

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**VLADISLAV KIM, PAVEL BORISSOV, AIBAR BURKITBAYEV, ALMAS CHUKIN,
LYAZZAT DAURENBKOVA, ADAL ISSABEKOV, DAMIR KARASSAYEV, AIDAN
KARIBZHANOV, AIGUL NURMAKHANOVA, KAIRAT OMAROV, NIKOLAY VARENKO
AND GULZHAMASH ZAITBEKOVA**
Claimants

and

REPUBLIC OF UZBEKISTAN
Respondent

ICSID Case No. ARB/13/6

DECISION ON JURISDICTION

Members of the Tribunal

Professor David D. Caron, President
The Honorable L. Yves Fortier, PC, CC, OQ, QC, Arbitrator
Mr. Toby Landau, QC, Arbitrator

Secretary of the Tribunal

Ms. Geraldine R. Fischer

Assistant to the Tribunal

Ms. Natalia Mikolajcyk (2015 – 2016) / Dr. Cian C. Murphy (2016 – Present)

Date of dispatch to the Parties: 8 March 2017

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Anonymous Expert I	First Author of Anonymous Experts' Report I or Exchange Report I
Anonymous Expert II	Second Author of Anonymous Experts' Report I or Exchange Report I
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BC	JSC Bekabadcement
BIT or Treaty	Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Uzbekistan on Promotion and Reciprocal Protection of Investments, signed in Almaty, Kazakhstan, on 2 June 1997 and entered into force on 8 September 1997
Black	Expert Report of Professor Bernard Black dated 2 March 2015
Born Expert Report	Expert Report of Mr. Gary Born dated 25 February 2015
Butler I	Expert Report of Professor William Butler dated 17 April 2014
Butler II	Second Expert Report of Professor William Butler dated 9 May 2015
Citizenship Law	Law of the Republic of Kazakhstan on Citizenship of the Republic of Kazakhstan dated 20 December 1991 (RL-0119)
Civil Code	Civil Code of the Republic of Uzbekistan (CL-0370)
Criminal Code	Criminal Code of the Republic of Uzbekistan (R-0027)
English SPAs	English Share Purchase Agreements
Hart I	Expert Report of Mr. Timothy Hart dated 31 July 2014
Hearing (Part I)	Hearing on Preliminary Objections, Washington, D.C., 28 July to 1 August 2015
Hearing (Part II)	Second Hearing on Preliminary Objections, The Hague, 10 to 12 November 2015
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966
Kaden	Kaden Invest Ltd.
Kazakh Constitution	Constitution of the Republic of Kazakhstan (CL-0013)

KC	JSC Kuvasaycement
Kim I	Witness Statement of Mr. Vladislav Kim dated 24 April 2014
Kim II	Second Witness Statement of Mr. Vladislav Kim dated 8 December 2014
Kim III	Third Witness Statement of Mr. Vladislav Kim dated 13 May 2015
Knyazev	Expert Report of Mr. Valery Knyazev dated 18 May 2015
Mamatov I	Expert Report of Mr. Shavkat Mamatov dated 31 July 2014
Mamatov II	Second Expert Report of Mr. Shavkat Mamatov dated 17 February 2015
McGlinchey	Expert Report of Professor Eric McGlinchey dated 7 April 2014
Nabolena	Nabolena Ltd.
Navigant II	Second Expert Report of Navigant Consulting dated 13 May 2015
Nurmakhanova	Witness Statement of Ms. Aigul Nurmakhanova dated 15 May 2015
NDA	Non-Disclosure Agreement
Pak I	First Witness Statement of Mr. Dmitry Pak dated 29 July 2014
Pak II	Second Witness Statement of Mr. Dmitry Pak dated 26 February 2015
Ray Companies	Raycross Limited, Raybird Limited, and Rayblock Limited
Raybird	Raybird Limited
Rayblock	Rayblock Limited
Raycross	Raycross Limited
Request or RFA	Request for Arbitration by Claimants dated 22 March 2013
required dates	Dates upon which Claimants' must hold Kazakh nationality for the Tribunal to have jurisdiction <i>ratione personae</i>
Resolution No. 12	Resolution of the Constitution Council of the Republic of Kazakhstan No. 12 dated 12 January 2003 (CL-0401)
Sauer	Witness Statement of Mr. Michael Sauer dated 15 May 2015
Tashkent SPAs	Tashkent Share Purchase Agreements

TSE	Tashkent Stock Exchange
UCG	United Cement Group Plc.
Working Group	Claimants' informal sub-committee to oversee the potential acquisition of BC and KC, established Spring 2005
Zaitbekova	Witness Statement of Ms. Gulzhamash Zaitbekova dated 15 May 2015

REPRESENTATION OF THE PARTIES

Counsel for the Claimants:

Jones Day

Mr. Baiju S. Vasani
21 Tudor Street
London EC4Y 0DJ
United Kingdom

and

Jones Day

Ms. Melissa S. Gorsline
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
United States of America

and

Visor Holding

Mr. Michael McNicholas
Esentai Tower
14th Floor
77/7 Al Farabi Avenue
Almaty 050060
Republic of Kazakhstan

Counsel for the Respondent:

White & Case LLP

Ms. Carolyn B. Lamm
Ms. Andrea J. Menaker
Mr. Brody K. Greenwald
Ms. Larissa Eltsefon
Ms. Jennifer A. Ivers
701 Thirteenth Street, N.W.
Washington, D.C. 20005-3807
United States of America

and

Republic of Uzbekistan

Minister Muzraf Ikramov
Mr. Davronbek Akhmedov
Ms. Khurliman Aytmiyazov
Ministry of Justice
5 Sayilgoh Street
Tashkent 100047
Republic of Uzbekistan

I. INTRODUCTION AND SUMMARY OF DECISION

A. The Dispute

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Uzbekistan on Promotion and Reciprocal Protection of Investments (the “**BIT**” or “**Treaty**”), which was signed on 2 June 1997 and entered into force on 8 September 1997, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. Claimants in this arbitration are 12 of 13 partners in Visor, a private equity investment group established in 2001 and headquartered in Kazakhstan. The twelve partners and claimants are Vladislav Kim, Pavel Borissov, Aibar Burkitbayev, Almas Chukin, Lyazzat Daurenbekova, Adal Issabekov, Damir Karassayev, Aidan Karibzhanov, Aigul Nurmakhanova, Kairat Omarov, Nikolay Varenko and Gulzhamash Zaitbekova (“**Claimants**”). The Respondent is the Republic of Uzbekistan (“**Uzbekistan**” or “**Respondent**”). The Claimants and the Respondent are hereinafter collectively referred to as the “**Parties**”.
3. The dispute relates to Claimants’ interest in two cement plants located in Uzbekistan, JSC Bekabadcement (“**BC**”) and JSC Kuvasaycement (“**KC**”), that are held through a Cypriot holding company, United Cement Group Plc. (“**UCG**”).

B. Summary of the Decision

4. Claimants seek arbitration before ICSID on the basis of the BIT and the ICSID Convention. In this Decision, the Tribunal addresses and denies four preliminary objections, each multifaceted, to the Tribunal’s jurisdiction and to the admissibility of Claimants’ case. This section provides a summary of the Tribunal’s Decision, with references to the full reasoning within. This summary is to be understood in terms of the exposition in the Decision.
 - (1) **The First Jurisdictional Objection – Nationality**
5. Respondent’s first objection is that the Tribunal lacks jurisdiction because of the nationality of Claimants. Under the terms of the BIT, Claimants must be Khazakh nationals to make their claim. Respondent argues that two of Claimants, Messrs. Almas Chukin and Nikolay

Varenko, failed to establish their Kazakh nationality, and that Claimants' evidence as regards the ten other Claimants is insufficient to establish their Kazakh nationality.¹

6. The Tribunal finds that Mr. Chukin's passport and citizenship certificate constitute evidence on their face establishing his possession of Kazakh citizenship on the required dates and that evidence as regards Mr. Chukin's previous possession of Kyrgyz citizenship does not call into question the probity of this evidence. The Tribunal considers that the termination of Mr. Varenko's Kazakh citizenship on 11 July 2014 demonstrates that, on that date, circumstances existed under Kazakh law to merit such termination. However, given the absence of any evidence of a prior termination of Kazakh citizenship, and given the evidence that Mr. Varenko did possess Kazakh citizenship on the required dates, the Tribunal concludes that the fact of the later termination of Mr. Varenko's citizenship does not call into question his possession of citizenship on the required dates. The Tribunal finds that the passports submitted with the Request for Arbitration are sufficient to satisfy the Tribunal of the Kazakh citizenship of the ten Claimants other than Messrs. Varenko and Chukin on the required dates.

(2) The Second Jurisdictional Objection – That Claimants are not “Investors” who made an “Investment”

7. By its second objection, Respondent asserts that Claimants are neither “investors” nor persons who made an “investment” as those terms are defined in the BIT and therefore their claim is beyond the Tribunal's jurisdiction.²
8. Respondent argues that Claimants fail to establish their status as “investors” under the BIT. In particular Respondent argues that (1) Claimants have not established the necessary link between themselves and the alleged investment, that is their ownership of shares in BC and KC prior to the alleged breach; (2) Claimants' role in relation to BC and KC is “passive” rather than “active” and therefore Claimants are not “investors”; and (3) Claimants are too remote from the “investment” and therefore Claimants are not “investors”.
9. The Tribunal concludes that Claimants have proven their ownership of shares in BC and KC through the ownership holding structure set out in the Request for Arbitration at the required times.
10. The Tribunal holds that the BIT in this case does not contain a distinction between active and passive investors so as to require investors are “active”. Furthermore, even if there were such a requirement, Claimants had an active role in the management of the BC and KC plants.

¹ The Tribunal's analysis is set forth at paragraphs 181 to 236 of this Decision.

² The Tribunal's analysis is set forth at paragraphs 237 to 357 of this Decision.

11. The Tribunal concludes that there is no basis – in the BIT or in the authorities to which the Parties make reference – to read a “remoteness” test into the definition of “investor”. The Tribunal does not accept that Claimants were unaware of their investment. The Tribunal also does not consider Claimants’ complex corporate structure to be sufficient, of itself, to render the BIT inapplicable. Furthermore, the Tribunal does not consider the fact that certain aspects of the ownership holding structure entail a beneficial, rather than a legal, ownership, to be material to the jurisdictional issue.
12. The second aspect that Respondent raises relates to whether Claimants can be said to have made an “investment” under the terms of the BIT. In particular, (1) that the investment did not involve a capital contribution; (2) that the investment was short term in nature; and (3) that the investment was made without the awareness of the Uzbek Government.
13. The Tribunal holds that there is nothing in the BIT, nor in the ICSID Convention, to provide any foundation for Respondent’s argument that investment arrangements dependent on credit facilities for their financing are not “investments”.
14. The Tribunal holds that there is nothing in the BIT, nor in the ICSID Convention, to provide a foundation for Respondent’s argument that investments made with some measure of intent to dispose, or possibly to dispose, of them in the short, rather than long, term do not gain the protection of the BIT as “investments”.
15. The Tribunal does not find any support in the BIT or in the ICSID Convention for the argument that there exists an “awareness requirement” for an investment to benefit from the protection of the BIT. Rather, the BIT constitutes consent to arbitration for “investors” who make “investments” in accordance with the general terms of the BIT. Specific co-operation with, or awareness of, investors’ activity by the Host State government is not necessary.

(3) The Third Jurisdictional Objection – Legality of the Investment

16. Respondent’s third objection is that Claimants’ investment was not made in compliance with Uzbek legislation and that therefore such investment does not attract protection under the BIT.³
17. The language of Article 12 limits the “application” of the BIT to investments made in compliance with the legislation of Uzbekistan. This legality requirement is limited to the time at which the investment is made.
18. The term “legislation” in Article 12 of the BIT encompasses those actions regarded as “law” by the Host State’s legal system which, on the basis of the record in this case, is

³ The Tribunal’s analysis is set forth at paragraphs 358 to 540 of this Decision.

defined by the normative-legal acts set out in Article 5 of the Uzbekistan Law on Normative-Legal Acts.

19. In the Tribunal's view, there has been little satisfactory analysis as to the types of acts of noncompliance that are encompassed within the legality requirement. The ordinary meaning of the phrase "made in compliance with legislation" is inclusive and without explicit substantive limitations. However, it is striking that no authority appears to argue that the "legality requirement" is entirely without limits. The limitations on the substantive scope of the terms in Article 12 become apparent when the ordinary meaning of the terms is considered in their context and in light of the object and purpose of the Treaty.
20. In the Tribunal's view, the interpretive task is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of entirely denying the application of the BIT when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State.
21. The Tribunal, by majority, finds that Respondent either has failed to establish that Claimants were not in compliance with various laws or that such acts of noncompliance do not result in a compromise of an interest that justifies, as a proportionate response, the harshness of denying application of the BIT. The Tribunal also finds one alleged act of noncompliance does not involve noncompliance with "legislation" as that term is defined in Article 12.

(4) The Fourth Jurisdictional Objection – Corruption

22. Respondent's fourth objection is that Claimants procured their investment through corruption and that the claim arising from an investment so procured is not, as a consequence, admissible.⁴
23. Respondent first argues that an overpayment to Ms. Karimova of approximately US\$8 million by Claimants disguised within the price for their acquisition of shares in KC and BC constituted a bribe in violation of Article 211 of the Criminal Code.
24. The Tribunal concludes that it is difficult to assess whether or not any overpayment was made because there is uncertainty in valuing the shares themselves. Moreover, even if there were some overpayment, the mere fact of such an overpayment would not in and of itself establish that the overpayment should be regarded as a bribe. Given the failure of

⁴ The Tribunal's analysis is set forth at paragraphs 543 to 617 of this Decision.

Respondent to establish the other elements of bribe-giving, the Tribunal need not decide whether an overpayment was made or whether any such overpayment constitutes a bribe. In particular, the Tribunal holds (1) Respondent has not substantiated its assertion that Ms. Karimova was a government official during the relevant period so as to satisfy the requirements of the Article 211 and (2) Respondent has not identified what, if any, action that Ms. Karimova took or could have taken as a result of any Government position she may have held, so as to advantage Claimants and thereby establish that the terms of Article 211 of the Criminal Code have been met.

25. Respondent, second, argues that the factual case put forward as regards Article 211 of the Criminal Code is also such as to violate international public policy and thereby render the claim inadmissible. The Tribunal concludes, on the basis of the record, that international public policy, as applicable to this dispute, is in concordance with Article 211 of the Uzbek Criminal Code and takes the bribery and corruption of government officials as its focus. As noted above, Respondent did not establish that Ms. Karimova is a government official and that, even if Ms. Karimova were a government official, Respondent failed to establish that there was any advantage improperly sought by, or provided to, Claimants. Given these findings, the Tribunal denies Respondent's objection that a payment by Claimants to Ms. Karimova was contrary to international public policy.
26. Respondent's third allegation of corruption rests upon a payment of US\$3 million to Mr. Bizakov as a part of the complex and convoluted purchase transactions. Respondent argues that this alleged bribe renders the claim inadmissible by virtue of the international public policy against corruption. Respondent offers no evidence that Mr. Bizakov had or has any relationship to the Government of Uzbekistan, or indeed had any contact with the Government of Uzbekistan. Respondent solely points to Mr. Bizakov's role as a conduit between Claimants and Ms. Karimova (or her representative). Respondent likewise has offered no evidence of any attempt by Mr. Bizakov to secure any advantage from the Government of Uzbekistan by way of a bribe. The Tribunal does not find, on the basis of its examination, any evidence of corruption so as to merit a conclusion that the transaction was illegal or contrary to public policy.

(5) Costs

27. As to allocation of the costs of proceedings thus far, and in particular with respect to the Anonymous Experts, it is the Tribunal's view that Respondent's Counsel failed to adopt adequate procedures to ensure the integrity of the confidential information entrusted to it. The Tribunal holds that Respondent is to bear the costs associated with the Anonymous Experts in these proceedings. As to the conduct of Mr. Kim, a Claimant, during the July

2015 Hearing, the Tribunal is deeply troubled. This unacceptable conduct will be a factor in the Tribunal's final allocation of costs at a later stage in this proceeding.⁵

II. PROCEDURAL HISTORY

A. Registration of the Request for Arbitration

28. On 25 March 2013, ICSID received a hard copy of the Request for Arbitration dated 22 March 2013 submitted by Vladislav Kim, Pavel Borissov, Aibar Burkitbayev, Almas Chukin, Lyazzat Daurenbekova, Adal Issabekov, Damir Karassayev, Aidan Karibzhanov, Aigul Nurmakhanova, Kairat Omarov, Nikolay Varenko and Gulzhamash Zaitbekova against the Republic of Uzbekistan with Factual Exhibits C-0001 to C-0022 and Legal Authorities CL-0001 to CL-0002 (the "**Request**" or "**RFA**").
29. On 24 April 2013, the Secretary-General of ICSID registered the Request, as supplemented by Claimants' letter of 10 April 2013, in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

B. Establishment of the Tribunal

30. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention and that the Tribunal would consist of three arbitrators: one to be appointed by each Party, and the third arbitrator and President of the Tribunal to be appointed by agreement of the Parties.
31. On 17 October 2013, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and the Tribunal was constituted on that date. The Tribunal is composed of: Professor David D. Caron, a U.S. national, President, appointed by agreement of the Parties; The Honourable L. Yves Fortier PC, CC, OQ, QC, a Canadian, appointed by Claimant; and Mr. Toby Landau QC, a British national, appointed by Respondent. That same day, Ms. Geraldine R. Fischer, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. On 13 April 2015, the Parties agreed to the appointment of Ms. Natalia Mikolajcyk as the Assistant to the Tribunal. On 8 July 2016, the Parties agreed to the appointment of Dr. Cian C. Murphy to replace Ms. Mikolajcyk as the Assistant to the Tribunal.

⁵ The Tribunal's analysis is set forth at paragraphs 618 to 639 of this Decision.

C. First Session

32. On 18 December 2013, the Tribunal held a first session with the Parties by video conference. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed, *inter alia*, that the applicable Arbitration Rules are those in effect from 10 April 2006 and the procedural language is English. The Parties' agreement on procedural matters was memorialized in **Procedural Order No. 1**, which was issued on 6 January 2014.

D. Written and Oral Procedure

33. On 25 April 2014, Claimants filed a **Memorial on the Merits**, in accordance with the approved modified procedural schedule, with the following supporting documents:
- Witness Statement of Mr. Poul Bech dated 24 April 2014;
 - Witness Statement of Mr. Sergei Deneschuk dated 24 April 2014;
 - Witness Statement of Mr. Vladislav Kim dated 24 April 2014 (“**Kim I**”);
 - Witness Statement of Mr. Alexander Korobeinikov dated 24 April 2014;
 - Witness Statement of Mr. Andrei Yorsh dated 24 April 2014;
 - Expert Report of Professor Eric McGlinchey dated 7 April 2014 (“**McGlinchey**”);
 - Expert Report of Professor William Butler dated 17 April 2014 (“**Butler I**”);
 - Expert Report of Navigant Consulting dated 25 April 2014;
 - Factual Exhibits C-0023 to C-0363; and
 - Legal Authorities CL-0003 to CL-0338.
34. On 22 May 2014, the Tribunal issued **Procedural Order No. 2** adopting the Parties' amended procedural timetable.
35. On 1 August 2014, Respondent filed a **Memorial on Preliminary Objections and Request for Bifurcation** with the following supporting documents:
- Witness Statement of Mr. Mukhtasarkhon Matkarimova dated 29 July 2014;
 - Witness Statement of Mr. Dmitry Pak dated 29 July 2014 (“**Pak I**”);

- Witness Statement of Mr. Mukhtar Mukhamedov dated 31 July 2014;
 - Witness Statement of Mr. Usmonali Ortikov dated 31 July 2014;
 - Expert Report of Mr. Shavkat Mamatov dated 31 July 2014 (“**Mamatov I**”);
 - Expert Report of Mr. Timothy Hart dated 31 July 2014 (“**Hart I**”);
 - Factual Exhibits R-0001 to R-0124; and
 - Legal Authorities RL-0001 to RL-0062.
36. On 22 August 2014, Claimants filed their observations on Respondent’s Request for Bifurcation with four enclosures. The Parties subsequently exchanged further correspondence on whether the Tribunal should grant Claimants’ request that the Tribunal defer its decision on bifurcation until after Claimants submitted their Counter-Memorial.
37. On 21 September 2014, the Tribunal issued **Procedural Order No. 3** granting Respondent’s Request for Bifurcation in respect of its first four (of five) objections to jurisdiction, namely whether (1) Claimants are nationals of Kazakhstan, (2) whether Claimants made an investment under the ICSID Convention and Article 1.2 of the BIT and (3) whether the acquisition of BC and KC involved acts of corruption, and (4) whether the acquisition of BC and KC involved fraud or other violations of Uzbekistan law. The fifth objection raised by Respondent, that senior managers of BC have consistently bribed Uzbek Government officials, was joined to the merits.
38. On 11 December 2014, Claimants filed a **Counter-Memorial on Preliminary Objections** with the following supporting documents:
- Second Witness Statement of Mr. Sergei Deneschuk dated 5 December 2014;
 - Second Witness Statement of Mr. Vladislav Kim dated 8 December 2014 (“**Kim II**”);
 - Unnamed Expert Report dated 9 December 2014;
 - Factual Exhibits C-0364 to C-0521; and
 - Legal Authorities CL-0339 to CL-0369.
39. On 30 December 2014, the Tribunal issued **Procedural Order No. 4** concerning Respondent’s 15 December 2014 motion to: “(1) exclude from the record the anonymous expert report of Claimants’ ‘unnamed’ alleged expert; and (2) direct Claimants to resubmit

their Counter-Memorial on Jurisdiction without any reference to that report”. The Tribunal denied the Respondent’s request, finding that “several reports submitted [by Claimants] pointing to political conditions within Uzbekistan as well as the citations to the alleged treatment of other interested parties in this dispute *prima facie* [...] support Claimants’ assertion of a substantial risk to the expert assuming the identity of the expert is disclosed”. The Tribunal confirmed that it would revisit the admissibility and probative value of the Anonymous Expert Report as part of its deliberations on preliminary objections and invited the Parties to make further submissions on these issues as part of their subsequent scheduled pleadings.

40. On 2 March 2015, Respondent filed a **Reply on Preliminary Objections** with the following supporting documents:

- Witness Statement of Mr. Akmaljon Valijonov dated 16 February 2015;
- Second Witness Statement of Mr. Usmonali Ortikov dated 25 February 2015;
- Witness Statement of Mr. Murat Khudayberganov dated 26 February 2015;
- Witness Statement of Mukhtasarkhon Matkarimova dated 26 February 2015;
- Second Witness Statement of Mr. Dmitry Pak dated 26 February 2015 (“**Pak II**”);
- Witness Statement of Mr. Abdunabi Matkholikov dated 27 February 2015;
- Witness Statement of Mr. Pazlillo Tishabev dated 27 February 2015;
- Witness Statement of Mr. Shavkat Egamberdiev dated 28 February 2015;
- Witness Statement of Mr. Nodir Foziljonov dated 28 February 2015;
- Witness Statement of Ms. Gulchekhra Mamurova dated 28 February 2015;
- Witness Statement of Mr. Aliya Tshmatova dated 28 February 2015;
- Witness Statement of Mr. Rustam Yuldashev dated 28 February 2015;
- Second Expert Report of Mr. Shavkat Mamatov dated 17 February 2015 (“**Mamatov II**”);
- Expert Report of Mr. Gary Born dated 25 February 2015 (“**Born Expert Report**”);
- Expert Report of Professor Bernard Black dated 2 March 2015 (“**Black**”);

- Second Expert Report of Mr. Timothy Hart dated 2 March 2015;
 - Expert Report of Mr. Daniel Nardello dated 2 March 2015;
 - Factual Exhibits R-0125 to R-0263; and
 - Legal Authorities RL-0063 to RL-0136.
41. On 18 May 2015, Claimants filed a **Rejoinder on Preliminary Objections** with the following supporting documents:
- Third Witness Statement of Mr. Sergei Deneschuk dated 13 May 2015;
 - Third Witness Statement of Mr. Vladislav Kim dated 13 May 2015 (“**Kim III**”);
 - Witness Statement of Ms. Aigul Nurmakhanova dated 15 May 2015 (“**Nurmakhanova**”);
 - Witness Statement of Mr. Michael Sauer dated 15 May 2015 (“**Sauer**”);
 - Witness Statement of Ms. Gulzhamash Zaitbekova dated 15 May 2015 (“**Zaitbekova**”);
 - Expert Report of Professor Craig Lewis dated 8 May 2015;
 - Second Expert Report of Professor William Butler dated 9 May 2015 (“**Butler II**”);
 - Second Expert Report of Professor Eric McGlinchey dated 10 May 2015;
 - Second Expert Report of Navigant Consulting dated 13 May 2015 (“**Navigant II**”);
 - Second Anonymous Expert Report dated 18 May 2015;
 - Expert Report of Valery Knyazev dated 18 May 2015 (“**Knyazev**”);
 - Expert Report of Mr. Robert Strahota dated 18 May 2015;
 - Factual Exhibits C-0522 to C-0740; and
 - Legal Authorities CL-0370 to CL-0447.

42. On 11 June 2015, Respondent submitted a letter requesting that Claimants' Exhibit C-0719 be excluded from the record, as it is an expert opinion and not contemporaneous factual evidence. Alternatively, Respondent asked to be given an opportunity to submit rebuttal evidence and to cross-examine Mr. Demetriades.
43. During the pre-Hearing conference call on 30 June 2015, the Tribunal allowed Respondent to file a rebuttal submission limited to the specific point raised in Exhibit C-0719 by 14 July 2015.
44. On 14 July 2015, Respondent submitted its rebuttal submission, including the Opinion of Menelaos Kyprianou, Managing Partner of Michael Kyprianou & Co. LLC in Nicosia, Cyprus, and relevant Cypriot and English law.
45. On 15 July 2015, Claimants, in a letter to the Tribunal, observed that Respondent's rebuttal submission went beyond the Tribunal's directions and raised points not addressed in Exhibit C-0719, namely the validity of the unwritten trust arrangements between Claimants. Claimants asked the Tribunal to strike Respondent's rebuttal submission from the record. Alternatively, Claimants asked the Tribunal that any rebuttal submission by Respondent be entered into the record as an exhibit.
46. On 16 July 2015, the Tribunal requested Respondent's comments by 17 July 2015. On 17 July 2015, Respondent, in a letter to the Tribunal, asked for the rebuttal submission to be entered into the record as an expert opinion arguing that points raised in the rebuttal submission, i.e. the validity of an oral trust agreement under Cyprus law, would have been raised in the cross-examination of Mr. Demetriades.
47. After due consideration, the Tribunal concluded that Respondent's rebuttal submission goes beyond the Tribunal's directions expressed during the pre-Hearing conference call. Consequently, the Tribunal, in Procedural Order No. 8 (see paragraph 52 below) ordered Respondent to file a rebuttal submission strictly limited to the one issue raised in the Claimants' exhibit and excluded Respondent's rebuttal submission of 14 July 2015 from the record.
48. On 21 June 2015, following several exchanges between the Parties, the Tribunal issued **Procedural Order No. 5** concerning various procedural matters regarding the Hearing and document production matters. Therein, the Tribunal also decided that it would issue a separate Order regarding Respondent's renewed request to exclude the Anonymous Expert Reports.
49. On 30 June 2015, the Tribunal held a pre-Hearing organizational meeting with the Parties and the Secretary of the Tribunal by telephone conference.

50. On 1 July 2015, the Tribunal issued **Procedural Order No. 6**, concerning Respondent’s renewed request to exclude from the record Claimants’ Anonymous Expert Reports. The Tribunal decided to pursue a phased approach for the examination of the Anonymous Experts during the oral proceedings. In the initial phase, the two Anonymous Experts would be permitted to testify in an “attorney’s eyes only” manner to allow the Tribunal to assess fully the risks and consequences of revealing the Anonymous Experts’ identities. During this initial phase, the identities of the Anonymous Experts would be disclosed only to certain counsel upon signing a Non-Disclosure Agreement (“**NDA**”), and the Anonymous Experts would be permitted to testify via video-link with representatives from both Parties and the ICSID Secretariat present in the room.
51. On 15 July 2015, the Tribunal issued **Procedural Order No. 7** ordering the sequestration and separate examination of the Anonymous Experts at the upcoming oral proceeding, deciding on the time allocation as well as permitting the submission of certain documents while remaining seized of all other document production and submission requests to be considered as necessary during the upcoming Hearing.
52. On 20 July 2015, the Tribunal issued **Procedural Order No. 8**, related to the evidence provided by Mr. Demetriades and marked as Claimants’ Exhibit C-0719.
53. A Hearing on Preliminary Objections took place in Washington, D.C. from 28 July to 1 August 2015 (“**Hearing (Part I)**”). In addition to the Members of the Tribunal, the Secretary of the Tribunal and the Assistant to the Tribunal, present at the Hearing were:

For Claimants:

Counsel

- | | |
|-------------------------------|----------------------|
| - Mr. Michael Swainston, QC | Brick Court Chambers |
| - Mr. Baiju S. Vasani | Jones Day |
| - Ms. Melissa S. Gorsline | Jones Day |
| - Ms. Tatiana Minaeva | Jones Day |
| - Mr. Charles T. Kotuby Jr. | Jones Day |
| - Ms. Sylvia Tonova | Jones Day |
| - Mr. James Egerton-Vernon | Jones Day |
| - Mr. Denis Olarou | Jones Day |
| - Ms. Anastasiya Ugale | Jones Day |
| - Ms. Lindsay Reimschuessel | Jones Day |
| - Ms. Maria I. Pradilla Picas | Jones Day |
| - Ms. Allison Prevatt | Jones Day |
| - Mr. Janai Orina | Jones Day |
| - Mr. Tendai Mukau | Jones Day |
| - Ms. Angela Dunay | Jones Day |

- Mr. Matthew Brewer Jones Day

Claimants' Representatives

- Ms. Aigul Nurmakhanova Claimant
- Mr. Almas Chukin Claimant
- Mr. Michael McNicholas Claimants' Agent

Fact Witnesses

- Mr. Vladislav Kim Claimant
- Ms. Gulzhamash Zaitbekova Claimant
- Mr. Michael Sauer Visor Holding
- Mr. Poul Bech Chimpharm OJS, CFO

Experts

- Mr. Valery Knyazev Haberman Ilett LLP
- Ms. Anastasia Mikhalitsyna Haberman Ilett LLP
- Mr. Robert D. Strahota Strahota Capital Markets
- Mr. Brent C. Kaczmarek Navigant Consulting, Inc.
- Mr. Kiran P. Sequeira Navigant Consulting, Inc.

For Respondent:

Counsel

- Ms. Carolyn Lamm White & Case LLP
- Ms. Andrea Menaker White & Case LLP
- Mr. William Currier White & Case LLP
- Mr. Adams Lee White & Case LLP
- Mr. Frank Schweitzer White & Case LLP
- Mr. Brody Greenwald White & Case LLP
- Mr. Jared Hubbard White & Case LLP
- Mr. Chauncey Bratt White & Case LLP
- Ms. Larissa Eltsefon White & Case LLP
- Ms. Jennifer Ivers White & Case LLP
- Mr. Anthony Bestafka-Cruz White & Case LLP
- Mr. Jeffrey Stelhorn White & Case LLP
- Mr. Darien Salehy White & Case LLP
- Ms. Erin Vaccaro White & Case LLP
- Ms. Luca Winer White & Case LLP
- Ms. Kate Stillman White & Case LLP
- Ms. Stephanie Isaia White & Case LLP
- Ms. Hannelore Sklar White & Case LLP
- Ms. Galina Duckworth White & Case LLP

- Mr. Dmitry Savransky White & Case LLP
- Mr. Alex Tararin White & Case LLP

Respondent's Representatives

- Minister Muzraf Ikramov Ministry of Justice of Uzbekistan
- Mr. Davronbek Akhmedov Ministry of Justice of Uzbekistan
- Mr. Sanjar Kasimov Law Department of Cabinet of Ministers
- Mr. Jurabek Akhmedov State Committee for Privatization, Demonopolization, and the Development of Competition
- Mr. Yunusali Shakirov Ferghana Securities Department
- Mr. Mukhtor Mukhamedov Tashkent Regional Prosecutor's Office
- Mr. Usmonali Ortikov Kuvasaycement OJSC
- Mr. Kamol Muhtarov Embassy of the Republic of Uzbekistan to the United States

Fact Witnesses

- Mr. Dmitry Pak Full Stock Group LLC

Experts

- Professor Bernard Black Northwestern University Law School and Kellogg School of Management
- Mr. Timothy Hart Credibility International
- Mr. Shavkat Mamatov Management Board of the Republican Stock Exchange Tashkent
- Mr. David Meilstrup Credibility International

54. The following Fact Witnesses and Experts testified at the Hearing (Part I):

For Claimants

- Mr. Vladislav Kim (Claimants' Fact Witness)
- Mr. Michael Sauer (Claimants' Fact Witness)
- Ms. Gulzhamash Zaitbekova (Claimants' Fact Witness)
- Mr. Poul Bech (Claimants' Fact Witness)
- Mr. Valery Knyazek (Claimants' Expert)
- Mr. Brent Kaczmarek (Claimants' Expert)

For Respondent

- Mr. Dmitry Pak (Respondent's Fact Witness)
- Mr. Timothy Hart (Respondent's Expert)

55. During the Hearing (Part I), special arrangements were made for the Anonymous Experts to testify via video-conference from an unidentified location with counsel from both sides and a representative of the ICSID Secretariat present. Due to multiple disclosures by Respondent's counsel, the Anonymous Experts feared they would be identified and declined to testify. As a result, the Tribunal decided that the Anonymous Experts would testify at a later time.
56. In the course of the Hearing (Part I), counsel for Respondent became aware of a discussion on social media in which one of Claimants had published on the same platform a photograph surreptitiously taken of the Hearing and negative remarks about Respondent's Counsel.
57. The Claimant in question sent an apology for his behaviour. The Tribunal made clear to participants that the Hearing was to continue in both strict confidentiality and with courtesy towards all participants. The participants undertook to maintain appropriate professional behavior thereafter.
58. Audio and video recordings were prepared of the Hearing (Part I) and the proceedings in English and Russian were transcribed verbatim. The recordings and transcripts were later distributed by the Centre to the Parties and the Members of the Tribunal.
59. On 7 August 2015, the Tribunal issued **Procedural Order No. 9** concerning Respondent's request to introduce additional documents into the record and request Claimants to produce additional documents.
60. On 5 October 2015, the President of the Tribunal, the Parties and the Secretary of the Tribunal held a second pre-Hearing organizational meeting with the Parties by telephone conference.
61. On 13 October 2015, the Tribunal issued **Procedural Order No. 10** concerning Respondent's request to introduce new evidence into the record and require Claimants to produce documents, as well as whether Claimants' rebuttal evidence should be allowed into the record.
62. On 19 October 2015, the Tribunal issued **Procedural Order No. 11**, which was subject to the confidential "attorney's eyes only" designation, concerning matters related to the examination of the Anonymous Experts.
63. On 7 November 2015, the Tribunal issued **Procedural Order No. 12**, which was subject to the confidential "attorney's eyes only" designation, regarding the Anonymous Experts' examination.

64. A second Hearing on Preliminary Objections took place in The Hague from 10 to 12 November 2015 (“**Hearing (Part II)**”). In addition to the Members of the Tribunal, the Secretary of the Tribunal and the Assistant to the Tribunal, present at the hearing were:

For Claimants:

Counsel

- | | |
|-------------------------------|----------------------|
| - Mr. Michael Swainston QC | Brick Court Chambers |
| - Mr. Baiju S. Vasani | Jones Day |
| - Ms. Melissa S. Gorsline | Jones Day |
| - Ms. Tatiana Minaeva | Jones Day |
| - Mr. Denis Olarou | Jones Day |
| - Ms. Lindsay Reimschuessel | Jones Day |
| - Ms. Maria I. Pradilla Picas | Jones Day |
| - Mr. Firoz Ehsan | Jones Day |

Claimants’ Representatives

- | | |
|--------------------------|------------------|
| - Ms. Aigul Nurmakhanova | Claimant |
| - Mr. Almas Chukin | Claimant |
| - Mr. Michael McNicholas | Claimants’ Agent |
| - Mr. Michael Sauer | Visor Holding |

Experts

- | | |
|--------------------------|--------------------------|
| - Mr. Robert D. Strahota | Strahota Capital Markets |
|--------------------------|--------------------------|

For Respondent:

Counsel

- | | |
|-----------------------------|------------------|
| - Ms. Carolyn Lamm | White & Case LLP |
| - Ms. Andrea Menaker | White & Case LLP |
| - Mr. William Currier | White & Case LLP |
| - Mr. Brody Greenwald | White & Case LLP |
| - Mr. Jared Hubbard | White & Case LLP |
| - Mr. Chauncey Bratt | White & Case LLP |
| - Ms. Larissa Eltsefon | White & Case LLP |
| - Ms. Jennifer Ivers | White & Case LLP |
| - Mr. Anthony Bestafka-Cruz | White & Case LLP |
| - Mr. Jeffrey Stellhorn | White & Case LLP |
| - Ms. Erin Vaccaro | White & Case LLP |

Respondent’s Representatives

- Minister Muzraf Ikramov Ministry of Justice of Uzbekistan
- Mr. Davronbek Akhmedov Ministry of Justice of Uzbekistan
- Mr. Jurabek Akhmedov State Committee for Privatization, Demonopolization, and the Development of Competition
- Ms. Malika Pulatova Respondent's Interpreter
- Mr. Alisher Khoshimov Respondent's Interpreter

Experts

- Professor Bernard Black Northwestern University Law School and Kellogg School of Management
- Mr. Shavkat Mamatov Management Board of the Republican Stock Exchange Tashkent

65. The following Experts testified at the Hearing (Part II):

For Claimants

- Mr. Robert D. Strahota (Claimants' Expert)

For Respondent

- Professor Bernard Black (Respondent's Expert)
- Mr. Shavkat Mamatov (Respondent's Expert)
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66. On 11 November 2015, the Tribunal issued **Procedural Order No. 13**, which was subject to the confidential "attorney's eyes only" designation, regarding the Anonymous Experts' Reports.

67. Audio and video recordings were prepared of the Hearing (Part II) and the proceedings in English and Russian were transcribed verbatim. The recordings and transcripts were later distributed by the Centre to the Parties and the Members of the Tribunal.

68. Although originally scheduled to testify in a phased approach at a separate session from the Hearings, Claimants' counsel subsequently notified the Tribunal that the Anonymous Experts withdrew their Reports after certain confidential information that could compromise their anonymity was again disclosed.

E. Post-Hearing Procedure

69. On 21 December 2015, the Parties filed simultaneous Post-Hearing Briefs.

70. On 22 December 2015, the Parties submitted their Submissions on Costs.

F. Procedural History as to Anonymous Experts

71. A particular and unusual aspect of the procedural history merits separate examination from the chronology set out in the preceding sections. Together with their Counter-Memorial on Preliminary Objections dated 11 December 2014, Claimants submitted Exchange Report I prepared by an anonymous individual (“**Anonymous Expert I**”).
72. In this report, the Anonymous Expert I provided reasons for the non-disclosure of his/her name or other personal details. These reasons, in essence, were that the Anonymous Expert I, and companies at which he/she is employed, might face greater scrutiny from the Uzbek state, to the detriment of their business activities.⁶
73. On 30 December 2014, the Tribunal issued **Procedural Order No. 4**, dealing with Respondent’s request, made by letter dated 15 December 2014, to exclude the Exchange Report I from the record. In this Order, the Tribunal denied Respondent’s request for the time being, indicating, however, that such decision is strictly without prejudice to a full consideration of the evidence and the probative value the Tribunal may give to the statements in the Report.
74. In principle, the Tribunal agreed with Respondent that an expert opinion must be signed and dated by the expert where the report contains the full name and address of the expert as well as a description of the background, qualifications, training and experience of the expert. The Tribunal also agreed that the burden of proving that the Tribunal should depart from this principle is on the party proffering the anonymous expert report. However, the Tribunal concluded that, *prima facie*, Claimants have submitted sufficient evidence not to exclude the Anonymous Expert Report at this stage of the proceedings.
75. Further, in **Procedural Order No. 4**, the Tribunal invited Claimants to investigate and suggest other effective ways to secure the Anonymous Expert I’s safety, while making her/him available for examination during the Hearing. The Tribunal also noted that it would revisit its decision not to exclude Exchange Report I (its admissibility and its probative value) as a part of its deliberations on the preliminary objections.
76. In its Reply on Preliminary Objections to Jurisdiction and Admissibility dated 2 March 2015, Respondent again requested for the anonymous expert testimony to be excluded from the record. Alternatively, if the Tribunal decided to admit Exchange Report I, Respondent argued that a more proportionate remedy would be to reveal Anonymous Expert I’s identity, background and qualifications to Respondent’s counsel, with no such disclosure being made to any of the client representatives.

⁶ Exchange Report I, ¶ 4.

77. Respondent argued that it must have the opportunity to challenge Anonymous Expert I's evidence by attacking her or his credibility through cross-examination. It further contended that Claimants' allegations regarding Respondent's political and legal system are generalized and Claimants had failed to meet their burden of proving that Anonymous Expert I would be in danger if the identity were revealed. According to Respondent, Claimants failed to establish that, the only way in which Claimants could produce testimony in response to Respondent's preliminary objection and simultaneously protect the safety and security of the author of that testimony, was through an anonymous expert report.
78. Additionally, together with the Reply on Preliminary Objections to Jurisdiction and Admissibility, Respondent submitted an Expert Report of Mr. Gary Born dated 25 February 2015 ("**Born Expert Report**"). In his report, Mr. Born raised the following principal issues that must be considered with regard to anonymous expert testimony in investment arbitration: *first*, procedural fairness; *second*, party's right to challenge evidence; *third*, challenging expert evidence through cross-examination; and *fourth*, generally admitting anonymous expert evidence in the context of procedural fairness.
79. In sum, the Born Expert Report argues that there are two elements of procedural fairness: the right to be heard and the right to equal treatment. The right to challenge evidence submitted by the opposing party forms part of the fundamental right to be heard (rebuttal evidence or cross-examination). Thus, a tribunal before whom evidence is proffered that cannot be tested by the opposing party should refuse to take that evidence into account. In Mr. Born's view, an award of a tribunal that refuses to allow cross-examination, but nevertheless takes the contested evidence into account, is subject to annulment.
80. The Born Expert Report points out that, as a rule, expert evidence must be authenticated in order for the other party to be able to test it (e.g., IBA Rules Article 5.2(a)). Therefore, if a tribunal is to receive, consider, and rely upon the statements of an individual, it is essential to allow the opposing party and the tribunal to know who that person is, to have that person's attestation of truth and to understand the basis for a purported expert's expertise. In the absence of this information, it is impossible for the opposing party to properly test the veracity, competence and integrity of the expert's evidence.
81. The Born Expert Report thus concludes that the threshold for admitting anonymous expert evidence in an investment arbitration is very high. In other words, the tribunal should only interfere with a party's right to procedural fairness, if the evidence before it demonstrates a clear and compelling risk of significant negative consequences for the witness (e.g., protecting a life of the witness, state security issues involved).
82. To offer a solution, Mr. Born looks to the principle of proportionality. He argues that, if specific threats to the witness's security exist, proportionality and non-discrimination

principles require consideration of other/less intrusive means to achieve a party's goal to submit the relevant evidence. For instance: (a) Claimants to find an expert from a country with a similar stock exchange system; (b) expertise from an individual who worked at the Uzbek stock market in the past, but now lives outside of the country; or (c) a hybrid of options (a) and (b).

