.2.
[609] Re. Mem., ¶ 102.
[610] Re. Mem., ¶ 103; Exh. RL-0115; Exh. R-0117.
[611] Re. Mem., ¶ 103; Exh. RL-0115; Exh. R-0116.

the Respondent argues that the BIT also requires that such investments have to be made "by the investors of one Contracting Party [*i.e.,* the Republic of Uzbekistan in this case]."[612]

387. According to the Respondent, it is uncontested that, in the case at hand, the bulk of the Claimants' alleged investments were made prior to 21 December 1991 (the date of dissolution of the Soviet Union), when neither the Kyrgyz Republic, nor the Republic of Uzbekistan existed:[613]

- For Claimant TMP (and the Zolotiye Peski Resort): (i) facilities constructed between 1960's and 1980's, purportedly upon instructions TAPOiCh', a USSR legal entity; and (ii) the rights to use land allocated to TAPOiCh in 1978 for no consideration.[614]

- For Claimant NBU (and the Resort Rokhat-NBU (formerly Resort Binakar)): (i) facilities constructed between 1960's and 1970's by a Ministry of the Uzbek SSR; and (ii) the rights to use land allocated to the same Ministry in 1965 and 1979 for no consideration.[615]

- For Claimant Asaka Bank (and the Resort Dilorom): (i) facilities constructed by instructions of yet another Ministry of the Uzbek SSR between 1960's and 1980's; and (ii) the rights to use land allocated to the same Ministry in 1967 for no consideration.[616]

- For Claimant Uzpromstroybank (and the Resort Buston), facilities constructed by instructions of yet another Ministry of the Uzbek SSR between 1960's and 1970's.[617]

388. Further, the Respondent submits that the Tribunal does not have jurisdiction *ratione materiae* and/or *ratione voluntatis* with respect to those purported Soviet-era 'investments' for two independent reasons:

[612] Re. Mem., ¶ 103; Exh. RL-0115.
[613] Re. Mem., ¶ 104; Exh. CL-0177.
[614] Re. Mem., ¶ 104.1; Cl. Mem., ¶¶ 16-18; Exh. C-0363.
[615] Re. Mem., ¶ 104.2; Cl. Mem., ¶¶ 19-20.
[616] Re. Mem., ¶ 104.3; Cl. Mem., ¶¶ 21-22.
[617] Re. Mem., ¶ 104.4; Cl. Mem., ¶¶ 23-24.

- First, the alleged investments of the Claimants made prior to 21 December 1991 fall outside of the scope of the BIT and the FIL as they were not made in the territory of the Kyrgyz Republic (which only came to existence as a sovereign State not comprising the USSR on, or no later than, 21 December 1991), but rather in the territory of the USSR.[618]

- Second, and in any event, any alleged investments made prior to 21 December 1991, were not "made" by the investors of the Republic of Uzbekistan (which, again, only came to existence as a sovereign State on, or no later than, 21 December 1991), but instead by different State-owned entities or organs of the USSR back in the Soviet era.[619] As of 21 December 1991, those purported investments were not made, but already existing. Further, any transfer of such Soviet-era 'investments' to the Claimants was made domestically in Uzbekistan at almost no cost – therefore no investment in the economy Kyrgyz Republic was effectuated by the Claimants.[620]

(1) Pre-1991 Investments Were Made In The Territory Of The USSR By State-Owned Entities Incorporated In The USSR (As Opposed To In The Territory Of The Kyrgyz Republic By The Investors Of The Republic Of Uzbekistan) And Thus Fall Outside The Scope Of The BIT And The FIL

389. The Respondent argues that the following three provisions of the BIT are relevant for its argument:

- Article 1(2) of the BIT, which defines 'investments' as "all kinds of assets […] invested by the investors of one Contracting Party […] in the territory of the other Contracting Party";

- Article 1(8) of the BIT, which defines 'territory' as "territory of the State of a Contracting Party, in which the Contracting Party exercises its sovereign rights and jurisdiction in accordance with rules of international law"; and

[618] Re. Mem., ¶ 105.1; Exh. RL-0118; Exh. RL-0119; Exh. RL-0120; Exh. RL-0121; Exh. RL-0122; Exh. RL-0123; Exh. RL-0124; Exh. C-0177.

[619] Re. Mem., ¶ 105.1.

[620] Re. Mem., ¶ 105.2.

- Lastly, Article 10 of the BIT, which provides that the Contracting Parties consent to arbitrate disputes in relation to the investments "made by [the investors of one Contracting Party] in the territory of" the other Contracting Party.[621]

390. The Respondent also argues that the Preamble and other provisions of the FIL and the Law on Normative Legal Acts are also relevant, and are as follows:

- The Preamble of the FIL, which stipulates that "[t]his Law establishes the basic principles of the state investment policy aimed at improving the investment climate in the Republic and stimulating attraction of domestic and foreign investments by providing fair, equitable legal treatment to investors and guarantees of protection of the investments attracted to the Kyrgyz Republic";

- Article 1(3) of the FIL, which states that foreign investor is "any natural or legal persons other than domestic investors making an investment in the economic activity of the Kyrgyz Republic [. . .]";

- Article 9(1) of the Law on Normative Legal Acts, which provides that "normative legal acts [laws] apply throughout the entire territory of the Kyrgyz Republic [. . .]."[622]

391. The Respondent contends that the ordinary meaning of the term 'Contracting Party' used throughout the BIT is either the Republic of Uzbekistan, or the Kyrgyz Republic[623] – two sovereign States that came to existence after the dissolution of the Soviet Union. The Respondent argues that, in the Soviet era, none of the Soviet Republics (including the Kyrgyz SSR), enjoyed sovereignty under international law.[624] Thus, the Respondent asserts that the newly-created Kyrgyz Republic could have only exercised its 'sovereign rights' on its territory (viz. Article 1(8) of the BIT) after the dissolution of the Soviet Union.[625]

[621] Re. Mem., ¶ 107.
[622] Re. Mem., ¶ 108.
[623] Re. Mem., ¶ 109; Exh. RL-0115.
[624] Re. Mem., ¶ 109; Exh. RL-0123; Exh. RL-0125.
[625] Re. Mem., ¶ 109.

392. Consequently, according to the Respondent, proper application of the customary rules on treaty interpretation indicates that the Contracting Parties have not consented to submission of disputes related to investments made in the territory of the Soviet Union, a State different from the Contracting Parties to arbitration.[626]

393. With respect to the Claimants' argument on the lack of temporal limitation in the BIT, the Respondent draws the Tribunal's attention to the wording of Article 12 of the BIT:

> This Agreement shall apply to investments made in the territory of one Contracting Party in accordance with its legislation by investors of the State of the other Contracting Party, regardless of whether they were made before or after the entry into force of this Agreement.[627]

394. The Respondent argues that while the BIT applies to investments made before its entry into force (6 February 1997), Article 12 of the BIT employs the same defined terms (*i.e.*, 'territory' and 'Contracting Party') and does not evidence the intent of the Contracting Parties to extend the application of the BIT to investments made in the Soviet era. According to the Respondent, this interpretation flows from Article 31(4) of the VCLT, which stipulates that special meaning cannot be given to the treaty term unless "it is established that the parties so intended."[628]

395. The Respondent also submits that it cannot be the case that the Contracting States to the BIT intended to extend its application to Soviet-era investments by virtue of the State succession doctrine. This follows from the abundance of complex arrangements regulating matters of succession which were negotiated and adopted by the CIS States vis-à-vis other foreign States, as well as on the intra-CIS level.[629]

396. To conclude, the Respondent contends that any pre-1991 investments pertaining to the Resorts were made in the territory of the USSR by State-owned entities incorporated in the USSR / State organs of the USSR (as opposed to in the territory of the Kyrgyz Republic

[626] Re. Mem., ¶ 110; Exh. RL-0002; Exh. RL-0121; Exh. RL-0123; Exh. RL-0124; Exh. CL-0177.
[627] Re. Mem., ¶ 111.
[628] Re. Mem., ¶ 112; Exh. RL-0002.
[629] Re. Mem., ¶ 113; Exh. RL-0086; Exh. RL-0124; Exh. RL-0128; Exh. RL-0129; Exh. C-0002.

by the investors of the Republic of Uzbekistan) and thus fall outside the scope of the BIT and the FIL.[630]

(2) The Claimants Themselves Did Not "Make" Any Pre-1991 Investments In The Territory Of The Kyrgyz Republic

397. The Respondents also argue that, in addition to Articles 1(2) and 10 of the BIT, which refers to investments "made" and "invested" in the territory of the Contracting Party, Articles 1(4) to 1(6) of the BIT, in defining the terms "legal persons," "nationals," and "stateless persons," also provide for "making investments in the territory of the State of the Contracting Party."[631]

398. The Respondent also relies on Article 1(6) of the FIL, which provides that an investment dispute is "a dispute between and an investor and State organs, state officials of the Kyrgyz Republic and other participants in the investment activity taking place in the implementation of investments" in the Kyrgyz Republic.[632]

399. Moreover, the Respondent contends that the Soviet-era investments also fall outside of the scope of Article 10 of the BIT because they were not "made" in the territory of the Kyrgyz Republic by the Claimants. The terms used in Article 10 of the BIT require the making of an investment in an active manner, as opposed to merely inheriting the investments that had already been in existence at the time when the Contracting Parties emerged (the point after which the BIT began to apply retroactively).

400. Furthermore, the Respondent asserts that the pre-1991 investments that were transferred from one Uzbek State-owned entity to another for a giveaway price and with no contribution to the economy of the Kyrgyz Republic – facilities of Rokhat-NBU, Dilorom and Buston constructed in the Soviet period – also do not qualify as investments "made" in the territory of the Contracting Party.[633]

[630] Re. Mem., ¶ 114.
[631] Re. Mem., ¶ 115.
[632] Re. Mem., ¶ 116.
[633] Re. Mem., ¶ 117.

401. First, the Respondent submits that the ordinary meaning of the terms "the investments made," interpreted in good faith and in light of the object and purpose of the BIT, which hinges on "economic cooperation [. . .] for mutual benefit" of the Contracting Parties and "the effective use of economic resources,"[634] excludes passive inheritance of investments made decades ago by entities other than the investors. The Respondent adds that "[T]he investments made" is a *ratione materiae* requirement for an investor's original active contribution, which is akin to the objective or inherent definition of an investment (even outside of the ICSID context).[635] The Respondent contends that, in the words of the tribunal in *Clorox Spain SL v. Bolivia*, which analyzed similarly worded provisions of the Spain–Venezuela BIT,

> [. . .] it is clear from the wording of the Treaty that its protection is limited to those assets that were invested by an investor of one Contracting Party in the territory of the other. […] To benefit from the protection of the Treaty, the asset must have been invested (Article I(2)) and the investment made (Article III(1)) […] Respondent's objection is not to demand more requirements than that of an investment, but to argue that Clorox España's alleged investment cannot qualify as such because it does not reflect any action to invest. [. . .] An asset or right that is listed in a treaty does not necessarily constitute a treaty-protected investment by the mere fact of being listed.[636]

402. The Respondent also contends that the tribunal in *Standard Chartered Bank v. Tanzania*, having interpreted largely similar terms in the Tanzania-UK BIT to the ones that appear in Article 10 of the BIT ("investments [. . .] made"), drew a clear distinction between "the verb 'made' [which] implie[d] some action in bringing about the investment, rather than purely passive ownership" and "the verb 'own' or 'hold' in connection with an investment by or of an investor." The Respondent further argues that the tribunal in *Standard Chartered Bank* was of the opinion that "the treaty protect[ed] investments 'made' by an

[634] Re. Mem., ¶ 117; Exh. RL-0115.

[635] Re. Mem., ¶ 117; Exh. RL-0133.

[636] Re. Mem., ¶ 118; Exh. RL-0134; Exh. RL-0135.

investor in some active way, rather than simple passive ownership," and that such interpretation reflected the object and purpose of the treaty.[637]

403. According to the Respondent, the moment starting from which the investments shall be "made" by an investor in order for them to fall within the scope of the Tribunal's jurisdiction *ratione materiae* and/or *ratione voluntatis* is 21 December 1991, when the Contracting Parties came into existence. The Respondent contends that while Article 12 of the BIT does not impose a specific temporal limitation on the application of the BIT, good faith interpretation of the terms of Article 10 in light of the BIT's context, object and purpose demonstrates that the Parties did not intend for the BIT to apply to the investments pre-dating the existence of the Contracting Parties. Therefore, the Respondent submits that the Contracting Parties' consent to arbitration of disputes only encompasses disputes related to the investments "made" (and not owned) by investors after 21 December 1991. The Respondent argues that, in the present case, this would mean that the Tribunal lacks jurisdiction over such Soviet-era investments as alleged property rights and/or rights to use facilities and land of Zolotiye Peski Resort by Claimant TMP, since TMP has not made any investments in the Republic after 1991.[638]

404. Second, the Respondent asserts that the phrase "the investments made" by an investor of a Contracting Party in the territory of the other Contracting Party interpreted in good faith and in light of the BIT's object and purpose similarly warrants some form of real economic contribution into the territory of the host State. Consequently, according to the Respondent, Article 10 of the BIT does not cover disputes related to investments which came about as a result of mere transfer of funds between the foreign investors, to an extent that such funds were not effectively invested in the territory of the Contracting Party.[639]

405. In this respect, the Respondent argues that such territorial nexus does not manifest itself in the scenarios involving the transfer of Rokhat-NBU, Dilorom and Buston from one State-owned Uzbek entity to a different one. Therefore, the Respondent submits that pre-1991

[637] Re. Mem., ¶ 119; Exh. RL-0136.
[638] Re. Mem., ¶ 120.
[639] Re. Mem., ¶ 121; Exh. RL-0137.

assets that were acquired by the Claimants in such a manner, as opposed to investments in fact made by the Claimants themselves following their acquisition of the Resorts in the 1990's, fall outside of the Tribunal's jurisdiction *ratione materiae* and/ or *ratione voluntatis*.[640]

406. Finally, the Respondent argues that while the making of an investment by way of active conduct does not necessitate a minimum floor value for which an asset is traded, transferring an asset for its nominal value does not qualify as an investment "made" or "invested." In this respect, the Respondent cites the reasoning of the tribunal in *Caratube v. Kazakhstan (I)*, concluding that payment of a nominal price "is an indication that the investment was not an economic arrangement, is not covered by the term 'investment' as used in the BIT, and thus is an arrangement not protected by the BIT."[641] Relying on *Caratube (I)*, the Respondent contends that transfer of an investment for a nominal price, in the present case, would also be in conflict with the spirit of the BIT which emphasizes "economic cooperation [. . .] for mutual benefit." It also argues that the purchase of Soviet-era facilities of Dilorom, Buston, and Rokhat-NBU by the Claimants from other State-owned Uzbek entities are prime examples of such transactions (*i.e.*, a transfer for nominal price which is an arrangement not protected by the BIT).[642]

407. In sum, the Respondent contends that pre-1991 assets that were acquired by the Claimants in such a manner, as opposed to investments in fact "made" by the Claimants themselves following their acquisition of the Resorts in the 1990's, fall outside of the Tribunal's jurisdiction *ratione materiae* and/ or *ratione voluntatis*.[643]

C. THE TRIBUNAL'S ANALYSIS

408. In its Counter-Memorial, the Respondent raised two objections to jurisdiction. The Tribunal will address each, in turn, below.

[640] Re. Mem., ¶ 122.
[641] Re. Mem., ¶ 123; Exh. RL-0138.
[642] Re. Mem., ¶ 123; Cl. Mem., ¶¶ 52, 71, 92; Exh. C-0152; Exh. C-0154; Exh. C-0155; Exh. C-0205.
[643] Re. Mem., ¶ 124.

409. The Respondent, first, contends that the Tribunal lacks jurisdiction over the Claimants' investments made prior to 21 December 1991, because the BIT and the FIL do not cover investments made in the territory of the Soviet Union by State-owned entities or State organs of the Soviet Union.[644] For the reasons set forth below, the Tribunal rejects this jurisdictional objection.

410. First, while the Respondent argues that Article 12 of the BIT cannot be interpreted as extending the application of the Agreement to investments made in the Soviet era, the plain language of Article 12 clearly indicates the opposite.[645] Article 12 of the BIT reads as follows:

> This Agreement shall apply to investments made on the territory of one Contracting Party in accordance with its legislation by investors of the state of the other Contracting Party, regardless of whether they were made before or after the entry into force of this Agreement.[646]

411. As the Claimants rightly note, the language of Article 12 of the BIT is explicitly retroactive and does not contain any temporal limitation.[647] Some BITs do contain temporal limitations (for example, limiting the category of protected investments to investments made after the BIT came into force), but the BIT in this case does not. Instead, the BIT's plain terms say the opposite, applying its protections to investments whenever they were made, without any temporal limitation – in the words of Article 12, "regardless of whether they were made before or after entry into force of [the BIT]." Therefore, it cannot be said that the BIT's protections do not apply to investments that were made before 21 December 1991.

412. It is not the function of arbitral tribunals to narrow the definitions of investment or the scope of investment protection that the parties to a bilateral investment treaty chose to provide to their respective nationals. By the plain terms of Article 12, which addresses

[644] Re. Mem., ¶¶ 101.1, 114.
[645] Re. Mem., ¶ 112.
[646] Exh. C-0001.
[647] Cl. Rep., ¶ 307.

precisely this question, the BIT does apply, without temporal limitations, to such investments.

413. Relatedly, the Tribunal notes that there is virtual unanimity among commentators and arbitral tribunals that, where a bilateral investment treaty is silent regarding the temporal scope of protected investments, no such limitation should be imposed. Thus, where treaty provisions defining protected investments are silent as to temporal scope, the treaty is not construed as impliedly limited to investments made after the effective date of the treaty.[648] This principle would apply here even absent the express terms of Article 12 and would preclude the implication of a temporal restriction like that which the Respondent urges.

414. Nor does the Tribunal consider that Article 12's reference to "Contracting Party" or "territory" as altering its conclusions regarding the BIT's temporal scope. It is at best awkward, and at worst a *non sequitur*, to argue that Article 12's reference to "the territory of a Contracting Party" was meant as a temporal, rather than a territorial, limitation. The obvious purpose of Article 12 was to address the geographic location of investments, not the temporal timing of investments; that is plain from the provision's text and from its

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[648] Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* 50 (3rd edn, Oxford University Press, 2022) ("Investment treaties often contain specific provisions determining their temporal application. Many BITs provide that they shall be applicable to all investments whether made before or after their entry into force. In other words, they protect also existing investments. This should not lead to the conclusion that, in the absence of such a clause, treaties will apply only to 'new' investments."); Zachary Douglas, *The International Law of Investment Claims* 340-41 (Cambridge University Press, 2009):

> Rule 41. The claimant's investment … can have been made before or after the investment treaty entered into force, subject to an express provision to the contrary in the investment treaty. … The question that arises is whether an investment treaty applies to investments made before the treaty enters into force in the absence of such an express stipulation. A negative answer would severely limit the scope of the investment treaty and lead to highly artificial distinctions. If only investments made after the critical date attracted the protection of an investment treaty, then, providing no dispute with the host state existed at that time, there would be nothing preventing an existing investor in a corporate group from entering into a transaction with an affiliated company and the latter becoming the new investor. By this simple device, a 'new' investment would have been made in the host state, thereby attracting the protection of the investment treaty. Furthermore, a temporal limitation upon the acquisition of an investment raises serious complications about the status of additional capital outlays by the investor after the investment treaty entered into force. Are these to be considered as a 'new' investment or merely part of the 'old' investment? So long as the possibility of forum shopping is excluded, and the intertemporal principles is [*sic*] respected, it is submitted that no injustice is caused to the host state by the recognition of the principle in Rule 41.

evident purposes.[649] Reading Article 12's territoriality restriction as imposing a temporal limitation distorts both the text and purpose of that restriction, while also contradicting the plain language of Article 12's language addressing the subject of temporal scope.

415. The Kyrgyz Republic obviously has a territory today (and had a territory when the measures complained of by the Claimants occurred). The Claimants' investments are concededly within that territory. In the Tribunal's view, that satisfies the requirements of Article 12 – both expressly and in terms of the purposes of the BIT. This conclusion is not altered by the fact that some of the investments were first made prior to the Kyrgyz Republic's independence, on territory that formally became territory of the Kyrgyz Republic only after independence. The investments were nonetheless made on territory which is now territory of the Kyrgyz Republic. That fully satisfies the requirements of Article 12.

416. The same is true of Article 12's requirement that investments have been made "in accordance with [the] legislation" of each Contracting Party. That language again does not address issues of temporal scope, and instead is directed to the lawfulness of investments. In neither text nor purpose does this aspect of Article 12 purport to impose a temporal restriction on investments.

417. Moreover, there has been no suggestion that the investments in question were not properly made, in accordance with the relevant legislation of the Soviet Union, prior to the date of Kyrgyzstan's independence. It is also clear that the investments were subsequently owned, improved and developed in accordance with the relevant legislation of the Kyrgyz Republic. That once more satisfies the requirements of Article 12's language and evident purposes: the investments in question were made on territory which is now Kyrgyz territory, in accordance with the legislation that was in force when the investments were initially made, and Kyrgyzstan succeeded to that territory upon its independence. Thereafter, the investments were owned, developed, and improved in accordance with the

[649] The term "made" (as in "investments made") has correctly been interpreted as setting forth a geographical as opposed to a temporal limitation on the "making of an investment. See *Stabil, Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v. The Russian Federation*, PCA Case No. 2015-35, 26 June 2017, ¶ 191.

legislation of the Kyrgyz Republic. Again, this fully satisfies the requirements of Article 12.

418. Second, the Respondent contends that the term "Contracting Party" implicitly signals a start date for the protection of investments under the BIT.[650] This interpretation, however, is inconsistent with the plain language and ordinary meaning of Article 12, which specifically addresses the temporal scope of the BIT, providing that there is no such limitation. Given that text, the Tribunal declines to imply a temporal limitation into the BIT. Further, the Tribunal agrees with the Claimants that in order to read such a temporal limitation into the provision, the Parties must have intended to assign a "special meaning" to the term "Contracting Party" pursuant to Article 31(4) of the VCLT, which they did not.[651]

419. Third, the Respondent argues that three provisions of the BIT – Articles 1(2), 1(8), and 10 – justify a temporal restriction, limiting the BIT's protection to investments made after 21 December 1991.[652] However, as the Claimants correctly point out, that is not the case.[653]

420. Article 1(2), which defines the term "investment," is broad in scope and does not contain any temporal reference or restriction. For the reasons already noted, including the text and purpose of Article 12, there is no basis for implying a temporal limitation into Article 1(2). Further, its supplementary clause is limited to "intellectual property rights," which are not relevant to this arbitration.[654]

421. Similarly, Article 1(8), which defines the term "territory," does not contain any language indicating that the term "territory" only applies to investment made before a certain point in time.[655] Nor, for the reasons noted above, should such a temporal limitation be implied into the BIT; that is particularly true where this would entail implying a temporal limitation

[650] Re. Mem., ¶ 112.
[651] Cl. Rep., ¶ 311.
[652] Re. Mem., ¶ 107.
[653] Cl. Rep., ¶ 313.
[654] Exh. C-0001.
[655] Exh. C-0001.

into a provision addressing the BIT's territorial scope, not its temporal scope, and where that implied limitation would contradict Article 12's express treatment of the subject.

422. Finally, Article 10, which addresses the scope of disputes that may be submitted for arbitration, does not address when the investment at issue in the dispute must have first been acquired; rather, consistent with Article 12's express terms, Article suggests that ongoing investment are protected.[656]

423. Therefore, the Tribunal has little difficulty concluding that Articles 1(2), 1(8), and 10 of the BIT do not justify any temporal limitation. Article 12 addresses this subject, and does so expressly. The Tribunal declines to imply into the BIT terms or limitations which are not contained, particularly when such a limitation would contradict the provisions that the BIT's drafters did include in the Treaty.

424. Fourth, the Respondent argues that the doctrine of State succession precludes the Kyrgyz Republic from assuming obligations incurred by the USSR.[657] The Tribunal concludes, however, that the doctrine of State succession does not support the Respondent's objections. As the Claimants correctly observe, this case does not concern the question whether the Kyrgyz Republic assumed responsibilities incurred by the USSR; instead, it deals with whether investments made during the Soviet era but existing in the territory of the Kyrgyz Republic today are covered under the BIT.[658] The doctrine of State succession does not address or alter the scope of the BIT's terms.

425. Fifth, and finally, it is clear from a careful reading of the FIL, as well as related laws, that the Respondent's argument that the FIL does not cover pre-1991 investments is also unfounded.[659] In particular, the Tribunal agrees with the Claimants that none of the provisions on which the Respondent relies – the Preamble, Articles 1(3) and 1(6) of the FIL, and Article 9(1) of the Law on Normative Legal Acts – contain any language that

[656] Exh. C-0001.
[657] Re. Mem., ¶ 110.
[658] Cl. Rep., ¶ 322.
[659] Re. Mem., ¶¶ 27, 108.

would indicate a temporal restriction on the scope of the FIL.[660] Further, a temporal restriction cannot properly be read into them absent any indication of such an intention. On the contrary, consistent with the express terms of the BIT in this case, the Tribunal concludes that the FIL contains no temporal limitation.

426. Given the aforementioned, it is evident that neither the BIT nor the FIL impose any temporal limitation. Rather, their language clearly demonstrates that the Kyrgyz Republic consented to the arbitration of disputes arising from investments situated within its borders, without regard to whether said investments were made prior to 21 December 1991.

427. Finally, and for the sake of completeness, the same conclusion would apply even if one imported some sort of temporal limitation into the BIT, whether in Article 12 or otherwise, limiting the definition of investment to investments made in the territory of 1991 following the Kyrgyz Republic's independence in 1991. Even with that limitation, the investments in question would have been "made" in the Kyrgyz Republic upon its independence. As discussed below, those investments continued following the Kyrgyz Republic's independence to be owned, operated, and developed in accordance with applicable legislation of the Kyrgyz Republic. In the Tribunal's view, that would satisfy even the most restrictive notion of what constitutes the "territory of a Contracting State" and that state's legislation.

428. The Respondent further contends that the Tribunal does not have jurisdiction over the Claimants' investments made prior to 21 December 1991, because the BIT and the FIL do not extend to investments that predated the formation or existence of the Contracting Parties and that were acquired by the Claimants via inheritance or for nominal cost when the Kyrgyz Republic became independent.[661] In other words, the Respondent alleges that the Claimants' investments were not "made" in a Contracting Party in accordance with the BIT and the FIL. For the reasons stated below, the Tribunal rejects this objection to jurisdiction.

[660] Cl. Rep., ¶¶ 323-330.
[661] Re. Mem., ¶¶ 101-105, 115-118.

429. First, the Respondent's assertion that the BIT does not cover investments that were inherited when the Kyrgyz Republic became independent is incorrect. As the Claimants correctly note, no provision of the BIT excludes investments on the basis of inheritance. Rather, Article 1(2) defines "investments" broadly to encompass "all kinds of assets and rights to them [. . .]."[662] Accordingly, it cannot be said that the BIT does not protect investments that were inherited; rather, it includes all types of investments regardless of whether they were purchased, inherited or otherwise.

430. Second, the Respondent's argument that the Claimants' investments are not protected because they are assertedly "passive" is misplaced.[663] In support of this argument, the Respondent relies on *Clorox Spain SL v. Bolivarian Republic of Venezuela* and *Standard Chartered Bank v. United Republic of Tanzania*; however, as the Claimants correctly observe, these cases must be distinguished from the case at hand.[664] Unlike in *Clorox*, where the tribunal found that a mere transfer of shares without payment did not constitute an investment, in the present case, the Claimants either built their Resorts at their own expense, or acquired them for consideration, and invested significant sums in renovations and modernization. Moreover, unlike *Standard Chartered Bank*, where the tribunal held that the claimant's passive ownership of shares, without more, did not qualify as a protected investment under the relevant agreement, the Claimants in this case have played an active role in directing, funding and controlling their investments until 4 April 2016 (*i.e.*, the date of the 2016 Order). The Tribunal also notes that there is nothing in the BIT's broad definition of "investment" that would suggest either of the limitations relied upon by the Respondent.

431. Third, the Respondent's contention that the Claimants obtained their rights in the Resort for no financial consideration or for a nominal price is inaccurate.[665] As the Claimants rightfully stress, the construction, acquisition and operation of the Resorts required

[662] Cl. Rep., ¶ 334; Exh. C-0001.
[663] Re. Mem., ¶¶ 117-119.
[664] Cl. Rep., ¶¶ 337-339; Exh. RL-0135; Exh. RL-0136.
[665] Re. Mem., ¶ 121.

significant outlays of funds, which in no sense are "nominal."[666] Moreover, the Respondent is wrong to assert that property rights acquired for nominal consideration are not protected under the BIT.[667] No provision of the BIT excludes property rights acquired for a nominal price from qualifying as protected investments and, instead, the BIT defines "investment" expansively and without limitation. Further, while the Respondent refers to *Caratube v. Kazakhstan I* in support of its argument, that case dealt with the application of Article 25(2)(b) of the ICSID Convention, which is not relevant to the present case.

432. Finally, the Respondent's contention that the phrase "implementation of investments" in Article 1(6) of the FIL places the same obligations as those in the BIT is unfounded.[668] In this regard, the Tribunal agrees with Professor Murphy that such a phrase pertains to the lifetime of the investment, as opposed to the mode of its execution.[669]

433. In light of the above, the Tribunal holds that the Claimants made their investments in accordance with the BIT and the FIL. Therefore, the Tribunal rejects the Respondent's second jurisdictional objection.

434. Having rejected the Respondent's objections to jurisdiction, the Tribunal is convinced that it has jurisdiction *ratione materiae*, *ratione tempore*, and/or *ratione voluntatis* over the present dispute under the BIT and the FIL. In any event, the Tribunal independently considers that the Respondent's objections must be rejected pursuant to the doctrine of *res judicata*.

435. The Tribunal has already carefully considered and upheld its jurisdiction over the dispute in its Decision on Bifurcated Preliminary Objections dated 1 May 2019. In that ruling, the Tribunal concluded, by majority, that it has jurisdiction over the dispute pursuant to the BIT and the FIL. The ruling is attached to this Award as Annex A and forms an integral

[666] Cl. Rep., ¶¶ 340-341.
[667] Re. Mem., ¶ 123.
[668] Re. Mem., ¶ 116.
[669] Murphy, ¶¶ 31-34

part thereof. The ruling was issued following lengthy submissions and detailed oral argument by able counsel.

436. The Tribunal considers that the doctrine of *res judicata* is a well-established principle of public international law. Under the doctrine, an earlier and final decision by an adjudicative body is conclusive as between the same parties in subsequent proceedings on the same matter.

