

**International Centre for Settlement of Investment Disputes**

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**METAL-TECH LTD.**

CLAIMANT

**v.**

**THE REPUBLIC OF UZBEKISTAN**

RESPONDENT

**ICSID Case No. ARB/10/3**

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**AWARD**

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Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Mr. John M. Townsend, Arbitrator

Mr. Claus von Wobeser, Arbitrator

Secretary of the Tribunal:

Ms. Geraldine Fischer

***Date of dispatch to the parties: 4 October 2013***

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## TABLE OF ABBREVIATIONS

AGMK	Almalik Mining Metallurgy Combine
BIT / Treaty	Bilateral Investment Treaty; specifically “Agreement Between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments” of 4 July 1994
C-CB 1	Metal-Tech’s Costs Brief of 1 August 2012
C-CB 2	Metal-Tech’s Reply Costs Brief of 22 August 2012
C-Mem. M.	Uzbekistan’s Counter-Memorial on Merits and Reply on Jurisdiction and Admissibility of 2 June 2011
C-PHB 1	Metal-Tech’s First Post-Hearing Brief of 18 June 2012
C-PHB 2	Metal-Tech’s Reply Post-Hearing Brief of 2 August 2012
Exh. C-	Metal-Tech’s Exhibits
Exh. CL-	Metal-Tech’s Legal Exhibits
Exh. R-	Uzbekistan’s Exhibits
Exh. RL-	Uzbekistan’s Legal Exhibits
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
January Hearing	Hearing Conducted between 23-28 January 2012
Lacey International	Lacey International Corp.
May Hearing	Hearing Conducted on 29 May 2012
Mem. J.	Uzbekistan’s Memorial on Jurisdiction, Admissibility, and Bifurcation of 11 November 2010
Mem. M.	Metal-Tech’s Statement of Claim and Counter-Memorial on Jurisdiction and Bifurcation of 14 February 2011
MPC	MPC International Investments and Consultants GmbH
MPC Companies	MPC and MPC-Tashkent
PO 1	Procedural Order No. 1 dated 8 March 2011
PO 2	Procedural Order No. 2 dated 14 July 2011
PO 3	Procedural Order No. 3 dated 13 December 2011
PO 4	Procedural Order No. 4 dated 22 December 2011
PO 5	Procedural Order No. 5 dated 13 January 2012
PO 6	Procedural Order No. 6 dated 15 January 2012

PO 7	Procedural Order No. 7 dated 10 February 2012
PO 8	Procedural Order No. 8 dated 13 March 2012
PO 9	Procedural Order No. 9 dated 2 April 2012
PO 10	Procedural Order No. 10 dated 17 April 2012
PO 11	Procedural Order No. 11 dated 22 May 2012
PO 12	Procedural Order No. 12 dated 12 July 2012
R-CB 2	Uzbekistan's Reply Costs Brief of 22 August 2012
R-PHB 1	Uzbekistan's Post-Hearing Brief of 18 June 2012
R-PHB 2	Uzbekistan's Post-Hearing Brief of 2 August 2012
RA or Request	Metal-Tech's Request for Arbitration dated 26 January 2010
Rej. M.	Uzbekistan's Rejoinder on the Merits of 23 November 2011
Reply M.	Metal-Tech's Reply on Merits and Rejoinder on Jurisdiction of 9 September 2011
Tr. [page:line]	Transcript of the hearing
VCLT / Vienna Convention	Vienna Convention on the Law of Treaties
WS	Witness Statement

## **I. INTRODUCTION**

### **A. THE PARTIES**

#### **1. The Claimant**

1. Metal-Tech Ltd.<sup>1</sup> ("Metal-Tech" or "the Claimant") is a manufacturer of ceramic powders, metals and metal derivatives, including molybdenum products.<sup>2</sup> It is a public company organized under the laws of the State of Israel, with its offices at Beer-Sheva 84874, Ramat Hovov St., P.O. Box 2412, Israel.

2. The Claimant has been represented in this arbitration by:

- Covington & Burling LLP  
Mr. O. Thomas Johnson, Jr. (until 6 April 2012)  
Ms. Marney Cheek  
Mr. Eugene D. Gulland (from 18 April 2012)  
Mr. Jonathan Gimblett  
Mr. John F. Scanlon  
Mr. Alexander Berengaut  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2401  
United States of America  
Tel: +1 202 662 6000  
Fax: +1 202 662 6291  
Email: mcheek@cov.com  
jgimblett@cov.com

Ms. Carmen Martínez López  
265 Strand  
London WC2R 1BH  
England  
Tel:+44 20 7067 2000  
Fax:+44 20 7067 2222  
Email: cmartinez@cov.com

- Ms. Maayan Bar, Adv  
Metal-Tech Ltd.  
Sea & Sun, Suite 4410  
8, Herzl Rosenblum Street  
Tel Aviv, 69379

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<sup>1</sup> Prior to 24 July 2001, Metal-Tech Ltd. was known as Metek Metal Technology, Ltd. (RA n.1).

<sup>2</sup> See RA n.3 (describing molybdenum as a "metallic element used to enhance the strength, durability, and corrosion resistance of steel, cast iron, and superalloys. Molybdenum products have many advanced applications in the industrial technology sector").



Israel  
Email: maayan@Metal-Tech.co.il

## **2. The Respondent**

3. The Respondent is the Republic of Uzbekistan (“Uzbekistan” or the “Government” or the “Respondent”).
4. The Respondent has been represented in this arbitration by:
  - White & Case LLP  
Ms. Carolyn B. Lamm  
Ms. Andrea J. Menaker  
Mr. William Currier  
Mr. Frank Panopoulos  
Mr. Lee A. Steven  
Mr. Brody K. Greenwald  
Ms. Kristen M. Young  
701 13th Street, N.W.  
Washington, DC 20005  
United States of America  
Tel: + 1 202 626 3605  
Fax: + 1 202 639 9355  
Email: [clamm@whitecase.com](mailto:clamm@whitecase.com)  
[amenaker@whitecase.com](mailto:amenaker@whitecase.com)
  - Ministry of Justice of the Republic of Uzbekistan  
Mr. Muzraf Ikramov (First Deputy Minister of Justice)  
Mr. Davronbek Akhmedov  
5 Sayilgoh Street  
Tashkent 100047  
Republic of Uzbekistan  
Tel/Fax: + 998 71 233 35 98  
Email: [ikramov@minjust.gov.uz](mailto:ikramov@minjust.gov.uz)  
[international@minjust.gov.uz](mailto:international@minjust.gov.uz)

## **B. MAIN FACTS**

5. The following summary is meant to give a general overview of the present dispute. It does not include all facts which may be of relevance, particularly as they emerged from the extensive evidence gathered at the hearings. To the extent relevant or useful, additional facts will be discussed in the Tribunal’s analysis of the disputed issues.

### **1. The Uzbek Molybdenum Industry**

6. As a result of a significant increase in the demand for molybdenum in the 1960s and 1970s, the Uzbek molybdenum industry flourished in the 1980s. With the collapse of

the Soviet Union, it then experienced a downturn.<sup>3</sup> Following its declaration of independence, Uzbekistan sought to attract foreign investment to revive the industry.

7. Beginning in December 1998 and continuing through 1999, Metal-Tech and the Uzbek government conducted negotiations concerning a joint venture to build and operate a modern plant for the production of molybdenum products. The joint venture was to be formed between Metal-Tech, on the one hand, and Uzbek Refractory and Resistant Metals Integrated Plant (“UzKTJM”) and Almalik Mining Metallurgy Combine (“AGMK”), two companies owned by the Government and involved in the molybdenum industry, on the other. AGMK produces molybdenum concentrate from raw deposits of copper and other minerals and sells it to others who use it to produce various molybdenum products.<sup>4</sup> It is the only company that mines molybdenum in Uzbekistan.<sup>5</sup> UzKTJM is the primary producer and exporter of molybdenum products in Uzbekistan.<sup>6</sup>
8. Due to the outdated technology used by AGMK, the molybdenum concentrate it produced was of low quality and did not meet world market standards. As a result, it could not be exported. While the industry standard required molybdenum concentrate to have a concentration of 51%, AGMK’s concentrate contained no more than 30% of molybdenum.<sup>7</sup> In addition, AGMK lost significant quantities of molybdenum, copper, and rhenium in the extraction process. It was also incapable of extracting the available osmium, and its extraction process produced gases that polluted the environment.<sup>8</sup>
9. UzKTJM, AGMK’s only local customer, could not use AGMK’s low-quality molybdenum concentrate to produce molybdenum trioxide (a high-end derivative product of molybdenum concentrate) that met international standards. Neither could it produce higher-grade products, such as molybdenum tiles and wire, to sell on the world market. In addition, UzKTJM’s technology and equipment was outdated; it frequently broke down while processing AGMK’s low-quality molybdenum concentrate. As a result, UzKTJM operated at 15-20% capacity. By 1998, it was losing money and falling into debt.<sup>9</sup>

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<sup>3</sup> Mem. J. ¶¶11-12; Witness Statement of Farhod Tashmetov dated 9 November 2010 (“Tashmetov WS”) ¶5.

<sup>4</sup> Mem. J. ¶10.

<sup>5</sup> RA ¶5.

<sup>6</sup> Mem. J. ¶10; Mem. M. ¶22.

<sup>7</sup> Mem. J. ¶12; Mem. M. ¶¶20, 25.

<sup>8</sup> Mem. M. ¶24.

<sup>9</sup> Mem. J. ¶¶12-14; Mem. M. ¶¶22-28; Exh. R-19, pp. 1-2.

10. It was against this background that a joint venture was to be formed with the Claimant. The Claimant was to contribute its technology, know-how and access to international markets as well as part of the financing needed for a new plant. UzKTJM and AGMK were to make their contributions in the form of buildings, constructions, machines, and equipment.<sup>10</sup> According to the Claimant, the most important contribution of AGMK was the raw molybdenum, which would be processed by the joint venture. AGMK being the only company in Uzbekistan to mine molybdenum, the joint venture would have no raw material, and thus no purpose, if it did not receive AGMK's raw molybdenum.<sup>11</sup>

## **2. Feasibility Study**

11. During the course of the negotiations, Metal-Tech prepared a draft feasibility study that set out what the Claimant expected to achieve by entering into the joint venture. The Ministry of Economy and Ministry of Finance reviewed this draft feasibility study and advised Metal-Tech how Metal-Tech would have to revise the feasibility study before the Government could approve the proposed project.<sup>12</sup>
12. In a revised feasibility study dated 29 August 1999 (the "Feasibility Study"), Metal-Tech detailed its proposed USD 17.5 million investment project.<sup>13</sup> According to the Claimant, the Feasibility Study was prepared on the basis of the "shared understanding" with the Uzbek government that the joint venture was specifically created to process AGMK's low quality concentrate into pure molybdenum oxide that could be sold on the international market.<sup>14</sup> The Feasibility Study, according to the Claimant, was a mere analytical tool to show how the proposed project would be planned and executed.