83. Bearing in mind the above, the Born Expert Report suggests two solutions for the Tribunal to consider: (1) disclosure only to Respondent's counsel meaning disclosure of the unnamed expert's identity, background and qualifications supported by Respondent's undertaking not to disclose the identity of the expert witness (procedure similar to situations where highly confidential commercial information is revealed); or (2) disclosure to both Respondent's counsel and Respondent's expert (meaning disclosure of the unnamed expert's identity, background and qualifications supported by a strict confidentiality agreement).
84. In response to Respondent's solutions offered in its Reply to Preliminary Objections on Jurisdiction and Admissibility, Claimants indicated in their Rejoinder on Preliminary Objections dated 18 May 2015 that the Anonymous Experts I and II would be willing to disclose their identities and testify in person, provided that: (1) they present their testimony in the "attorneys' eyes only"; (2) Respondent's counsel sign an NDA to keep the experts' identity and credentials confidential from (i) Respondent; (ii) Respondent's witnesses who are Uzbek citizens or reside in Uzbekistan; (iii) any other person who possesses Uzbek citizenship or currently resides in Uzbekistan; and (iv) any person outside this arbitration process; (3) Respondent's counsel indemnify the experts should either of them suffer any adverse effects as a result of a breach of the NDA; (4) Claimants seek separate agreements with the court reporters and translators; (5) the Tribunal issues an order confirming the NDA and the arrangements for the testimony and confirming that the Tribunal will maintain confidentiality of the information; (6) the experts be allowed to testify either (i) in person in Moscow or Almaty, or (ii) via Skype from an undisclosed location; and (7) any confidential information be redacted and not disclosed to Prohibited Persons as defined under the NDA.
85. However, with the same Rejoinder, Claimants further submitted Exchange Report II, in which it was disclosed that Exchange Report I was in fact co-authored by two anonymous individuals (Anonymous Expert I and Anonymous Expert II, together the "Anonymous Experts").⁷
86. In reaction to this disclosure, Respondent in its letter of 3 June 2015 argued that Claimants and their counsel acted in bad faith and with lack of candor. Respondent again asked the

⁷ Exchange Report II, ¶ 2.

Tribunal to exclude Exchange Reports I and II or, alternatively, requested to be provided with the identities and *curricula vitae* of the Anonymous Experts.

87. In response, Claimants in their letter dated 11 June 2015 indicated that they were truly unable to present their arguments without the anonymous testimony and asked the Tribunal to wait until after the Hearing, or at least until there was no possibility of testimony by the Anonymous Experts, before the Tribunal determines whether the reports are actually ‘unauthenticated’. Claimants also submitted that the Tribunal should allow for the “attorney’s eyes only” solution suggested by Mr. Born and outlined in detail in Claimants’ Rejoinder on Preliminary Objections.
88. After due consideration of the Parties’ arguments and the unique circumstances of the case, the Tribunal issued **Procedural Order No. 6** on 1 July 2015, in which the Tribunal agreed with the Parties at the outset that procedural fairness and equal treatment of the parties constitute fundamental principles underlying arbitration proceedings. The Tribunal further agreed that one party’s right to challenge evidence (either by rebuttal evidence or cross-examination) submitted by the opposing party is inherent in that party’s right to be heard. The Tribunal similarly agreed that any departure from these principles is subject to the highest scrutiny and must be balanced against the ability of both parties to present their case in full and any danger to the potential witness that may be involved.
89. Favoring a solution to be mutually agreed by the Parties, the Tribunal decided in its Procedural Order No. 6 to approach the issue in a phased manner and as an initial matter to adopt an “attorney’s eyes only” solution as follows:
 - i. Claimants were to provide Respondent with a draft NDA. The Tribunal also observed that it did not see the necessity to include in the NDA the indemnity clause requested by Claimants. The Tribunal was of the view that Respondent’s counsel undertaking not to disclose the identity of Anonymous Expert I and Anonymous Expert II should constitute a sufficient measure of protection.
 - ii. Claimants were to provide Respondent’s counsel with a confidentiality agreement to be signed by the court reporters and the translators.
 - iii. The Tribunal directed the Parties to provide it with a signed draft of the NDA at the earliest convenience.
 - iv. The Tribunal directed Claimants to provide Respondent and the Tribunal with complete *curricula vitae* of Anonymous Expert I and Anonymous Expert II, including (but not limited to) their identities and qualifications, upon the conclusion of the NDA.
90. At this initial stage, the Tribunal confirmed that both Anonymous Expert I and Anonymous Expert II were to be made available to give testimony at the Preliminary Hearing via a video link. To ensure procedural fairness, the Tribunal confirmed that Respondent must be

given the opportunity to have its representative present in the room, from which the two Anonymous Experts would be testifying.

91. Finally, the Tribunal underlined that, its initial willingness to allow the Anonymous Experts to testify in the “attorney’s eyes only” approach as described above, did not in any way impede the Tribunal’s discretion to exclude this evidence from the record, should the Tribunal decide this was justified under the circumstances.
92. On 15 July 2015, the Parties signed the NDA, identifying “confidential information” and setting out the Parties’ obligations with regard to the handling of such confidential information in the course of the arbitration.
93. On 15 July 2015, taking into account the Parties’ arguments with respect to the sequestration of the Anonymous Experts,⁸ the Tribunal issued **Procedural Order No. 7**. Given the unusual circumstances surrounding the examination of the Anonymous Experts, the Tribunal ordered that they be presented and examined separately, and be accompanied by the necessary sequestration arrangements.
94. However, during the Hearing (Part I), two (both accepted-as-inadvertent) disclosures of confidential information by Respondent’s Counsel, as proscribed by the Confidentiality Agreement, occurred. In light of this, and after numerous discussions with both Parties’ counsels, it was decided that the Anonymous Experts would give their testimony at a later stage.
95. Subsequently, on 5 October 2015, the President of the Tribunal, the Secretary of the Tribunal, and the Parties held a conference call, during which counsel for Respondent indicated that it intended to use publicly available documents, not on the record of this arbitration, during its cross-examination of the Anonymous Experts in Phase I. Claimants’ Counsel requested to be provided with the documents reasonably in advance and a discussion ensued. The President of the Tribunal requested the Parties to submit their brief written commentary on the issue by 9 October 2015.
96. On 6 October 2015, Respondent submitted its request to use publicly available documents, not on the record, during its Phase I cross-examination of the Anonymous Experts. Respondent indicated in its letter that Respondent had located these documents only after the limited information regarding the Anonymous Experts was revealed to them and that they concerned “the bona fides of the Anonymous Experts as independent experts and their alleged reasons for requesting anonymity”.

⁸ See Parties’ letters regarding the sequestration of the Anonymous Experts dated respectively 10 and 13 July 2015.

97. On 9 October 2015, Claimants submitted their objection to Respondent's request. Claimants indicated that there were no exceptional circumstances allowing for such a late introduction of the said documents on the record and that allowing Respondent to "impeach" Claimants' experts by surprise would be a violation of Claimants' due process rights in these proceedings. Thus, Claimants asked the Tribunal to either (1) deny Respondent's request to cross examine the Anonymous Experts with the proposed impeachment documents or any other materials not in the record; or (2) order Respondent to immediately produce the proposed impeachment documents, along with any other documents or evidentiary materials that it planned to use during the upcoming Hearing, while providing Claimants with an opportunity for rebuttal.
98. Consequently, on 19 October 2015 the Tribunal issued **Procedural Order No. 11**, in which it granted Respondent's request to add the impeachment documents to the record and to order Respondent to produce the said documents at its earliest convenience. The Tribunal also granted Claimants' request to submit rebuttal evidence and ordered Claimants to produce such rebuttal documents at its earliest convenience.
99. After reviewing the new documents submitted by Respondent, in their letter of 30 October 2015, Claimants raised a number of points in order to argue that there was no good reason for Respondent to introduce at such a late stage new documents to be used for the cross-examination of the Anonymous Experts. Claimants further indicated that given the inability to predict the line of Respondent's argumentation during their cross, Claimants were unable to fully respond with their rebuttal evidence. Thus, Claimants asked the Tribunal to be allowed to produce further rebuttal evidence, if necessary, with their Post-Hearing Briefs.
100. In response, in a letter of 3 November 2015, Respondent indicated that Claimants' characterization of the "impeachment evidence" and the manner in which Respondent introduced this into the record contained a number of misrepresentations. Specifically, Respondent focused on Claimants' contentions regarding the documents used for the cross-examination of Mr. Knyazev. Respondent also objected to Claimants' request to submit further rebuttal evidence with Post-Hearing Briefs. Respondent indicated that it would be impermissible to require it to set out in advance its arguments and that submission of further rebuttal evidence with Claimants' Post-Hearing Brief would be impractical and not warranted under the circumstances.
101. On 2 November 2015, in a letter to the Tribunal, this time Claimants brought to the Tribunal's attention that on 23 October 2015 at 8:31 PM, Respondent's Counsel had sent an email to the Tribunal – which also copied an Uzbek Government official – attaching edited transcripts and including confidential information regarding the Anonymous Experts.

102. As a consequence, Claimants informed the Tribunal that the Anonymous Experts had informed Claimants' Counsel that they were no longer willing to testify in this arbitration under any circumstances. As explained by Claimants' Counsel, the Anonymous Experts believed that Respondent's Counsel could not be trusted to preserve their anonymity and further, they were concerned that if they testified, they would be exposed to extreme danger – a concern which Claimants' Counsel submitted was fully justified.
103. In response, in its letter of 4 November 2015, Respondent informed the Tribunal that its client had deleted the email without reading it or opening its attachments. Respondent's Counsel also contended that the transcripts at issue did not, in fact, contain any information that was not previously disclosed or that could be used to identify the Anonymous Experts, their whereabouts, or the location of the Hearing (Part I).
104. Therefore, Respondent asked the Tribunal to: (1) order the Anonymous Experts to testify in person at the scheduled Hearing (Part I); (2) alternatively, order the Anonymous Experts to testify by video-link, but only in the event that the Tribunal concluded that there were valid grounds for the Anonymous Experts to refuse to testify in person as scheduled; and (3) if the Anonymous Experts refused to testify at the Hearing (Part I) as ordered by the Tribunal, exclude their reports from the record or accord them no weight, and allocate Hearing time for Respondent to present its impeachment evidence and arguments.
105. In their letter of 5 November 2015, Claimants' Counsel firmly denied the various allegations regarding the alleged underlying reasons for the Anonymous Experts' refusal to give testimony at the upcoming hearing. Claimants' Counsel further confirmed that the Anonymous Experts were not willing to testify due to their safety concerns and again asked the Tribunal that, nonetheless, the Anonymous Experts' written evidence be kept on the record and given full weight.
106. On 7 November 2015, the Tribunal issued **Procedural Order No. 12** rejecting Respondent's first request that the Tribunal order the Anonymous Experts to appear for cross-examination at the designated Hearing (Part I) location as initially scheduled. At the same time, the Tribunal invited the Parties, and Claimants' Counsel in particular, to explore the possibility of video-link testimony by the Anonymous Experts.
107. By way of Claimants' email of 7 November 2015, the Tribunal and Respondent were informed that the Anonymous Experts were not willing to further testify in this arbitration under any circumstances. Claimants' Counsel conveyed two overriding concerns that were presented by the Anonymous Experts. First, the Anonymous Experts were concerned that Respondent already knew their identity. Second, even if Respondent was to be taken at its word that the email containing confidential information had been deleted without review, the Anonymous Experts no longer had any confidence that the existing arrangements that

had been put in place to protect their identities would effectively serve their purpose going forward.

108. In an email of 7 November 2015, Respondent's Counsel advised the Tribunal that it did not acquiesce to the alleged facts underlying the Anonymous Experts' decision.
109. The Claimants contacted the Anonymous Experts to ascertain whether they were willing to appear by video link as an alternative. The Anonymous Experts declined to appear by video link for the same reasons, as explained above.
110. During the Hearing (Part II), the Tribunal noted that the Anonymous Experts had not withdrawn their expert reports from the record, despite their refusal to testify in these proceedings. The Tribunal thus asked Counsel for Claimants whether the Anonymous Experts, in declining to appear, appreciated that they could also withdraw their reports. Counsel for Claimants indicated that the Anonymous Experts appreciated that the Tribunal might exclude their reports or not give them any weight as a consequence of their nonappearance.
111. On 11 November 2015, the Tribunal issued **Procedural Order No. 13**, which directed Claimants' Counsel to contact expeditiously the Anonymous Experts to reiterate that their expert reports remained a part of the record in this proceeding at the present time and, putting aside possible contract issues between the experts and Claimants, to ask whether they wished the expert reports to be withdrawn, assuming that the anonymity they requested was allowed.
112. The Tribunal took into account the fact that the Anonymous Experts had expressed a fear of retaliation as a possible consequence of the expert opinions they had submitted to the Tribunal, and that thereafter they had not agreed to appear for examination because of the fear expressed. The Tribunal was also concerned that it had a responsibility to ensure the good order and fairness of these proceedings.
113. On 12 November 2015, Claimants' Counsel informed the Tribunal that the Anonymous Experts wanted to withdraw their reports, even if the Tribunal would provide them anonymity, because of the reasons previously stated.⁹ Notwithstanding this request by the Anonymous Experts, Claimants' Counsel asked that these reports remain part of the record in this arbitration.¹⁰
114. After a break for deliberations, on the same day, the Tribunal informed the Parties of its decision to withdraw Exchange Report I and Exchange Report II from the record in their

⁹ Second Hearing on Preliminary Objections, Day 4, p. 302:2-8.

¹⁰ Second Hearing on Preliminary Objections, Day 4, p. 303:4-14.

entirety, including the exhibits that were part of those Expert Reports.¹¹ Upon Claimants' request, the Tribunal gave permission to Claimants to make a motion to add to the record certain exhibits relied upon by Anonymous Expert I and Anonymous Expert II as Claimants' exhibits.¹²

115. On 17 November 2015, in a letter to the Tribunal, Claimants, *inter alia*, requested to have a number of documents, previously cited in Exchange Reports I and II, readmitted into the record. Claimants argue that the majority of the exhibits cited were also extensively cited in the Parties' pleadings and in other expert reports. Further, Claimants contended that the readmission of the exhibits to the record would not result in any prejudice to Respondent.
116. In a letter to the Tribunal of 25 November 2015, Respondent confirmed that it did not object to Claimants' request that the Tribunal readmit to the record the exhibits referenced in the Anonymous Experts' reports.
117. In its decision regarding the exclusion of the Anonymous Experts' reports from the record, the Tribunal took into account the following considerations.
118. First, the Tribunal considered the Anonymous Experts' request for the reports to be withdrawn from the record, even if the Experts' anonymity was to be preserved. The Tribunal also noted that the Experts wished Respondent to be informed of the fact that their reports have been withdrawn.
119. Second, the Tribunal considered Claimants' request for the reports to remain on the record, notwithstanding the Experts' request described above. Claimants' position is that they have obtained the Anonymous Expert evidence in good faith and that it thus should benefit from the appropriate weight and stay on the record.
120. The Tribunal also considered Respondent's position set out earlier during the Hearing regarding the Experts' anonymity as well as the overall circumstances leading to the Experts' request to have their reports withdrawn.
121. As noted in Procedural Order No. 13, the Tribunal may not ignore the continuing representations of fears of professional or personal retaliation held by the Anonymous Experts. Further, as recalled in that same Order, the Tribunal holds that it has a responsibility to ensure the good order and fairness of these proceedings.
122. In light of the above circumstances, the Tribunal finds it difficult to reconcile Claimants' request that the Anonymous Experts' reports be retained as part of the record with the Experts asking to have them withdrawn. The Tribunal also appreciates the difficulty in

¹¹ Second Hearing on Preliminary Objections, Day 4, pp. 310:21-311:3.

¹² Second Hearing on Preliminary Objections, Day 4, pp. 311:5-312:2.

which the Respondent's Counsel would find itself towards its client should the reports be given weight by the Tribunal even though the Anonymous Experts asked for Respondent to be informed about their decision to withdraw the reports. Consequently, and on balance, as communicated to the Parties during the Hearing, the Tribunal decides to exclude the Anonymous Experts' reports from the record.

123. In turn, the Tribunal appreciated the duties of candor and professionalism that Claimants' Counsel owes to its clients. The Tribunal also notes the difficult circumstances that led to the withdrawal of their reports by the Anonymous Experts. The Tribunal thus grants Claimants' request for the exhibits listed in the Annex A to remain as part of the record in this arbitration. The Tribunal notes in this respect that the said exhibits already are designated as Claimants' factual or legal exhibits and were referred to and/or relied upon by both Parties in the course of these proceedings. Therefore, the Tribunal believes that should these exhibits remain on the record, they will not cause any prejudice to Respondent.
124. The issue of the allocation of costs associated with the Anonymous Experts is addressed *infra* in **Part XI** of this Decision.

III. FACTUAL BACKGROUND

125. The factual background differs in considerable respects as between Claimants' and Respondent's representations. This section provides a summary of those representations insofar as they relate to Claimant's acquisition of the BC and KC plants in Uzbekistan and Respondent's objections to this Tribunal's jurisdiction. The different representations of the factual background pervade the arguments on jurisdiction throughout this award. An additional exposition of the factual background as it relates to the merits of this claim will be necessary in the award on the merits.

A. Claimants' Representation of the Factual Background

126. Claimants' position describes a good faith investment in the Uzbek cement industry that led to a campaign of harassment by the Uzbek Government against Claimants' business interests. The campaign involved arrests, the seizure of company documents and assets, and the bringing of criminal and civil proceedings against Claimants' companies and certain of the managers of those companies.
127. Claimants maintain that they hold a portfolio of cement manufacturing assets, including BC and KC, cement plants, and related assets, in Kazakhstan, Kyrgystan, and Russia. These assets are held through a Cypriot holding company, UCG, and, in the case of BC and KC, its Cypriot subsidiaries – Raycross Limited (“**Raycross**”), Raybird Limited (“**Raybird**”),

and Rayblock Limited (“**Rayblock**”) (Raycross, Raybird, and Rayblock, together: the “**Ray Companies**”).

128. In 2005, Claimants were in the process of growing the cement sector of their investment portfolios.¹³ In Spring of that year, they learned from Mr. Nurlan Bizakov, a prominent businessman, that there may be an opportunity to complement their growing cement holding with the BC and KC plants in Uzbekistan.¹⁴
129. Claimants set up an informal sub-committee to oversee the potential acquisition of BC and KC (the “**Working Group**”) and negotiations commenced via the intermediation of Mr. Bizakov.
130. The price of US\$33.98 million for BC and KC together was deemed a reasonable price by both Claimants and Sellers.¹⁵
131. Following from Claimant’s perceived limitations of the Tashkent Stock Exchange (“**TSE**”), relating to spread limits and investment protection, Claimants and Sellers entered into two complementary agreements:
 - The Tashkent Share Purchase Agreements executed by the brokers to record title transfer in the shares on the TSE (“**Tashkent SPAs**”); and
 - The English Share Purchase Agreements negotiated by the parties and containing the additional protections required by the Claimants (“**English SPAs**”).¹⁶
132. Mr. Kim, acting on behalf of the Claimants’ subsidiaries, Kaden Invest Ltd. (“**Kaden**”) and Nabolena Ltd. (“**Nabolena**”), was introduced to a broker at the TSE, Mr. Pak, whose only colleague at the brokerage firm Tenet Invest, Mr. Allakverdyan, represented Sellers.¹⁷
133. On 16 January 2006, Mr. Kim signed the Agency Agreements, whereby brokers were able to complete the transaction by “matching” buyers’ and sellers’ terms on the stock exchange. On the basis of that matched transaction, the brokers filled out the transaction card, executed the Tashkent SPAs, and informed Mr. Kim and Sellers of the completed deal report.

¹³ See Saur, ¶ 12.

¹⁴ Claimants’ Rejoinder on Preliminary Objections, ¶ 10; Nurmakhanova, ¶ 17.

¹⁵ Claimants’ Rejoinder on Preliminary Objections, ¶¶ 12-13.

¹⁶ Claimants’ Rejoinder on Preliminary Objections, ¶ 14.

¹⁷ Claimants’ Rejoinder on Preliminary Objections, ¶ 15.

134. When the deal was done, Claimants also contracted to pay Mr. Bizakov his commission of US\$3 million for introducing them to the opportunity.¹⁸
135. Between the spring of 2006 and 2007, Claimants proceeded to increase their majority stakes in BC and KC by acquiring minority shareholdings.¹⁹ After further acquisitions of cement plants in 2006 and 2007, Claimants restructured their cement holdings under the umbrella of UCG in 2008.²⁰
136. Between 2006 and 2010 Claimants invested “over US\$127 million in the modernization and improvement of BC’s and KC’s production facilities”.²¹ This led to an increase in production capacity and profitability of the plants. On foot of this increase in production capacity Claimants secured debt financing “in excess of US\$320 million from Kazkommertsbank (the largest bank in Kazakhstan)”.²²
137. Claimants began to prepare for an initial public offering (“**IPO**”) of UCG. As part of these preparations Claimants had to produce audited accounts of UCG. At that point, Claimants had to make a choice between maintaining the complete confidentiality of the BC and KC acquisitions, as insisted upon by Sellers, and providing auditors with financial information on the transactions for the purposes of the UCG accounts. Claimants provided UCG’s auditors with the Tashkent SPAs, rather than the English SPAs, as part of this process.²³
138. From early in 2010, Claimants’ business interests were subject to a campaign of harassment by Respondent. The harassment took place under the guise of official and lawful action by offices and agencies of the Uzbek Government but was done in violation of national law and in violation of Respondent’s obligations under the BIT.
139. Claimants’ BC cement production facilities were subject to criminal and regulatory investigations. These investigations led to the arrest and detention of employees at Claimants’ cement production facilities, disruption of business activities, and confiscation of company property. In June 2011, BC and four of its managers were found guilty of criminal charges by an Uzbek criminal court. Furthermore, the court held that a 51% shareholding in BC was to be given over to the Uzbek Government. This expropriation of Claimants’ investment in BC was done without substantive or procedural due process. Claimants’ attempts to achieve redress through the Uzbek courts were unsuccessful. As a result of these actions by the Uzbek Government, Claimants have lost their majority

¹⁸ Claimants’ Rejoinder on Preliminary Objections, ¶ 17.

¹⁹ Claimants’ Rejoinder on Preliminary Objections, ¶ 18.

²⁰ **C-0332**, Claimants’ Rejoinder on Preliminary Objections, ¶ 19; *see* IPA Roadshow Presentation, United Cement Group, Plc. dated February 2010, slide 4.

²¹ Claimants’ Request for Arbitration, ¶ 5.

²² Claimants’ Request for Arbitration, ¶ 6.

²³ Claimants’ Rejoinder on Preliminary Objections, ¶ 20; *see* Zaitbekova, ¶¶ 17-20.

shareholding in BC and, as a consequence of further Uzbek Government actions, consider their minority shareholding to have lost all value.

140. Claimants' KC cement production facilities were, in the course of the legal proceedings involving BC, subject to a similar campaign of criminal and regulatory investigations. Uzbek prosecutors ordered the seizure of currency in KC's accounts. The Uzbek Government brought a civil claim to seek the transfer of 12% of Claimants' shares in KC to over 1,400 individuals that the Uzbek Government claims were deceived or coerced into selling their shares. After a final hearing that was conducted without substantive or procedural due process, a judge found for the Government-supported individuals. As a result of these actions, Claimants have lost a significant proportion of the shareholding in KC.
141. In sum, as a result of Respondent's actions, Claimants have suffered losses in their interests in BC and KC. They have also been made liable to debt repayments to Kazkommertsbank for the debt financing that may be enforced against Claimants' other interests. Claimants therefore seek damages that they anticipate to be "no less than US\$500 million" from Respondent.²⁴

B. Respondent's Representation of the Factual Background

142. Respondent denies Claimants' representation of the factual background. Respondent counters with a narrative of a sham investment involving corruption and fraud by Claimants in violation of Uzbek law and to the detriment of existing shareholders in BC and KC.
143. Respondent argues that there is no evidence that Claimants held shares in BC or KC or that they were in control of the various companies in the complex corporate structure that Claimants purport to use to manage their investments in the cement industry in Uzbekistan and other markets.
144. Insofar as Claimants purport to control the investment vehicles known as Kaden and Nabolena, Claimants made false disclosure as regards the agreed purchase price of the BC and KC shares, and therefore violated Uzbek law and committed securities fraud. This was done by Claimants to evade taxes, fees to the stock exchange, and to improperly improve the prospects of the IPO that Claimants sought for UCG.²⁵
145. The false disclosures to the TSE also enabled Claimants to use UGC to obtain a large bank loan from Kazkommertsbank and thereby to pay distributions to its shareholders.²⁶

²⁴ Claimants' Request for Arbitration, ¶ 18.

²⁵ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 88-94.

²⁶ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 95-97.

146. Claimants subsequently coerced minority shareholders of BC and KC stock to sell their shares at prices far below what Claimants had paid for the majority shares. Mr. Deneschuk, then General Manager at KC, threatened employees with the loss of their jobs if they refused to sell to Claimants at the price Claimants had set.²⁷
147. Claimants also made an off-the-books, offshore payment of US\$33.98 million to Ambassador Gulnara Karimova, in exchange for a relationship of trust and her influence on her father, the then-President of Uzbekistan.²⁸
148. Claimants' alleged subsidiary, Caspian Resources, coordinated BC's systematic bribing of numerous Uzbek Government officials. To do so, Caspian Resources organized a secret "black cash" fund, which BC funded through fraudulent payments to consulting companies controlled by Caspian Resources.²⁹
149. In light of the illegal activities by BC and KC, the Uzbek Government brought criminal proceedings against the managers of BC and against the Uzbek Government officials who participated in Claimants' bribery scheme.³⁰
150. Claimants' Request for Arbitration lacks merit and, furthermore, is an improper invocation of the BIT for the reasons set out at paragraphs 167-172 of this decision.

C. Tribunal's Preliminary Comment on the Factual Background

151. While much of the factual background to the dispute is contested by the Parties, there is a degree of congruence between the accounts as regards certain aspects.
152. First, Claimants and Respondent agree that acquisitions of shares in BC and KC took place by certain undertakings.
153. Second, Claimants and Respondent agree that there were two sets of agreements (the Tashkent SPAs and the English SPAs) used to effect these acquisitions of shares.
154. Third, Claimants and Respondent also agree that a substantial time after the acquisitions the Uzbek Government has taken certain actions against BC and KC as a result of regulatory and criminal investigations.

²⁷ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 78-87.

²⁸ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 98-102.

²⁹ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 103.

³⁰ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 103.

155. However, there are significant differences in the representations as regards the motivations and intentions of both Claimants and Respondent in respect of these and other actions taken by the Parties.
156. The differences in the Parties' accounts go directly to the resolution of Respondent's preliminary objections. The Tribunal resolves these disputes as regards the factual background in its consideration, below, of four of Respondent's five preliminary objections. The fifth preliminary objection, that senior managers of BC have consistently bribed Uzbek Government officials, is joined to the merits.
157. The Tribunal will return to the factual background in its consideration of the merits.

IV. SUMMARY OF THE PARTIES' CLAIMS AND REQUEST FOR RELIEF

158. In its Memorial on Preliminary Objections, Respondent requests that the Tribunal

[I]ssue a Decision on Jurisdiction on Admissibility dismissing all of Claimants' claims, and awarding Respondent its full costs and expenses associated with defending against Claimants' claims.³¹

159. In their Counter-Memorial on Preliminary Objections, Claimants ask the Tribunal to:

(a) Dismiss each of Respondent's four preliminary objections to jurisdiction;

(b) Award Claimants all of their legal fees and all of their costs and expenses incurred in the jurisdictional stage of these proceedings; and

(c) Grant such other relief as the Tribunal considers appropriate.³²

V. THE JURISDICTION OF THE TRIBUNAL

160. This Tribunal is constituted under the ICSID Convention. Both Kazakhstan and Uzbekistan are State Parties to the Convention.³³ The Convention provides, at Article 25(1), as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State

³¹ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 255.

³² Claimants' Counter-Memorial on Preliminary Objections, ¶ 285.

³³ Kazakhstan signed the ICSID Convention on 23 July 1992, deposited its instrument of ratification on 21 September 2000, with the Convention's entry into force falling on 21 October 2000. Uzbekistan signed the ICSID Convention on 14 March 1994, deposited its instrument of ratification on 26 July 1995, with the Convention's entry into force falling on 25 August 1995.

designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

161. It is for Claimants to establish the basis of jurisdiction of an ICSID Tribunal. Consent by the Parties may be found in a variety of written instruments. The offer to arbitrate may be in one written instrument and the acceptance in another.
162. Claimants base the jurisdiction of the Tribunal on the BIT and the ICSID Convention.³⁴ The two State Parties to the Treaty – Kazakhstan and Uzbekistan – provide their consent to arbitration in the Treaty. This consent is contained in the form of an offer to arbitrate claims made by investors of one State Party as regards treaty breaches by the agents of the other State Party.³⁵ Claimants accepted Uzbekistan’s offer to arbitrate by submitting their Request to ICSID.³⁶
163. Article 41(1) of the Arbitration Rules states that objections to a Tribunal’s jurisdiction “shall be made as early as possible”. Respondent timely filed its Memorial on Preliminary Objections and Request for Bifurcation on 1 August 2014.

A. Claimant’s Assertion as to Jurisdiction

164. Claimants seek arbitration before ICSID on the basis of the BIT and the ICSID Convention. Article 10 of the BIT states:

Each Contracting Party hereby consents to the referral of any legal dispute between one Contracting Party and an investor from the other Contracting Party’s State in respect of investments made by it within the territory of the former Contracting Party to one of the following institutions:

[...]

c) the International Centre for Development [sic: Settlement] of Investment Disputes, if both Contracting Parties shall be members of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature on 18 March 1965 in Washington, DC.³⁷

³⁴ C-0001, BIT.

³⁵ C-0001, BIT, Art. 10.

³⁶ Claimants’ Request for Arbitration, ¶ 133.

³⁷ C-0001, BIT, Art. 10.

165. Claimants assert that have met the BIT’s jurisdictional requirements as they are qualified “investors” from Kazakhstan who have made an “investment” in Uzbekistan through their acquisition and development of the BC and KC cement plants in the Host State. Claimants therefore contend that arbitration before ICSID is available to them for the resolution of their dispute with Uzbekistan.³⁸
166. Claimants contend that they have met the jurisdictional requirements established in Article 25 of the ICSID Conventions as:
- Uzbekistan is a Contracting State to the ICSID Convention and Claimants are nationals of Kazakhstan, another Contracting State to the ICSID Convention;³⁹
 - Claimants and Respondent have a “legal dispute” regarding Claimants’ legal rights under the Treaty, relevant Uzbekistan and international laws, and violation of such rights by Respondent;⁴⁰
 - The dispute arises directly out of Claimants’ investment in BC and KC, because of actions taken by Respondent. Claimants underscore that although there is not definition of the term “investment” under the ICSID Convention, the term is widely accepted to have a broad meaning, which Claimants meet. According to Claimants, they “have continuously invested in Uzbekistan since 2006 and have poured over US\$139.8 million into BC and KC[, including] invest[ing] heavily in the improvement of the efficiency and productivity of the cement plants, turning them into highly profitable enterprises employing hundreds of local Uzbek workers and supplying cement in the country for construction of important infrastructure”;⁴¹ and
 - The Parties have consented to ICSID arbitration in writing when the Claimants accepted Uzbekistan’s offer of arbitration, contained in Article 10 of the Treaty, by requesting registration of its Request with ICSID in March 2013.⁴²

B. Respondent’s Jurisdictional Objections

167. As noted at paragraph 35 above, Respondent initially raised five preliminary objections to the Tribunal’s jurisdiction and the admissibility of the claims. In Procedural Order No. 3, the Tribunal decided to deal with the Respondent’s first four objections to jurisdiction as a preliminary matter.

³⁸ Claimants’ Memorial on the Merits, ¶¶ 691-699.

³⁹ Claimants’ Memorial on the Merits, ¶¶ 703-704.

⁴⁰ Claimants’ Memorial on the Merits, ¶ 701.

⁴¹ Claimants’ Memorial on the Merits, ¶ 702.

⁴² Claimants’ Memorial on the Merits, ¶¶ 705-707.

168. In addition, in its Reply on Preliminary Objections, Respondent raised further objections with regard to Claimants' nationality. The essence of all of the objections is summarized below.
169. First, Respondent argues that Claimants have failed to meet their burden of proving that they own – and have owned since the first alleged Treaty breach in March 2010 – the shares of BC and KC.⁴³
170. Second, Respondent contends that it has consented under the BIT to arbitrating legal disputes concerning investments that were actively made by investors, but did not consent to arbitrating legal disputes concerning indirect shareholders that are remotely and passively held. Thus, Respondent argues that, even assuming *arguendo* that the Claimants indirectly have owned shares in BC and KC since the first alleged Treaty breach, they did not make an investment in Uzbekistan under the BIT or the ICSID Convention.⁴⁴
171. Third, Respondent further contends that it has consented under the BIT to arbitrating legal disputes arising out of investments that were made in compliance with its laws, but did not consent to arbitrating legal disputes arising out of unlawful investments. In this context, Respondent argues that Claimants made their investment in violation of Uzbek laws, through fraud and deceit, and that consequently the Tribunal lacks jurisdiction and/or the Claimants' claims are inadmissible under the BIT, the ICSID Convention and principles of international public policy.⁴⁵
172. Fourth, Respondent alleges that Claimants made their investments through an off-the-books payment of US\$33.98 million to bank accounts in Latvia and that these payments were corrupt payments to a relative of a Government official, namely Ms. Gulnara Karimova. Consequently, Respondent argues that the Tribunal lacks jurisdiction and/or the claims are inadmissible under the BIT, the ICSID Convention and principles of international public policy.⁴⁶
173. The Tribunal will first consider the nationality argument and then will discuss each of the remaining objections in turn, dealing with any factual disputes so far as necessary in order to dispose of them.
174. The Tribunal has had the benefit of extensive submissions and evidence from the Parties in this case. Many issues and sub-issues have been raised in the course of the proceedings. The Tribunal has carefully considered all submissions, all evidence, and all issues but for

⁴³ Respondent's Memorial on Preliminary Objections, ¶ 4.

⁴⁴ Respondent's Memorial on Preliminary Objections, ¶ 5.

⁴⁵ Respondent's Memorial on Preliminary Objections, ¶ 6.

⁴⁶ Respondent's Memorial on Preliminary Objections, ¶ 7.

the sake of procedural economy has only discussed in this Decision those it considers necessary.

VI. THE APPLICABLE LAW

175. Article 42(1) of the ICSID Convention provides that “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”
176. The principal international law applicable to the dispute is the BIT. The Treaty entered into force between Kazakhstan and Uzbekistan on 8 September 1997.
177. Insofar as Article 10 of the BIT entails consent to arbitration by an ICSID tribunal, jurisdiction under the BIT is limited by the jurisdictional provisions of the ICSID Convention.
178. The applicable law for interpretation of the BIT is found in the Vienna Convention on the Law of Treaties (“VCLT”), to which both Kazakhstan and Uzbekistan have acceded.⁴⁷
179. The Tribunal observes that Article 14 of the BIT indicates that the text was drawn up in Kazakh, Uzbek and Russian languages, with all texts having equal legal force although the “Russian text is used for the purposes of interpretation of this Agreement”. The Tribunal has been provided by the Parties with an English text of the BIT. The Parties have not disputed the accuracy of this translation of the Russian text. The Tribunal therefore in its analysis refers solely to the language of the English translation as provided.
180. As regards the burden of proof, it is for Claimants to establish that they have made an investment in accordance with the BIT and the ICSID Convention. Furthermore, it is for Respondent to bear the burden of proof for objections that it raises to Claimants’ assertion that they have made an investment that attracts the protection of the BIT. The Tribunal addresses specific questions of burden of proof in its examination of the objections in this Decision.

⁴⁷ **CL-0322**, the Vienna Convention on the Law of Treaties, adopted and opened for signature on 23 May 1969, entered into force 27 January 1980 (1155 United Nations Treaty Series 331) was acceded to by Kazakhstan on 5 January 1994 and by Uzbekistan on 12 July 1995.

VII. THE FIRST JURISDICTIONAL OBJECTION - NATIONALITY

A. Introduction

181. Respondent's first objection is that the Tribunal lacks jurisdiction *ratione personae*. Respondent argues that two of Claimants, Messrs. Almas Chukin and Nikolay Varenko, failed to establish their Kazakh nationality, and that Claimants' evidence as regards the ten other Claimants is insufficient to establish their Kazakh nationality.⁴⁸
182. Claimants counter that all Claimants are Kazakh nationals for the purposes of this arbitration, including Messrs. Chukin and Varenko, as each Claimant has provided a copy of their passport and thus satisfied *prima facie* the nationality requirement.⁴⁹ Claimants argue that the burden of proof as regards the nationality requirement at that point shifts to Respondent, who Claimants argue has failed to rebut the presumption raised by the *prima facie* evidence.⁵⁰
183. The Tribunal in the following sections first sets out the nationality requirement in international and applicable national law and then applies that requirement to Mr. Chukin, Mr. Varenko, and the ten other Claimants.

B. The Nationality Requirement in International and National Law

184. The applicable international law on the nationality requirement is found in Article 1(1) and 1(5) of the BIT and Article 25(2) of the ICSID Convention. The applicable international law in part refers to national law, and the applicable national law is found in the Law of the Republic of Kazakhstan on Citizenship of the Republic of Kazakhstan ("**Citizenship Law**").⁵¹ The Constitution of the Republic of Kazakhstan ("**Kazakh Constitution**") and Resolution of the Constitution Council of the Republic of Kazakhstan No. 12 of 12 January 2003 ("**Resolution No. 12**") are also pertinent to this objection.⁵²
185. Article 1(1) of the BIT sets out a definition of "investor". The term includes "legal entities of the Contracting Parties' States". It also includes "citizens, associations of citizens, and stateless persons of the Contracting Parties' States".⁵³

⁴⁸ Respondent's Memorial on Preliminary Objections, ¶ 15 *et seq.* See also Respondent's letter of 2 September 2014, p. 6.

⁴⁹ Claimants' Rejoinder on Preliminary Objections, ¶ 42.

⁵⁰ Claimants' Rejoinder on Preliminary Objections, ¶ 43.

⁵¹ **RL-0119**, Law of the Republic of Kazakhstan on Citizenship of the Republic of Kazakhstan dated 20 December 1991 ("**Citizenship Law**").

⁵² **CL-0013**, Constitution of the Republic of Kazakhstan ("**Kazakh Constitution**"); **CL-0401**, Resolution of the Constitution Council of the Republic of Kazakhstan No. 12 dated 12 January 2003 ("**Resolution No. 12**").

⁵³ **C-0001**, BIT, Art.1(1).

186. Article 1(5) of the BIT provides that the term “citizens” refers to “persons holding citizenship and legal capacity under the laws of one Contracting Party’s State, permanently residing in its territory or abroad, and making investments within the territory of the other Contracting Party’s State”.⁵⁴
187. Article 25 of the ICSID Convention provides that the Centre’s jurisdiction extends to claims brought by a “National of another Contracting State”.
188. Article 25(2)(a) of the ICSID Convention states that a “National of another Contracting State” includes “any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute”.⁵⁵
189. The Article 25 of the ICSID Convention requirement entails a positive nationality requirement (that Claimants had the nationality of a Contracting State other than the State party to the dispute) and a negative nationality requirement (that Claimants did not have the nationality of the Contracting State party in the dispute).⁵⁶ The negative nationality requirement is not put in issue by the Parties in this case.
190. It is not in dispute that, under the terms of the BIT and the ICSID Convention, it is necessary for Claimants to demonstrate that they were Kazakh nationals on three dates relevant as regards this requirement (“**required dates**”).⁵⁷
191. The required dates are:
- (i) the date of the alleged breach: 1 March 2010;⁵⁸
 - (ii) the date the claim was submitted to ICSID: 22 March 2013; and

⁵⁴Article 1(6) of the BIT defines the term “stateless persons” as persons without citizenship, permanently residing within the territory of one Contracting Party’s State, registered in accordance with the laws of said Contracting Party’s State to carry out entrepreneurial activity, and making investments within the territory of the other Contracting Party’s State. The term “stateless” is not put in issue by the Parties in this case. **C-0001**, BIT, Art. 1(6).

⁵⁵ ICSID Convention, Art. 25(2)(a).

⁵⁶ See also **RL-0051**, *Waguïh Elie George Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction dated 11 April 2007, ¶ 142.

⁵⁷ Respondent’s Reply on Preliminary Objections, ¶ 22; Claimants’ Rejoinder on Preliminary Objections, ¶ 41.

⁵⁸ On this point see **RL-0008**, *Abaclat and Others. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated 4 August 2011 (“*Abaclat*”).

- (iii) the date the claim was registered by ICSID: 24 April 2013.⁵⁹
192. It is also not in dispute that the attribution of Kazakh nationality is a matter of Kazakh law. The principal applicable national laws are the Constitution of Kazakhstan, the Citizenship Law, and Resolution 12.⁶⁰
193. Although the Parties are in agreement that the Citizenship Law is one of the applicable national laws, there is significant disagreement about the interpretation of that law, and about its application to Mr. Chukin, Mr. Varenko, and the other ten Claimants.
194. The Parties agree that passports and certificates of nationality constitute *prima facie* evidence of a claimant's nationality.⁶¹ However, Respondent argues that the Tribunal should nonetheless look beyond the *prima facie* evidence and consider "counter-indications" that, Respondent argues, should rebut the presumption raised by the *prima facie* evidence.⁶²
195. Respondent argues that the Kazakh Constitution strictly prohibits dual citizenship. In particular, Respondent argues, Article 10(3) of the Constitution establishes the principle that "a citizen of the Republic shall not be recognized as a citizen of a different state".⁶³
196. Therefore, a central contention of Respondent's submission is that the Citizenship Law can result in the immediate and automatic loss of Kazakh citizenship under certain circumstances.⁶⁴
197. Respondent draws the Tribunal's attention to the award in *Soufraki* which, Respondent contends, is an analogous case.⁶⁵ The tribunal in *Soufraki* held that an Italian citizen had lost his Italian citizenship upon acquisition of Canadian citizenship when he did not take the necessary steps under Italian law to reacquire Italian citizenship. Respondent relies upon an analogy with *Soufraki* to inform its interpretation of the Citizenship Law in this case.
198. Article 19 of the Citizenship Law provides that Kazakh citizenship "shall be terminated" as a result of either renunciation of Kazakh citizenship or as a result of the "loss of

⁵⁹ ICSID Convention, Art. 25(2)(a); Respondent's Reply on Preliminary Objections ¶ 3; Claimants' Rejoinder on Preliminary Objections, ¶ 41.

⁶⁰ **CL-0013**, Kazakh Constitution; **RL-0119**, Citizenship Law; **CL-0401**, Resolution No. 12.