437. The Tribunal has carefully considered whether a decision on jurisdiction, as opposed to a final decision on the merits falls within the scope of the doctrine. The principles justifying the doctrine of *res judicata* – in particular, those of protecting the finality of judicial and arbitral decisions and promoting procedural economy – apply fully to jurisdictional rulings. The Tribunal sees no reason to conclude that the doctrine of *res judicata* would not apply fully to jurisdictional rulings.

438. Pursuant to Article 45(1) of the Arbitration (Additional Facility) Rules, a tribunal has the power to rule on its jurisdiction and competence. Moreover, pursuant to Article 45(5), a tribunal has the discretion to address any jurisdictional objection in a preliminary phase or join the objection to the merits.

439. Where a tribunal decides to bifurcate the proceedings to address a jurisdictional challenge in a preliminary phase, if it upholds the objection, the outcome will be an award. By contrast, if a tribunal dismisses the objection, it must do so in a decision. It is undisputed that a ruling upholding a jurisdictional objection has *res judicata* effect. It would in the Tribunal's view be illogical to deny the same quality to a ruling which dismisses an objection simply because it is contained in a decision rather than an award.

440. Further, when deciding whether to bifurcate the proceedings, a tribunal must be guided by the principle of procedural economy. For this reason, where a tribunal has dismissed a jurisdictional challenge in a preliminary phase, the objecting party should be precluded from raising that objection again in the merits phase, unless the decision was provisional rather than final or exceptional circumstances exist.

441. The Tribunal considers that there are no exceptional circumstances that merit reopening its decision on jurisdiction, therefore, the Tribunal turns to the question whether the Decision on Bifurcated Preliminary Objections dated 1 May 2019 was intended to be final. The dispositive reads, in relevant part, that the Tribunal:

> REJECTS the Respondent's arguments that the Tribunal lacks jurisdiction under the FIL; [and]
>
> REJECTS, by majority, the Respondent's arguments that the Tribunal lacks jurisdiction under the BIT[.]

442. The language of the Decision on Bifurcated Preliminary Objections is clearly that of a final ruling, therefore, the Tribunal concludes that it constitutes *res judicata*.

443. The Tribunal does not consider that this conclusion is altered by the fact that the jurisdictional objections now asserted by the Respondent were not asserted or addressed in the preliminary phase of this arbitration. In the Tribunal's view, the doctrine of *res judicata* applies to claims or objections that could have been raised or asserted in an earlier proceeding, but were not. Here, there is no question but that the Respondent's present jurisdictional objections could have been asserted previously. The fact that they were not does not alter application of the doctrine of *res judicata*.

VI. LIABILITY

A. UNLAWFUL EXPROPRIATION UNDER ARTICLE 6 OF THE BIT AND ARTICLE 6 OF THE FIL

(1) The Claimants' Position

444. Article 6 of the BIT provides in relevant part that:

> 1. The Contracting Parties shall take no action directly or indirectly to seize or nationalize, or take any other action of the same nature or having equivalent effects, in relation to investments of investors of the other Contracting Party, if such actions are not related to legislative measures taken in the public interest on a non-discriminatory basis, or adopted in response to actions that have been taken by the other Contracting Party.

> 2. A Contracting Party that has taken out an investment in the circumstances set forth in paragraph 1 of this Article, shall provide compensation to the investors of the other Contracting Party. Such compensation shall correspond to the market value of the taken investments, determined as of the date of the seizure or as of the date when the decision to seize was made public (whichever occurs first), shall include a percentage of interest based on the value of the taken investment as calculated at the 'Libor' rate on the date of the seizure, and be freely transferable.
>
> […]
>
> 4. Investors of one Contracting Party shall have the right to recover damages, including lost profit, suffered by their investments on the territory of the other Contracting Party as a result of actions of state bodies or officials of that Contracting Party contrary to the laws of the state at the place of investment, as well as due to the inadequate implementation by such bodies or officials of the obligations stipulated by the legislation towards investors of the first Contracting Party or enterprises with these investments.[670]

445. Article 6(1) of the FIL provides that:

> Investments shall not be subject to expropriation (nationalization, requisition or any other equivalent measures, including actions or inactivity on the part of the authorized governmental authorities of the Kyrgyz Republic, which led to the forced alienation of assets of an investor or the denial of an opportunity to use investments results), except in those instances, specified in the laws of the Kyrgyz Republic, where such expropriation is carried out for an overriding public purpose, in the public interest, on a non-discriminatory basis, in accordance with the required legal procedure, and accompanied by prompt, adequate and actual compensation for damages, including lost profits.[671]

446. As detailed below, one of the Claimants' principal contentions in this arbitration is that by depriving the Claimants of their investments without compensation, the Respondent violated Article 6 of the BIT and Article 6 of the FIL.[672]

[670] Cl. Mem., ¶ 128; Exh. C-0001.

[671] Cl. Mem., ¶ 129; Exh. C-0025.

[672] Cl. Mem., ¶ 127.

447. The Claimants argue that tribunals in numerous arbitrations, such as *Crystallex v. Venezuela* and *Stans Energy v. The Kyrgyz Republic*, have held that a failure to fulfil a condition for a lawful expropriation (*e.g.*, provide compensation for expropriated property) entails a breach of treaty and customary international law protections regarding expropriation.[673]

448. The Claimants submit that in the present case, the Respondent failed to comply with any of the required conditions for a lawful expropriation while creating a climate of hostility in a creeping expropriation that culminated in a direct, arbitrary, discriminatory expropriation without compensation.[674]

449. The Claimants contend that a direct expropriation "occurs where the investor's investment is taken through a formal transfer of title or outright seizure," which can take place in the form of a nationalization – "a concept similar to expropriation, except that the State takes over the investment of which is has dispossessed the investor." The Claimants add that nationalization typically involves "takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain."[675]

450. The Claimants argue that in the present case the 2016 Order issued by the Respondent on 4 April 2016 took the Claimants' rights in the Resorts through formal transfer of title to the Kyrgyz Fund for the Management of State Property, without compensation, and thus constituted a direct expropriation of Claimants' investments.[676] In doing so, the Claimants contend, the Kyrgyz Government, through the 2016 Order, directed the Kyrgyz Fund for the Management of State Property to "[a]ssume state ownership over the following resort and recreational facilities located on the territory of the Kyrgyz Republic and currently used by the legal entities of the Republic of Uzbekistan," which included Resort Zolotiye Peski, Resort Dilorom, Resort Rokhat-NBU and Resort Buston.[677]

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[673] Cl. Mem., ¶ 130. Exh. RL-0069; Exh. CL-0217; Exh. CL-0219; Exh. CL-0233; Exh. CL-0255.
[674] Cl. Mem., ¶ 131.
[675] Cl. Mem., ¶ 132; Exh. CL-0233; Exh. CL-0031; Exh. CL-0022.
[676] Cl. Mem., ¶ 135; Exh. C-0009.
[677] Cl. Mem., ¶ 137; Exh. C-0009.

451. The Claimants also argue that the Kyrgyz Government further instructed the Kyrgyz Fund for the Management of State Property to conduct an inventory and valuation of each property to ensure "[s]afekeeping organizational and other measures resulting from this resolution," and on 15 June 2016, the Kyrgyz Republic Ministry of Justice registered Resort Dilorom, Resort Rokhat-NBU, and Resort Zolotiye Peski as breaches of the State Enterprise Vityaz under the Fund for the Management of State Property. The Kyrgyz Fund for the Management of State Property then designated new management for the Resorts, which began operating during the 2016 season as branches of State Enterprise Vityaz.[678]

452. In sum, the Claimants argue that through the 2016 Order and subsequent implementing orders, the Respondent directly expropriated the Claimants' protected rights in the Resorts.[679]

453. The Claimants also submit that the Respondent admitted its direct expropriation of the Claimants' rights in the Resorts in a Diplomatic Note sent to Uzbekistan on 9 April 2016, informing Uzbekistan of its decision "to accept transfer of ownership [of the four Resorts] to the Kyrgyz Republic."[680]

454. According to the Claimants, in the 2016 Order and the 9 April 2016 Diplomatic Note, the Respondent sought to justify its nationalization of the Resorts by reference to the 1992 Agreement (and ratification of this Agreement "with the exception of Article 4") and Resolution No. 1080 of the Supreme Council of the Republic of Kyrgyzstan "on transfer of ownership of the Kyrgyz Republic of facilities of resort and recreational sector used by the legal entities of other CIS states" dated 16 December 1992, but neither of these justify the nationalization.[681]

455. With respect to the Article 4 reservation, the Claimants argue that the Respondent's reservation to Article 4 is invalid for several reasons, including: (i) its failure to confirm its reservation in accordance with Article 23(2) of the VCLT when signing the 1992

[678] Cl. Mem., ¶ 137; Exh. C-0009; Exh. C-0455; Exh. C-0456; Exh. C-0457; Exh. C-0464; Exh. C-0465; Exh. C-0466.
[679] Cl. Mem., ¶ 137.
[680] Cl. Mem., ¶ 138; Exh. C-0135.
[681] Cl. Mem., ¶ 138; Exh. C-0009; Exh. C-0135; Exh. R-0030.

Agreement, which requires that the reservation be confirmed by the State at the time it expresses its consent to be bound by the treaty;[682] (ii) the reservation failed to comply with the procedural requirements regarding the form of declaring reservations under the VCLT;[683] (iii) the reservation is invalid under Article 19(c) of the VCLT because it is incompatible with the object and purpose of the 1992 Agreement;[684] and (iv) the reservation is invalid as a result of the subsequent 1994 and 1995 Protocols concluded between the Kyrgyz Republic and Uzbekistan, which post-dated the Kyrgyz Republic's purported reservation and expressly affirmed the rights of the Uzbek entities in the Resorts and pursuant to which the Kyrgyz Republic agreed to "[t]o preserve for the Republic Uzbekistan the right of ownership to the objects of the resort – recreational facilities located on the territory of the Kyrgyz Republic on Lake Issyk-Kul: 'Zolotiye Peski,' 'Yubileyny,' 'Rokhat,' and 'Dilorom.'"[685]

456. The Claimants further submit that the 1994 and 1995 Protocols are undoubtedly in force, as agreed upon by the Kyrgyz Republic and the Republic of Uzbekistan in July 2017, at which time the bilateral agreements between the two States, including the 1994 and 1995 Protocols, were inventoried and designated as "in force."[686]

457. With respect to Resolution No. 1010, the Claimants argue that the Respondent's reliance on this Resolution (which in 1992 provided for the Respondent to take ownership of the resorts and recreational facilities within the territory of the Respondent and used by legal entities of other CIS countries by 10 January 1993) is also misplaced because: (i) the Respondent's failure to implement this Resolution for more than 23 years means that it now lacks legal force to serve as a basis for expropriation; and (ii) the Respondent's subsequent commitments, including the 1994 ratification of the 1992 Agreement and the 1994 and 1995 Protocols, render Resolution No. 1080 moot.[687]

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[682] Cl. Mem., ¶ 139; Exh. RL-0002.
[683] Cl. Mem., ¶ 139; Exh. C-0111.
[684] Cl. Mem., ¶ 140; Exh. CL-0183; Exh. C-0002.
[685] Cl. Mem., ¶ 141; Exh. C-0004.
[686] Cl. Mem., ¶ 141; Exh. C-0108.
[687] Cl. Mem., ¶ 143; Kenenbaev II, ¶¶ 72-75; Exh. R-0089; Exh. R-0030.

458. Alternatively, the Claimants argue that even if grounded in its reservation to the 1992 Agreement and Resolution No. 1080, the Respondent's direct expropriation violates Article 6 of the BIT and Article 6 of the FIL.[688]

459. The Claimants submit that the Respondent's direct expropriation was unlawful because it failed to satisfy any of the conditions required for a lawful expropriation under Article 6 of the BIT and Article 6 of the FIL, namely: (i) expropriation must be taken in the public interest;[689] (ii) expropriation must not be discriminatory;[690] (iii) expropriation must be in accordance with due process of law;[691] and (iv) accompanied by prompt, adequate or effective compensation.[692]

a. Taken In The Public Interest

460. The Claimants contend that to be lawful, an expropriation must be undertaken in the public interest,[693] which has been taken to mean "that the public purpose was the reason the investment was expropriated," and that the public purpose must be based on a "legitimate concern."[694] A mere assertion of a public purpose is not dispositive.[695]

461. The Claimants argue that, in the present case, the Respondent did not articulate any reason for its nationalization of the Resorts, let alone any legitimate public purpose for that nationalization. That is, neither the 2016 Order nor any of the subsequent implementing orders contain any reference to any "public interest" or "overriding public purpose" for the nationalization, as required under the BIT and the FIL.[696]

462. Aside from any lack of articulated public purpose, the Claimants assert that there is also no evidence that the nationalization of the Resorts was reasonably related to the fulfilment of

[688] Cl. Mem., ¶ 144.
[689] Cl. Mem., ¶¶ 145-151.
[690] Cl. Mem., ¶¶ 152-161.
[691] Cl. Mem., ¶¶ 162-168.
[692] Cl. Mem., ¶¶ 169-174.
[693] Exh. C-0001; Exh. C-0025.
[694] Cl. Mem., ¶ 145; Exh. CL-0108; Exh. CL-0109.
[695] Cl. Mem., ¶ 147; Exh. CL-0107; Exh. CL-0234.
[696] Cl. Mem., ¶ 149; Exh. C-0010; Exh. C-0025.

any such public purpose. Instead, the Claimants submit that the evidence indicates that the nationalization targeted Uzbek-owned resorts as a result of political tensions between the Kyrgyz and Uzbek governments at the time of the nationalization.[697]

b. Discriminatory

463. The Claimants maintain that the BIT and the FIL mandate that a lawful expropriation shall not be discriminatory,[698] meaning that similarly situated entities cannot be treated differently without a reasonable justification.[699] Discrimination is an effects-based analysis and is not based on subjective intent.[700]

464. The Claimants argue that in this case, the 2016 Order only applied to the four Uzbek-owned Resorts (and not to any of the other nearly 200 resorts owned by Kyrgyz and other foreign nationals on Lake Issyk-Kul) and was therefore discriminatory on its face.[701] Also, the Claimants contend that no reasonable justification was given for the discriminatory nationalization.[702]

465. Importantly, the Claimant also argues that the Respondent treated four similarly-situated Kazakh-owned resorts on Issyk-Kul differently, deciding not to nationalize them in April 2016 or at any time since, despite acknowledging that they were similarly-situated.[703]

c. In Accordance With Due Process Of Law

466. Article 6.4 of the FIL provides:

> In case of expropriation, [the] judicial authority or other competent state authority of the Kyrgyz Republic with the proper legal procedure shall provide [the] investor with the right to a speedy trial, including an assessment of its investment and payment of compensation in accordance with the provisions of this Article, without violating the procedure for compensation [of] foreign

[697] Cl. Mem., ¶¶ 150-151; Exh. C-0447; Exh. C-0471; Exh. C-0507.
[698] Exh. C-0001; Exh. C-0025.
[699] Cl. Mem., ¶¶ 152-153; Exh. RL-0069; Exh. C-0025; Exh. CL-0185; Exh. CL-0231; Exh. CL-0240; Exh. CL-0241.
[700] Cl. Mem., ¶ 154; Exh. CL-0207; Exh. CL-0208; Exh. CL-0213; Exh. CL-0215.
[701] Cl. Mem., ¶ 157; Exh. C-0009; Exh. C-0469; Exh. C-0474.
[702] Cl. Mem., ¶ 157.
[703] Cl. Mem., ¶¶ 157-161; Exh. C-0404; Exh. C-0405; Exh. C-0416; Exh. C-0434; Exh. C-0459; Exh. CL-0161.

> investors under Article 18 of this Law [Settlement of Investment Disputes].[704]

467. The Claimants argue that beyond Article 6.4 of the FIL, there is an international standard of due process which requires certain basic aspects, for example, the right to advance notification, a fair hearing and an impartial adjudicator to assess the actions in dispute.[705] This standard is applicable regardless of the particular formulation of the due process requirement in the legal instrument at issue.[706]

468. The Claimants assert that, in the present case, the expropriation of the Claimants' investments was not carried out in accordance with the required legal procedure, failing to accord the Claimants due process. The Respondent failed to even notify the Claimants or the Resorts of the 2016 Order.[707]

469. Further, the Claimants contend that they were never given any assessment of their investments or any compensation, both required by Article 6.4 of the FIL.[708]

d. Compensation

470. The Claimants submit that Article 6.2 of the BIT, Article 6.2 of the FIL and the general principles of international law all require a lawful expropriation to be made with prompt, adequate and effective compensation.[709]

471. Article 6.2 of the BIT requires that compensation "shall correspond to the market value of the taken investments, determined as of the date of the seizure or as of the date when the decision to seize was made public (whichever occurs first)." Article 6.2 of the FIL requires that compensation "shall be equivalent to the objective market value of the expropriated investment [. . .] expropriated on the date of the decision on expropriation. Objective

[704] Cl. Mem., ¶ 162; Exh. C-0025.
[705] Cl. Mem., ¶¶ 163-164; Exh. CL-0107; Exh. CL-0109; Exh. CL-0194.
[706] Cl. Mem., ¶ 165; Exh. CL-0232.
[707] Cl. Mem., ¶ 166; Exh. Usmanov, ¶ 25; Kariev, ¶ 6; Yuldashev II, ¶ 8; Elmurodov II, ¶¶ 10, 12.
[708] Cl. Mem., ¶ 167; Exh. C-0025.
[709] Cl. Mem., ¶ 169; Exh. C-0001; Exh. C-0025; Exh. CL-0191.

market value should not reflect any change in value due to the awareness of the expropriation in the past."[710]

472. The Claimants note that with this language, the BIT and the FIL require that compensation for expropriation must be based on a value that does not consider the effects of the expropriatory conduct.[711]

473. The Claimants assert that, in the present case, the Respondent failed to provide, or offer, any compensation to the Claimants for the expropriation of the Resorts. Accordingly, the expropriation violates the BIT and the FIL.[712]

e. The Respondent Is Barred Under International Law Principles of Estoppel, Acquiescence, And Fairness From Denying The Claimants' Property Rights In Their Four Resorts

474. The Claimants contend that through their respective registered branch or subsidiary in the Kyrgyz Republic, each Claimant held the right to use the land plot and an ownership right in the buildings and structures comprising their respective Resorts. These rights were "valid" under Kyrgyz law.[713] But even if the Tribunal were to find that the Claimants did not hold properly registered rights in the land, buildings, and structures comprising their Resorts, which they did, the Claimants contend that they nonetheless acquired valid property rights in the buildings and structures comprising their respective Resorts, as well as rights to use the land plots on which their respective Resorts were located, under the doctrine of adverse possession, as codified under Article 265 of the Civil Code.[714]

475. Moreover, the Claimants submit that the principles of international law, including the doctrine of estoppel, bar the Respondent from asserting that the Claimants lack valid rights in their Resorts. As Professor Murphy observes, tribunals have applied principles of estoppel, acquiescence, or fairness in circumstances where a State has accepted and

[710] Cl. Mem., ¶ 169; Exh. CL-0191; Exh. C-0001; Exh. C-0025.

[711] Cl. Mem., ¶ 170; Exh. CL-0186; Exh. CL-0187; Exh. CL-0192; Exh. CL-0193; Exh. CL-0197.

[712] Cl. Mem., ¶ 174; Usmanov, ¶ 25; Kariev, ¶¶ 6-8; Yuldashev II, ¶¶ 6-10; Elmurodov II, ¶¶ 10-15.

[713] Cl. Rep., ¶ 353; Exh. C-0028; Exh. C-0020; Exh. C-0021; Exh. C-0049; Exh. C-0050; Exh. C-0067; Exh. C-0076; Exh. C-0281; Exh. CL-0302; Exh. CL-0304; Exh. C-0363 .

[714] Cl. Rep., ¶ 354.

affirmed the property rights of a foreign investor, and benefited from the exercise of those rights for years. The Claimants contend that having consistently acknowledged and benefited from the investment, the Respondent "cannot invoke certain types of arguments—such as a denial of the existence of lawful rights to an investment—before the tribunal."[715]

476. Accordingly, the Claimants argue that the Respondent's conduct over the years in affirming and reaffirming the Claimants' rights bars the Respondent under international law principles of estoppel, acquiescence, and fairness, from asserting that the Claimants had no "valid" rights in their Resorts.[716]

f. Creeping Expropriation

477. The Claimants also argue that Article 6.1 of the BIT's prohibition of measures with "equivalent effects" to expropriation and Article 6.1 of the FIL's prohibition of "equivalent measures" to expropriation demonstrate that these instruments prohibit "indirect expropriation," which includes "creeping" expropriation.[717] A "creeping" expropriation is one that occurs through a series of acts and/or omissions in the aggregate.[718]

478. According to the Claimants, in this case, in addition to directly expropriating the Claimants' investments on 4 April 2016 through the 2016 Order, the Respondent created a climate of hostility toward the Claimants and their investments over a period of several years, frustrating their operation and management of the Resorts, before ultimately seizing the Resorts.[719]

479. The Claimants contend that the above-mentioned actions and omissions, viewed collectively, deprived the Claimants of the use and enjoyment of their investments and interfered with the operation and management of their Resorts over several years, resulting

[715] Cl. Rep., ¶¶ 356-360; Murphy, ¶ 51; Exh. CL-0107; Exh. CL-0122; Exh. C-0009; Exh. C-0010; Exh. C-0028; Exh. C-0041l; Exh. C-0067; Exh. C-0135; Exh. C-0164; Exh. C-0184; Exh. C-0219; Exh. C-0257; Exh. C-0306; Exh. C-0363; Exh. C-0430.

[716] Cl. Rep., ¶ 360.

[717] Cl. Mem., ¶¶ 175-176; Exh. CL-0199; Exh. CL-0210; Exh. R-0080.

[718] Cl. Mem., ¶ 176; Exh. CL-0201.

[719] Cl. Mem., ¶ 184.

in a creeping expropriation.[720] The Claimants also assert that a creeping expropriation requires prompt, adequate and effective compensation under the BIT and the FIL, which the Respondent failed to provide.[721]

(2) The Respondent's Position

a. The Claimants' Direct Expropriation Claim Is Misguided

480. The Respondents argues that the Claimants' direct expropriation claim is overly simplistic and fails to consider the following four points:

- First, that a determination of whether an expropriation has occurred must be made examining the factual situation on a case-by-case basis.[722]

- Second, that a determination of whether an investor holds a right constitutive of an investment and capable of being expropriated must be carried out under the relevant domestic law.[723]

- Third, there is a consistent line of case law stipulating that there cannot be an expropriation of a right to which the investor never had a legitimate claim.[724]

- Fourth, while the Claimants devote pages of their pleadings on the well-settled four criteria of lawful expropriation, the Tribunal's expropriation analysis should end well before this given that the Claimants never had a legitimate claim over the right allegedly expropriated.[725]

481. Accordingly, the Respondent contends that:

[720] Cl. Mem., ¶ 185.

[721] Cl. Mem., ¶ 186; Exh. C-0001; Exh. C-0025.

[722] Re. Mem., ¶ 157; Exh. CL-0202; Exh. C-0203.

[723] Re. Mem., ¶ 158; Exh. RL-0155; Exh. RL-0156; Exh. RL-0157; Exh. RL-0158; Exh. RL-0159; Exh. CL-0231; Exh. CL-0234.

[724] Re. Mem., ¶¶ 159-160; Exh. RL-0080; Exh. RL-0156; Exh. RL-0160; Exh. RL-0161; Exh. RL-0162; Exh. RL-0163; Exh. RL-0164; Exh. RL-0165; Exh. RL-0166.

[725] Re. Mem., ¶ 161; Exh. RL-0167.

- With respect to Claimant TMP, it did not hold any valid rights on the 25 hectares of land for the Zolotiye Peski Resort, nor did it hold any rights to the facilities erected on that land. The Claimant was merely a lessor, under a short-term lease agreement, of a 2.7-hectare beachfront land plot, and the lease agreement was set to expire mere days after the 2016 Order, while the Claimant was already months late in requesting an extension of that lease. There was therefore no guarantee, or even an expectation that the lease would have been extended or renewed. In any event, the Claimant's temporary right to use the 2.7-hectare beachfront land plot under the lease agreement is not a property right and therefore cannot be – and was not – expropriated by the Respondent.[726]

- With respect to Claimant NBU, it did not hold any property either on the 14.65-hectare main land plot for the Rokhat-NBU Resort, or the 4.4-hectare beachfront land plot. Nor did it hold any rights to the facilities erected on that land. However, the Claimant did have a right of temporary use over the 14.65-hectare main land plot together with buildings and other structures situated on it. Further, the Claimant was a lessor, under a short-term lease agreement, of a 4.4-hectare beachfront land plot, and the lease agreement was set to expire mere days after the 2016 Order, while the Claimant was already months late in requesting an extension of that lease. There was therefore no guarantee, or even an expectation that the lease would have been extended or renewed. In any event, the Claimant's temporary right to use the two land plots under the lease agreement is not a property right and therefore cannot be – and was not – expropriated by the Respondent.[727]

- With respect to Claimant Asaka, it did not hold any direct property rights on the 27-hectare land plot for the Dilorom Resort, nor did it hold any property rights to the facilities erected on that land. However, the Claimant's subsidiary did have a right of temporary use over the 27-hectare land plot together with buildings and other structures situated on it. Yet, the temporary right of the Claimant's subsidiary to use that land plot

[726] Re. Mem., ¶ 162.1.
[727] Re. Mem., ¶ 162.2.

(and the facilities situated on it) is not a property right and therefore cannot be – and was not – expropriated by the Respondent. In any event, that right was assigned to the Claimant's subsidiary, not the Claimant.[728]

- Lastly, with respect to Claimant Uzpromstroybank, it did not hold any direct property rights on the 10.65-hectare land plot for the Buston Resort, nor did it hold any direct property rights on the facilities erected on the land. The Claimant's subsidiary was merely a lessor, under a lease agreement, of the 10.65-hectare land plot together with buildings and other structures situated on it. Yet, the temporary right of the Claimant's subsidiary to use that land plot (and the facilities situated on it) under the lease agreement is not a property right and therefore cannot be – and was not – expropriated by the Respondent. In any event, that right was assigned to the Claimant's subsidiary, not the Claimant.[729]

b. The Kyrgyz Republic Did Not Indirectly Expropriate The Claimants' Investments

482. The Respondent also maintains that the Claimants' investments were not indirectly expropriated by the Kyrgyz Republic since the Claimants failed to establish losses caused to their investments by acts attributable to the State that would result in permanent and substantial deprivation of their investments.[730]

(i) Legal Standard Of Indirect Expropriation

483. The Respondent submits that indirect or 'creeping' expropriation is characterized as a series of acts and/or omissions attributable to the host State that, in sum, result in a deprivation of property rights.[731] Accordingly, the Respondent argues that the starting point in the analysis of any expropriation claim is to determine whether the facts or events complained of constitute acts or omissions attributable to the host State, as well as whether they make part of a single chain of actions aimed at depriving the investor of its investment. Moreover, the Respondent contends that in the present case the Tribunal needs to consider

[728] Re. Mem., ¶ 162.3.
[729] Re. Mem., ¶ 162.4.
[730] Re. Mem., ¶ 125.5.
[731] Re. Mem., ¶ 169; Exh. RL-0170; Exh. RL-0080.

the indirect expropriation claim with regard to each individual Claimant separately, as, according to the Respondent, the Claimants have not provided any evidence that their alleged misfortunes were parts of the Respondent's unitary strategy to harm all of them indiscriminately.[732]

484. Furthermore, the Respondent argues that in order to determine whether the host State's measures amount to indirect expropriation under international law, tribunals frequently refer to the criteria summarized in *Burlington v. Ecuador*. According to these criteria, a State's actions constitute expropriation if (i) they deprive the investor of his investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine.[733]

1. The Measure Must Deprive The Investor Of His Investment

485. The Respondent maintains that it is widely accepted that in order to constitute an expropriation, a measure (or a combination thereof) must substantially deprive the investor of the title, possession or access to the benefit and economic use of his investment.[734] In other words, minor restrictions or inconveniences of administrative nature do not suffice for there to be an indirect expropriation. In this context, the Respondent submits that an economic activity that is rendered more difficult or less profitable, but not impossible, will not constitute indirect expropriation.[735]

486. Further, the Respondent asserts that in the assessment of the seriousness of the alleged deprivation, a decisive criterion is the loss of the economic value or economic viability of the investment. In addition, the Respondent argues that the standard of indirect expropriation also requires a cause-and-effect relationship between the substantial deprivation and the allegedly expropriatory measures of the host State,[736] which the Claimants have failed to demonstrate.

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[732] Re. Mem., ¶ 170.
[733] Re. Mem., ¶ 171; Exh. RL-0060.
[734] Re. Mem., ¶ 173; Exh. CL-0254; Exh. RL-0173; Exh. RL-0175; Exh. RL-0175.
[735] Re. Mem., ¶ 177.
[736] Re. Mem., ¶ 178; Exh. RL-0177; Exh. RL-0178; Exh. RL-0179.

2. The Deprivation Must Be Permanent

487. The Respondent also contends that for the alleged deprivation to amount to an indirect expropriation, it must be permanent. In this regard, the Respondent argues that this requirement has been consistently upheld by arbitral tribunals.[737] For instance, the Respondent relies on the holding of the tribunal in *LG&E v. Argentina* which states that the expropriation "cannot have a temporary nature."[738] Similarly, the Respondent also invokes the decision of the tribunal in *Busta v. Czech Republic* which has observed that "for an expropriation to occur [. . .] there must be a permanent and irreversible deprivation."[739]

3. The Deprivation Must Have No Justification Under The Police Powers Doctrine

488. The Respondent further argues that the police powers doctrine contemplates that a State is empowered to exercise its regulatory powers, and, even if such execution causes economic detriment to foreign investors, the State shall not be held liable to pay compensation.[740]

489. The Respondent asserts that this element of indirect expropriation requires a balance to be struck between the contradictory interests of the host State and the investor, only permitting what is proportionate in the circumstances. The Respondent argues that in determining the proportionality of a State's measure, arbitral tribunals frequently apply the test developed by the tribunal in *Tecmed v. Mexico*, namely (i) whether the deprivation of the investor's property is substantial; (ii) whether there is *prima facie* existence of public interest; and (iii) whether the measure complained of is necessary to achieve its aims, i.e., the state had no other option in achieving the public interest goals but to exercise the measure in question.[741]

[737] Re. Mem., ¶ 182; Exh. RL-0179; Exh. RL-0181; Exh. CL-0202.
[738] Re. Mem., ¶ 180; Exh. RL-0207.
[739] Re. Mem., ¶ 181; Exh. RL-0180.
[740] Re. Mem., ¶ 184; Exh. RL-0183.
[741] Re. Mem., ¶ 185; Exh. CL-0202.