## **3. Resolutions Nos. 15 and 29F**

13. The Feasibility Study was presented to the Uzbek authorities on 29 August 1999. On 29 September 1999, the Cabinet of Ministers of the Republic of Uzbekistan provided its comments. On 18 January 2000, on the basis of the Feasibility Study, the Cabinet of Ministers issued Resolution No. 15<sup>15</sup> and Resolution No. 29-F,<sup>16</sup> which authorized the creation of the joint venture Uzmetal Technology ("Uzmetal" or the "JV").

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<sup>10</sup> Mem. M. ¶¶30; Mem. J. ¶¶30; Exh. C-3/R-21.

<sup>11</sup> Mem. M. ¶¶30; RA ¶¶4-5.

<sup>12</sup> Mem. J. ¶¶17.

<sup>13</sup> Mem. M. ¶¶48-55.

<sup>14</sup> Mem. M. ¶¶48-55.

<sup>15</sup> Exh. C-3.

<sup>16</sup> Exh. R-22.

14. Resolution No. 15 was issued to “effectively use copper and molybdenum deposits Kalmokar and SaryCheku (Tashkent Region), to process molybdenum products and increase the export potential of the Republic”.<sup>17</sup> Resolution No. 29-F was issued to approve “the technical and economical justification” for the creation of Uzmetal.<sup>18</sup> As set out in the Resolution, the value of the project, including construction works, amounted to USD 19,398,000. Uzmetal was to create 109 workplaces and produce 600 tons of molybdenum products per year. The construction of the new plant was to be completed within 12 months. Uzmetal was given five years to repay its loans taken from Metal-Tech and from the National Bank of Uzbekistan (“NBU”) as described below (¶17).
15. Pursuant to Article 2 of Resolution No. 15, Uzmetal’s share capital amounted to USD 1 million<sup>19</sup> distributed among Metal-Tech (50%), UzKTJM (30%) and AGMK (20%). Metal-Tech was to make a capital contribution of USD 500,000 or Soum 60,500,000. UzKTJM and AGMK were to make their contributions in kind as set out above (¶10). Article 2 further provided that Uzmetal’s main purpose was “to develop the processing of molybdenum products at AGMK and to manufacture molybdenum products at UzKTJM using state-of-the-art technology”. The volumes and terms of export of Uzmetal’s products were to be defined in separate agreements with Metal-Tech.
16. Article 3 of Resolution No. 15 provided that “all molybdenum-containing products manufactured by AGMK shall be processed by JV Uzmetal Technology, while by-products shall remain in the possession of AGMK”. Article 3 further provided that Uzmetal was to return the metal-containing cake left over from the processing of molybdenum to AGMK.
17. Articles 4 to 6 of Resolution No. 15 dealt with the financing of the project. Under Article 4, Uzmetal was authorized to take a loan from Metal-Tech in the amount of USD 2.624 million (15% of the contract value) for a period of three years. An Israeli bank was to grant another loan to NBU for the remaining USD 14.866 million (85% of the contract value) for a period of five years. Uzmetal was to repay both loans out of its revenues in foreign currency. Pursuant to Article 6, the Uzbek Minister of Finance was authorized to guarantee these loans on behalf of the Government.

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<sup>17</sup> Preamble to Resolution No. 15, Exh. C-3.

<sup>18</sup> Exh. R-22.

<sup>19</sup> Uzmetal’s share capital was later increased to USD 5 million (Exh. R-192, pp. 6-9).

18. Resolution No. 15 also granted several benefits to Metal-Tech. For example, according to Article 10, Uzmetal was exempted from paying customs duties for a period of five years (except for customs clearance charges). Uzbekistan also agreed to issue working permits and visas for Uzmetal's foreign employees and to exempt them from paying consular fees or state duty. Moreover, Metal-Tech's bank was exempted from paying taxes on the income of non-resident personnel.<sup>20</sup>

#### **4. Charter and Constituent Contract of Uzmetal**

19. On 28 January 2000, Metal-Tech, UzKTJM and AGMK adopted the Charter of the Joint Venture Uzmetal Technology (the "Charter")<sup>21</sup> and signed the Constituent Contract About Creation and Activity of Uzbek-Israeli Joint Venture Uzmetal Technology (the "Constituent Contract")<sup>22</sup>, incorporating Uzmetal as a limited liability corporation in Uzbekistan.
20. According to Article 2.1 of the Charter and Article 2.1 of the Constituent Contract, the purpose of Uzmetal was the "manufacture of pure molybdenum and products from it and realization, reception of the profit, including currency". Article 2.1 of the Charter further provided that Uzmetal's "basic tasks" would be the following:

"- organization of manufacture for processing of molybdenum industrial product on OAO "Almalik GMK" and introduction of modern technology for manufacturing of molybdenum production on UZKTJM;

- maintenance of UZKTJM with clean molybdenum raw material from OAO «ALMALIK GMK» and loading of a part of its capacities;

- expansion of commercial and public connections between the State of Israel and Republic of Uzbekistan."

21. In addition, Article 2.2 of the Constituent Contract provided that Uzmetal would have as a "main task":

"- to create on UZKTJM and on OAO "Almalik GMK" a modern manufacture of pure molybdenum and products from it with a high export potential."

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<sup>20</sup> Article 16, Exh. R-21.

<sup>21</sup> Exh. C-4.

<sup>22</sup> Exh. C-5.

22. According to Article 4.1 of the Charter, Uzmetal's "bodies of management" were the General Meeting of the Participants, the General Director and the Auditing Commission. The highest power in the JV was with the General Meeting of the Participants.<sup>23</sup>
23. On 23 March 2000, the JV was registered with the Ministry of Justice.

#### **5. Contract No. 0150500/U**

24. On 15 May 2000, Metal-Tech and Uzmetal entered into Contract No. 0150500/U (the "EPC Contract") for the sale of goods and services by Metal-Tech to Uzmetal. Under the Construction Contract, Metal-Tech agreed to build a new roasting plant in Almalik and to upgrade the facilities in Chirchik.<sup>24</sup> Uzmetal in turn agreed to purchase from Metal-Tech equipment, know-how, and installations needed to modernize the molybdenum production at the AGMK and UzKTJM facilities.<sup>25</sup>
25. On 19 July 2000, Supplementary Agreement No. 1<sup>26</sup> was concluded, modifying several provisions of the Construction Contract.<sup>27</sup>
26. In 2002, the construction and upgrading of the facilities in Almalik and Chirchik was completed. Operations commenced on 1 October 2002.<sup>28</sup>

#### **6. Export Contract No. 180800EX**

27. On 12 November 2000, Metal-Tech and Uzmetal concluded Export Contract No. 180800EX (the "Export Contract"), pursuant to which Uzmetal agreed to sell all of its molybdenum production to Metal-Tech.<sup>29</sup> Metal-Tech was then to sell the products on the world market and to pay Uzmetal with the proceeds from these sales. Uzmetal would ship the products directly to the purchasers, pursuant to shipping instructions received from Metal-Tech, and the purchasers would pay Metal-Tech under their separate sale contracts with Metal-Tech.<sup>30</sup>

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<sup>23</sup> Article 4.2, Exh. C-4; *see also* Article 8.1, Exh. C-5.

<sup>24</sup> Mem. J. ¶48, Mem. M. ¶37; Exh. R-29.

<sup>25</sup> Mem. M. ¶36; Exh. R-29.

<sup>26</sup> Exh. R-29.

<sup>27</sup> C-Mem. M. ¶¶109-111, Exh. R-29.

<sup>28</sup> C-Mem. M. ¶183.

<sup>29</sup> Article III.1, Exh. R-34.

<sup>30</sup> C-Mem. M. ¶256, Exh. R-34.

## **7. Consulting Contracts**

28. On 15 December 2000 and 3 March 2003, Metal-Tech entered into consulting agreements with MPC International Investments and Consultants GmbH ("MPC"), a Swiss limited liability company founded on 20 July 1998. As of 14 May 2012, MPC's shareholders were BV Chemie Pharmacie Holland (45%) ("CPH"), Bordeaux Intertrade Inc. (45%) ("Bordeaux"), and Mr. Wouter Hans Müller (10%).<sup>31</sup> Mr. Müller is also the Director of MPC. On 25 October 2004, Metal-Tech entered into another consulting agreement with MPC-Tashkent, the "daughter enterprise" of MPC ("MPC" and "MPC-Tashkent" are collectively referred to as the "MPC Companies").
29. In addition, on 1 October 2004, Metal-Tech entered into three individual consulting agreements with Messrs Victor Mikhailov, Uygur Sultanov and Igor Chijenok (collectively referred to as the "Consultants"). On 28 February 2005, Metal-Tech entered into a further contract with the Consultants. Payments under this contract were made to Lacey International Corp. ("Lacey International").
30. The Parties disagree about the purpose of these consulting agreements. While the Claimant submits that these were legitimate consulting contracts, the Respondent argues that they were a sham meant to cover the Claimant's illegal payments to Government officials or to persons closely connected to the Government.

## **8. Origin of the Present Dispute**

31. On 22 May 2002, at the General Meeting of Participants of Uzmetal, the then General Director, Mr. Shwa, informed the Participants that the new facilities would soon start to operate and that by the end of 2002, 100-150 tons of finished molybdenum products would be manufactured and sold by Uzmetal.<sup>32</sup>
32. On the basis of Resolution No. 15, on 14 June 2002, AGMK and Uzmetal concluded Contract No. 07-1335 under which Uzmetal undertook to deliver to AGMK "off-gas, generated in the course of firing of molybdenum middling product [...]".<sup>33</sup>

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<sup>31</sup> Expert Report by Mr. Juval Aviv dated 14 May 2012 (the "Aviv Report") ¶18. See also Exh. R-679; Kanyazov II Attachment 15, p. 9.

<sup>32</sup> Exh. R-39, p. 5.

<sup>33</sup> Exh. R-170

33. On 26 July, 2002, AGMK and Uzmetal concluded a framework agreement, entitled Contract No. 12-1614, by which AGMK agreed to sell to Uzmetal its molybdenum concentrate. Uzmetal agreed to return “all by-products – cake with the metals it contains – obtained after reprocessing of the molybdenum middling product” to AGMK.<sup>34</sup> Over the years, this agreement was amended.
34. Uzmetal’s facilities started operating on 1 October 2002. The Parties are in disagreement over the date when Uzmetal should have commenced operations. They also diverge on whether the delays in setting up the facilities were minor or major and whether or not they were attributable to Metal-Tech.
35. On 17 October 2002, Uzmetal and Metal-Tech concluded Export Contract No. 1. Under this contract, Uzmetal undertook to sell Metal-Tech 150 tons of molybdenum oxide for the total amount of USD 1,218,000.<sup>35</sup>
36. The Parties dispute whether Uzmetal and Metal-Tech fulfilled their contractual obligations during operation from October 2002 until mid-2006. In particular, the Parties disagree on the scope of Metal-Tech’s obligations and whether Metal-Tech complied with these obligations. It is undisputed, however, that Uzmetal made a profit in 2005 and that on 26 May 2006, the Uzmetal General Meeting of Participants decided to distribute dividends.<sup>36</sup>
37. On 12 June 2006, the Public Prosecutor’s Office for the Tashkent Region initiated criminal proceedings on the ground that officials of Uzmetal had abused their authority and caused harm to Uzbekistan. These proceedings focused on Mr. Krespel, the General Director of Uzmetal, who had negotiated and signed the Export Contract and its amendments on behalf of Uzmetal.<sup>37</sup>
38. On 18 July 2006, Uzbekistan’s Cabinet of Ministers adopted Resolution No. 141.<sup>38</sup> This Resolution abrogated Article 3 of Resolution No. 15, namely Uzmetal’s rights to

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<sup>34</sup> Exh. R-41.