⁶¹ Claimants' Rejoinder on Preliminary Objections, ¶ 42.

⁶² Respondent's Reply on Preliminary Objections, ¶¶ 28-31.

⁶³ **CL-0401**, Resolution No.12, p. 3.

⁶⁴ Respondent's Reply on Preliminary Objections, ¶ 16.

⁶⁵ **RL-0127**, Hussein Nuaman *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award dated 7 July 2004 ("*Soufraki*").

Citizenship”.⁶⁶ Article 21 further provides that Kazakh citizenship “shall be lost,” among other reasons, “as a result of joining the [...] State government bodies and other administrative bodies of another state”, or “in the event that a person has obtained Citizenship of a different state”.⁶⁷

199. Respondent argues, therefore, that in certain circumstances a Kazakh citizen may lose their citizenship by operation of law if, for example, they acquire the citizenship of a foreign state or serve in the government of a foreign state.
200. Claimants dispute Respondent’s analogy with *Soufraki* because, Claimants argue, under the Italian law applicable in *Soufraki* no governmental act was required to terminate the citizenship. Rather, the Italian citizenship was automatically terminated as soon as the Italian national acquired another citizenship.⁶⁸
201. Claimants furthermore contest Respondent’s interpretation of Articles 19 and 21 of the Citizenship Law, insofar as Respondent asserts citizenship is automatically and immediately lost “by operation of law”.⁶⁹ Claimants argue that “[i]f anything, those two articles read together suggest that losing citizenship is *not* automatic or immediate because termination of citizenship (Article 19) and loss of citizenship (Article 21) are evidently two separate stages”.⁷⁰
202. Claimants submit that there are additional relevant provisions of national law that make clear that an individual remains a Kazakh citizen until his citizenship is terminated by the Kazakh government: Resolution No. 12 and Articles 30 and 37 of the Citizenship Law.
203. Resolution No. 12, according to Claimants, provides that if a citizen of another state who acquires Kazakh citizenship fails to renounce the other state’s citizenship, that person’s Kazakh citizenship “shall be deemed invalid”.⁷¹ Claimants argue that the term “deemed invalid” must be interpreted in light of Articles 30 and 37 of the Citizenship Law.
204. Article 30 of the Citizenship Law provides that the Office of Internal Affairs is the only authority empowered to determine the “existence of citizenship of the Republic of Kazakhstan, or lack thereof” of persons permanently residing in Kazakhstan.⁷² Article 37

⁶⁶ **RL-0119**, Citizenship Law, Art. 19.

⁶⁷ **RL-0119**, Citizenship Law, Art. 21(1), 21(5).

⁶⁸ Claimants’ Rejoinder on Preliminary Objections, ¶ 52.

⁶⁹ Claimants’ Rejoinder on Preliminary Objections, ¶ 46; Respondent’s Reply on Preliminary Objections, ¶ 27.

⁷⁰ Claimants’ Rejoinder on Preliminary Objections, ¶¶ 47-52 (emphasis in original).

⁷¹ Claimants’ Rejoinder on Preliminary Objections, ¶ 49; **CL-0401**, Resolution No. 12, pp. 3, 5.

⁷² **RL-0119**, Citizenship Law, Art. 30.

provides that citizenship is only officially terminated the day “of registration of its loss by the Government”.⁷³

205. Consequently, Claimants contend, only the Office of Internal Affairs is empowered to determine the existence of Kazakh citizenship of persons residing in Kazakhstan.⁷⁴ Further, Claimants argue that Kazakh citizenship is terminated only on the day of registration of its loss by the Government.⁷⁵
206. The Tribunal finds the citizenship law at issue in *Soufraki* is sufficiently distinct to that before the Tribunal in the instant case such that the reasoning in *Soufraki* is not applicable. The *Soufraki* tribunal found that the terms of the Italian law were “clear and leave no room for interpretation”.⁷⁶ The Kazakh Citizenship Law, however, is not clear. Moreover, when the Kazakh Citizenship Law is read in the context of the Kazakh Constitution and Resolution No. 12, the Tribunal finds strength to Claimants’ argument that there is a distinction between the invalidity or loss of entitlement to citizenship (under Article 21 of the Citizenship Law) and the termination of that citizenship (under Article 19 of the Citizenship Law).
207. The existence of such a distinction indicates that an individual may be susceptible to the termination of citizenship but may retain such citizenship until a decision is taken by the Office of Internal Affairs. In contrast, in the Italian law applicable in *Soufraki*, an individual’s Italian citizenship was lost by operation of law unless the individual themselves took action to reaffirm that citizenship.
208. The Tribunal finds therefore, that a claim that an individual does not hold Kazakh citizenship requires evidence not just that they have either made a renunciation of citizenship or that they meet the criteria for “loss of citizenship” under Article 21 of the Citizenship Law, but also that they have been subject to “termination of citizenship” under Article 19 of the Citizenship Law. Such a conclusion is consistent with the presumption against statelessness that is a general principle of public international law – as an automatic loss of citizenship increases the risk of an individual being rendered stateless by operation of law.

C. Application of the Nationality Requirement

209. The Tribunal is in agreement with the Parties that passports and certificates of nationality constitute *prima facie* evidence of citizenship that raise a presumption in favour of such

⁷³ **RL-0119**, Citizenship Law, Art. 30.

⁷⁴ Claimants’ Rejoinder on Preliminary Objections, ¶ 50.

⁷⁵ Claimants’ Rejoinder on Preliminary Objections, ¶ 51.

⁷⁶ **RL-0127**, *Soufraki*, ¶ 52.

citizenship.⁷⁷ In the event that Claimants provide such *prima facie* evidence, it would be for Respondent to rebut the presumption that such evidence raises.

210. The Tribunal's finding is in concordance with the conclusions of other arbitral tribunals to which the Parties have made reference. The *Micula* tribunal held that "there exists a presumption in favour of the validity of a State's conferment of nationality. The threshold to overcome such presumption is high [...] It is for Respondent to make such a showing. For this purpose, casting doubt is not sufficient".⁷⁸
211. The award of the *Micula* tribunal was relied on by the *Arif* tribunal, which held that it would only be inclined to disregard the national authority's decision on citizenship if "there was convincing and decisive evidence" that the acquisition of nationality "was fraudulent or at least resulted from a material error".⁷⁹ Further, in *Tza Yap Sum*, the tribunal held that the burden on respondents to overcome the presumption in this regard is "onerous".⁸⁰
212. All Claimants have provided Kazakh passports as *prima facie* evidence of their Kazakh nationality.⁸¹ The question before the Tribunal in the determination of Respondent's first objection is therefore whether this *prima facie* evidence has been subject to rebuttal in relation to (1) Mr. Chukin, (2) Mr. Varenko, and (3) all other Claimants.

(1) Mr. Chukin

213. Mr. Chukin has provided a copy of his Kazakh passport issued on 25 September 2009 as *prima facie* evidence of his citizenship on the required dates: 1 March 2010; 22 March 2013; 24 April 2013.⁸² Mr. Chukin has also provided a copy of a certificate attesting to his Kazakh nationality issued on 15 May 2015 as further such evidence.⁸³
214. Respondent notes that Mr. Chukin served as the Head of the Department of Industry for Kyrgyzstan's Ministry of Economy and Finance from 1990 until 1992 and as the *chargé d'affaires* of Kyrgyzstan's Embassy to the United States from 1992 until 1996.⁸⁴ Mr.

⁷⁷ Claimants' Rejoinder on Preliminary Objections ¶ 41, Respondent's Memorial on Preliminary Objections, ¶¶ 28-31; see also **RL-0126**, *Ambiente Ufficio S.P.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 February 2013 ("*Ambiente*"), ¶ 312; **RL-0008**, *Abaclat*, ¶ 422.

⁷⁸ **CL-0398**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L. v. Romania* ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility dated 24 September 2008 ("*Micula*"), ¶¶ 87, 95.

⁷⁹ **RL-0128**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 April 2013, ¶ 357.

⁸⁰ **CL-0345**, *Tza Yap Sum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence dated 19 June 2009 ("*Tza Yap Sum*").

⁸¹ **C-0002**, Excerpts of Claimants' Passports.

⁸² **C-0002**, Excerpts of Claimants' Passports.

⁸³ **C-0663**, Certificate of the Office of Internal Affairs of Almaty dated 15 May 2015.

⁸⁴ Respondent's Memorial on Preliminary Objections, ¶ 17.

Chukin was a Deputy Chairman of the State Property Fund in Kyrgyzstan between 1996 and 1997.

215. Respondent argues that in accordance with the Citizenship Law, Articles 19 and 21, Mr. Chukin lost his Kazakh citizenship while he was a government official of the Government of Kyrgyzstan.⁸⁵ Respondent further submits that Claimants have failed to provide additional information to establish Mr. Chukin as a Kazakh citizen on the required dates.⁸⁶
216. Claimants argue that Mr. Chukin surrendered his Kyrgyz citizenship at the same time as gaining his Kazakh citizenship. Claimants also argue that even if Mr. Chukin did not surrender his Kyrgyz citizenship, or even if his renunciation was not effective for whatever reason, Kazakh citizenship is only terminated upon official governmental action.⁸⁷ Claimants further submit that they have provided a copy of Mr. Chukin's Kazakhstan passport and his citizenship certificate to establish Mr. Chukin as a Kazakh citizen on the required dates.⁸⁸
217. The Tribunal finds that Mr. Chukin's passport and citizenship certificate constitute *prima facie* evidence of his possession of Kazakh citizenship on the required dates. The Tribunal finds that the evidence as regards Mr. Chukin's previous possession of Kyrgyz citizenship does not call into question the probity of this *prima facie* evidence.
218. Therefore, on the basis of the evidence in the record, the Tribunal rejects the argument that it does not have jurisdiction *ratione personae* over the claim insofar as it relates to Mr. Chukin.

(2) Mr. Varenko

219. Mr. Varenko has provided a copy of his Kazakh passport issued on 1 October 2009 as *prima facie* evidence of his citizenship on the required dates: 1 March 2010; 22 March 2013; 24 April 2013.⁸⁹
220. On 11 July 2014, as a result of Mr. Varenko's acquisition of Russian citizenship, the Government of Kazakhstan registered a decision to terminate Mr. Varenko's Kazakh citizenship.
221. Claimants submit that Mr. Varenko's citizenship terminated on 11 July 2014, when the Office of Internal Affairs issued and registered a decision in this regard.⁹⁰ Claimants

⁸⁵ Respondent's Reply on Preliminary Objections, ¶¶ 16-18.

⁸⁶ Respondent's Reply on Preliminary Objections, ¶ 18.

⁸⁷ Claimants' Rejoinder on Preliminary Objections, ¶ 55.

⁸⁸ Claimants' Rejoinder on Preliminary Objections, ¶¶ 54-55.

⁸⁹ C-0002, Excerpts of Claimants' Passports.

⁹⁰ Claimants' Rejoinder on Preliminary Objections, ¶¶ 50, 52.

contend that the termination does not call into question Mr. Varenko's citizenship on the required dates. Respondent, in contrast, contends that the loss of Mr. Varenko's Kazakh citizenship at that time does call into question his possession of Kazakh citizenship on the required dates.

222. The Tribunal considers that the termination of Mr. Varenko's Kazakh citizenship on 11 July 2014 demonstrates that, on that date, circumstances existed under Kazakh law to merit such termination. It is a reasonable inference that, if such circumstances also existed prior to 11 July 2014, Mr. Varenko may have been susceptible to a termination of citizenship at an earlier date.
223. However, given the absence of any evidence of a prior termination of Kazakh citizenship, and given the *prima facie* evidence that Mr. Varenko did possess Kazakh citizenship on the required dates, the Tribunal concludes that the fact of the later termination of Mr. Varenko's citizenship does not call into question his possession of citizenship on the required dates.
224. The Tribunal considers that the very act of termination of Mr. Varenko's citizenship on 11 July 2014 strengthens the conclusions as regards the distinction between the "loss" of Kazakh citizenship and its "termination" by the state of Kazakhstan.
225. Therefore, on the basis of the evidence in the record, the Tribunal rejects the argument that it does not have jurisdiction *ratione personae* over the claim insofar as it relates to Mr. Varenko.

(3) All Other Claimants

226. All other Claimants have provided copies of their passports as *prima facie* evidence of their Kazakh citizenship on the required dates: 1 March 2010; 22 March 2013; 24 April 2013.⁹¹
227. Respondent argues that "in light of the issues raised with respect to Messrs Chukin and Varenko, Claimants passports do not conclusively establish that they were Kazakh nationals [...] [on the required dates]".⁹² Claimants, in contrast, argue that Claimants' passports constitute *prima facie* evidence of nationality that Respondent is required to rebut and that Respondent has failed to rebut.⁹³
228. Claimants state in the Request for Arbitration that Claimants are all "lifelong citizens of the Republic of Kazakhstan". Such statement may be called into question – for example by

⁹¹ C-0002, Excerpts of Claimants' Passports.

⁹² Respondent's Reply on Preliminary Objections, ¶ 32.

⁹³ Claimants' Rejoinder on Preliminary Objections, ¶ 43; **RL-0126**, *Ambiente*, ¶¶ 309, 312, 320-21. *See also* **CL-0398**, *Micula*, ¶¶ 95-96.

Respondent's evidence as regards Mr. Chukin's service in the Government of Kyrgyzstan.⁹⁴ However, the Tribunal's jurisdiction is not dependent on Claimants being "lifelong citizens" of Kazakhstan, but rather its jurisdiction is only dependent on Claimants having citizenship of Kazakhstan on the required dates. The Tribunal therefore draws no inferences from the statement by Claimants as regards "lifelong citizenship" or from Respondent's attempts to rebut that statement.

229. Respondent requested an attestation of citizenship by Claimants that they "have not held and do not hold any other nationality and were Kazakh nationals on each of the required dates".⁹⁵ No attestation was made by Claimants. The Tribunal also notes Claimants' argument that, despite Respondent's calls for such attestation by Claimants, Respondent did not ask any question on this point during their cross-examination of Mr. Kim or Ms. Zaitbekova.⁹⁶ In addition, Respondent did not make any additional arguments on the law or on the facts in relation to this first objection on jurisdiction in its Post-Hearing Brief. The Tribunal therefore draws no inferences from the presence or absence of attestations of citizenship beyond what is in the record.
230. It is not in dispute that the ten Claimants' passports serve as *prima facie* evidence of the existence of the ten Claimants' Kazakh citizenship.⁹⁷ For nine of the ten additional Claimants those passports were issued between 2007 and 2009 and were valid for a period of ten years that includes the required dates.⁹⁸
231. For the tenth additional Claimant, Ms. Aigul Nurmakanova, the passport was issued on 1 September 2011.⁹⁹ This falls after the first required date, the date of breach, on 1 March 2010. However, there has been no evidence adduced to suggest that Ms. Nurmakanova did not hold Kazakh citizenship on the first required date. Indeed, Ms. Nurmakanova was born, according to her passport, in Kazakhstan, and therefore in accordance with Article 3 of the Citizenship Law is likely to have been a Kazakh citizen from birth.
232. The Tribunal recalls the *Micula* tribunal's finding that the "casting of doubt" is not sufficient to rebut a presumption raised by *prima facie* evidence and the *Tza Yap Sum* tribunal's finding that the burden on Respondent is an "onerous" one.¹⁰⁰

⁹⁴ Claimants' Request for Arbitration, ¶¶ 1, 121; Claimants' Memorial on the Merits, ¶ 696.

⁹⁵ Respondent's Reply on Preliminary Objections, ¶ 32.

⁹⁶ Claimants' Post-Hearing Brief, ¶ 8.

⁹⁷ Respondent's Memorial on Preliminary Objections, ¶¶ 28-31; Claimants' Rejoinder on Preliminary Objections, ¶ 43; **RL-0126**, *Ambiente*, ¶¶ 309, 312, 320-21. *See also* **CL-0398**, *Micula*, ¶¶ 95-96.

⁹⁸ **C-0002**, Excerpts of Claimants' Passports.

⁹⁹ **C-0002**, Excerpts of Claimants' Passports.

¹⁰⁰ **CL-0398**, *Micula*, ¶¶ 95-96, **CL-0345**, *Tza Yap Sum*, ¶ 63.

233. In the absence of specific evidence to call into question the Kazakh nationality of Ms. Nurmakanova, or any of the ten Claimants other than Messrs. Chukin and Varenko, the Tribunal must base its finding on the evidence that is in the record, i.e. on the passports that Claimants have provided. The Tribunal finds that those passports, submitted with the Request for Arbitration, are sufficient to satisfy the Tribunal of the Kazakh citizenship of the ten Claimants other than Messrs. Varenko and Chukin on the required dates. As in *Ambiente Ufficio*, “due to the lack of relevant concrete submissions and documentation from the Respondent’s side, no problems as to the jurisdiction of the Centre [...] arise”.¹⁰¹
234. Therefore, on the basis of the evidence in the record, the Tribunal rejects the argument that it does not have jurisdiction *ratione personae* over the claim insofar as it relates to the ten Claimants other than Messrs. Chukin and Varenko.

D. The Tribunal’s Conclusion

235. In the course of its arguments Respondent conducted a very detailed forensic examination of the evidence with which it was presented and advanced a range of arguments to challenge Claimants’ case on this point. In the Tribunal’s view, none of these arguments have been sufficient to displace the *prima facie* evidence set out above.
236. For the reasons set out above, and on the basis of the evidence in the record, the Tribunal finds that it has jurisdiction *ratione personae* over the dispute and therefore dismisses Respondent’s first objection.

VIII. THE SECOND JURISDICTIONAL OBJECTION – THAT CLAIMANTS ARE NOT “INVESTORS” WHO MADE AN “INVESTMENT”

A. Introduction

237. By its second objection, Respondent asserts that Claimants are neither “investors” nor persons who made an “investment” as those terms are defined in the BIT.¹⁰²
238. To address this jurisdictional objection, the Tribunal first sets out the applicable law from the ICSID Convention and the BIT. The Tribunal then goes on to group Respondent’s specific objections under two categories: those relating to Claimants’ status as “investors”; and those relating to the characterization of Claimants’ business affairs as an “investment”.

¹⁰¹ **RL-0126**, *Ambiente*, ¶¶ 320-21.

¹⁰² Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 164-201.

B. The Law Applicable to the Objection

239. The law applicable to this objection is contained in Article 25 of the ICSID Convention and Article 1(1) of the BIT. Article 25 of the ICSID Convention provides that the Centre’s jurisdiction shall “extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre”.¹⁰³ The ICSID Convention does not offer a definition of “investment”.
240. Article 1(1) of the BIT defines “investors” in relevant part as “(a) legal entities of the Contracting Parties’ States; (b) citizens, associations of citizens, and stateless persons of the Contracting Parties’ States”.¹⁰⁴
241. Article 1(2) of the BIT defines “investments” as “any kind of asset and the rights thereto, as well as intellectual property rights, invested by the investors of one Contracting Party within the territory of the other Contracting Party’s State for profit (income) and includes, in particular, but not exclusively: [...]”.¹⁰⁵ Article 1(2)(a)-(e) then sets out a non-exhaustive list of types of investment. Of particular relevance to this dispute are “movable and immovable property and related property rights; [...]”¹⁰⁶ and “cash, shares, stocks and other securities and any forms of participation in enterprises, joint stock companies, business partnerships, associations and other legal entities registered in accordance with the laws of each of the Contracting Parties; [...]”.¹⁰⁷
242. For jurisdiction to be established, the claim must pass both through the institutional jurisdictional keyhole set forth in Article 25 as well as the specific jurisdictional keyhole defined in the BIT. The drafters of Article 25 in constructing that keyhole were cognizant that the parties to a particular BIT may construct a more specific jurisdictional keyhole in their instrument. Both Article 25 of the ICSID Convention and Article 1 of the BIT are to be interpreted in accordance with the VCLT.¹⁰⁸
243. Respondent’s various specific objections to this Tribunal’s jurisdiction under Respondent’s second argument fall into two broad categories: one category that disputes Claimants’ status as “investors” under the BIT and the ICSID Convention and another category that

¹⁰³ ICSID Convention, Art. 25.

¹⁰⁴ C-0001, BIT, Art. 1(1).

¹⁰⁵ C-0001, BIT, Art. 1(2).

¹⁰⁶ C-0001, BIT, Art. 1(2)(a).

¹⁰⁷ C-0001, BIT, Art. 1(2)(b).

¹⁰⁸ CL-0322, VCLT, Art. 31.

disputes Claimants' interests as an "investment" under the BIT and the ICSID Convention. The Tribunal addresses each in turn.¹⁰⁹

244. Before it turns to these objections, the Tribunal takes note of Claimants' citation of the award of the *Micula* tribunal in which it held that it need not resolve the precise scope of the investment at the jurisdictional stage, but rather need only establish, as a threshold matter, that there is an investment.¹¹⁰ The Tribunal agrees that the precise scope of the investment may become more clear at the merits stage of these proceedings, and that – to resolve this objection – it need only establish at this stage that Claimants are "investors" who made an "investment" in accordance with the BIT and the ICSID Convention.

C. Objections that Claimants are not "Investors"

245. Respondent argues that Claimants fail to establish their status as "investors" under the BIT.¹¹¹ In particular, Respondent argues that (1) Claimants have not established the necessary link between themselves and the alleged investment, that is their ownership of shares in BC and KC prior to the alleged breach; (2) Claimants' role in relation to BC and KC is "passive" rather than "active" and therefore Claimants are not "investors"; (3) Claimants are too remote from the "investment" and therefore Claimants are not "investors".

(1) Claimants Have Not Proven their Ownership of Shares in BC and KC

246. Both Respondent and Claimants have made extensive representations as to the ownership of BC and KC and the structure of holding companies and trusts through which Claimants purport to own BC and KC. This structure is complex. The particulars of Claimants' ownership of shares in BC and KC became more detailed during the course of the proceedings, with Claimants making available further information about the holding structure in the face of challenges from Respondent.
247. Claimants provided an outline of their ownership holding structure of BC and KC as of 30 April 2008 in their Request for Arbitration.¹¹² This alleged ownership holding structure was included in graphic format by Respondent in its Memorial on Preliminary Objections and Request for Bifurcation as follows:¹¹³

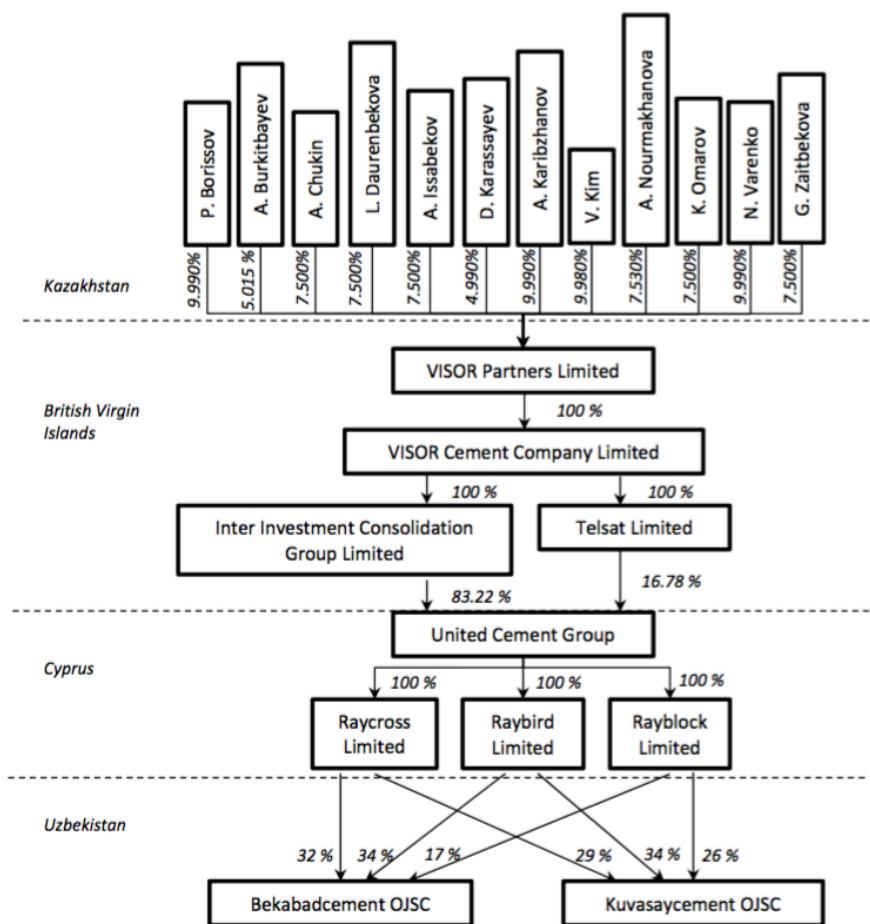
¹⁰⁹ The Tribunal notes that Respondent further refers to Article 1(1) of the BIT, arguing that to qualify as an investor under the BIT, Claimants must hold citizenship under the laws of the Contracting State (Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 175). The Tribunal addresses, and dismisses, this objection at paragraphs 181-236 above. For the purposes of this arbitration and on the basis of the evidence before it, the Tribunal holds that Claimants are Kazakh nationals and that the Tribunal has jurisdiction *ratione personae* over their claims.

¹¹⁰ Claimants' Rejoinder on Preliminary Objections, n. 185.

¹¹¹ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 11-12.

¹¹² Claimants' Request for Arbitration, Schedule 2.

¹¹³ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 29.



248. Claimants agree with this representation and argue that this structure has been unchanged since 30 April 2008.¹¹⁴ Claimants further state that they have held their shares in BC and KC through this holding structure to be in the best possible position to take advantage of market opportunities and to restructure their interests after any further acquisitions.¹¹⁵
249. Respondent argues that Claimants “have not substantiated this alleged holding structure”.¹¹⁶ In particular, Respondent alleges that Claimants have failed to provide sufficient evidence that they made investments in Uzbekistan – such as originals or copies of share certificates of each Claimants’ ownership in the investment’s holding structure.¹¹⁷ Respondent further argues that Claimants do not offer testimony as to their ownership,¹¹⁸ and that the available share exchange agreements do not indicate the shareholders of

¹¹⁴ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 30.

¹¹⁵ Claimants’ Rejoinder on Preliminary Objections, ¶ 66.

¹¹⁶ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 30.

¹¹⁷ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 180.

¹¹⁸ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 33, 195.

parties to the transactions.¹¹⁹ Respondent also raises a series of objections, set out below at paragraph 255, to Claimants' statement of their ownership holding structure.

250. The Tribunal must assess claims about the ownership holding structure only insofar as such claims relate to its jurisdiction over this dispute. The Parties agree that "an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time".¹²⁰ It is for Claimant to substantiate its ownership of shares in BC and KC to demonstrate that Claimants' Request for Arbitration falls within the Tribunal's jurisdiction, in accordance with the BIT and the ICSID Convention.
251. Claimants emphasize that such ownership needs to be established at the time of the alleged breaches of the BIT.¹²¹ The Tribunal agrees that it is well settled law that the relevant time for Claimants to demonstrate their ownership is the time of the breach.
252. For Claimants, "the relevant times for the purposes of jurisdiction are: the date this arbitration was instituted on 22 March 2013, the dates on which Claimants' investments in BC and KC were expropriated by the Uzbek state on 5 June 2012 and 10 June 2013 respectively, and, to the extent relevant to other claims, the dates on which the Uzbek state first took unlawful action against their investments in BC and KC on 2 March 2010 and 16 April 2012 respectively".¹²² Claimants also allege further breaches of the BIT when their investments in BC and KC were expropriated by the Uzbek state on 5 June 2012 and 10 June 2013 respectively. The Tribunal concludes that Claimants must therefore demonstrate their ownership of the investment on these dates.
253. Claimants argue that it is "undisputed" that they have owned the shares in BC and KC "at the very latest since 20 February 2009 and continuing through the time of the breach".¹²³ Claimants therefore argue that it is not necessary for the Tribunal to examine this issue any further.
254. Respondent, however, raises five assertions in order to dispute such ownership.
255. Respondent argues variously that (a) Claimants have not proven their ownership of the upper levels of their holding structure; (b) Claimants have not proven their ownership of Kaden and Nabolena, their majority share acquisition vehicles; (c) Claimants have not proven their ownership of Carsoco, Clipco, Fasinco, Karuteco, Robianco, and Vernico,

¹¹⁹ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 27.

¹²⁰ **RL-0016**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award dated 17 September 2009, ¶ 112. *See also* RL-0028, *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award dated 2 September 2011, ¶ 128; **RL-0021**, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award dated 13 August 2009, ¶¶ 25, 27-28 ().

¹²¹ Claimants' Rejoinder on Preliminary Objections, ¶ 58.

¹²² Claimants' Counter-Memorial on Jurisdiction, n. 16.

¹²³ Claimants' Rejoinder on Preliminary Objections, ¶¶ 58, 77.

their minority share acquisition vehicles; (d) Claimants have not proven their ownership of the Ray Companies (Raybird, Rayblock, and Raycross); and (e) the oral trusts, based in Cyprus, through which Claimants hold and have held their business interests, are invalid under Cypriot Law.

256. These arguments – if substantiated – would only be sufficient to deny jurisdiction if they led to a failure by Claimants to demonstrate their ownership at the time of the alleged breach. Despite the many claims that Respondent makes about Claimants’ ownership structure, for the purposes of jurisdiction, it is only necessary for Claimants to meet this test. The Tribunal nevertheless takes each of the claims in turn in the sub-sections that follow.

a. Ownership of the top levels of Holding Structure: Visor Partners Limited, Visor Cement Companies Limited, Inter Investment Consolidation Group Limited, and Telsat Limited

257. Respondent disputes Claimants’ ownership of the top levels of the holding structure. On Claimants’ account, they hold shares in BC and KC via a holding structure that has as its upper tiers Visor Partners Limited, Visor Cement Companies Limited, Inter Investment Consolidation Group Limited (“**IICG**”), Telsat Limited, and UCG. The Tribunal deals with Claimants’ ownership of each of these entities in turn.

(i) Visor Partners Limited

258. Claimants state that Visor Partners Limited was incorporated on 31 July 2007 and that since incorporation the company has been owned by various Claimants (and Mr. Michael Sauer).¹²⁴ Claimants also state that Visor Cement Companies Limited was incorporated on 31 July 2007 and that since incorporation the company has been owned by Visor Partners Limited.¹²⁵ Claimants evidence these aspects of its holding structure by means of various documents including certificates of incumbency, registers of members, resolutions, and share certificates.¹²⁶ Respondent does not offer evidence to call these documents into question. The Tribunal, on the basis of the evidence before it, concludes that Claimants (with Mr. Michael Sauer) have been owners of Visor Partners Limited and Visor Cement Companies Limited since 31 July 2007 and therefore at all times relevant to jurisdiction.

¹²⁴ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 12.

¹²⁵ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 13.

¹²⁶ See **C-0435** to **C-0451**.

(ii) **IICG**

259. Claimants state that IICG was incorporated on 31 July 2007 with Visor Cement as its sole shareholder.¹²⁷ Claimants evidence this ownership with a certificate of incumbency, share certificate, and company resolution. Respondent does not offer evidence to call these documents into question. The Tribunal, on the basis of the evidence before it, concludes that Claimants (with Mr. Michael Sauer) have been owners of IICG since 31 July 2007 and therefore at all times relevant to jurisdiction.¹²⁸

(iii) **Telsat**

260. Claimants state that Telsat was incorporated on 31 July 2007 at which time its sole shareholder was Veller Investment Group Limited – a company owned by Claimants (except Claimant Borissov). Since 5 September 2007, Telsat has been owned in its entirety by Visor Cement Companies Limited.¹²⁹ Claimants evidence this ownership with a Certificate of Incumbency, registers of members, and company resolutions.¹³⁰ Respondent does not offer evidence to call these documents into question. The Tribunal concludes, on the basis of the evidence before it, that Claimants (with Mr. Michael Sauer) have been owners of Telsat since 31 July 2007 and therefore at all times relevant to jurisdiction.

(iv) **Starwheel Limited (later UCG)**

261. Claimants state that Starwheel Limited was incorporated on 3 April 2007 with Abacus (Cyprus) Limited as its sole shareholder.¹³¹ Ownership was transferred to “United Cement Group Ltd.”, a company in the Isle of Man, on 8 October 2007, and thereafter to Telsat and IICG on 14 November 2007. Claimants evidence this ownership with certificates of incorporation and name change, registers of members and share ledgers, lists of shareholders, and declarations of trust.¹³² The Tribunal concludes, on the basis of the evidence before it, that Claimants (with Mr. Michael Sauer) have been owners of UCG since 31 July 2007 and at all times relevant to jurisdiction.

262. Thus, having carefully considered all the arguments and evidence available to it, the Tribunal concludes that Claimants have demonstrated their ownership of Visor Partners Limited, Visor Cement Companies Limited, IICG, Telsat Limited; and UCG.

263. The Tribunal turns, in Section VIII.C(1)d below, to the transfer by Claimants of shares in BC and KC from various share acquisition vehicles to the three companies known as the

¹²⁷ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 15.

¹²⁸ See C-0420 to C-0426.

¹²⁹ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 14.

¹³⁰ See C-0521; C-0427 to C-0434.

¹³¹ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 16.

¹³² See C-0414 to C-0417; C-0475; C-0514 to C-0515.

Ray Companies, and thereby into its ownership holding structure. First, however, it is necessary to examine Respondents' claims as regards the ownership of the majority share acquisition vehicles (Kaden and Nabolena) and the minority share acquisition vehicles (Carsoco, Clipco, Fasinco, Karuteco, Robianco, and Vernico).

b. Ownership of Acquisition Vehicles for Majority Shares in BC and KC

264. Claimants state that they acquired their majority share interests in BC and KC in January 2006 through Kaden and Nabolena and then transferred those interests from the share acquisition vehicles into their holding structure. Respondent argues that Claimants have not proven their ownership of the acquisition vehicles, namely Kaden and Nabolena, used to purchase the majority shares in BC and KC.¹³³
265. Claimants state that Nabolena was incorporated on 20 April 2005 with Dema Nominees and Dema Trustees as its sole shareholders.¹³⁴ These companies made trust declarations in favour of Claimant Kim on 11 May 2005.¹³⁵ Claimants further state that Mr. Kim held his shares in Nabolena in trust for Claimants as a whole (except Claimant Borissov).¹³⁶ This ownership, Claimants state, covers all relevant times – from 27 January 2006 (the date of KC share acquisition by Nabolena) to 29 April 2008 (the date of transfer of KC shares to the Ray Companies and therefore into Claimants' holding structure).¹³⁷
266. Respondent argues that Claimants have not proven the continuity of ownership of Nabolena. In particular, Respondent refers to the transfer of shares in Nabolena from Dema Nominees and Dema Trustees to a variety of other entities in the months prior to the transfer by Nabolena of its KC shares into Claimants' holding structure.¹³⁸ Respondent therefore disputes Claimants' ownership of the KC shares in the time between their acquisition by Nabolena and their transfer to the Ray Companies and therefore into Claimants' ownership structure.
267. The Tribunal notes that Claimants have demonstrated their ownership of Nabolena at the time of its acquisition of the KC shares. Further noted is that Claimants do not address in full all points that Respondent raises as regards their ownership of Nabolena, in particular the transfer of ownership of Nabolena.¹³⁹ However, the Tribunal does not find the question

¹³³ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 14.

¹³⁴ Claimants' Counter-Memorial on Preliminary Objections, ¶ 28, Claimants' Rejoinder on Preliminary Objections, ¶ 79. *See also* C-0476, Corporate Register of Nabolena dated 18 June 2012.

¹³⁵ Claimants' Rejoinder on Preliminary Objections, ¶ 79. *See also* C-0477, Trust Declarations of Nabolena dated 11 May 2005.

¹³⁶ Claimants' Rejoinder on Preliminary Objections, ¶ 80. *See also* Kim III, ¶¶ 37-38.

¹³⁷ Kim III, ¶ 38.

¹³⁸ Respondent's Reply on Preliminary Objections, ¶¶ 263-267.

¹³⁹ *See* Claimants' Rejoinder on Preliminary Objections, ¶ 81; Nurmakhanova, ¶ 52.

of continuity of ownership, assuming there were a break, relevant. Critically, Respondent does not set out how any breach in continuity of ownership, in particular between the date of acquisition of KC shares by Nabolena and the date of transfer of those shares into Claimants' holding structure, may impact upon jurisdiction.

268. The burden on Claimants is to demonstrate its ownership at the time of the alleged breach. It is possible for Claimants to do so without a demonstration of continuity of ownership at all times from the first acquisition of KC shares by Nabolena. Therefore, subject to Claimants' satisfactory demonstration of ownership – i.e. through its holding structure – at the time of the alleged breach, its failure to demonstrate continuity of ownership at all times from the date of first acquisition will not impact upon jurisdiction.
269. Claimants state that Kaden was incorporated on 7 October 2005. On 27 October 2005, its shareholder was Visor Investment Services Ltd. Visor Investment Services Ltd was owned by three Claimants from its date of incorporation, 10 January 2005, and was owned by Weimar Properties Limited from 5 December 2005. Weimar was owned by Berrimor Associates Ltd. which was, in turn, owned by Claimant Kim.¹⁴⁰
270. Claimants acknowledge that they cannot locate a document to demonstrate their ownership on 27 January 2006 – i.e. on the date of acquisition of BC shares by Kaden. Rather, they provide documents to evidence their ownership on dates both prior to, and after, that date. There is, Claimants note, “a gap of four months between 5 December 2005 and 20 April 2006 in respect of which there are no documents that directly support Claimants' case [of ownership of Kaden]”.¹⁴¹
271. As with Nabolena, Claimants do not entirely substantiate continuity of ownership of Kaden. In contrast with Nabolena, the gap in evidence as regards Kaden relates to the date of acquisition of a majority of shares in BC. Claimants argue that they owned Kaden at the date of acquisition. The Tribunal holds that, if it were necessary to conclude whether Claimants were owners of Kaden at the date of acquisition, it would find that the preponderance of evidence indicates that Claimants owned Kaden at the date of acquisition.
272. However, the Tribunal reiterates that the burden on Claimants is to demonstrate its ownership at the time of the alleged breach of the BIT. The Tribunal further reiterates that it is possible for Claimants to do so without a demonstration of continuity of ownership at all times from the first acquisition of shares. Therefore, subject to Claimants' satisfactory demonstration of ownership – i.e. through its holding structure – at the time of the alleged

¹⁴⁰ Claimants' Counter-Memorial on Preliminary Objections, ¶ 27. *See also* C-0463, C-0466, C-0464, C-0474, C-0516 and C-0517.

¹⁴¹ Claimants' Rejoinder on Preliminary Objections, ¶ 85.

breach, its failure to demonstrate continuity of ownership at all times from the date of first acquisition will not impact upon jurisdiction.

273. On the basis of all materials before it, the Tribunal concludes that Claimants have demonstrated their ownership of the majority share acquisition vehicles at various times prior to the transfer by Nabolena and Kaden of shares in KC and BC to the Ray Companies and therefore into Claimants' holding structure.
274. The Tribunal next considers Respondent's claims as regards the ownership of the minority share acquisition vehicles (Carsoco, Clipco, Fasinco, Karuteco, Robianco, and Vernico).

c. Ownership of Acquisition Vehicles for Minority Shares in BC and KC

275. The acquisition of further shares in BC and KC by Claimants' companies is also in dispute. Respondent argues that Claimants have not proven their ownership of the various share acquisition vehicles that Claimants purport to have used to acquire further shares in BC and KC. There are six such share acquisition vehicles in dispute: Carsoco, Clipco, Fasinco, Karuteco, Robianco, and Vernico.¹⁴²
276. Claimants argue that it is sufficient for this Tribunal to find that Claimants had a majority shareholding in BC and KC so as to resolve the jurisdictional question.¹⁴³ However, they also state that they have sufficiently demonstrated the ownership of the acquisition vehicles for the further shares in BC and KC, as follows.
277. In the case of the BC share acquisition vehicles, Carsoco,¹⁴⁴ Vernico,¹⁴⁵ and Karuteco,¹⁴⁶ Claimants state that each share acquisition vehicle was held by a Cypriot trustee in bare trust for Claimant Varenko who, in turn, held all shares in trust for Claimants generally (except Claimant Borrisov). Claimants have provided share exchange agreements, sale and purchase of shares agreements, company registers, and trust deeds to this effect.
278. In a similar vein, in the case of the KC share acquisition vehicles, Clipco,¹⁴⁷ Fasinco,¹⁴⁸ and Robianco,¹⁴⁹ Claimants state that each share acquisition vehicle was held by a Cypriot trustee in bare trust for Claimant Varenko who, in turn, held all shares in trust for

¹⁴² Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 23; ¶¶ 277-279.

¹⁴³ Claimants' Rejoinder on Preliminary Objections, ¶ 77.

¹⁴⁴ Claimants' Rejoinder on Preliminary Objections, ¶ 97. *See also* C-0490; C-0504; C-0685; C-0686.

¹⁴⁵ Claimants' Rejoinder on Preliminary Objections, ¶ 98. *See also* C-0494; C-0503; C-0698; C-0699.

¹⁴⁶ Claimants' Rejoinder on Preliminary Objections, ¶ 94. *See also* C-0493; C-0495; C-0507; C-0692; C-0693.

¹⁴⁷ Claimants' Rejoinder on Preliminary Objections, ¶ 95. *See also* C-0497; C-0498; C-0505; C-0687; C-0688; C-0689.

¹⁴⁸ Claimants' Rejoinder on Preliminary Objections, ¶ 96. *See also* C-0496; C-0499; C-0506; C-0690; C-0691.

¹⁴⁹ Claimants' Rejoinder on Preliminary Objections, ¶ 99. *See also* C-0500; C-0508; C-0694; C-0695; C-0696; C-0697.

Claimants generally (except Claimant Borrisov). Claimants have provided share exchange agreements, sale and purchase of shares agreements, company registers, and trust deeds to this effect.

279. Claimants evidence their ownership of the share acquisition vehicles using factual exhibits that include corporate registers, tables of Tashkent Stock Exchange transactions, and trust deeds. Aside from its objection to the validity of the Cypriot trusts, Respondent does not offer any evidence to contradict Claimants' factual exhibits.
280. Having carefully considered all arguments and evidence available to it, and subject to the Tribunal's consideration of the validity of the oral trusts in Claimants' holding structure, the Tribunal concludes that Claimants have demonstrated their ownership of the minority share acquisition vehicles.
281. The Tribunal next turns to Respondent's objection to a series of transactions through which the various share acquisition vehicles transferred ownership of shares in BC and KC to the Ray Companies and thereby into the holding structure Claimants set out in the Request for Arbitration.

d. Transfer of BC and KC Shares to UCG via the Ray Companies

282. Claimants state that, in 2008, they sought to consolidate and restructure their holding structure for KC and BC to prepare for an IPO.¹⁵⁰ Central to this consolidation was the transfer of shares from the KC contributor companies (Nabolena, Clipco, Fasinco, and Robianco) and from the BC contributor companies (Kaden, Carsoco, Vernico, and Karuteco) into Claimants' new holding structure.
283. Claimants state that between 26 March and 10 April 2008 the KC contributor companies (Nabolena, Clipco, Fasinco, and Robianco) each transferred their shares in KC to the Ray Companies in exchange for shares in the Ray Companies.¹⁵¹ The KC contributor companies then, on 29 April 2008, transferred their shares in the Ray Companies to Starwheel (later UCG).¹⁵² As a result of these transactions Starwheel (later UCG) came to own a majority shareholding in KC by 30 April 2008.¹⁵³
284. Claimants also state, in a similar vein, that between 9 April and 10 April 2008 the BC contributor companies (Kaden, Carsoco, Vernico, and Karuteco) each transferred their shares in BC to the Ray Companies in exchange for shares in the Ray Companies.¹⁵⁴ The

¹⁵⁰ Claimants' Counter-Memorial on Preliminary Objections, ¶ 30.