490. The Respondent further maintains that according to the tribunal in *Investmart v. Czech Republic* the State's decisions taken in the course of execution of the regulatory powers must not be second-guessed by arbitral tribunals.[742]

(ii) In The Present Case, The Claimants Have Failed To Establish Indirect ('Creeping') Expropriation

491. Considering the above, the Respondent argues that none of the alleged (or even real) events invoked by the Claimants in their submissions can be characterized as elements of indirect expropriation, whether individually or collectively.[743]

4. Zolotiye Peski Resort

492. With respect to the Zolotiye Peski Resort, the Claimants argue that the following events cumulatively led to the indirect expropriation of TMP's investments:

- Losses allegedly caused by civil unrest during the 2005 'Tulip Revolution' and its aftermath;
- Losses allegedly caused by the civil unrest during the April 2010 revolution, its aftermath and the ethnic tensions between Kyrgyz and Uzbeks that allegedly took place in 2010; and
- Losses allegedly caused by criminal activity in a nearby Bosteri village and the alleged failure of the Republic's law enforcement agencies to address the complaints and reports submitted by the Resort's management.[744]

493. The Respondent asserts that these allegations must be rejected for the following reasons:

- First, the Claimants do not provide any evidence that the Resort had in fact suffered any losses in 2005 or 2010, that the alleged criminal activity in the nearby Bosteri village had actually taken place or that the Resort's representatives had actually submitted any complaints with the police with respect to any criminal incidents. The

[742] Re. Mem., ¶ 186; Exh. RL-0184.
[743] Re. Mem., ¶ 188.
[744] Re. Mem., ¶ 189; Cl. Mem., ¶ 184.

only support for the above allegations served by the Claimants is a self-serving testimony of Mr. Akbar Elmurodov, testifying 10 to 15 years after the events in question, stating generally and without any supporting evidence that "the Resort suffered a loss." This so-called 'testimony' is a hearsay at best and should be disregarded by the Tribunal.[745] Moreover, the fact that the Claimants submitted in this arbitration a number of carefully selected financial record documents pertaining to the Resort makes Mr. Elmurodov's allegation that all supporting documents had been left behind at the Resort very convenient and simply implausible.[746]

- Second, even if the alleged losses had actually occurred, the Claimants have failed to demonstrate that they had been caused by either the 2005 revolution, the 2010 revolution or the alleged criminal activity. In this context, it suffices to point out that the events surrounding the 2005 revolution had ended months before the opening of the tourist season, were centered in the Kyrgyz capital city of Bishkek and had lasted for less than three weeks. The events of the 2010 revolution, similarly, mostly concerned Bishkek and lasted for a little more than a week. Moreover, the Claimants have also failed to provide evidence that the hostilities at the Kyrgyz-Uzbek border had any impact on the Resorts' operations. Here again, the border clashes had lasted for five days, 400 km away from the Resort.[747]

- Third, even assuming that Zolotiye Peski's alleged losses were indeed caused by the events alleged by the Claimants, the Claimants have failed to explain how any of these events could be attributed to the Kyrgyz Republic and considered as a violation by the Republic of its international obligations. It is well-established under international law, as observed by the tribunal in *Oztas Construction v. Libya*, that the host State is not responsible for the mere fact that a rebellion, riot, civil unrest, revolution, or even civil war was taking place on its territory and that such events are causing damage to foreign investors.[748] Moreover, the disturbances of which the Claimants complain, impacted

[745] Re. Mem., ¶ 191; Elmurodov II, ¶¶ 7-8.
[746] Re. Mem., ¶ 192; Elmurodov II, ¶ 7.
[747] Re. Mem., ¶¶ 193-194; Exh. R-0109; Exh. R-0110; Exh. R-0111.
[748] Re. Mem., ¶ 195; Exh. RL-0185; Exh. RL-0186; Exh. RL-0187

all business and investments in the country, be it local or foreign, indiscriminately and cannot be regarded as the Republic's violation of its obligations towards the Claimants specifically. Furthermore, with respect to the alleged losses due to unparticularized "criminal activity," the Claimants have failed to show a single instance where the Kyrgyz law enforcement would have failed to react to a criminal incident with respect to the Zolotiye Peski Resort.[749]

- Finally, and at any rate, the Claimants have failed to demonstrate that any of the events they complain about with respect to the Zolotiye Peski Resort satisfy the criteria of a creeping expropriation set by the *Burlington* tribunal. Accordingly, the Respondent asserts that the Claimants' creeping expropriation claim with regard to the Zolotiye Peski Resort must be dismissed.[750]

5. Rokhat-NBU Resort

494. With respect to Rokhat-NBU Resort, the Claimants argue that the following events had cumulatively led to the indirect expropriation of NBU's investments:

- Losses allegedly caused by the civil unrest during the 2005 'Tulip Revolution' and its aftermath;

- Losses allegedly caused by the civil unrest during the April 2010 revolution, its aftermath and the ethnic tensions between Kyrgyz and Uzbeks in summer of 2010;

- The assassination of Rokhat-NBU's Uzbek director Mr. Bakhrul Burkhanov in 2004, which had allegedly occurred because of the Resort's refusal to pay bribes to local 'mafia', and which allegedly had not been properly investigated by the Kyrgyz authorities; and

- The Kyrgyz Supreme Court's decision of 4 April 2016 ordering Rokhat-NBU to pay KGS 15.4 million to the Vostokelektro electricity company on the basis of the allegedly

[749] Re. Mem., ¶¶ 196-198.
[750] Re. Mem., ¶¶ 199.

"baseless" claim stemming from an unpaid invoice for the consumption of electricity.[751]

495. The Respondent submits that none of the above allegations reveal any violation on behalf of the Kyrgyz Republic, let alone expropriation:

- First, with regard to losses allegedly caused by the 2005 and 2010 revolutions, here again, the Claimants have not offered any evidence that Rokhat-NBU's alleged losses had anything to do with either the 2005 or the 2010 Revolution, or that any of those losses could be attributable to the Republic's actions. Moreover, the Claimants' case is also based almost exclusively on a self-serving witness testimony of Mr. Shuhrat Yuldashev – a person who had not spent a single day working at the Resort in any capacity whatsoever – and the Claimants' pretenses of not having access to Rokhat-NBU's documents are similarly implausible.[752]

- Second, the Claimants misrepresent the circumstances surrounding the death of Rokhat-NBU's former director Mr. Bakhul Burkhanov. One would expect such serious allegations to be supported by at least some sort of contemporaneous evidence. Yet, here again, the Claimants' only proof of their account is a one-paragraph testimony of Mr. Kabul Karimov, who had not only never worked at the Rokhat-NBU Resort but had actually left NBU itself as early as in 2002, two years prior to the murder of Mr. Burkhanov.[753]

  What had actually happened is that on the day of Mr. Burkhanov's death on 17 February 2004, the investigators of the Issyk-Kul District of Internal Affairs launched a thorough criminal investigation into his murder, which was suspended on 30 June 2004, as the time limit for investigation under Kyrgyz law had expired and the suspects had not been identified. Importantly, the Main Directorate for Criminal Investigation of the Kyrgyz Ministry of Interior was specifically

[751] Re. Mem., ¶ 200; Cl. Mem., ¶ 184.
[752] Re. Mem., ¶ 202; Yuldashev I, ¶¶ 1-2; Yuldashev II, ¶ 5.
[753] Re. Mem., ¶¶ 203-204; Karimov, ¶¶ 1, 13.

instructed to resume the investigation if new material facts allowing for the investigation to continue were revealed.[754]

- Third, the Claimants' story regarding Rokhat-NBU's KGS 15.4 million debt towards the Vostokelektro electricity supplier fares no better. The debt in question was invoiced by Vostokelektro for electricity consumed by Rokhat-NBU via unauthorized connection to Vostokelektro's power lines (the "**Vostokelektro Invoice**"). Once Rokhat-NBU failed to voluntarily settle the invoice, Vostokelektro filed a claim with the inter-district court of the Issyk-Kul region.[755]

  Rokhat-NBU had its day in court – multiple days over three years, in fact. On 19 December 2012, Rokhat-NBU was ordered to pay the Vostokelektro Invoice by a decision of the inter-district court of the Issyk-Kul region, which, on 15 September 2014, was upheld by a resolution of the Supreme Court of the Kyrgyz Republic.[756] Thereafter, Rokhat-NBU decided to initiate a separate set of proceedings aimed at invalidation of the Vostokelektro Invoice. It had success at the first two instances, but ultimately lost to a resolution of the Kyrgyz Supreme Court dated 4 April 2016.[757]

- Finally, with respect to the Rokhat-NBU Resort, the Claimants have failed to demonstrate that the factual circumstances complained of today satisfy the criteria set by the *Burlington* tribunal to establish a creeping expropriation.[758]

6. Resort Dilorom

496. With respect to the Resort Dilorom, the Claimants allege that the following events had cumulatively led to indirect expropriation of Claimant Asaka Bank's investments:

[754] Re. Mem., ¶ 205; Exh. R-0114; Exh. R-0115; Exh. R-0116; Exh. R-0117; Exh. R-0118; Exh. R-0119; Exh. R-0120; Exh. R-0121; Exh. R-0122; Exh. R-0123; Exh. R-0124; Exh. R-0125; Exh. R-0126.

[755] Re. Mem., ¶ 211; Exh. C-0426; Exh. C-0427l Exh. C-0431.

[756] Re. Mem., ¶ 212; Cl. Mem., ¶ 69; Exh. C-0432; Exh. C-0439.

[757] Re. Mem., ¶ 213; Exh. C-0446.

[758] Re. Mem., ¶ 216.

- Losses allegedly caused by the civil unrest during the 2005 'Tulip Revolution' and its aftermath;

- Losses allegedly caused by the civil unrest during the April 2010 revolution, its aftermath and the ethnic tensions between Kyrgyz and Uzbeks in summer of 2010;

- Alleged failure of the Kyrgyz Republic to conduct a police investigation into the theft of approx. USD 52,000 from the Resort's premises in 2004; and

- Alleged failure of the Kyrgyz Republic's authorities to address racketeering from the local criminal groups in 2010-2011.[759]

497. The Respondent asserts that none of the above allegations can succeed for the reasons set forth below:

- First, with regard to losses allegedly caused by the 2005 and 2010 revolutions, as well as tensions at the Kyrgyz-Uzbek border in 2010, the Claimants have, again, not offered any evidence that Dilorom's alleged losses had anything to do with said events, or that any of those losses could be attributable to the Republic's actions or inactions. Further, the Claimants' case is based upon uncorroborated testimony of their witnesses.[760]

- Second, the Claimants' allegations that Kyrgyz authorities had failed to investigate the theft of cash from Dilorom's premises in 2004 are simply false, as demonstrated by the Claimants' own exhibits on the record of this arbitration. Moreover, as reported in a 27 October 2004 letter to Asaka Bank by the Directorate of the National Security Service of the Kyrgyz Republic for the Issyk-Kul Region, a five-member strong investigation team had been assigned on the case led by the Deputy Head of the Issyk-Kul District Department of Internal Affairs. Despite their efforts, the investigators had not achieved the desired result, and no suspects had been apprehended. This, however, does mean

[759] Re. Mem., ¶ 217; Cl. Mem., ¶ 184; Exh. C-0213.
[760] Re. Mem., ¶ 219.

that the Claimants' requests for the authorities to investigate the theft went unanswered.[761]

- Third, the Claimants' complaints regarding the alleged racketeering of the Dilorom Resort by local 'mafia' in 2010 and 2011 are unsubstantiated and are not supported by any contemporaneous evidence. The only proof of the alleged 'mafia' harassment is a one paragraph testimony of Mr. Saidumarhon Mamatov, who claims that "local mafia [. . .] frequently demanded to stay in our cottages without payment [and that] local police were unable to help." Conveniently, Mr. Mamatov claims that the Resort's staff only "orally" reported the incidents to the local police and did not file any written reports "due to fear of the mafia learning of our complaints."[762]

- At any rate, the Claimants have failed to establish that any of the factual allegations regarding the Dilorom Resort satisfy the *Burlington* criteria to amount to a creeping expropriation. Accordingly, the Respondent contends that the Claimants' corresponding claim must be rejected.[763]

7. Resort Buston

498. The Respondent argues that the Claimants' indirect expropriation claim with respect to the Resort Buston hinges upon a single factual allegation, namely the allegedly "unlawful[], arbitrar[y], and without due process" taking of Uzpromstroybank's rights in the Buston Resort in favor of the local self-governance body The Kunchygysh self-governing authority of the Tonski district by virtue of the 23 January 2007 Decision.[764]

499. According to the Respondent, as of 2007 the land and real estate objects that had comprised the Buston Resort had remained in legal 'limbo.' The Respondent asserts that while the actual user of the land had been the legal entity Resort Buston LLC established by Uzpromstroybank in 2004, the only then available documents affirming any rights *in rem* over the Buston Resort land and real estate were: (i) the State Certificate No. 000231 dated

[761] Re. Mem., ¶¶ 220-221; Cl. Mem., ¶ 184; Exh. C-0213; Exh. C-0215; Exh. C-0222.
[762] Re. Mem., ¶ 222; Mamatov, ¶ 6.
[763] Re. Mem., ¶ 223.
[764] Re. Mem., ¶ 224; Cl. Mem., ¶ 184; Exh. C-0230.

15 June 1981; and (ii) the Resolution of the Executive Committee of Tonski district Council of people's deputies No. 21 dated 24 January 1984, which had jointly granted rights of permanent use over 10.65 hectares of land to Tashselmash – the original user of the land.[765]

500. The Respondent argues that this situation was manifestly illegal for multiple independent reasons:

- First, pursuant to the 1991 Land Code and Article 9 of the Law of the Kyrgyz Republic, rights that had been granted to Tashselmash during the Soviet period had become invalid as a matter of Kyrgyz law as of mid-1996 given that it is undisputed that Tashselmash has not undertaken any action towards re-registration of its rights over the Buston Resort land plot.[766]

- Second, even assuming that Tashselmash's right of perpetual use over the Buston Resort land plot had been properly re-registered in accordance with the 1991 Land Code, with the enactment of the 1999 Land Code, Tashselmash had to bring its rights over the Buston Resort land plot in conformity with the law and to re-register them as a right of temporary use before 1 January 2000. Clearly, Tashselmash had not done this, so its alleged right had expired on 1 January 2000.[767]

- Third, and finally, with regard to the purported transfer by Tashselmash of its supposed rights over the Buston Resort to Uzpromstroybank in 2003 and then to the newly established legal entity Resort Buston LLC in 2004, such transfers had not had any legal effects under Kyrgyz law since neither of these two transfers were followed by a proper re-registration of Tashselmash's purported rights over the Buston Resort land plot with the Kyrgyz State organs as required under Articles 9(2) and 37(1) of the 1999 Land Code.[768]

[765] Re. Mem., ¶ 224; Exh. CL-0176; Exh. C-0230; Exh. C-0315.
[766] Re. Mem., ¶ 225.1; Exh. RL-0107; Exh. RL–0108.
[767] Re. Mem., ¶ 225.2; Exh. RL-0112.
[768] Re. Mem., ¶ 225.3; Exh. C-0205; Exh. C-0207.

501. The Respondent maintains that in light of the above situation, the Kunchygysh self-governing authority filed a claim against the Tonski district department of land utilization and registration of rights over immovable property, seeking to withdraw the Buston Resort land plot from the use of Tashselmash and to register full property rights over the Buston Resort land plot to The Kunchygysh self-governing authority. The Respondent further submits that through the 23 January 2007 Decision, the Inter-District Court of the Issyk-Kul Region granted the claim holding, in particular, that in accordance with Articles 5(3) and 7(3) of the 1999 Land Code, foreign residents could not have had right of perpetual use over land in the Kyrgyz Republic. The court, accordingly, ordered to withdraw the Buston Resort land plot from the use of Tashselmash and to register full property rights with The Kunchygysh self-governing authority.[769]

502. The Respondent adds that the legal entity Resort Buston LLC and Uzpromstroybank sought to appeal the 23 January 2007 Decision, first before the Issyk-Kul Regional Court and then before the Supreme Court of the Kyrgyz Republic, raising similar arguments to those the Claimants are raising today in this arbitration.[770] Those arguments were dismissed by Kyrgyz courts which held in particular that:

> The Kyrgyz Republic did not recognize the ownership right of member states of the [1992 Multilateral Property Rights Agreement] over objects of social infrastructure located on its territory, and signed the present agreement with condition stating "except for Article 4". Later [on] January 12, 1994 Zhokoru Kenesh of the Kyrgyz Republic issued its Resolution and ratified the present Agreement.
>
> The [1994 Kyrgyz-Uzbek Property Rights Protocol] and the [1995 Kyrgyz-Uzbek Protocol] at present are not ratified.[771]

503. The courts had also held that Tashselmash's rights over the Buston Resort land plot had expired on 1 January 2000 at the latest, that Resort Buston LLC had not provided any

[769] Re. Mem., ¶ 226; Exh. C-0230

[770] Re. Mem., ¶ 227; Exh. C-0231.

[771] Re. Mem., ¶ 227; Exh. C-0236; Exh. C-0351; Exh. C-0261.

documents establishing that it had any rights *in rem* over the Buston Resort land plot, and that Resort Buston LLC was not a proper successor to Tashselmash under Kyrgyz law.[772]

504. The Claimants raise a number of alleged due process and corruption issues with respect to the 23 January 2007 Decision, which are addressed by the Respondent in turn below:

- First, the Claimants argue that "neither Resort Buston nor Uzpromstroybank was notified of the claim or invited to participate in the Court hearing." The Respondent asserts that this argument is misleading since neither Resort Buston LLC, nor Uzpromstroybank were supposed to be notified, as they were not the parties to the proceedings. Nor were they registered as having had any rights over the land plot in question. The last known user had been Tashselmash, which had been duly notified of the proceedings.[773]

- Second, the Claimants argue that the Inter-District court "did not grant any compensation to Resort Buston for the loss of its property rights" but fail to explain just on what basis such compensation would have been due. According to the Respondent, as of 2007 Resort Buston LLC had occupied the land illegally, therefore, it did not lose any rights by virtue of the 23 January 2007 Decision and was not entitled to any compensation.[774]

- Third, the Claimants argue that Brick Production LLC – the legal entity to which The Kunchygysh self-governing authority leased the Buston Resort land plot after the 23 January 2007 Decision – had "ties to the family of then Kyrgyz President Kurmanbek Bakiev," apparently alluding to some corruption angle to the dispute. The Respondent contends that the Claimants' only proof of this allegation is Uzpromstroybank's own letter to the Uzbek Ministry of Foreign affairs from 4 years later. Thus, the Respondent argues that this meagre conspiracy theory fails.[775]

[772] Re. Mem., ¶ 228; Exh. C-0236; Exh. C-0351.
[773] Re. Mem., ¶ 229.1; Cl. Mem., ¶ 98; Exh. C-0230.
[774] Re. Mem., ¶ 229.2; Cl. Mem., ¶ 97.
[775] Re. Mem., ¶ 229.3; Cl. Mem., ¶¶ 99, 184; Exh. C-0261.

- Fourth, and finally, in a further conspiracy twist, the Claimants argue that Judge Darkinbayev, who had rendered the 23 January 2007 Decision, would have had personal interest in the outcome of the case. This time, the only evidence presented by the Claimants is a letter from the Uzbek Ministry of Foreign Affairs to the Kyrgyz Republic's embassy in Uzbekistan. The Respondent asserts that such barebones allegations cannot be accepted as evidence, not least because Judge Darkimbayev's decision was subsequently upheld by two superior court instances.[776]

505. In sum, the Respondent submits that the Claimants have failed to establish any violation with respect to the Buston Resort, let alone an indirect expropriation.[777]

(3) The Tribunal's Analysis

506. Before analyzing whether the Respondent expropriated the Claimants' investments, the Tribunal must determine whether the Claimants held any rights in the Resorts under Kyrgyz law as of 4 April 2016 (*i.e.*, the date of the 2016 Order).[778]

507. As the Respondent rightly notes, during the Soviet period, land was in the exclusive property of the State and could be provided for use on the basis of a resolution of the Council of Ministers of the Kyrgyz SSR or a decision of the executive committee of the relevant Council of Deputies of workers. Further, a right of use over a land plot had to be certified by an appropriate State certificate.[779]

508. The record clearly shows that during the Soviet period entities of the Uzbek SSR constructed four Resorts – Resort Zolotiye Peski, Resort Dilorom, Resort Rokhat-NBU, and Resort Buston – in land plots allocated to them by the Kyrgyz SSR for permanent use. Moreover, the property rights of the Uzbek entities in the Resorts were each duly registered

[776] Re. Mem., ¶ 229.4; Cl. Mem., ¶ 99; Exh. C-0231; Exh. C-0232; Exh. C-0236; Exh. C-0237; Exh. C-0239; Exh. C-0351; Exh. C-0399.

[777] Re. Mem., ¶ 230.

[778] Exh. RL-0155; Exh. RL-0156; Exh. RL-0157; Exh. RL-0158; Exh. RL-0159; Exh. RL-0160; Exh. RL-0161; Exh. RL-0162; Exh. RL-0163; Exh. RL-0164; Exh. RL-0165; Exh. RL-0166.

[779] Re. Mem., ¶ 46.1.

and certified by the Kyrgyz SSR.[780] Accordingly, the Tribunal finds that during the Soviet period, entities of the Uzbek SSR had rights of use over all of the Resorts that are at issue in this case.

509. At issue, however, is whether following the dissolution of the Soviet Union, the Uzbek entities preserved their rights in the Resorts through a series of multilateral and bilateral agreements between the Kyrgyz Republic and the Republic of Uzbekistan; namely, the 1992 Agreement, the 1994 Protocol, and the 1995 Protocol.[781]

510. According to the Respondent, the 1992 Agreement did not preserve the rights of the Uzbek entities in the Resorts because it is a *pactum de contrahendo* (*i.e.*, an agreement to agree).[782] In this regard, the Tribunal disagrees with the Respondent given that the 1992 Agreement, as the Claimants correctly point out, is a legally binding instrument whose text unambiguously imposed binding obligations on the parties.[783] In the Tribunal's view, the 1992 Agreement is not merely a *pactum de contrahendo* or an agreement to agree, but instead a binding international agreement that imposed legal obligations on the parties thereto.

511. Thus, under Article 4 of the 1992 Agreement, the Contracting Parties agreed as follows:

> The Parties mutually recognize that located on their territory facilities (or corresponding shares of participants) of the social sphere – sanatoriums, sanatorium-dispensaries, health and recreation centers, vacation resorts, hotels and camping sites, tourist facilities, children's healthcare institutions, construction of which was carried out from the funds of the Republican budgets of other Parties, as well as the funds of the enterprises and organizations of the Republican and former Soviet Union's subordination, located on the territory of the other Parties, are the property of these Parties or their legal entities and individuals.[784]

[780] Exh. C-0028; Exh. C-0029; Exh. C-0030; Exh. C-0031; Exh. C-0351; Exh. C-0352; Exh. C-0357; Exh. C-0361; Exh. C-0363; Exh. C-0365; Exh. C-0370; Exh. CL-0166; Exh. CL-0167; Exh. CL-0168; Exh. CL-0175; Exh. CL-0184.

[781] Exh. C-0002; Exh. C-0003; Exh. C-0004.

[782] Re. Mem., ¶¶ 40-42, 125, 130-131.

[783] Cl. Rep., ¶ 33; Exh. C-0002.

[784] Exh. C-0002.

512. In other words, the parties to the 1992 Agreement recognized that facilities of the social sphere, including specifically facilities such as the Resorts at issue in the present dispute, whose construction had been funded by entities of one party in the territory of another party, remained the property of the legal entity which funded the construction.[785] The specificity of this obligation, and the language used to impose it (*i.e.*, language of "recognition" of "property") is in the Tribunal's view inconsistent with the Respondent's contention that the 1992 Agreement is merely a *pactum de contrahendo*. Rather, it was a valid and binding international agreement that imposed, at least in Article 4, binding obligations. That is confirmed by the absence of any language in the 1992 Agreement that would indicate that it was intended to be only an agreement to agree (although such language is readily and routinely used in state practice).

513. The Tribunal recognizes that the 1992 Agreement could have been (and was) implemented in greater detail and with greater specificity through further international agreements and otherwise (as discussed below). That does not alter the Tribunal's conclusion, however, that even standing alone the 1992 Agreement was intended by the parties to have binding legal effects directly applicable in the parties' respective legal systems. The fact that further implementation might have been envisioned or would have been desirable does not affect the status of the 1992 Agreement itself; a treaty can have immediate, direct effects even if further steps are also intended (and taken).

514. As detailed above, the Resorts were constructed by entities of the Uzbek SSR in the territory of the Kyrgyz SSR. Hence, in the Tribunal's view, pursuant to Article 4 of the 1992 Agreement, the Uzbek entities preserved their property rights in the Resorts following the dissolution of the Soviet Union.

515. Notwithstanding the above, the Respondent contends that, in any case, the Uzbek entities did not preserve their property rights in the Resorts because it made a valid reservation to Article 4 of the 1992 Agreement when signing, ratifying and depositing the relevant Instrument of Ratification with the Depository.[786] In this respect, the Tribunal considers

[785] Exh. C-0002; Exh. CL-0320.

[786] Re. Mem., ¶¶ 132-143.

that the Respondent is wrong because the reservation in question is invalid under Article 19(c) of the VCLT.

516. Article 19(c) of the VCLT states that "[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty."[787]

517. The title of the 1992 Agreement reads, "AGREEMENT ON MUTUAL RECOGNITION OF RIGHTS AND REGULATION OF THE PROPERTY RELATIONS."[788] Further, the Preamble reads:

> States – participants of the present Agreement, hereafter referred to as Parties, recognizing the necessity of creation of the legal norms, preventing the mutual claims and guaranteeing the protection of the property rights of the Parties, their citizens and legal entities, confirming the necessity of the regulation of the property rights as a basis for establishing of the comprehensive inter-state relations, for the purposes of creation of the conditions for efficient development of the production and preserving the unified technological complexes, have agreed on the following [. . .][789]

518. When considering the 1992 Agreement as a whole, including the title and Preamble, the Tribunal considers that the "object and purpose" of the 1992 Agreement was to mutually recognize the rights and regulation of property relations between the parties, including, specifically, when relevant facilities of one State or its enterprises were located on the territory of another State.[790] As this was the very subject of Article 4 of the 1992 Agreement, the Tribunal finds that the Respondent's reservation to that provision violated Article 19(c) of the VCLT and is therefore invalid.

519. In light of the aforementioned, the Tribunal finds that following the dissolution of the Soviet Union, the Uzbek entities preserved their property rights in the Resorts through the 1992 Agreement. Moreover, the Tribunal is convinced that the 1992 Agreement, on its

[787] Exh. RL-0002.
[788] Exh. C-0002.
[789] Exh. C-0002.
[790] Exh. C-0002.

own, sufficed to preserve such rights. In other words, its conclusion would remain unchanged regardless of whether the 1994 and 1995 Protocols affirmed or maintained the rights of the Uzbek entities in the Resorts.

520. Given its conclusions regarding the 1992 Agreement, the Tribunal would not need to address the legal effect of the subsequent bilateral agreements (i.e., the 1994 and 1995 Protocols). Nonetheless, for the sake of completeness, the Tribunal also concludes that these agreements had similar consequences to the 1992 Agreement, confirming on a bilateral basis the status of the Resorts.

521. The 1994 Protocol gave bilateral effect to the 1992 Agreement between the Republic of Uzbekistan and the Kyrgyz Republic. That implementation further confirmed the binding force of Article 4 of the 1992 Agreement (and, for the reasons noted above, was not inconsistent with the 1992 Agreement's own binding force).

522. The 1995 Protocol gives further and mores specific effect to the 1992 Agreement and the 1994 Protocol. It makes specific reference to the preservation of the right of ownership of Uzbekistan parties in the four resorts, which are specifically identified (and further provided a priority right of hiring of service personnel from among local residents).[791] Again, as with the 1992 Agreement and the 1994 Protocol, the 1995 Protocol makes clear that the Claimants' investments retained their status in Kyrgyz territory, under Kyrgyz law.

523. The Tribunal is unconvinced by the Respondent's argument that the 1995 Protocol was not intended as an international agreement. On the contrary, the 1995 Protocol, considered in the context of the 1992 Agreement and the 1994 Protocol, was very much in the form and of the terms that a binding agreement further implementing those earlier agreements would take. The Tribunal is satisfied that, like the 1992 Agreement and the 1994 Protocol, the 1995 Protocol was intended to be binding and valid and to have immediate effects in the Kyrgyz Republic's legal system, preserving the Uzbek entities' rights in the Resorts.

[791] Cl. Rep., ¶ 25; Exh. C-0004.

524. Having determined that the Uzbek entities preserved their rights in the Resorts following the dissolution of the Soviet Union, the Tribunal must examine whether these rights remained valid following land reforms instituted by the Kyrgyz Government in the 1990s.

525. According to the Respondent, the Uzbek entities lost their rights in the Resorts because they failed to re-register them in accordance with Kyrgyz law.[792] Specifically, pursuant to:

- Article 4 of Resolution No. 429-XII;
- Article 9 of the Law on Land Reform;
- Articles 7(2), 24(2), and 25(1) of the 1996 Civil Code;
- Article 53 of the 1998 Law on State Registration;
- Article 9(2) of the 1999 Land Code; and
- Article 7(2) of the Law on the Enactment of the Land Code.

The Tribunal, however, disagrees with the Respondent's contention, finding it to be inconsistent with Kyrgyz law. In particular, the Tribunal finds that the provisions the Respondent relies on do not explicitly or implicitly invalidate pre-existing rights of use that were not re-registered within a certain timeframe. Further, some of these provisions were limited in scope and therefore had no effect over the rights of the Uzbek entities in the Resorts. The Tribunal addresses each of these provisions in turn below.

526. Article 4 of Resolution No. 429-XII provides that "legal entities, temporarily using land plots provided to them by agricultural enterprises before June 1, 1991, retain their rights until the re-registration of their rights to land possession or land use."[793] The Tribunal agrees with the Claimants that nothing in this provision implies that the rights of the Uzbek entities in the Resorts would be invalidated if not re-registered; rather, the provision explicitly states that such rights are "retained."[794] Further, the Tribunal concurs with the

[792] Re. Mem., ¶¶ 47-50.
[793] Exh. RL-0107.
[794] Cl. Rep., ¶ 93.

Claimants that, as Article 4 reflects, the scope of Resolution No. 429-XII is limited to land plots provided by "agricultural enterprises" for "temporary use."[795] As mentioned above, the rights of the Uzbek entities in the Resorts were granted by the Kyrgyz SSR for permanent use. Accordingly, the rights of the Uzbek entities in the Resorts were not invalidated under Article 4 of Resolution No. 429-XII.