<sup>35</sup> Exh. R-42.

<sup>36</sup> Exh. R-64.

<sup>37</sup> Mem. J. ¶¶86-87; Witness Statement of Azizbek Usmanov dated 10 November 2010 (“Usmanov WS I”), ¶13; Exh. R-65.

<sup>38</sup> Exh. C-6.



purchase raw materials.<sup>39</sup> According to the Claimant, the resolution cancelled its exclusive right to export Uzmetal's refined molybdenum oxide.<sup>40</sup>

39. On 21 July 2006, AGMK notified Uzmetal of its intention to terminate the supply contract in force at the time between AGMK and Uzmetal, i.e. Contract No. 12-17 of 5 January 2006. The Parties dispute whether Resolution No. 141 prevented AGMK from continuing to supply molybdenum concentrate to Uzmetal and whether Uzmetal could have purchased molybdenum concentrate from alternative sources.
40. On 25 July 2006, AGMK sent Uzmetal a draft agreement for terminating Contract No. 12-17, which Uzmetal did not sign.<sup>41</sup> A few months later, on 25 December 2006, AGMK initiated proceedings against Uzmetal before the Economic Court of Tashkent Region requesting that the Court cancel Contract No. 12-17.<sup>42</sup>
41. By letter dated 27 December 2006, UzKTJM requested that Uzmetal pay UzKTJM's share of the dividends, i.e. USD 162,859,175.55, before the close of the calendar year in accordance with Uzmetal's Charter and the decision of the Uzmetal General Meeting of Participants of 26 May 2006.<sup>43</sup> UzKTJM renewed this request in a letter of 23 February 2007.<sup>44</sup>
42. On 26 January 2007, the Economic Court of the Tashkent Region declared that Contract No. 12-17 shall be terminated.<sup>45</sup> That court's decision was confirmed on appeal on 26 March 2007<sup>46</sup> and on 21 May 2007.<sup>47</sup>
43. On 22 May 2007, UzKTJM initiated proceedings against Uzmetal before the Commercial Court of the Tashkent Region seeking the distribution of its share of UzKTJM's dividends decided on 26 May 2006.<sup>48</sup>

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<sup>39</sup> Mem. M. ¶9; C-Mem. M. ¶¶277-288; Exh. C-6, Exh. C-3.

<sup>40</sup> Mem. M. ¶78.

<sup>41</sup> Mem. M. ¶82 citing Exh. C-39.

<sup>42</sup> Exh. C-45.

<sup>43</sup> Exh. C-46.

<sup>44</sup> Exh. R-295.

<sup>45</sup> Exh. C-49.

<sup>46</sup> Exh. C-51.

<sup>47</sup> Exh. C-54.

<sup>48</sup> Exh. C-55.

44. The Commercial Court of the Tashkent Region awarded the relief sought by UzKTJM on 18 June 2007 and ordered Uzmetal to distribute the unpaid dividends to its shareholders.<sup>49</sup>
45. On the same day, Uzmetal initiated court proceedings before the Tashkent District Economic Court to invalidate the decision taken at Uzmetal's General Meeting of participants on 26 May 2006 to distribute dividends.<sup>50</sup> On 19 July 2007, the Court dismissed Uzmetal's claims and upheld the validity of the decision.<sup>51</sup>
46. On 31 July 2007, UzKTJM initiated bankruptcy proceedings against Uzmetal before the Economic Court of Tashkent Region on the basis of Uzmetal's failure to pay the dividends.<sup>52</sup> It is disputed between the Parties whether these bankruptcy proceedings were fair and whether they were conducted in accordance with Uzbekistan's Bankruptcy Law.
47. On 2 August 2007, UzKTJM's bankruptcy claim was accepted by the Court and a temporary manager, Mr. Bakhriev, was appointed.<sup>53</sup> A few days later, on 7 August 2007, the Commercial Court of the Tashkent Region appointed an external auditor, the audit company Bukhgalter.<sup>54</sup>
48. On 31 August 2007, Metal-Tech submitted its claims in the bankruptcy proceedings to the temporary manager, who rejected the claims on 12 September 2007.<sup>55</sup> The Parties dispute whether this rejection of Metal-Tech's claims was proper.
49. On 4 and 5 September 2007, AGMK and UzKTJM submitted their respective claims in Uzmetal's bankruptcy, which the temporary manager accepted.<sup>56</sup>
50. On 17 September 2007, the first meeting of Uzmetal's creditors took place with UzKTJM and AGMK as the only recognized creditors (Metal-Tech's claims having been

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<sup>49</sup> C-Mem. M. ¶325 and n. 1082 (citing Exh. R-299).

<sup>50</sup> Exh. R-300.

<sup>51</sup> Exh. R-305; C-Mem. M. ¶321.

<sup>52</sup> Exh. C-63.

<sup>53</sup> Exh. C-66.

<sup>54</sup> Exh. C-68.

<sup>55</sup> Exh. C-71, 76.

<sup>56</sup> Exh. C-73.

rejected). At this meeting, UzKTJM and AGMK voted to liquidate of Uzmetal.<sup>57</sup> On 18 October 2007, the Economic Court of the Tashkent Region accepted the liquidation of Uzmetal.<sup>58</sup> On 14 January 2008, the Uzbek Court of Cassation upheld the Economic Court's ruling by declaring Uzmetal bankrupt and initiating liquidation proceedings.<sup>59</sup>

51. A number of creditors' meetings were held during the course of the liquidation proceedings, specifically on 9 November 2007, 3 January 2008, 22 February 2008, and 15 October 2008. Metal-Tech did not attend these meetings.<sup>60</sup> At the creditors' meeting of 15 October 2008, a liquidation plan was finalized and the creditors approved, *inter alia*, the transfer of Uzmetal's property to UzKTJM and AGMK.<sup>61</sup>
52. On 20 October 2008, the report on the completion of the liquidation proceedings was submitted to the Commercial Court of the Tashkent Region.<sup>62</sup> On 18 November 2009, the Economic Court of the Tashkent Region closed the liquidation proceedings.<sup>63</sup>
53. As a result, on 30 December 2009, Uzmetal was delisted from the state registry of legal entities.<sup>64</sup>
54. According to the Claimant, all of Uzmetal's assets are presently jointly or individually owned by AGMK and UzKTJM, both of which are, in turn, controlled by Uzbekistan.<sup>65</sup>

## **II. PROCEDURAL HISTORY**

### **A. INITIAL PHASE**

55. On 26 January 2010, Metal-Tech submitted a Request for Arbitration (the "Request" or "RA") to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre"), accompanied by 16 exhibits (Exh. C-1 to C-16). In its Request, Metal-Tech sought the following relief:

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<sup>57</sup> Exh. C-75; Exh. R-325.

<sup>58</sup> Exh. C-80.

<sup>59</sup> Exh. R-364.

<sup>60</sup> C-Mem. M. ¶¶371-383, Exhs. R-350, 360, 366, 385.

<sup>61</sup> Exh. R-385.

<sup>62</sup> Exh. R-390.

<sup>63</sup> Exh. R-403.

<sup>64</sup> Exh. R-408.

<sup>65</sup> Mem. M. ¶99. See also C-Mem. M. ¶¶388-391.

“Claimant requests that an ICSID tribunal be appointed to hear the claims set forth in this Request for Arbitration, and that the tribunal render an award in favor of Claimant:

- (i) Declaring that Respondent has breached its obligations under Article 9 of the Law on Foreign Investments by failing to accord to Claimant and its investment fair and equitable treatment in accordance with the norms and standards of international law;
- (ii) Declaring that Respondent has breached its obligations under Article 9 of the Law on Foreign Investments by failing to accord to Claimant and its investment full and constant protection and security;
- (iii) Declaring that the Respondent has breached Article 19 of the Law on Foreign Investments through its breach and repudiation of the Joint Venture Agreement and Uzmetal Charter;
- (iv) Declaring that the Respondent has breached Article 3 of the Law on Guarantees and Measures for the Protection of Rights of Foreign Investors by failing to ensure that legislative acts do not have retroactive effect prejudicing a foreign investor and its investments;
- (v) Declaring that the Respondent has breached Article 5 of the Law on Guarantees and Measures for the Protection of Rights of Foreign Investors and Article 10 of the Law on Foreign Investments by expropriating Claimant's property without due process of law and without payment of prompt, adequate, and effective compensation;
- (vi) Declaring that the Respondent has breached the investor guarantees set forth in Appendix 1 of Resolution No. 548;
- (vii) Declaring that Respondent has breached its obligations under Article 2.2 of the Israel-Uzbekistan Bilateral Investment Treaty by failing to accord Claimant's investment fair and equitable treatment;
- (viii) Declaring that Respondent has breached its obligations under Article 2.2 of the Israel-Uzbekistan Bilateral Investment Treaty by failing to accord to Claimant's investment full and constant protection and security;
- (ix) Declaring that Respondent has breached its obligations under Article 2.2 of the Israel-Uzbekistan Bilateral Investment Treaty by taking unreasonable and discriminatory measures that impair the management, use, enjoyment, and disposal of Claimant's investment;
- (x) Declaring that Respondent has breached Article 5 of the Israel-Uzbekistan Bilateral Investment Treaty by expropriating Claimant's investment without complying with the requirements of the Treaty relating to due process and payment of prompt, adequate and effective compensation;
- (xi) Declaring that Respondent has violated its obligations under customary international law by breaching the international minimum standard of treatment of foreign investors and by expropriating Claimant's investment without either due process or prompt, adequate, and effective compensation;
- (xii) Ordering the Respondent to pay to the Claimant full compensation in accordance with the Israel-Uzbekistan Bilateral Investment Treaty and customary international law including, without limitation, compensation for damages in an amount to be established in the proceeding, plus interest thereon in accordance with applicable law;
- (xiii) Ordering the Respondent to pay all costs and expenses of this arbitration, including the fees and expenses of the tribunal and the cost of legal representation, plus interest thereon in accordance with applicable law; and

(xiv) Such other or additional relief as may be appropriate under the applicable law or may otherwise be just and proper.”<sup>66</sup>

56. On 4 February 2010, the Secretary-General of ICSID registered the Claimant's Request for Arbitration.
57. By letter dated 9 February 2010, the Claimant proposed that an arbitral tribunal be constituted and consist of three arbitrators, one appointed by each party, and the President of the Tribunal appointed by agreement of the parties.
58. On 4 March 2010, the Respondent agreed to the Claimant's proposal, in accordance with Arbitration Rule 2(1)(b) of the ICSID Arbitration Rules.
59. On 26 March 2010, the Claimant informed ICSID that it appointed Mr. John M. Townsend, a national of the United States, as arbitrator in this case.
60. On 30 April 2010, the Respondent informed ICSID that it appointed Mr. Claus von Wobeser, a national of Mexico, as arbitrator in this case. Messrs Townsend and von Wobeser subsequently accepted their appointments.
61. By letters of 17 June and 18 June 2010, the Parties informed ICSID of their agreement to appoint Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, as presiding arbitrator. On 22 June 2010, Prof. Kaufmann-Kohler accepted her appointment.
62. By letter dated 28 June 2010, ICSID informed the Parties and the Tribunal that the Tribunal was constituted and that the proceedings were deemed to have commenced as of that date. ICSID also informed the Parties and the Tribunal that Ms. Janet Whittaker would serve as the Secretary of the Tribunal. Subsequently, on 21 November 2012, Ms. Geraldine Fischer replaced Ms. Whittaker.
63. On 3 August 2010, the Tribunal held its first session by teleconference. At the session, the Parties expressed their agreement that the Tribunal had been properly constituted (ICSID Arbitration Rule 6) and stated that they had no objections to the appointment of any of the members of the Tribunal. In addition, the calendar for the proceedings and procedural matters were addressed.