¹⁵¹ Claimants' Counter-Memorial on Preliminary Objections, ¶ 31.

¹⁵² Claimants' Counter-Memorial on Preliminary Objections, ¶ 32.

¹⁵³ Claimants' Counter-Memorial on Preliminary Objections, ¶ 32.

¹⁵⁴ Claimants' Counter-Memorial on Preliminary Objections, ¶ 31.

BC contributor companies then also, on 29 April 2008, transferred their shares in the Ray Companies to Starwheel (later UCG).¹⁵⁵ As a result of these transactions Starwheel (later UCG) came to own a majority shareholding in BC by 30 April 2008.¹⁵⁶

285. On Claimants' account, therefore, from 30 April 2008 until the time of the alleged breaches of the BIT, UCG owned, via its whole ownership of the Ray Companies, a majority holding in KC and in BC. The structure has been unchanged ever since that date.¹⁵⁷
286. Respondent, however, disputes Claimants' ownership of the Ray Companies (Raybird, Rayblock, and Raycross) which received shares as detailed above in 2008.¹⁵⁸
287. Claimants state that the Ray Companies were incorporated in December 2007 under the ownership of Abacus (Cyprus) Limited. Claimants evidence these incorporations with certificates of incorporation.¹⁵⁹ On 10 March 2008, Abacus transferred its shares in the Ray Companies to the majority share acquisition vehicles (Kaden and Nabolena) and the minority share acquisition vehicles (Carsoco, Clipco, Fasinco, Karuteco, Robianco, and Vernico).¹⁶⁰ Respondent has provided no argument or evidence to call these transactions into question.
288. In light of the foregoing, and having carefully considered all materials available to it, the Tribunal concludes that, subject to the validity of the oral trust, Claimants have proven their ownership of shares in BC and KC.

e. Claimants' Ownership Relies on an Invalid Oral Trust

289. Respondent argues that the oral trusts, based in Cyprus, through which Claimants hold and have held their business interests, are invalid under Cypriot Law.
290. Respondent notes that the trust declarations of Dema Trustees and Dema Nominees as regards their shares in Nabolena are not notarized.¹⁶¹ Respondent further notes that Claimants' trust declarations pre-date the acquisition of shares in BC and KC and argues that this fact calls into question Claimants' ownership of the share acquisition vehicles.

¹⁵⁵ Claimants' Counter-Memorial on Preliminary Objections, ¶ 32.

¹⁵⁶ Claimants' Counter-Memorial on Preliminary Objections, ¶ 32.

¹⁵⁷ Claimants' Counter-Memorial on Preliminary Objections, ¶ 30.

¹⁵⁸ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 27, 30-31.

¹⁵⁹ Claimants' Counter-Memorial on Preliminary Objections, 17; *See also* **C-0384**, Certificate of Incorporation of Raycross dated 22 February 2008; **C-0394**, Certificate of Incorporation of Rayblock dated 22 February 2008; **C-0404**, Certificate of Incorporation of Raybird dated 22 February 2008.

¹⁶⁰ Claimants' Counter-Memorial on Preliminary Objections, ¶ 18.

¹⁶¹ Respondent's Reply on Preliminary Objections, ¶ 269.

291. Respondent argues that Claimant relies upon testimony from Mr. Kim as regards the ownership of Nabolena which has proven to be changeable during the course of proceedings. For example, neither the Request for Arbitration nor Mr. Kim’s first witness statement make reference to the role of Dema Trustees and Dema Nominees and their trust declarations in the ownership of Nabolena.¹⁶² Respondent also cites a report, by Global Witness, that states that it is not possible to determine the ultimate beneficiaries of Dema Nominees and Dema Trustees.¹⁶³
292. Claimants argue that the oral trusts are valid under Cypriot Law and deny that there is anything suspicious about their use of the oral trusts in their holding structure.¹⁶⁴
293. Claimants argue that, under the applicable Cypriot Law, it is not necessary for a trust declaration to be notarized in order for such a declaration to be authentic.¹⁶⁵ Claimants further argue that, contrary to Respondent’s arguments, it is not salient that the Trust Declarations pre-date the acquisition of shares in BC and KC by several months in each case.¹⁶⁶ Rather, Claimants state that it would be entirely unusual to execute the trusts over and over in anticipation of future litigation or arbitration.
294. Claimants do not accept Respondent’s position as regards the evidence of Mr. Kim and state that they have offered additional details as regards their holding structure in reply to Respondent’s challenges to the validity of that holding structure. Claimants further argue that the Global Witness report is unpersuasive, insofar as the Tribunal itself may come to a conclusion on this matter, as the Tribunal is in possession of more information than were the authors of the Global Witness report.¹⁶⁷
295. In this regard, Claimants cite a letter from Mr. Lellos Demetriades, a lawyer in Cyprus.¹⁶⁸ Mr. Demetriades states, after review of the Dema Trustees and Dema Nominees Trust Declarations, “that under Cypriot law the absence of notarisation or witnesses does not affect their validity”. Mr. Demetriades then offers the general observation that “under Cyprus law a trust relating to the abovementioned trust declarations does not have to be in writing and thus the need for notarisation or witnessing does not arise”.¹⁶⁹

¹⁶² Respondent’s Reply on Preliminary Objections, ¶ 261

¹⁶³ Respondent’s Reply on Preliminary Objections, ¶ 268. *See also* **R-0156**, Global Witness, “Funny Business in the Turkmen-Ukraine Gas Trade” dated April 2006.

¹⁶⁴ Claimants’ Rejoinder on Preliminary Objections, ¶ 64.

¹⁶⁵ Claimants’ Rejoinder on Preliminary Objections, ¶ 60.

¹⁶⁶ Claimants’ Rejoinder on Preliminary Objections, ¶ 63.

¹⁶⁷ Claimants’ Rejoinder on Preliminary Objections, ¶ 66.

¹⁶⁸ Claimants’ Rejoinder on Preliminary Objections, ¶ 60.

¹⁶⁹ **C-0719**, Letter from Lellos Demetriades to Jones Day dated 12 May 2015.

296. Claimants submit that, in the absence of rebuttal evidence from Respondents, there is *prima facie* evidence that the oral trusts were valid under Cypriot law.
297. The Tribunal must base its decision on the validity of the oral trusts in Cypriot law on the preponderance of evidence available to it. Thus, the Tribunal considers neither the testimony of Mr. Kim, nor the Global Witness report, to be determinative of the matter.
298. The Tribunal further notes that, although Claimants did not, at the outset of these proceedings, offer all of the information as regards its holding structure that is now available to the Tribunal, the ongoing clarification of Claimants' holding structure does not, of itself, call into question the veracity of the information now available to the Tribunal.
299. The Tribunal notes in particular the letter from Mr. Demetriades.¹⁷⁰ Mr. Demetriades has evident expertise in Cypriot Law and is clear and unequivocal in his statements as regards the validity of the oral trusts in that legal system. The Tribunal considers that this letter is strong evidence as regards the applicable Cypriot Law in general and the validity of the Dema Trustees and Dema Nominees oral trusts in particular.
300. In the absence of further argument or evidence from Respondent on this point, and on the basis of all the materials available to it, the Tribunal concludes that the oral trusts were valid in Cypriot Law. This conclusion applies to the oral trusts as regards Dema Trustees and Dema Nominees and to oral trusts found elsewhere in Claimants' holding structure.

f. Conclusions on Ownership

301. The Tribunal notes once more that the precise scope of the "investment" may be the subject of further discussion in any award on the merits of the dispute, as necessary.
302. For the purposes of the resolution of Respondent's second objection it is necessary, only, that Claimants prove their ownership at the time of the alleged breach.
303. The Tribunal concludes, on the basis of the argument and the evidence available to it, that Claimants have proven their ownership of shares in BC and KC through the ownership holding structure set out in the Request for Arbitration from 30 April 2008 until the dates of the alleged breaches.
304. The Tribunal also concludes, on the basis of the argument and the evidence available to it, that Claimants have proven their initial ownership of shares in BC and KC on the date of first acquisition by Kaden and Nabolena respectively, on 27 January 2006. The Tribunal reaches this conclusion on the basis of the preponderance of the evidence – notwithstanding

¹⁷⁰ C-0719, Letter from Lellos Demetriades to Jones Day dated 12 May 2015.

Claimants not having produced documentation to prove continuity of ownership from that date.

305. The Tribunal therefore rejects the objection to its jurisdiction on this ground.

(2) **The Investors are Passive Rather than Active**

306. Respondent argues that the term “investor” involves an active relationship to the investment rather than merely a passive one. Respondent notes, for example, that certain clauses in the BIT use the formulation “investments (made) by investors”.¹⁷¹ Respondent argues, on the basis of this language, that each Claimant must establish that he or she took specific action involving substantial contribution and risk to make his or her investment.¹⁷² Respondent observes that there is support for such a requirement in the awards of other ICSID tribunals.¹⁷³
307. Respondent further argues that Claimants do not meet this requirement. Respondent states that there is no evidence that Claimants were engaged in the management of their investment. Respondent notes Mr. Kim’s statement in which he said that after the acquisition of BC and KC he “had no further direct involvement with BC and KC”.¹⁷⁴ As to a later statement from Mr. Kim, that sets out the involvement of Claimants in the management of their investment, Respondent argues that Mr. Kim’s “self-serving change in testimony is not credible”.¹⁷⁵ Respondent also stresses that Claimants have not provided “any record of any meeting” at which Claimants took strategic decisions as regards BC and KC.¹⁷⁶
308. Claimants dispute the existence of a distinction between active and passive “investors”.¹⁷⁷ Claimants argue that it is necessary only to establish that the investing activity of their intermediary entities is performed at their direction or that the intermediate entities are subject to the investor’s control.¹⁷⁸ Claimants argue that Respondent’s reliance on awards of other ICSID tribunals is inapposite because of different language in the BITs in those

¹⁷¹ **C-0001**, BIT, Art. 2, 3, 4, 5, 7, 10, 12 and 14. Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 176-177; ¶¶ 338-344. *See e.g.*, **C-0001**, BIT, Art. 2(1), 3(1) and 3(2).

¹⁷² Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 178.

¹⁷³ Respondent Memorial on Preliminary Objections and Request for Bifurcation, 177; *See also* **RL-0047**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award dated 2 November 2012 (“*Standard Chartered Bank*”).

¹⁷⁴ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 35; Kim I, ¶ 27.

¹⁷⁵ Respondent’s Reply on Preliminary Objections, ¶ 318.

¹⁷⁶ Respondent’s Reply on Preliminary Objections, ¶ 320.

¹⁷⁷ Claimants’ Counter-Memorial on Preliminary Objections, ¶¶ 51-53.

¹⁷⁸ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 51. *See also* **RL-0047**, *Standard Chartered Bank*.

disputes and because the facts of those disputes are distinguishable.¹⁷⁹ Claimants further cite awards of yet other ICSID tribunals for the proposition that the verb “made” does not in itself require Claimants to meet a particular standard as “active” investors.¹⁸⁰

309. Claimants also submit that, even if such a test is applicable, they were active managers of their investment in BC and KC.¹⁸¹ In particular, Claimants refer to the “Investment Committee”, which they assert was a sub-committee of Claimants that met on a regular basis to assist the collective decisions of the entire group on the handling of their strategic investments.¹⁸² Claimants give the example of a meeting of the Investment Committee held on 3 April 2007, where various investment plans were presented to the group, and then were subsequently implemented by the BC and KC Supervisory Boards.¹⁸³ Claimants further cite their management of UCG as an example of the active management of their investments.¹⁸⁴ Claimants note that they would be in a position to offer further testimony as regards their management, were it not the case that certain of their plant managers, such as Mr. Nikitin, have been imprisoned by Respondent.¹⁸⁵
310. The Tribunal takes note of Respondent’s argument as regards the implications of the term “made” in the BIT. As set out at paragraphs 373-377 below, the term “made” does indicate that there exists a temporal limitation on the legality requirement. However, the Tribunal does not agree that the ordinary meaning of the term “made” does not necessarily entails a requirement that Claimants must have an ongoing “active” role in the investment such that the term imposes a limitation on the definition of “investor” under the BIT.
311. Therefore, the Tribunal rejects Respondent’s argument that the definition of “investors” in the BIT must be read in a more restrictive manner or to require a greater degree of involvement in the management of the investment by Claimants than would otherwise be the case.
312. The Tribunal therefore holds that the BIT in this case does not contain a distinction between active and passive investors requiring the former. Furthermore, even if there were such a requirement, Claimants had an active role in the management of the BC and KC plants. In particular, the Tribunal notes: (i) the role of the Investment Committee, and a sub-group of

¹⁷⁹ Claimants’ Rejoinder on Preliminary Objections, ¶ 67; see **CL-0344**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award dated 16 July 2012; **RL-0047**, *Standard Chartered Bank*.

¹⁸⁰ Claimants’ Rejoinder on Preliminary Objections, ¶ 69; **RL-0008**, *Abaclat*, ¶¶ 282, 393.

¹⁸¹ Claimants’ Counter-Memorial on Preliminary Objections, ¶¶ 38-40.

¹⁸² Claimants’ Counter-Memorial on Preliminary Objections, ¶¶ 38-40; Claimants’ Rejoinder on Preliminary Objections, ¶¶ 108-123.

¹⁸³ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 44. See also Kim II, ¶ 14; **C-0518**, Protocol No. 5 of the Supervisory Board of KC dated 25 October 2007; Claimants’ Rejoinder on Preliminary Objections, ¶¶ 112-117.

¹⁸⁴ Claimants’ Counter-Memorial on Preliminary Objections, ¶¶ 41-43; Claimants’ Rejoinder on Preliminary Objections, ¶¶ 118-123.

¹⁸⁵ Claimants’ Counter-Memorial on Preliminary Objections, ¶¶ 38-43.

Claimants, to take decisions about Claimants' investment strategy;¹⁸⁶ (ii) the appointment of several Claimants to the Supervisory Boards of BC and KC;¹⁸⁷ and (iii) the development of the BC and KC plants in anticipation of the aborted IPO.¹⁸⁸

313. The Tribunal also does not agree that the decisions of other ICSID tribunals alter this conclusion. In *Standard Chartered Bank*, the respondent state argued that the claimants' investment was limited to the holding of loans, securities, and other financial claims.¹⁸⁹ The tribunal accepted that these were investments 'of' the claimants and not investments 'by' the claimants.¹⁹⁰ In contrast, in this case, Claimants have undertaken not just to hold a financial interest in the BC and KC plants but also to manage and develop those plants. *Standard Chartered Bank* is therefore not analogous to the present proceedings. In *Alapli Elektrik*, the decision of the Tribunal majority to which Respondent in this dispute refers was that the claimant acquired the investment "for the sole purpose of manufacturing international jurisdiction, at a time when the project was already in great difficulty and the facts that are at the root of the dispute with Turkey were already known to the Sponsors of the Project".¹⁹¹ In contrast, in this case, it is not in dispute that Claimants acquired the shares in BC and KC several years before the plants came into difficulty and sought, in any case, to develop the BC and KC plants for the purpose of future sale. Therefore, *Alapli Elektrik* is also not analogous to the present proceedings.

314. The Tribunal denies the objection to its jurisdiction on this ground.

(3) The Investors are too Remote from BC and KC

315. Respondent argues that an investor may be too remote from an investment for that investment to attract protection under the BIT applicable to a dispute. Respondent argues that "[i]n contrast to some other bilateral and multilateral investment treaties [...] the BIT does not offer specific protection for the indirect ownership of shares or other remote categories of investments".¹⁹² Respondent also relies on the awards of other ICSID tribunals that have made reference to such a requirement.¹⁹³ Respondent also contends further that each Claimant owns, at most, a "small and attenuated interest in BC and KC".¹⁹⁴ Respondent argues that awards from other ICSID tribunals have held that a

¹⁸⁶ Claimants' Counter-Memorial on Preliminary Objections, ¶¶ 38-40.

¹⁸⁷ Claimants' Counter-Memorial on Preliminary Objections, ¶ 44; *See also* Kim II, ¶ 14; C-0518, Protocol No. 5 of the Supervisory Board of KC dated 25 October 2007; Claimants' Rejoinder on Preliminary Objections, ¶¶ 112-117.

¹⁸⁸ Claimants' Rejoinder on Preliminary Objections, ¶ 22.

¹⁸⁹ RL-0047, *Standard Chartered Bank*, ¶ 73.

¹⁹⁰ RL-0047, *Standard Chartered Bank*, ¶¶ 196-198.

¹⁹¹ Respondent Memorial on Preliminary Objection and Request for Bifurcation, n. 580.

¹⁹² Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 176.

¹⁹³ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 185-189.

¹⁹⁴ Memorial on Preliminary Objections and Request for Bifurcation, ¶ 198.

minority shareholding was too remote to attract protection under the terms of the applicable international investment law.¹⁹⁵ As a final point, Respondent puts in issue the beneficial nature of Claimants' ownership of certain of its companies. Claimants' holding structure, set out at paragraphs 247-305 above, was such that Claimants are legal owners of certain aspects of their holding structure and beneficial owners of other aspects. Respondent argues that, even if Claimants' oral trusts are valid in Cypriot Law, such trusts give Claimants at best beneficial ownership of the assets.¹⁹⁶ Respondent notes that Claimants' citation of *Reza Nemazee v. Iran* entails a decision in which the Iran-United States Claims Tribunal rejected a finding of beneficial ownership owing to the failure of the claimants to evidence that ownership.¹⁹⁷

316. Claimants, in contrast, state that in this case they together own a majority interest in the investment and therefore that the authorities in question are distinguishable.¹⁹⁸ Claimants also argue that the corporate structure they used as an investment strategy does not render them "remote" as investors. Claimants argue that "Respondent's depiction of Claimants' corporate structure involving sixteen intermediaries is grossly exaggerated".¹⁹⁹ The corporate chain of ownership at the time of majority share acquisition was, according to Claimants, four intermediary companies in the case of BC and three intermediary companies in the case of KC. After reorganization BC and KC were owned through a chain of "no more than eight intermediaries".²⁰⁰ Claimants argue that nothing in the BIT or in the ICSID Convention limits the protection of international investment law to legal rather than beneficial ownership. Claimants further assert that, in the awards of other ICSID tribunals, beneficial ownership has been given at least the same extent of protection as legal ownership.²⁰¹
317. Although the BIT does not offer specific protection for what Respondent terms "indirect ownership" nor does it exclude such "indirect ownership" from the definitions of either "investors" or "investments". Furthermore, it is clear from the above analysis that the definitions of those terms in Article 1 of the BIT may be read to include such ownership.

¹⁹⁵ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 186. See also **RL-0020**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated 14 January 2004 ("**Enron**").

¹⁹⁶ Respondent's Reply on Preliminary Objections, ¶ 270.

¹⁹⁷ Respondent's Reply on Preliminary Objections, ¶ 340. See also **CL-0343**, *Reza Nemazee v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 575-4-3 dated 10 December 1996, ¶ 55.

¹⁹⁸ Claimants' Counter-Memorial on Preliminary Objections, ¶¶ 53-58.

¹⁹⁹ Claimants' Rejoinder on Preliminary Objections, ¶ 71.

²⁰⁰ Claimants' Rejoinder on Preliminary Objections, ¶ 71 (emphasis in original).

²⁰¹ **CL-0411**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability dated 2 September 2009, ¶¶ 144-145; **RL-0117**, *James M. Saghi, Michael R. Saghi and Allan J. Saghi v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 544-298-2 dated 22 January 1993.

318. Moreover, although certain other ICSID tribunals have held that there may be circumstances under which an investor is too remote from the investment in question, it is more often the case that such tribunals find that their jurisdiction is not lost on this ground. Respondent itself notes that several of the awards it cites are ones in which, notwithstanding their comments about remoteness, the tribunals in question held that there was a protected investment.²⁰² Thus, statements of the ICSID tribunals in *Enron v. Argentina*, *Société Générale v. Dominican Republic*, and *African Holding Co. v. Democratic Republic of Congo* are of limited application on this point.²⁰³
319. The Tribunal notes that Respondent also cites *Standard Chartered Bank*, and *Alapli Elektrik*, as regards “remoteness”. However, neither *Standard Chartered Bank* nor *Alapli Elektrik* are analogous to the situation in the current dispute, for the reasons set out at paragraph 313 above, and therefore the cases are not applicable for the disposition of this issue.
320. The Tribunal concludes that there is no basis – in the BIT or in the authorities to which the Parties make reference – to read a “remoteness” test into the definition of “investor”. Indeed, Respondent does not offer any specificity as to what such a requirement would entail. The Tribunal does not accept that Claimants were unaware of their investment. The Tribunal also does not consider Claimants’ complex corporate structure to be sufficient, of itself, to render the BIT not applicable. Furthermore, the Tribunal does not consider the fact that certain aspects of the ownership holding structure entail a beneficial, rather than a legal, ownership, to be material to the jurisdictional issue.
321. The Tribunal therefore rejects the objection to its jurisdiction on this ground.
322. In conclusion on these points, the Tribunal finds that Respondent has not substantiated its objections that Claimants are not “investors” in accordance with the terms of the BIT and the ICSID Convention. The Tribunal next turns to Respondent’s objections that Claimants did not make an “investment”.

²⁰² **RL-0020**, *Enron*; **RL-0033**, *Noble Energy Inc. and MachalaPower Cia. Ltda. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction dated 5 March 2008; **RL-0046**, *Société Générale in respect of DR Energy Holdings Ltd. and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction dated 19 September 2008 (“*Société Générale*”); **RL-0010**, *African Holding Co. of America Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of Congo*, ICSID Case No. ARB/05/21, Award on Objections and Jurisdiction and Admissibility dated 29 July 2008 (“*African Holding*”).

²⁰³ **RL-0020**, *Enron*; **RL-0046**, *Société Générale*; **RL-0010**, *African Holding*.

D. Objections that Claimants did not make an “Investment”

323. The second category of objections that Respondent raises relate to whether Claimants can be said to have made an “investment” under the terms of the BIT. Respondent argues that “numerous tribunals have recognized that a protected “investment” under the ICSID Convention must involve substantial contribution and risk”.²⁰⁴
324. Claimants argue in response that Respondent is reading “extra-textual jurisdictional criteria” into the BIT.²⁰⁵ Claimants argue that such criteria are “inapplicable” but are, nevertheless, met by Claimants, and state that they “clearly made a contribution of value in Uzbekistan and assumed a long-term, significant risk in doing so”.²⁰⁶
325. At the outset, the Tribunal disagrees with Respondent’s general argument that there is a restrictive test to be applied to the definition of “investments” in the BIT. In the Tribunal’s view, this argument is without any basis.
326. First, to the extent that it is argued that obligations on states should be interpreted restrictively, the VCLT eschews such canons of interpretation in favour of the general rule of interpretation set forth in Article 31 of the VCLT.
327. Second, the BIT itself contains no such restrictions when read in accordance with the VCLT. The definition of “investments” is broad, as is not uncommon in such treaties, so as to encompass a wide range of business and financial activities in Host States.
328. Third, Respondent’s reference to other awards of other ICSID tribunals are inapposite. Respondent itself notes that “[t]erms that are defined in the BIT must be accorded their specific meaning under the BIT [in this dispute]”.²⁰⁷ The Tribunal, nevertheless, addresses the specific awards cited by Respondent in the sections that follow.
329. Notwithstanding its more specific consideration in the sections that follow, as a preliminary finding, the Tribunal holds that there is no basis in the text of the BIT to read a restrictive definition of “investments” into the Treaty, nor is it persuaded by the citation of other awards to do so.
330. In what follows the Tribunal considers each of Respondent’s specific objections to Claimants’ investments in Uzbekistan to assess whether they cause Claimants to lose the

²⁰⁴ Respondent Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 173, 185. *See also* ¶¶ 193-197 at which Respondent relies upon *KT Asia* and *Quiborax*. **RL-0027**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award dated 17 October 2013; **RL-0042**, *Quiborax S.A., Non Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction dated 27 September 2012 (“*Quiborax*”).

²⁰⁵ Claimants’ Rejoinder on Preliminary Objections, ¶ 57.

²⁰⁶ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 21; ¶¶ 34-37.

²⁰⁷ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 175.

protection of the BIT: (1) that the investment did not involve a capital contribution; (2) that the investment was short term in nature; and (3) that the investment was made without the awareness of the Uzbek Government.

(1) **The Investment Did Not Involve a Capital Contribution**

331. Respondent argues that Claimants did not make a contribution of capital or equity in the acquisition of BC and KC and therefore that there is no investment *per se*.²⁰⁸ In particular, Respondent argues that Claimants used loans from Kazkommertsbank Joint Stock Company (“**KKB**”) – rather than their own capital or equity – to fund their acquisitions and that such use deprives those acquisitions of the protection of the BIT.²⁰⁹
332. Respondent argues that neither Claimants’ majority share acquisition vehicles (Kaden and Nabolena), nor Claimants themselves, contributed capital or equity to obtain the KKB loans used to purchase the BC and KC shares.²¹⁰ According to Respondent, these loans were unusual for KKB and were also under-collateralized. Respondent further alleges that there is no evidence that Claimants were obliged to repay these loans.²¹¹
333. Claimants argue that it is entirely proper to rely upon credit facilities to make an investment. Claimants submit that they bear the risk for the repayment of the KKB loans.²¹² Claimants highlight that the 2006 KKB loans involved a guarantee by the Claimants-controlled entity Caspian Cement LLP.²¹³ Claimants also state that interest continue to accrue on these loans, interest that Claimants seek in damages in this arbitration.
334. It is undisputed that the investor must make an “investment”. The Tribunal, however, holds that there is nothing in the BIT, nor in the ICSID Convention, to provide any foundation for Respondent’s argument that investment arrangements dependent on credit facilities for their financing are not “investments”.
335. Indeed, this argument is manifestly unsustainable. It is not at all unusual for investments to entail the use of credit facilities by investors. As the tribunal in *Sistem v. Kyrgyz Republic* observed “it is entirely normal for investment projects to be financed by borrowed funds”.²¹⁴ Therefore, the Tribunal holds that Claimants’ reliance on a line of

²⁰⁸ Respondent’s Reply on Preliminary Objections, ¶¶ 291-316.

²⁰⁹ Respondent’s Reply on Preliminary Objections, ¶ 292.

²¹⁰ Respondent’s Reply on Preliminary Objections, ¶¶ 291-301.

²¹¹ Respondent’s Reply on Preliminary Objections, ¶¶ 291-301.

²¹² Claimants’ Counter-Memorial on Preliminary Objections, ¶¶ 34-37; Claimants’ Rejoinder on Preliminary Objections, ¶¶ 101-123.

²¹³ Claimants’ Rejoinder on Preliminary Objections, ¶ 104.

²¹⁴ **CL-0196**, *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB (AF)/06/1, Award dated 9 September 2009 (“*Sistem*”), ¶ 35; *See also* **CL-0419**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award dated 5 June 2012, ¶ 355; **CL-0420**, *Saipem S.p.A. v.*

credit from KKB does not vitiate Claimants' status as "investors" nor does it make the "investment" one that falls outside the protection of the BIT.

336. As to Respondent's allegations with respect to the financing arrangement in this instance, the Tribunal finds on the basis of the evidence before it that Respondent's contention that the loans were under-collateralized is not supported, given the guarantee provided by Caspian Cement.
337. Furthermore, on the basis of the available evidence, Respondent's contention that Claimants may not be required to repay the loans is not supported. Respondent argues that Claimants used proceeds from the 2008 KKB loans for the UCG non-dividend distributions to its shareholders, rather than to repay the 2006 KKB loans.²¹⁵ The Tribunal notes the letter from KKB, dated 8 May 2015, that confirms that the 2006 loans were repaid in full.²¹⁶
338. Finally, the Tribunal does not accept Respondent's contention that the 2006 and 2008 KKB loans were related-party transactions. Respondent argues that the KKB loans were a related-party transaction designed to profit Claimants while burdening the various subsidiaries with debt and consequently defrauding the Kazakh Sovereign Wealth Fund.²¹⁷ Claimants deny Respondent's allegations,²¹⁸ and assert that there is no evidence of "relatedness" between KKB and their companies. In particular, Claimants maintain that they had no relation with KKB at the time the loans were issued in 2006 and 2008. Claimants state that none of them held any key managerial positions at KKB when they held managerial positions at Visor International Solutions.²¹⁹ The Tribunal notes Claimants' explanation of the relationship between KKB and Claimants. On the basis of the arguments and evidence available to it, the Tribunal holds that Respondent has failed to establish the impropriety that it alleges.
339. The Tribunal therefore denies the objection to its jurisdiction on this ground.

(2) The Investment was Short Term

340. Respondent argues that, insofar as Claimants had business interests in BC and KC, these do not constitute a protected investment as the interests were anticipated to be short-

People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures dated 21 March 2007, ¶ 106.

²¹⁵ Respondent's Reply on Preliminary Objections, ¶¶ 302-307.

²¹⁶ C-0527, Letter from KKB to UCG dated 8 May 2015. *See also* Nurmakhanova, ¶ 79.

²¹⁷ Respondent's Reply on Preliminary Objections, ¶¶ 308-316.

²¹⁸ Claimants' Rejoinder on Preliminary Objections, ¶¶ 103-104.

²¹⁹ Claimants' Rejoinder on Preliminary Objections, ¶¶ 105-106.

term.²²⁰ In particular, Respondent draws the Tribunal’s attention to Claimants’ statement that their intention was to consolidate and sell their interests in BC and KC, either through an IPO of the holding company, UGC, or direct to a private investor.²²¹

341. Claimants do not dispute their intention to sell their interests,²²² but argue that such an intention does not remove their investment from the protection of the BIT.²²³ They note that their intention was to invest in the BC and KC plants and then, at an opportune time in terms of market conditions, to sell on their interests.
342. The Tribunal holds that there is nothing in the BIT, nor in the ICSID Convention, to provide a foundation for Respondent’s argument that investments made with some measure of intent to dispose, or possibly to dispose, of them in the short, rather than long, term do not gain the protection of the BIT as “investments”.
343. The Tribunal agrees that there might be circumstances in which it would be appropriate for an “investment” to lose the protection of a BIT on the grounds that it was “short term”. Those circumstances might include, for example, where investors in a stock exchange briefly hold shares in an undertaking, in the midst of buying and selling.
344. However, such circumstances do not obtain in this instance. Claimants made their initial investment through the acquisition of a majority of shares in BC and KC and then made further investments – for example to develop the facilities at the plant. It is not salient that Claimants did so with the ultimate intention to either sell their interest through an IPO or to a private investor. Indeed, this course of action is by no means unusual and not inconsistent with the objects and purpose of international investment law.
345. The Tribunal therefore denies the objection to its jurisdiction on this ground.

(3) **The Investment was Made without the Awareness of the Uzbek Government**

346. Respondent objects that the investment that Claimants purport to have made was done, if it was done at all, without the awareness of the Uzbek Government.²²⁴ In particular, Respondent argues that there is no evidence that the Uzbek Government had any involvement with Claimants as regards the investment or that the Uzbek Government was

²²⁰ Respondent’s Opening Statement, Hearing Tr., Day 1, 26:2-8.

²²¹ Respondent’s Opening Statement, Hearing Tr., Day 1, 26:2-8.

²²² Kim II, ¶ 17; Kim III, ¶ 6; *see also* Kim I, ¶ 8.

²²³ Claimants’ Post-Hearing Submission, ¶ 17.

²²⁴ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶ 34. Respondent’s Reply on Preliminary Objections, ¶¶ 329-332.

aware that Claimants were indirect owners of BC and KC.²²⁵ Respondent compares the situation in this case with that in the awards of other ICSID tribunals to argue that Claimants' investment does not attract the protection of the BIT.²²⁶

347. Claimants respond that there is no requirement of Host State awareness (an "awareness requirement") to be found in the BIT or in the ICSID Convention.²²⁷ Claimants state that in the cases identified by Respondent, the reference to Government knowledge of, or co-operation with, an investor was not a determinative factor in the tribunals' decisions.²²⁸ Claimants also argue that, in any event, it is not plausible that Respondent was unaware of Claimants' investment given the scale of Claimants' investment in one of Uzbekistan's key industries, and given the fact that foreign investment companies such as KC and BC must register with the Department of Justice in Tashkent.²²⁹
348. The Tribunal does not find any support in the BIT or in the ICSID Convention for the argument that there exists an "awareness requirement" for an investment to benefit from the protection of the BIT. Rather, the BIT constitutes consent to arbitration for "investors" who make "investments" in accordance with the general terms of the BIT. Specific co-operation with, or awareness of, investors activity by the Host State government is not necessary.
349. As regards Respondents' reference to the awards of other tribunals, in particular *Enron v. Argentina*, *Société Générale v. Dominican Republic*, and *African Holding v. Democratic Republic of Congo*, the Tribunal notes that those awards were made under the terms of different BITs, and that the factual and legal backgrounds to the disputes were critically different from those at issue in this dispute.
350. In *Enron*, the fact of the claimants' participation in a scheme run by the host state government was sufficient to rebut an argument by that host state that the state did not consent to arbitration with the claimants.²³⁰ In *Enron* there was a specific requirement for investors to establish a particular investment vehicle to participate in the government scheme. In this dispute, in contrast, there is no applicable Host State Government scheme in which Claimants were expected to participate. Rather, Claimants' investment was made through the acquisition of shares from another private party. Therefore, the fact of the existence of a host state scheme in *Enron*, and the use of that scheme by the claimants in that case to demonstrate the host state's consent, does not, of itself establish a general

²²⁵ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 187-189; **RL-0020**, *Enron*, ¶ 52; **RL-0046**, *Société Générale*, ¶ 52; **RL-0010**, *African Holding*, ¶¶ 100-101; Respondent's Reply on Preliminary Objections, ¶¶ 329-332.

²²⁶ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 187-188; ¶¶ 199-201.

²²⁷ Claimants' Counter-Memorial on Preliminary Objections, ¶ 59.

²²⁸ Claimants' Rejoinder on Preliminary Objection, ¶ 73.

²²⁹ Claimants' Rejoinder on Preliminary Objections, ¶ 74.

²³⁰ **RL-0020**, *Enron*.

“awareness requirement” in international investment law. The situation in *Enron* is not analogous to that in the current proceedings.

351. In *Société Generale*, the tribunal refers to the *Enron* award. However, the tribunal also notes that in *Enron* there was a specific requirement for investors to establish a particular investment vehicle to participate in the government scheme. Thus, the tribunal in *Société Generale*, if anything, concurs with the analysis of *Enron* in paragraph 350 above, insofar as it establishes only that where there is a requirement to engage with a host state scheme, such engagement may constitute evidence of consent to arbitration on the part of the respondent State.²³¹ The citation of the award in *Société Générale* is therefore also unhelpful to Respondent’s case.
352. In *African Holding*, the tribunal’s citation of the Host State’s knowledge of the investor was part of a general discussion on the investor’s relationship with the investment at issue in the dispute and was not determinative of jurisdiction.²³² The Tribunal finds that it offers no support for Respondent’s argument that it read an “awareness requirement” into the BIT in this dispute.
353. The examination of Host State awareness in the specific circumstances under consideration by these other tribunals does not merit the conclusion that there is a general rule of international investment law that stipulates an “awareness requirement” to be read into a particular BIT or the ICSID Convention itself.
354. Indeed, the Tribunal considers this argument by Respondent to be inconsistent with the objects and purpose of international investment law. The promotion of international investment does not require a Host State to be aware of each and every investment made in its territory. Rather, by its agreement of an investment treaty, the Host State makes the offer of protection to any international investor whose investment falls within the terms of the Treaty. In the absence of specific language to require it in a particular BIT, there is no foundation for the claim that the offer of protection is implicitly restricted by reference to an “awareness requirement”.
355. In the absence of such an “awareness requirement” for an investment to attract protection under the BIT or the ICSID Convention, the Tribunal does not need to conclude on whether or not the Uzbek state was aware of Claimants’ investment. However, the Tribunal notes the arguments and evidence that Claimants adduce to indicate that there is a high likelihood that the Uzbek state was aware of the investment particularly given the importance of the cement industry to the Uzbek economy.²³³

²³¹ **RL-0046**, *Société Générale*.

²³² **RL-0010**, *African Holding*.

²³³ Claimants’ Rejoinder on Preliminary Objections, ¶ 74.

356. The Tribunal therefore rejects the objection to its jurisdiction on this ground.

E. The Tribunal’s Conclusion on the Second Objection

357. For the reasons set out above, and subject to the resolution of the third and fourth jurisdictional objections below, the Tribunal finds that Claimants are “investors” that made an “investment” in accordance with the terms of the ICSID Convention and the BIT and therefore dismisses Respondent’s second objection.

IX. THE THIRD JURISDICTIONAL OBJECTION – LEGALITY OF THE INVESTMENT

A. Introduction

358. Respondent’s third objection is that Claimants’ investment was not made in compliance with Uzbek legislation and that therefore such investment does not attract protection under the BIT. Respondent and Claimants have filed extensive pleadings regarding the third objection. The third objection gained specificity through the course of the arbitration, and the contentions of the Parties are assembled with that evolution in mind.

359. Respondent argues that it has consented under the BIT to arbitrate disputes arising out of investments that were made in compliance with its laws, and conversely that it did not consent to arbitrate disputes arising out of unlawful investments. Claimants in response observe that “[b]oth Parties agree that the relevant BIT includes an ‘in accordance with the law’ or ‘legality’ provision,” but disagree sharply on the scope [of the legality requirement] and whether the provision was violated”.²³⁴

360. Respondent alleges that Claimants’ investment is not in compliance with numerous specific code provisions, laws, resolutions, orders or rules. Consequently, Respondent contends that the Tribunal lacks jurisdiction, or that Claimants’ claims are inadmissible under the BIT, the ICSID Convention and principles of international public policy.²³⁵ Claimants counter that Respondent’s objection is based on “erroneous factual assumptions” (including assumptions supported only by what Claimants allege to be demonstrably false witness statements) and on “a purposeful misreading of Uzbek law (including the addition of legal requirements that *did not even exist* during the time of Claimants’ investment)”.²³⁶ Claimants argue that they “have not violated *any* Uzbek Law, let alone a fundamental legal principle of Uzbek Law, in the making of their investments [...] [n]or have Claimants committed any illegality under international law or international

²³⁴ Claimants’ Rejoinder on Preliminary Objections, ¶ 185.

²³⁵ Respondent’s Memorial on Preliminary Objections, ¶ 6.

²³⁶ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 5 (emphasis in original).

public policy such that this Tribunal would lack jurisdiction over Claimants' claims for breach of the Treaty".²³⁷

361. Claimants further submit that as Respondent almost certainly knew the particular facts said to be at the root of the illegality argument, namely that the price paid at the TSE was lower than fair market value, and that Respondent did nothing to "cure this so-called illegality", that the Respondent as a consequence should be estopped from pursuing this objection.²³⁸
362. In the following sections the Tribunal first ascertains the scope of the legality requirement applicable in this proceeding and second applies that requirement to each of the illegalities alleged by Respondent. For each section, the views of the Parties are summarized prior to the Tribunal setting forth its analysis and holdings.

B. The Scope of the Legality Requirement

(1) Article 12 of the BIT: The Source of the Legality Requirement

363. Respondent submits that it has limited its consent to arbitrate through a legality requirement in Articles 12, 1(3), 2(2) and 11 of the Kazakhstan-Uzbekistan BIT.²³⁹ According to Respondent, prior ICSID tribunals confronted with similar legality provisions have held that disputes arising out of unlawful investments impose a jurisdictional bar and are beyond the scope of the parties' consent.²⁴⁰ Even where no such express legality clause is found in the treaty, Respondent asserts that ICSID tribunals have found that such a requirement is implicit.²⁴¹ Respondent highlights that "Claimants agree that the [BIT] contains an 'in accordance-with-law' or 'legality provision'".²⁴²

²³⁷ Claimants' Rejoinder on Preliminary Objections, ¶ 186.

²³⁸ Claimants' Rejoinder on Preliminary Objections, ¶¶ 436-437.

²³⁹ Respondent's Memorial on Preliminary Objections, ¶¶ 204-205.

²⁴⁰ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 206-207 (citing **RL-0012**, *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award dated 19 May 2010 ("**Anderson**"); **RL-0022**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award dated 14 July 2010; **RL-0026**, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award dated 2 August 2006; **RL-0030**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 October 2013 ("**Metal-Tech**")).

²⁴¹ Respondent's Memorial on Preliminary Objections, ¶¶ 209-210 (citing **RL-0039**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award dated 27 August 2008; **RL-0038**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 April 2009 ("**Phoenix Action**"); **RL-0044**, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability dated 6 June 2012; **RL-0025**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010 ("**Hamester**").

²⁴² Respondent's Reply on Preliminary Objections, ¶ 185 (quoting Claimants' Counter-Memorial on Preliminary Objections, ¶ 61 n. 164).

364. Although the Parties agree that the BIT contains a legality requirement, the precise source and language of that requirement must be identified so that the Tribunal may ascertain its scope and content. Respondent argues that its objection finds its source in four clauses of the BIT: Articles 12, 1(3), 2(2), and 11.²⁴³ The Tribunal notes that Respondent emphasises Article 12 as the basis of the requirement with the references in other cited articles to the laws of the Host State as reinforcing the existence of such a requirement.

365. Article 12 of the BIT is entitled “Application of the Agreement” and provides:

This Agreement shall apply to investments within the territory of one Contracting Party’s State, *made in compliance with its legislation* by investors from the other Contracting Party’s State, regardless of whether they were made before or after the entry into force of this Agreement (emphasis added).

366. The language of Article 12 limits the “application” of the BIT to investments made in compliance with the legislation of Uzbekistan. The Tribunal observes that other tribunals have found similar language to establish a legality requirement when such language is present in the relevant BIT as a part of the definition of “investment”.²⁴⁴ The Tribunal’s conclusion in the present case is all the stronger where the relevant language is found in a specific clause delineating the scope of application of the BIT. Such language in a BIT is sometimes referred to as an “explicit legality requirement”.²⁴⁵ The Tribunal will refer to the requirement simply as the “legality requirement”.

367. As to the other articles of the BIT referenced by Respondent, the Tribunal does not consider that the presence of similar language elsewhere in the BIT imports a legality requirement broader or more demanding than Article 12. Indeed, the other articles relied upon do not appear to bear on the legality requirement at all.

368. As regards Articles 2(2) and 11 of the BIT, these do not pertain to the scope of the Tribunal’s jurisdiction. Article 2(2) provides: “Within the scope of the laws of its State, each Contracting Party will support various forms of mutual investment and ensure their protection within the territory of its State and will not infringe upon these investments by arbitrary control measures, in respect of their operation, use, and placement”. The reference to the “scope of the laws of its State” in this Article is a limitation on the extent of the Contracting Parties’ obligations to support and protect investments. It does not pertain to the definition of such investments or the application of the BIT to such investments. Article 11 states: “Unless otherwise provided in this Agreement, all

²⁴³ Respondent’s Memorial on Preliminary Objections, ¶¶ 204-205.