527. Article 9 of the Law on Land Reform reads as follows:

> Re-issuance and issuance to legal entities of State acts for the right to possess (permanently use) land and certificates of the right of temporary use of land are issued to legal entities by local [Councils] of people's deputies and the land use planning service at the expense of the State budget . . . [T]he previously established right to the respective land plot shall be retained for a period of five years from the beginning of the land reform . . . Upon expiration of this period, the right to a land plot shall be lost.[796]

The land reform began in 1998; hence, the right of the Uzbek entities in the Resorts would have been retained until 2003. Nonetheless, as the Claimants correctly point out, the Law on Land Reform, including Article 9, became invalid after the enactment of the 1999 Land Code.[797] The Tribunal, therefore, finds that the rights of the Uzbek entities in the Resorts were not invalidated pursuant to Article 9 of the Law on Land Reform.

528. Second, even if one took a different view of when the "land reform" began for purposes of Article 9's reference to "a period of five years from the *beginning of the land reform*" the Tribunal would reach no different result. In the Tribunal's view, one must look to the international agreements discussed above (i.e., the 1992 Agreement, the 1994 Protocol and the 1995 Protocol) in determining what "the land reform" was for purposes of the Resorts.

529. Those agreements, which were concluded *after* the 1991 Law was enacted, established a specific regime for the four resorts, different from whatever the generally-applicable "land reform" might be for other properties. That is obviously the effect and intention of those international agreements (even if they were not directly applicable), and it would make a

[795] Cl. Rep., ¶ 94.
[796] Exh. RL-0108.
[797] Cl. Rep., ¶ 95; Exh. CL-0304.

nonsense of the agreements to interpret the 1991 Law as invalidating rights recognized specifically under the agreements (with the five-year period supposedly expiring five years later in 1996) only very shortly after the Protocol recognizing those rights had been concluded (in 1995). If the "land reform" for the resorts began in 1995, then the five-year period would not have concluded until 2000 – by which time the 1999 Law on Enactment of the Land Code would have repealed the 1991 Law (and in particular Article 9 thereof). In those circumstances, it is irrelevant whether or not the 1999 Law had retroactive effect: Article 9 was repealed before its five-year forfeiture provision took effect.

530. The Tribunal is also unpersuaded that Article 9 of the 1991 Land Reform Law operated to deprive TMP of its conceded ownership of the Zolotiye Peski Resort. It is clear that the 1999 Law on Enactment of the Land Code repealed the Article 9 of the 1991 Law. The Respondent argues that the 1999 Law's repeal was not "retroactive," thereby assertedly justifying a conclusion that TMP's rights to the Zolotiye Peski Resort expired in 1996, because those rights were not registered locally pursuant to the 1991 Law within Article 9's five-year period.

531. In the Tribunal's view, the issue is not whether Article 9 of the 1991 Law was "retroactively" invalidated, but instead what the effect of the 1999 Land Code was on property rights that had not been registered. On that, the Tribunal sees nothing in the 1999 Land Code or otherwise that leads to, much less requires, a conclusion that those rights did not benefit from the Land Code's prospective provisions. In particular, Article 7(2) of the 1999 Land Code provides that "[i]f the time period of the use was not specified when granting the land plots, the right to use the land plots shall be deemed to have been granted until 1 January 2000."[798] There is nothing that suggests that, even apart from the international agreements applicable to the Resorts, this provision does not apply to properties that had the status of the Zolotiye Peski Resort.

532. In the Tribunal's view, the decisive point is that the 1999 Land Code repealed prior legislation, including Article 9 of the 1991 Law (when it need not have), and prescribed a

[798] Re. Mem., ¶ 50.3.

comprehensive new legislative regime governing property. Under that regime, which is applicable today, TMP enjoyed long-term rights to the Zolotiye Peski Resort.

533. Similarly, the Tribunal finds that the rights of the Uzbek entities in the Resorts were not invalidated under Articles 7(2), 24(2), and 25(1) of the 1996 Civil Code. Article 4 of the Law on the Enactment of the Civil Code limits the application of the 1996 Civil Code "to civil legal relations that have arisen after its entry into force, that is, from June 1, 1996."[799] As already discussed, the rights of the Uzbek entities in the Resorts arose prior to 1 June 1996; therefore, the Tribunal finds that their rights were not lost pursuant to the 1996 Civil Code.

534. Article 53 of the 1998 Law on State Registration provides that:

> Rights to the immovable property that existed prior to the opening of the local registration authority in the registration zone remain valid and shall be re-registered during the systemic registration.[800]

The Tribunal agrees with the Claimants that the text of Article 53 does not provide for the invalidation of rights that have not been re-registered; rather, the text explicitly reaffirms the validity of those rights.[801] The Tribunal, accordingly, finds that Article 53 of the 1998 Law on State Registration did not invalidate the rights of the Uzbek entities in the Resorts.

535. Likewise, Article 9(2) of the 1999 Land Code does not invalidate the rights of the Uzbek entities in the Resorts. Article 9(2) provides that "the following shall be subject to state registration in the unified state register: the emergence of rights to a land plot, their transfer, conveyance, restrictions, servitude, mortgage and their termination."[802] Article 9(2), however, as the Claimants rightly note, does not explicitly state that pre-existing rights in a land plot cease to exist if such rights are not re-registered in the unified state register.[803]

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[799] Exh. C-0318.
[800] Cl. Rep., ¶ 96; Exh. CL-0305.
[801] Cl. Rep., ¶ 98.
[802] Exh. CL-0304.
[803] Cl. Rep., ¶ 99.

Hence, the Tribunal finds that the rights of the Uzbek entities were not invalidated pursuant to Article 9(2) of the 1999 Land Code.

536. Finally, the Tribunal finds that pursuant to the Law on the Enactment of the Land Code, the rights of the Uzbek entities in the Resorts did not expire on 1 January 2000. Article 7(1) clearly states that Article 7(2) applies to land plots granted to "individuals" for "agricultural purposes" or "for the organization of minifarms, farms, including dairy and meat mini-farms."[804] In other words, Article 7(1) circumscribes the scope of Article 7(2). Consequently, the application of Article 7(2), as the Claimants maintain, does not extend to land plots granted for the construction of resorts, such as in the present case.[805]

537. The Tribunal would in any event not conclude that general provisions of municipal law in the Kyrgyz Republic had the effect of overriding the terms of the 1992 Agreement, the 1994 Protocol and the 1995 Protocol (placing the Kyrgyz Republic in breach of its obligations thereunder). In the Tribunal's view, the terms of the 1995 Protocol, specifically recognizing the rights to particular properties in an international agreement, would only be overridden with the clearest statutory text, which is, as discussed above, entirely lacking here. The specific terms of the 1995 Protocol, directed to the Resorts, would in the Tribunal's view, not be overridden by statutes of general domestic application such as those relied upon by the Respondent.

538. In sum, the Tribunal finds that the right of the Uzbek entities in the Resorts remained valid following the land reforms instituted by the Kyrgyz Government during the 1990s. At issue remains, however, whether the Claimants held registered rights in the Resorts as of 4 April 2016.[806]

539. With regard to Claimant TMP, the Tribunal finds that it maintained registered rights in Resort Zolotiye Peski until 4 April 2016 pursuant to the doctrine of universal succession.[807] The fact that TMP did not re-register its rights in the Resort after its reorganization is

[804] Exh. C-0319.
[805] Cl. Rep., ¶ 100.
[806] Re. Mem., ¶ 54.
[807] Exh. CL-0304; Exh. CL-0302.

irrelevant since the doctrine of universal succession is an exception to any purported re-registration requirement.[808]

540. Concerning Claimant NBU, the Tribunal finds that the record clearly demonstrates that, through its Kyrgyz subsidiary, it acquired and registered valid rights in Resort NBU-Rokhat. Further, NBU's rights in the Resort were re-registered pursuant to a Resolutions of the Issyk-Kul District Government Administration and thereafter confirmed by Certificates for the Right of Temporary Use of Land granted by the Department of Land Management.[809]

541. Similarly, Claimant Asaka, through its Kyrgyz subsidiary, acquired and registered valid rights in Resort Dilorom. Further, Asaka's rights in the Resort were re-registered pursuant to a Resolution of the Issyk-Kul District Government Administration, which thereafter confirmed those rights through a State Act for the Right of Land Use.[810]

542. Finally, Claimant Uzpromstroybank, through its Kyrgyz subsidiary, acquired and registered valid rights in Resort Buston. Further, Uzpromstroybank's rights in the Resort were, likewise, confirmed through a Certificate for the Right of Temporary Use of Land granted by the Department of Land Management.[811]

543. It follows, therefore, that each Claimant, indirectly through its Kyrgyz branch or subsidiary, held a registered right to use their respective Resort as of 4 April 2016. Hence, it is fair to say that this case represents a clearcut example of an unlawful expropriation.

544. Because the 2016 Order constitutes the primary State action at issue, it is helpful to provide the entirety of the text, which reads:

> For the purposes of effective use of the state property in accordance with the provisions of the Agreement "On mutual recognition of rights and regulations of property ownership relations" dated 9 October 1992 and ratified by the Resolution No. 1404-XII of Jogorku Kenesh of the Kyrgyz Republic dated January 12, 1994, and

[808] Re. Mem., ¶ 50.4.

[809] Exh. CL-0159; Exh. C-0041; Exh. C-0042; Exh. C-0060; Exh. C-0067; Exh. C-0220; Exh. C-0221.

[810] Exh. C-0113, Exh. C-0170; Exh. C-0049; Exh. C-0050.

[811] Exh. C-0060; Exh. C-0066; Exh, C-0072; Exh. C-0205.

taking into consideration the Resolution No.1080 of the Supreme Council of the Republic of Kyrgyzstan "On assumption of ownership of the Republic of Kyrgyzstan over the resort and recreational facilities being used by the legal entities of other CIS countries" dated by December 16, 1992, as well as guided by Articles 10 and 17 of the constitutional Law of the Kyrgyz Republic "On the Government of the Kyrgyz Republic":[812]

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

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

-Resort "Zolotiye," located in the village of Bosteri of the Issyk Kul district of Issyk-Kul region, with a total area of 28.35 hectares;

-Resort "Dilorom," located in the village of Kara-Oy of the Issyk Kul district of Issyk-Kul region, with a total area of 21.77 hectares;

-Resort "Rokhat-NBU," located in the village of Kara-Oy of the Issyk Kul district of the Issyk-Kul region, with a total area of 19.05 hectares;

-Resort "Buston," located on the territory of the Kun Chygysh rural district administration of the Ton district of Issyk-Kul region with a total area of 10.65 hectares.

2) Carry out:

-Inventory and valuation of the property complex of facilities set out in subparagraph 1 of this paragraph;

-Safekeeping and further use of the above mentioned facilities;

[812] Exh. C-0009.

> -Necessary organizational and other measures resulting from this resolution.
>
> 2. The State Registration Service under the Government of the Kyrgyz Republic shall, in the established manner, register the facilities set out in subparagraph 1 of this paragraph.
>
> 3. The Ministry of Interior of the Kyrgyz Republic jointly with the Authorized representatives of the Government of the Kyrgyz Republic in the Issyk-Kul region of the Kyrgyz Republic shall:
>
> -Provide assistance to the Fund for Management of State Property under the Government of the Kyrgyz Republic in assuming the state ownership over the facilities set out in subparagraph 1 of this paragraph;
>
> -Ensure security of the said facilities.
>
> 4. The State Tax Service under the Government of the Kyrgyz Republic shall take comprehensive measures to collect all accumulated debts from the legal entities of the Republic of Uzbekistan operating the facilities.
>
> 5. Execution of this resolution shall be supervised by the department of economy and investments and the department of international cooperation of the Executive office of the Government of the Kyrgyz Republic.

545. It is also helpful to highlight the text of the 13 April 2016 order "On accepting into the state ownership the facilities of resort and recreational sector, located at the territory of Kyrgyz Republic, under the use of the legal entities of the Republic of Uzbekistan," issued by the Chairman of the Fund for Management of the State Property under the Government of the Kyrgyz Republic:[813]

> For the purposes of efficient management of the state property, in accordance with the Order of the Government of Kyrgyz Republic dated April 4, 2016, No. 138-r, observing the Regulations on the Fund for Management of the State Property under the Government of the Kyrgyz Republic, approved by the Resolution of the

[813] Exh. C-0010.

Government of Kyrgyz Republic dated February 20, 2012 No. 134, I order:

1. To accept into the state ownership the following facilities of resort and recreational sector, located on the territory of Kyrgyz Republic, under the use of the legal entities of the Republic of Uzbekistan:

-Resort Zolotiye Peski located in the village Bosteri, Issyk Kul district, with total area of 28.35 hectares;

-Resort Dilorom, located in the village of Kara-Oy, Issyk Kul district, with total area of 21.77 hectares;

-Resort Rokhat-NBU, located in the village of Kara-Oy, Issyk Kul district, with total area of 19.05 hectares;

-Resort Buston. located in the Kun-Chygysh village council, Ton district, with total area of 10.65 hectares;

2. To create an Inter-agency Commission on conducting the inventory of the property complex (buildings and structures) of the facilities, indicated in the clause 1 of the present Order, in accordance with the Annex No. 1.

3. To create a Working Commission on conducting the inventory of the property complex (buildings and structures) of the facilities, indicated in the clause 1 of the present Order, in accordance with the Annex No. 2.

4. The Commission shall, in accordance with the established procedure:

Conduct the inventory of the property complex (buildings, structures and inventory) of the facilities, indicated in the clause 1 of the present Order;

Submit the results of the inventory to the Fund for Management of the State Property under the Government of the Kyrgyz Republic for conducting the evaluation and re-registration of the facilities, indicated in the clause 1 of the present Order;

Implement necessary organizational and other measures, arising from the present Order;

> 5. Control over implementation of the present order shall be assigned to the State Secretary of the Fund for Management of the State Property under the Government of the Kyrgyz Republic N.T. Kalmatov.

546. The Claimants are correct that a direct expropriation "occurs where the investor's investment is taken through formal transfer of title or outright seizure," which may occur in the form of a nationalization, which "is a concept similar to expropriation, except that the State takes over the investment of which it has dispossessed the investor."[814]

547. While the Claimants cite relevant authority to display comparable examples of such nationalizations, including *Rusoro v. Venezuela* and *Guaracachi v. Bolivia*, such examples are quite unnecessary here, as the relevant orders in this case explicitly provide for such nationalization.

548. Specifically, the 2016 Order directed the Kyrgyz Fund for the Management of State Property to "[a]ssume state ownership over [the Resorts]."[815] The Respondent then openly acknowledged the nationalization in a Diplomatic Note sent to Uzbekistan on 9 April 2016, informing Uzbekistan of its decision "to accept transfer of ownership [of the four Resorts] to the Kyrgyz Republic."[816] The 13 April 2016 order then called for the same nationalization, namely the "accept[ing] into the state ownership" of the four Resorts.[817] (Parenthetically, the Tribunal notes that both the Order and the Diplomatic Note refer expressly to the "transfer," "assum[ption]" and "accept[ance]" of ownership, further confirming the conclusion that the Claimants possessed ownership rights prior to the expropriatory measures; if there had been no such rights, then these references would have made no sense.)

549. On 15 June 2016, the Kyrgyz Ministry of Justice registered the Resorts as branches of the State Enterprise Vityaz under the Fund for the Management of State Property.[818]

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[814] Cl. Mem., ¶ 132; Exh. CL-0022; Exh. CL-0031; Exh. CL-0233.

[815] Exh. C-0009.

[816] Cl. Mem., ¶ 138; Exh. C-0135.

[817] Exh. C-0010.

[818] Cl. Mem., ¶ 137; Mamatov, ¶ 15; Yuldashev II, ¶ 9; Elmurodov II, ¶ 13; Exh. C-0465; Exh. C-0466.

550. As these orders set out, the Respondent quite openly "assum[ed] state ownership over" and "accept[ed] into state ownership" the Claimants' investments. In other words, the Respondent expropriated the Claimants' rights in their Resorts. The question thus becomes whether the expropriations were lawful under the BIT and the FIL.

a. Whether Expropriation Was Properly Grounded In Resolution No. 1080

551. In its 9 April 2016 diplomatic note to the Republic of Uzbekistan informing Uzbekistan of its decision to accept transfer of the Resorts to the Kyrgyz Republic, as well as the 2016 Order, the Respondent justified its nationalization of the Resorts by reference to Resolution No. 1080 of the Supreme Council of the Republic of Kyrgyzstan "on transfer of ownership to the Kyrgyz Republic of facilities of resort and recreational sector used by the legal entities of other CIS states" dated 16 December 1992.[819]

552. Resolution No. 1080, dated 16 December 1992, states, *inter alia*:

> The Supreme Soviet of the Kyrgyz Republic hereby deliberates to:
>
> 1. Take, within 10 January 1993, the Kyrgyz Republic ownership of the resorts and recreational facilities located within the territory of the Republic and used by the legal entities of the other CIS countries.[820]

553. Resolution No. 1080 remained unenforced for almost 24 years with regard to the Resorts. Since the express deadline for the execution of Resolution No. 1080 was set at 10 January 1993, the Tribunal considers that the Resolution ceased to operate and became unenforceable.[821]

554. Due to the doubtful validity of Resolution No. 1080 as a result of the extensive period during which it was unenforced, the Tribunal finds that Resolution No. 1080 did not provide proper grounds for the 2016 Order.

[819] Exh. C-0135; Exh. C-0009.

[820] Exh. R-0089.

[821] Kenenbaev II, ¶ 74.

555. Further, the Tribunal finds that, had Resolution No. 1080 provided legitimate grounds for nationalization, such an expropriation would still be required to conform with the conditions for a lawful expropriation as set forth in Article 6 of the BIT and Article 6 of the FIL. Those conditions are now discussed.

b. Factors To Consider

556. The Claimants correctly highlight the relevant criteria for examining an allegation of expropriation as they are taken both from the texts of the BIT and the FIL as well as concept of international law. These are: (i) that the expropriation was taken in the public interest; (ii) that the expropriation was not discriminatory; (iii) that the State afforded due process when executing the expropriation; and (iv) that the expropriation is coupled with prompt, adequate and effective compensation. These requirements are examined in turn below.

c. Taken In The Public Interest

557. Both the BIT and the FIL explicitly require that a lawful expropriation be taken in the public interest.[822]

558. Here, the Respondent failed to articulate, let alone sufficiently establish, any such public purpose in the 4 April 2016 and 13 April 2016 orders nationalizing the resorts.

559. The Tribunal's own review of the record fails to identify any such justification. Instead, the Claimants provide evidence of the true motive of the expropriation in the form of a local public official, Mr. Baky Usenbekov, the Chairman of the Council of Kara-Oy, expressing in an interview that the nationalization was justified to increase revenue for the Respondent.[823] An expropriation is not "taken in the public interest" merely because it is said to seek to increase local revenue. Some more specific and articulated public interest or public policy is necessary.

[822] Exh. C-0001 ("The Contracting Parties shall take no action . . . if such actions are unrelated to legislative measures taken in the public interest . . ."); Exh. C-0025 ("Investments shall not be subject to expropriation . . . except in those instances . . . where such expropriation is carried out for an overriding public purpose, in the public interest . . .").

[823] Cl. Mem. ¶ 119; Exh. C-0447.

560. Without any professed public purpose for these expropriations or any public purpose discernible from the record, the Tribunal finds that the expropriation of the Resorts lacked a public purpose in violation of the BIT and the FIL.

d. Discriminatory

561. While the exact number of "resorts" owned by Kyrgyz and other foreign nationals on Lake Issyk-Kul is unknown, the Claimants cite a travel website specializing in Central Asia which notes that there are nearly 200 such resorts in existence.[824] While such a website is not necessarily conclusive proof of a precise number of resorts, the Tribunal finds this evidence sufficient, absent contrary evidence, to at least demonstrate that there exist a considerable number of resorts on Lake Issyk-Kul.

562. Despite such a large number, the 2016 Order explicitly targets only the four Uzbek-owned Resorts.[825] This alone suggests an improper, discriminatory basis for the expropriation. The Respondent has provided no explanation for why such discrimination could have been justified.

563. More specific evidence of such discrimination is found in the similarly-situated Kazakh-owned resorts noted by the Claimants.[826] In 2008 discussions on the transfer of assets and leasing of land to Kazakhstan for operation of these four Kazakh-owned resorts on Lake Issyk-Kul, Kyrgyz government officials even equated such resorts to the Uzbek Resorts at the heart of this arbitration.[827] The similarities seem apparent, as both scenarios involved the ownership/lease rights of foreign entities for foreign-run resorts on Lake Issyk-Kul, where the development of those resorts are tied to those foreign States.[828]

564. Despite these similar situations, based on quite comparable histories, the Respondent did not nationalize the four Kazakh resorts when in 2016 it nationalized the four Resorts at issue in this arbitration. The Claimants contend that they have no knowledge indicating

[824] Cl. Mem. ¶ 157; Exh. C-0469; Exh. C-0474.
[825] Exh. C-0009.
[826] Cl. Mem., ¶¶ 157-161.
[827] Exh. C-0404; Exh. C-0405.
[828] Exh. C-0404; Exh. C-0405.

that the Respondent has nationalized any of the four Kazakh resorts, or any other resorts, since that 2016 nationalization. The Tribunal lacks before it any evidence suggesting that any additional nationalizations have taken place.

565. The Respondent's decision to nationalize the Resorts in 2016, while failing to nationalize other resorts along Lake Issyk-Kul, including the four Kazakh resorts which have convincingly been described as similarly-situated, indicates that the 2016 nationalization was discriminatory. Therefore, the Tribunal finds that the 2016 expropriation through the 2016 Order and subsequent implementing orders were improperly discriminatory in violation of Article 3.1 of the BIT and Article 4.1 of the FIL.

e. Due Process

566. The Tribunal notes that Article 6.4 of the FIL provides explicit procedural requirements for the execution of a lawful expropriation. Article 6.4 mandates, *inter alia*, that a competent state authority of the Respondent provide the investor with a speedy trial, including an assessment of the relevant investment, and payment of compensation.[829]

567. In addition to the language of Article 6.4 of the FIL, international law incorporates due process requirements in the case of an expropriation. As discussed by Rudolf Dolzer and Margrete Stevens in legal authority provided by the Claimants, supported by tribunals such as the tribunal in *ADC Affiliate Ltd. And ADC & ADMC Mgmt. Ltd. V. Republic of Hungary*,[830] such due process includes providing the investor advance notice and a fair hearing before the expropriation takes place, with the ultimate decision being taken by an unbiased official after a reasonable period of time.[831]

568. In this case, the Respondent failed to provide any aspect of due process in expropriating the Resorts. The Respondent provided no reasonable advance notice of the nationalization and failed to even provide notice to the Claimants when the nationalization had been

[829] Exh. C-0025.
[830] Exh. CL-0107.
[831] Exh. CL-0109; Exh. CL-0194.

executed. The Respondent also failed to provide any assessment of the Claimants' investments and failed to provide any compensation.

569. In all, the Tribunal finds that in nationalizing the Resorts, the Respondent failed to afford any level of due process, whether under the explicit mandate in Article 6.4 of the FIL or in the context of international law.

f. Prompt, Adequate And Effective Compensation

570. While it is a well-established principle of international law that lawful expropriation requires compensation, here Article 6.2 of the BIT also explicitly mandates that such compensation "shall correspond to the market value of the taken investments, determined as of the date of the seizure or as of the date when the decision to seize was made public (whichever occurs first)."[832] Further, Article 6.2 of the FIL requires that compensation:

> shall be equivalent to the objective market value of the expropriated investment . . . expropriated on the date of the decision on expropriation. Objective market value shall not reflect any change in value due to the awareness of the expropriation in the past.[833]

571. Here, the Respondent has failed to provide any compensation for the expropriated investments. As such, no analysis needs to be carried out to determine whether compensation was prompt, adequate or effective. By nationalizing the Resorts without payment of any compensation whatsoever, the Respondent violated Article 6.2 of the BIT and Article 6.2 of the FIL.

g. Creeping Expropriation

572. Since the Tribunal finds a direct, unlawful expropriation, the Claimants' creeping expropriation contention is duplicative. Accordingly, and without any indication as to the substance of this argument, the Tribunal does not address the Claimants' contention.

[832] Exh. C-0001.

[833] Exh. C-0025.

B. FAIR AND EQUITABLE TREATMENT

(1) The Claimants' Position

573. Article 3.1 of the BIT provides:

> Each Contracting Party shall provide fair and equitable treatment to investments and the income of investors of the other Contracting Party on its Territory, no less favorable than that it accords to investments and revenues of its own investors and/or investments and returns of investors of any third state.[834]

574. The Preamble of the FIL provides:

> This Law establishes the basic principles of the state investment policies aimed to improve the investment climate in the country and to attract domestic and foreign investments by providing fair, equal legal treatment to investors and by guarantee to protect attractive investments in the Kyrgyz Republic.[835]

575. Article 4(4) of the FIL further provides:

> The Kyrgyz Republic through its authorities governmental agencies, government officials and local authorities, shall abstain from interference in the economic activity, rights and legally recognized interests of investors, except cases specified by the laws of the Kyrgyz Republic.[836]

576. The Claimants maintain that in 2010, the Respondent issued Decree No. 23 on the Protection of Investments, which expressly incorporated a standard of "fair and equitable" ("**FET**") treatment into the FIL:

> Pursuant to the Law of the Kyrgyz Republic 'On Investments in the Kyrgyz Republic', foreign and domestic investments shall be guaranteed, and shall continue to enjoy, a fair, equitable legal regime, including guarantees of protection of their investments made into the economy of the Kyrgyz Republic.[837]

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[834] Cl. Mem., ¶ 188; Exh. C-0001.

[835] Cl. Mem., ¶ 189; Exh. C-0025.

[836] Cl. Mem., ¶ 190; Exh. C-0025.

[837] Cl. Mem., ¶ 191; Exh. CL-0256.

577. The Claimants add that pursuant to these provisions, the Respondent had an obligation to provide fair and equitable treatment to the Claimants' investments, which it violated by, *inter alia*, seizing the Claimants rights in the Resorts in an arbitrary, discriminatory, capricious and unlawful manner.[838]

578. Specifically, the Claimants submit that the Respondent violated its obligation to provide fair and equitable treatment to the Claimants' investments by, among other things:

- Unlawfully and arbitrarily depriving Claimant Uzpromstroybank of its rights in Resort Buston from 2007 to 2012 without any compensation by improperly ordering the transfer of Resort Buston's land to the local Kunchygysh Government, leading to years of litigation;[839]

- Failing to provide adequate or reasonable protection to Resort Rokhat-NBU, Resort Zolotiye Peski or Resort Dilorom to protect them against unlawful extortion or repeated harassment from the local Kyrgyz mafia;[840]

- Failing to provide adequate or reasonable protection from the widespread criminal activity and civil unrest following the 2005 and 2010 Revolutions;[841]

- Failing to assist Resort Rokhat-NBU in addressing the baseless payments sought by the State-owned electricity company, Vostokelektro, despite requests to the Kyrgyz Ministry of Economy and other Kyrgyz authorities for such assistance;[842] and

- Nationalizing the four Resorts and ordering their transfer to the Kyrgyz Fund for the Management of State Property without any legal process or compensation to Claimants for the loss of their rights.[843]

[838] Cl. Mem., ¶¶ 187, 192.
[839] Cl. Mem., ¶¶ 210-211; Exh. C-0230.
[840] Cl. Mem., ¶ 212; Exh. C-0382; Exh. C-0384.
[841] Cl. Mem., ¶ 212.
[842] Cl. Mem., ¶ 213; Exh. C-0435.
[843] Cl. Mem., ¶ 214.

579. In its Counter-Memorial, the Respondent contends that the Claimants must demonstrate that the alleged breaches are attributable to the State, and that the FET standard "contemplates a high threshold," such as a showing of "willful neglect" or "subjective bad faith."[844] The Respondent further asserts that "alleged failure to provide protection cannot amount to a violation of the FET standard," and that the "characterization of the FET standard as coterminous with the full protection and security standard has been dismissed time and again in arbitral case law."[845] The Claimants submit that the Respondent's assertions are misguided and without merit.[846]

580. First, the Claimants argue that it is well established under the ILC Articles on Responsibility of States for Internationally Wrongful Acts that the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[847] Accordingly, the Claimants contend that here all of the measures taken in violation of the FET standard were clearly carried out by the State and are thus attributable to the Respondent.[848]

581. Moreover, the Claimants submit that the Respondent incorrectly relies on arbitral awards to argue for a heightened FET standard which does not encompass a mere "business risk" or "out-of-control situation."[849]

582. Finally, the Claimants argue that contrary to the Respondent's contention, it is well established that there is a connection between the FET and the FPS standards, particularly when legal protection is involved.[850]

[844] Cl. Rep., ¶ 389; Re. Mem., ¶ 231.
[845] Cl. Rep., ¶ 389; Re. Mem., ¶¶ 231-232.
[846] Cl. Rep., ¶ 389.
[847] Cl. Rep., ¶ 390; Exh. CL-0201.
[848] Cl. Rep., ¶ 391.
[849] Cl. Rep., ¶¶ 392-396; Re. Mem., ¶ 232.
[850] Cl. Rep., ¶ 397; Exh. RL-0252.

(2) The Respondent's Position

583. The Respondent asserts that the Kyrgyz Republic did not violate the FET standard under the BIT since the Respondent's conduct vis-à-vis the Claimants' investment was not (i) arbitrary; (ii) did not breach due process; and, in any event, (iii) the Claimants failed to establish acts by the Respondent capable of infringing the FET standard.[851]

a. Relevant Elements Of The Legal Test Under The FET Standard

584. The Respondent maintains that it is widely accepted under investment case law that the FET standard contemplates a high threshold for establishing a violation on behalf of the host State.[852]

585. According to the Respondent, a logical conclusion that stems from this high evidentiary threshold is that the FET standard was not designed to serve as an insurance for the investors against all business risks and out-of-control situations.[853]

(iii) Duty Not To Act Arbitrarily As A Component Of The FET Standard

586. The Respondent further contends that finding that the host State has resorted to arbitrary measures against the investor requires a high standard of proof. In this respect, the Respondent submits that in arbitral practice, arbitrary measures are characterized as a conduct "founded on prejudice or preference rather than on reason or fact," something that is "done capriciously, without reason."[854]

587. The Respondent further argues that according to Professor Schreuer, the following categories of measures attributable to the host State can be characterized as unreasonable or arbitrary:

> [A] measure that inflicts damage on the investor without serving any apparent legitimate purpose [. . .];

[851] Re. Mem., ¶ 125.6.
[852] Re. Mem., ¶ 232; Exh. RL-0188.
[853] Re. Mem., ¶¶ 233-234; Exh. RL-0190; Exh. RL-0191.
[854] Re. Mem., ¶ 235; Exh. CL-0211.