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<sup>66</sup> RA ¶36.

64. The first session was audio-recorded and copies of the recording were deposited in the ICSID archives and subsequently sent to the Parties. Minutes were drafted, signed by the President and the Secretary of the Tribunal, and transmitted to the Parties on 3 September 2010.

**B. WRITTEN PHASE ON JURISDICTION AND MERITS**

65. On 11 November 2010, the Respondent submitted its Memorial on Jurisdiction, Admissibility, and Bifurcation ("Mem. J."), in accordance with the procedural calendar set out in Annex 2 to the Minutes. The Respondent's Memorial was accompanied by Exhibits R-1 to R-110, eight witness statements and one expert report, and legal authorities (Exhibits RLA-1 to RLA-100).
66. On 11 February 2011, the Claimant submitted its Statement of Claim and Counter-Memorial on Jurisdiction and Bifurcation ("Mem. M.") in accordance with the procedural calendar. The Statement of Claim was accompanied by Exhibits C-1 to C-93, legal authorities (Exhibits CLA-1 to CLA-44), and two witness statements and two expert reports.
67. On 24 February 2011, a procedural hearing on the issue of bifurcation took place in Washington, D.C. The procedural hearing was audio-recorded and a real time transcription was made. Copies of the transcript and the audio-recording were sent to the Parties and the Tribunal on 25 February and 28 February 2011 respectively.
68. On 8 March 2011, the Tribunal issued Procedural Order No. 1 ("PO 1"), according to which the Parties were advised that issues of jurisdiction and admissibility would be considered together with the merits and that the proceedings would be bifurcated between jurisdiction and liability, on the one hand, and quantum, on the other.
69. By letter dated 20 May 2011, the Respondent requested an extension of the deadline for filing its Counter-Memorial on the Merits and Reply on Jurisdiction from 26 May 2011 to 2 June 2011, and a corresponding one-week extension of some of the remaining deadlines set forth in the procedural calendar.
70. The Tribunal granted the Respondent's request on 23 May 2011. It also issued a revised procedural calendar for the proceedings, replacing the procedural calendar set out in Annex 2 to the Minutes of the First Session.

71. On 2 June 2011, the Respondent submitted its Counter-Memorial on the Merits and Reply on Jurisdiction ("C-Mem. M.") in accordance with the revised procedural calendar. The Respondent's Counter-Memorial was accompanied by Exhibits R-19 to R-21, R-29, R-85, and R-110 to R-506, legal authorities (Exhibits RLA-101 to RLA-169) and by 17 witness statements and two expert reports. Subsequently, the Respondent submitted corrected versions of some of its exhibits and legal authorities.
72. On 16 June 2011, each Party filed simultaneous document production requests. On 23 June 2011, each filed its objections to the other Party's requests and, on 30 June 2011, its replies to the other Party's objections. On 14 July 2011, the Tribunal issued Procedural Order No. 2 ("PO 2") ruling on the Parties' requests for document production. On 28 July 2011, the Parties produced the required documents. In its production, the Claimant redacted some information as it was allegedly related to third parties.
73. On 9 September 2011, the Claimant submitted its Reply on Merits and Rejoinder on Jurisdiction ("Reply M."). The reply was accompanied by Exhibits C-92 to C-202, legal authorities (Exhibits CLA-45 to CLA-95), and three witness statements and one expert report.
74. On 15 November 2011, the Claimant requested that the Tribunal amend the dates set forth in the revised procedural calendar for the designation of witnesses and experts and the submission of documents for cross and redirect examination.
75. On 23 November 2011, the Respondent submitted its Rejoinder on the Merits ("Rej. M.") in accordance with the revised procedural calendar. The Respondent's Rejoinder was accompanied by Exhibits R-507 to R-658, as well as Exhibits R-85, R-150, R-305, R-311, R-339, R-344, R-350, R-382, R-383, R-468, R-473, and R-486. It was also accompanied by legal authorities RLA-170 to RLA-189 and nine witness statements and two expert reports.
76. On the same day, the Respondent informed the Tribunal that it had recently become aware of details concerning a criminal investigation by the Prosecutor General's Office of Uzbekistan into the activities of several joint venture companies operating or having operated in Uzbekistan, including Uzmetal. The alleged criminal enterprise involved kickback payments to individuals, including Uzbek government officials and individuals affiliated with the Claimant and Uzmetal. The Respondent requested that, in light of this

investigation, the Tribunal postpone the forthcoming hearing and order the Claimant to produce unredacted copies of all documents responsive to Respondent's document production requests Nos. 14, 15, 17, 30, 35, 50, and 51.

77. On 1 December 2011, the Tribunal informed the Parties that the pre-hearing conference call scheduled for 6 December 2011 was postponed to 7 December 2011. It also advised them that it had ruled on the Claimant's request of 14 November 2011 that they should: (i) designate the witnesses for cross-examination by no later than 6 December 2011; (ii) submit the documents for cross-examination by no later than 20 December 2011; and (iii) submit the documents for redirect examination by no later than 3 January 2012. The Tribunal added that it would hear presentations by the Parties on the postponement of the hearing and the production of unredacted documents during the 7 December telephone conference.
78. The pre-hearing conference call took place on 7 December 2011, during which matters relating to the organization of the forthcoming hearing were addressed and the Parties made oral submissions on the Respondent's request to postpone the forthcoming hearing and its request for the production of unredacted documents.
79. By letter dated 8 December 2011, the Tribunal confirmed that it had decided not to postpone the hearing. It noted that it was providing its decision by way of a letter for the Parties to be advised as promptly as possible and indicated that it would issue an order providing the reasons for such decision and addressing the Respondent's application for further document production and the organization of the forthcoming hearing.
80. Accordingly, it followed up on 13 December 2011, with Procedural Order No. 3 ("PO 3"), which also dealt with the Respondent's request for production of unredacted documents. To protect potentially sensitive information relating to third parties, the Tribunal proposed to appoint an independent confidentiality advisor to review unredacted copies of certain documents. The Tribunal proposed Mr. Brooks Daly of the Permanent Court of Arbitration ("PCA") for that role and gave the parties until 15 December 2011 to object to Mr. Daly's appointment. Both Parties subsequently agreed to Mr. Daly's appointment.
81. On 16 December 2011, the Respondent submitted a corrected version of its Counter-Memorial, together with corrected versions of witness statements and expert reports.



82. On 22 December 2011, the Tribunal issued Procedural Order No. 4 ("PO 4") on a request filed by the Respondent in connection with the review of Exhibits R-636 and C-194, and on matters of witness examinations.
83. On 13 January 2012, the Tribunal issued Procedural Order No. 5 ("PO 5") on matters relating to Mr. Daly's review of documents, document production issues, and confidentiality.
84. On 15 January 2012, the Tribunal issued Procedural Order No. 6 ("PO 6") on the organization of the evidentiary hearing.

**C. JANUARY HEARING AND FURTHER SUBMISSIONS**

85. A hearing on jurisdiction and liability was held at the World Bank's Washington D.C. office between 23-28 January 2012 ("January Hearing") in accordance with the procedural calendar.
86. At the January Hearing, three facts came to light of which the Tribunal had been unaware: (a) the February 2005 consulting agreement ("February 2005 Consulting Agreement") between Metal-Tech, Ltd. and Messrs Uygur Sultanov, Igor Chijenok, and Victor Mikhailov was an amendment to or a replacement of earlier agreements that had been in place since 1998; (b) the Consultants primarily or exclusively engaged in what was described as "lobbyist activity," rather than in the activities set out at page 107 of Exhibit R-101, namely, assistance with the operation, production, and delivery of the joint venture's products; and (c) the Consultants had been compensated by payments totalling approximately USD 4 million. In light of these new elements, at the close of the January Hearing, the Tribunal indicated that it had decided to order the Parties to produce additional information and documents, pursuant to its powers under Article 43 of the ICSID Convention, which would be reflected in a procedural order issued after the hearing.
87. Accordingly, on 10 February 2012, the Tribunal issued Procedural Order No. 7 ("PO 7") restating the directions on the production of documents and post-hearing submissions given at the close of the January Hearing. It ordered the Parties to produce certain documents by 27 February 2012 and to submit their first post-hearing submissions by 19 April 2012, and their reply post-hearing submissions, not exceeding 20 pages, by 25 May 2012.

88. In a letter to the Tribunal of 28 February 2012, the Claimant proposed to limit its production as contemplated by PO 7. Consequently, on 13 March 2012, the Tribunal issued Procedural Order No. 8 ("PO 8") clarifying the information required to be produced by the Claimant pursuant to PO 7.
89. On 16 March, 2012, the Claimant produced the relevant documents including the payment schedule contemplated by PO 7 and modified by PO 8 (the "Payment Schedule"). In addition, the Claimant submitted a "Statement of Ariel (Aik) Rosenberg in Response to Procedural Order No. 7 dated 16 March, 2012" ("the Rosenberg Statement"). On the same day, the Respondent produced documents responding to PO 7, including the Second Statement of Mr. Esemurat Kanyazov dated 28 February 2012 ("Kanyazov WS II").
90. By letter dated 16 March 2012, the Respondent proposed a confidentiality order to cover the service record of Mr. Uygur Sultanov (the brother of the former Prime Minister and one of the Consultants). As the Claimant had consented to the proposed confidentiality order, the Tribunal endorsed the order in Procedural Order No. 9 dated 2 April 2012 ("PO 9").
91. On 22 March 2012, the Respondent requested the Tribunal to strike the Rosenberg Statement from the record and, on 28 March 2012, it asked for an order that the Claimant produce certain documents.
92. On 17 April 2012, the Tribunal issued Procedural Order No. 10 ("PO 10"), in which it struck the Rosenberg Statement from the record because it had been filed contrary to the applicable rules. It also noted that it would be assisted by receiving further information about the services provided by the Consultants. Specifically, it directed the Claimant to submit information about the payments made to each individual Consultant, specifying (a) the specific services rendered, (b) which Consultant rendered the service, and (c) when the services were rendered. The Tribunal also asked for responses to the following questions:
- a) Where payments were made to companies (i.e., MPC Companies or Lacey International):
- For which individual Consultant were these payments meant?
  - What was the amount paid to each individual Consultant?
  - What service was the payment intended to remunerate?