²⁴⁴ See, e.g., **RL-0012**, *Anderson* and the interpretation of the BIT between Costa Rica and Canada at ¶¶ 51-61. See further **CL-0350**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No ARB/03/25, Award dated 16 August 2007 (“*Fraport*”).

²⁴⁵ See, e.g., **CL-0350**, *Fraport*, ¶ 332.

investments made in accordance with this Agreement shall be governed by the laws in force within the territory of the Contracting Party's State, wherein said investments were made". The reference to "governed by the laws in force..." in this Article relates to the laws applicable within a territory in which investments are made. It does not pertain to the definition of such investments or the application of the BIT to such investments.

369. As to Article 1(3), this also does not pertain to the Tribunal's jurisdiction. The definition of "investment" is found in Article 1(2): an investment is "any kind of asset and the rights thereto, as well as intellectual property rights, invested by investors of one Contracting Party within the territory of the other Contracting Party's State for profit (income) and includes, in particular, but not exclusively [...]". In some BITs, the presence of a "made in accordance with law" requirement is argued to flow from the definition of investment. However, Article 1(2) of the BIT here does not contain any statement as to the legality of such investments or any obligation that such investments be made in accordance with law. Rather, Respondent places reliance on Article 1(3), which states: "Changing the form of investments, made in accordance with the law of the Contracting Party's State at the place of investment, does not change its qualification as an investment". Article 1(3) can be read in one of two ways: (i) "Changing the form of investments, [such investments having been] made in accordance with the law [...]" or (ii) "changing the form of investments, [such changes having been] made in accordance with the law [...]". Of these two possible readings, the second is the better interpretation in the Tribunal's opinion. Article 1(2) defines "investment". Article 1(3) is a special rule applicable to changes to the form of investment. It would be incorrect to read into the general requirement as to the definition of "investment" the special rule that relates to the protection of investments that may change form. Article 1(3) in the Tribunal's opinion therefore does not support the claim that investments, in general, must be "in accordance with law".
370. Respondent also bases its objection on an implicit legality requirement in international law, citing to the awards of other ICSID tribunals.²⁴⁶ The Tribunal notes that references as to an "implicit legality requirement" have been made even where there is an explicit legality requirement in the text of the BIT.²⁴⁷ However, following the general principle of applying a specific requirement over a general one, the presence of an explicit legality requirement – such as that in Article 12 – defines the jurisdictional impact of a legality requirement thereby displacing any implicit legality requirement as regards jurisdictional questions. Similar reasoning has been adopted by other ICSID tribunals.²⁴⁸ Moreover, given the Tribunal's finding that an explicit legality requirement is present in Article 12, the Tribunal need not rule on the existence of a parallel legality requirement particularly

²⁴⁶ Respondent Reply on Preliminary Objections, ¶¶ 184-186.

²⁴⁷ See, e.g., **CL-0350**, *Fraport*, ¶ 332; **RL-0038**, *Phoenix Action*, n. 231.

²⁴⁸ See, e.g., **RL-0025**, *Hamester*, ¶¶ 123-128; **CL-0350**, *Fraport*, ¶¶ 344-345.

as explicit legality requirement here is not limited by the text in any unusual way and, indeed, neither Party has so argued.

371. Before interpreting the scope of the requirement in Article 12, the Tribunal observes that the Parties in their submissions have utilized various terms when referring to the legality requirement. Although the English text of Article 12 uses the phrase “made in compliance with legislation,” both Parties in their submissions at times equate this phrase with “made in accordance with law”.²⁴⁹ Moreover, both Parties at various points equate an investment not “made in accordance with law” with an “illegal investment”. As a matter of interpretation, the Tribunal adopts the apparent view of the Parties that the phrases “made in compliance with legislation” and “made in accordance with law” involve equivalent obligations. Likewise, the Tribunal views an investment that is made not in accordance with, or not in compliance with, the law to be an investment that is illegal under Uzbekistan law. Thus, in its analysis in this Award, the Tribunal’s use of the phrases “legality requirement” or “made in accordance with law” should be read as equivalent to the “made in compliance with legislation” requirement in Article 12 of the BIT.
372. As far as the scope of the legality requirement is concerned, the Tribunal finds that there are three dimensions to be considered: temporal, formal, and substantive.

(2) **“Made”: The Temporal Scope and Causative Dimension of the Legality Requirement.**

373. Claimants assert that “tribunals have found that a violation of law depriving a claimant of treaty protection must also be directly linked to the claimant’s ability to make the investment”.²⁵⁰ Claimants argue that Respondent admits that an “illegality defense to jurisdiction is concerned only with violations of law [...] occurring ‘at the *initiation* of the investment’”, especially where the treaty (like the BIT) “requires that investments be ‘made’ in accordance with host State law”.²⁵¹
374. The Tribunal finds that the legality requirement has a temporal dimension. The word “made”, both in terms of its ordinary meaning and its use in the past tense, indicates that the test applies at the time the investment is established. It is not a requirement subsequent to the making of the investment. Indeed, if this were not so, the second use of the word “made” in Article 12 of the BIT would make no sense:

This Agreement shall apply to investments within the territory of
one Contracting Party’s State, made in compliance with its

²⁴⁹ Although not argued by the Parties, the Tribunal observes there is support for the equation of legislation with law in the original Russian text. It appears that the English word “law” in Article 1(3) and the word “legislation” in Article 12 are both translations of the same Russian word “законодательство”.

²⁵⁰ Claimants’ Post-Hearing Brief, ¶ 38.

²⁵¹ Claimants’ Post-Hearing Brief, ¶ 39 (citing **RL-0025**, *Hamester*).

legislation by investors from the other Contracting Party's State, regardless of whether they were *made* before or after the entry into force of this Agreement (emphasis added).

375. Other tribunals have reached similar conclusions where the word “made” was the operative term in the particular clause. In *Quiborax v. Bolivia*, for example, the tribunal held that the word “made” imposed a temporal restriction on the legality requirement in the BIT relevant to that proceeding.²⁵² Similarly, in *Hamester v. Ghana*, the tribunal held that the legality requirement in that BIT, in particular the term “made”, conditions the scope of application of the BIT “only by reference to legality at the initiation of the investment”.²⁵³ The tribunal continued: “the legality of the creation of the investment is a jurisdictional issue; the legality of the investor’s conduct during the life of the investment is a merits issue”.²⁵⁴ Likewise, tribunals facing arguably analogous terminology have found a temporal limitation. In the 2013 award in *Metal-Tech v. Uzbekistan*, for example, the tribunal read the word “implemented” as imposing a temporal restriction on the legality requirement in the BIT relevant to that proceeding.²⁵⁵
376. Further, the use of the term “made” indicates that an additional consideration in the examination of a violation of the law is whether the illegal action was related to Claimants’ making of the investment. If a violation of the law is not related to Claimants’ decision to make the investment, then such violation is not an action within the scope of the legality requirement.
377. The Tribunal therefore holds that the scope of application of the BIT is limited by a legality requirement that an investment must be “in compliance with [Host State] legislation” at the time that the investment is made. This limitation does not discount the possibility that there may be illegal action by Claimants at a later date or an illegal action unrelated to the making of the investment, but any such later illegality would be a matter for the Tribunal to consider at the merits stage of these proceedings.

²⁵² **RL-0042**, *Quiborax*, ¶ 266. The *Quiborax* tribunal held that the BIT's legality requirement was limited to the time of the establishment of the investment and it did not extend to the subsequent performance. Indeed, the treaty refers to the legality requirement in the past tense by using the word investments “made” in accordance with the laws and regulations of the host state (in Spanish, “haya efectuado”).

²⁵³ **RL-0025**, *Hamester*, ¶ 127.

²⁵⁴ **RL-0025**, *Hamester*, ¶ 127. The tribunal also concluded that this specific language displaced at the jurisdictional phase the reach of what is described in this award as the implicit legality requirement.

²⁵⁵ **RL-0030**, *Metal-Tech*, ¶¶ 185-193. In this proceeding, the tribunal’s jurisdiction to arbitrate investment disputes pursuant to Article 8 of the treaty hinged upon the definition of investment. Article 1(1) of the treaty defined investments as “[...] any kind of assets, implemented in accordance with the laws and regulations” of the host state. Uzbekistan had urged arbitrators to read “implemented” in a broad temporal fashion so as to mean established and operated. However, the tribunal elected to read the term as akin to “established” only, thus consonant with another term (“invested”) that is commonly seen in other bilateral investment treaties. Indeed, the arbitrators took comfort from the wider “context”, and in particular the fact that the term “implemented” was used at another juncture in the treaty – the transfers provision – to denote the particular day that an investment was made.

(3) **“Legislation”**: The Formal Scope of the Legality Requirement.

378. The Tribunal finds that the legality requirement has a formal dimension that turns on the meaning given to the word “legislation”. As noted at paragraph 371 above, the Parties use the phrases “in accordance with law” and “in compliance with legislation” interchangeably. The Tribunal agrees that the term “law” and the term “legislation” indicate largely overlapping descriptions of normative legal acts. It could be argued that the term “legislation” is a narrower form of “law” pointing only to statutory law but not, for example, to higher laws such as a constitution. The Tribunal concludes that the better reading is that the legality requirement found in Article 12 of the BIT requires that the investment be made in compliance with the legislation of the Host State, where the term “legislation” encompasses those normative actions regarded as “law” by the Host State’s legal system.
379. Professor William Butler, Claimant’s Expert on Uzbekistan Law and a Senior Jurisconsult by examination in the Republic of Uzbekistan, in his Second Expert Report provides an opinion as to the scope of the term “laws” within the Uzbekistan legal system. He opines:

[...] Uzbekistan legislation and legal doctrine recognizes a hierarchy of sources of law and is among the few countries in the world to have reduced that hierarchy to codified form. The codification takes the form of the Law of the Republic Uzbekistan on Normative-Legal Acts, adopted 14 December 2000, as amended to December 2014 [...] The Law on Normative-Legal Acts determines, *inter alia*, precisely what a normative-legal act is in Uzbekistan; namely, an “official document” adopted in accordance with the Law on Normative-Legal Acts that establishes, changes, or repeals legal norms in their capacity as generally-binding State prescriptions. It also sets forth the requirements for the registration and obligatory publication of the normative-legal acts. [...] The legal system of Uzbekistan is also structured on the basis that violations of law, whether criminal, administrative, labour, civil, or otherwise, may be sanctioned only by the relevant branch legislation and within the limits established by it. Non-normative legal acts may not create general normative consequences contrary to general legislation. [...] The types of normative-legal acts are set out in hierarchical sequence from top to bottom in Article 5 of the Law on Normative-Legal Acts:

- Constitution of the Republic Uzbekistan;
- laws of the Republic Uzbekistan;
- decrees of chambers of the Oliy Mazhlis of the Republic Uzbekistan (as amended by Law of 3 December 2004, No. 714-II);

- edicts, decrees, and regulations of the President of the Republic Uzbekistan;
- decrees (also called resolutions) of the Cabinet of Ministers of the Republic Uzbekistan;
- orders and decrees of ministries, State committees, and departments.²⁵⁶

380. The Tribunal is persuaded that the term “legislation” for the purposes of Article 12 of the BIT encompasses, and is limited to, the normative-legal acts set out in Article 5 of the Law on Normative-Legal Acts. Conduct not in compliance with a normative legal act other than those normative-legal acts set out in Article 5 of the Law on Normative-Legal Acts does not constitute conduct addressed by the legality requirement.

(4) **“In Compliance with Legislation”: The Substantive Content and Scope of the Legality Requirement**

a. **The Issue of the Substantive Scope of the Legality Requirement**

381. The third dimension to the scope of the legality requirement is substantive. Both Parties accept that not all actions not “in compliance with legislation” will render an investment outside of the protections of the BIT. The Parties disagree, however, as to how the Tribunal is to identify those acts of noncompliance to which the legality requirement applies. That is, by what test is the Tribunal to ascertain what is a sufficiently serious act of noncompliance. Articulation of the substantive limits to the illegality requirement requires the interpretation of Article 12 in accordance with the rules set forth in the VCLT.

b. **Contentions of the Parties**

382. Respondent does not so much define the test that the Tribunal must apply as it asserts that the Uzbek Law violations by Claimants are not trivial but rather are of a manifestly serious character. Respondent asserts, for example, that Claimants’ “false disclosures were deliberate and material”, and they caused significant harm to the State, the TSE, the clearing house, the brokers and the minority shareholders while providing a significant benefit to Claimants.²⁵⁷ Respondent does, however, disagree with several specific limitations on the legality requirement advanced by Claimants.²⁵⁸

383. Claimants contend that prior tribunals dealing with “in accordance with law” provisions have found that “only *fundamental* violations of law that are necessary to the making of

²⁵⁶ Butler II, ¶¶ 2-5.

²⁵⁷ Respondent’s Reply on Preliminary Objections, ¶ 211.

²⁵⁸ Respondent’s Reply on Preliminary Objections, ¶¶ 185 *et seq.* Respondent disagrees, for example, that there is a good faith exception to the legality requirement (¶¶ 185-207).

an illegal investment will deprive an investor-State tribunal of jurisdiction”.²⁵⁹ According to Claimants, “[o]nly where the investment is not capable of being made under Uzbek Law – where it constitutes a violation of a ‘fundamental rule of law’ or ‘fundamental legal principles’ rendering the transaction void *ab initio* or illegal *per se* – would it fall outside the scope of protected investments”.²⁶⁰ Although “tribunals have differed in their specific definition of ‘fundamental,’ two factors have been a constant”: (1) “whether [the violation] renders the investment void *ab initio* or merely voidable”; and (2) “whether there is a specified cure for the violation in host State law”.²⁶¹

c. The Tribunal’s Analysis of the Substantive Scope of the Legality Requirement

384. The legality requirement reflects a condition of great importance to the Host State, the international community and to investors contemplating a major undertaking. Numerous tribunals have addressed the legality requirement present in other BITs and forged, if not a test of the substantive scope of the legality requirement, a series of statements that have come to be employed by ICSID tribunals. The dominant tendency within these awards is (1) to state that the substantive scope of the legality requirement is limited to violations of fundamental laws of the Host State and (2) to state a variety of rule-like statements whereby the first proposition may be applied.
385. The Tribunal does not find the analysis thus far satisfactory. The rule-like statements in other awards are in several instances constructed without reference either to the text of the treaty in question or to underlying principles. A characteristic of rules is that they may include more situations than appropriate (over-inclusive) and simultaneously not include situations that should be captured (under-inclusive). Previous tribunals through rule-like statements, as a practical matter, have approximated what this Tribunal regards as the core of those acts that trigger a legality requirement, but the lack of underlying principles makes problematic a nuanced articulation of the boundaries of that core. Although all proceedings are contested, unmoored rule-like statements have accentuated the contestation in this proceeding. Moreover, such rule-like statements are not necessarily phrased in ways that can be applied easily to other Host State laws, or adapted to the variety of legal systems encountered by ICSID tribunals.

²⁵⁹ Claimants’ Post-Hearing Brief, ¶ 34 (emphasis in original) (citing **CL-0198**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008; **CL-0351**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 February 2008; **CL-0435**, *Hochtief A.G. v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability dated 29 December 2014; **RL-0042**, *Quiborax*).

²⁶⁰ Claimants’ Rejoinder on Preliminary Objections, ¶ 185.

²⁶¹ Claimants’ Post-Hearing Brief, ¶¶ 35-37 (citing **CL-0347**, *Liman Caspian Oil BV and NCL Dutch Investments BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award dated 22 June 2010 (excerpts) (“*Liman*”).

386. As already noted, the legality requirement in the instant proceeding is found in Article 12 of the BIT. The proper place to begin therefore is with the interpretation of Article 12 in accordance with the VCLT.
387. Article 31 of the VCLT is entitled the “General Rule of Interpretation”. Article 31(1) provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Article 31(2) proceeds to specify that “context” includes, in addition to the text, the preamble of the treaty.
388. Interpretation under Article 31 of the VCLT is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty’s object and purpose, and by cycling through this three-step inquiry iteratively closes in upon the proper interpretation. In approaching this task, it is important to observe that the VCLT does not privilege any one of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. Rather, the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a word or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document.
389. Apart from the above analysis of the terms “made” and “legislation”, reference to the ordinary meaning of the terms in Article 12 does not suggest limitations on the substantive scope of the legality requirement. The ordinary meaning of the phrase “made in compliance with legislation” is inclusive and without explicit substantive limitations.
390. The lack of support for substantive limits in the ordinary meaning of the terms used is striking inasmuch the Tribunal is not aware of any authority that argues that the legality requirement has no limits. On the contrary, many, if not all, other tribunals exclude minor or trivial acts not in compliance with legislation as not the type of acts intended to be captured by a legality requirement.²⁶² Further, the Parties do not dispute that the legality requirement does not include minor or trivial acts of noncompliance.
391. The limitations on the substantive scope of the terms in Article 12 become apparent when the ordinary meaning of the terms is considered in their context and in light of the object and purpose of the treaty.
392. As to context, Article 12 of the BIT is entitled “Application of the Agreement”. This is significant in that the consequence of finding a failure to satisfy the legality requirement is that the BIT does not apply to the investment in question. The legality requirement does

²⁶² See, e.g., **RL-0042**, *Quiborax*.

not only remove access to arbitration but removes the obligations of the Host State *vis-à-vis* the investor and the investment in total. This, on any view, is a very significant – and harsh – consequence.

393. Context also includes the preamble which is a primary textual location for ascertaining the object and purpose of the treaty. The preamble of the BIT indicates that Kazakhstan and Uzbekistan entered into the BIT:

[D]esiring to promote greater economic cooperation between them for the mutual benefit of both states on a long-term basis,

[R]ecognising the need to promote and protect investments in order to create and maintain favourable conditions for investors of one Contracting Party's State within the territory of the other Contracting Party's State, and

[B]eing in agreement that a stable investment framework will ensure maximally efficient utilisation of economic resources and the development of productive forces.²⁶³

394. It is the combination of desiring to “promote greater economic cooperation” and the fact that an act not in compliance with legislation under Article 12 excludes an investment from the scope of application of the BIT generally, that indicates the necessary substantive limits on the legality requirement. Given the aim of encouraging investment through the provision of some measure of security, it is not plausible that the drafters of the BIT intended to include minor acts of noncompliance as a basis for denying jurisdiction.
395. The exclusion of acts of noncompliance that are minor or trivial, however, does not establish that the legality requirement is limited to violations of fundamental laws.
396. In the Tribunal's view, a more principled approach is to be guided in the interpretive task by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by *noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State*.

²⁶³ C-0001, BIT.

397. Several tribunals have referred to proportionality as a principle informing its decision to limit the substantive scope of the legality requirement. In its Decision on Jurisdiction in *Metalpar v. Argentina*, for example, the tribunal wrote:

As explained above, the Organic Law of the General Inspectorate of Justice concerning the Law of Commercial Societies, indicated that sanctions may be imposed for violations of the law, statutes or regulations, which would include lack of registration of a foreign company in the Public Registry of Commerce. These sanctions are, in sum, a notice of warning and fines imposed on the company and its directors.

In the Tribunal's view, the lack of adequate registration could be sanctioned by refusing to register certain documents of the company, through a notice of warning, or by imposition of a fine on the company or its directors, but it would be disproportionate to punish this omission to register by denying the investor an essential protection such as access to ICSID tribunals.²⁶⁴

398. The phrase “*noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State*” is chosen so as to focus more sharply the substantive scope of the legality requirement not on whether the law is fundamental but rather on the significance of the violation. The Tribunal believes that the gravity of the law itself is a central part of the examination but not the sole focal point. It is not only the law, but the act of noncompliance (or in some wordings, the violation) that is key. The seriousness of the act is a combination of both the importance of the requirements in the law and the flagrancy of the investor's noncompliance. The text or standing of the law – although central – does not in and of itself determine whether the legality requirement is triggered. Rather, the law must be considered in concert with the particulars of the investor's violation. An investor may violate a law of some import egregiously or it may violate a law of fundamental importance in only a trivial or accidental way. Seriousness to the Host State is to be determined by the overall outcome, which will depend on the seriousness of the law viewed in concert with the seriousness of the violation.
399. Adoption of a legal principle places the application of that principle, as well as a measure of appreciation, with the tribunal. In this sense, rules are preferable in that they both provide more clarity to governments and investors and channel more strongly the decision making of tribunals. This Tribunal would prefer a legality requirement in the BIT that is textually clear and specific. That is not the case, however. Presented with the bare bones language of Article 12, the Tribunal finds that the proper interpretation requires the application of a principle. The use of principle-based reasoning rather than rule-based

²⁶⁴ CL-0437, *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction dated 27 April 2006 (excerpts of English translation) (“*Metalpar*”), ¶¶ 83-84.

categorical divides is more appropriate when States themselves in drafting a treaty provide only objectives. Rule-like statements constructed by tribunals in such instances provide the comfort of certainty but do so without justification for either their under or over inclusiveness. The Tribunal in this sense does not so much seek to increase the scope of acts captured as a practical matter by existing rule-like statements but rather aims to identify the underlying principle that can provide a more nuanced definition of the limits of the acts of noncompliance that would trigger the legality requirement.

400. The focus on the principle of proportionality (rather than on rule-like statements) means that the proper test must be applied on a case-by-case basis taking into account all relevant factors. Many of those factors are the ones that have been set out by other tribunals in the form of rule-like statements. But the incorporation of them into reasoning on the basis of an application of a principle renders them factors rather than categorical divides. Principles require the tribunal to treat each case on its own facts. Of course, where treaties add detail to the legality requirement, then rule based categorical divides may become appropriate.
401. The shift from rule-like statements to the application of the principle of proportionality transforms many of the rule-like statements articulated by tribunals to date into factors to be considered. For example, Claimants assert that the legality requirement requires that the act be taken in bad faith and that there is a good faith exception under international law for violations of local law particularly where the Host State law is not clear as, it argues, is the case in this proceeding. Claimants relying on the *MTD v. Chile* and *Anderson v. Costa Rica* cases submit:²⁶⁵

Anderson is premised on the existence of a good faith exception, as it suggests that an investor who performs “the kind of due diligence that *reasonable* investors would have undertaken” may retain protection under the BIT in spite of a potential violation of domestic law. And *MTD* stands for the proposition that a host State has a duty to act coherently in the implementation and application of its laws and regulations. If the State promulgates a legal regime that is confusing or internally contradictory, a good faith violation of that legal regime “is the responsibility [of the Host State], not of the investor”.²⁶⁶

²⁶⁵ Claimants’ Post-Hearing Brief, ¶ 166.

²⁶⁶ Claimants’ Post-Hearing Brief, ¶ 167 (citing **RL-0012**, *Anderson*, ¶ 58, and **CL-0245**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004, ¶ 164).

Claimants assert that several tribunals have found that a legality provision will not bar jurisdiction where the alleged violation of law was made in good faith.²⁶⁷

402. Respondent submits “[a]s the *Anderson* decision reflects, bad faith or intent is not required where, as here, the BIT conditions its protection on the investor making its investment in accordance with host State’s law”.²⁶⁸ Respondent also contends that “Claimants fail to establish that there is an exception to the legality requirement in the BIT for investments that were made in violation of law, where the investor undertook in good faith to comply with the law”.²⁶⁹
403. For this Tribunal, focusing on the seriousness of non-compliance, both in terms of the seriousness of the law and the action taken by the investor, makes the good faith of the investor something that is considered as a factor in the overall assessment of the proportionality between the violation and the sanction. An action in good faith possibly may render an act of noncompliance less serious, but – depending on the seriousness of the law violated – not necessarily. It may be that the law alleged to be violated has as an element of a violation that bad faith or a specific intent is required. Likewise, it may be that the law alleged to be violated provides an exception if the act is undertaken in good faith when, for example, due diligence is exercised.
404. By way of summary, having considered the submissions of the Parties as well as the commentary of publicists and the awards of other tribunals cited by the Parties, the Tribunal holds that the legality requirement in the BIT denies the protections of the BIT to claims when the investment involved was made in noncompliance with a law of Uzbekistan where together the act of noncompliance and the content of the legal obligation results in a compromise of a correspondingly significant interest of Uzbekistan. This test requires a case-by-case analysis examining both the seriousness of the investor’s conduct and the significance of the obligation not complied with so as to ensure that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined. To hold that the Tribunal is to examine the applicability of the legality requirement on a case-by-case basis does not mean that it is done without guidance. The proportionality principle guides the Tribunal’s consideration and indicates that the combination of the investor’s conduct and the law involved must result in a compromise of a significant interest of the Host State.

²⁶⁷ Claimants’ Counter-Memorial on Preliminary Objections, ¶ 229. Claimants also argue that the present case is entirely distinguishable from *Anderson v. Costa Rica*, *Plama v. Bulgaria* and *Inceysa v. El Salvador* where “the claimants had uniformly acted knowingly and in bad faith to commit ‘serious’ violations of the host State’s law in order to make *per se* illegal investments”. Whereas in this case, Claimants “acted in good faith to make lawful legitimate investments”. Claimants’ Counter-Memorial on Preliminary Objections, ¶ 225; Claimants’ Rejoinder on Preliminary Objections, ¶ 421.

²⁶⁸ Respondent’s Reply on Preliminary Objections, ¶ 187.

²⁶⁹ Respondent’s Reply on Preliminary Objections, ¶ 196.

405. The Tribunal's case-by-case application of the legality requirement involves three steps.
406. First the Tribunal must assess the significance of the obligation with which the investor is alleged to not comply. In undertaking this assessment for this objection, the Tribunal identified the following non-exhaustive list of relevant considerations:
- What does the level of sanction provided in the law suggest as to the significance of the obligation to the State? A low level fine, for example, suggests an obligation that is less significant than obligations that involve forfeiture of assets or that are within the criminal code and provide for possible imprisonment. Similarly, a law which provides that a transaction is void (*ab initio*) suggests that the obligation is significant. A law that provides that the transaction is voidable, suggests – but does not necessarily indicate – less significance than a provision that declares the transaction void. Likewise, a law that allows for the State to waive the legal consequences of the wrong-doing suggests that the obligation – at least in some cases – is less significant. Finally, the possibility that the law provides that the illegal act may be cured through specified acts by the noncompliant party suggests an obligation of lesser significance.²⁷⁰
 - What does a general non-enforcement of an obligation by the Host State suggest as to the significance to the state of that obligation? Consideration of enforcement or non-enforcement needs to be approached carefully, however, inasmuch as the investigative and prosecutorial resources of any given host state are limited.
 - What does the specific decision of the Host State not to investigate or prosecute the particular alleged act of noncompliance suggest as to the significance to the state of the obligation in the specific context? This, again, with the same caveat about limitations on state resources as identified with the previous factor (although to a lesser extent).
 - What does evidence of widespread noncompliance suggest as to the significance of the obligation to the State? Again, care needs to be exercised. Widespread noncompliance in the sense of desuetude of the obligation may suggest a past, but not present, significance of an obligation. Simultaneously, widespread noncompliance in terms of a law that reflects an important current objective of the State – for example, combatting corruption – should not lessen the significance of the obligation not to take bribes.

²⁷⁰ A violation of the law that is curable may not be sufficient to prevent seizure of jurisdiction by a Tribunal. *See to this effect* the awards in **CL-0426**, *Achmea B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Final Award dated 7 December 2012; **CL-0347**, *Liman*; **CL-0437**, *Metalpar*; **CL-0436**, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award dated 30 March 2015.

407. Second, the Tribunal must assess the seriousness of the investor's conduct. In undertaking this assessment, the Tribunal identifies the following non-exhaustive list of relevant considerations:

- Does the investor's conduct violate the obligation as alleged? A threshold inquiry is whether there was noncompliance where the elements required for a violation are established in accordance with the applicable standard of proof.
- What does the investor's intent suggest as to the seriousness of the investor's conduct? Where a particular state of mind is not required for the violation, does the intentionality of the investor's conduct suggest a more egregious act? In contrast, does an act of noncompliance that is mere accident suggest a less egregious act? Whether intent as an aggravating factor, or lack of intent as an excuse, is to be considered may be indicated by the law itself.
- What does an unclear, evolving or incoherent law suggest as to the seriousness of an act of noncompliance? Although the intentional violation of an unclear law would still be a serious act, the lack of clarity to a law potentially suggests a greater likelihood of acts that are accidental or in good faith as opposed to egregious violations.
- What does the exercise of due diligence by an investor suggest as to the seriousness of an act of noncompliance? Although due diligence does not foreclose an intentional violation of law, it does otherwise suggest an effort to understand and comply with the requirements of the law.
- What does a failure of the State to investigate or prosecute the alleged particular act of noncompliance suggest as to the seriousness of the investor's conduct? This factor requires that the State have knowledge, or be presumed to have had knowledge, of the alleged act of noncompliance.
- What does the subsequent conduct of the investor suggest as to the seriousness of the alleged act of noncompliance? For example, continued investment in the asset may indicate that the investor pursued the investment in good faith.

408. Third, the Tribunal must evaluate whether the combination of the investor's conduct and the law involved results in a compromise of a significant interest of the Host State to such an extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined. The primary indication of such a compromised significant interest is whether the legal consequence of the violation under the Host State's law manifests a gravity to the act of

noncompliance that is proportional to the harshness of denying access to the protections of the BIT.

409. The Tribunal notes that in carrying out its evaluation it will not necessarily consider all factors in relation to all alleged breaches. The factors set out above are non-exhaustive and are likely to be of varying applicability in different circumstances. In its consideration of Respondent's allegations of acts of noncompliance with Uzbek law by Claimants, the Tribunal examines those factors that are relevant to a particular allegation, such factors being different for the different allegations.

(5) The Tribunal's Conclusions as to the Legality Requirement

410. The language of Article 12 limits the "application" of the BIT to investments made in compliance with the legislation of Uzbekistan. The legality requirement is limited to the time that the investment is made.
411. The term "legislation" in Article 12 encompasses those normative actions regarded as "law" by the Host State's legal system which on the basis of the record in this case is defined by the normative-legal acts set out in Article 5 of the Uzbekistan Law on Normative-Legal Acts.
412. In the Tribunal's view, there has been little satisfactory analysis as to the types of acts of noncompliance that are encompassed within the legality requirement. The ordinary meaning of the phrase "made in compliance with legislation" is inclusive and without explicit substantive limitations. However, it is striking that no authority appears to argue that there are no limits to the "legality requirement". The limitations on the substantive scope of the terms in Article 12 become apparent when the ordinary meaning of the terms is considered in their context and in light of the object and purpose of the treaty.
413. In the Tribunal's view, the interpretive task is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State.

C. The Acts of Noncompliance with Uzbek Law Alleged by Respondent.

414. Respondent alleges acts of noncompliance by Claimants with different provisions of Uzbek law. Respondent submits that the actions by Claimants that place their alleged investments in serious violation of Uzbek laws begin with Claimants purchasing the majority of the BC

and KC shares using two sets of agreements that Respondent argues to be unlawful in several respects. The two sets of agreements are:

- (1) “**English SPAs**”: Respondent contends that Kaden and Nabolena, Claimants’ alleged investment vehicles, through Mr. Kim acting allegedly on behalf of Claimants, concluded the English law share and purchase agreements to buy the majority shares in BC and KC for US\$33.98 million (and US\$4.37 million in alleged related expenses), which they then concealed from the TSE in violation of Uzbek laws and regulations that require all share sale and purchase agreements be registered in Uzbekistan.²⁷¹
 - (2) “**Tashkent SPAs**”: Kaden and Nabolena also registered agreements on the Tashkent Stock Exchange disclosing a false purchase price of only US\$2.2 million, in violation of Uzbek laws and regulations that require complete and accurate disclosures and strictly prohibit false disclosures and fraud.²⁷²
415. According to Respondent, Claimants’ “other alleged acquisition vehicles purchased significant volumes of shares from minority shareholders, many of whom were employees of BC and KC, at far below the fair market price of those shares, without revealing the earlier concealed price in the Secret Agreements” in further violation of “Uzbek securities laws and regulations and the general antifraud provisions of the Uzbek Civil and Criminal Codes”.²⁷³
416. To aid in the presentation of the Parties’ contentions as well as the Tribunal’s analysis, the violations alleged to arise out of these facts are grouped by the Tribunal in the following sections into four categories. The specific laws identified in each of the categories are listed in order of the normative-legal hierarchy set out in Article 5 of the Uzbekistan Law on Normative-Legal Act summarised in paragraph 379 above.
417. Before the Tribunal begins its application of the legality test to the violations alleged in this objection, the Tribunal observes that Respondent has the burden of proof to establish that the investment was not made in compliance with a law of Uzbekistan.
418. The Tribunal notes that, on the application of the legality test to certain of the violations alleged in this objection, it possesses both a majority view and a minority view. In some instances, the reasoning of the minority view arrives at a different result, whereas in other

²⁷¹ Respondent’s Reply on Preliminary Objections, ¶ 4; *see also* Respondent’s Memorial on Preliminary Objections, ¶¶ 202, 217, 218, with citation of Mamatov I, ¶¶ 13-14. *See also* Mamatov I, ¶ 31.

²⁷² Respondent’s Reply on Preliminary Objections, ¶ 4; *see also* Respondent’s Memorial on Preliminary Objections, ¶¶ 202, 217, 219, 220, with citation of Mamatov I, ¶¶ 17-22, 29.

²⁷³ Respondent’s Reply on Preliminary Objections, ¶ 5.

instances the reasoning of the minority view arrives at the same result. These differences are made clear in what follows.

(1) **Fraud in Violation of Uzbek Securities Law**

419. First, Respondent submits that Claimants “caused fraudulent transactions to occur on the TSE” in violation of the following Uzbek Securities Laws and Regulation.²⁷⁴

<u>Claimants’ Alleged Action(s)</u>	<u>Alleged Violation of Uzbek Law Provision</u>
“Mr. Kim caused the TSE to publicly report that the BC and KC majority shareholdings were purchased for US\$2.2 million, and not the prices paid of US\$34 million, and thus misleading the market participants”.	Order No. 04-103 on “Regulations on the Prevention of Manipulation of the Stock Market” dated 25 June 1999 “Prohibits any market participants from ‘[p]erform[ing] any act aimed at artificially inflating/underpricing of securities, the product of a false or misleading impression of active trading in order to induce third parties to buy/sell securities at a bargain price for the manipulators”.
	“A member (group members) of the securities market and/or their customers do not have the right to conclude a transaction of sale and purchase of a particular type of security on the basis of mutual agreement, with the intent to mislead other market participants”.

(2) **Failure to Register the English SPAs**

420. Second, Respondent alleges that the English SPAs are void, because they were required to be registered on the TSE but were not, and that the failure to do so resulted in three violations of Uzbek law, as follows:²⁷⁵

<u>Claimants’ Alleged Action</u>	<u>Uzbek Law Provision Allegedly Violated</u>
“Claimants contracted for the sale and purchase of the majority shareholdings of BC and KC in the English SPAs, which were never registered on the Tashkent Stock Exchange”. ²⁷⁶	Law No. 218-I, Art. 22 (Basic Principles of Uzbek Securities Market) ²⁷⁷ “[E]ach operation at the securities market associated with changes in prices [and] the owner [...] shall be registered in accordance with legislation” and that “transaction[s] with registered securities [...] carried out between the legal entities are subject to registration”.

²⁷⁴ Respondent’s Closing Presentation, p. 72.

²⁷⁵ Respondent’s Closing Presentation, slide 125. *See also* Respondent’s Reply, ¶ 34 (citing Mamatov II, ¶¶ 5, 17-18; Mamatov I, ¶¶ 12-13, 26, 28; Pak I, ¶8; Black, ¶¶ 15-16 (explaining that Uzbekistan has, and had at the time of the transactions, Consolidating Reporting Rules which require the registration of all transactions of shares in public companies).

²⁷⁶ Respondent’s Closing Presentation, slide 125.

²⁷⁷ Respondent’s Reply on Preliminary Objections, ¶ 44. *See also* **R-0075**, Law No. 218-I dated 25 April 1996 and Claimants’ Rejoinder on Preliminary Objections, ¶ 220 (*citing* **R-0070**, Order No. 2003-08, Art. 5; Butler II, ¶¶ 44-45, n. 74).

Cabinet of Minister’s Resolution No. 285, App. 2 Art. 5 (Transactions in Securities on TSE)²⁷⁸ “Transactions on the secondary market for purchase and sale of shares of open joint stock companies are concluded exclusively on stock exchanges and organized out of exchange securities market”.

Order No. 2003-08 (Prohibiting Off-Exchange Transactions)²⁷⁹ “Purchase and sales transactions of shares of open joint stock companies concluded on a secondary market outside of organizers of exchanges and over-the-counter sales and securities shall be deemed [null and void]/[invalid]” (the final term is dependent on whether Claimants’ or Respondent’s translation is accepted –see discussion at paragraphs 457 - 464 below).

(3) **False Disclosure and Concealment in Registering the Tashkent SPA.**

421. Third, Respondent alleges that the Tashkent SPAs are invalid as they were registered on the basis of false disclosures and concealment and that such actions give rise to a further nine violations of Uzbek law. Respondent contends that the Tashkent SPAs also violated Uzbek law as these were “sham contracts that described fictitious transactions” as the sale price reflected was significantly lower than the actual purchase price.²⁸⁰ Respondent asserts that Claimants’ non-disclosure of the English SPA price on the TSE, amounted to “false and misleading disclosures” violating the following Uzbek Securities Laws and Regulations and such transactions are void under the Uzbek Civil Code.²⁸¹

Claimants’ Alleged Action(s)

Claimants deliberately concealed the price paid for the BC and KC shares from the Uzbek securities market by registering the transactions on the TSE at a false price.²⁸²

Alleged Violation of Uzbek Law Provision

Uzbekistan Civil Code Art. 116:²⁸³ “A transaction whose content does not correspond to the requirements of legislation, and also concluded for a purpose knowingly contrary to the foundations of the legal order or morality shall be null”.

Uzbekistan Civil Code Art. 124:²⁸⁴ “A transaction concluded only for form, without the intention to create legal consequences, shall be null (fictitious transaction).”

²⁷⁸ **R-0005**, Cabinet of Ministers Resolution No. 285 dated 8 June 1994.

²⁷⁹ **R-0070**, Order No. 2003-08 dated 26 May 2003.

²⁸⁰ Respondent’s Memorial on Preliminary Objections, ¶ 219 with citation of Mamatov I, ¶ 29.

²⁸¹ Respondent’s Memorial on Preliminary Objections, ¶ 220; Respondent’s Reply on Preliminary Objections, ¶ 51; Respondent’s Closing Presentation, pp. 79-81; Respondent’s Post-Hearing Brief, ¶ 62.

²⁸² Respondent’s Closing Presentation, p. 79.

²⁸³ **CL-0370**, Civil Code, Art. 116.

²⁸⁴ **CL-0370**, Civil Code, Art. 124.

If a transaction is concluded for the purpose of concealing another transaction (sham transaction), then the rules relating to such transaction which the parties actually had in view shall apply”.

Mr. Kim instructed his broker Mr. Pak to register transaction documents showing that Kaden and Nabolena purchased shares on the TSE Exchange for a price that he knew was not the actual price.²⁸⁵

Law No. 260-II (Law on Exchange Activity), Art. 15:²⁸⁶ “The following are not allowed on the Exchange...spread of false information that may be the reason for artificial change in the market structure”.

Law 218-I “on the Mechanism of Securities Market Performance”, Art. 31:²⁸⁷ “Securities market participants for violation of securities legislation shall be liable in accordance with established procedure [for...] misleading investors and supervising authorities by release (provision) of deliberately false information”.

Claimants disclosed false purchase price for the BC and KC shares to TSE.²⁸⁸

Law 218-I “on the Mechanism of Securities Market Performance”, Arts. 6 and 25:²⁸⁹ Article 6 provides that the “[m]ain principles of trading in the securities market” include “pricing based on actual current demand and supply; strict compliance with the legislation on the securities market by all participants; ...providing full disclosure about the securities and their issuers[;] transparency and accessibility of that information; protection of the interests of investors and issuers; [and] prohibition and prosecution of fraud and other illegal activities on the market”. Article 25 prohibits “manipulation at the securities market through bogus transactions”.

Law No. 260-II (Law on Exchange Activity), Arts. 7, 15 and 27:²⁹⁰

“The main principles of the exchange activity are: openness and publicity of exchange trades; freedom of formation of prices during exchange trades; voluntariness of concluding exchange transactions; equality of conditions of participation in exchange trades for all exchange members. [...] The following are not allowed in the exchange: [...] spread of false information that may be the reason for artificial change in the market structure. [...] Persons responsible for violating legislation on exchanges and

²⁸⁵ Respondent’s Closing Presentation, p. 79.

²⁸⁶ **R-0008**, Law No. 260-II dated 29 August 2001, Art. 3, 7 and 15.

²⁸⁷ **R-0075**, Law No. 218-I dated 25 April 1996. Respondent also argues Claimants violated Art. 6 and 25 of Law No. 218-I. Respondent’s Reply on Preliminary Objections, ¶ 51; Mamatov I, ¶ 18; Pak II, ¶ 13.

²⁸⁸ Respondent’s Closing Presentation, p. 79.

²⁸⁹ **R-0075**, Law No. 218-I dated 25 April 1996. Respondent’s Reply on Preliminary Objections, ¶51 (citing Art. 6, 25 of Law No. 218-I); Mamatov I, ¶18; Pak II, ¶13.

²⁹⁰ **R-0008**, Law No. 260-II dated 29 August 2001.

exchange activity shall bear responsibility in the established procedure.”

Order No. 04-103 (Order on the Prevention of Stock Market Manipulation), Art. 2.3.2:²⁹¹ “All market participants are prohibited from ‘distribut[ing] / transmit[ing] information to other participants or to make any statement, which, in terms of time and/or the circumstances under which they were made, is false or misleading [to] any other market participants, and in respect of which the declarant was aware that it is false and misleading”.

Order No. 2002-06 (Securities Disclosure Order), Art. 28:²⁹² “Participants of the securities market shall bear responsibility established by the legislation for the improper disclosure of the information at the securities market or disclosure of the information, which is misleading”.

TSE Rules, Rule 2:²⁹³ This rule provides the “basic principles of exchange activities” were “strict compliance with the legislation legal acts of the securities market and other internal regulations-orders and contractual relations between all participants in the securities market; [...] transparency and publicity of the exchange trade; equality of conditions for participation in exchange trading for all members of the exchange; voluntariness of settlement of stock transactions on purchase and sale of securities; freedom of pricing on the stock exchange trading; timeliness and publication of reliable and complete data on securities admitted to stock exchange trading and informing participants of trading on prices of stock exchange transactions; openness and accessibility of information on settled transactions to the participants of trading; prohibition and prosecution of fraudulence, price manipulation, [and] knowingly proving unreliable information [to the Exchange]”.

(4) **Fraud Causing Significant Harm to the State, BC and KC Minority Shareholders, the TSE and the Brokers**

422. Fourth, Respondent alleges that false disclosures and concealment by the Claimants caused significant harm to the State, the BC and KC minority shareholders, the TSE and the brokers, resulting in illicit benefits to Claimants and giving rise to a further four violations of Uzbek law. In particular, Respondent asserts that Claimants defrauded the

²⁹¹ **R-0013**, Order No. 04-103 dated 25 June 1999.