> a measure that is not based on legal standards but on discretion, prejudice, or personal preference;
>
> a measure taken for reasons that are different from those put forward by the decision-maker [. . .];
>
> a measure taken in willful disregard of due process and proper procedure.[855]

588. The Respondent contends that Professor Schreuer's definition was originally adopted by the arbitral tribunal in *EDF v. Romania* and has since been endorsed and relied upon by multiple other arbitral tribunals.[856]

(iv) Requirement Of Due Process As A Component Of The FET Standard

589. The Respondent further maintains that it is not disputed that the FET standard encompasses an obligation for the host State to grant investors due process in judicial and administrative proceedings. According to the Respondent, this standard is primarily concerned not with the substance of decisions by judicial or administrative authorities, but rather requires that a certain standard is observed in the administration of justice as such.[857]

590. The Respondent argues that a finding of a violation of the host State's obligation to extend due process also implies a high standard of proof. Specifically, as the Respondent asserts, an alleged violation of due process needs to go beyond judicial discretion and constitute a manifest failure of natural justice in order to amount to a breach of the FET standard.[858]

b. Claimants Have Not Established Any FET Violation

591. The Claimants' allegations that the Kyrgyz Republic violated the FET standard are addressed by the Respondent in turn below.[859]

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[855] Re. Mem., ¶ 236; Exh. RL-0193.

[856] Re. Mem., ¶ 237; Exh. RL-0194; Exh. CL-0233.

[857] Re. Mem., ¶ 238; Exh. RL-0195.

[858] Re. Mem., ¶¶ 239-249; Exh. CL-0203; Exh. CL-0212; Exh. CL-0215; Exh. RL-0196; Exh. RL-0197; Exh. RL-0198.

[859] Re. Mem., ¶ 242.

592. First, the Claimants argue that the Kyrgyz Republic's violation include "the unlawful and arbitrary deprivation of Claimant Uzpromstroybank's rights in Resort Buston from 2007 and 2012 without any compensation." The Respondent contends that this is wrong given that as of 2007 Uzpromstroybank had no rights in Buston Resort's land or real estate whatsoever and its subsidiary Resort Buston LLC had occupied the land illegally. Accordingly, the Respondent asserts that Uzpromstroybank did not lose any rights by virtue of the 23 January 2007 Issyk Kul Court Decision and was not entitled to any compensation.[860]

593. Second, the Claimants argue that the Republic had "failed to adhere to the FET standard with respect to Resort Rokhat-NBU's dealings with the State-owned electricity company, Vostokelektro." The Respondent asserts that this is patently wrong since the Claimants are not even capable of explaining what exactly the alleged violation consists of, apart from them being unhappy with the outcome of Rokhat-NBU's litigation against Vostokelektro.[861]

594. Third, the Claimants generally argue that "the Kyrgyz authorities also did not provide adequate or reasonable protection" to the Resorts against alleged mafia harassment, alleged criminal activity and civil unrest that followed the 2005 and 2010 revolutions. The Respondent submits that these allegations are not only baseless, but also the alleged failure to provide protection cannot amount to violation of the FET standard, such that the Claimants' complaints are inapposite altogether. The characterization of the FET standard as coterminous with the full protection and security standard has been dismissed repeatedly in arbitral case law.[862]

595. Accordingly, the Respondent asserts that the Claimants have failed to establish any FET violation.[863]

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[860] Re. Mem., ¶ 242; Cl. Mem., ¶¶ 209-210.

[861] Re. Mem., ¶ 243; Cl. Mem., ¶ 213.

[862] Re. Mem., ¶¶ 244-245; Exh. RL-0179; Exh. RL-0199; Exh. RL-0200; Exh. RL-0201; Exh. RL-0202; Exh. RL-0203.

[863] Re. Mem., ¶ 246.

(3) The Tribunal's Analysis

596. The Tribunal has determined that the Respondent unlawfully expropriated the Claimants' investments, affording it the damages discussed below in Section VII. Any additional finding with respect to fair and equitable treatment would have no effect on the remedies established in this Award, including the award of damages. Accordingly, in light of its finding of a direct expropriation, the Tribunal does not address the Claimants' fair and equitable treatment contentions.

C. FULL AND UNCONDITIONAL LEGAL PROTECTION

(1) The Claimants' Position

597. Article 2.1 of the BIT provides:

> Each Contracting Party shall, in accordance with its laws and regulations, allow and encourage investments of investors of the other Contracting Party on its territory, and ensure full and unconditional legal protection to these investments.[864]

598. The Claimants contend that this provision requires the Respondent to enforce its laws in a manner reasonably expected under the circumstances to protect the covered investments, including "tak[ing] active measures to protect the investment from adverse effects that stem from private parties or from the host state and its organs."[865]

599. The Claimants also argue that the obligation to provide full and unconditional protection extends beyond physical harm and includes protection in a legal and administrative sense.[866]

600. The Claimants argue here that the Respondent failed to provide adequate or reasonable protection and assistance to the four Resorts against unlawful extortion and harassment

[864] Cl. Mem., ¶ 217; Exh. C-0001.

[865] Cl. Mem., ¶ 218; Exh. CL-0014; Exh. CL-0194; Exh. CL-0200; Exh. CL-0220; Exh. CL-0232; Exh. CL-0236.

[866] Cl. Mem., ¶¶ 219-222; Exh. CL-0014; Exh. CL-0205; Exh.CL-0206; Exh. CL-0207; Exh. CL-0209; Exh. CL-0218; Exh. CL-0220; Exh. CL-0221; Exh. CL-0223; Exh. CL-0228; Exh. CL-0242.

from the local Kyrgyz mafia and other criminal elements in the Kyrgyz Republic, as well as the criminal activity and civil unrest following the 2005 and 2010 Revolutions.[867]

601. According to the Claimants, the Respondent further failed to conduct an investigation or address in any way the issues surrounding the judicial taking of Claimant Uzpromstroybank's rights in Resort Buston, and failed to assist Claimant NBU with its dispute with Vostokelektro.[868]

602. Moreover, the Claimants submit that the Respondent violated its duty to provide full and unconditional legal protection when it nationalized the four Resorts without notice or compensation.[869]

603. The Respondent contends that the standard of protection in Article 2(1) of the BIT "should not be equated with a more traditional full protection and security standard often found" in other BITs, and that the case law the Claimants rely upon is thus "inapposite."[870] The Respondent further contends that full protection and security requires analysis of the "particularities of the case at hand, including the political situation in the host country at the moment of the alleged violation," and that there is a "high bar" to establish a violation.[871] The Claimants submit that the Respondent's contentions are inaccurate and unavailing.[872]

604. First, the Claimants argue that the Respondent's contention that its obligation under the BIT is limited to only legal protection is misguided. The Claimants specifically note that as scholars have explained, the language of the full protection and security standard varies from "full legal protection and full legal security" (Argentina – Germany BIT), to "continuous protection and security" (BLEU – United Arab Emirates BIT), to "full legal protection" (Mongolia – Russia BIT).[873] According to the Claimants, all of these

[867] Cl. Mem., ¶¶ 223-224.
[868] Cl. Mem., ¶¶ 225-226.
[869] Cl. Mem., ¶ 227-228.
[870] Cl. Rep., ¶ 417; Re. Mem., ¶ 248.
[871] Cl. Rep., ¶ 417; Re. Mem., ¶ 253.
[872] Cl. Rep., ¶ 417.
[873] Cl. Rep., ¶ 418; Exh. CL-0021.

formulations are considered variations of the full protection and security standard, which encompass both physical and legal security.[874] Moreover, the Claimant contends that as tribunals have found, where, as here, a treaty refers to "legal protection," the standard encompasses both physical and legal protection.[875]

605. Second, the Claimants submit that contrary to the Respondent's contention, tribunals have found States liable for their failure to protect an investment from the unstable political situation in the State.[876]

606. Third, the Claimants assert that the Respondent misrepresents the threshold for establishing a violation of the FPS standard, asserting that "there is a high bar for establishing that the violation had occurred."[877] The Claimants submit that the full protection and security provision is breached when the host State fails to take active measures to protect the investment from adverse effects stemming from the host State, its organs, or third parties. Further and contrary to the Respondent's contention, the Claimants contend that the host State is required to take sufficient and active measures to protect the investment from such adverse effects.[878]

607. Fourth, the Claimants also argue that the Respondent's contentions that the "Claimants fail to establish any negligence on the Republic's part, and the Republic's authorities had at all times taken reasonable measures justified under the circumstances," and that it is not responsible for the unfavorable outcome of the court proceedings concerning the Vostokelectro invoice, as previously discussed, are meritless.[879]

[874] Cl. Rep., ¶ 418; Exh. CL-0208; Exh. CL-0221; Exh. CL-0349; Exh. CL-0350.
[875] Cl. Rep., ¶¶ 419-421; Exh. CL-0014; Exh. CL-0206; Exh. CL-0221; Exh. CL-0327; Exh. CL-0347.
[876] Cl. Rep., ¶¶ 422-423; Exh. RL-221; Exh. CL-0236.
[877] Cl. Rep., ¶ 425; Re. Mem., ¶ 253.
[878] Cl. Rep., ¶ 425; Exh. CL-0014; Exh. CL-0220; Exh. CL-0232.
[879] Cl. Rep., ¶ 426; Cl. Mem., ¶ 256.

608. For all of these reasons, the Claimants submit that the Respondent's actions and omissions violated its duty to accord full and unconditional legal protection to the Claimants' investments.[880]

(2) The Respondent's Position

609. In response to the Claimants' contention that the Kyrgyz Republic violated the standard of full and unconditional legal protection under Article 2(1) of the BIT, the Respondent contends that this claim has no merit.[881]

610. By way of a preliminary remark, the Respondent submits that the standard of protection set by Article 2(1) of the BIT is clearly different from and should not be equated with a more traditional full protection and security often found in bilateral investment treaties. Accordingly, the Respondent asserts that the Claimants' extensive reliance in its submissions on arbitral case law interpreting the full protection and security standard with regard to host State's obligation to provide physical security to the investments, is inapposite and must be disregarded. Moreover, the Respondent avers that it is clear from the wording of Article 2(1) of the BIT that the Kyrgyz Republic's obligation is limited to providing legal protection.[882]

a. Relevant Elements Of The Legal Standard

611. The Respondent maintains that the standard of full and unconditional legal protection contemplates the duty of a host State to exercise due diligence, *i.e.*, to take such measures to protect the foreign investment as are reasonable in the circumstances of the particular case. Accordingly, the Respondent submits that the standard does not impose strict liability on the host State and therefore does not protect foreign investments against every possible loss of value that may occur.[883]

612. Rather, the Respondent contends that the obligation to exercise due diligence contemplates that the host State must take reasonable measures within the context of existing

[880] Cl. Rep., ¶ 427.
[881] Re. Mem., ¶ 247.
[882] Re. Mem., ¶ 248; Cl. Mem., ¶¶ 218-221.
[883] Re. Mem., ¶ 249; Exh. CL-0194; Exh. CL-0202; Exh. RL-0069; Exh. RL-0204; Exh. RL-0205.

circumstances to carry out protection of foreign investments. Furthermore, the Respondent argues that the reference to the existing circumstances suggests that the assessment of the full protection and security standard must consider the particularities of the case at hand, including the political situation in the host country at the time of the alleged violation.[884]

613. Accordingly, the Respondent submits that in light of the above, there is a high bar for establishing that the violation had occurred, which the Claimants failed to meet.[885]

b. The Claimants Have Failed To Establish Any Violation Of The Legal Protection Standard By The Kyrgyz Republic

614. The Respondent notes that in support of their Article 2(1) BIT claim, the Claimants rely on the same factual allegations as raised with respect to their FET claim.[886]

615. First, the Claimants argue that the Kyrgyz Republic "failed to provide full and unconditional legal protection" to the Resorts from the alleged mafia harassment, alleged criminal activity and the unrest during the 2005 and 2010 revolutions. The Respondent contends that the Claimants have failed to establish any negligence on the Kyrgyz Republic's part, as, according to the Respondent, the Republic's authorities had at all times taken reasonable measures justified under the circumstances to protect the Resorts, including with regard to investigations of the murder of Rokhat-NBU's former director Mr. Burkhanov or the theft of cash from Dilorom's premises.[887]

616. Second, the Claimants once again put the blame on the Kyrgyz Republic for the unfavorable outcome of the court proceedings concerning the Resort Buston land plot and the Vostokelektro Invoice. The Respondent argues that these meritless allegations have already been addressed by the Kyrgyz Republic.[888]

[884] Re. Mem., ¶¶ 250-252; Exh. RL-205; Exh. RL-0206; Exh. RL-0207.
[885] Re. Mem., ¶ 253.
[886] Re. Mem., ¶ 254; Cl. Mem., ¶¶ 223-229.
[887] Re. Mem., ¶ 255; Cl. Mem., ¶¶ 203-210, 220-224.
[888] Re. Mem., ¶ 256; Cl. Mem., ¶¶ 225-226.

617. Accordingly, the Respondent submits that the Claimants have failed to establish any violation of the legal protection standard.[889]

(3) The Tribunal's Analysis

618. The Tribunal has determined that the Respondent unlawfully expropriated the Claimants' investments, affording it the damages discussed below in Section VII. Any additional finding with respect to full and unconditional legal protection would have no effect on the remedies established in this Award, including the award of damages. Accordingly, in light of its finding of a direct expropriation, the Tribunal does not address the Claimants' full and unconditional security contention.

D. NATIONAL TREATMENT AND MOST-FAVORED NATION TREATMENT

(1) The Claimants' Position

619. Article 3.1 of the BIT provides:

> Each Contracting Party shall provide fair and equitable treatment to investments and the income of investors of the other Contracting Party on its territory, no less favorable than that it accords to investments and revenues of its own investors and/or investments and returns of investors of any third state.[890]

620. Article 4.1 of the FIL provides:

> The Kyrgyz Republic shall provide foreign investors making investments within the territory of the Kyrgyz Republic with the national treatment of economic activity applied to individuals and legal entities of the Kyrgyz Republic.[891]

621. The Claimants assert that here, the Respondent failed to accord the Claimants and their investments with national treatment and most-favored nation treatment in violation of the BIT and the FIL. The Claimants specifically contend that the Respondent nationalized only the four Uzbek-owned Resorts on Lake Issyk-Kul and not any of the other nearly 200

[889] Re. Mem., ¶¶ 254-256.

[890] Cl. Mem., ¶ 230; Exh. C-0001.

[891] Cl. Mem., ¶ 231; Exh. C-0025.

resorts owned by Kyrgyz and other foreign nationals, including Kazakh-owned resorts that the Respondent has acknowledged were similarly situated. The Claimants therefore submit that the Respondent has provided no justification for the difference in treatment.[892]

(2) The Respondent's Position

622. The Respondent avers that the Claimants contrast themselves with "nearly 200 resorts owned by the Kyrgyz and other foreign nationals" that they say were treated more favorably than the Claimants, specifically as they were not "nationalized" by the Respondent. As explained in the preceding Sections, the Respondent alleges that this is a false comparison given that: (i) the Claimants did not hold any property rights over the Resorts (some of them had limited rights *in rem* over the underlying land plots, while others did not) and consequently could not be compared to other holders of valid titles over resort facilities on lake Issyk-Kul; and (ii) the fate of the Soviet-era Kazakh resorts was subject of prolonged negotiations between the Respondent and the Republic of Kazakhstan, based on the 1992 Multilateral Property Rights Agreement, which resulted in detailed inter-Governmental arrangements on the use of those resorts by the Kazakh entities.[893]

623. Accordingly, the Respondent submits that the Claimants have failed to establish any violation of national treatment and most-favored nation treatment under the BIT and the FIL.[894]

(3) The Tribunal's Analysis

624. The Tribunal has determined that the Respondent unlawfully expropriated the Claimants' investments, affording it the damages discussed below in Section VII. Any additional finding with respect to national treatment and most-favored nation would have no effect on the remedies established in this Award, including the award of damages. Accordingly, in light of its finding of a direct expropriation, the Tribunal does not address the Claimants' national treatment and most-favored nation contentions.

[892] Cl. Mem., ¶¶ 233-234; Exh. C-0469; Exh. C-0474.
[893] Re. Mem., ¶ 258.
[894] Re. Mem., ¶ 259.

VII. REMEDIES AND QUANTUM

A. THE CLAIMANTS' POSITION

(1) The Claimants Must Be Compensated For The Fair Market Value Of The Resorts

625. The Claimants maintain that the BIT and the FIL set out a standard of compensation for lawful expropriation, providing that compensation shall be equivalent to the "market value" of the taken investment.[895] Moreover, the Claimants argue that where, as here, unlawful conduct is at issue, compensation cannot be less than the compensation due in accordance with the treaty's provisions for a lawful expropriation.[896]

626. Further, the Claimants also argue that where, as here, the applicable investment treaty or foreign investment law provides no express form of reparation or compensation standard for the violation at issue, tribunals typically have applied customary international law to determine the appropriate form of reparation and measure of damages.[897] The Claimants reason that under customary international law, the general standard of compensation for unlawful expropriations and other internationally wrongful acts is "full reparation."[898] This obligation requires States to "wipe out all the consequences of the illegal act, and reestablish the situation which would, in all probability, have existed if that act had not been committed."[899]

627. The Claimants also submit that under international law, the primary form of reparation is restitution.[900] The Claimants note, however, that while they initially requested restitution of the Resorts, they eventually withdrew this request in their Points of Clarification and no longer seek restitution.[901] The Claimants explain that in view of the substantial and on-going political and legal instability in the Kyrgyz Republic, the Respondent's refusal to participate in the merits phase of the arbitration, and its refusal to comply with several prior

[895] Cl. Rep., ¶ 432; Cl. Mem., ¶ 236; Exh. C-0001; Exh. C-0025.
[896] Cl. Rep., ¶ 432; Cl. Mem., ¶ 236; Exh. CL-0044; Exh. CL-0255.
[897] Cl. Rep., ¶ 433; Cl. Mem., ¶¶ 236-237; Exh. CL-0257.
[898] Cl. Rep., ¶ 433; Cl. Mem., ¶ 239; Exh. CL-0260.
[899] Cl. Rep., ¶ 433; Cl. Mem., ¶¶ 240, 242-260; Exh. CL-0107; Exh. CL-0209.
[900] Cl. Rep., ¶ 434; Exh. CL-0006; Exh. CL-0201.
[901] Cl. Rep., ¶ 434; Cl. POC, ¶ 16.

arbitral awards rendered against it, the Respondent is unlikely to comply with any award of restitution issued by this Tribunal.[902] Also the Claimants allege that even if the Respondent was to comply with such an award, there remains a substantial risk that the Respondent could unlawfully seize the Resorts again, or otherwise substantially interfere in their operations.[903]

628. Additionally, the Claimants argue that where, as here, restitution either is not available or is unreasonable, States must provide compensation for their wrongful acts in an amount corresponding to "payment of a sum corresponding to the value which a restitution in kind would bear," in addition to "damages for loss sustained which would not be covered by restitution in kind or payment in place of it."[904] According to the Claimants, this concept has been confirmed by numerous tribunals as being applicable to determine compensation for unlawful expropriations, as well as for violations of other investment treaty protections, including for failure to accord full protection and constant security and fair and equitable treatment, as well as for discriminatory or arbitrary treatment.[905]

629. Further, the Claimants argue that such compensation must cover the restitution value of those investments based on their fair market value, which is an appropriate form of compensation for both expropriation and other treaty breaches value" of the taken investment. [906]

630. The Claimants also contend that they do not have an obligation to prove damages with certainty, as it is well established that the standard of proof for establishing the amount of damages suffered is the balance of probabilities.[907]

631. In addition, the Claimants submit that the principle of full compensation requires that compensation include compound interest at a commercially reasonable rate from the

[902] Cl. Rep., ¶ 434; Cl. POC, ¶¶ 16-23.
[903] Cl. Rep., ¶ 434; Cl. POC, ¶¶ 18-27.
[904] Cl. Rep., ¶ 435; Exh. CL-0259; Exh. CL-0113.
[905] Cl. Rep., ¶ 435; Exh. CL-0208; Exh. CL-0209; Exh. CL-0229; Exh. CL-0265; Exh. CL-0266; Exh. RL-0046.
[906] Cl. Rep., ¶ 436; Exh. CL-0201.
[907] Cl. Rep., ¶ 436; Exh. CL-0229.

valuation date until the payment of the award.[908] The Claimants add that this obligation is further provided in the BIT and the FIL, which confirm that, to be lawful, an expropriation must be accompanied by compensation, which "shall include" at least interest at the LIBOR rate.[909] Moreover, according to the Claimants, in order to achieve full reparation for an unlawful violation of an obligation under customary international law, it is widely accepted that a commercially reasonable rate is set at the LIBOR rate, plus an appropriate margin.[910] Further, it is the Claimants' contention that full compensation requires that the Claimants also be compensated for the income tax that they will pay on any award.[911]

632. According to the Respondent, monetary compensation is appropriate "only as a last alternative," and, if awarded, should only be awarded based on the sunk costs methodology.[912] The Claimants argue that as detailed below, the Respondent's assertions are erroneous and counter to principles of international law.[913]

(2) The Claimants Are Entitled To Compensation Based On The Market Value Of The Resorts In The Amount Calculated By PwC And Affirmed By Mr. Hart

633. The Claimants submit that as elaborated in his Expert Report and at the hearing on the merits, Mr. Timothy Allen from PwC calculated the fair market value of the Claimants' Resorts by: (i) selecting comparable properties from resorts in the Issyk-Kul region advertised for sale as of November 2019; (ii) comparing Claimants' Resorts to four comparable properties with respect to the facilities, and three comparable properties with respect to the land; (iii) adjusting the market values of the comparable properties to more closely reflect the Claimants' Resorts to account for several different variables; and (iv) weighting the land and facility value of the comparable properties to determine the reasonable weighted average land value (for all Resorts), and facility value (for the operational Resorts), per square meter.[914]

[908] Cl. Rep., ¶ 438; Exh. CL-0233; Exh. CL-0268.
[909] Cl. Rep., ¶ 438; Exh. C-0001; Exh. C-0025.
[910] Cl. Rep., ¶ 438; Allen, ¶ 5.63; Exh. CL-0235; Exh. CL-0277.
[911] Cl. Rep., ¶ 438; Cl. Mem., ¶ 297.
[912] Cl. Rep., ¶ 439; Re. Mem., ¶¶ 259.4, 272.
[913] Cl. Rep., ¶ 439.
[914] Cl. Rep., ¶ 441; PwC Report, ¶¶ 2.14, 5.27-5.42, 5.48, 5.60-5.61.

634. The Claimants note that with respect to the three operational Resorts, PwC relied on the weighted averages of the land and facility values to calculate the market value as of 1 November 2019, and adjusted for inflation to determine the market value as of 4 April 2016.[915] With respect to Resort Buston, which was not operational, PwC reduced the market value of the land by the cost of demolishing the existing facilities and adjusted for inflation as of 4 April 2016.[916]

635. According to the Respondent, PwC's valuation is based on "defective key assumptions," namely, that PwC's "assessment of the investments' market value rests on [the] Claimants' incorrect instructions as to the nature of their rights in the Resorts," because the "Claimants did not own the Resorts" and their "rights of use in the Resorts were limited in time."[917] Further, the Respondent contends that PwC's valuation "rests on the wrong comparables."[918] The Claimants submit that, as set forth below, the Respondent's assertions are wrong.

636. First, the Claimants argue that the Respondent erroneously asserts that PwC failed to consider that the "Claimants did not own the Resorts" and that their "rights of use in the Resorts were limited in time," which affect PwC's overall assumptions and its analysis of the comparable properties.[919] The Claimants contend that, as previously demonstrated, they in fact maintained ownership rights in the buildings and structures at their Resorts.[920]

637. Second, the Claimants maintain that the Respondent's allegations that PwC "failed to provide a reliable sample of comparable properties" because the Claimants' Resorts "were built during the Soviet period" and have deteriorated, while the comparable properties were not, is erroneous.[921] In this respect, the Claimants argue that, as Mr. Hart explains, "[a] crucial step in a market approach based on comparable properties is to apply adjustments

[915] Cl. Rep., ¶ 442; PwC Report, ¶¶ 5.13, 5.16-5.17, 5.19-5.20.
[916] Cl. Rep., ¶ 442; PwC Report, ¶¶ 5.24-5.25.
[917] Cl. Rep., ¶ 443; Re. Mem., ¶ 366.
[918] Cl. Rep., ¶ 444; Re. Mem., ¶¶ 342-343, 346, 360.
[919] Cl. Rep., ¶ 445; Re. Mem., ¶¶ 342-343, 346, 360.
[920] Cl. Rep., ¶ 445.
[921] Cl. Rep., ¶ 448; Re. Mem., ¶¶ 367, 370.3.

to the data of the properties to make them more aligned with the subject property, in this case the Claimants' Resorts." The Claimants further contend that indeed, Mr. Hart confirms that PwC "properly applied adjustments [. . .] so that the data from the comparable properties could be used to estimate a market value of the subject properties."[922]

638. Third, the Claimants assert that the Respondent's allegation that PwC "failed to provide a reliable sample of comparable properties" because the Claimants' Resorts "are markedly larger" than the comparable properties is also erroneous.[923] The Claimants argue that as explained in its Expert Report, PwC identified the value of a square meter of land of the comparable properties, and then multiplied that value by the size of the Claimants' Resorts, thereby expressly accounting for the difference in the size of the properties.[924]

639. Fourth, with respect to the Respondent's allegations that PwC "failed to provide a reliable sample of comparable properties" because the comparable properties operated under different business models than the Claimants' Resort, the Claimants maintain that Mr. Hart explains that any difference in business models between the Claimants' Resorts and the comparable properties is not relevant.[925] According to the Claimants, neither the nature of the business model nor the financial results of the Claimants' Resorts or the comparable properties have any bearing on the methodology applied by PwC.[926]

640. Fifth, the Claimants also maintain that Mr. Hart has conducted a separate and additional analysis to assess the values that PwC calculated under the market approach described above. According to the Claimants, this analysis confirms that PwC's valuation of the Claimants' Resorts under the market comparables approach in fact was reasonable and non-speculative. Specifically, the Claimants submit that Mr. Hart analyzed the value of the Claimants' investments under the highest and best use approach, which has been applied by other investment tribunals in valuing real estate, including resorts.[927]

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[922] Cl. Rep., ¶ 448; Hart, ¶ 57.
[923] Cl. Rep., ¶ 450; Re. Mem., ¶ 370.1
[924] Cl. Rep., ¶ 450; PwC Report, ¶¶ 5.36-5.38.
[925] Cl. Rep., ¶ 452; Re. Mem., ¶¶ 367, 370.
[926] Cl. Rep., ¶ 452; Hart, ¶ 62.
[927] Cl. Rep., ¶¶ 454-455; Hart, ¶¶ 78-87; Exh. C-0370.

641. The Claimants further note that in his assessment of the highest and best use of the land of the Claimants' Resorts, Mr. Hart relied on the project, "Asman, the City of the Future" ("**Asman**"), which the Kyrgyz Government announced in July 2021.[928] Three French investors – Finentrep Aspir, MEDEF, and MercurooHe – already have pledged to invest USD 5 billion through an agreement signed with President Japarov on 12 April 2022, which makes up a quarter of the estimated total USD 20 billion-dollar capital total investment required to complete the project within the next seven to ten years. According to the Kyrgyz Government, Asman will be built on 4,000 hectares of land.[929] The Claimants argue that, as Mr. Hart confirms, this project represents the highest and best use of the land.[930]

642. The Claimants add that Mr. Hart considers that the USD 5 billion investment constitutes "payment" for those 4,000 hectares of land, which means that the market price for the land is USD 1.25 million per hectare. Applying this per hectare price to the hectares covered by the Resorts, yields a total value of USD 99.6 million as of 2022. Mr. Hart then subtracted the cost of demolition of the existing facilities, based on the demolition costs previously relied upon by PwC and the size of the facilities at each Resort. Once adjusted by inflation back to 2016, the implied market value of the Resorts under this methodology is USD 86.5 million in total, as shown below:[931]

Table 7.1: Value of Resorts Based on Asman Price per Hectare with $5 Billion Investment[144]

	Zolotiye Peski	Rokhat-NBU	Dilorom	Buston	Total
Resort Land (ha)	25.00	19.05	24.99	10.65	79.69
Market Value per Hectare (US$/ha)	$1,250,000	$1,250,000	$1,250,000	$1,250,000	
2022 Implied Market Value of Resort Land (US$)	$31,250,000	$23,817,500	$31,237,500	$13,312,500	$99,617,500
Demolition Costs (US$)	$130,372	$89,263	$48,924	$77,364	$345,923
2022 Implied Market Value of Resort Land, including Demolition (US$)	$31,119,628	$23,728,237	$31,188,576	$13,235,136	$99,271,577
2016 Implied Market Value of Resort Land, including Demolition (US$)	**$27,114,361**	**$20,674,283**	**$27,174,436**	**$11,531,702**	**$86,494,782**

[928] Cl. Rep., ¶ 456; Hart, ¶¶ 73-78; Exh. C-0655.
[929] Cl. Rep., ¶ 457; Hart, ¶¶ 73, 75; Exh. C-0636; Exh. C-0655.
[930] Cl. Rep., ¶ 457; Hart, ¶ 84.
[931] Cl. Rep., ¶ 458; Hart, ¶ 86.

643. The Claimants contend that Mr. Hart's assessment also confirms the reasonableness of PwC's calculation (*i.e.*, Mr. Allen's expert report) under the market comparables approach (USD 26.98 million).[932]

(3) The Respondent's Requests For Alternative Relief Should Be Denied

a. Satisfaction Is Insufficient To Ensure Full Reparation And Should Not Be Considered By The Tribunal

644. The Respondent asserts that satisfaction, *i.e.*, "a declaration and an acknowledgement by Respondent of its wrongdoing," is the only appropriate form of reparation, and that, under international law, "satisfaction is the appropriate form of reparation [. . .] in cases where compensation is improper, but a wrongful act has nonetheless occurred."[933] The Claimants contend that the Respondent's assertions are baseless and incorrect with respect to the damage at issue in the present case.[934]

645. First, the Claimants submit that the "general position in international law [is] that the injured State may elect between the available forms of reparation and may prefer compensation to restitution."[935] The Claimants note that investment arbitration tribunals thus have found that a claimant is free to identify its preferred request for relief, subject to the tribunals consideration of its appropriateness.[936] The Claimants therefore argue that they are entitled to request compensation as their preferred form of relief, rather than satisfaction, and the Tribunal then may consider whether such relief is appropriate.[937]

646. Second, the Claimants maintain that, as the Respondent recognizes, it is well established that satisfaction is an appropriate remedy only where restitution or compensation is improper.[938] The Claimants submit that this is supported by Article 37 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, which provides that "[t]he

[932] Cl. Rep., ¶ 459; Hart, ¶ 87.
[933] Cl. Rep., ¶ 460; Re. Mem., ¶¶ 260-263; Exh. RL-0208; Exh. CL-0372.
[934] Cl. Rep., ¶ 460.
[935] Cl. Rep., ¶ 461; Exh. C-0006; Exh. CL-0201.
[936] Cl. Rep., ¶ 461; Exh. RL-0211.
[937] Cl. Rep., ¶ 461.
[938] Cl. Rep., ¶ 462; Exh. CL-0201.