- When was this service rendered?
- b) Where payments were made to individual Consultants:
- What service was the payment intended to remunerate (beyond mere reference to the contracts under which the service was rendered)?
  - When was this service rendered?
93. The Tribunal further stated that this information would best be supplied in a revised written statement of Mr. Rosenberg, which should be accompanied by a brief written submission, if useful, and by "relevant contemporaneous documents concerning the Claimant's submission that services were effectively rendered by the Consultants" (¶75, PO 10). Together with this submission, the Claimant was invited to supplement the Payment Schedule to reflect the additional information sought by the Tribunal.
94. The Respondent was given an opportunity to file a rebuttal witness statement together with a brief submission limited to issues contained in the revised statement by Mr. Rosenberg and the Claimant's submission and relevant contemporaneous documents by 14 May 2012. Further, the Parties were given until 17 May 2012 to request an additional hearing for the purpose of examining Mr. Rosenberg and/or the Respondent's additional witness (if any). They were informed that the additional hearing, if any, would take place on 28 or 29 May, 2012 in Washington, D.C. or New York, NY and that a pre-hearing conference call would be conducted on 21 May 2012 at 11:00 a.m. (Washington, D.C.-time) ("Procedural Conference Call"). Finally, the time limits for the first round of post-hearing submissions was extended to 18 June 2012 and for the reply post-hearing submissions to 23 July 2012.
95. On 1 May 2012, the Claimant submitted the Third Witness Statement of Mr. Ariel Rosenberg of the same date ("Rosenberg WS III"). The Claimant informed the Tribunal that it would only be available for an additional hearing on 29 May 2012. On 15 May 2012, the Respondent submitted the Third Witness Statement of Victor Mikhailov dated 14 May 2012 ("Mikhailov WS III") in rebuttal of the Rosenberg WS III. The Respondent also submitted a witness statement of Mr. Nodirjon Juraev dated 14 May 2012, and an Expert Report by Mr. Juval Aviv of the same date. The Respondent informed the Tribunal that Mr. Mikhailov would be available for examination by videoconference on 29 May 2012.

96. In its letter to the Tribunal dated 16 May 2012, the Claimant notified the Tribunal that it intended to cross-examine Mr. Mikhailov. On the next day, the Respondent notified the Tribunal that it intended to cross-examine Mr. Rosenberg.
97. On 17 May 2012, the Secretary of the Tribunal, acting on the instructions of the Tribunal, confirmed to the Parties that, in accordance with PO 10 and further to the Claimant's letter dated 16 May 2012, an additional hearing would take place on 29 May 2012 at the offices of the World Bank in Washington, D.C. ("May Hearing").
98. In its letter of 14 May 2012, the Respondent informed the Tribunal that Mr. Mikhailov would be available for examination by video link. On 16 May 2012, the Claimant objected to a videoconference and requested that Mr. Mikhailov testify in person. The Claimant also requested the production of all the documents on which Mr. Mikhailov had relied when preparing his latest witness statement. Finally, the Claimant requested that the Aviv Report be struck from the record. In subsequent correspondence, the Respondent objected to all these requests. During the pre-hearing conference call conducted on 21 May 2012, the Tribunal heard the Parties' oral submissions on these issues.
99. On 22 May 2012, the Tribunal issued Procedural Order No. 11 ("PO 11") on the Claimant's requests. It held that because Mr. Mikhailov was detained in Uzbekistan, he would testify by video link from a neutral location in Tashkent, preferably from the World Bank's local offices. It rejected the Claimant's request to strike the Aviv Report from the record and directed the Respondent to produce, by 24 May 2012, the documents relied on by Mr. Mikhailov in preparing his latest witness statement or a statement by Mr. Mikhailov confirming that he had not relied on any documents (other than those already produced) in preparing his statement. The Tribunal also issued several directions concerning the organization of the May Hearing.

#### **D. MAY HEARING**

100. On 29 May 2012, the hearing took place as scheduled. Mr. Rosenberg was examined at the offices of the World Bank in Washington, D.C., while Mr. Mikhailov was examined by video conference, with the Tribunal in Washington and Mr. Mikhailov at the Ministry of Justice in Tashkent. Ms. Menaker, Messrs Currier and Savransky of White & Case and Messrs Kanyazov, Juraev, Meliev and Shadibaev from the Ministry of Justice attended the examination of Mr. Rosenberg by video link from Tashkent.

During Mr. Mikhailov's examination, only Ms. Menaker and Mr. Currier of White & Case and Ms. Aurélia Antonietti (Team Leader/Legal Counsel, ICSID), were present in the Tashkent conference room. The representatives of the Ministry of Justice did not attend. The hearing arrangements in Tashkent were supervised by Ms. Aurélia Antonietti, who was in the hearing room at all times.

101. On 18 June 2012, in accordance with PO 10, the Parties submitted their first round of post-hearing submissions ("C-PHB 1" and "R-PHB 1").
102. In a letter to the Tribunal of 6 July 2012, the Respondent submitted three commentaries on provisions of the Uzbek Criminal Code dealing with bribery, marked as Exhibits R-681 through R-683. The Respondent stated that it was submitting these documents in advance of the time limit for the reply post-hearing briefs "so that both parties will have an equal opportunity to comment thereon." On 9 July 2012, the Claimant objected to the introduction of these materials into the record "in the interests of the equality of the parties and procedural good order."
103. On 12 July 2012, the Tribunal issued Procedural Order No. 12 ("PO 12") on such new documents and granted the Respondent's request. To ensure that the Claimant had sufficient opportunity to express itself on the content of these documents, the Tribunal extended the page limit for the Claimant's reply post-hearing submission. It also invited the Parties to submit their reply post-hearing submissions by 2 August 2012.
104. On 2 August 2012, the Parties submitted their reply post-hearing submissions ("C-PHB 2" and "R-PHB 2").
105. The Claimant submitted its cost statement on 1 August 2012 ("C-CB 1") and the Respondent included its cost statement in its First Post-Hearing Submission ("R-CB 1"). Replies on costs were submitted simultaneously on 22 August 2012 ("C-CB 2" and "R-CB 2").
106. The Tribunal closed the proceedings on the date of dispatch of this Award.

### **III. POSITIONS OF THE PARTIES AND RELIEF REQUESTED**

#### **A. THE CLAIMANT'S POSITION AND REQUEST FOR RELIEF**

107. In its written and oral submissions, Metal-Tech made the following main submissions:

- i. The justifications advanced by Uzbekistan for Resolution No. 141, namely that Uzmetal had failed to perform a number of the tasks set forth in Resolution No. 15 and in the founding documents (i.e. Uzmetal's Charter and the Constituent Contract), are without merit. Uzmetal had the right to decide for itself what products to manufacture and in what volumes. Based on this right and on market realities during the relevant period, Uzmetal took the business decision to focus on production and sale of pure molybdenum oxide, to which neither UzKTJM nor AGMK objected. Thus, Uzbekistan's actions were illegitimate and designed to seize Uzmetal's assets. The government, together with AGMK and UzKTJM, worked in league with the shared objective of depriving the Claimant of its investment;<sup>67</sup>
- ii. In any event, even if Resolution No. 15 required Uzmetal to produce fabricated products, Uzmetal's non-compliance would not have justified revocation of the guarantees forming the basis of the Claimant's investment. Further, the Respondent's new allegations in respect of Resolution No. 15 and the founding documents did not form the basis of Resolution No. 141 at the time, and should not be entertained by the Tribunal now. In any case, the Respondent's allegations are baseless as neither the Claimant nor Uzmetal violated the founding documents or Resolution No. 15. For instance, pursuant to Appendix 2 of Resolution No. 15, the Claimant could contribute either USD 500,000 or 60,500,000 Soum. Therefore, Uzbekistan's assertion that the Claimant could only contribute USD 500,000 is wrong;<sup>68</sup>
- iii. In reliance on Resolution No. 141, AGMK stopped supplying molybdenum to Uzmetal. As a result, Uzmetal was forced to cease operations, as there was no feasible alternative source of supply. On the other hand, UzKTJM immediately

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<sup>67</sup> Mem. M. ¶¶106-120; Reply M. ¶¶34-50.

<sup>68</sup> Mem. M. ¶¶126-147.

benefited from Resolution No. 141 as all of AGMK's raw material went to UzKTJM;<sup>69</sup>

- iv. Uzbekistan breached its obligations under the Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments of 4 July 1994 (the "Treaty" or the "BIT") and Uzbek Law. First, by enacting Resolution No. 141, which deprived Metal-Tech of the expected economic benefits of its investment, Uzbekistan expropriated Metal-Tech's investment without compensation in violation of Article 5 of the BIT.<sup>70</sup> The deprivation inflicted by Resolution No. 141 was compounded by the decision of the Economic Court of the Tashkent Region to void Uzmetal's supply contract with AGMK.<sup>71</sup> It was then completed by the illegitimate bankruptcy proceedings against Uzmetal, which were designed to transfer all of Uzmetal's assets to AGMK and UzKTJM. Additionally, the expropriation was unlawful because Uzbekistan discriminated against Metal-Tech on the grounds of its nationality;<sup>72</sup>
- v. Second, by issuing Resolution No. 141, Uzbekistan violated its obligation to accord Israeli investments fair and equitable treatment pursuant to Article 2(2) of the BIT, namely its obligation not to frustrate the legitimate expectations engendered by the representations and commitments which it made and on which the Claimant relied in making its investment;<sup>73</sup>
- vi. Third, by adopting Resolution No. 141 and thereby revoking its commitments made to and relied on by Metal-Tech, Uzbekistan subjected Metal-Tech's investment to unreasonable and discriminatory measures in violation of Article 3 of the BIT. Uzbekistan's measures against Uzmetal were taken in wilful disregard of due process and proper procedure. Further, Metal-Tech was singled out for arbitrary treatment as part of the Government's reaction to criticism from Western democracies;<sup>74</sup>

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<sup>69</sup> Mem. M. ¶¶148-149.

<sup>70</sup> See Mem. M. ¶¶164-179; Reply M. ¶¶152-206.

<sup>71</sup> Mem. M. ¶171.

<sup>72</sup> Mem. M. ¶179.

<sup>73</sup> Mem. M. ¶¶180-185; Reply M. ¶¶207-221.

<sup>74</sup> Mem. M. ¶¶186-196; Reply M. ¶¶222-237.