²⁹² **R-0003**, Order No. 2002-06 dated 27 March 2002, Art. 28 and 29.

²⁹³ **R-0002**, Rules of Exchange Trade of Services in the Republican Stock Exchange, “Tashkent”.

State, the TSE, their broker, and the minority shareholders of BC and KC in violation of the following Uzbek laws:²⁹⁴

<u>Claimants' Alleged Action(s)</u>	<u>Alleged Violation of Uzbek Law Provision</u>
<p>“Claimants paid commissions to their broker Mr. Pak and fees to the TSE that were calculated based on the knowingly false and significantly lower price registered on the TSE”.</p>	<p>Uzbekistan Criminal Code Article 168:²⁹⁵ Fraud is the “acquisition of someone’s property or the right thereto by deception or abuse of confidence”.</p>
<p>“Claimants defrauded minority shareholders by purchasing shares from them at artificially low prices and without disclosing the real value of the shares”.</p>	<p>Uzbekistan Criminal Code Articles 30 and 184:²⁹⁶ “[...] helpmates shall be subject to liability under the same Article of the Special Part of this Code, as committers [...] Intentional concealment or understatement of profit (income) or other taxable objects as well as other evasion from taxes, duties, or other payments, established by the State, in large amount [...] is punishable by fine, correctional labor, arrest, or imprisonment].”</p>
<p>“Claimants assisted sellers to evade paying profit taxes on KC and BC transactions”.</p>	<p>Uzbekistan Civil Code Article 123:²⁹⁷ “A transaction concluded under the influence of fraud, coercion, threat, or ill-intentioned agreement of a representative of one party with the other party [...] may be deemed by a court to be invalid upon the suit of the victim”.</p>

423. The Tribunal notes that Respondent, in its first submission on this objection, put forward what might be termed a residual violation category, in its contention that, “[i]n addition to violating numerous provisions of Uzbek law, Claimants’ fraud on the market violated transnational public policy” as “the securities laws and regulations of other countries are for the most part universal in requiring truthful and accurate disclosures and prohibiting concealment, fraud of manipulation”.²⁹⁸ As indicated at paragraphs 378-380 above, the legality requirement must allege a violation of a law of Uzbekistan. Given that a residual category is not specified and is not related to the laws of Uzbekistan, the Tribunal holds that the residual category does not provide a basis for application of the legality requirement.

²⁹⁴ Respondent’s Closing Presentation, p. 148.

²⁹⁵ **R-0027**, Criminal Code, Art. 168.

²⁹⁶ **R-0027**, Criminal Code, Art. 30 and 184.

²⁹⁷ **CL-0370**, Civil Code, Art. 123.

²⁹⁸ Respondent’s Memorial on Preliminary Objections, ¶ 221 (*citing* Hart I, ¶ 40).

424. The Tribunal in the following sections assesses by category whether the alleged violations trigger application of the legality requirement.

D. Alleged Violation Relating to Fraud in Violation of Uzbek Securities Law

425. The Tribunal begins its consideration with the allegation that Claimants are culpable of fraud in violation of Uzbek Securities Law – in particular Order No. 04-103.

426. Respondent argues that Claimants manipulated the stock market in violation of Order No. 04-103 which “[p]rohibits any market participants from ‘[p]erform[ing] any act aimed at artificially inflating/underpricing of securities, the product of a false or misleading impression of active trading in order to induce third parties to buy/sell securities at a bargain price for the manipulators’ and also provides that “[a] member (group members) of the securities market and/or their customers do not have the right to conclude a transaction of sale and purchase of a particular type of security on the basis of mutual agreement, with the intent to mislead other market participants”.

427. As to the significance of the prohibition on fraud, the Tribunal finds this obligation very significant. An act of fraud of the kind alleged results under the statute in the transaction being void, a consequence that reflects the great significance of the interest to the State. As is often the case with such a harsh consequence, a specified intent by the person accused is required. In this instance, the accused must act “in order to induce third parties to buy/sell” and “with the intent to mislead other market participants”. As will be seen below, the Tribunal by majority holds that the Respondent has not established the requisite intent to support its allegation that Claimants violated Order No. 04-103.

428. As to the significance of the conduct of the Claimants, given its eventual conclusion that Respondent has not established a violation of Order No. 04-103, the Tribunal need not go any further in its legality requirement analysis. However, the Tribunal’s assessment of the conduct of Claimants is relevant to several of the other alleged violations and it is thus appropriate to set out those considerations here. Three of these considerations indicate that Claimants’ conduct was not as egregious as Respondent alleges.

429. First, the transactions in question took place in the context of a highly uncertain legal environment, in which the applicable legal regime was unclear, difficult for any reasonable investor to ascertain, subject to change and still evolving. At the time the transactions took place the TSE was still under development – as was the regulatory framework that governed transactions both on and off the exchange. This uncertainty made compliance with the regulatory framework much more difficult for Claimants than it would have been in a more mature, and more stable, legal environment.

430. Second, Claimants were heavily reliant on the advice of their broker, Mr. Pak, and Sellers, on the matter of compliance with Uzbek law. Indeed, the steps they took which are now the subject of criticism by Respondent were those advised by Mr. Pak and Sellers. In this regard, the Tribunal – given the apparent inconsistencies in his testimony – finds unconvincing the evidence of Mr. Pak. First, Mr Pak implies, in Pak I, that Mr. Kim’s arrival at Tenet Investment was as a walk-in client.²⁹⁹ In oral testimony, however, Mr. Pak admitted that his introduction to Mr. Kim was made by his sole business partner, Mr. Allakverdyan, who was Sellers’ agent.³⁰⁰ Second, Mr. Pak claims that he did not know Sellers.³⁰¹ However, on cross-examination, Mr Pak acknowledged that Tenet Investment had, on 30 August 2005, engaged in the sale of shares in the BC plant in which Mr. Allakverdyan was the agent of Velner Group (the sellers) and in which he, Mr. Pak, was the agent of the purchaser, Sonora Tex UK Ltd.³⁰² These shares were then sold back to Velner Group on 24 October 2005 for the same price.³⁰³ Third, Mr. Pak claims in Pak I that the share price of US\$37.50 was given to him by Mr. Kim.³⁰⁴ However, in oral testimony Mr. Pak stated that Mr. Allakverdyan had “an excerpt from the depository record, and the number of stock was mentioned there, and their price”.³⁰⁵ Furthermore, under cross-examination Mr. Pak admitted that the share price for the August and October 2005 transactions was US\$37.00 per share.³⁰⁶ Mr. Pak nevertheless denied that the amount of US\$37.00 per share had come from him or from Mr. Allakverdyan.³⁰⁷
431. The inconsistencies between Mr. Pak’s written statements and his oral evidence cast doubt on the probity of that evidence as a whole. The Tribunal concludes that it is likely that when Mr. Allakverdyan acted for the Velner Group in such transactions he introduced the transaction’s other party to Mr. Pak, who then acted as the latter’s agent. Thus, it is likely that Mr. Pak was aware of the whole scheme of the transactions and, despite his claims to the contrary, aware of the price to be paid in advance of Mr. Kim’s involvement in the transaction.
432. Third, the Tribunal is satisfied that Claimants were purchasers that sought to acquire the majority share in BC and KC plants in good faith and in accordance with an investment

²⁹⁹ Pak I, ¶ 10: “I met Mr. Kim in January 2006. My office at Tenet Invest was located directly next to the main entrance to the building of the Tashkent Stock Exchange. I recall that Mr. Kim entered my office and stated that he represented the interests of foreign investors and needed a broker who could help provide brokerage services for the purchase of securities on the Stock Exchange.” No reference is made in this entire statement to Mr. Allakverdyan.

³⁰⁰ Mr. Pak, Hearing Tr., Day 1, 235:10-14. “The first time I met Mr. Kim approximately in January of 2006 [...]. We met when he came to my office. He was introduced to me by Allakverdyan, who was a second broker in the brokerage. He was introduced to me as a foreign investor. We met in our office”.

³⁰¹ Mr. Pak, Hearing Tr., Day 1, 236:13-14.

³⁰² Mr. Pak, Hearing Tr., Day 1, 277:2-20.

³⁰³ Mr. Pak, Hearing Tr., Day 1, 277:2-20. *See further R-0006*, entries 36, 37, 38 and 39.

³⁰⁴ Pak I, ¶ 15.

³⁰⁵ Mr. Pak, Hearing Tr., Day 1, 237:13-15.

³⁰⁶ Mr. Pak, Hearing Tr., Day 1, 277:2-20.

³⁰⁷ Mr. Pak, Hearing Tr., Day 1, 285:15-288:14.

strategy. Their principal goals at all times were to develop the BC and KC cement plants, and to consolidate their investment in this sector, so as to later sell the investment through an IPO or to a private purchaser. Indeed, Claimants made further substantial investments in the development of the cement plants in the years following the acquisition of them.

433. Against these three considerations, the Tribunal finds equivocal Claimants' assertion that the involvement of Ms. Karimova and the contractual limitations she or her representatives placed on further due diligence itself explains or justifies Claimants' conduct. On the one hand, the Tribunal accepts that the involvement of Ms. Karimova in a transfer of shares in the strategically important cement industry meant that the Uzbek Government likely was aware of the transaction. On the other hand, the Tribunal is persuaded that a private contractual commitment does not excuse one's conduct.
434. The Tribunal likewise recalls that Claimants maintain that it was their belief both that it was not possible to record the correct price on the Tashkent SPAs for a transaction of the size involved and that the practice they followed was not unusual in this market. The Tribunal finds these assertions also equivocal, although it must be said that the evidence given as to the possibility of registering this transaction on the TSE made clear to the Tribunal the difficulty of ascertaining the requirements of the Rules of the TSE. Moreover, the indications that the TSE was not a very active exchange at the time as well as the lack of evidence given as to governmental investigations under or prosecutions of the various relatively recent securities laws of Uzbekistan left unclear questions of practice on the Exchange.
435. The Tribunal emphasizes that these considerations would not, of themselves, be exculpatory for a Claimant whose noncompliance with a Host State law inherently was of sufficient seriousness to render proportionate the loss of treaty protection. In particular, a proven allegation of fraud, with its requirement of intention, would likely be sufficient to cause an investment to fall outside the scope of the legality requirement in Article 12 of the BIT and therefore to cause the investment to lose the protection of the BIT and thereby vitiate the Tribunal's jurisdiction. In this sense, the Tribunal returns to Respondent's allegation that Claimants violated Order No. 04-103.
436. An allegation of fraud under Order No. 04-103 requires a specific intention by the fraudulent party. In this instance, the accused must act "in order to induce third parties to buy/sell" and "with the intent to mislead other market participants". The Tribunal concludes that Respondent has not met its burden of proof in this regard.
437. In attempting to establish fraud, Respondent points to the intentional decision of Claimants to enter a price on the Tashkent Stock Exchange other than that provided for in the English SPAs. Respondent is correct that the price recorded on the Tashkent SPAs is not the price

paid by Claimants in the English SPAs. Indeed, the Tribunal considers the fact that different figures were entered to be agreed by the Parties.

438. The Tribunal accepts *to an extent* Claimants' argument that the English SPAs do more than the Tashkent SPAs in terms of gaining a "control Premium" and granting various rights such as a choice of law and choice of courts agreement. But those additions in the Tribunal's opinion cannot explain fully the difference between the price paid by Claimants in the English SPAs and the price recorded on the Tashkent SPAs.
439. However, the Tribunal, by a majority, does not consider the entry of an incorrect price sufficient to establish fraud in violation of Order No. 04-103. The deliberate act of entering a false price on the exchange is not equivalent to the intent to defraud. On the basis of the record before it, there is not a sufficient foundation on which the Tribunal majority can find that Claimants had an intention to mislead other market participants or to manipulate the market. Respondent alleges that Claimants sought to defraud minority shareholders, and has explained how this could have happened. However, a majority of the Tribunal does not find this allegation established by the actual record before it. It may be the case that the Claimants did not comply with some other law, but the majority does not find the intent to defraud necessary for noncompliance with Order No. 04-103 to have been established.
440. On the view of a minority of the Tribunal, there is a sufficient basis to find the requisite "intent". On this view, the recording of an incorrect price was required by Sellers, and Sellers insisted that the true price be kept strictly confidential. Indeed, if Claimants had not agreed to this stipulation, the evidence was that the sale likely would not have gone ahead. The primary purpose of giving price information to the TSE is to inform all participants in the market as to the details of the sale and in particular the price, for the purposes of other purchases and sales. This being the case the necessary conclusion is that Claimants intended the market to be given misleading information. Claimants may have preferred not to do this, but given Sellers' insistence, on their own evidence they agreed to do so, to secure the deal. For the minority, such conduct readily falls within "fraud" as understood in Uzbek law, and was a very serious violation, given the existence of a public reporting requirement integral to the operation of an exchange.

E. Alleged Violations Relating to the Conclusion of the English SPAs

441. The Tribunal next considers Respondent's allegations relating to the conclusion of the English SPAs.

(1) Law No. 218-I, Article 22

442. Respondent notes that Article 22 of Law No. 218-I provides that "each operation at the securities market associated with changes in prices [and] the owner [...] shall be registered

in accordance with legislation” and that “transaction[s] with registered securities [...] carried out between the legal entities are subject to registration”. Respondent submits that the English SPAs violated Article 22 by not being registered on the TSE.³⁰⁸

443. Claimants contest Respondent’s reading of Law No. 218-I. They assert that Article 22 requires registration for trades at the stock exchange and organized over-the-counter exchange but not for private contracts related to securities.³⁰⁹ Therefore, Claimants assert they complied with the Article 22 requirement by registering the Tashkent SPAs, and the English SPAs were not subject to this registration obligation.³¹⁰
444. The Tribunal observes that although Respondent alleges several violations of Law No. 218-I in its Post-Hearing Brief that discussion did not focus on Article 22 as argued in Respondent’s earlier pleadings. The Tribunal assumes, however, that this argument is maintained by Respondent.
445. As to the alleged violation of Article 22, the Tribunal recalls that it is not contested that the price in the English SPAs was not registered on the TSE. A majority of the Tribunal doubts that the language of Article 22 applies to private contacts related to the purchase of shares.
446. By majority, the Tribunal, assuming that the registration requirement of Article 22 applies to a private contract related to the purchase of shares, finds that noncompliance by Claimants does not sufficiently compromise a significant interest of Uzbekistan so as to render proportionate the exclusion of the investment from the protections of the BIT.
447. In assessing the significance of the obligation, the Tribunal notes that the sanctions generally applicable for violations of Law No. 218-I are set forth in Article 31 entitled “Responsibility for violations of securities legislation”. It is true that Article 22 contains within itself the specification of sanctions applicable to certain violations of that Article. However, those situations do not include the specific act of noncompliance alleged in this case. As a result, the Tribunal concludes that the Article 31 sanctions generally applicable are those applicable to the alleged act of noncompliance. The sanctions specified in Article 31 do not include rendering a transaction null and void, but rather specify a range of fines or penalties.
448. As to the seriousness of Claimants’ action, a failure to register is a deliberate act. However, the Tribunal also notes as possibly mitigating factors that certain of the factors set out at

³⁰⁸ Respondent’s Reply on Preliminary Objections, ¶ 44.

³⁰⁹ Claimants’ Rejoinder on Preliminary Objections, ¶ 222.

³¹⁰ Claimants’ Rejoinder on Preliminary Objections, ¶ 222.

paragraphs 429 to 432 above are also applicable to this alleged violation. In particular, the regulatory framework was under development at this time.

449. Considering the seriousness of the obligation in concert with the seriousness of the conduct of Claimants, the Tribunal by majority concludes that noncompliance by Claimants with Article 22 as alleged does not sufficiently compromise a significant interest of Uzbekistan so as to render proportionate the exclusion of the investment from the protections of the BIT.
450. On the minority view, this analysis of Article 22 draws an artificial distinction between the English and Tashkent SPAs. The BC and KC plants were each subject to one sale. The sets of SPAs relate to the same, single, transactions. The English SPAs may have been “private contracts”, but that is because the Claimants and Sellers wrongly concealed them, and concluded them off the TSE. Such an approach would have been satisfactory if the entire transaction was properly kept off the TSE. However, the deal was done on the Exchange, and as such the true price had to be disclosed. If parallel private contracts were permissible, Article 22 would be defeated in its purpose, and the TSE (as with any exchange) could simply not function. One may only pause to consider how such an arrangement might have been treated had it been attempted on exchanges in London or New York (by way of examples) for its severity to be appreciated. On this view, the compromise of an interest of Uzbekistan is significant, meets the legality test, and the objection should be allowed.

(2) Cabinet of Minister’s Resolution No. 285, Appendix 2 Article 5

451. Respondent refers to the Cabinet of Minister’s Resolution No. 285, Appendix 2 Article 5 (Transactions in Securities on TSE). The Resolution provides that “[t]ransactions on the secondary market for purchase and sale of shares of open joint stock companies are concluded exclusively on stock exchanges and organized out of exchange securities market”. Respondent argues that Claimants violated this provision by concluding the English SPA outside of the TSE.
452. Claimants assert that Resolution No. 285 does not require that the English SPAs to be concluded and registered on the TSE. According to Claimants, Respondent selectively quotes from Resolution No. 285, but when reviewing the full provision, it is “clear that the Claimants were *not* required to use a single contract for their majority acquisitions”:³¹¹
453. Cabinet of Minister’s Resolution No. 285 is “legislation” for the purposes of the legality requirement. Article 5 of Appendix 2 provides:

³¹¹ Claimants’ Rejoinder on Preliminary Objections, ¶ 217 (emphasis in original).

Transactions for purchase and sale of securities (hereinafter – transactions with securities), except for transactions concluded without intermediary and performed while concluded, are concluded in written form by signing by the parties of a single document – the contract, *as well as by other methods* (exchange of letters, telegrams, facsimile and other means of communication, signed by party that sends them), *allowing to fix in a documentary form the will of the parties.*³¹²

454. Claimants argue that the language “as well as by other methods [...] allowing to fix in a documentary form the will of the parties” makes clear that Resolution No. 285 did not require the English SPAs to be registered on the TSE.
455. The Tribunal considers the Article in question to be unclearly drafted both as to what is required and as to the scope of its application. The Tribunal further notes that Articles 31 and 32 of Appendix 2 set forth the potential sanctions for violations of rules in the Appendix. Those sanctions are limited to the deprivation of qualification certificates or the suspension or revocation of licenses for conducting activities with securities.
456. The Tribunal therefore considers this law not to reflect a high degree of significance in the sense of the test the Tribunal is here employing for the legality requirement. When the lesser degree of seriousness of the law is considered in concert with the Claimants’ conduct in the context of the alleged violation, as set out at paragraphs 429 to 432 above, the Tribunal considers that, even if it were to conclude that Claimants had not complied with this provision, the act, and the manner in which such act would have taken place in this case, would not be sufficient to render proportionate the the exclusion of the investment from the protections of the BIT.

(3) Order No. 2003-08

457. Respondent submits that Order No. 2003-08 “provides that transactions for the sale and purchase of shares in public companies that are concluded outside the Stock Exchange or the organized over-the counter exchange in Uzbekistan ‘shall be deemed null and void’”.³¹³ Mr. Mamatov, Respondent’s expert as to the practice of the TSE, states that the English SPAs “needed to be concluded and registered in the Republic of Uzbekistan,

³¹² Claimants’ Rejoinder on Preliminary Objections, ¶ 217 (*quoting R-0005*, Cabinet of Ministers Resolution No. 285 dated 8 June 1994, App. 2, Art. 5 (emphasis supplied by Claimants)).

³¹³ Respondent’s Reply on Preliminary Objections, ¶ 46 (*quoting R-0070*, Order No. 2003-08 dated 26 May 2003, Sec. 2(5)).

because they are agreements for the sale and purchase of shares in two open joint stock companies in Uzbekistan”.³¹⁴

458. Claimants submit that “[a]lthough Resolution No. 285 does generally require transactions for the purchase and sale of OJSC shares” to be concluded on the TSE, Respondent has provided a misleading translation of the provision. In particular, Claimants assert that Order No. 2003-08 provides that “off-exchange sales of securities shall be considered to be *invalid*,” rather than “null and void” as asserted by Respondent.³¹⁵ In support, Claimants refer the Tribunal to the second report of their expert, Professor Butler, where he states in relevant part that:

Article 5 of the Statute, as noted above, refers to “invalidity” (“недействительность”) and does not qualify a transaction as null (“ничтожная”). As I explained earlier, invalid transactions could be either null or contested. The court of the relevant jurisdiction shall determine whether the transaction is null or contested and would be in the position to invalidate it. I do not believe Mr. Mamatov has authority to pronounce a transaction null and void based on the language of the Statute.³¹⁶

459. Before assessing the opinion of Claimants’ expert as to the Uzbekistan law, the Tribunal notes and finds significant that Respondent did not avail itself of the opportunity to cross-examine Professor Butler, the only expert on Uzbekistan law in this proceeding. Such an examination would have tested his evidence on this and other points of law.
460. Having reviewed Professor Butler’s report, the Tribunal, on the basis of the evidence before it, finds the sanction provided in this provision of Order No. 2003-08 to be that the transaction may be declared invalid, not that the transaction is null and void. Before proceeding to the significance of that distinction, the Tribunal first considers Claimants argument that it did not act contrary to Order No. 2003-08.
461. In this regard, Respondent’s expert Professor Black opines: “Article 3 of the Civil Code of the Republic of Uzbekistan establishes that the Civil Code trumps Uzbek securities laws, which trump governmental regulations”.³¹⁷ On this basis, Claimants contend that even if Respondent’s arguments were accurate concerning consequences under Uzbek law, it would be inconsistent with the fundamental principle of freedom of contract and

³¹⁴ Respondent’s Reply on Preliminary Objections, ¶ 43. *See also* Respondent’s Memorial on Preliminary Objections, ¶ 218 (*citing* Mamatov I, ¶¶ 28, 30).

³¹⁵ Claimants’ Rejoinder on Preliminary Objections, ¶ 220 (*citing* R-0070, Order No. 2003-08 dated 26 May 2003, Art. 5; Butler II, ¶¶ 44-45, n. 74).

³¹⁶ Butler II, ¶ 45.

³¹⁷ Claimants’ Rejoinder on Preliminary Objections, ¶ 223 (*citing* Respondent’s Reply on Preliminary Objections, ¶ 136; Black, ¶ 53).

hence the Uzbek Civil Code, which would trump any regulation or Order.³¹⁸ In response, Respondent submits that the freedom of contract principle cannot override Uzbek securities laws, which requires a transaction agreement relating to the sale and purchase of securities be registered at the TSE.³¹⁹ The Tribunal has doubts as to the proposition asserted by Professor Butler and Claimants but given the Tribunal's conclusion below need not resolve this issue.

462. In particular, on the basis of Professor Butler's evidence Claimants argue that Order No. 2003-08 would not be a fundamental violation of law as "invalid" transactions can either be "contested" (i.e. potentially voidable) or null (i.e. void), and such a transaction would need a further court determination as to such invalidity initiated by person with standing.³²⁰
463. In assessing the significance of the obligation, the Tribunal agrees that the sanction specified does not provide that the transaction is null and void. As noted, Professor Butler argues that the transaction may be necessarily void but also instead potentially voidable. The distinction between void and voidable can be likened to that between a substantial mandatory sentence and a range of possible sentences that includes the mandatory sentence. Neither formulation reflects trivial obligations. But the provision of a mandatory substantial sentence reflects a greater seriousness than the provision of a possibly equal sentence to be determined in a court's discretion. As with several other provisions of Uzbek law, the meaning of the use of the phrase "invalid transaction" is contested by the Parties. The Tribunal notes the different views of Claimants' legal expert, Professor Butler, and Respondent's expert, Mr. Mamatov. A majority of the Tribunal considers Professor Butler's evidence to be the more persuasive of the two. The majority recalls that Mr. Mamatov's educational background is in economics rather than in law. On this basis, the majority believes it important to distinguish the respective spheres of expertise and does not see the justification for extending Mr. Mamatov's particular experience with the TSE to how a court would assess the appropriateness of voiding a transaction under the law at hand. As significantly, Respondent has not presented the Tribunal with a record of prosecutions under this law nor with any commentary as to the possible criteria that would likely influence a judge seeking to make such a determination so as to aid this Tribunal assessment. Finally, the majority finds it significant that Respondent chose not to call and cross-examine Professor Butler on this and other points of Uzbek law.
464. The obligation at issue is not trivial. However, the Tribunal's majority view is that the Respondent has not carried its burden in establishing the seriousness of the alleged act of noncompliance. Even accepting that there exists an act of noncompliance to be considered

³¹⁸ Claimants' Rejoinder on Preliminary Objections, ¶ 225.

³¹⁹ Respondent's Post-Hearing Brief, ¶ 70.

³²⁰ Claimants' Rejoinder on Preliminary Objections, ¶ 221.

in concert with Claimants conduct in the context of the alleged violation, as set out at paragraphs 429 to 432 above, the Tribunal by majority finds that such an act of noncompliance does not result in a compromise of an interest of sufficient significance so as to render proportionate the exclusion of the investment from the protections of the BIT.

465. On the minority view, the obligation of disclosure and truthfulness on the Exchange is obviously fundamental (as is the case with any exchange). Against this context, the severity of the violation is not lessened because the law refers to “invalid” rather than “null and void”. The use of the term “invalidity”, together with other rules on transparency, points to a significant interest of the Host State. The significance of the interest of the Host State in the operation of its stock exchange cannot be subverted by the freedom of contract of Claimants. Further, the minority notes the long and first-hand experience of the operation of the TSE of Mr. Mamatov (unlike Professor Butler), and considers his evidence probative as to the disclosures of information, and the requirements of transparency and truthfulness, that were vital for the TSE. Further still, the minority does not regard the three aspects of Claimants’ conduct relied upon here by the majority as sufficient to reduce the severity of the violation. All three aspects, according to the minority, are trumped by the Claimants’ own evidence that they intentionally provided false information on the all-important issue of price to the Exchange, because this was the only way to do the deal, given Sellers’ demands. The minority view would conclude that the investment therefore falls outside the scope of Article 12 of the BIT on this ground.

F. Alleged Violations Relating to False Disclosure and Concealment in the Registration of the Tashkent SPAs

466. Respondent submits that through Mr. Kim’s instructions to his broker, Mr. Pak, and other actions of the Claimants, Claimants registered a false price for the purchased shares on the TSE. Respondent submits the Tashkent SPAs are invalid as they were registered on the basis of false disclosures and concealment and that such actions give rise to numerous further violations of Uzbek law. The following sections consider each alleged violation in turn.

(1) Civil Code, Article 116

467. Article 116 of the Civil Code provides: “A transaction whose content does not correspond to the requirements of legislation, and also concluded for a purpose knowingly contrary to the foundations of the legal order or morality shall be null”.³²¹

³²¹ CL-0370, Civil Code, Art. 116.

468. Respondent asserts that Claimants deliberately concealed the price paid for the BC and KC shares from the Uzbek securities market by registering the transactions on the TSE at a false price.³²²
469. In assessing the significance of the obligation, the Tribunal observes and holds at the outset that Article 116 is of a high level of seriousness. The provision states that certain transactions are null, and in the Tribunal’s view such a provision provides a strong indication as to the seriousness of the law.
470. In its assessment of the seriousness of the alleged violation, the Tribunal observes that there are two elements to a violation of Article 116. First, the transaction must be “not correspond to the requirements of legislation”. Second, the transaction must “also [be] concluded for a purpose knowingly contrary to the foundations of the legal order or morality [...]”.
471. As to the first element that the transaction not correspond “to the requirements of legislation”, this question is one with which the entirety of the Third Objection is concerned. However, in light of the majority’s finding as regards the second requirement of Article 116 of the Civil Code, in the following paragraphs, it is not necessary to focus here on the question of whether transactions did not correspond to the requirements of legislation.
472. In particular, a violation of Article 116 of the Civil Code secondly requires such non-correspondence with legislation to be concluded *for a purpose knowingly contrary to the foundations of the legal order or morality*.
473. The majority of the Tribunal recalls its discussion of Claimants’ intentions as regards the allegation of fraud at paragraphs 425-439 above and in particular whether the Claimants acted “in order to induce third parties to buy/sell” and “with the intent to mislead other market participants”. The reasons that the majority of the Tribunal did not find such intent to have been established are applicable *mutatis mutandis* to the specific intent required under Article 116.
474. Respondent’s allegation that such intent existed is not sufficient. Nor can it be the case that any deliberate noncompliant act can be elevated to an act knowingly contrary to the foundations of the legal order or morality and therefore to violate not only the relevant legislation but also Article 116. Indeed, Professor Butler – Claimants’ expert as to Uzbekistan law – points the Tribunal’s attention to the statement of the Plenum of the Supreme Economic Court of Uzbekistan that “foundations of the legal order” means “legal norms . . . aimed at the preservation and protection of the constitutional order,

³²² Respondent’s Closing Presentation, p. 79.

human rights and freedoms, civil defense, security and economic system of the state (illegal arms exports, tax evasion, etc.)” and that the norm of “public morality” refers to “viola[tion of] existing in the society notions of good and evil, right and wrong, virtue and vice, etc.”.³²³ The majority of the Tribunal finds persuasive Professor Butler’s conclusion that not every contract contrary to the laws of Uzbekistan also violates Article 116 but rather that under Article 116 “transactions that are entered into knowingly with a purpose of committing actions against the very foundations of law and morality of Uzbekistan would be deemed null—‘antisocial’ acts, as they are called in practice, ‘the most ‘dangerous’ and ‘damaging’ contract with the gravest consequences’”.³²⁴ As noted previously, the majority of the Tribunal finds significant that Respondent chose not to call and cross-examine Professor Butler on this and other points of Uzbek law.

475. The majority of the Tribunal does not find the record before it establishes that Claimants’ purpose was knowingly contrary to the foundations of the legal order or morality. It may be the case that the Claimants’ transaction did not correspond with some requirement of legislation, but the majority does not find the intent to act contrary to the foundations of the legal order or morality necessary for noncompliance with Article 116. The Tribunal’s majority therefore holds that Respondent fails to establish the elements required for a violation of Article 116.
476. On the minority view, in accordance with the reasoning set out at paragraphs 440, 450, and 465 above, there is a breach of Civil Code Article 116, and the breach is such that it compromises a significant interest of the Host State. As noted previously, on the Claimants’ own evidence, the true price was intentionally concealed from the Exchange. And such a concealment was self-evidently contrary to the bases of the legal order and morality – as would have been manifest to anyone who has had any prior dealings with a public exchange. In this regard, it may be recalled that the Claimants are highly sophisticated international businessmen, with no doubt intimate knowledge of such matters. The minority view would conclude that the investment therefore falls outside the scope of Article 12 of the BIT on this ground.

(2) **Civil Code, Article 124**

477. Article 124 of the Civil Code provides:

³²³ Butler II, ¶ 29 (citing **CL-0372**, Decree of the Plenum of the Supreme Economic Court No. 269 dated 28 November 2014, ¶ 12

³²⁴ Butler II, ¶ 30 (citing **CL-0371**, S. M. As’ianov, in Kh. R. Rakhmankulov (ed.), Комментарий к Гражданскому кодексу Республики Узбекистан [Commentary to the Civil Code of the Republic Uzbekistan] (Tashkent, 2010) I, p. 304.

A transaction concluded only for form, without the intention to create legal consequences, shall be null (fictitious transaction).

If a transaction is concluded for the purpose of concealing another transaction (sham transaction), then the rules relating to such transaction which the parties actually had in view shall apply.³²⁵

478. This allegation has a confused history in this proceeding as it was unclear whether Respondent alleges that Claimants failed to act in compliance with both the first and second paragraphs of Article 124. Claimants submit that Respondent confuses the concepts of “sham” and “fictitious” under Uzbek Civil Code Article 124.³²⁶ Moreover, Claimants assert that during the hearing, Respondent failed to advance an argument based on Article 124(1) (“fictitious” transactions), and Professor Black, Respondent’s own expert, testified that this provision is irrelevant to the facts of this case and instead focused on Article 124(2), which demonstrates that the Respondent has conceded there was no Article 124(1) violation.³²⁷ Claimants’ expert, Professor Butler, explains that under Uzbek law a “fictitious” transaction “is one concluded without an intention to create legal consequences and is null”.³²⁸ Claimants contend that Tashkent SPAs clearly did create the legal consequences that the parties intended them to, and Professor Butler therefore concludes “it is clear that neither the Tashkent nor English SPAs are ‘fictitious’ as a matter of Uzbek law”.³²⁹
479. The Tribunal agrees that the Respondent appears to have conceded at the Hearing (Part II) to not pursue any allegation under the first paragraph. Nonetheless, for the sake of completeness and out of an abundance of caution, the Tribunal holds that the record does not establish a violation of the first paragraph in that the transaction is not fictitious but rather without doubt created “legal consequences”.
480. As to the second paragraph of Article 124 of the Civil Code, Respondent argues that the use of a false price renders the transaction a sham and invalid. Relying on its expert, Professor Black, Respondent explains that the Tashkent SPAs “were sham because they contained false prices and they were used to hide the actual U.K. transactions at the actual prices, and the result was that the false prices were reported to the Tashkent Stock Exchange...and then to the public”.³³⁰ According to Respondent, further demonstrating the “sham” transaction, it is undisputed that Claimants’ obligation to remit the US\$2.2

³²⁵ **CL-0370**, Civil Code, Art. 124.

³²⁶ Claimants’ Rejoinder on Preliminary Objections, ¶ 224.

³²⁷ Claimants’ Post-Hearing Brief, ¶ 56.

³²⁸ Claimants’ Rejoinder on Preliminary Objections, ¶ 227.

³²⁹ Claimants’ Rejoinder on Preliminary Objections, ¶ 228.

³³⁰ Respondent’s Post-Hearing Brief, ¶ 69 (citing, Prof. Black, Hearing Tr., Day 7, 1587:3-7).

million for the purchased securities under the Tashkent SPAs was never intended to be fulfilled or enforced.³³¹

481. Claimants dispute Respondent’s allegations that the BC and KC transactions undertaken at the TSE were “sham contracts that described fictitious transactions”,³³² “because Claimants allegedly ‘deliberately concealed the price paid for those shares from the [TSE]’ by registering th[ose] transactions at a false price”.³³³
482. Claimants first contest Respondent’s characterization of the Tashkent SPAs as “sham” transactions. Professor Butler explains a “sham” transaction is one that “is entered into to conceal another transaction”.³³⁴ Claimants assert that the Tashkent SPAs are not “sham” transactions as they were real undertakings that were expressly mandated by the English SPAs, and the two sets of agreements were distinct and complementary.³³⁵ There were two different prices as the Tashkent SPAs contemplated only share transfers whereas the English SPAs included the amount plus the consideration for the control premium, the escrow agreement, the representation and warranties and the arbitration rights, among others.³³⁶ Claimants contend that “Respondent may not vitiate a contract that the parties entered into in good faith and in accordance with the Civil Code, particularly where, as here, the structure of the transaction Respondent challenges is a direct result of the failures of Respondent’s own regulatory system”.³³⁷
483. As concluded above, the Tribunal accepts *to an extent* Claimants’ argument that the English SPAs do more than the Tashkent SPAs in terms of gaining a “control Premium” and granting various rights such as a choice of law and choice of court agreement. But those additions in the Tribunal’s opinion can’t explain fully the difference between the price paid by Claimants in the English SPAs and the price recorded on the Tashkent SPAs.
484. Second, Claimants rely on the opinion of its expert Professor Butler to argue that the provision of the first paragraph rendering the transaction “null” is not applicable to the second paragraph which instead renders the sham transaction invalid so that reference is made to the true transaction. The Tribunal finds this view to correctly represent the text. The result of the second paragraph does not reflect the seriousness of declaring a transaction void because of seriousness of the interest potentially compromised. Article 124(2) instead makes clear which of two applicable transactions is the one that will apply. Article 124(2) would do this regardless of whether the sham is one that is minor or major.

³³¹ Respondent’s Post-Hearing Brief, ¶ 69.

³³² Claimants’ Post-Hearing Brief, ¶ 54 (citing Mamatov II, ¶ 19 (emphasis added)).

³³³ Claimants’ Post-Hearing Brief, ¶ 102.

³³⁴ Claimants’ Rejoinder on Preliminary Objections, ¶ 229.

³³⁵ Claimants’ Rejoinder on Preliminary Objections, ¶¶ 230, 233. Claimants’ Post-Hearing Brief, ¶102.

³³⁶ Claimants’ Rejoinder on Preliminary Objections, ¶ 233.

³³⁷ Claimants’ Rejoinder on Preliminary Objections, ¶ 233.

It may be that Claimants' act does not comply with other laws of Uzbekistan that reflect serious interests, but the Tribunal by majority does not regard Article 124(2) as such a law.

485. The Tribunal by majority concludes that Respondent has not carried its burden in establishing the seriousness of the alleged act of noncompliance. Accepting that there exists an act of noncompliance to be considered in concert with Claimants conduct in the context of the alleged violation, as set out at paragraphs 429 to 432 above, the Tribunal by majority finds that such an act of noncompliance does not result in a compromise of an interest of sufficient significance so as to render proportionate the exclusion of the investment from the protections of the BIT.
486. On the minority view, the Tashkent SPAs were necessary to secure transfer of title in the shares and in this sense were not “sham” or “fictitious”. However, the Tashkent SPAs were “sham” or “fictitious” insofar as they purported to set out the terms under which title was transferred. Contrary to the impression they were designed to convey, the Tashkent SPAs were never intended to be performed (i.e. *the shares would never have been sold at the price and on the terms set out*). Thus, in the words of Article 124 of the Uzbek Civil Code, the Tashkent SPAs were clearly transactions “concluded for the purpose of concealing another transactions (sham transactions)”. Having said this, however, the effect of Article 124 of the Uzbek Civil Code is such that the consequences of such a sham or fictitious contract are those provided for in other legislation (including those provisions addressed elsewhere in this section).

(3) **Law No. 260-II (Law on Exchange Activity), Articles 7, 15 and 27**

487. Law No. 260-II was adopted so as “to regulate relations related to the establishment and activities of exchanges”.³³⁸ Article 7 provides that the “main principles” of exchange activity are “openness and publicity of exchange trades; freedom of formation of prices during exchange trades; voluntariness of concluding exchange transactions; equality of conditions of participation in exchange trades for all exchange members”.
488. An “exchange” is defined as “a legal entity creating necessary conditions for trading in exchange commodities by arranging and holding public and open exchange trades on the basis of established rules in previously identified venue and time”.³³⁹ The law is directed at “members of an exchange” defined as “those who had purchased or received a brokerage place in procedure established by the exchange”.³⁴⁰ Also mentioned are

³³⁸ **R-0008**, Law No. 260-II dated 29 August 2001, Art. 1.

³³⁹ **R-0008**, Law No. 260-II dated 29 August 2001, Art. 3.

³⁴⁰ **R-0008**, Law No. 260-II dated 29 August 2001, Art. 16.

participants of exchange transactions” which are defined as “[m]embers of the exchange”.³⁴¹

489. Article 6 provides in part that:

In case of violation by exchanges or their members of legislation on exchanges and exchange activity, the authorized bodies for regulating the activity of exchanges may issue compulsory directives requiring elimination of revealed violations.

In case of non-compliance of exchanges with directives of authorized bodies and provisions of Articles 14 and 15 of this Law, the authorized bodies may suspend the license of the exchange for a period of not more than ten working days or go to law requesting suspension of the license for a period of more than ten working days or termination of license.³⁴²

490. Article 15 provides:

An exchange may not carry out a direct production, trade, trade and brokerage activity or be a founder (shareholder) of other legal entities, except for cases provided by legislation.

Public authorities and bodies of public administration may not act as a founder (shareholder) of an exchange, except for the cases provided by legislation.

The exchange employees are prohibited from acquiring a brokerage place and use the classified information for purposes not related to their job description.

The following are not allowed in the exchange:

trade in commodities not included in the exchange bulletin;

any type of concerted actions of participants of exchange trades that may entail a change in current exchange prices or their fixation;

spread of false information that may be the reason for artificial change in the market structure;

registration of an exchange transaction concluded between its members without exchange trades.³⁴³

³⁴¹ **R-0008**, Law No. 260-II dated 29 August 2001, Art. 24.

³⁴² **R-0008**, Law No. 260-II dated 29 August 2001, Art. 6.

³⁴³ **R-0008**, Law No. 260-II dated 29 August 2001, Art. 15.

491. Respondent alleges that the nondisclosure of the correct price on the TSE by Claimants did not comply with Articles 7, 15 and 27 of Law 260-II. In particular, Respondent points to the prohibition in Article 15 of the “spread of false information that may be the reason for artificial change in the market structure”.³⁴⁴ Respondent argues that Claimants’ alleged investment is illegal as Mr. Kim instructed his broker Mr. Pak to register transaction documents showing that Kaden and Nabolena purchased shares on the TSE for a price that he knew was not the actual price.³⁴⁵ Claimants argue that (1) the obligations in Article 15 are “only applicable to professional market participants”, and (2) Respondent has not established the elements of noncompliance with Article 15. Respondent argues that Article 27 of Law 206-II extends the obligations of the law to the “persons” responsible for violations. Claimants respond that Article 27 refers to responsibility under “established procedure” which in turn is a reference to Order No. 2002-04 and goes on to argue that persons other than exchange participants thus would require conduct which violates a separate specific law.³⁴⁶
492. The Tribunal finds that the obligations in Article 15 of Law 260-II, reflecting the focus of the law as a whole, are directed at Members of the exchange and that therefore the Respondent has not established that Claimants – who are clients rather than members in the language of the Law – acted in non-compliance. The Tribunal accepts that Article 27 of Law 260-II is applicable to all persons responsible, including Claimants. However, the reference in Article 27 to “established procedure” indicates that Claimants ultimately would be responsible under a separate specific law. It is to such other law that the Tribunal must look to assess whether the Claimants acted in noncompliance with legislation.

**(4) Law No. 218-I (Law on Functioning Mechanism of Securities Market),
Articles 6, 25 and 31**

493. Article 6 of Law No. 218-I provides that the “[m]ain principles of trading in the securities market” include “pricing based on actual current demand and supply; strict compliance with the legislation on the securities market by all participants; [...] providing full disclosure about the securities and their issuers[;] transparency and accessibility of that information; protection of the interests of investors and issuers; [and] prohibition and prosecution of fraud and other illegal activities at the securities market”.³⁴⁷

³⁴⁴ Respondent’s Post-Hearing Brief, ¶ 62.

³⁴⁵ Respondent’s Closing Presentation, p. 79.

³⁴⁶ Claimants’ Post-Hearing Brief, ¶ 112-117.

³⁴⁷ **R-0075**, Law No. 218-I dated 25 April 1996, Art. 6. Respondent’s Reply on Preliminary Objections, ¶51 (citing Art. 6 and 25 of Law No. 218(I)); Mamatov I, ¶18; Pak II, ¶13.