State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation."[939] The Claimants also assert that the tribunals, considering Article 37, have rejected satisfaction as a sole form of reparation where monetary damages are available.[940] Thus, the Claimants contend that the Respondent's assertion that only satisfaction may be awarded in this case is erroneous.[941]

647. Third, the Claimants argue that the Respondent's reliance on the S.S. "*I'm Alone*" Case to support its position that "satisfaction is an appropriate remedy" for unlawfulness when "the underlying asset could not have any legal value,"[942] is misplaced. The Claimants submit that, in that case, Canada claimed damages against the U.S. for a Canadian-registered liquor-smuggling ship that was sunk by the U.S. Government in "hot pursuit." The tribunal found that Canada could not have suffered financial damage for the loss of the ship, or the cargo, because the ship was owned by U.S. citizens. The tribunal thus ordered the U.S. only to "formally [. . .] acknowledge its illegality," rather than pay any compensation. The Claimants note that in that case compensation was not proper, because the underlying asset was owned by the respondent state's citizens, as opposed to the claimant, and thus did not have any legal value to the party requesting compensation.[943] But, the Claimants submit that in this proceeding, by contrast, they held rights in their Resorts, thus their investments do have a defined legal financial value, one which has been quantified by independent experts.[944]

b. Specific Performance Is Insufficient To Ensure Full Reparation And Should Not Be Considered By The Tribunal

648. The Respondent also contends that "tribunals in investment disputes have the power to order specific performance to disputing parties," and that, as an alternative to satisfaction, the "Claimants are entitled, at best, to specific performance in the form of an order to the

[939] Cl. Rep., ¶ 462; Exh. CL-0201.
[940] Cl. Rep., ¶ 463; Exh. CL-0371.
[941] Cl. Rep., ¶ 464.
[942] Cl. Rep., ¶ 465; Re. Mem., ¶ 261.
[943] Cl. Rep., ¶ 465; Exh. CL-0372.
[944] Cl. Rep., ¶ 465.

Parties to agree on the Resorts' legal status."[945] The Claimants submit that the Respondent's request for specific performance is unsubstantiated, does not fully and effectively compensate the Claimants, and should be rejected.[946]

649. First, as detailed above, because the Claimants have not requested specific performance, but rather request only compensation, the Claimants emphasize that the Tribunal should reject the Respondent's request for specific performance here.[947]

650. Second, the Claimants also contend that contrary to the Respondent's assertion that the *Occidental Petroleum Corporation v. Ecuador* tribunal "characterized specific performance as a 'unique, absolute and compulsory' remedy in international law where there has been an illegal act causing damages,"[948] the *Occidental* tribunal in fact noted the exact opposite, observing that "[s]pecific performance is, of course, a conditional right, as it is precisely conditioned on the possibility of performance, and consequently hindered by its impossibility."[949] The Claimants therefore argue that, here, in addition to not seeking specific performance – which is their choice – there is no legitimate possibility of specific performance given the Respondent's past behavior and ongoing political instability.[950]

651. Third, the Respondent relies on a CIS Economic Court decision regarding a dispute involving the 1992 Agreement and a Soviet-era resort built by the Kazakh SSR entities in Russia, in which the Court recommended the parties to "settle the property rights" by way of an agreement.[951] According to the Claimants, that case did not concern an investment dispute under a bilateral investment treaty or investment law that expressly provided for compensation.[952]

[945] Cl. Rep., ¶ 466; Re. Mem., ¶ 265.
[946] Cl. Rep., ¶ 466.
[947] Cl. Rep., ¶ 467.
[948] Cl. Rep., ¶ 468; Re. Mem., ¶ 265.
[949] Cl. Rep., ¶ 468; Exh. RL-0210.
[950] Cl. Rep., ¶ 468.
[951] Cl. Rep., ¶ 469; Re. Mem., ¶ 266; Exh. RL-0132.
[952] Cl. Rep., ¶ 469; Exh. RL-0132.

652. Finally, the Claimants argue that reparation in the form of an order to the Parties to agree on the Resorts' legal status would be fruitless. The Claimants and the Respondent previously have attempted to settle the present dispute through negotiations without success. Hence, the Claimants aver that an order for the Respondent and the Claimants to agree on the legal status of the Resorts would not provide full reparation to the Claimants, as required under international law, and in any event likely would not be successful.[953]

c. Restitution Is Insufficient To Ensure Full Reparation And Should Not Be Considered By The Tribunal

653. The Respondent requests that it "be granted the right to determine within 120 days, in light of each of the breaches found by the Tribunal, if restitution appears materially possible and, in that case to provide restitution as an alternative to any damages the Tribunal may award."[954] According to the Respondent, restitution is the "preferred form of reparation for an internationally wrongful act," and "[i]t matters not, [. . .] that Claimants have withdrawn their request for restitution at the eleventh hour," because "[a]rbitral tribunals have, in fact, ordered restitution even when a claiming party was exclusively seeking monetary compensation."[955] The Claimants assert that the Respondent's request is baseless and should be rejected.[956]

654. The Claimants maintain that contrary to the Respondent's contention, it is relevant that the Claimants no longer request relief in the form of restitution given that under international law, "the injured State may elect between the available forms of reparation and may prefer compensation to restitution."[957]

655. Moreover, the Claimants submit that it is well established that monetary compensation is appropriate where "restitution is either not meaningfully available or not sufficient to fully repair the loss."[958] The Claimants allege that the likelihood that the Respondent would

[953] Cl. Rep., ¶ 470; Exh. RL-0132.

[954] Cl. Rep., ¶ 471; Re. Mem., ¶ 271.

[955] Cl. Rep., ¶ 471; Re. Mem., ¶¶ 268, 270.

[956] Cl. Rep., ¶ 471.

[957] Cl. Rep., ¶ 472; Re. Mem., ¶ 270; Exh. C-0006; Exh. CL-0201.

[958] Cl. Rep., ¶ 473; Exh. CL-0107; Exh. CL-0188; Exh. CL-0201; Exh. CL-0208; Exh. CL-0265; Exh. CL-0229; Exh. RL-0046.

comply with an award of restitution is negligible given the continued, substantial political and legal instability in the Kyrgyz Republic, the Respondent's failure to appear or to present its case in the merits phase of this arbitration, and its refusal to comply with several prior arbitral awards rendered against it.[959] In light of these circumstances, the Claimants withdrew their request for restitution.[960] The Claimants therefore contend that where, as here, restitution is not available, the Tribunal should order compensation.[961] Alternatively, the Claimants argue that if, however, the Tribunal were to decide to order any form of restitution in its award, which it should not, any such order also should provide the Claimants with the choice between: (i) a proposal for restitution by Respondent, or (ii) monetary compensation established by the Tribunal in its Award.

d. The Sunk Costs Approach Does Not Ensure Full Reparation To The Claimants, And The Tribunal Should Reject The Respondent's Alternative Request To Appoint An Independent Expert

656. The Respondent asserts that compensation is the "last alternative" form of reparation, and that such reparation, if any, should be limited solely to the Claimants' sunk costs."[962] The Respondent further asserts that the sunk costs approach is the appropriate methodology in cases where, as here, "the commercial prospects of the investment were doubtful and/or uncertain."[963] The Respondent also contends that the Tribunal should "appoint an independent quantum expert with a view to not only quantifying [the] Claimants' alleged losses but also assessing the evidentiary value of [the] Claimants' financial documents" because "Mr. Allen's [(PwC's)] market-based approach is defective."[964] If the Tribunal decides not to appoint an independent expert, the Respondent asserts that the Claimants are entitled to monetary damages of no more than USD 7.6 million based on their sunk costs.[965]

[959] Cl. Rep., ¶ 474; Cl. POC, ¶ 18.
[960] Cl. Rep., ¶ 474; Cl. POC, ¶ 16.
[961] Cl. Rep., ¶ 474.
[962] Cl. Rep., ¶ 478; Re. Mem., ¶ 259.4.
[963] Cl. Rep., ¶ 478; Re. Mem., ¶ 375.
[964] Cl. Rep., ¶ 478; Re. Mem., ¶¶ 383-384.
[965] Cl. Rep., ¶ 478; Re. Mem., ¶¶ 273, 374-387.

The Claimants contend that the Respondent's assertions are erroneous and must be rejected.[966]

657. First, the Claimants contend that, contrary to the Respondent's contentions, the sunk costs methodology is not appropriate here, as it will not provide the Claimants with full reparation based on the market value of their investments, as required under international law.[967] Specifically, the Claimants argue that it is well established that the sunk cost approach "generally does not meet the legal requirement to make the award equivalent to the investment's fair market value," and is considered "an imperfect measure to value a revenue-generating asset."[968] This is, according to the Claimants, because the approach does not take into account the impact (positive or negative) that expenditures have on the market value of an investment from the perspective of a willing buyer or a willing seller.[969] Accordingly, the Claimants contend that an award of sunk costs would fail to fully compensate the Claimants, as it would disregard the future use and possibilities of the properties and compensate the Claimants only for the amount invested historically.[970]

658. Second, the Claimants also contend that, contrary to the Respondent's assertion, PwC's comparables approach is not defective. In this regard, the Claimants argue that PwC and Mr. Hart both confirm that the comparables approach is the most appropriate approach to apply to the circumstances of this case, and results in a reasonable and non-speculative valuation of the Claimants' investments in the Resorts.[971] Therefore, according to the Claimants, there is no need to apply the sunk costs methodology in this case.[972]

659. Third, the Claimants maintain that the Respondent's contention that "the Resorts were not profitable," and that the sunk costs approach is proper in cases where, as here, "the commercial prospects of the investment were doubtful and/or uncertain" are misleading

[966] Cl. Rep., ¶ 478.
[967] Cl. Rep., ¶ 479; Exh. CL-0201.
[968] Cl. Rep., ¶ 479; Exh. CL-0362; Exh. Cl-0373; Exh. CL-0379.
[969] Cl. Rep., ¶ 479; Exh. CL-0362; Exh. CL-0379.
[970] Cl. Rep., ¶ 481; Hart, ¶¶ 98-100.
[971] Cl. Rep., ¶ 483; Hart, ¶ 79.
[972] Cl. Rep., ¶ 483.

and erroneous. The Claimants argue that as detailed above, and as a factual matter, Resort Zolotiye Peski, Resort Rokhat-NBU, and Resort Dilorom in fact were profitable in nearly every year except for 2005 and 2010. The Claimants add that having operated for decades, the Resorts showed no sign of any doubtful or uncertain future.[973]

660. Fourth, the Claimants argue that the Respondent's request for the Tribunal to appoint an independent quantum expert to assess the evidentiary value of the Claimants' financial documents and to assess the Claimants' sunk costs is baseless and should be denied. The Claimants contend that if the Respondent saw a need to engage an expert with respect to the Resorts' financial statements or to assess quantum, the Respondent could and should have participated in the merits phase of the arbitration, in which it would have had the opportunity to submit a Counter-Memorial and a Rejoinder in accordance with the procedural schedule. The Respondent also could have engaged an expert in the preparation of the pleading that it submitted on 6 May 2022. Having failed to do so, the Claimants maintain that the Respondent cannot now request the Tribunal to appoint an independent expert.[974]

661. The Claimants also contend that the appointment of an independent expert would require significant additional time and expense, and substantially protract these proceedings – which already have been extended unnecessarily due to the Respondent's sudden reappearance at the eleventh hour, nearly one year after the Hearing.[975] The Claimants should not also have to bear the costs of any independent expert retained at the Respondent's request. In this regard, the Claimants submit that if the Tribunal does appoint an independent expert, which it should not, all such costs should be borne solely by the Respondent.[976]

662. Additionally, the Claimants assert that it is also unnecessary for the Tribunal to appoint an independent expert. According to the Claimants, arbitral tribunals repeatedly have denied a party's request to appoint an independent expert where the tribunal had the opportunity

[973] Cl. Rep., ¶ 484.
[974] Cl. Rep., ¶ 486.
[975] Cl. Rep., ¶ 487; Cl. POC, ¶¶ 28-44.
[976] Cl. Rep., ¶ 487.

to solicit information regarding the valuation of the claimant's investment, or where the record provided sufficient information from which the tribunal could make a determination regarding the valuation of the investment.[977] The Claimants maintain that in this case, Mr. Allen of PwC submitted a clear and credible valuation of the Claimants' Resorts and was cross-examined by the Tribunal during the Hearing.[978]

663. Finally, the Claimants note that if the Tribunal considers the Respondent's valuation of the Claimants' sunk costs as USD 7.6 million, which it should not, Mr. Hart confirms that the Respondent's calculations are vastly understated. According to the Claimants and as explained above, many of the Resorts' documents and financial records were kept in hardcopy in the Resorts' archives, which, since the 2016 nationalization, the Claimants have been unable to access, and the Respondent has objected to document requests. Accordingly, the Claimants allege that given the lack of financial information available due to the taking and lack of transparency and accessibility to such information, sunk costs cannot reliably be applied.[979]

664. The Claimants therefore submit that for the aforementioned reasons, an award based on sunk costs would not adequately compensate the Claimants and should be rejected by the Tribunal.[980]

(4) The Claimants Are Entitled To Recover Post-Award Interest At An Appropriate Commercial Rate

665. The Claimants maintain that the BIT and the FIL require interest to be awarded at the LIBOR rate for a lawful expropriation.[981] Moreover, the Claimants contend that interest in the case of a treaty breach must be at least at the level provided by the treaty.[982] Further, according to the Claimants, full reparation for an unlawful expropriation requires interest

[977] Cl. Rep., ¶ 489; Exh. CL-0208; Exh. C-0290.
[978] Cl. Rep., ¶ 489.
[979] Cl. Rep., ¶ 491; Hart, ¶ 100.
[980] Cl. Rep., ¶ 492.
[981] Cl. Rep., ¶ 494; Exh. C-0001; Exh. C-0025; Exh. C-0201.
[982] Cl. Rep., ¶ 494; Exh. CL-0246.

at a commercially-reasonable rate *plus* an appropriate margin, compounded annually from the Valuation Date until payment of award.[983]

666. The Claimants allege that the Respondent ignores the distinction between a lawful and unlawful expropriation for the purposes of awarding interest, and disputes that "the Tribunal [is] to apply the twelve month LIBOR rate plus four percent on the market value as of the date of the taking, compounded annually." According to the Respondent, the Tribunal should award only simple interest because tribunals routinely award simple interest and the Claimants fail to demonstrate "particular circumstances justifying compound interest."[984] The Claimants argue that the Respondent's assertions are incorrect.[985]

667. The Claimants specifically submit that as the commentary to ILC Article 38 explains, "[t]he interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act."[986] The Claimants further note that in this regard, many tribunals have confirmed that for an unlawful breach, "the best approach for establishing 'a normal commercial rate' is to select LIBOR *plus* an appropriate margin," for which arbitral tribunals routinely apply a premium of at least 4 percent.[987]

668. The Claimants, moreover, request application of the 10-year U.S. Treasury rate, instead of the LIBOR rate given that the latter is in the process of being phased out, and it may be defunct by the time an award is rendered. According to the Claimants, a 10-year duration is appropriate because the award will not be rendered until at least 7 years after the 2016 valuation date.[988]

[983] Cl. Rep., ¶ 494; PwC Report, ¶ 5.63; Exh. CL-0235.
[984] Cl. Rep., ¶ 495; Re. Mem., ¶¶ 388-393.
[985] Cl. Rep., ¶ 495.
[986] Cl. Rep., ¶ 495; Exh. CL-0201; Exh. CL-0233.
[987] Cl. Rep., ¶¶ 495-497; Exh. CL-0235.
[988] Cl. Rep., ¶ 499; Hart, ¶ 15; Exh. CL-0376.

669. In sum, the Claimants aver that in order to fully compensate the Claimants, they are entitled to compound interest, at the 10-year U.S. Treasury rate plus a 4 percent margin.[989]

(5) The Claimants Are Entitled To Compensation For Taxes To Be Paid On An Award

670. The Claimants further maintain that in order to ensure full reparation, the Claimants are also entitled to an award that covers a tax gross-up on the direct damages. In this respect, the Claimants assert that the rate of income tax under the Uzbek Tax Code to be deducted from any award of damages is 20 percent for NBU, Asaka and Uzpromstroybank, and 15 percent for TMP.[990] Therefore, the Claimants contend that to make the Claimants whole, any award should be increased as appropriate to account for the applicable income tax.

671. The Respondent contends that neither the BIT, the FIL or customary international law require that reparation must make the claimant whole "after taxes," and that "not a single arbitral tribunal has followed [the] Claimants' logic."[991] The Claimants argue that the Respondent is wrong.[992]

672. The Claimants note that numerous tribunals have confirmed that compensation should be paid "net of any taxes," and that tribunals should factor in any tax liability that may be incurred in the calculation of the damages amount.[993] Tribunals have accepted the notion of net taxes for potential taxes levied in the host jurisdiction of the investor, as well as its home jurisdiction.[994] Given that the applicable taxes in this case are clearly established in the Tax Code of the Republic of Uzbekistan, the Claimants contend that they should be awarded damages net of any taxes, and are entitled to an appropriate tax gross-up.[995]

[989] Cl. Rep., ¶ 502.
[990] Cl. Rep., ¶ 503.
[991] Cl. Rep., ¶ 504; Re. Mem., ¶¶ 333-335.
[992] Cl. Rep., ¶ 504.
[993] Cl. Rep., ¶ 505; Exh., C-0208; Exh. CL-0120; Exh. CL-0324; Exh. CL-0377; Exh. RL-0174.
[994] Cl. Rep., ¶ 505; Exh. C-0208; Exh. CL-0120.
[995] Cl. Rep., ¶ 505.

673. Based on these adjustments, Mr. Hart arrives at the following valuation of the Claimants' damages:[996]

Table 8.2: Tax Calculation Based on PwC's Revised Market Value[150]

(in US$)	Zolotiye Peski	Rokhat-NBU	Dilorom	Buston	Total
Market value as of 4 Apr 16	$11,883,039	$8,336,989	$6,078,221	$677,681	$26,975,930
Interest through 31 Aug 22	$5,381,483	$3,775,580	$2,752,649	$306,902	$12,216,614
Tax Gross-Up	$3,046,680	$3,028,142	$2,207,718	$246,146	$8,528,686
Total Damages	**$20,311,202**	**$15,140,711**	**$11,038,588**	**$1,230,729**	**$47,721,230**

B. THE RESPONDENT'S POSITION

(1) At Best, The Claimants Are Entitled To Reparation By Satisfaction, Taking The Form Of A Declaration By The Tribunal That A Wrongful Act Has Taken Place

674. The Respondent maintains that international law on State liability recognizes satisfaction as one of the appropriate forms of reparation for an internationally wrongful act. According to the Respondent, typical modalities of satisfaction include a simple declaration of the wrongfulness of the State action, an expression of regret, or a formal apology. The Respondent relies on Brownlie, which has indicated, "[i]n some cases a declaration by a court as to the illegality of the act of the defendant state constitutes a measure of satisfaction [. . .]."[997]

675. The Respondent also submits that Brownlie goes on to note that satisfaction is the appropriate form of reparation in cases where compensation is improper, but a wrongful act has nonetheless occurred, such that the offending State should provide "a token of regret and acknowledgment of wrongdoing."[998]

676. The Respondent asserts that in the case at hand, compensation is improper given that the Claimants were knowingly operating the Resorts at a great risk, some with no proper legal title to the land and properties at all, and others with partial legal title.[999]

[996] Cl. Rep., ¶ 508.
[997] Re. Mem., ¶ 260; Exh. CL-0201.
[998] Re. Mem., ¶ 261; Exh. RL-0208.
[999] Re. Mem., ¶ 262.

677. Accordingly, the Respondent argues that were this Tribunal to find that the Respondent has breached the BIT or the FIL, the only reparation available is a declaration and an acknowledgment by the Respondent of its wrongdoing.[1000]

(2) Alternatively, The Claimants Are At Best Entitled To An Order For Specific Performance For The Claimants And The Respondent To Agree On The Legal Status Of The Resorts

678. The Respondent also maintains that, as confirmed by arbitral practice, tribunals in investment disputes have the power to order specific performance to the disputing parties.[1001] By way of an example, the Respondent cites the decision in *CMS v. Argentina*, in which the tribunal observed that renegotiation of new terms governing the relationship between the investor and the State can be considered a form of restitution.[1002] Therefore, the Respondent argues that in the case at hand, the form that specific performance to be ordered by the Tribunal should take is an order for the Respondent and the Claimants to agree on the legal status of the Resorts.[1003]

(3) As A Further Alternative, Only Some Of The Claimants Are Entitled To Restitution Of The Very Limited Protected Rights That They Had As Of 4 April 2016

679. The Respondent also contends that restitution is another – in fact, preferred – form of reparation for an internationally wrongful act.[1004] The Respondent notes that that much has been recognized by the Claimants who have, until the very last moment in this arbitration, persistently sought restitution of their purported rights as the primary, appropriate form of reparation.[1005]

680. Indeed, according to the Respondent, restitution would put those Claimants that had any protected rights as of 4 April 2016 exactly back to the position they would have been in absent any violation of the BIT or the FIL (assuming any). The Respondent further asserts

[1000] Re. Mem., ¶ 263.
[1001] Re. Mem., ¶ 265; Exh. RL-0210; Exh. RL-0211; Exh. RL-0212.
[1002] Re. Mem., ¶ 266; Exh. RL-0213.
[1003] Re. Mem., ¶ 267.
[1004] Re. Mem., ¶ 268; Exh. CL-0201.
[1005] Re. Mem., ¶ 268; Cl. Mem., ¶¶ 242-260.

that such a remedy would avoid giving the relevant Claimants windfall profits for exclusivity that they seek to obtain by an order of damages. It would instead require the relevant Claimants to operate their loss-making, instead of claiming them as a lump sum from the Kyrgyz treasury.[1006]

681. It matters not, according to the Respondent, that the Claimants have withdrawn their request for restitution at the eleventh hour. Arbitral tribunals have, in fact, ordered restitution even when a claiming party was exclusively seeking monetary compensation.[1007]

682. Accordingly, as a further alternative, the Respondent requests that it should be granted the right to determine within 120 days, in light of each of the breaches found by the Tribunal, if restitution appears materially possible and, in that case to provide restitution as an alternative to any damages the Tribunal may award.[1008]

(4) As A Last Alternative, The Claimants Are Entitled To Some Monetary Compensation That Does Not Include Either Lost Profits Or The Market Value Of The Resorts, But Should Be Limited To The Claimants' Sunk Costs To Be Determined By A Tribunal-Appointed Expert

683. As a last alternative, the Respondent argues that, should the Tribunal determine that damages are warranted for any of the Claimants' claims, it will see that the amount of compensation the Claimants request is grossly inflated, rests on spurious and unsubstantiated assumptions, and is otherwise based on flawed methodologies. Accordingly, the Respondent asserts that even if the Claimants succeed in establishing the jurisdiction of this Tribunal, demonstrating that Respondent breached the BIT and demonstrating that they are entitled to compensation as opposed to other forms of reparation, the Claimants cannot recover neither their purported lost profits, nor the market value of the Resorts. The Respondent alleges that at best, monetary compensation that the

[1006] Re. Mem., ¶ 269.
[1007] Re. Mem., ¶ 270; Exh. RL-0201.
[1008] Re. Mem., ¶ 271.

Claimants may be entitled to is limited to the Claimants' sunk costs that should be determined by a Tribunal appointed expert.[1009]

a. The Claimants Are Not Entitled To Lost Profits

684. The Claimants contend that in addition to restitution of their rights in the Resorts, further compensation should be accorded to them with a view to ensuring full reparation. Such supplemental compensation is sought in the form of lost profits between the date of the 2016 Order and the date of the Tribunal's Award.[1010]

685. To calculate lost profits, the Claimants' damages expert, Timothy Allen of PwC relies on the historic financial information for each of the Resorts from the years 2011 to 2015.[1011] These figures are then adjusted and extrapolated to the estimated profits for each of the three operational resorts for the period 2016 to 2021 by applying the Kyrgyz Republic's inflation rate.[1012]

686. Moreover, the Claimants' damage expert supplements the lost profits to account for the respective tax rates that would be applied to each Claimant in Uzbekistan on any award of damages, to ensure that the Claimants are made whole, inclusive of all taxes.[1013]

687. The Respondent contends that the Claimants' lost profits claims must be dismissed given that the Claimants have failed to establish with reasonable certainty that restitution alone would not restore them to the situation "but for" the alleged expropriation. Nor have they proven that they would have, in fact, gained any profits from the exploitation of the Resorts, which implies that their lost profits' claims are merely speculative. Moreover, according to the Respondent, the quantification of the Claimants' supposed lost profits rests on unreliable financial evidence, imprecise instructions of the Claimants' damages expert, and – as a result – deeply flawed valuations.[1014]

[1009] Re. Mem., ¶ 272.
[1010] Re. Mem., ¶ 273; Cl. Mem., ¶¶ 275-281.
[1011] Re. Mem., ¶ 274; Cl. Mem., ¶ 278; PwC Report, ¶¶ 4.4-4.5.
[1012] Re. Mem., ¶ 274; Cl. Mem., ¶ 279.
[1013] Re. Mem., ¶ 274; PwC Report, ¶ 4.8.
[1014] Re. Mem., ¶¶ 275-276.

688. The Respondent demonstrates below that the Claimants have failed to prove their case. Specifically, the Respondent submits that to the extent that the Claimants failed to discharge their burden of proof as to causation, the existence, and the extent of their lost profits, this claim should be dismissed. Further, as the Respondent sets out below, any lost profits awarded to the Claimants should be reduced proportionally to their contributory fault. Finally, the Respondent maintains that the Claimants' tax "gross-ups" on alleged lost profits are neither legally nor economically justified and should be equally rejected.[1015]

(v) The Claimants Failed To Discharge The Burden Of Proof As To Causation, The Existence, And The Extent Of Their Lost Profits

689. The Respondent maintains that as a threshold matter, the Claimants bear the burden of proof not only as to the existence and extent (*i.e.*, quantum) of the losses that they have allegedly suffered, but also that those losses flow directly from the "breaches" of the Kyrgyz Republic's international law obligations identified by the Tribunal, *i.e.*, that there is a proximate causal link between those breaches and the losses for which the Claimants seeks compensation.[1016]

1. The Claimants Fail To Establish Proximate Causation For Their Lost Profits' Claims

690. To begin, the Respondent asserts that the lost profits that the Claimants allege they have suffered do not bear any causal relationship with the 2016 Order that is allegedly falling short of the Respondent's obligations under the BIT and the FIL.[1017]

691. The Respondent notes that it is axiomatic in the law of State responsibility that the duty to provide compensation encompasses only damages caused by a State's own wrongful conduct. Accordingly, the Respondent alleges that even if it had any obligation to provide compensation, only those losses that flow from the alleged expropriation of the Claimants' rights in the Resorts fall to be compensated by the Kyrgyz Republic.[1018]

[1015] Re. Mem., ¶ 278.
[1016] Re. Mem., ¶ 279.
[1017] Re. Mem., ¶ 281; Cl. Mem., ¶¶ 174, 186, 275-281.
[1018] Re. Mem., ¶ 282; Exh. CL-0201.

692. As a threshold matter, the Respondent maintains that the Claimants bear the burden of proof as to the existence and the extent of Claimants' supposed losses. Moreover, the Respondent submits that the Claimants must prove that those losses flow directly from the "breaches" of the Kyrgyz Republic's international law obligations and that there is a proximate causal link between those breaches and the losses for which the Claimants seek compensation.[1019]

693. The Respondent further maintains that it is trite law that "factual" or simply "but for" causation is insufficient. The Claimants have the burden of demonstrating that the Respondent's breach of a specific treaty provision is the proximate or legal cause of its injury.[1020]

694. In this regard, the Respondent relies on the holding of the tribunal in *Lemire v. Ukraine*, which provided a simple formula: "proof of causation requires (A) cause, (B) effect, and (C) a logical link between the two to be established."[1021] The Respondent, however, asserts that in the counterfactual scenario, generally prevailing economic conditions that would have diminished the value of the investment should be excluded from the valuation of the purported losses.[1022] In the same vein, according to the Respondent, the Claimants cannot seek compensation for losses originating from their own conduct resulting in incompetent business management.[1023]

695. Accordingly, the Respondent submits that to satisfy the lost profits claims, the Claimants must ascertain that "but for" the alleged expropriation of the Claimants' rights in the Resorts:

- They would have – on the balance of probabilities – earned profits between 2016 and 2021;

[1019] Re. Mem., ¶ 283; Exh. RL-0214; Exh. RL-0192.
[1020] Re. Mem., ¶ 284; Exh. RL-0216; Exh. RL-0217.
[1021] Re. Mem., ¶ 285; Exh. RL-0218.
[1022] Re. Mem., ¶ 285; Exh. RL-0219; Exh. RL-0220; Exh. RL-0221.
[1023] Re. Mem., ¶ 285; Exh. RL-0222; Exh. CL-0201; Exh. CL-0266.

- They were prevented from earning profits by wrongdoings attributable to the Respondent under the applicable international law instruments; and

- The lack of said profits cannot be attributable to any other external factor such as the Claimants' poor management of the Resorts or general socio-economic conditions adversely affecting the tourist business in Kyrgyzstan.[1024]

2. The Claimants Fail To Demonstrate With Reasonable Certainty That They Would Have Gained Profits From The Exploitation Of The Resorts "But For" The Alleged Expropriation

696. The Respondent maintains that the overwhelming practice of international arbitral tribunals requires that lost profits be "reasonably anticipated, and that the profits anticipated were probable and not merely possible."[1025]

697. The Respondent further submits that from an economic perspective, a damages expert ensures that lost profits are calculated with reasonable certainty by selecting an appropriate valuation methodology. In this respect, the Respondent notes that Mr. Allen explains that he has relied upon historical financial information provided by the Claimants for each of the Resorts for the years 2011 to 2015. As to the adjustments, Mr. Allen considered the following steps:

> a. I deducted, where relevant, any further expenditure which would have been incurred by the Claimants but was not captured within the historical financial information; and
>
> b. I adjusted the historical financial information provided to me to remove noncash items, such as depreciation and amortisation. This is because compensation is based on monetary losses, and depreciation and amortisation are accounting adjustments to profit.[1026]

[1024] Re. Mem., ¶ 287.