- vii. Fourth, Uzbekistan violated its obligation to provide full protection and security to Metal-Tech's investment in violation of Article 2(2) of the BIT. In particular, by revoking the legal guarantees set forth in Resolution No. 15, the Respondent violated its obligation to provide Metal-Tech with a secure commercial and legal environment. Moreover, by not intervening when UzKTJM denied Uzmetal access to its facilities in Chirchik, Uzbekistan violated its obligation to provide Claimant's investment with physical security;<sup>75</sup>
- viii. Finally, even if Uzbekistan did not violate the standards of treatment set forth in the BIT, it is still liable for violating several of its own foreign investments laws, which standards of treatment are incorporated into the BIT through Article 11 of the BIT. Uzbekistan has also consented to ICSID arbitration of claims arising under its foreign investments laws in the foreign investment laws themselves.<sup>76</sup> For instance, the Respondent has violated the stabilization clause contained in Article 3 of the Law on Guarantees by adopting and immediately applying Resolution No. 141 to Metal-Tech's investment only six-and-a-half years after the date of the initial investment;<sup>77</sup>
- ix. Uzbekistan's wrongful measures resulted in the total deprivation of Metal-Tech's 50% interest in Uzmetal and its exclusive right to export molybdenum oxide without compensation.<sup>78</sup> Metal-Tech is thus entitled to reparation in accordance with the standards prescribed by international law for wrongful acts;<sup>79</sup>
- x. Contrary to the Respondent's allegations, the Tribunal has jurisdiction over the present dispute. The legality requirement in the BIT must be interpreted as a bar to jurisdiction only where the establishment of the investment was tainted by illegality. It does not apply where the unlawful act is committed in the course of the operation of the investment.<sup>80</sup> Further, in application of the most favoured nation provision in Article 3(2) of the BIT, the Tribunal must assert jurisdiction on the basis of the more favorable definition of investment under Article 1(1) of

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<sup>75</sup> Mem. M. ¶¶197-199; Reply M. ¶¶238-245.

<sup>76</sup> Mem. M. ¶280.

<sup>77</sup> Mem. M. ¶¶200-205; Reply M. ¶¶246-252.

<sup>78</sup> Mem. M. ¶¶170, 183-192, 202; Reply M. ¶¶76, 153, 158-163, 209-210, 240.

<sup>79</sup> Mem. M. ¶¶282-294.

<sup>80</sup> Mem. M. ¶¶200-208; Reply ¶¶262-265.



the Greece-Uzbekistan BIT, which includes no legality requirement.<sup>81</sup> In the event that the Tribunal were to deny the MFN claim, Metal-Tech still has not violated Uzbek law: Uzmetal was constituted and operated in accordance with Uzbek law;<sup>82</sup> and,

- xi. Again contrary to the Respondent's allegations, the counterclaims are not directly concerned with the subject matter of this dispute, which involves Uzbekistan's violations of international law with respect to the Claimant's investment. Hence, Article 8 (1) of the BIT is not sufficiently broad to include counterclaims. Finally, even assuming that the Tribunal has jurisdiction, Uzbekistan's counterclaims should be dismissed because they are insufficiently pled.<sup>83</sup>

108. For these reasons, in its Reply on Merits and Rejoinder on Jurisdiction, Metal-Tech requested the following relief:

"323. For the reasons set forth above, Claimant respectfully requests that the Tribunal:

- exercise jurisdiction under Article 8 of the Israel-Uzbekistan BIT over Metal-Tech's claims described in its Request for Arbitration, Part IV of its Statement of Claim, and Part I of its Reply on Merits;
- deny Respondent's objections to jurisdiction described in Uzbekistan's Memorial and Reply on Jurisdiction;

324. Claimant further requests that the Tribunal:

- find that Respondent has violated its obligations under the BIT by:
  - a) unlawfully expropriating Metal-Tech's investment in Uzbekistan without paying prompt, adequate and effective compensation;
  - b) failed to accord fair and equitable treatment to Metal-Tech's investment;
  - c) subjected Metal-Tech's investment to unreasonable and discriminatory measures; and
  - d) failed to accord full protection and security to Metal-Tech's investment.
- find that Respondent has violated its obligations under its own Foreign Investment Laws by:

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<sup>81</sup> Mem. M. ¶¶209-231; Reply M. ¶¶267-291.

<sup>82</sup> Mem. M. ¶¶248-272; Reply M. ¶¶292-322.

<sup>83</sup> Reply M. ¶¶254-261.

- a) violating the stabilization clause contained in Article 3 of the Law on Guarantees; and
  - b) violating Article 18 of the Law on Foreign Investments by failing to reorganize or liquidate Metal-Tech's investment in accordance with the law and by denying Metal-Tech the right to recover its share of the investment in the event that it is liquidated;
- o deny Respondent's defenses on the merits described in Sections III.G to III.L. of Respondent's Counter-Memorial on Merits.

325. Claimant further requests that the Tribunal decline to exercise jurisdiction over Respondent's counterclaims, to which it fleetingly refers in Section III.N of its Counter-Memorial on Merits. In the alternative, Claimant requests that the Tribunal dismiss Respondent's counterclaims for the reasons set forth in Section II of Metal-Tech's Reply on Merits.

326. Claimant further requests that the Tribunal order further proceedings on the issue of quantum and eventually order Respondent to pay compensation to the Claimant in the amount of \$173,962,625.

327. Finally, Claimant requests that the Tribunal order Respondent to pay interest on the above amount at a reasonable commercial rate, compounded from 18 July 2006 until full payment has been made; and to order Respondent to pay Claimant's costs in this arbitration, including all attorney's and expert-witness fees, and to bear sole responsibility for compensating the Tribunal and the International Centre for the Settlement of Investment Disputes."<sup>84</sup>

109. In its first post-hearing submission, Metal-Tech referred to the relief requested earlier and summarized it as follows:

"For the reasons set forth above, Metal-Tech renews its request for relief as presented in its written memorials and its oral arguments at the hearing. The Tribunal should find for Metal-Tech on all claims, reject Respondent's jurisdictional objections, defenses, and counterclaims, and order Respondent to pay the costs of this proceeding."<sup>85</sup>

## **B. THE RESPONDENT'S POSITION AND REQUEST FOR RELIEF**

110. In its written and oral submissions, the Respondent put forward the main following submissions:

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<sup>84</sup> Reply M. ¶¶323-327.

<sup>85</sup> C-PHB 1 ¶184. At the January and May hearings, the Claimant did not appear to seek any relief other than that mentioned in its written submissions.

- i. The Tribunal lacks jurisdiction over this dispute because the Claimant's investment was "implemented", i.e. made *and* operated, in violation of Uzbek law.<sup>86</sup> In particular, the Claimant engaged in corruption and made fraudulent and material misrepresentations to gain approval for its investment.<sup>87</sup> It also implemented its investment unlawfully by unjustly enriching itself and defrauding the JV, the Uzbek partners and the State. Contrary to the Claimant's allegations, in the absence of clear and unambiguous language to that effect, Article 1(1) of the BIT cannot be expanded to cover investments that are unlawfully implemented via the most favoured nation clause in the BIT. In any case, the jurisdiction of the Tribunal cannot be based on the Greece-Uzbekistan BIT via the MFN clause because the Claimant's investment was not only operated, but also made in violation of Uzbekistan's laws. The requirement that investments must be made in accordance with the host State's law is implied in BITs, including the Greece-Uzbekistan BIT, irrespective whether they contain a legality clause or not;<sup>88</sup>
- ii. The Tribunal also lacks jurisdiction over claims for violation of Uzbek and customary international law because Uzbekistan has not agreed to arbitrate these claims. In particular, Articles 8 and 11 of the BIT do not provide any foundation for claims based on national and customary international law;<sup>89</sup>
- iii. Alternatively, the claims should be dismissed because they are inadmissible on account of the Claimant's unlawful conduct. Under the "clean hands" doctrine, the Claimant should not be allowed to pursue its claims because it has engaged in significant misconduct directly related to its investment;<sup>90</sup>
- iv. Uzbekistan has not breached any of its obligations under the Israeli-Uzbekistan BIT. First, Resolution No. 141 did not expropriate the Claimant's investment because it did not have the effect of a "taking". It did not deprive Metal-Tech of all or substantially all of its investment, but merely voided Article 3 of Resolution No. 15 which granted Uzmetal the privilege to purchase all of AGMK's

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<sup>86</sup> C-Mem. M. ¶392.

<sup>87</sup> C-Mem. M. ¶¶393-407.

<sup>88</sup> C-Mem. M. ¶¶408-429.

<sup>89</sup> C-Mem. M. ¶560.

<sup>90</sup> C-Mem. M. ¶¶471-472

molybdenum middlings.<sup>91</sup> The Resolution did not prohibit AGMK from continuing to supply molybdenum middlings to Uzmetal and did not prevent Uzmetal from purchasing molybdenum raw material from other sources.<sup>92</sup> In any event, the Resolution is not expropriatory because it was legitimately enacted in response to the Claimant's wrongdoing.<sup>93</sup> Further, none of the actions taken in the bankruptcy proceedings by the judicial receiver who served as interim and later liquidation manager of Uzmetal are attributable to the Respondent and the acts of the Uzbek courts in Uzmetal's bankruptcy proceedings did not expropriate the Claimant's investment as the courts acted in conformity with Uzbek law.<sup>94</sup> Finally, the transfer of Uzmetal's assets to AGMK and UzKTJM was lawful and even if it was not, AGMK's and UzKTJM's acts are not attributable to the State;<sup>95</sup>

- v. Second, the Claimant could not have legitimately expected that its investment would remain entitled to the benefits granted under Resolution No. 15 despite its failure to comply with its obligations under that Resolution and its efforts to unjustly enrich itself to the detriment of the joint venture, the Uzbek parties and Uzbekistan. Resolution No. 141 was legitimately enacted in direct response to the Claimant's unlawful conduct and failure to fulfill its obligations under Resolution No. 15;<sup>96</sup>
- vi. Third, Resolution No. 141 was legitimately enacted and therefore does not constitute unreasonable treatment in violation of the BIT. The investment would not have been approved, and the exclusive supply arrangement would not have been granted, but for Metal-Tech's representations that Uzmetal would comply with the obligations specified in Resolution No. 15.<sup>97</sup> Since Uzmetal did not comply with its obligations, it was reasonable to expect that the Respondent would revoke the benefits granted in return for these obligations. Further, in light of the multiple notifications that Uzmetal was not performing and the warnings by the Government that there would be "serious consequences" if Uzmetal did not fulfill its obligations set forth in the approved Feasibility Study

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<sup>91</sup> C-Mem. M. ¶¶516-520.

<sup>92</sup> C-Mem. M. ¶¶521-525.

<sup>93</sup> C-Mem. M. ¶¶526-530.

<sup>94</sup> C-Mem. M. ¶¶501-507, 531-544.

<sup>95</sup> C-Mem. M. ¶¶545-549.

<sup>96</sup> C-Mem. M. ¶¶473-487.

<sup>97</sup> C-Mem. M. ¶490; Rej. M. ¶220-234.

and Resolution No. 15, the Claimant cannot assert that it was surprised by the enactment of Resolution No. 141 or that it had not been given any prior notice.<sup>98</sup> Moreover, the bankruptcy proceedings were reasonable and conducted in conformity with Uzbek law. In any event, UzKTJM's actions in the bankruptcy proceedings cannot be attributed to Uzbekistan. Finally, Resolution No. 141 was based on the Claimant's failure to deliver on its promises and did not discriminate against the Claimant on the basis of its nationality;<sup>99</sup>

- vii. Fourth, Uzbekistan did not cause any physical damage to Metal-Tech's investment in Uzbekistan. Therefore, Uzbekistan did not violate the full protection and security clause in Article 2 of the BIT. The Claimant is wrong in contending that the obligation to afford full protection and security extends beyond physical protection to legal security. The BIT's full protection and security clause does not operate as a legal stabilization agreement that guarantees the absolute stability of Resolution No. 15 irrespective of Claimant's actions;<sup>100</sup>
- viii. Finally, even if the Tribunal were to find that it has jurisdiction over claims for violation of Uzbek law, the Respondent has not breached any of its laws. In particular, the so-called stability clause in Article 3 of the Law of Guarantees is inapplicable as Resolution No. 141 does not fall within the types of "legislation" to which the protections of Article 3 apply. Further, even if Resolution No. 141 was covered by Article 3, the Claimant has not given notice that the change in legislation worsened its investment conditions, which notice was required to trigger the application of Article 3;<sup>101</sup> and,
- ix. The Respondent is entitled to bring counterclaims to recover for damages sustained as a direct result of the Claimant's unlawful conduct. These counterclaims fall within the ICSID's jurisdiction and the Parties' consent to arbitration provided in Article 8(1) of the BIT. They also arise directly out of the subject matter of the dispute pursuant to Article 46 of the ICSID Convention and Article 40 (1) of the ICSID Arbitration Rules.<sup>102</sup>

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<sup>98</sup> C-Mem. M. ¶¶488-496.