494. Article 25 of Law No. 218-I prohibits “manipulation at the securities market through bogus transactions”. Respondent argues that Claimants are in breach of this provision insofar as Claimants disclosed false purchase price for the BC and KC shares to the TSE.³⁴⁸

495. Article 31 of Law No. 218-I provides that:

Securities market participants for violation of securities legislation shall be liable in accordance with established procedure. In case of violation of the securities legislation the economic sanctions to the securities market participants shall apply for: [...] misleading investors and supervising authorities by release (provision) of deliberately false information - in the amount of 300 to 400 times the amount of the minimum wage.³⁴⁹

“Securities market participants” is defined in Article 2 as including investors.³⁵⁰

496. Respondent alleges that Claimants are in breach of Article 25 in that Claimants disclosed false purchase price for the BC and KC shares to the TSE.³⁵¹

497. Respondent also alleges that Claimants’ alleged investment breaches Article 31 in that Mr. Kim instructed his broker Mr. Pak to register transaction documents showing that Kaden and Nabolena purchased shares on the TSE for a price that he knew was not the actual price.³⁵²

498. As stated above in regard to other allegations, the Tribunal concludes that Claimants entered a price on the TSE that did not reflect the full price paid for those shares. However, as also stated above, the Tribunal by majority finds that Respondent has not established that Claimants intended to mislead investors and supervising authorities. Likewise, the Tribunal by majority finds that Respondent has not established that Claimants intended to manipulate the market.

499. Even assuming the Claimants were found to have acted in non-compliance with these provisions, the Tribunal by majority does not regard the sanctions provided for these provisions to reflect a seriousness to the obligations that renders proportionate the removal of protection of the BIT. Therefore, the Tribunal by majority considering this lesser degree of seriousness of the obligation in concert with the context of the alleged violation, as set out at paragraphs 429 to 432 above, the Tribunal concludes that, even if it were to conclude

³⁴⁸ **R-0075**, Law No. 218-I dated 25 April 1996, Art. 25. Respondent’s Closing Presentation, p. 79.

³⁴⁹ **R-0075**, Law No. 218-I dated 25 April 1996, Art. 31.

³⁵⁰ **R-0075**, Law No. 218-I dated 25 April 1996, Art. 2.

³⁵¹ Respondent’s Closing Presentation, p. 79.

³⁵² Respondent’s Closing Presentation, p. 79.

that Claimants had acted in non-compliance with either provision, the act would not be sufficient so as to render proportionate the loss of application of the BIT.

500. On the minority view, in accordance with the reasoning set out at paragraphs 440, 450, and 465 above, there is a breach of Articles 25 and 31 of Law No. 218-I, and the breach is such that it compromises a significant interest of the Host State. The minority view would conclude that the investment therefore falls outside the scope of Article 12 of the BIT on this ground.

(5) Order No. 04-103 (Order on the Prevention of Stock Market Manipulation), Article 2.3.2

501. Article 2.3.2 of Order No. 04-103 provides that “[i]n order not to be accused of manipulating in the securities market”, all market participants are prohibited from “distribut[ing] / transmit[ting] information to other participants or to make any statement, which, in terms of time and / or the circumstances under which they were made, is false or misleading [to] any other market participants, and in respect of which the declarant was aware that it is false and misleading”.³⁵³ Article 1.4 of the same Order indicates that “securities market participants” includes not only professional participants but also “investors”.
502. Respondent argues that Claimants’ alleged investment does not comply with this provision because Claimants disclosed a false purchase price for the BC and KC shares to the TSE.³⁵⁴
503. The Tribunal first recalls that it accepts *to an extent* Claimants’ argument that the English SPAs do more than the Tashkent SPAs in terms of gaining a “control Premium” and granting various rights such as a choice of law and choice of court agreement. But those additions in the Tribunal’s opinion can’t explain fully the difference between the price paid by Claimants in the English SPAs and the price recorded on the Tashkent SPAs.
504. A close examination of the obligation in Article 2, however, makes clear that the consequence of noncompliance with Article 2.3.2 under the Order is to allow for the accusation of manipulation and a referral of the matter to the court. This conclusion in part arises from the opening of Article 2 which states that certain steps are “forbidden”, if the participant wishes “to not be accused of manipulating in the securities market”. In other words, the conditional language indicates that certain “steps” may give rise to the possibility of accusation. And indeed, the Tribunal notes that the Order itself does not specify the applicable sanction, but rather in Article 3.1 (as amended in 2008) provides that “[i]n case of finding signs of price manipulation in the securities market (in the activities

³⁵³ **R-0013**, Order No. 04-103 dated 25 June 1999, Art. 2.3.2.

³⁵⁴ Respondent’s Closing Presentation, p. 79.

of the Participant) by authorized state body or its territorial bodies, within ten days of inspections materials of declaration accepting the fact of price manipulation goes to the court”.³⁵⁵ In other words, the presence of “signs” (e.g., noncompliance with Article 2.3.2) lead to referral to a court for prosecution under another law.

505. The Tribunal considers that when this lower degree of priority is taken with the context of the alleged violation, as set out at paragraphs 429 to 432 above, the majority of the Tribunal concludes that, even if it were to conclude that Claimants had acted in noncompliance with this provision, the violation would not be sufficient to render proportionate exclusion of the investment from the scope of the BIT.
506. On the minority view, the consequence of the matter “go[ing] to the court” is not sufficient to indicate a lesser degree of seriousness of the law. In accordance with the reasoning set out at paragraphs 440, 450, and 465 above, there is a breach of Order No. 04-103, and the breach is such that it compromises a significant interest of the Host State. The minority view would conclude that the investment therefore falls outside the scope of Article 12 of the BIT on this ground.

(6) Order No. 2002-06 (Securities Disclosure Order), Articles 25 and 28

507. Order No. 2002-06 provides in its preamble that the “present Regulation [...] establishes the requirements towards the participants of the securities market on disclosure by them [of] the information” and applies “to all participants of the securities market, except the banks”. Section 1 of the Order sets forth “general provisions”. Sections 2 through 6 then proceed – each in turn – to address the disclosure requirements of issuers (Section 2), professional participants (Section 3), organizers of the trades (Section 4), owners of the securities (Section 5), investors (Section 5*bis*) and the authorized state body (Section 6)”. Section 7 is entitled “concluding provisions”, and consists of Articles 28 and 29. Article 28 of Order No. 2002-06 provides that “[p]articipants of the securities market shall bear responsibility established by the legislation for the improper disclosure of the information at the securities market or disclosure of the information, which is misleading”.³⁵⁶ Respondent argues that Claimants’ investment is illegal as Claimants disclosed a false purchase price for the BC and KC shares to TSE.³⁵⁷

³⁵⁵ **R-0013**, Order No. 04-103 dated 25 June 1999. The Tribunal notes that the text of Order No. 04-103 has been the subject of amendment several times since Claimants’ acquisition of the majority shares in BC and KC. The Tribunal further notes that, after the most recent amendments to the Order, the consequence of “finding of signs of price manipulation in the securities market” is that the matter “goes to the court”. Importantly, the Order does not specify further consequences.

³⁵⁶ **R-0003**, Order No. 2002-06 dated 27 March 2002, Art. 28.

³⁵⁷ Respondent’s Post-Hearing Brief, ¶¶ 62-64.

508. Section 5*bis* on the disclosure obligations of investors has three articles. Article 25*bis* is most pertinent and provides:

Investor is obliged to disclose the information on the intention to buy (through one or several transactions) independently or jointly with his affiliated persons 15 and more percents of the total volume of the charter capital of the open joint stock company through the preliminary publication of the following mandatory information:

Surname, name and patronymic name of the investor for the natural person or full name for the legal person;

Full name of the issuer and its address;

Type of the shares being procured;

Quantity of the shares being procured (pieces);

Volume of the shares being procured (in percent to the total volume of the charter capital of the company).³⁵⁸

509. According to Respondent, the share purchase price is a material term that must be disclosed accurately, that price being reflected in the TSE Rules in force in 2006 and the transaction cards.³⁵⁹ Respondent, in contending there is generally a price disclosure obligation, submits that “Claimants erroneously assert that the only disclosure obligations under Uzbek law are listed in Order No. 2002-06, and that ‘no provision of Uzbek law or regulations were violated by Claimants’ failure to disclose’ the real transaction price of US \$34 million”.³⁶⁰ Respondent submits that while Order No. 2002-06 contains specific disclosure requirements when investors “intend to purchase 15 percent or more or when they complete a purchase for 35 percent or more of a security, the share purchase price must be disclosed and published for *all* transactions at the TSE”.³⁶¹ Moreover, there is an affirmative obligation to disclose that extends beyond brokers.³⁶²

510. Claimants’ response in terms of Order No. 2002-06 is to emphasize that although specific disclosures are required of investors, price is not one of them.³⁶³ Investor disclosures required pursuant to Article 25*bis* of Order No. 2002-06 are: “[1] [s]urname, name and patronymic name of the investor for the natural person or full name for the legal person; [2] [f]ull name of the issuer and its address; [3] type of the shares being procured (pieces);

³⁵⁸ **R-0003**, Order No. 2002-06 dated 27 March 2002, Art. 25*bis*.

³⁵⁹ Respondent’s Post-Hearing Brief, ¶¶ 62-64.

³⁶⁰ Respondent’s Post-Hearing Brief, ¶ 64.

³⁶¹ Respondent’s Post-Hearing Brief, ¶ 64 (emphasis in original).

³⁶² Respondent’s Post-Hearing Brief, ¶¶ 66-68.

³⁶³ Claimants’ Post-Hearing Brief, ¶ 120.

[4] volume of the shares being procured (in percent to the total volume of the charter capital of the company)”.³⁶⁴ The price is not included, and it is therefore not a term that the investor must disclose.³⁶⁵ Claimants submit that Respondent’s expert Professor Black acknowledged that “there is no ‘affirmative requirement in this Order [Securities Disclosure Order No. 2002-06] that the price of the transactions [English SPAs] be disclosed’”.³⁶⁶

511. The Tribunal agrees that Article 25 of Order No. 2002-06 by its own terms does not place on investors a duty to disclose the price. Therefore, the Tribunal concludes that Respondent has not been established that Claimants failed to comply with Article 25.
512. As far as Respondent’s argument that Claimants acted in noncompliance with Article 28, the Tribunal does not read Article 28 or 29 as containing independent obligations but rather as general provisions applicable to and supplementing all of the previous articles. Therefore, the Respondent not having established noncompliance with an article placing an obligation to disclose on the Claimants, Tribunal concludes that Respondent has not established that Claimants failed to comply with Article 28.

(7) TSE Rules, Rule 2

513. Claimants further dispute Respondent’s attempt to argue that Claimants breached certain TSE Rules that were only applicable to brokers and professional exchange members.³⁶⁷ For example, Claimants explain that the price on the transaction cards is to be filled in by the broker, and investors had no obligation to report or disclose anything to the Stock Exchange.³⁶⁸ Moreover, under the TSE Rules, Claimants could not have reported or disclosed anything on the transaction card as it “was completed, by the brokers, after the trades were completed and the prices on the transaction card were taken from the trading system”.³⁶⁹ The Parties have also agreed that the TSE Rules are not part of the laws of Uzbekistan (the TSE Rules are not normative-legal acts).³⁷⁰
514. The Tribunal does not consider the TSE Rules to fall within the formal scope of the legality requirement insofar as the TSE Rules are not normative-legal acts. As a result, there can be no relevant illegality as regards this allegation, and therefore the investment does not fall outside the scope of Article 12 of the BIT on this ground.

G. Alleged Violations Relating to Fraud Causing Significant Harm to the State,

³⁶⁴ R-0003, Order No. 2002-06 dated 27 March 2002, Art. 25; *see also* Claimants’ Post-Hearing Brief, ¶¶ 118-125.

³⁶⁵ Claimants’ Post-Hearing Brief, ¶ 120.

³⁶⁶ Claimants’ Post-Hearing Brief, ¶ 120.

³⁶⁷ Claimants’ Rejoinder on Preliminary Objections, ¶ 248.

³⁶⁸ Claimants’ Post-Hearing Brief, ¶ 124.

³⁶⁹ Claimants’ Post-Hearing Brief, ¶ 124.

³⁷⁰ Claimants’ Post-Hearing Brief, ¶ 123.

the BC and KC Minority Shareholders, the TSE, and the Brokers

515. Respondent alleges that false disclosures and concealment by the Claimants caused significant harm to the State, the BC and KC minority shareholders, the TSE and the brokers, resulting in illicit benefits to Claimants and giving rise to a further four violations of Uzbek law. In particular, Respondent asserts that Claimants defrauded the State, the TSE, their broker, and the minority shareholders of BC and KC in violation of Uzbek law.³⁷¹
516. Claimants draw attention to the fact that Respondent has failed to prove that there are “general antifraud provisions of the Uzbek Civil and Criminal Codes”, and, as Professor Butler shows, Respondent instead cites to “Article 123 [...] a narrow provision dealing with fraudulent contracts, [...] and Articles 168 and 184 of the Criminal Code [that] prohibit specific fraudulent actions (swindling and tax evasion)”.³⁷²
517. Claimants assert that these provisions are inapplicable to this case as: (1) Claimants did not commit criminal fraud in violation of Article 168 (swindling) or (2) Article 184 (tax evasion) of the Criminal Code; nor did (3) Claimants commit civil fraud as they did not deliberately induce anyone to enter a transaction by fraud.³⁷³

(1) Criminal Code, Article 168

518. Respondent argues that Claimants’ actions are in violation of Article 168 of the Uzbekistan Criminal Code. Article 168 provides: “[f]raud, that is, acquisition of someone’s property or the right thereto by deception or abuse of confidence” is punishable by fine, correctional labor or arrest.³⁷⁴
519. Claimants argue that a finding of criminal law is within the exclusive jurisdiction of Uzbek courts and should not be inferred during these proceedings.³⁷⁵ Moreover, Claimants stress that Respondent has not even indicted Claimants despite knowing of these “alleged” crimes for over a year.³⁷⁶
520. Both “swindling” and “tax evasion” require “proof of direct intent to commit crime”, which Claimants assert is absent in this case. Claimants argue that there was no intent to deceive anyone. With respect to “swindling”, the Uzbek Supreme Court has clarified that there must be a “gratuitous acquisition of another’s property”, and it is undisputed that in

³⁷¹ Respondent’s Closing Presentation, p. 148.

³⁷² Claimants’ Post-Hearing Brief, ¶ 158 (*citing* Butler II, ¶¶51-52).

³⁷³ Claimants’ Rejoinder on Preliminary Objections, ¶ 257.

³⁷⁴ **R-0027**, Criminal Code, Art. 168.

³⁷⁵ Claimants’ Rejoinder on Preliminary Objections, ¶ 258.

³⁷⁶ Claimants’ Rejoinder on Preliminary Objections, ¶ 258.

this case each contracting party to the share purchase agreement received consideration.³⁷⁷ Claimants further contend that Sellers have never complained about the transaction nor did Claimants intend to deceive or “swindle” the minority shareholders.³⁷⁸ According to Claimants, Respondent has not provided evidence that “the minority shareholders actually knew about and relied on the supposedly misstated TSE price” so “their decision could not have been influenced by it” and hence there would be no “swindling”.³⁷⁹ Claimants note that Respondent chose not to cross-examine either Ms. Nurmakhanova or Mr. Deneschuk, Claimants’ witnesses involved in the minority acquisitions.³⁸⁰

521. Moreover, Claimants assert that even if such allegations were true (which Claimants deny), as Respondent alleges a violation of Article 168 only with respect to the minority shareholder acquisitions, the Tribunal would still retain jurisdiction over the majority stake acquisition.³⁸¹
522. The Tribunal notes that the determination of criminal charges is a matter for the criminal justice system of the Host State. However, the Tribunal may conclude, on the basis of an examination of the law of the Host State and the facts that pertain to an allegation, that there has been non-compliance with legislation sufficient to trigger the legality requirement. In this regard, the commission of a criminal offence under Article 168, if established, would constitute an illegality sufficient to cause the investment to fall outside the scope of Article 12 of the BIT as the loss of the protection of the BIT, and the vitiation of the Tribunal’s jurisdiction, would be a proportionate response to an illegality of such significance.
523. The Tribunal notes that in this case, Respondent has not proven any of the elements of the alleged crimes. As a result, the Tribunal concludes, on the basis of the arguments and the evidence before it, that there is no illegality as regards this allegation, and therefore the investment does not fall outside the scope of Article 12 of the BIT on this ground.

(2) Criminal Code, Article 184

524. Article 184 of the Criminal Code of Uzbekistan provides: “[i]ntentional concealment or understatement of profit (income) or other taxable objects as well as other evasion from taxes, duties, or other payments, established by the State, in large amount” is punishable by fine, correctional labor, arrest, or imprisonment.³⁸² Respondent in addition directs the

³⁷⁷ Claimants’ Rejoinder on Preliminary Objections, ¶ 260.

³⁷⁸ Claimants’ Rejoinder on Preliminary Objections, ¶ 260.

³⁷⁹ Claimants’ Post-Hearing Brief, ¶ 68.

³⁸⁰ Claimants’ Post-Hearing Brief, ¶ 69.

³⁸¹ Claimants’ Post-Hearing Brief, ¶ 65 (*citing* Claimants’ Memorial on the Merits, ¶ 85; Respondent’s Reply, ¶¶ 76,148,153, 205; Respondent’s Closing Presentation, Disclosure, slide 71).

³⁸² R-0027, Criminal Code, Art. 184.

Tribunal’s attention to Article 30 of the Criminal Code which provides in relevant part: “[...] helpmates shall be subject to liability under the same Article of the Special Part of this Code, as committers”.³⁸³

525. As to Respondent’s “tax evasion” argument, Claimants highlight that Respondent did not excerpt the entire text for Article 184, which Claimants’ expert, Professor Butler, explains would have shown that criminal responsibility under this provision “is possible only after the relevant tax authorities impose administrative penalty for the same act”.³⁸⁴ Additionally, Claimants assert that they had no duty to pay taxes on their acquisition; only Sellers would have to pay on the sale proceeds.³⁸⁵ Claimants submit that “Respondent’s accusations of tax evasion are therefore not only purely speculative, but also directed at the wrong party”.³⁸⁶
526. Claimants assert there was no Article 184 violation as Respondent failed to adduce evidence of the “specific taxes that Claimants supposedly avoided paying” and nor did Respondent produce an Uzbek tax expert or question any of Claimants’ witnesses on this allegation.³⁸⁷
527. Claimants also highlight the Respondent’s argument regarding Ms. Karimova’s involvement as being inconsistent: Respondent argues, on the one hand, “Claimants agreed to assist the Sellers in evading taxes as a ‘quid pro quo’ for a *reduced* share purchase price” while on the other hand arguing “Claimants agreed to pay an *increased* share purchase price as a bribe for Ms. Karimova”.³⁸⁸
528. As regards Respondent’s argument that Article 184 was violated as the Agency Agreement contained a lower price, Claimant points out that Respondent’s expert Professor Black “conveniently overlooks the fact that the payment he is referring to are actually fees due to a commercial broker under a commercial agency agreement rather than fees due to the TSE”.³⁸⁹
529. In their Post-Hearing Brief, Claimants also respond to a new argument raised by Respondent at the closing, namely that the agency agreements with Mr. Pak’s firm, Tenet Invest, were voidable as the price at which the commission was based is “false”.³⁹⁰ Claimants dispute this allegation for two reasons: (1) the Tashkent SPAs contained the

³⁸³ **R-0027**, Criminal Code, Art. 30.

³⁸⁴ Claimants’ Rejoinder on Preliminary Objections, ¶ 261.

³⁸⁵ Claimants’ Rejoinder on Preliminary Objections, ¶ 261.

³⁸⁶ Claimants’ Rejoinder on Preliminary Objections, ¶ 263.

³⁸⁷ Claimants’ Post-Hearing Brief, ¶ 62.

³⁸⁸ Claimants’ Post-Hearing Brief, ¶ 64 (emphasis in original).

³⁸⁹ Claimants’ Post-Hearing Brief, ¶ 59.

³⁹⁰ Claimants’ Post-Hearing Brief, ¶ 94.

actual price at which the BC and KC shares traded on the TSE and the English SPAs did not conclude the BC and KC transactions so they were not subject to the registration requirements under Articles 5 and 17 of Resolution No. 285; and (2) given the history and prior transactions where Tenet Invest played a role for BC shares, as elucidated by “Mr. Pak’s prevarication and eventual volte-face on the stand,” “there can be no serious doubt that [Mr. Pak] was well aware of the full terms of the BC and KC transactions”.³⁹¹

530. In the Tribunal’s view, Respondent has not established any of the elements of the alleged crime. As a result, the Tribunal concludes on the basis of the arguments and the evidence before it that the investment does not fall outside the scope of the BIT as a result of an act of noncompliance with legislation under Article 12.

(3) Civil Code, Article 123

531. Article 123 of the Civil Code provides: “A transaction concluded under the influence of fraud, coercion, threat, or ill-intentioned agreement of a representative of one party with the other party [...] may be deemed by a court to be invalid upon the suit of the victim”.³⁹²
532. Claimants’ expert, Professor Butler, explains that “there is no civil-law ‘anti-fraud’ provision”, and Article 123 is inapplicable and in any event would only concern the parties to the transaction (not third parties).³⁹³ Professor Butler further asserts that, unlike the common law concept of fraud, Article 123 would not prohibit fraud, but rather only give the alleged victim a right to invalidate the transaction (until then it would be valid).³⁹⁴ At any rate, according to Claimants, the managers of BC and KC did not coerce or defraud the minority shareholders nor did they defraud or intend to defraud anyone through the planned UCG IPO.³⁹⁵ Claimants further submit that “Respondent’s failure to confront Mr. Deneschuk, along with its abandonment of its original Article 123 argument in its closing, is quite telling. There was no coercion and no deceit toward the minority shareholders, and there can be no violation of Article 123”.³⁹⁶
533. Claimants also dispute Respondent’s allegations that Claimants engaged in “securities fraud” and “manipulation”, in violation of Clauses 2.3.2, 2.3.3 and 2.3.4 of the Manipulation Order and Article 123 of the Uzbek Civil Code and Article 168 of the Criminal Code, by “‘making false disclosures to the Exchange’ and allegedly ‘defraud[ing] BC and KC’s Minority Shareholders from whom Claimants purchased

³⁹¹ Claimants’ Post-Hearing Brief, ¶¶ 96-97.

³⁹² **CL-0370**, Civil Code, Art. 123.

³⁹³ Claimants’ Rejoinder on Preliminary Objections, ¶ 264.

³⁹⁴ Claimants’ Rejoinder on Preliminary Objections, ¶ 265.

³⁹⁵ Claimants’ Rejoinder on Preliminary Objections, ¶¶ 268-410.

³⁹⁶ Claimants’ Post-Hearing Brief, ¶ 100.

shares at below-market prices”³⁹⁷ Claimants contend that: (1) as previously explained, there was no “false disclosure”; (2) there is no concept of “securities fraud” in Uzbek law; and (3) as a matter of fact and Uzbek law, Claimants did not commit manipulation.³⁹⁸

534. Claimants explain that Uzbek Civil Code Article 123 and Uzbek Criminal Code 168, which form the bases of Respondent’s securities fraud allegations, do not concern securities.³⁹⁹ Instead, Claimants explain that Uzbek law “only defines the acts that must be avoided ‘[t]o avoid being accused of manipulation in the securities market’”.⁴⁰⁰
535. Further, as explained by Claimants’ expert Mr. Strahota, “under the general notion of ‘securities fraud,’ Respondent would need to prove *scienter* on behalf of Claimants, and reliance on behalf of the minority shareholders”.⁴⁰¹ Again, Claimants contend “there is no proof that Claimants intended to violate the securities laws” and “absolutely no proof the minority shareholders in any way relied upon the prices at which BC and KC majority stakes were traded on the TSE when deciding whether to sell their shares”.⁴⁰²
536. The Tribunal’s majority recalls its conclusions that Respondent has not proven its allegations that Claimants engaged in fraud in violation of Uzbek law. On the basis of the record before it, there is not a sufficient foundation on which the Tribunal majority can find that Claimants had an intention to mislead other market participants or to manipulate the market. Respondent alleges that Claimants sought to defraud minority shareholders, and has explained how this could have happened. However, a majority of the Tribunal does not find this allegation established by the actual record before it. The Tribunal holds that Respondent has not established that a transaction was made under the influence of “fraud, coercion, threat, or ill-intentioned agreement of a representative of one party with the other part”. Indeed, Article 123 is addressed to vitiating factors between contracting parties, where such factors have not been established and indeed the intended situation is not applicable.
537. The Tribunal’s minority view is in concordance with the majority on the outcome as regards this ground albeit with different reasons. As set out earlier, the minority disagrees with the majority with respect to whether Claimants engaged in fraud in violation of Uzbek law. However, the minority agrees that the specific requirements of Article 123 (a “transaction concluded under the influence of fraud, coercion, threat, or ill-intentioned agreement of a representative of one party with the other party”) are not satisfied here. As

³⁹⁷ Claimants’ Rejoinder on Preliminary Objections, ¶ 248.

³⁹⁸ Claimants’ Rejoinder on Preliminary Objections, ¶ 248.

³⁹⁹ Claimants’ Rejoinder on Preliminary Objections, ¶ 249.

⁴⁰⁰ Claimants’ Rejoinder on Preliminary Objections, ¶ 249 (citing Butler II, ¶ 50; CL-0381, Order No. 04-103 on Prevention of Manipulations of the Securities Market dated 25 June 1999).

⁴⁰¹ Claimants’ Post-Hearing Brief, ¶ 157.

⁴⁰² Claimants’ Post-Hearing Brief, ¶ 157.

noted above, this provision appears to be addressed to vitiating factors as between contracting parties, of which there were none proven in this case.

H. Claimants' Argument that Respondent is Estopped from Raising Illegality

538. Claimants contend that Respondent should be estopped from raising the illegality defense. At its core, Claimants argue that Respondent must have known that the prices stated in the Tashkent SPAs were lower than the fair market price of the majority shares, especially given that this was a transaction in the strategic cement industry involving Kazakh purchasers and Ms. Karimova.⁴⁰³ This lower Tashkent Stock Exchange price is a critical element of the acts of noncompliance alleged by Respondent. Respondent disputes such knowledge. Respondent also notes that Claimants did not plead any of the “essentials of estoppel in international law”, namely “(1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorized; and (3) ... reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement”.⁴⁰⁴
539. Given the Tribunal majority’s denial of Respondent’s Third Objection, it need not consider Claimants’ plea that Respondent should be estopped from raising its illegality objection.⁴⁰⁵
540. In the view of the minority, Claimants’ estoppel argument is unpersuasive, given that: (a) there is no evidence – at least so far in these proceedings – that Respondent had the requisite knowledge of the false prices (and no basis to attribute Ms. Karimova’s alleged knowledge in this regard); and (b) there is no evidence of detrimental reliance on any representation or conduct by Respondent on the part of Claimants.

I. Conclusion on Third Objection

541. The Tribunal, by a majority, finds that Respondent either has failed to establish that Claimants acted in noncompliance with various laws or that such acts of noncompliance do not result in a compromise of an interest that justifies, as a proportionate response, the harshness of denying application of the BIT. The minority view is that Respondent has established the intent required to conclude that Claimants acted in noncompliance with various laws and that such acts of noncompliance – particularly the nondisclosure of the price paid for the shares – result in the compromise of a correspondingly significant interest

⁴⁰³ Claimants’ Rejoinder on Preliminary Objections, ¶ 435.

⁴⁰⁴ Respondent’s Reply on Preliminary Objections, ¶ 213 (citing **RL-0098**, *Pope & Talbot Inc. v. Canada*, NAFTA, Interim Award dated 26 June 2000).

⁴⁰⁵ The Tribunal notes, however, that the pleadings present two opposing conceptions of estoppel present in investment arbitration. An advantage of the legality requirement test adopted in this Decision is that the equitable notions underlying Claimants’ argument, in particular the significance to be accorded inaction by the Host State are incorporated *in part* as factors to be considered in the Tribunal’s analysis of the significance of the obligation to the State and the seriousness of the investor’s conduct.

of Uzbekistan that renders proportionate the exclusion of the investment from the protections of the BIT.

542. The Tribunal also finds that one alleged act of noncompliance does not involve noncompliance with a law as that term is defined in Article 12. The Tribunal, by a majority, denies Respondent's Third Objection to its jurisdiction.

X. THE FOURTH JURISDICTIONAL OBJECTION - CORRUPTION

543. Respondent's fourth objection is that Claimants procured their investment through corruption and that the claim so procured, as a consequence, is not admissible. Corruption is antithetical to the rule of law in its broadest sense. The international community, many nations and many investors have repeatedly stressed the importance of combatting corruption. The primacy of this effort is distinct from the task of establishing the presence of corruption. The Tribunal in considering this objection thus first examines the threshold matter of the burden of proof and the significance to be afforded "red flags". The Tribunal then proceeds to consider (1) Respondent's argument that a payment to Ms. Karimova of approximately US\$8 million by Claimants disguised within the price for their acquisition of KC and BC constituted a bribe in violation of Article 211 of the Criminal Code; (2) Respondent's argument that that payment constituted a bribe in violation of international public policy; and (3) Respondent's argument that a payment by Claimants of US\$3 million to Mr. Bizakov constitutes corruption. The following sections discuss each of these aspects of the fourth objection in turn.

A. The Burden of Proof and the Significance to be Afforded Red Flags

544. As in other corruption cases, the Parties differ on whether the allegation of corruption, as with other crimes, need be established with an exacting standard such as "clear or convincing evidence" or whether the difficulty of proving corruption indicates that the violation need only be established with "reasonable certainty".⁴⁰⁶ The Tribunal observes that the international community and many nations have placed a high priority on combatting corruption and that it may be the case that the standard of proof is shifting in this area of law.
545. Where the allegation is that the alleged act violated a provision of a particular Host State's law, then it follows that the standard of proof to be employed is that provided for in that

⁴⁰⁶ Respondent points to the award of the tribunal in *Metal-Tech v. Uzbekistan* where it is stated: "As in *World Duty Free*, the present factual matrix does not require the Tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments. Instead, the Tribunal will determine on the basis of the evidence before it whether corruption has been established with *reasonable certainty*. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence". **RL-0030**, *Metal-Tech*, ¶ 243 (emphasis added).

law. In this respect, the Parties in this case have not argued what the applicable standard of proof is before Uzbekistan courts adjudicating an alleged violation of Article 211. Moreover, as will become clear in the following sections, regardless of whether the standard of proof is “reasonable certainty” or “clear and convincing evidence”, the Tribunal holds that the allegations of bribery and corruption have not been established by the evidence presented in this proceeding.

546. As a central part of the evidence supporting its objection, Respondent identifies certain red flags in relation to Claimants’ alleged dealings with both Ms. Karimova and Mr. Bizakov. In particular, Respondent focuses on convoluted and complex aspects of Claimants’ acquisition of the shares in BC and KC arguing that they raise red flags indicating potential corruption.⁴⁰⁷ Respondent points to the urgency of the payments;⁴⁰⁸ the lack of formal due diligence or site visits;⁴⁰⁹ the fact that payments were made through a third-party intermediary;⁴¹⁰ the fact that payments were made to bank accounts in a third country;⁴¹¹ and the multilayered corporate structures involved.⁴¹² Respondent also argues that further red flags are present in that the TSE prices were different than those stated in the English SPAs (a circumstance detailed in the Third Objection) and there were later illegal acts taken by Kaden.⁴¹³ Respondent adds that Claimant’s failure to produce requested documents justifies the Tribunal drawing adverse inferences as to the existence of corruption. Respondent cites several ICC cases in which it is argued that the tribunal relied on red flags to conclude that corrupt practices were involved.⁴¹⁴
547. Claimants in response argue, among other things, that the complicated means of acquisition and the financing structure do not violate any laws, and that the presence of many corporate layers are elements commonly seen in transactions in the CIS region. Claimants argue that some of the circumstances cited to as red flags were conditions contractually required by the seller. Claimants argue that a mere existence of red flags may assist a fraud examiner

⁴⁰⁷ The red flags cited are drawn from slides 90-91 of Respondent’s Opening Presentation.

⁴⁰⁸ Kim I, ¶ 18.

⁴⁰⁹ Kim I, ¶ 18.

⁴¹⁰ Kim I, ¶ 20.

⁴¹¹ Kim III, ¶ 26.

⁴¹² Respondent’s Reply on Preliminary Objections, ¶ 353.

⁴¹³ Kaden Invest Limited (BVI): Paid US\$15 million to Finex, US\$1.5 million to Swansea, and US\$2.4 million to Playrise; Nabolena Limited (Cyprus): Paid US\$18.98 million to Finex, US\$1.5 million to Swansea, and US\$520,000 to Playrise; Finex Limited (Hong Kong): Received US\$33.98 million from Kaden and Nabolena; Swansea Enterprises Corp. (BVI): Received US\$3 million from Kaden and Nabolena; Playrise Limited (United Kingdom): Received US\$2.92 million from Kaden and Nabolena and then transferred a large amount of these funds back to Kaden and Nabolena. Respondent’s Opening Presentation, slide 44. *See also* Respondent’s Opening Presentation, slide 51.

⁴¹⁴ Respondent’s Reply on Preliminary Objections, ¶ 234. *See e.g.* **RL-0137**, ICC Case No. 13914 dated March 2008, ICC Bulletin Vol. 24, Special Supplement 2013, pp. 77-79; **RL-0125**, ICC Case No. 8891, Final Award of 1998, reprinted in 4 *Journal du Droit International* 1076 (2000), pp. 1080-1082; **RL-0138**, *Principality of Lichtenstein v. Federal Republic of Germany*, ICC Case No. 6497, Final Award of 1994, reprinted in 24a *Y.B. Comm. Arb.* (1999) 71, 75, ¶¶ 17-29.

in formulating a hypothesis and focus its investigation. However, Claimants state that the red flags, of themselves, do not constitute actual evidence of fraud or corruption.⁴¹⁵ Claimants further contend that many of the above listed flags are in fact normal features of transactions in the business environment in the CIS region.⁴¹⁶

548. The Tribunal first finds that red flags most often provide only circumstantial, as opposed to direct, evidence. As circumstantial evidence, red flags can play an important supporting role in the assessment of guilt. Whether red flags can directly establish, for example, an element of a crime depends on the legal system applicable. There is not a universal answer.
549. The Tribunal second finds red flags useful in triggering an awareness that a transaction does not conform with the characteristics usually found in comparable transactions. Simultaneously, an examination of circumstances that give rise to red flags must take the surrounding context into consideration. In this sense, the Tribunal finds persuasive Claimants' assertion that the business and personal safety considerations in the CIS countries at the time in question in this dispute justified the taking of extra measures so as not to call attention to any individual's wealth or business dealings. This explanatory surrounding context does not negate the red flags in their entirety, but rather may lessen the strength of the red flags identified.
550. The Tribunal has concerns about several aspects of the transactions that led to Claimants' investment. These concerns relate to some – albeit as set out below not all – of the red flags that Respondent contends are present in this dispute. As a result of its concerns, the Tribunal has taken particular steps throughout its consideration of this objection to subject those transactions to heightened scrutiny.
551. First, the Tribunal acceded to an expansive additional document request by Respondent as regards financial aspects of the purchase of the shares, and undertook itself to examine for relevancy the documents requested by Respondent (despite a lack of apparent relevancy or materiality).
552. Second, the Tribunal has conducted a rigorous examination of Respondent's allegations as regards Claimants' alleged interactions with both Ms. Karimova and Mr. Bizakov. In doing so the Tribunal has examined the allegations in relation to both national law and international public policy.
553. As a final point, the Tribunal notes that its focus, at this stage of these proceedings, is on jurisdictional matters and therefore on bribery or corruption only that pertains to

⁴¹⁵ Knyazev, ¶ 4.2.

⁴¹⁶ Knyazev, ¶ 3.28.

Claimants' initial investment. Any matters as regards bribery or corruption that arose later are more appropriately addressed at the merits stage.

A. Respondent's Assertion That an Excess Payment to Ms. Karimova was a Violation of Article 211 of the Uzbekistan Criminal Code

554. Respondent argues that a payment to Ms. Karimova of approximately US\$8 million by Claimants disguised within the price for their acquisition of KC and BC constituted a bribe in violation of Article 211 of the Criminal Code. This article, entitled "Bribe-giving", provides:

Bribe-giving, that is, knowingly illegal provision of tangible valuables to an official, personally or through an intermediate person, or of pecuniary benefit for performance or nonperformance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe-

shall be punished with fine up to fifty minimum monthly wages, or correctional labor up to three years, or arrest up to six months, or imprisonment up to three years.

Bribe-giving:

a) repeatedly, by a dangerous recidivist or a person who has previously committed crimes punishable under Articles 210 or 212 of this Code;

b) in large amount –

shall be punished with imprisonment from three to five years.

Bribe-giving:

a) in especially large amount;

b) in the interests of an organized group;

c) by an authorized official –

shall be punished with imprisonment from five to ten years.

(Paragraphs 2 and 3 as amended by Law of 29.08.2001.)

The person who has given a bribe shall be discharged from criminal liability in the instance if there was extortion with regard to the person, or he communicated voluntarily about the event of the

crime, after having committed criminal actions, repented honestly, and facilitated actively detection of the crime.⁴¹⁷

555. Respondent's objection to jurisdiction is grounded in the BIT as a breach of the legality requirement contained in Article 12 of the BIT. Under the Tribunal's test of whether an act of noncompliance by virtue of Article 12 places an investment outside the scope of application of the BIT, the Tribunal examines the circumstances of the investor's act in concert with the seriousness of the obligation in the law. As regards an act of noncompliance with Article 211 of the Criminal Code, it is the view of the Tribunal that in virtually all circumstances that the Tribunal can envision, such noncompliance would meet that test.
556. In the case of bribery, the Tribunal has no hesitancy in viewing a prohibition on bribery or corruption of governmental officials as a matter of great importance to the Host State. As indicated in the text of Article 211 – bribery requires the “knowingly illegal” act with intent on the part of the investor to gain a particular advantage. The requirement that there be intent renders the action of the investor a serious breach in virtually all cases. The Tribunal does not foreclose that there may exist a set of circumstances that does not trigger the illegality requirement: for example, the provision of an item with trivial value that an Uzbek court might find deserving of only a minimal fine. However, as the Tribunal's analysis demonstrates, the matters in this dispute are likely to surpass any such threshold. The issue therefore presented by this portion of Respondent's Fourth Objection is not whether a violation of Article 211 potentially triggers the legality requirement, but rather whether Respondent has established that Claimants violated Article 211.
557. The criminal law of Uzbekistan generally and the language of Article 211 specifically require that the elements of the crime of bribe-giving be established by the prosecution. Correspondingly, in the context of this objection to jurisdiction, it is Respondent that bears the burden of establishing the elements of this offence.⁴¹⁸
558. There are four elements underlying Respondent's allegation that Claimants violated Article 211 of the Criminal Code. The first two elements are objective: (a) did Claimants make an overpayment as a part of the purchase price; and (b) was that overpayment made to Ms. Karimova? The second two elements are mixed questions of fact and law: (c) was Ms. Karimova an “official” of the Government and (d) was the overpayment intended “for performance or nonperformance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe”?

⁴¹⁷ **R-0027**, Criminal Code, Art. 211.

⁴¹⁸ See **CL-0356**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/04, Award dated 8 December 2002, ¶ 117, in which the tribunal states that “the Tribunal notes that Egypt – which bears the burden of proving such an affirmative defense – has failed to present any evidence that would refute [...]”.

559. To resolve these questions in these proceedings this Tribunal does not, *per se*, apply the criminal statute of Uzbekistan. Rather, it looks to the content of the statute to determine whether, owing to a breach of its terms, the investment in this dispute falls outside the scope of application of the Treaty as described in Article 12 of the BIT.

a. Whether an overpayment was made as a part of the purchase price

560. Respondent asserts that the alleged bribe consisted of payment of monies over and above the actual value of the shares purchased. Respondent asserts that such an overpayment is a common means in CIS countries by which a bribe is paid.⁴¹⁹

561. It is undisputed that Claimants paid to the seller US\$33.98 million for the acquisition of the shares.⁴²⁰ As to the value of the shares of BC and KC at the time of acquisition, Respondent cites statements of Claimants' witnesses and statements in later consolidated financial statements as indicating that the actual value of the shares was US\$25.8 million. The difference of US\$8.2 million is argued by Respondent to be an overpayment made without apparent justification that "should be deemed bribes".⁴²¹

562. Claimants dispute the method of valuation made by Respondent and its interpretation of the statements in the record. Claimants' valuation expert concludes that the price paid for the shares of BC and KC in 2006 was a reasonable one.⁴²²

563. The Tribunal concludes that it is difficult to assess whether or not any overpayment was made since there is uncertainty in valuing the shares themselves. Moreover, even if there were some overpayment, the mere fact of such an overpayment would not in and of itself establish that the overpayment should be regarded as a bribe. It is difficult to determine whether such an overpayment indicates an error in judgment of the buyer or reflects a failure in market valuation of the asset – such a failure being apparent to the buyers but not to other market participants.

564. Ultimately, however, given not only the uncertainties mentioned above but also, as set out below, the failure of Respondent to establish the other elements of bribe-giving, the Tribunal need not decide whether an overpayment was made or whether any such overpayment constitutes a bribe.

b. That the overpayment, if any, was made to Ms. Karimova

⁴¹⁹ Respondent's Post-Hearing Brief, ¶¶ 23-25.

⁴²⁰ Claimants' Memorial on the Merits, ¶¶ 21-22; Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 63; Claimants' Counter-Memorial on Preliminary Objections, ¶ 248.

⁴²¹ Respondent's Post-Hearing Brief, ¶ 14.

⁴²² *Navigant II*, ¶ 36.

565. No document in the record states who was the seller of the shares of BC and KC. Although the record indicates that the purchase price was paid into an account with Finex Bank, the ultimate beneficiary of that payment is not stated. Likewise, the contract of sale does not name Ms. Karimova. However, it appears quite clear from the record that the investors in this transaction assumed that the seller was Ms. Karimova.
566. Respondent points to a number of statements by Claimants, which indicate that Claimants believed that the actual seller of the BC and KC shares was Ms. Gulnara Karimova:⁴²³
- Claimants felt comfortable moving forward with the transaction because they were dealing with Ms. Karimova and wanted a relationship of trust with her.⁴²⁴
 - From the beginning, Claimants believed that Ms. Gulnara Karimova had the ability to protect or destroy their investment.⁴²⁵
 - Claimants believe that Ms. Karimova later influenced State entities that allegedly destroyed Claimants' investment in BC and KC.⁴²⁶
567. Claimants do not dispute that they believed that the seller of the shares was Ms. Karimova. Rather, they point out that the record itself does not confirm this with certainty.
568. The Tribunal finds on the basis of the evidence before it that the seller in all likelihood was Ms. Karimova and that the overpayment, if any, therefore was made to her.

c. That Ms. Karimova was an “official” of the Government

⁴²³ Request for Arbitration, ¶¶ 4, 28, 44; Claimants' Memorial on the Merits, ¶¶ 14, 19; Claimants' Counter-Memorial on Preliminary Objections, ¶¶ 253, 270; Claimants' Rejoinder on Preliminary Objections, ¶¶ 10, 15, 24, 135-136, 174,181; Kim I, ¶¶ 10, 11, 15, 21; Kim II, ¶¶ 20, 24, 53; Kim III, ¶¶ 7,12, 25, 35; Nurmkanova, ¶¶ 17, 19-20, 37, 39-40, 43-44; Sauer, ¶ 37; Zaitbekova, ¶¶ 18-20.