[1025] Re. Mem., ¶ 289; Exh. RL-0205; Exh. RL-0223; Exh. RL-0224; Exh. RL-0221; Exh. RL-0164.

[1026] Re. Mem., ¶¶ 290-291; PwC Report, ¶ 4.4.

698. The Respondent also maintains that it is not uncommon in accounting practice that experts rely on the so-called "before and after" method. This method allows for the calculation of lost profits by reliance upon the historical performance of the business entity. Yet, pursuant to the international accounting literature, a damages expert is required to "find out if there are no other factors which could cause the declining of revenues, and if they exist – to evaluate to what extent which factor could cause a drop of revenues." Moreover, according to the Respondent, a prudent approach of the damages expert would also suppose consultation with industry experts with a view to identifying any possible impact of macroeconomic factors or industry fluctuations. [1027]

699. The Respondent contends that falling short of recognized accounting practices, Mr. Allen refers to having prepared the report with assistance from the Real Estate Valuation and Strategy Unit of the Advisory Practice of PwC Moscow. The Respondent further alleges that, at no point has Mr. Allen's report considered tourism market fluctuations throughout the valuation period, *i.e.*, from 2016 to 2021 by reliance on objective, verifiable data. Nor has Mr. Allen consulted with any certified real estate expert in the Kyrgyz Republic. [1028]

700. The Respondent argues that it should, however, not escape the eye of the Tribunal that under the laws of the Kyrgyz Republic, real estate valuation is regulated. Pursuant to the Governmental Decree No. 537 on the activities of surveyors and surveyors' organizations in the Kyrgyz Republic of 21 August 2003:

> A valuation report prepared by a foreign appraiser, for the purposes of ensuring its legitimacy in the Kyrgyz Republic, shall be certified by an appraiser of the Kyrgyz Republic who has documents confirming professional knowledge in valuation [. . .] [1029]

701. The Respondent further notes that for the purposes of the Governmental Decree No. 537 on the activities of surveyors, the Real Estate Valuation and Strategy Unit of the Advisory Practice of PwC Moscow is a foreign appraiser. Not only has Mr. Allen failed to submit the conclusions of the Real Estate Valuation Unit of PwC Moscow but he has also failed

[1027] Re. Mem., ¶¶ 292-293; Exh. RL-0225.

[1028] Re. Mem., ¶ 294.

[1029] Re. Mem., ¶ 295; Exh. RL-0226; Exh. RL-0227.

to seek certification by an appraiser in the Kyrgyz Republic. Thus, according to the Respondent, the mere "off-record" consultation with the Russian branch of PwC is unmistakably insufficient for the assessment of the market conditions in which the Claimants would have supposedly earned profits in the counterfactual scenario.[1030]

702. The Respondent also alleges that Mr. Allen self-evidently assesses the Claimants' estimated profits in an economic information vacuum, with no regard to the macroeconomic conditions of the tourism market in the Kyrgyz Republic for the relevant period. Nor does Mr. Allen provide a fair account of the costs that Claimants would have suffered in any event.[1031]

703. In addition, the Respondent maintains that, pursuant to the accounting guidance of the American Institute of Certified Public Accountants "only net profits are allowed as damages." The Respondent adds that lost net profit "is computed, in general, by estimating the gross revenue that would have been earned but for the wrongful act reduced by avoided costs."[1032] The Respondent further submits that the avoided costs are the incremental costs that were not incurred because of the loss of the revenue. In other words, the avoided costs are those that would have been incurred by the Claimants if they had been running a going concern (for example costs resulting from the utilities and wages).[1033]

704. Further, the Respondent cites the author and damages specialist Serena Morones, to indicate that there are several ways of determining the avoided costs:

> The most common steps to identify avoided costs include reviewing the financial statement's cost categories for variable-type cost descriptions, conducting regression analysis using revenue and expense data, interviewing witnesses or reading deposition testimony and reviewing documents to identify costs that must be variable due to financial arrangements, such as a commission rate or incentive bonus.[1034]

[1030] Re. Mem., ¶¶ 296-297.
[1031] Re. Mem., ¶ 298.
[1032] Re. Mem., ¶ 299; Exh. RL-0225; Exh. RL-0228.
[1033] Re. Mem., ¶ 299.
[1034] Re. Mem., ¶ 300; Exh. RL-0229.

705. The Respondent then alleges that none of the above-recommended analysis were performed by the Claimants' damages expert. The Respondent submits that as it transpires from the Appendices submitted in support of Mr. Allen's Expert Report, avoided costs were chosen for each of the Resorts based on their uncorroborated Reports of Profit and Losses. The Respondent emphasizes that amongst the avoided costs must appear for example the necessary maintenance and renovation expenses, wages, utility costs etc. Without those expenses, the exploitation of the Resorts with a view to generating profit "but for" the 2016 Order would be no more than a wishful prospect. In Mr. Allen's own admission he has assumed that "no additional capital expenditure (nor associated revenue) would have been incurred in the period other than annual maintenance and repair costs."[1035]

706. Crucially, the Respondent asserts that a plethora of guests' negative reviews indicate that the Resorts were in bleak condition, necessitating renovation, and significant structural improvements.[1036] Moreover, the Respondent adds that any profits earned from the Resorts would have been reinvested due to the pressing necessity to maintain the Resorts at a certain level of attractiveness for the tourists.[1037]

707. **'Zolotiye Peski' Resort**: With respect to Zolotiye Peski Resort, the Respondent maintains that:

- The Claimants admit that 'Zolotiye Peski' Resort does not show an impeccable record of profitability from 2005 to 2015. Quite the opposite, in the 10 years of operation, 'Zolotiye Peski' Resort was profitable only in 2013 and 2014.[1038]

- On the Claimants' own case, an array of external factors – not imputable to the Respondent under the proximate causation standard – lead to the dire cost effectiveness of the Resort. Those factors allegedly include political tensions in the Kyrgyz Republic, spikes in both violent and non-violent crimes and the 2010 Revolution. According to the Claimants' witness, Mr. Elmurodov, "the Resort earned a small profit in 2015, but

[1035] Re. Mem., ¶¶ 301-302; PwC Report, ¶ 4.10.
[1036] Re. Mem., ¶ 303: Exh. RL-0102; Exh. RL-0103; Exh. RL-0107.
[1037] Re. Mem., ¶ 304: Exh. RL-0102; Exh. RL-0103; Exh. RL-0107.
[1038] Re. Mem., ¶ 305.1; Exh. C-0273; Exh. C-0276.

ultimately recorded a loss due to accounts receivables carried over from the prior year."[1039]

- Yet, the Claimants omit to mention that 'Zolotiye Peski' Resort was in wretched condition, yielding multiple negative reviews by its guests. The Resort is described by its guest as, among other things, "disgusting" and "sovietesque."[1040]

708. **Resort Rokhat-NBU**: With respect to Resort Rokhat-NBU, the Respondent submits that:

- Similarly, the Claimants contend that Resort Rokhat-NBU had suffered losses resulting from the downfall of the tourist business in the Kyrgyz Republic due to the 2005 and 2010 Revolutions and resulting instability in the country,[1041] yet they omit to mention the Resort's wretched condition. A review on Trip Advisor from 17 August 2015 entitled "Back in USSR" described the stay at the Resort as a "deplorable experience." The guest explained that whilst she has travelled a lot, this was the first time she had "ever seen such filth" which included the lack of cleaning and "dead insects" on the walls.[1042]

709. **Resort Dilorom**: With respect to Resort Dilorom, the Respondent maintains that:

- Again, on the Claimants' own case, Resort Dilorom was not immune from dismal tourism market conditions, political and civil unrest in the Kyrgyz Republic and numerous issues with local organized crime.[1043] The former Chief Auditor and Head of the Internal Audit Service at Asaka Bank confirmed that in the 10 years of Dilorom's operation, the Resort could count merely "several profitable seasons" in 2006-2009.[1044] Moreover, Dilorom's guests also remained unsatisfied with their stay at the Resort,

[1039] Re. Mem., ¶ 305.2; Cl. Mem., ¶¶ 44, 48; Elmurodov II, ¶¶ 8-9.
[1040] Re. Mem., ¶ 305.3; Exh. R-0102.
[1041] Re. Mem., ¶ 306; Cl. Mem., ¶ 63.
[1042] Re. Mem., ¶ 306; Exh. R-0104.
[1043] Re. Mem., ¶ 307.1; Cl. Mem., ¶ 63
[1044] Re. Mem., ¶ 307.1; Exh. R-0104.

pointing to, among other things, the Resort's poor management, the rudeness of the staff, and the lack of running water.[1045]

710. The Respondent asserts that in view of the evidence of the Resorts' wretched conditions, the Claimants are unable to prove with reasonable certainty that they would have earned profits from the exploitation of the Resorts "but for" the alleged expropriation. Thus, it will be demonstrated that the quantum of the Claimants' lost profits is predicated on unreliable financial data.

3. The Claimants Do Not Substantiate The Extent Of Their Lost Profits With Reliable Financial Documentation

711. The Respondent maintains that the Claimants' lost profit claims are bereft of reliable evidence, and the supposed "quantification" of alleged "losses" falls apart under closer scrutiny.[1046]

712. In this respect, the Respondent submits that Mr. Allen explains that to the extent that he has not been provided with the quantum of actual profits generated by the Respondent, he has relied upon the financial information provided to him by the Claimants for each of the resorts for the years 2011 to 2015.[1047]

713. The Respondent contends that the Tribunal should not attribute evidential weight to these documents and, by extension, to the financial information contained therein.[1048]

714. The Claimants' so-called "historic results" are set out in the Reports of Profits and Losses. These documents are prepared and signed by the Claimants' Chief Accountants.[1049] However, according to the Respondent, the numbers in these Reports are not supported by the underlying documentation nor corroborated by certified accounts. Put simply, the

[1045] Re. Mem., ¶ 307.2; Exh. R-0101; Exh. R-0107; Exh. R-0108.

[1046] Re. Mem., ¶ 309.

[1047] Re. Mem., ¶ 310; PwC Report, ¶ 4.4.

[1048] Re. Mem., ¶ 311.

[1049] Re. Mem., ¶ 312; Exh. C-0243; Exh. C-0245; Exh. C-0253; Exh. C-0258; Exh. C-0271; Exh. C-0273; Exh. C-0274; Exh. C-0276; Exh. C-0279; Exh. C-0282; Exh. C-0290; Exh. C-0291; Exh. C-0296; Exh. C-0304; Exh. C-0310; Exh. C-0313; Exh. C-0391; Exh. C-0394; Exh. C-0401; Exh. C-0406; Exh. C-0407; Exh. C-0409.

Respondent alleges that there is no feasible method of verifying the accuracy of these figures and the underlying raw data is missing.[1050]

715. For example, the Respondent notes that the Tribunal should be wary that the figures in the Zolotiye Peski Resort's Reports on Profits and Losses are handwritten. Aside from the obvious risks of errors, these handwritten numbers are not corroborated by any other financial evidence whatsoever. [1051]

Көрсөткүчтүн аталышы	Саптардын коду Код строк	Өткөн мезгил За Предыдущий период	Отчеттук мезгил За отчетный период	Наименование показателей
Негизги операциялык ишмердүүлүк				Основная операционная деятельность
Операциялык ишмердүүлүктүн негизги кирешеси - түшкөн акча же Биологиялык активдерден пайда (зыян)	010	10053,0	12703,3	Выручка – основной доход от операционной деятельности или Прибыль/ убыток от биологических активов
Товарлардын, тейлөөлөрдүн өздүк наркы же Биологиялык активдерди өндүрүү боюнча чыгашалар	020			Себестоимость реализации товаров, услуг или Расходы по производству биологических активов
Дүн пайда (010-020)	030	10053,0	12703,3	Валовая прибыль (010-020)
Башка операциялык ишмердүүлүктөн түшкөн кирешелер жана чыгашалар:				Доходы и расходы от прочей операционной деятельности:
Операциялык ишмердүүлүктөн түшкөн башка кирешелер	040	1507,0	1036,3	Прочие доходы от операционной деятельности

716. The Respondent also argues that at no point has Mr. Allen relied on audited and certified accounts which would attest to the reality of the actual profits generated by the Resorts.[1052]

717. The Respondent submits that International Financial Reporting Standards ("**IFRS**") comprise a set of accounting standards that govern how particular types of transactions and events should be reported in financial statements. The Respondent notes that pursuant to IAS 1, a company is required to prepare its financial statements which comprise a profit and loss account, balance sheet, cash flow statement and explanatory notes.[1053] When the accounts are audited, an important page in the financial statements is the audit report. The auditor reviews all the companies' accounting transactions and financial statements on a

[1050] Re. Mem., ¶ 312.
[1051] Re. Mem., ¶ 313.
[1052] Re. Mem., ¶ 314.
[1053] Re. Mem., ¶ 315; Exh. RL-0230.

sample basis "and concludes on whether the financial statements show a true and fair view of the company's transactions in the year and comply with accounting standards and include all the disclosures the financial statements are required to include."[1054]

718. The Respondent submits that the rationale for the statutory certification of accounts is to give an objective appraisal of the real value of the assets belonging to the audited entity. The Respondent further notes that a proper audit process entails an all-encompassing verification of all ledgers against all assets. The requirement of account certification is provided for both Kyrgyz and Uzbek legislations as well as in the IFRS.[1055]

719. The Respondent submits that the Claimants' witness, Mr. Elmurodov, alleges that Rokhat-NBU is not in possession of the certified accounts because "they remain at the Resort."[1056] This argument is to no avail. The Respondent maintains that to the extent that Rokhat-NBU is a financial institution, it had the obligation to publish the accounts annually under both Kyrgyz and Uzbek laws.[1057] Therefore, the Respondent submits that the Claimants' argument that they do not have access to their own certified accounts is simply preposterous.[1058]

720. Moreover, the Respondent maintains that the International Valuation Standards on which Mr. Allen relies for the identification of the market value require that the expert examine not only the content of the financial information but also its trustworthiness.[1059] Given that the Claimants' internal accounting documents were neither reviewed nor certified by an external auditor, the Respondent avers that Mr. Allen cannot properly rely on them for the purposes of any credible valuation exercise of the Claimants' lost profits.[1060]

[1054] Re. Mem., ¶ 315; Exh. RL-0231.
[1055] Re. Mem., ¶ 316; Exh. RL-0232; Exh. RL-0233.
[1056] Re. Mem., ¶ 319; Cl. Mem., ¶ 48; Elmurodov, ¶ 4; Elmurodov II, ¶¶ 5, 9, 14.
[1057] Re. Mem., ¶ 319.
[1058] Re. Mem., ¶ 320.
[1059] Re. Mem., ¶ 321; Exh. RL-0235.
[1060] Re. Mem., ¶ 322.

(vi) In Any Event, The Claimants' Lost Profits Should Be Reduced Proportionally To The Claimants' Contributory Fault

721. The Respondent maintains that, as previously relayed, the management of the Resorts under the Claimants was far from exemplary, with issues from insufficient financing for the Resorts' maintenance and renovation, absence of profitability, indebtedness for tax and utilities payments, as well as lambasting reviews from guests. The Respondent therefore contends that the Claimants' mismanagement and recklessness should be deemed to constitute "contribution to the injury" for the purposes of the law of State responsibility.[1061]

722. In this regard, the Respondent notes Article 39 of the Articles on the Responsibility of States for Internationally Wrongful Acts, which states that:

> In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[1062]

723. The Respondent adds that the principle of contributory fault dictates that the aggrieved party's role in its own injury should be taken into account when calculating the compensation.[1063] The Respondent states that such principle is widely recognized in international law and finds its source as a general principle of law in domestic legal systems.[1064]

724. In addition, the Respondent argues that investment tribunals recognize the principle of contributory fault and acknowledge a wide exercise of their discretion in determining the scope and the extent of the responsibility of the claiming party. In particular, the Respondent submits that contributory fault has been found where the investor suffers loss from poor business decisions and reckless judgment of the investment risk; or if the

[1061] Re. Mem., ¶¶ 324-325.
[1062] Re. Mem., ¶ 326; Exh. CL-0201.
[1063] Re. Mem., ¶ 327; Exh. RL-0222; Exh. RL-0236.
[1064] Re. Mem., ¶ 327; Exh. RL-0237.

investor provokes the wrongful act of the State – even if that reaction is found to be ultimately excessive.[1065]

725. On this basis, the Respondent notes that tribunals have found that a commensurable portion of responsibility rested on both the investor and the State and opted for a percentage apportionment.[1066]

726. The Respondent alleges that in the present case and in light of the gravity of the Claimants' mismanagement of the Resorts and lack of reliable accounting information, any additional compensation in form of lost profits (if awarded to the Claimants) should be discounted by at least 50%.[1067]

(vii) The Claimants' Tax Gross-Ups Are Unjustified And Must Be Dismissed

727. The Respondent argues that the Claimants would have this Tribunal believe that it is necessary to supplement lost profits with taxes that would be applied to each Claimant in Uzbekistan on any award of damages pursuant to the principle of full reparation under the *Chorzów Factory* standard.[1068]

728. The Respondent submits, however, that the idea that reparation must make the Claimants whole "after taxes" is absent from both the BIT and the FIL.[1069] Moreover, the Respondent adds that under the *Chorzów Factory* standard, there is no general rule that the Respondent State should account for the taxation implications of the award in a third State.[1070]

729. The Respondent contends that to date, not a single arbitral tribunal has followed the Claimants' logic. Quite to the contrary, in all publicly available decisions, requested tax gross-ups that would cover tax implications in third States have been flatly denied.[1071]

[1065] Re. Mem., ¶ 328; Exh. RL-0266; Exh. RL-0239.
[1066] Re. Mem., ¶ 329; Exh. RL-0266, RL-0239; Exh. RL-0240.
[1067] Re. Mem., ¶ 330.
[1068] Re. Mem., ¶¶ 331-332.
[1069] Re. Mem., ¶ 334; Exh. C-0001; Exh. C-0025.
[1070] Re. Mem., ¶ 334.
[1071] Re. Mem., ¶¶ 335-338; Exh. CL-0233; Exh. RL-0175; Exh. RL-241; Exh. RL-0242; Exh. RL-0243.

730. Accordingly, the Respondent contends that the Claimants' tax gross-ups are unjustified as a matter of international law, unsupported by the international arbitral practice, and must be dismissed.[1072]

b. The Claimants Are Not Entitled To The Market Value Of The Resorts

731. The Respondent maintains that the principle of full reparation aims to "eliminate all consequences of the internationally wrongful act and restore the injured party to the situation that would have existed if the act had not been committed."[1073] Therefore, the Respondent submits that the standard of full reparation requires that the aggrieved party receives no more and no less than what it would have had but for the breach by the host State of its international law obligations.[1074] The Respondent adds that it follows that the standard of full reparation sets the upper limit of the amount of damages that an investor can claim.[1075]

732. The Respondent argues that the claim for the Resorts' market value is predicated on an important factual imprecision, namely, the Claimants did not own the Resorts, but merely had short-term and long-term lease rights over the land and rights to use the buildings. Therefore, the Respondent contends that the Claimants can only claim damages for losses that they themselves incurred and cannot cloak "rights of use" into the robe of ownership.[1076]

733. The Respondent further submits that as a threshold point, Mr. Allen is assessing the market value of the Resorts on the basis of defective key assumptions. In this respect, the Respondent asserts that as an immediate consequence of this factual imprecision, Mr. Allen's valuation methodology is unreliable and therefore unfit to prove the Claimants' alleged losses. Further, the Respondent submits that even assuming that the Kyrgyz

[1072] Re. Mem., ¶ 339.
[1073] Re. Mem., ¶ 340; Exh. RL-0244.
[1074] Re. Mem., ¶ 341; Exh. RL-0245.
[1075] Re. Mem., ¶ 341; Exh. RL-0246.
[1076] Re. Mem., ¶ 342.

Republic should compensate the Resorts' market value, Mr. Allen's market approach is predicated on the wrong data.[1077]

(viii) The Claimants' Assessment Of The Resorts' Market Value Is Predicated On Wrong Assumptions

734. The Respondent argues that both the BIT and the FIL require that the taken investment be compensated for its market value.[1078]

735. The Respondent notes that the international valuation standards define "market value" as "the amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently, and without compulsion."[1079]

736. The Respondent does not dispute this. However, the Respondent contends that Mr. Allen's assessment of the investments' market value rests on the Claimants' incorrect instructions as to the nature of their rights in the Resorts and unreliable comparables.[1080]

737. The Respondent also argues that there is a striking inconsistency between the Claimants' submission as to the nature of their rights and their damage expert's instructions. That is, while the Claimants refer to the compensation based on "the current market value of their rights in the land and facilities of the Resorts," Mr. Allen states that he has been instructed to value the Resorts, and not the rights of use thereof.[1081]

738. The Respondent adds that pursuant to the Appraisal Institute's guidance, the first step of the valuation process is to identify the rights to be appraised. Moreover, the Respondent notes that real property appraisal encompasses not only the identification and valuation of

[1077] Re. Mem., ¶ 343.
[1078] Re. Mem., ¶ 344; Exh. RL-0115; Exh. RL-0116.
[1079] Re. Mem., ¶ 345; Exh. RL-0235.
[1080] Re. Mem., ¶ 346.
[1081] Re. Mem., ¶ 346; Cl. Mem., ¶ 285.

a variety of different rights, "but also analysis of the many limitations on those rights and the effect of those limitations on the valuation."[1082]

739. The Respondent also emphasizes that the imprecise distinction between "right of use" and "ownership" calls for several important observations. Specifically, the Respondent submits that in the realm of real estate appraisal, "ownership" is sometimes described as an absolute property right. Ownership is commonly described as a bundle of rights involving several rights which, the Respondent submits that the Claimants simply did not have, including (i) the right to sell or to transfer an interest; (ii) the right to lease an interest; (iii) the rights to mortgage an interest; or (iv) the right to give away an interest.[1083]

740. As amply relayed by the Respondent, the lease rights over the land and the right to use the buildings were indivisible and limited in time.[1084] In this case, from both legal and economic perspectives, the difference between "the rights of use" and "ownership rights" is key. Yet, the Respondent asserts that it appears that the market value of the "rights" was somehow equated to the market value of the real-estate assets, which alone should put Mr. Allen's valuation methodology to rest.[1085]

(ix) The Claimants' Market Approach To The Valuation Of The Resorts Rests On Wrong Comparables

741. The Respondent also argues that while the Claimants' expert has attempted to select comparable resorts to Zolotiye Peski, Rokhat-NBU and Dilorom, he has failed to provide a reliable sample of comparable properties.[1086]

742. The Respondent agrees that in the realm of real estate valuation, the market approach is not uncommon. With a right set of comparable, it is possible to approximate the market value of a real estate item. Moreover, the Respondent agrees that the comparable properties "need not be identical, as long as they are reasonably similar and the appraiser can make

[1082] Re. Mem., ¶ 350; Exh. RL-0247.

[1083] Re. Mem., ¶ 351; Exh. RL-0247.

[1084] Re. Mem., ¶ 352; Exh. C-0049; Exh. C-0072; Exh. C-0076; Exh. C-0220; Exh. C-0281; Exh. C-0519; Exh. R-0093; Exh. R-0094; Exh. R-0095.

[1085] Re. Mem., ¶ 352.

[1086] Re. Mem., ¶ 367.

adjustments for features that differ."[1087] The Respondent adds that differences for which an expert may implement adjustments may include property amenities, the age of the improvements, the amount of traffic and the market area, as well as time and conditions of the sale, and anything else recognized by the market as having value.[1088]

743. The Respondent submits that there are no analogues to the Resorts and the market-approach in this case leads to speculative results. In particular: (i) the Resorts are markedly larger than any of the properties from Mr. Allen's set of comparable resorts; (ii) the Resorts were built during the Soviet period and have an eye-watering degree of deterioration; (iii) the Resorts operate differently, namely on the basis of a much larger tourist influx and by imposing lower prices per room; and (iv) the Resorts' very large land territory is not for sale.[1089]

744. In terms of the size, the Respondent contends that the Resorts are on average 95-98% larger than the comparable properties. The Respondent therefore submits that while both the Resorts and the comparables are located on the lake Issyk-Kul, the real estate items are of a different scale and thus not comparable in size.[1090]

745. In terms of the state and condition of the Resorts, the Respondent argues that even though the Resorts are in dire condition, neither Mr. Allen nor the PwC real estate team based in Moscow visited the Resorts. As such, Mr. Allen performed a so-called "desk-top based valuation," assuming that the Resorts are "free from any significant hidden defects that may affect the valuation, and that they are in working condition, even though the resorts need some current repair."[1091] The Respondent adds that the myriad of negative reviews from the Resorts' guests relating to the condition of the Resorts should not have escaped Mr. Allen's valuation, and in any case, the comparables are admittedly not in such deteriorated condition.[1092]

[1087] Re. Mem., ¶ 367; Exh. RL-0250.
[1088] Re. Mem., ¶ 367.
[1089] Re. Mem., ¶¶ 369-370.
[1090] Re. Mem., ¶¶ 370.1.2-370.1.6.
[1091] Re. Mem., ¶¶ 370.2.1-370.2.2; PwC Report, ¶¶ 2.14, 5.11.
[1092] Re. Mem., ¶¶ 370.2.3-370.2.3; Exh. R-0102; Exh. R-0103; PwC Report, Appendix 5.1.

746. Moreover, the Respondent asserts that the Resorts were social, and not commercial recreational facilities. The Resorts were destined to accommodate a large influx of tourists and are therefore not comparable to guest houses or hotels. The Respondent adds that a hypothetical buyer of the Resorts' rights of use would have to consider that the operational expenses of a large Soviet resort are significantly greater than for a guest house or a hotel.[1093]

747. Accordingly, the Respondent asserts that Mr. Allen's market-based valuation of the Resorts should be dismissed.[1094]

c. The Claimants Can Only Seek Their Sunk Costs Which Should Be Determined By A Tribunal-Appointed Damages Expert

748. Should the Tribunal find in favor of the Claimants and award compensation instead of restitution, the Respondent maintains that the Claimants are only entitled to their sunk costs in the Resorts. Moreover, the Respondent contends that these sunk costs should be assessed by an independent quantum expert appointed by the Tribunal.[1095]

749. In this regard, the Respondent adds that sunk costs or "effective losses" correspond to the actual value of the Claimants' investments in the Kyrgyz Republic. The effective loss is reflective of the amounts invested and expenses incurred by the investor in making the investment. The Respondent argues that this method was applied by arbitral tribunals where the commercial prospects of the investment were doubtful and/or uncertain.[1096]

750. For example, the Respondent relies on *Wena Hotels v. Egypt*, in which the tribunal found that Egypt had expropriated the claimant's interest in two hotel ventures. The Respondent adds that the tribunal in *Wena Hotels* rejected the claimant's claim for lost profits on the basis that there was an insufficiently solid base to find any profit or for predicting growth or expansion of the investment made by Wena. Instead, the tribunal found that "the proper calculation of 'the market value of the investment expropriated immediately before the

[1093] Re. Mem., ¶¶ 370.3.2-370-3-3.
[1094] Re. Mem., ¶ 373.
[1095] Re. Mem., ¶ 374.
[1096] Re. Mem., ¶ 375; Exh. CL-0200; Exh. RL-0251.

expropriation', is best arrived at, in this case, by reference to Wena's actual investments in the two hotels."[1097]

751. The Respondent argues that in the present case, and on the Claimants' own admission, the Resorts were not profitable. Moreover, the Respondent contends that while the Claimants allege to have made investments to expand and modernize the facilities, the documents submitted by the Claimants to support these allegations are unreliable given that the Claimants ought to have submitted their certified accounts but failed to do so.[1098]

752. Crucially, the Respondent maintains that the Tribunal should appoint an independent quantum expert with a view to not only quantifying the Claimants' alleged losses but also to assessing the evidentiary value of the Claimants' financial documents.[1099]

753. Should the Tribunal decide not to appoint an independent expert, the Respondent submits that the Claimants should receive no more than USD 7.6 million as a matter of sunk costs. This amount, according to the Respondent, corresponds to the proven expenditures made by the Claimants after the dissolution of the Soviet Union:[1100]

- **Zolotiye Peski Resort**. In support of allegations of reinvestment of profits over the years, TMP solely relied on the unsupported testimony of Mr. Elmurodov. To the extent that TMP has not provided a single document justifying its expenses in the Resort, no sunk costs should be awarded to it.[1101]

- **Resort Rokhat-NBU**. NBU contends having spent approximately USD 704,727 to purchase eleven cottages from Uzstroytrans and engaged a Kyrgyz contractor to repair and renovate them.[1102] Moreover NBU has paid approximately USD 372,350 to Uzpromgrazhdanstroy for the Resort.[1103] Further, NBU paid USD 85,126 to the Resort

[1097] Re. Mem., ¶ 377; Exh. CL-0200.
[1098] Re. Mem., ¶¶ 381-383.
[1099] Re. Mem., ¶ 384.
[1100] Re. Mem., ¶¶ 386-387.
[1101] Re. Mem., ¶¶ 387.1-387.2.
[1102] Karimov, ¶ 7; Exh. C-0151; Exh.C-0152; Exh. C-0153; Exh. C-0155; Exh. C-0157; Exh. C-0164; Exh. C-0378; Exh. C-0479.
[1103] Exh. CL-0159; Exh. C-0479.

to repay its accounts payable.[1104] As to the improvements, Claimants submit that NBU has expensed a total of USD 2.9 million to update, modernize and improve the property.[1105] Accordingly, on the Claimants' own evidence, the total of NBU's sunk costs is USD 4,087,074.[1106]

- **Resort Dilorom**. The Claimants submit that Asaka Bank purchased nine cottages from the Uzbek State-owned enterprise for approximately USD 166,934.[1107] Asaka invested a total of USD 2,859,010.85 to renovate and expand Resort Dilorom's facilities by constructing new buildings on the Resort's territory,[1108] constructing luxury cottages,[1109] constructing a cafeteria, and improving beach facilities.[1110] Moreover, the Claimants submit that in October 2016 Resort Dilorom had USD 150,633 in its deposit accounts.[1111] Accordingly, on the Claimants' own evidence, the total of Asaka Bank's sunk costs is USD 3,334,333.85.[1112]

- **Resort Buston**. Uzpromstroybank acquired the Resort at no cost but repaid the accounts payable in the amount USD 9,660.[1113] Moreover, the bank has contributed USD 38,203 to Resort Buston's charter fund.[1114] Uzpromstroybank paid salaries to the Resort's five employees.[1115]

[1104] Re. Mem., ¶¶ 387.3-387.5; Karimov, ¶ 10; Exh. C-0163; Exh. C-0408; Exh. C-0481.