<sup>99</sup> C-Mem. M. ¶¶508-509.

<sup>100</sup> C-Mem. M. ¶¶510-514.

<sup>101</sup> C-Mem. M. ¶¶550-556.

<sup>102</sup> C-Mem. M. ¶¶561-565.

111. For these reasons, in its Rejoinder on the Merits, the Respondent requested that the Tribunal “dismiss Metal-Tech’s claims in their entirety and issue a decision in favor of Respondent in respect of its Counterclaims. Respondent furthermore respectfully requests that it be awarded all the expenses and costs associated with defending against Claimant’s claims.”<sup>103</sup>

112. In its first post-hearing submission, the Respondent sought the following relief:

“For all of the reasons set forth in Respondents submission to the Tribunal, at the Hearing and above, Respondent respectfully requests that the Tribunal:

(1) Dismiss Metal-Tech’s claims in their entirety for lack of jurisdiction, inadmissibility, or on the merits;

(2) enter a decision in favor of Respondent in respect of all of its counterclaims;

(3) if the Tribunal reaches the merits the Tribunal should decide:

(A) Respondent has not breached the fair and equitable treatment standard under the treaty;

(B) Respondent has not impaired by unreasonable and discriminatory measures Metal-Tech’s management, maintenance, use enjoyment or disposal of its investment;

(C) Respondent has not failed to provide full protection and security to Metal- Tech’s investment;

(D) Respondent has not expropriated Metal-Tech’s investment without just compensation; and,

(E) Respondent has not violated the foreign investment laws of Uzbekistan.

(4) award all costs and expenses associated with defending against Claimants claims.”<sup>104</sup>

#### **IV. ANALYSIS**

113. The Respondent submits that the claims must be dismissed before reaching the merits on the following grounds: first, because the Tribunal lacks jurisdiction under the express terms of the BIT and, second, because Uzbek law does not provide an independent basis for jurisdiction. The Respondent also invokes the inadmissibility of the claims. Following some preliminary matters discussed in Section IV.A, the Tribunal will consider the Parties’ arguments on jurisdiction and specifically on legality under the BIT in Section IV.B, and then address their submissions on Uzbek law in Section IV.C. It will then conclude on the claims in Section IV.D, before dealing with the counterclaims in Section IV.E.

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<sup>103</sup> C-PHB 1 ¶448.

<sup>104</sup> R-PHB 1 ¶612. At the January and May hearings, the Respondent did not appear to seek any relief other than that mentioned in its written submissions.

## **A. PRELIMINARY MATTERS**

114. Prior to entering the merits of the Parties' positions, the Tribunal will address the relevance of previous decisions or awards in Section IV.A.1, the scope of this Award in Section IV.A.2, and the applicable legal framework in Section IV.A.3.

### **1. Relevance of Previous Decisions and Awards**

115. In support of their positions, both Parties have relied on previous decisions or awards, either to conclude that the same solutions should be adopted in the present case or in an effort to explain why this Tribunal should depart from a solution reached by another tribunal.

116. The Tribunal's view is that it is not bound by previous decisions of ICSID or other arbitral tribunals. At the same time, it is of the opinion that it should pay due regard to earlier decisions of international tribunals. The Tribunal is further of the view that, unless there are compelling reasons to the contrary, it has a duty to follow solutions established in a series of consistent cases comparable to the case at hand, but subject, of course, to the specifics of a given treaty and of the circumstances of the actual case. By doing so, it will meet its duty to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.<sup>105</sup>

### **2. Scope of this Award**

117. In PO 1, the Tribunal decided to join the Respondent's objections to jurisdiction and admissibility to the merits on the ground that they were closely related to the merits. At the same time, it bifurcated the proceedings between jurisdiction and liability, on the one hand, and quantum on the other, because damage quantification (if applicable) could be easily heard in isolation from the rest of the case. As will be seen in the course of its analysis, the Tribunal has come to the conclusion that it has no jurisdiction over the Claimant's claims. Thus, the Award does not address liability issues.

118. Further, in its Counter-Memorial, the Respondent raised certain counterclaims, as according to it, the Tribunal's lack of jurisdiction over the claims does not affect the

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<sup>105</sup> See e.g., *Saipem S.p.A. v. the People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶¶67; *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 13 July 2005, ¶¶30-33; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (hereafter "*Saba Fakes*"), ¶¶96.

counterclaims. In Section IV.E below, the Tribunal will thus analyze the Respondent's counterclaims.

### **3. Legal Framework**

119. This arbitration is brought under the Treaty, which is thus the primary source of law for this Tribunal. As this arbitration is an ICSID arbitration, the ICSID Convention is also a relevant source of law in respect of jurisdictional and procedural matters. The interpretation of these two instruments is governed by customary international law as codified by the Vienna Convention on the Law of Treaties ("Vienna Convention" or "VCLT").<sup>106</sup>

120. In this context, the Tribunal notes that Uzbek law recognizes and prioritizes treaties and generally accepted norms of international law. This is, in particular, evident from the Preamble of the Constitution of the Republic of Uzbekistan,<sup>107</sup> from the Law on Foreign Investments of 30 April 1998<sup>108</sup> and from the Law on Guarantees and Measures of Protection of Foreign investors' Rights of 30 April 1998 (the "Law on Guarantees").<sup>109</sup>

## **B. JURISDICTIONAL OBJECTIONS TO TREATY CLAIMS**

### **1. Applicable Law**

121. The Tribunal's jurisdiction is governed by the ICSID Convention and by the BIT. Where these treaties are silent on an issue that is relevant to determine jurisdiction, e.g. the manner in which consent is given, such issue is subject to customary international law,

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<sup>106</sup> While Israel is not a party to the VCLT, it has not been contested that the rules on interpretation that it contains reflect customary international law.

<sup>107</sup> The Preamble of the Constitution reads as follows: "The people of Uzbekistan, solemnly declaring their adherence to human rights and principles of state sovereignty, aware of their ultimate responsibility to the present and the future generations, relying on historical experience in the development of Uzbek statehood, affirming their commitment to the ideals of democracy and social justice, *recognizing priority of the generally accepted norms of the international law*, aspiring to a worthy life for the citizens of the Republic, setting forth the task of creating a humane and democratic rule of law, aiming to ensure civil peace and national accord [...]" (emphasis added).

<sup>108</sup> Article 2 of the Law of the Republic of Uzbekistan No. 609-I "On Foreign Investments" of 30 April 1998 reads as follows: "If an international agreement concluded by the Republic of Uzbekistan established other rules than those provided by the legislation on foreign investments, then the rules of international agreement are applied" (Exh. R-14).

<sup>109</sup> Article 2 of the Law of the Republic of Uzbekistan No. 611-I "On Guarantees and Measures of Protection of Foreign Investors' Rights" of 30 April 1998 reads as follows: "If an international agreement concluded by the Republic of Uzbekistan established other rules than those provided by the legislation on guarantees and measures of protection of foreign investors' rights then rules of international agreement are applied" (Exh. R-15).



unless the treaties refer to municipal law. This is in particular so when an investment treaty requires that an investment be made in accordance with host State law.

**a. ICSID Convention**

122. Jurisdiction under the ICSID Convention is governed by Article 25(1), which reads 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 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."

123. For a tribunal to have jurisdiction under Article 25(1) of the ICSID Convention, four conditions must be satisfied: (i) the arbitration must be between a Contracting State and a national of another Contracting State, (ii) there must be a legal dispute arising directly out of (iii) an investment, and (iv) the Contracting State and the investor must have consented in writing to ICSID arbitration. In addition, of course, the ICSID Convention must have been applicable at the relevant time.<sup>110</sup> Finally, it is the duty of a tribunal established on the basis of a treaty to verify its jurisdiction under that treaty, even if the parties have not objected to it.

124. There is no dispute between the Parties – and rightly so – on the fulfilment of the first condition of nationality. The Republic of Uzbekistan and Israel are each parties to the ICSID Convention. The Claimant is a company organized under the laws of the State of Israel. As such, it is a national of Israel, i.e. it is a “national of another Contracting State” as defined by Article 25(2)(b) of the ICSID Convention. There is no issue either about the applicability of the ICSID Convention *ratione temporis*. Uzbekistan signed the ICSID Convention on 17 March 1994, and ratified it on 26 July 1995, with an effective date of 25 August 1995. Israel, for its part, signed the Convention on 16 June 1980, and ratified it on 22 June 1983, with an effective date of 22 July 1983.

125. In connection with the second and third conditions, the Parties agree about the existence of a legal dispute. They also agree that the Claimant has made an investment in the sense that it has committed resources to a project in Uzbekistan. However, they diverge on whether such investment must be in conformity with law and,

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<sup>110</sup> *Phoenix Action Ltd. v. Czech Republic* (hereafter “*Phoenix*”), Decision on Jurisdiction, 15 April 2009, ¶54.

if so, whether it actually was. The Parties' disagreement thus hinges on the necessity that the allocation of resources be in conformity with the law. In other words, they diverge on whether the definition of the term "investment" contained in Article 25(1) includes a requirement of legality.

126. The Claimant submits that "... Article 25 [does not contain] any requirement that investments be entered into in good faith or made in accordance with host state law, and the Tribunal should not incorporate additional jurisdictional requirements ... at Uzbekistan's request."<sup>111</sup> The Tribunal agrees with the Claimant's position.
127. The Tribunal does not share the view expressed for instance in *Phoenix* pursuant to which compliance with the laws of the host State and respect of good faith are elements of the objective definition of investment under Article 25(1) of the ICSID Convention.<sup>112</sup> In the Tribunal's view, the Contracting Parties to an investment treaty may limit the protections of the treaty to investments made in accordance with the laws and regulations of the host State. Depending on the wording of the investment treaty, this limitation may be a bar to jurisdiction, i.e. to the procedural protections under the BIT, or a defense on the merits, i.e. to the application of the substantive treaty guarantees. Similarly, a breach of the general prohibition of abuse of right, which is a manifestation of the principle of good faith, may give rise to an objection to jurisdiction or to a defense on the merits. This does not mean that these elements are part of the objective definition of the term "investment" contained in Article 25(1) of the ICSID Convention.
128. Bearing these clarifications in mind, the Tribunal finds that the Claimant's investment, which consists in a 50% participation in Uzmetal, a joint venture established under the laws of the Republic of Uzbekistan, meets the objective definition of investment as understood to be contained in Article 25(1) of the ICSID Convention and thus fulfills the second condition set in such provision.
129. Turning now to the third condition which requires consent to ICSID arbitration, the Tribunal notes that the Claimant consented to ICSID jurisdiction in a letter of 13 July 2009 and subsequently by filing its Request for Arbitration. The Respondent has expressed its consent to ICSID jurisdiction in Article 8(1) of the BIT. However, the Respondent submits that it "consented to arbitrate only those disputes concerning

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<sup>111</sup> Reply M. ¶288.