⁴²⁴ Kim I, ¶ 15: “Knowing that purchasing major companies in Uzbekistan was not going to be the same as making an acquisition in say the U.S. or U.K., that we were dealing with the President's daughter, that we wanted to build a long-term relationship of trust with the seller for potential future deals, and that the seller had a team of Uzbek lawyers and advisors to drive the process of completing the transaction to meet Uzbek law requirements, we felt comfortable moving forward”.

⁴²⁵ Sauer, ¶ 37: “[W]e did not wish to antagonize Ms. Karimova who was a powerful person in Uzbekistan due to her personal wealth and political connections. Claimants decided that they had no choice but to honor the requirement for confidentiality for fear that she would retaliate against our investments in Uzbekistan if we did not. As she owned a lot of assets in the country, we knew we were likely to do business with her again”. Zaitbekova, ¶ 18: “We were afraid that Ms. Karimova and her associates would harm our investments in the country if we breached our obligation of confidentiality”.

⁴²⁶ Claimants' Request for Arbitration, ¶ 44.

569. Both governmental officials and private persons are susceptible to corruption in its ordinary meaning. However, Article 211 is concerned only with the corruption of public officials, not private citizens. A commentary on this portion of the Criminal Code states:

Bribery is an umbrella term comprising three independent crimes in public office against the procedure of functioning of supervisory authorities: bribetaking, bribe-giving and mediation in bribery. [...] High degree of social danger of such offence as bribetaking is defined by the fact that it roughly deforms the established procedure for performance of official powers by the officials and thus outrages the behalf civil service. A bribe is the most typical and characteristic display of corruption — the most dangerous criminal phenomenon which undermines the bases of power and government, discredits and undermines its prestige in the eyes of people, acutely affects legal rights and interests of general public.⁴²⁷

570. Article 211 thus requires the person who receives the bribe to be an “official” of the government. The payment of funds to a private person does not fall within the ambit of “bribe-giving” in Article 211 of the Criminal Code.

571. As to whether Ms. Karimova was a “government official”, it is undisputed that Ms. Karimova is the daughter of the then-President of Uzbekistan. That relationship rendered her a “politically exposed person”.⁴²⁸ However, although that characterization can suggest a greater risk that bribery or corruption may play a role in a transaction, neither Ms. Karimova’s familial relationship, nor her status as a “politically exposed person”, of itself can render her a government official in the sense of Article 211 of the Criminal Code.

572. Respondent draws the Tribunal’s attention to the evidence of Claimants’ expert witness, Professor McGlinchey, who refers to Ms. Karimova as “[t]he president’s daughter, working in various high-ranking government positions in the mid-2000s”.⁴²⁹ Respondent itself states that “Ambassador Karimova was an advisor to the Minister of Foreign Affairs from 2005 to 2008 and thus an Uzbek Government official at the time of the payments”.⁴³⁰

573. It is undisputed that at various points in time, Ms. Karimova has held various government posts. The question, however, is whether she was a government official at the relevant time under Article 211, namely when the shares were acquired in early 2006. The Tribunal in this regard notes several exhibits in which reference is made to Ms. Karimova having governmental roles before early 2006:

⁴²⁷ **R-0064**, M.Kh. Rustambayev, *Statement on the Criminal Code of the Republic of Uzbekistan* (2004).

⁴²⁸ Respondent’s Post-Hearing Brief, ¶ 7.

⁴²⁹ Respondent’s Reply on Preliminary Objections, ¶ 221(citing McGlinchey, ¶ 72).

⁴³⁰ Respondent’s Reply on Preliminary Objections, ¶ 233.

- “Karimova, 37, served as a deputy foreign minister and was listed as an adviser to the Uzbek ambassador to Russia from 2003-05”.⁴³¹
 - “[Karimova is] now [in 2004] officially listed as an aide at the Uzbek Embassy in Moscow”.⁴³²
574. The Tribunal further notes additional exhibits that support the claim that, after 2006, Ms. Karimova was to serve as Uzbekistan’s ambassador to the United Nations in Geneva, and as Uzbekistan’s ambassador to Spain.⁴³³
575. The evidence in the record thus indicates that Ms. Karimova did hold governmental posts both before and after the relevant period. However, the record does not substantiate Respondent’s claim that Ms. Karimova held such a post during the period of share acquisition by Claimants. The Tribunal does not find the general statement of Professor McGlinchey whose expert report “examines how the Uzbek state governs”⁴³⁴ to be intended to provide a definitive statement of the governmental role of Ms. Karimova at the time in question. Finally, Respondent’s statement that Ms. Karimova “was an advisor to the Minister of Foreign Affairs from 2005 to 2008” is not sufficiently specific to establish that she was a government official in the sense of Article 211 of the Criminal Code. The Tribunal notes both that Respondent, the Government of Uzbekistan, is presumably in a position to document what persons served as its officials and that there is a dearth of evidence in this regard.
576. The Tribunal considers that an alternative means by which to meet the “government official” part of the test relies on a commentary to Article 211 of the Criminal Code. This commentary claims that the objective element of giving a bribe can be fulfilled by a payment to an official or through a mediator.⁴³⁵ Indeed, Article 211 states that bribe-giving is “knowingly illegal provision of tangible valuables to an official, personally *or through an intermediary person* [...]”. However, Respondent does not argue that Ms. Karimova acted as an intermediary delivering the bribe to an official, and the Tribunal’s determination is that all parties consider Ms. Karimova to be the ultimate beneficiary of

⁴³¹ **C-0513**, Radio Free Europe Radio Liberty, “Uzbek President’s Daughter Appointed Ambassador to Spain”, dated 25 January 2010.

⁴³² **CL-0043**, S. Ostrovsky, “MTS Pays Premium to Uzbek ‘Princess’”, *Moscow Times* dated 19 July 2004.

⁴³³ **CL-0020**, S. Kendzior, *Nations in Transit: Uzbekistan* (Freedom House, 2013), p. 622: “In her spare time, Karimova has served as Uzbekistan’s ambassador to Spain and representative to the UN Council in Geneva”; **CL-0005**, E. McGlinchey, *Chaos, Violence, Dynasty: Politics and Islam in Central Asia*, 1st ed. (Pittsburgh: University of Pittsburgh Press, 2011), p. 115: “Gulnara Karimova, when not in Madrid serving as her father’s ambassador to Spain, applies her considerable wealth to bring international stars to Tashkent”.

⁴³⁴ McGlinchey, ¶ 6.

⁴³⁵ **R-0064**, M.Kh. Rustambayev, *Statement on the Criminal Code of the Republic of Uzbekistan* (2004), p. 8.

the payments made as part of Claimants' transactions. This is therefore not a relevant means by which to meet the "government official" part of the test in this case.

577. The Tribunal holds Respondent has not substantiated its assertion that Ms. Karimova was a government official during the relevant period so as to satisfy the requirements of the Article 211.

d. Performance or nonperformance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe

578. The second aspect of this part of the test in Article 211 of the Criminal Code is that a bribe was given "for performance or nonperformance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe".

579. Respondent, first, places reliance on a commentary to Article 211 to argue that no specific action is necessary for the article's requirements to be met. Claimants, on Mr. Kim's account, sought to develop a "relationship of trust" with Ms. Karimova in anticipation of a long-term business relationship.⁴³⁶ Respondent argues:

[...] while Claimants assert that "establishing goodwill or trust relations is not considered a bribe where the Government official performs no official actions," the commentary to the Criminal Code confirms that "[c]ases when the conditions of the acceptance of the bribe object are not stipulated but the parties understand that the bribe is handed to satisfy the interests of the briber should be qualified as bribery. . . ." As the commentary explains, "[s]uch situations are quite typical for the present-day conditions when representatives of organized crime with a view to the corruption of officials take charge of their 'upkeep', reasonably reckoning that in case of a need [the official] will have no option but to act in their interests".⁴³⁷

580. Whether in fact there was an instance of an "upkeep bribe" is a matter that may arise at the merits stage of these proceedings. At this stage, Respondent does not link its broad interpretation of Article 211 of the Criminal Code as regards an "upkeep bribe" to the acquisition of the investment by Claimants.

581. Respondent, second, argues that Claimants sought to have Ms. Karimova play a role as regards the consent of the Uzbek Antimonopoly Commission to Claimants' acquisition of the shares in BC and KC. It is this argument that is most similar to the majority of cases of

⁴³⁶ Kim I, ¶ 15.

⁴³⁷ Respondent's Post-Hearing Brief, ¶ 12 (citing **R-0066**, Z. Gulomov et al., *Commentaries to the Criminal Code of the Republic of Uzbekistan* (1997) (emphasis added by Respondent)).

alleged corruption wherein a participant to a transaction is the government itself or where governmental approvals or permits are necessary.

582. The Tribunal notes that the authority to which Respondent refers, paragraphs 42-44 of the Request for Arbitration, offers no support for Respondent's claim. Those paragraphs relate to a different acquisition by Claimants; do not make mention of the Uzbek Antimonopoly Commission; and do not make reference to BC or KC. This appears to be an obvious inaccuracy in Respondent's argument on this point.
583. The record indicates that on 25 November 2005, Kaden and Nabolena applied for the consent of the Uzbek Antimonopoly Commission to the acquisition of BC and KC respectively. The relevant letter from Nabolena is exhibited, dated 25 November 2005.⁴³⁸ Both BC and KC received the requisite consents on 16 January 2006.⁴³⁹ The Tribunal notes that there is no evidence, as regards the Uzbek Antimonopoly Commission's decision, that any bribe was sought or given to influence the outcome.
584. Respondent, third, places reliance on Mr. Kim's statement that "*there was no other seller from whom we could buy a cement plant in Uzbekistan, so our choice was to work to the sellers' deadline and terms or leave these assets for a competitor to acquire*".⁴⁴⁰ Respondent argues that this demonstrates that Claimants agreed to Ms. Karimova's terms and therefore that "the payment was made to obtain Claimants' investment, as no such investment would have been possible without the payment". The Tribunal, however, does not agree that this is of necessity the correct interpretation of Mr. Kim's comments. In particular, the "terms" in question might be said to refer to the limitations on due diligence or the non-retention of Uzbek counsel and cannot, without more, be taken to mean that Claimants admit to making corrupt payments or paying bribes to Ms. Karimova.
585. Respondent, fourth, places reliance on Ms. Zaitbekova's statement that Claimants "were concerned, if not afraid, that [Ms. Karimova's] people would infringe or would jeopardize our assets. Yes, we were concerned about that".⁴⁴¹ The Tribunal does not find Respondent's use of this statement persuasive as regards Article 211 of the Criminal Code.
586. First, the test in Article 211 of the Criminal Code requires the identification of "certain action" that the government official must or could take "officially". The statement upon which Respondent places reliance does not identify any such action and does not demonstrate how – whatever position she is said to have held – Ms. Karimova could have

⁴³⁸ **C-0327**, Letter from Nabolena Limited to the Antimonopoly Committee dated 25 November 2005.

⁴³⁹ **C-0189**, Decision of the Antimonopoly Committee on Consent to the Acquisition of KC dated 16 January 2006 ; **C-0153**, Decision of the Antimonopoly Committee on Consent to the Acquisition of BC dated 16 January 2006.

⁴⁴⁰ Respondent's Reply on Preliminary Objections, ¶ 255 (*citing* Kim II, ¶ 21 (emphasis added by Respondent)).

⁴⁴¹ Respondent's Post-Hearing Brief, ¶ 11 (*citing* Zaitbekova, ¶ 18 and Ms. Zaitbekova's oral evidence. *See* Ms. Zaitbekova, Hearing Tr., Day 3, 719:15-18).

“officially” taken such action. Respondent’s claim does not demonstrate any nexus between Ms. Karimova’s position, if any, and any action that might have been taken.

587. Second, Article 211(3) of the Criminal Code provides that a person “who has given a bribe shall be discharged from criminal liability in the instance if there was extortion with regard to the person”. It is not the Tribunal’s role to determine criminal liability. However, the Tribunal finds that if Claimants were to be culpable under Article 211 of the Criminal Code as a result of the inferences that Respondent seeks to draw from Ms. Zaitbekova’s statement, so too would that culpability be discharged as a result of the extortionate nature of the alleged conduct by Ms. Karimova that was feared. Under such circumstances, wherein national law would discharge liability, it would not be appropriate for the Tribunal to conclude that such actions vitiate the Tribunal’s jurisdiction.
588. The Tribunal concludes that Respondent fails to identify what, if any, action that Ms. Karimova took or could have taken as a result of any government position she may have held, so as to advantage the Claimants and thereby establish that the terms of Article 211 of the Criminal Code have been met.
589. In conclusion, the Tribunal notes the statement of the tribunal in *Sistem v. Kyrgyz Republic*. In its award the tribunal held that an “important element of the concept of bribery or corruption is the link between the advantage bestowed and the improper advantage obtained”.⁴⁴² This Tribunal agrees. Proof of bribery or corruption may be difficult but it is fundamental that the severe consequences that follow a finding of corruption justify the need for such a linkage. The casting of doubt or aspersions as to the probity of a transaction is not sufficient. As stated above, red flags may serve to heighten scrutiny. Red flags as circumstantial evidence likewise can play an important supporting role in the assessment of guilt. Under the law of Uzbekistan and under Article 211, however, Respondent has not established that red flags can of themselves substantiate the most basic required elements of the crime of bribe giving as set forth in Article 211.
590. The Tribunal further notes that the centrality of Ms. Karimova to Respondent’s objection begs the question as to why Respondent did not (a) provide witness testimony from Ms. Karimova who at the time was in the government’s custody or (b) explain why this would not have been possible. The Tribunal also notes that Respondent has not made available in this proceeding the results of any governmental investigation that may have taken place into Ms. Karimova’s role. And the Tribunal further notes that Respondent has not made available the testimony of other individuals known to assist Ms. Karimova in her business dealings and who may be in Respondent’s custody or otherwise accessible to it.

⁴⁴² CL-0196, *Sistem*, ¶ 43.

591. For the reasons set out above, the Tribunal concludes that Respondent has not met its burden of proof, and therefore denies Respondent's objection that an excess payment by Claimants to Ms. Karimova was in violation of Article 211 of the Uzbekistan Criminal Code so as to render the claim inadmissible under Article 12 of the BIT.

B. Respondent's Assertion That an Excess Payment to Ms. Karimova was Contrary to International Public Policy Prohibiting Corruption

592. Respondent argues that the factual case put forward in the previous section as regards Article 211 of the Criminal Code is also such as to violate not only the Uzbekistan law regarding corruption, but also international public policy regarding corruption thereby rendering the claim inadmissible.

593. Other tribunals have found there to be an international public policy against corruption, the violation of which would result in the inadmissibility of a claim where the investment at issue was made possible by such corruption. The Tribunal agrees that such an international public policy exists and is present implicitly in BITs.⁴⁴³ The Tribunal observes that this aspect of international public policy is not defined with the specificity found in the Uzbekistan Criminal Code. This is because of the uncodified nature of international public policy despite the seriousness of both the allegation and the consequence.

594. The task of specifying the content of an international public policy against corruption may be undertaken by reference to international instruments addressing corruption.⁴⁴⁴ The Tribunal has reviewed the international instruments on corruption in the record in this proceeding.⁴⁴⁵ Having done so, the Tribunal holds that the international public policy against corruption, like Article 211 of the Uzbekistan Criminal Code, focuses on situations that aim at the corruption of governmental officials.

⁴⁴³ As an implicit requirement that may be displaced by explicit text, the Tribunal does not foreclose the possibility that parties to a BIT or other treaty might choose to address corruption explicitly through mechanisms that sanction such conduct in ways other than the denial of admissibility.

⁴⁴⁴ Respondent cites **RL-0005**, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions dated 17 December 1997; **RL-0006**, United Nations Convention Against Corruption, General Assembly Resolution No. 58/4 dated 31 October 2003.

⁴⁴⁵ Respondent cites **RL-0005**, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions dated 17 December 1997; **RL-0006**, United Nations Convention Against Corruption, General Assembly Resolution No. 58/4 dated 31 October 2003. The Tribunal notes that Respondent also relies upon several commentaries. See **RL-0054**, B. Cremades and D. Cairns, *Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud*, in *Arbitration: Money Laundering, Corruption and Fraud* (K. Karsten, A. Berkeley, eds., ICC Publishing S.A., 2003); **RL-0120**, I. Zerbes, *The Offense of Bribery of Foreign Public Officials*, in *The OECD Convention on Bribery: A Commentary* (M. Pieth, L. Low, and N. Bonucci, eds., 2014); **RL-0123**, G. Ware, et al., *Corruption in Public Procurement: A Perennial Challenge*, in *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level 300* (J. E. Campos and S. Pradhan, eds., 2007).

595. For instance, that the OECD Convention, which Respondent cites as indicative of international public policy, takes as its focus the bribery of government officials.⁴⁴⁶ Thus, the titular concern of the OECD Convention is “Combating Bribery of Foreign Public Officials in International Business Transactions” and the substantive provisions of the Convention bear out this conclusion. The UN Convention, which Respondent also cites, also has this focus.
596. Simultaneously, the Tribunal acknowledges that the effort to combat corruption is an evolving area. Insofar as the UN Convention makes broader reference to “Trading in Influence”, or “Bribery in the Private Sector”, the relevant articles of the Convention use the language “consider making”. This language matches the evolving and serious effort to combat corruption. It also suggests a lower level of consensus amongst the parties to the Convention as to corruption within the private sector, a sector governed by a broad range of criminal statutes. In that sense, the language employed, if anything, supports the conclusion that the scope of international public policy is focused on the corruption of governmental officials.⁴⁴⁷
597. Respondent cites *World Duty Free* and *Metal-Tech* as authority for the argument that payments to officials constitute corruption contrary to international public policy.⁴⁴⁸ The Tribunal notes that the payment in *World Duty Free* was to the President of the Host State and that the payment in *Metal-Tech* was to officials in the Host State government. These authorities add weight to the conclusion that the scope of international public policy is such that it relates to bribery and corruption of public officials.
598. The Tribunal concludes, on the basis of the record, that international public policy, as applicable to this dispute, is in concordance with Article 211 of the Uzbek Criminal Code and takes the bribery and corruption of government officials as its focus. Moreover, the Tribunal concludes that there is no clear consensus that the scope of the prohibition on bribery in international public policy at present extends beyond those circumstances that aim at the corruption of government officials.
599. The Tribunal recalls its conclusions above that Respondent did not establish that Ms. Karimova is a governmental official and that even if Ms. Karimova were a government

⁴⁴⁶ See **RL-0005**, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions dated 17 December 1997; **RL-0006**, United Nations Convention Against Corruption, General Assembly Resolution No. 58/4 dated 31 October 2003.

⁴⁴⁷ **RL-0006**, United Nations Convention Against Corruption, General Assembly Resolution No. 58/4 dated 31 October 2003, Art. 18 and 21.

⁴⁴⁸ Respondent’s Memorial on Preliminary Objections and Request for Bifurcation, ¶¶ 223-225 (citing **RL-0053**, *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award dated 4 October 2006; **RL-0030**, *Metal-Tech*).

official as required by Article 211, Respondent has failed to establish that there was any advantage improperly sought by, or provided to, Claimants.

600. On these bases, the Tribunal denies Respondent's objection that a payment by Claimants to Ms. Karimova was contrary to international public thereby rendering the claim inadmissible.

C. Respondent's Assertion that a Payment by Claimants to Mr. Bizakov Constitutes Corruption in Violation of International Public Policy

601. Respondent's third allegation of corruption rests upon a payment of US\$3 million to Mr. Bizakov as a part of the complex and convoluted purchase transaction. Respondent argues that this alleged bribe renders the claim inadmissible by virtue of the international public policy against corruption. Respondent's allegation emerged over the course of the proceedings as the details of the purchase transaction became clearer during document production.
602. Respondent in this aspect of the fourth objection emphasizes the complexities in terms of the levels of corporate structures involved in the purchase and the role and payment made to Mr. Bizakov as well as possibly other payments to unknown persons. Claimants in response argue, among other things, that the complicated means of acquisition and financing structure do not violate any laws, and that the presence and role of persons such as Mr. Bizakov who can facilitate introductions are elements commonly seen in transactions in the CIS region.
603. Claimants in their Memorial on the Merits describe Mr. Bizakov as a "prominent Kazakh businessman, who had previously introduced Claimants to the Kanstsky Cement Plant opportunity in Kyrgyzstan".⁴⁴⁹ Claimants state that Mr. Bizakov, "as the conduit for the exchange of information between Claimants and the seller", provided the introduction to the seller in a series of meetings in Almaty in Spring-Summer 2005 with Mr. Kim eventually joining such meetings as they extended into early Autumn 2005.⁴⁵⁰ As to the services provided by Mr. Bizakov, Claimants assert that he:

⁴⁴⁹ Claimants' Memorial on the Merits, ¶ 18, (*citing* Kim I, ¶ 10). *See also* Claimants' Rejoinder on Preliminary Objections, ¶ 10 ("By the end of 2005, Claimants had already acquired the Novotroitsk and Kant cement plants in Russia and Kyrgyzstan, respectively. In the meantime, in the spring of that year, Claimants also learned from Mr. Nurlan Bizakov, a prominent Kazakh businessman who also introduced Claimants to the Kant acquisition, that there may be an opportunity to complement their growing cement holding with the BC and KC plants in Uzbekistan". (footnote omitted)).

⁴⁵⁰ Claimants' Memorial on the Merits, ¶ 20. *See also* Claimant's Rejoinder on Preliminary Objections, ¶ 11 ("Negotiations then commenced with the sellers of BC and KC via the intermediation of Mr. Bizakov, and lasted on and off for a number of months before Claimant Kim finally attended the first meeting with the sellers themselves in Tashkent in autumn 2005").

- introduced Claimants to the acquisition opportunity;⁴⁵¹
- provided insight and advice on the Uzbek cement industry;⁴⁵²
- facilitated Claimants’ introduction to sellers⁴⁵³ and acted as an intermediary between Claimants and sellers;⁴⁵⁴
- provided financial data on plants, including plant capacity;⁴⁵⁵ and
- reviewed initial English law SPAs.⁴⁵⁶

604. Mr. Bizakov’s involvement in the transaction is memorialized in two brief consulting agreements.⁴⁵⁷ Neither agreement names Mr. Bizakov but rather both agreements refer to Swansea Enterprises Corp. as the “Consultant, represented by K. Zhorayeva, acting on the basis of the power of attorney[...]” allegedly given by Mr. Bizakov. The agreements indicate that they each were entered into on 15 December 2005. Claimants state that “[w]ith the deal done,” the agreements were drawn up “to pay Mr. Bizakov his commission for introducing them to the opportunity”.⁴⁵⁸

605. Respondent offers no evidence that Mr. Bizakov had or has any relationship to the Government of Uzbekistan. Respondent also offers no evidence that Mr. Bizakov had any contact with the Government of Uzbekistan. Respondent solely points to Mr. Bizakov’s role as a conduit between Claimants and Ms. Karimova (or her representative). Respondent likewise has offered no evidence of any attempt by Mr. Bizakov to secure any advantage from the Government of Uzbekistan by way of a bribe.

606. Respondent rather alleges there are red flags that “bear *all* the recognized indicia of corruption for transactions involving intermediaries”.⁴⁵⁹ The Tribunal recalls its consideration of red flags at paragraphs 544-553 above. The Tribunal considers that the presence of red flags indicates that a transaction merits particular scrutiny. In relation to

⁴⁵¹ Kim I, ¶ 10; Kim III, ¶ 35; Sauer, ¶ 34; Nurmakhanova, ¶ 17; Zaitbekova, ¶ 9.

⁴⁵² Kim I, ¶ 10; Kim II, ¶ 20; Sauer, ¶ 34; Nurmakhanova, ¶ 17.

⁴⁵³ Kim I, ¶ 12; Nurmakhanova, ¶ 45.

⁴⁵⁴ Kim I, ¶ 12; Kim II, ¶ 18.

⁴⁵⁵ Kim III, ¶¶ 16, 35.

⁴⁵⁶ Kim III, ¶ 35.

⁴⁵⁷ See (1) **C-0625**, Agreement on provision of financial advisory services for acquisition of participation interest in the charter capital between Nabolena Limited (a Cypriot company) and Swansea Enterprises Corp. (a British Virgin Islands company); and (2) **C-0626**, Agreement on provision of financial advisory services for acquisition of participation interest in the charter capital between Kaden Invest Limited (a British Virgin Islands company) and Swansea Enterprises Corp. (a British Virgin Islands company). Both agreements state that they were entered into on 15 December 2005.

⁴⁵⁸ Claimants’ Rejoinder on Preliminary Objections, ¶ 17.

⁴⁵⁹ Respondent’s Post-Hearing Brief, ¶ 27 (emphasis in original).

Mr. Bizakov, the Tribunal undertook such additional scrutiny by, among other things, acceding to an expansive additional document request by Respondent as regards financial aspects of the purchase of the shares, and undertaking itself to examine for relevancy of the documents requested by Respondent despite a lack of apparent relevancy or materiality.

607. In particular, on 6 July 2015, Respondent submitted a letter requesting that the Tribunal order Claimant to produce Kaden's unredacted bank statements and to produce Playrise's bank records,⁴⁶⁰ both entities being present in the corporate chain of the purchase of the majority of shares of KC and BC. With respect to both of these requests, Claimants objected on the basis of relevancy and materiality, and lack of exceptional circumstances. Claimants later at the Hearing (Part I) indicated they would not object for the Tribunal, but not Respondent, to review the documents to determine their relevance. In Procedural Order No. 9 of 15 August 2015, the Tribunal ordered:

Claimants to provide the Tribunal, but not Respondent, with (i) Kaden's unredacted bank statements, original and translation, corresponding to Enclosure 5 to Claimants' letter of 11 June 2015 and (ii) Playrise's bank statements from December 2005 to December 2006, within 7 days of this Order. The Tribunal, at its discretion, shall determine the relevancy and materiality of the documents in question and inform the Parties of its decision and further steps, if any, in due course. The Tribunal may request guidance from the Respondent as to the Tribunal's review of the documents produced if and when it concludes such guidance would assist the Tribunal.

In Procedural Order No. 10 of 13 October 2015, the Tribunal denied Respondent's production request explaining:

8. Claimants complied with the Tribunal's Procedural Order No. 9 [...]

9. The Tribunal meticulously reviewed this documentation. In particular, the Tribunal has paid significant attention to the major transactions in the relevant periods and cross-referenced the entities involved in these transactions and the titles of such transactions against entities named and entries identified in the Parties' pleadings and other submissions in this arbitration. No matching entities or entries were identified. Given this review, the Tribunal does not find Respondent's request for production of the unredacted bank

⁴⁶⁰ Playrise Ltd. is a UK-based company owned by Claimants with which Kaden made certain transactions. See Claimants' Rejoinder on Preliminary Objections, ¶ 144 and the exhibits to which reference is made in n. 417, also at that paragraph.

statements of Kaden and Playrise's bank statements for the relevant time period to be material to the present dispute.

608. The Tribunal therefore did not find, on the basis of its examination, any evidence of corruption so as to merit a conclusion that the transaction was illegal or contrary to public policy. Nevertheless, Respondent makes several particular arguments as regards Mr. Bizakov, and his relationship with Claimants. The Tribunal considers those arguments and offers its conclusions as follows.
609. First, Respondent argues that Mr. Bizakov has not carried out consulting services in Uzbekistan previously. The Tribunal does not give much significance to this allegation. First, it is not known to the Tribunal whether in fact Mr. Bizakov has not operated in Uzbekistan previously. Second, and more significantly, Mr. Bizakov's experience in relevant part is in relation to the concrete industry in Central Asia. Respondent does not dispute Claimant's assertion that Mr. Bizakov assisted Claimants with previous purchases they made of concrete plants in Russia and Kyrgyzstan. Absence of work in the country previously is a possible indicator that the person involved had nothing to offer as a consultant. But in this case, the Tribunal finds the relevant experience not to be work in the country *per se* but rather experience in the industrial sector in the region concerned.
610. Second, Respondent points out that Swansea Enterprises Corporation is not based in Uzbekistan. However, the Tribunal finds persuasive the argument that the prevailing business situation, as well as personal safety questions, associated with the CIS countries at the relevant time calls for caution as to what should be regarded as unusual.
611. Third, Respondent argues that the contracts appear to be shams because they require payment "irrespective of whether the transaction was completed".⁴⁶¹ Claimants, however, from the outset of their pleadings have stated that Mr. Bizakov's work took place from spring to autumn of 2005 and that in this sense the work was already completed by the time of the agreements.
612. Fourth, Respondent also argues that the size of the commission to Mr. Bizakov is of concern. The Tribunal agrees that a payment of US\$3 million on a purchase price of US\$33.98 million would appear high in the context of a developed economy with more available information and robust rule of law. Thus, the payment is high when compared to, for example, the commission formula employed on Wall Street, the relevance or application of which was contested by the Parties. Claimants respond that Uzbekistan:

[...] was not a market where an investor could simply approach a seller and do a deal. There was not that kind of information flow or market. Investors relied on intermediaries such as Mr. Bizakov to

⁴⁶¹ Respondent's Post-Hearing Brief, ¶ 28.

introduce them to potential deals and, unsurprisingly, those intermediaries who were able to do so successfully expected, and received, a commission for it. Indeed, both the acquisition price itself and the commission to Mr. Bizakov were funded via loans from KKB, a major Kazakh bank, which was evidently satisfied that it was appropriate for it to lend the sums requested.⁴⁶²

Claimants further contend that the commission paid to Mr. Bizakov was an accepted practice and the amount paid within the accepted percentage of the total contract price. The Tribunal finds Claimants' explanation of the different circumstances as to market information prevailing in that time in Uzbekistan to be persuasive. The Tribunal still regards the commission paid as large but to constitute a red flag of less significance. This is particularly the case when the commission is compared with that referred to in a previous arbitration as summarized in the next paragraph.

613. Fifth, Respondent argues that the award in *Metal-Tech v. Uzbekistan* involves comparable facts and should guide this Tribunal.⁴⁶³ The Tribunal disagrees. First, *Metal-Tech* involved a joint venture with the Government while these proceedings involve a transaction between two private parties. In *Metal-Tech*, the consultant was a national of Uzbekistan, a government official, and a brother of the Prime Minister.⁴⁶⁴ In the present case, the consultant is not a national of Uzbekistan and has no known relationship to the Government of Uzbekistan. Most importantly to the question of the size of commission to Mr. Bizakov, the consultant in *Metal-Tech* was paid US\$3.5 million which “exceeded [claimant’s] initial cash contribution to the venture and amounted to nearly 20% of the entire project cost”,⁴⁶⁵ while Mr. Bizakov’s commission of US\$3 million in contrast was just under 10% of the shares acquisition price.
614. Respondent has not proven, either to the standard of “clear and convincing evidence”, or “reasonable certainty” that the payment of US\$3 million to Mr. Bizakov was an act contrary to the international public policy against corruption thereby rendering the claim inadmissible. The Tribunal therefore denies Respondent’s objection to its jurisdiction on these grounds.

D. Tribunal Conclusions as to the Fourth Objection

615. On the basis of the evidence before it, the Tribunal holds that Respondent has not established that any payment to Ms. Karimova was a violation of Article 211 of the Uzbekistan Criminal Code or in violation of international public policy against corruption.

⁴⁶² Claimants’ Rejoinder on Preliminary Objections, ¶ 17.

⁴⁶³ **RL-0030**, *Metal-Tech*.

⁴⁶⁴ **RL-0030**, *Metal-Tech*, ¶¶ 225-27.

⁴⁶⁵ **RL-0030**, *Metal-Tech*, ¶ 199.

616. On the basis of the evidence before it, the Tribunal holds that Respondent has not established that a payment by Claimants of US\$3 million to Mr. Bizakov constitutes corruption in violation of international public policy against corruption.
617. Given these holdings, the Tribunal denies Respondent's fourth objection.

XI. COSTS

618. Both Parties claim their costs in these proceedings. Respondent argues that the Tribunal should award "Respondent its full costs and expenses associated with defending against Claimants' claims".⁴⁶⁶ Claimants argue that the Tribunal should award "Claimants all of their legal fees and all of their costs and expenses incurred in the jurisdictional stage of these proceedings".⁴⁶⁷
619. Under Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules, the Tribunal may, in its award, decide which party should pay (a) the costs of the arbitration, including the fees and expenses of the Tribunal and the charges of the Centre, and (b) legal and other costs incurred by each party. ICSID Convention Article 61(2) and ICSID Arbitration Rule 28 grant the Tribunal substantial discretion in the allocation of costs. One principle applied in the exercise of that discretion is the widely-accepted view that costs follow the event, that is, the costs of the prevailing party should be borne by the losing party. However, the question of who prevails is better and certainly more fully understood at the conclusion of the merits phase. On this basis, the Tribunal defers the general request for costs to the final award in this proceeding.
620. However, as regards this Decision on the Tribunal's jurisdiction over Claimants' matter set forth in its Request for Arbitration, the Tribunal finds it necessary and appropriate to take particular note of two issues: (A) the inadequate safeguarding of confidential information regarding the Anonymous Experts; and (B) one additional matter of concern as regards the conduct of one of the Claimants. The Tribunal takes note of each issue in turn before it sets out its decision on costs.

A. The Inadequate Safeguarding of Information Regarding the Anonymous Experts⁴⁶⁸

621. The Tribunal's Procedural Order No. 6 dated 1 July 2015 and deciding that an "attorney eye's only" approach would be adopted and that a Confidentiality Agreement would be concluded by the Parties rested in part on its finding in Procedural Order No. 4 that the

⁴⁶⁶ Respondent's Memorial on Preliminary Objections and Request for Bifurcation, ¶ 255.

⁴⁶⁷ Claimants' Counter-Memorial on Preliminary Objections, ¶ 285.

⁴⁶⁸ The full history of the procedural issues surrounding the Anonymous Experts is set forth at paragraphs 71 to 124 of this Decision.

evidence submitted supported *prima facie* “Claimants[’] assertion of a substantial risk to the expert assuming the identity of the expert [was] disclosed”.

622. The negotiation of the Confidentiality Agreement called for in Procedural Order No. 6 was contentious. Among other things, the Parties disagreed on the resolution of disputes under the agreement as well as the necessity of an indemnity clause. On 13 July 2015, the Tribunal wrote to the Parties with its views as to the terms of the Agreement and stated that “it is also the view of the Tribunal that the strength of such an agreement rests first and foremost upon the reputation and standing of the firms and counsel involved”.⁴⁶⁹ A Confidentiality Agreement was concluded on 15 July 2015.
623. As noted at paragraph 94, there followed two (both accepted as inadvertent) disclosures of confidential information by counsel for Respondent that twice derailed extensive efforts aimed at assessing whether it was appropriate to grant anonymity to the two experts and potentially to allow for the Tribunal to hear both their opinion and the cross examination of them.
624. After twice being derailed in potentially engaging with the issues raised by expert opinions of the Anonymous Experts, complex arrangements were undertaken by the Tribunal and Parties for a third attempt shortly prior to the Hearing (Part II).
625. Of prime concern to the Tribunal at this stage is the third disclosure of confidential information that ultimately led to the collapse of these arrangements, to a loss of confidence by the Anonymous Experts in the integrity of the system in place, and to the withdrawal of the Anonymous Experts from these proceedings out of concern for their interests and even safety.
626. The third disclosure arose because Counsel for Respondent copied a high-ranking official of the Uzbekistan Government on an email that contained confidential information relating to the Anonymous Experts. Respondents’ Counsel indicated that the email was deleted by the official and stated that the inclusion of the official was an inadvertent oversight on its part.
627. The Tribunal makes no finding as to intention of Respondent’s Counsel as regards these incidents. It suffices to say that the Tribunal finds that Respondent’s Counsel did not approach the implementation of the Confidentiality Agreement with the professionalism to be expected.
628. At a confidential session held prior to the Hearing (Part II), the Tribunal inquired into the process utilized by Counsel for Respondent to safeguard the information entrusted to it.

⁴⁶⁹ Email from the Tribunal to the Parties dated 13 July 2015.

The Tribunal recalls the following exchange which came after Respondent Counsel's description of the process used:

[Tribunal]: Thank you. Is there an individual responsible for this system that is described [by you], a named individual?

[Counsel for Respondent]: We have an IT department that set up a number of these things. I don't know that we--

[Tribunal]: I'm sorry, responsible. Is there a person designated in this case to be responsible for confidentiality in handling what seems to be a complex group of people?

[Counsel for Respondent]: I think we are all very careful, [Counsel B], myself, [Counsel C]. We all are the ones who--

[Tribunal]: So there is not a particular person?

[Counsel for Respondent]: We have three of us at least.

[Tribunal]: Three of you at least. Is there a written protocol? I see elements of what you would describe could be in a protocol, but is there a written protocol?

[Counsel for Respondent]: Other than the Agreement? No, there is not. The Agreement is what we follow.⁴⁷⁰

629. The disclosure described in paragraph 626 led to the withdrawal of the Anonymous Experts from these proceedings after significant time had been spent and costs had been incurred to facilitate their participation. The Anonymous Experts appropriately concluded in the Tribunal's view that the information entrusted to the care of Counsel for Respondent would not be properly safeguarded.
630. The Confidentiality Agreement existed because of what the Tribunal found to be a *prima facie* supported assertion of risk, including physical risk, to the Anonymous Experts. In the Tribunal's view, Respondent's Counsel failed to adopt adequate procedures to ensure the integrity of the information entrusted to it. The Tribunal in this matter does not believe it is calling for a high bar of conduct. Rather, it observes a lack of serious engagement with the duties assumed under the Confidentiality Agreement.
631. In conclusion on this point, the Tribunal determines that it is appropriate for Respondent to bear the expenses associated with the Anonymous Experts in these proceedings.

⁴⁷⁰ Hearing Tr., Confidential Session, November 9, 2015, 20:16-21:13.

632. The expenses related to the Anonymous Experts have three elements: (1) the fees and expenses of the Tribunal, including those of its Assistant; (2) the expenses associated with the logistical arrangements arising from additional hearing sites; and (3) the costs incurred by the Parties.
633. The Tribunal has examined its work in, among other things, preparing and deliberating upon numerous Procedural Orders dealing with the Anonymous Experts, and meeting with the Parties both via teleconference and in special hearings. The fees and expenses associated with this work are estimated conservatively to be \$80,000.
634. The ICSID Secretariat has examined the direct expenses associated with, among other things, establishing full-service hearing venues at undisclosed sites several times as well as the direct expense of having present at such hearing sites a representative of ICSID. The direct expenses associated with these efforts are estimated conservatively to be \$40,000. The Tribunal finds these direct expenses to be reasonable.
635. The Tribunal requested the Parties to submit a statement of their costs and particularly requested that Claimants identify those costs incurred in relation to the Anonymous Experts. In its filing dated 22 December 2015, Claimants identified such costs, totaling £259,519.76. The Tribunal finds the costs itemized by Claimants to be reasonable.
636. The Tribunal holds that Respondent should bear its own costs as they relate to the Anonymous Experts and compensate Claimants for their costs, their share of the fees and expenses of the Tribunal and their share of the direct expenses associated with additional hearing sites as such costs, fees and expenses relate to the Anonymous Experts. The Tribunal, therefore, awards Claimants the amounts of £259,519.76 and \$60,000, these amounts to be paid by Respondent within 30 days of the date of this Decision. After 30 days from the date of this decision, interest shall accrue on any unpaid amount at the rate of Libor plus 1% until such compensation is paid in full to Claimants.

B. Additional Matter of Concern – Conduct of Specific Claimant

637. As to Claimant, the Tribunal is deeply troubled by the conduct of Mr. Kim during the Hearing (Part I). Mr. Kim surreptitiously took photographs during his witness testimony, later posting at least one of these photos on social media accompanied by offensive language and the statement “White & Case must die”. Mr. Kim acknowledged and apologized for this conduct in a subsequent letter to the Tribunal. Mr. Kim’s conduct at its best was jejune and evidenced an absence of maturity. At a minimum, the conduct is deeply offensive to Counsel for Respondent and to this Tribunal. The Tribunal finds that his conduct indicates a lack of trustworthiness to his testimony given at the same exact time. The Tribunal discounted the probative value of his testimony substantially as a

consequence. This unacceptable conduct will be a factor in the Tribunal's final allocation of costs in this proceeding.

C. The Tribunal's Conclusion on Costs

638. The Tribunal will make its overall decision as to the awarding of costs as part of the final award in these proceedings.
639. However, on the matter of the costs of this proceeding associated with the Anonymous Experts, the Tribunal holds Respondent should bear its own costs as they relate to the Anonymous Experts and compensate Claimants for their costs, their share of the fees and expenses of the Tribunal and their share of the direct expenses associated with additional hearing sites as such costs, fees and expenses related to the Anonymous Experts. The Tribunal, therefore, awards Claimants the amounts of £259,519.76 and \$60,000, these amounts to be paid by Respondent within 30 days of the date of this Decision. After 30 days from the date of this decision, interest shall accrue on any unpaid amount at the rate of Libor plus 1% until such compensation is paid in full to Claimants.

XII. DECISION


640. On the basis of the foregoing, the Tribunal holds:
- (a) Respondent's First Objection to the jurisdiction of the Tribunal, in relation to the nationality of Claimants, is denied;
 - (b) Respondent's Second Objection to the jurisdiction of the Tribunal, in relation to whether Claimants are "investors" who made an "investment", is denied;
 - (c) Respondent's Third Objection to the jurisdiction of the Tribunal, in relation to whether Claimants' investment was "illegal", is denied by majority;
 - (d) Respondent's Fourth Objection to the jurisdiction of the Tribunal, in relation to allegations of bribery and corruption, is denied;
 - (e) Claimants are awarded their costs of this proceeding associated with the Anonymous Experts in the amount of £259,519.76;
 - (f) Claimants are awarded their share of fees and expenses of the Tribunal, as well as their share of direct expenses associated with additional hearing sites, as such fees and expenses relate to the Anonymous Experts in the amount of \$60,000;

- (g) Claimants are entitled to recover interest from Respondent on the sum referred to in (e) and (f) above from the 30th day following the date of this Decision, at the applicable six month LIBOR plus 1% rate through until the date of payment, with such interest being compounded six-monthly; and
- (h) Respondent is to bear its own costs and its share of the fees and expenses of the Tribunal, as well as its share of direct expenses associated with additional hearing sites, as such fees and expenses relate to the Anonymous Experts.

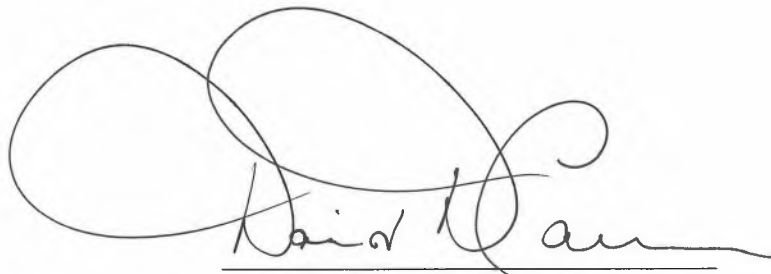
641. The Tribunal will proceed to the scheduling of the merits phase of the proceedings.



The Hon. L. Yves Fortier, P.C., C.C., O.Q., Q.C.
Arbitrator



Mr. Toby Landau, Q.C.
Arbitrator



Professor David D. Caron
President of the Tribunal