[1105] Re. Mem., ¶¶ 387.3-387.5; Karimov, ¶ 11; Exh. C-0153; Exh. C-0160; Exh. C-0161; Exh. C-0164; Exh. C-0167; Exh. C-0172; Exh. C-0173; Exh. C-0174; Exh. C-0178; Exh. C-0179; Exh. C-0180; Exh. C-0188; Exh. C-0190; Exh. C-0198; Exh. C-0334; Exh. C-0484.

[1106] Re. Mem., ¶¶ 387.3-387.5.

[1107] Re. Mem., ¶¶ 387.6-387.7; Exh. C-0154; Exh. C-0156; Exh. C-0479.

[1108] Re. Mem., ¶¶ 387.6-387.7; Umorova, ¶ 8; Exh. C-0168; Exh. C-0175; Exh. C-0176; Exh. C-0177; Exh. C-0186; Exh. C-0187; Exh. C-0199.

[1109] Re. Mem., ¶¶ 387.6-387.7; Umorova, ¶ 8; Exh. C-0191; Exh. C-0192; Exh. C-0193; Exh. C-0194; Exh. C-0195; Exh. C-0196; Exh. C-0197; Exh. C-0204.

[1110] Re. Mem., ¶¶ 387.6-387.7; Exh. C-0208; Exh. C-0212.

[1111] Re. Mem., ¶¶ 387.6-387.7; Exh. C-0331.

[1112] Re. Mem., ¶¶ 387.6-387.7.

[1113] Re. Mem., ¶ 387.8; Exh. C-0200.

[1114] Re. Mem., ¶ 387.8; Exh. C-0211.

[1115] Re. Mem., ¶ 387.8; Usmanov, ¶ 20.

	Resort Zolotiye Peski	Resort Rokhat-NBU	Resort Dilorom	Resort Buston	Total of sunk costs
Proven amount invested funds in the Resort after the the Alma-Ata Declaration	$ -	$ 4,087,074.00	$ 3,334,333.85	$ 99,297.00	**$ 7,520,704.85**

(5) Interest

754. The Respondent submits that there is no debate that interest may be necessary to ensure full reparation for the state's wrongful conduct.[1116] The Respondent adds that the idea that compensation should comprise a percentage of interest at the "London Interbank Offered Rate" is embodied in both the BIT and the FIL.[1117] The Claimants submit that this percentage is applicable for lawful expropriations only, and invited the Tribunal to apply the twelvemonth LIBOR rate plus four percent on the market value as of the date of the taking, compounded annually.[1118] The Claimants' expert acknowledges having added "4% to the LIBOR rates to take account of the fact that the expropriation is alleged by the Claimants to be illegal."[1119]

755. The Respondent disagrees. Particularly, the Respondent contends that the distinction between unlawful and lawful expropriation is nothing to the point in light of the Contracting Parties' express agreement on an applicable interest rate. According to the Respondent, this approach finds support in both academic commentary and the prior practice of other investment treaty Tribunals.[1120] The Respondent also submits that the Claimants have provided no justification for the Tribunal to depart from this approach in the present case.

756. Moreover, the Respondent argues that the Tribunal should only award the Claimants simple interest, as according to the Respondent, there is no uniform practice of arbitral tribunals for awarding compound interest.[1121] Rather, the Respondent submits that arbitral tribunals routinely award simple interest, as far as it is sufficient and provides appropriate

[1116] Re. Mem., ¶ 388; Exh. CL-0201.
[1117] Re. Mem., ¶ 388; Exh. RL-0115; Exh. C-0025.
[1118] Re. Mem., ¶ 388; Cl. Mem., ¶ 270.
[1119] Re. Mem., ¶ 388; PwC Report, ¶ 5.63.
[1120] Re. Mem., ¶¶ 389-391; Exh. RL-0199; Exh. RL-0254; Exh. RL-0255.
[1121] Re. Mem., ¶¶ 392-393; Exh. RL-0256; Exh. RL-0257.

compensation.[1122] The Respondent adds that the Claimants have failed to demonstrate particular circumstances justifying compound interest, and are therefore, at best, entitled to simple interest.[1123]

C. THE TRIBUNAL'S ANALYSIS

757. The BIT and the FIL stipulate that compensation for a lawful expropriation must be equivalent to the market value of the taken investment.[1124] The BIT and the FIL, however, provide no form of reparation or compensation standard for an unlawful expropriation. Where this is the case, tribunals have relied on customary international law to determine the appropriate form of reparation and measure of damages.[1125] The Tribunal finds no reason to depart from this practice.

758. Under customary international law, the standard of compensation for an unlawful expropriation is "full reparation."[1126] Full reparation requires states to "wipe out all the consequences of the illegal act, and re-establish the situation which would, in all probability, have existed if that act had not been committed."[1127]

759. It is well-settled that restitution is the primary form of reparation under international law.[1128] However, where restitution is not available, the breaching State must provide compensation to the affected party based on the fair market value of the expropriated investment.[1129] In the present case, under the totality of the circumstances (*i.e.*, the on-going political and legal instability in the Kyrgyz Republic and its belated participation in the merits phase of the arbitration), the Tribunal considers that restitution is not available.

760. Having said this, the Tribunal agrees with the Claimants that their explicit request for monetary compensation at market value is appropriate under the circumstances and

[1122] Re. Mem., ¶ 393; Exh. RL-0258.
[1123] Re. Mem., ¶ 393.
[1124] Exh. C-0001; Exh. C-0025.
[1125] Exh. CL-0257.
[1126] Exh. CL-0260.
[1127] Exh. CL-0259; Exh. CL-0107; Exh. CL-0209.
[1128] Exh. CL-0201; Exh. CL-0006.
[1129] Exh. CL-0201.

therefore should be respected.[1130] Accordingly, the Tribunal rejects the multiple alternative requests for relief advanced by the Respondent (*i.e.*, satisfaction, specific performance, restitution, or monetary compensation limited to Claimants' sunk costs), finding them to be insufficient to ensure full reparation.

761. The Tribunal, moreover, rejects the Respondent's request for the Tribunal to appoint an independent quantum expert. The Tribunal considers that if the Respondent felt a need to engage an expert, it could have done so in preparation of the pleading that it submitted on 6 May 2022.

762. In any case, the Tribunal finds the appointment of an independent quantum expert unnecessary since the Tribunal is satisfied that Mr. Allen's findings, later confirmed by Mr. Hart, provide a clear and reliable valuation of the Claimants' rights in the Resorts.

(1) Scrutinizing PwC's Valuation

763. During the hearing on the merits, Mr. Allen, from PwC, appeared as a witness to discuss his expert opinion on quantum. After a preliminary presentation, Mr. Allen was examined by the Tribunal. While the entirety of the examination will not be discussed here, some of the main points are highlighted. Further, the Respondent's criticisms of PwC's valuation are also addressed.

a. Use Of Local Personnel

764. In compiling his report, Mr. Allen to an extent relied on local personnel for certain aspects of the calculation inputs. In a question from Mr. Born concerning the use of such local personnel in identifying proper comparables and identifying other necessary local real estate issues, Mr. Allen clarified:

> In any real estate valuation exercise such as this, where damages represent real property, I typically use a qualified chartered surveyor on the team, and in this instance I used a RICS qualified surveyor from our Moscow office, who ran the research on the ground into the comparables, so my colleague in Moscow supervised all of the research into the comparable facilities and the comparable land

[1130] Cl. Rep., ¶ 472; Exh. CL-0201.

> areas, together with a local team, very much in conjunction with me, as the expert, to make sure I was comfortable with the way values were being constructed, et cetera, et cetera, and they obviously are native Russian speakers and they could talk to the brokers locally.
>
> They went through an exercise for facilities. I think we identified 41 potential comparables, so there were 41 facilities that were on sale in the Lake Issyk-Kul area as of November 2019. Those are all researched. That list was knocked down and knocked down and knocked down, until we came to those that were in close proximity, of similar value, and were of similar type to the resorts that are the subject of the valuation. So we landed on four, which you can see from the map were very close to and were very similar in type. They had a mix of cottages and hotel rooms like the resorts that are the subject of valuation do. They had some land around them, not as much as the resorts that are the subject do have, but they were of a similar ilk to the properties that were being valued.
>
> In terms of land, we went through a similar exercise. I think there were 28 plots of land that were identified as on sale as of November 2019. Those were whittled down again, and we came up with three that were close proximity, very similar type, same type of use permitted on them, which gave the three best comparables for the land areas we were talking about. Very difficult to get a land comparable for Buston because it is the south shore of the lake, it is a different kettle of fish, but, as you could see from the isolated location of that, I think there is nothing but yurts around where that hotel is, so it is hard to get a land value for something on the south shore, but we knocked that value down for demolition, for lack of utilities, so I think you could assume we have been conservative in assessing the value of land for the Buston Resort.[1131]

b. Comparing Resorts Of Different Sizes

765. Mr. Born and Mr. Douglas both questioned Mr. Allen about how he went about comparing the Resorts at issue in this arbitration with four "comparables" which had characteristics that were not completely in line with the Resorts (*e.g.*, size).[1132] Mr. Allen admitted that having comparables of equal size to the Resorts would have been ideal, but that:

> if you have got properties that are in the same general location and of the same type, and the values they are being offered at, dollars

[1131] Tr. Day 2 171:15-173:14.

[1132] Tr. Day 2 173:15-176:16.

> per square meter, are broadly similar, as they are for these four, then I think that gives you comfort that you have a bag of the largest properties here that you can compare to.[1133]

766. Mr. Allen added that:

> if there had been larger ones, or more larger ones, then it would have averaged the sample out more than the four, but I think given that the four are clustered, that they are in the same locale, and of the same type of facility, just scaled down, I did feel comfortable with the four comparables.[1134]

767. With respect to specifically dealing with the differences between the Resorts and the comparables, Mr. Allen explained that while it is true that some of the four Resorts would have added value over some of those smaller comparables, whether it be because of size and facilities (*e.g.*, Zolotiye Peski), or unique parkland with mature trees (*e.g.*, Rokhat), in the end it was difficult to arrive at a precise number for such added value. As a result, Mr. Allen took a conservative approach and only added a premium for private beach access.[1135] This conservative approach thus actually omitted potential added value to the Resorts.

c. Separating Facilities From Land

768. Mr. Douglas raised the concern that separating facilities from land could possibly lead to a distortion in the overall valuation of the property.[1136] Mr. Douglas specifically inquired as to whether such an approach is a Red Book approach to valuing real estate or whether it was *sui generis* for this particular situation.[1137]

769. Mr. Allen responded, in part:

> Again, it is a standard approach, where you are using a square meterage for a large land plot and facility area. Obviously you have got to land on a value that is not going to distort, so you are trying to come at, for the larger area, a very small value, and the facilities area at a large value, so when we take the comparables, admittedly

[1133] Tr. Day 2 186:13-187:1.
[1134] Tr. Day 2 187:1-6.
[1135] Tr. Day 2 174:9-178:3.
[1136] Tr. Day 2 190:16-22.
[1137] Tr. Day 2 191:11-14.

> with larger facility areas than -- sorry, smaller land, so the facility is a greater proportion of the area, we are taking off the land area to come to a facilities value, so that was the best we could do with the comparables we had of the size they were.[1138]
>
> . . .
>
> It is an approach that has been used by my colleagues before for real estate, so in discussion with them this is how they said it the best way to approach it, and it seems logical given the fact they are very large land areas and facility areas that are separate.[1139]

d. Asking Price vs. Sale Price Of Comparables

770. Referring to Appendix 5.1 of the PwC Report, which provided a table of the comparables, Mr. Douglas noted that Mr. Allen used the asking price of such properties as a means of comparing values but did not use any information with respect to what ultimately happened with those properties (*e.g.*, ultimate sale price).[1140] Mr. Douglas inquired as to whether such information would have been helpful (or even important) in arriving at more accurate valuations.[1141]

771. In reply, Mr. Allen clarified that there had been detailed conversations with brokers about selling prices versus actual results, and that the brokers had informed Mr. Allen's team that, as of November 2019, it was normally the case that a sale price would include an average 10% discount on the asking price.[1142] Mr. Allen acknowledged that obtaining precise sales data from local sources had proven difficult, necessitating the use of this general trend.[1143]

e. Discount For Long-Term Lease vs. Owned Land

772. Mr. Douglas, focusing on paragraph 5.52 of the PwC Report, noted that the average unit price for long-termed leased land for recreational facilities was listed as 86% of the average

[1138] Tr. Day 2 190:23-191:10.
[1139] Tr. Day 2 191:15-20.
[1140] Tr. Day 2 194:13-21.
[1141] Tr. Day 2 194:3-195:25, 195:4-6.
[1142] Tr. Day 2 195:7-13.
[1143] Tr. Day 2 202:14-203:1.

unit price for owned land.[1144] Mr. Douglas specifically sought clarity as to whether this standard discount supposedly applied to any particular market/geographical area (*e.g.*, Kyrgyzstan).[1145]

773. Mr. Allen clarified that this discount, received from his Russian colleagues, was taken from a broad, worldwide survey, with no focus on the Kyrgyz market. Mr. Allen contended that his colleagues in real estate used this discount "*all the time when they are looking at leasehold properties*."[1146]

(2) Determining Damages

774. As mentioned above, despite the lack of a quantum expert report from the Respondent, the Tribunal has before it a comprehensive, detailed and very credible expert report produced by a respected firm. The Tribunal has had the opportunity to review the expert analysis and to examine Mr. Allen in considerable detail on his methodology, key assumptions and findings. The Tribunal benefitted further from additional post-hearing expert reports detailing the ownership structures of the Resorts and confirming PwC's valuation. In all, the Tribunal has before it more than sufficient information to make an informed and reasoned ruling on damages.

775. The Tribunal considers that Mr. Allen's key assumptions and methodology in this case are reasonable. While some potential areas for improvement were highlighted during the examination of Mr. Allen (*e.g.*, the use of asking prices without selling price data), the Tribunal does not find such issues significant enough to justify a departure from the valuations contained in the PwC Amended Hearing Presentation. The Tribunal, moreover, disagrees with the Respondent's contentions that PwC's valuation is based on defective key assumptions and wrong and/or unreliable comparables.[1147]

776. According to the Respondent, Mr. Allen's valuation is based on defective key assumptions because it failed to consider that the Claimants did not own the Resorts and that their rights

[1144] Tr. Day 2 198:8-198:15.
[1145] Tr. Day 2 199:15-19.
[1146] Tr. Day 2 200:11-200:21.
[1147] Re. Mem., ¶¶ 342-366.

of use in the Resorts were limited in time. Consequently, the Respondent maintains that PwC's valuation rests on wrong comparables because it compares the sale of properties on Lake Issyk-Kul to a 'but for' sale of the rights to use the Resorts.[1148]

777. As explained by Mr. Hart, from a financial perspective, the right to the long-term use of land or buildings is similar to the right to ownership thereof. Hence, for the purposes of calculating the Claimants' damages, the market value of the Resorts based on such rights is not materially different from the right of ownership of the Resorts.[1149] The Tribunal agrees with Mr. Hart and therefore considers that the market value of the Resorts as of 4 April 2016 – *i.e.*, the day of the taking – is a valid and reliable valuation of the Claimants' rights in the Resorts.

778. The Respondent further contends that Mr. Allen's valuation rests on an unreliable sample of comparable properties because the Claimants' Resorts were built during the Soviet period and are severely deteriorated, are significantly larger than any of the properties from Mr. Allen's set of comparable resorts, and the comparable resorts operate under different business models than the Claimants' Resorts.[1150]

779. The Tribunal is convinced that Mr. Allen valued the Resorts in an appropriate manner considering that the best comparables that could be located did not perfectly match the Resorts. With respect to the condition of the facilities, as confirmed by Mr. Hart, PwC expressly notes that the comparable resorts were in a better state than the Claimants' Resorts and therefore applied a discount of US$ 65 per square meter in its comparable analysis to account for the difference in condition.[1151] The Tribunal considers that such a discount adequately accounts for the difference in condition.

780. Regarding the difference in size, as mentioned above, PwC identified the value of a square meter of land of multiple comparables and then multiplied that value by the size of the Claimants' Resorts. By doing so, as Mr. Hart explains, PwC accounted for the difference

[1148] Re. Mem., ¶¶ 342-366.
[1149] Hart, ¶ 53.
[1150] Re. Mem., ¶¶ 367, 370.
[1151] PwC Appendix 5.1; Hart, ¶ 61.

in the size of the properties.[1152] In the Tribunal's view, such a methodology was appropriate under the circumstances, and if anything, provided a conservative calculation.

781. Concerning the differences in the nature of the business models, the Tribunal concurs with Mr. Hart that they did not have any bearing on the methodology applied by PwC and therefore any difference in business models between the Claimants' Resorts and the comparable properties is irrelevant.[1153]

782. The Tribunal, additionally, accepts Mr. Allen's contention that his manner of separating facilities from land is the industry-standard approach widely used in the real estate field. Further, concerning Mr. Allen's use of the asking price of comparables with no knowledge of ultimate sale prices, the Tribunal highlights Mr. Allen's clarification that detailed discussions were concluded with local brokers about the typical discount one would expect to come off of the selling price when realizing the value of the properties. While precise selling prices of the comparables could have confirmed whether this trend remained consistent with the properties relevant for the valuations in this case, the Tribunal is satisfied with the legitimacy of the discount used by Mr. Allen based on the information received from local brokers.

783. Finally, the Tribunal is satisfied with Mr. Allen's discount for properties with long-term leases (like the Resorts) compared to those properties owned outright. The Tribunal sees no reason to doubt Mr. Allen's contention that while the discount used was not based on specific survey of the market here, it was based on a survey that is regularly used in real estate valuations on a global level.

784. Accordingly, the Tribunal approves Mr. Allen's valuations as revised on 9 July 2021 and finds no convincing reason to depart from any of Mr. Allen's figures. As a result, the Tribunal values the expropriated Resorts, at the 4 April 2016 expropriation date, as follows:

- Resort Zolotiye Peski - USD 11,883,039.00;

[1152] Hart, ¶ 58.
[1153] Hart, ¶ 62.

- Resort Rokhat - USD 8,336,989.00;
- Resort Dilorom - USD 6,078,221.00; and
- Resort Buston - USD 677,681.00.

785. Further, the Tribunal finds a pre- and post-award interest at LIBOR plus 4%, compounded annually, to be reasonable and supported by other investment tribunals. Considering that the BIT and FIL call for interest at the LIBOR rate for a lawful expropriation and fail to note the proper interest rate for an unlawful expropriation, the Tribunal considers that an interest rate of LIBOR plus 4% is reasonable, as such a rate constitutes "LIBOR plus an appropriate margin," as used by previous investment treaty tribunals.

786. The Tribunal is cognizant that LIBOR will soon cease to exist and considers that it is prudent to provide clarity on its award of interest when this eventuality occurs. The Tribunal will not supplant LIBOR with another interest rate given its application in the BIT and FIL. However, when LIBOR ceases to exist, then interest shall accrue at the interest rate 10-year US Treasury rate + 4%, compounded annually. The Claimants proposed the use of the 10-year US Treasury rate as an alternative to LIBOR. The Respondent, by its silence, did not object to the application of this interest rate.

787. Finally, the Tribunal finds it appropriate to supplement the valuations to account for the respective tax rates that would be applied to each Claimant to ensure that the Claimants obtain "full reparation"– in this case using the tax rates as indicated by the Claimants (*i.e.*, 20% for Claimants NBU, Asaka Bank and Uzpromstroybank and 15% for Claimant TMP).

VIII. COSTS

A. THE CLAIMANTS' COSTS SUBMISSION

788. The Claimants maintain that the Respondent should bear the total arbitration costs incurred by the Claimants in connection with this entire arbitral proceeding, including legal fees and expenses.[1154]

[1154] Cl. Rep., ¶509; Cl. Mem., ¶ 298.

789. In this regard, the Claimants submit that the Respondent has repeatedly frustrated these proceedings, including first in the jurisdictional phase, through the following actions and inactions:

- The Respondent's last-minute abandonment during the jurisdictional phase of an argument that it first had raised itself, resulting in significant wasted costs to both Parties and the Tribunal;

- The Respondent's failure to pay to the Centre its portion of the advance on costs for this phase of the arbitration, requiring the Claimants to pay this considerable sum and resulting in a considerable delay to the proceedings; and

- The Respondent's efforts to divest itself of the Claimants' Resorts, requiring the Claimants to file a Request for Provisional Measures to protect their investments and their fundamental due process rights in this arbitration.[1155]

790. The Claimants further contend that because the Respondent violated its obligations to the Claimants under both the BIT and FIL, an award that covers the costs and expenses incurred by the Claimants in this arbitration is necessary to achieve full reparation.[1156]

791. The Claimants also argue that the BIT does not prevent the Tribunal from awarding costs to one party. In particular, the Claimants submit that Article 9(8) provides that, in a dispute between the Contracting Parties, while each Contracting Party shall bear its own costs, the Tribunal may, in its decision, assess higher costs to one of the Contracting Parties involved.[1157] The Claimants further submit that Article 10, which concerns disputes between a Contracting Party and an investor of another Contracting Party, does not provide as a default rule that costs should be split.[1158]

792. In addition, the Claimants note that Article 58(1) of the Arbitration (Additional Facility) Rules also grants broad discretion to allocate costs between the parties, directing that "the

[1155] Cl. Rep., ¶ 512; Cl. Mem., ¶ 299.
[1156] Cl. Mem., ¶¶ 298, 300.
[1157] Cl. Rep., ¶ 513; Cl. Mem., ¶ 301; Exh. C-0001.
[1158] Cl. Rep., ¶ 513; Cl. Mem., ¶ 301; Exh. C-0001.

Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne."[1159]

793. The Claimants also contend that, in allocating costs, investment treaty tribunals frequently and increasingly have applied the principle of "loser pays" or "costs follow the event," and have awarded the successful party all or a majority portion of its costs. This principle recognizes that a claimant is not fully compensated for its loss if it must bear significant costs to obtain an award and, likewise, that a respondent is not fully vindicated if it is saddled with the costs of defeating a meritless claim or objection.[1160]

794. The Claimants submit that in total, as of 21 November 2022, they have been compelled to incur the following costs and expenses to make their case and defend against the Respondent's baseless arguments and jurisdictional objections in this proceeding:[1161]

COST CATEGORY	**USD**	**EUR**
ICSID and Tribunal Costs	875,000.00	
White & Case LLP Legal Fees	7,538, 669.20	
White & Case LLP Expenses	462,328.63	
Claimants' Expenses	158,149.35	5,522.00
Expert Fees and Expenses	797,402.68	
TOTAL	**9,831,549.86**	**5,522.00**

[1159] Cl. Rep., ¶ 514; Cl. Mem., ¶ 302; Exh. CL-0219; Exh. CL-0287.

[1160] Cl. Rep., ¶ 515; Exh. CL-0110; Exh. CL-0113; Exh. CL-0118.

[1161] Cl. Stmt. of Costs, ¶ 8.

795. For all the reasons set forth above, the Claimants request that the Tribunal order the Respondent to bear all of the Claimants' costs incurred in this proceeding.[1162]

B. THE RESPONDENT'S COSTS SUBMISSION

796. The Respondent maintains that pursuant to Article 58(1) of the Arbitration (Additional Facility) Rules and international arbitral practice, the tribunals benefit from a broad discretion to allocate costs between the parties.[1163] The Respondent submits that in the present case, the Respondent should be awarded its legal costs.[1164]

797. The Respondent acknowledges that its participation in this arbitration was interrupted between early 2020 and early 2022. However, this occurred due to material circumstances, such as *force majeure* events involving the State apparatus, institutional reorganization and other unfortunate extraneous circumstances. The Kyrgyz Republic submits that while its absence may have caused inconvenience to the Tribunal, the effect of such absence on costs is marginal, compared to the consequences of the Claimants' procedural conduct.[1165]

798. Unlike the Respondent, the Claimants were not impeded by unstable domestic situation in this arbitration. Nevertheless, the Respondent adds, the Claimants failed to conduct themselves in a professional and cost-effective manner, although they were effectively unopposed at the merits stage of the present proceedings. The Respondent puts forward examples of such conduct including, *inter alia*:

- First, the Claimants' blatant mischaracterization of multiple material facts and events surrounding this dispute, including the Claimants' own alleged rights over the Resorts, which required no less than two post-hearing briefs, in the course of which the Claimants had to submit clarifications regarding claimed rights in their purported investments, together with a redacted (and utterly unhelpful) expert report.

[1162] Cl. Rep., ¶ 518.
[1163] Re. Mem., ¶ 394; Exh. RL-0199; Exh. RL-0259; Exh. RL-0260; Exh. RL-0261.
[1164] Re. Mem., ¶ 394.
[1165] Re. Mem., ¶ 395.

- Second, at the merits stage of this arbitration alone, the Claimants submitted 14 witness statements, provided by individuals, testimony of which does not add any value to the establishment of facts of the case. Moreover, some of those witnesses are incapable of providing first-hand testimony regarding the events directly relevant to the dispute and merely relay second-hand rumors. Evidentiary value of such witness statement is questionable, to say the least.

- Third, the Claimants submitted a manifestly unreliable quantum expert report which serves farfetched valuation disconnected from reality, with the expert himself admitting to not being sure of his own conclusions.[1166]

799. The Respondent asserts that all of the above factors have resulted in a spectacular waste of time and costs for everyone involved, including the Respondent who has ultimately had to address the various deficiencies of the Claimants' pleading of their case. Accordingly, the Respondent argues that it is entitled to a full award of its costs, plus interest thereon as of the date of the final award at such commercial rate as the Tribunal deems fit and on a compound basis. The Respondent thus alleges that the Claimants must fully bear the Tribunal's and ICSID's fees and costs.[1167]

800. The Respondent submits that in total, as of 21 November 2022, the Respondent has incurred the following costs and expenses:[1168]

COST CATEGORY	**USD**
ICSID and Tribunal Costs	150,000.00
Jones Day Legal Fees	1,335,385.90
Respondent's Expenses and Disbursements in Stage I (Bifurcated Preliminary Objections Stage)	93,871.85

[1166] Re. Mem., ¶ 396; Tr. Day 2 182:13-17.
[1167] Re. Mem., ¶ 397.
[1168] Re. Mem., ¶ 398; Re. Stmt of Costs, pp. 1-2.

Respondent's Costs in Stage II (Non-bifurcated Preliminary Objections Stage, Merits, and Quantum Stage)	350,000.00
TOTAL	**1,929,257.75**

C. THE TRIBUNAL'S DECISION ON COSTS

801. The provisions cited by the Parties give the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

802. It is common practice to allocate costs and fees based on the "costs follow the event" principle, with the Claimants having prevailed in this arbitration at the jurisdictional and merits phases. The Tribunal sees no reason to depart from this principle in this case for those fees and costs reasonably incurred. Such an evaluation of reasonableness concerns both the efficiency with which the Claimants prosecuted their claims as well as the proportionality of the costs claimed as compared to the amount in dispute.

803. The Tribunal notes, contrary to the Respondent's submissions, that during the proceedings, the Claimants did not cause any undue delay or act in a manner that the Tribunal would characterize as unreasonable. On the contrary, the Claimants dealt reasonably and professionally with the particular procedural challenges the arbitration presented. The Tribunal thus chooses not to decrease its costs award due to how the Claimants conducted their case.

804. On the issue of proportionality, the Tribunal observes that the amount claimed for costs and fees is more than the damages sought (and awarded) for Resort Buston and Resort Dilorom, with the figure being almost equal to that sought for Resort Rokhat NBU. Only Resort Zolotiye Peski concerned claimed damages in clear excess of the legal fees and costs now requested. In all, the fees and costs incurred by the Claimants total more than 30% of the total claimed value of the four Resorts. In the Tribunal's opinion, and without

in any way criticizing the Claimants, such a ratio indicates a lack of necessary proportionality.

805. As a result of the above, the Tribunal finds it proper to order that the Respondent pays all costs of this arbitration and reimburse the Claimants for 70% of the legal fees and expenses incurred.

806. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD and EUR):

Arbitrators' Fees and Expenses	
Mr. Bernardo Cremades	USD 415,075.73
Mr. Gary Born	USD 108,456.92
Mr. Zachary Douglas KC	USD 146,339.30
ICSID's Administrative Fees	USD 284,000.000
Direct Expenses	USD 81,303.93
Total	**USD 1,035,235.88**

807. Accordingly, the Tribunal orders the Respondent to pay to the Claimants USD 875,000.00 for the expended portion of the Claimants' advances to ICSID and USD 6,269,584.90 and EUR 3,865.40 to cover 70% of the Claimants' legal fees and expenses.

IX. AWARD

808. For the reasons set forth above, the Tribunal:

(1) DECLARES that the Respondent unlawfully expropriated the Claimants' investments in breach of its obligations towards the Claimants under Article 6 of the BIT and Article 6 of the FIL;

(2) CONSIDERS the Claimants' (i) fair and equitable treatment claim under Article 3.1 of the BIT and the FIL; (ii) full and unconditional legal protection claim under Article 2.1 of the BIT; and (iii) national treatment and most-favored nation

treatment under Article 3.1 of the BIT and Article 4.1 of the FIL to be duplicative as a result of its decision under point (1) above and does not rule on such claims;

(3) DENIES all other claims;

(4) ORDERS the Respondent to pay the Claimants damages in the amount of:

(i) USD 13,980,045.90, amounting to USD 11,883,039.00 for the expropriation of Resort Zolotiye Peski divided by 0.85 to account for taxation, plus interest of LIBOR plus 4%, compounded annually, from 4 April 2016 up through the payment of the Award;

(ii) USD 10,421,236.20, amounting to USD 8,336,989.00 for the expropriation of Resort Rohkat NBU divided by 0.8 to account for taxation, plus interest of LIBOR plus 4%, compounded annually, from 4 April 2016 up through the payment of the Award;

(iii) USD 7,597,776.25, amounting to USD 6,078,221.00 for the expropriation of Resort Dilorom divided by 0.8 to account for taxation, plus interest of LIBOR plus 4%, compounded annually, from 4 April 2016 up through the payment of the Award;

(iv) USD 847,101.25, amounting to USD 677,681.00 for the expropriation of Resort Buston divided by 0.8 to account for taxation, plus interest of LIBOR plus 4%, compounded annually, from 4 April 2016 up through the payment of the Award; and

(5) When LIBOR ceases to exist, interest shall accrue at the 10-year U.S. Treasury Rate + 4%, compounded annually.

(6) ORDERS the Respondent to pay to the Claimants USD 875,000.00 for the expended portion of the Claimants' advances to ICSID, as well as USD 6,269,584.90 and EUR 3,865.40 to cover the Claimants' legal fees and expenses.

Mr. Gary B. Born
Arbitrator

Date: 16 MAY 2023

Professor Zachary Douglas KC
Arbitrator
(subject to my Dissenting Opinion)

Date:

Professor Bernardo M. Cremades
President of the Tribunal

Date:

Mr. Gary B. Born
Arbitrator

Date:

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Arbitrator
(subject to my Dissenting Opinion)

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