<sup>112</sup> See e.g., *Phoenix* ¶¶101, 114.

lawfully implemented investments. Where, as here, the investment at issue was made and implemented contrary to the laws and regulations of the Republic of Uzbekistan, Respondent has not granted its consent to arbitrate before ICSID a dispute concerning that investment.”<sup>113</sup> Whether the Respondent’s consent covers the present dispute depends on the content of the BIT and in particular on Article 8(1) thereof. If the requirements set in Article 8(1) are not met, then the Respondent has not consented to submit the present dispute to ICSID arbitration and the *ratione voluntatis* condition required by Article 25(1) of the ICSID Convention is not satisfied. The analysis of Article 8(1) of the BIT follows.

**b. BIT**

130. The following provisions of the BIT are relevant:

- Article 12, which deals with the BITs temporal scope of application:  
“The provisions of this Agreement shall apply to investments made on or before the entry into force of this Agreement.”<sup>114</sup>
- Article 8, which provides for dispute settlement as follows:  
“1. Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter: the "Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.  
[...]  
3. If any such dispute should arise and cannot be resolved, amicably or otherwise, within three (3) months from written notification of the existence of the dispute, then the investor affected may institute conciliation or arbitration proceedings by addressing a request to that effect to the Secretary-General of the Centre, as provided in Article 28 or 36 respectively of the Convention. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the investor which is the other party to the dispute has received, in pursuance of an insurance contract, an indemnity in respect of some or all of his or its losses.  
4. Neither Contracting Party shall pursue, through the diplomatic channel, any dispute referred to the Centre, unless:

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<sup>113</sup> Mem. J. ¶200.

<sup>114</sup> The Treaty entered into force on 19 February 1997.

(a) the Secretary-General of the Centre or a conciliation commission or an arbitral tribunal constituted by it decides that the dispute is not within the jurisdiction of the Centre; or  
(b) the other: Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal”.

- Article 1(1), which defines "investments" as follows:

“The term ‘investments’ shall comprise any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made, including, but not limited to:

- a) movable and immovable property, as well as any other rights in rem, in respect of every kind of asset;
- b) rights derived from shares, bonds and other kinds of interests in companies;
- c) claims to money, goodwill and other assets and to any performance having an economic value;
- d) rights in the field of intellectual property, technical processes and know-how;
- e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.”

- And Article 1(3), which defines "investors" as follows:

“The term “investor” shall comprise:

[...]

With respect to investments made in the Republic of Uzbekistan:

- a) Natural persons who are nationals of the State of Israel who are not also nationals of the Republic of Uzbekistan; or
- b) Companies including corporations, firms or associations incorporated or constituted in accordance with the law of the State of Israel, which are not directly or indirectly controlled by nationals or permanent residents of the Republic of Uzbekistan.”

131. It is undisputed that the *ratione personae* conditions provided in Articles 8 and 1(3) and the *ratione temporis* requirement set in Article 1 are met. It is equally common ground that the pre-requisite for the submission of a claim to ICSID arbitration provided in Article 8(3) is satisfied. Indeed, despite an attempt by the Claimant, the Parties were unable to resolve the dispute amicably.<sup>115</sup> By contrast, while the Parties agree that Article 1(1) contains a legality requirement, they diverge on the scope of such requirement, an issue to which the Tribunal will turn below in Section IV.B.3. Before doing so, however, the Tribunal must address the Claimant's most favored nation or MFN argument in Section IV.B.2. Indeed, the Claimant argues that on the basis of Article 3 of the BIT, it is entitled to import a definition of investment from a third party

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<sup>115</sup> RA ¶35.

treaty that comprises no legality requirement and, therefore, jurisdiction is not conditional on a lawful investment.

## **2. Legality Requirement and MFN**

### ***a. Claimant's Position***

132. The Claimant submits that the most favored nation provision in Article 3(2) of the Treaty requires that the Tribunal incorporate the more favorable definition of “investment” of Article 1(1) of the Greece-Uzbekistan BIT into the Israel-Uzbekistan BIT.
133. The Claimant argues that while normally the definition of “investment” is not considered as “treatment” under an MFN provision, the parties to the Treaty expressly agreed that the definition of “investment” in Article 1(1) of the Treaty could lead to more or less favorable treatment for investors. In support of this proposition, the Claimant relies on Article 7(c) of the Treaty.
134. According to the Claimant, the language of Article 7(c) of the Treaty makes clear that the parties intended the term “treatment” in Article 3(2) to include more favorable treatment accorded to investors resulting from the definition of “investment” in Article 1(1) of the Treaty. Were it otherwise, there would have been no need for the exception in Article 7(c) of the Treaty. For the Claimant, “[t]he contemplated exception demonstrates that the parties considered whether more favorable treatment accorded to investors under the MFN clause would encompass broader definitions of investment contained in BITs with third parties, and Israel and Uzbekistan concluded that it would. They then concluded that there would be a narrow exception to this principle for definitions of investment that appeared in pre-1992 Israeli BITs.”<sup>116</sup> Further, the Claimant submits that other Uzbek BITs do not contain such an exception.
135. Accordingly, the Claimant concludes that Metal-Tech may avail itself of a more favorable definition of “investment” found in a BIT that Uzbekistan has entered into with a third party. The Greece-Uzbekistan BIT, does not exclude substantive protections to investors whose investments are initiated or operated in violation of host State law or operated in violation of host State law.<sup>117</sup> If the Tribunal adopts Uzbekistan’s

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<sup>116</sup> Mem. M. ¶229.

<sup>117</sup> Article 1(1) of the Greece-Uzbekistan BIT provides: “1. The term “investment” means every kind of asset and in particular, though not exclusively, includes: a) movable and immovable property and any

interpretation of the definition of investment in the Israel-Uzbekistan BIT, Israeli investors “would be treated less favorably than Greek investors with respect to their management, maintenance, and use of their investments in Uzbekistan.”<sup>118</sup>

136. In response to the Respondent’s reliance on prior decisions holding that a MFN clause does not apply to the definition of investment, the Claimant submits that all of the decisions cited interpreted MFN provisions in treaties that do not contain exceptions like the one in Article 7(c) of the Treaty.<sup>119</sup> The language of Article 7(c) shows that the parties intended to include the definition of investment within the scope of Article 3(2) of the Treaty. Any other interpretation would reduce part of Article 7 to “inutility,” a result that is contrary to well-established principles of treaty interpretation.<sup>120</sup>
137. To the Respondent’s comparison with other treaties, the Claimant replies that such an approach is not in accordance with the principles of treaty interpretation set forth in the Vienna Convention. There is no rationale for the Respondent’s proposition that, because in other treaties Israel negotiated an exception that focused on the repatriation provisions of Article 6 of the Treaty, Article 7(c) in the Treaty should be read the same way. Article 7 of the Treaty refers not only to the repatriation provisions of other investment treaties entered into by Israel before 1992, but also to the definition of “investment” in those pre-1992 investment treaties. If Israel’s only concern in respect of the MFN provision was its extension to the repatriation provisions in Article 6, it would not have been necessary to include the definition of “investment” in Article 7(c) of the Treaty. The reference to Article 6 itself would have been sufficient for this purpose.<sup>121</sup>
138. Finally, according to the Claimant, the Respondent’s submission that a legality requirement is to be read into the BITs definition of investment, must be rejected as “it would require the Tribunal to incorporate its own language into [the BIT], in contravention of the Vienna Convention’s mandate to interpret a treaty in good faith

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rights in rem, such as servitudes, usufructus [sic], mortgages, liens or pledges; b) shares in and stock and debentures of a company and any other form of participation in a company; c) claims to money or to any performance under contract having an economic value, as well as loans connected to an investment; d) intellectual and industrial property rights, patents, trade marks, technical processes, know-how, goodwill and any other similar rights; e) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake an economic activity. A possible change in the form in which the investments have been made does not affect their character as investments” (Exh. CL-1).

<sup>118</sup> Mem. M. ¶231.

<sup>119</sup> Reply M. ¶283.

<sup>120</sup> Reply M. ¶284.

<sup>121</sup> Reply M. ¶285.

according to the ordinary meaning of its terms in context.”<sup>122</sup> Principles of good faith should not be incorporated into a treaty to alter the jurisdictional requirements of the ICSID Convention and the applicable BIT. Further, the decisions cited by Uzbekistan in support of its argument are easily distinguishable. In both *Phoenix Action v. Czech Republic* and *Gustav Hamester v. Ghana*, the BITs contained legality clauses requiring that investments be made in accordance with host state law. The discussions of the application of the international legal principles of good faith were therefore *obiter dicta*. In any event, according to the Claimant, even assuming that a legality requirement can be implied if the treaty is silent, such a requirement would exclude jurisdiction “only for serious illegalities committed during the establishment of an investment.”<sup>123</sup> All of the cases cited by the Respondent confirm that a legality clause may be implied in a BIT only in respect of conduct during the initiation of the investment.

#### **b. Respondent’s Position**

139. According to the Respondent, applying the MFN clause in the manner proposed by Claimant “would improperly circumvent the basic prerequisite that an investment first be covered under one treaty before receiving the benefits of a second treaty.”<sup>124</sup> Tribunals have consistently rejected attempts to use the MFN clause to circumvent the scope of treaty coverage, including the definition of a qualifying investment.<sup>125</sup> In *Société Générale v. Dominican Republic* for instance, the tribunal denied an attempt to use an MFN provision to access a broader definition of investment in another treaty.<sup>126</sup> The tribunal in *Yaung Chi Oo Trading v. Myanmar* also followed a similar approach.<sup>127</sup> Moreover, the tribunal in *Tecmed v. Mexico* concluded that an MFN clause “cannot be used to circumvent the core matters which determine whether an investor may access a treaty’s substantive protections.”<sup>128</sup>

140. The Respondent submits that it is a “fundamental principle” that an MFN provision cannot be used to circumvent basic treaty coverage requirements to defeat the treaty’s

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<sup>122</sup> Reply M. ¶287.

<sup>123</sup> Reply M. ¶290.

<sup>124</sup> C-Mem. M. ¶409.

<sup>125</sup> C-Mem. M. ¶410.

<sup>126</sup> C-Mem. M. ¶410 citing *Société Générale v. Dominican Republic*, UNCITRAL, Award on Preliminary Objections to Jurisdiction, 19 September 2008 (hereafter “*Société Générale*”), ¶41.

<sup>127</sup> C-Mem. M. ¶410 citing *Yaung Chi Oo Trading PTE Ltd. v. Gov’t of the Union of Myanmar*, ASEAN ICSID Case No. ARB/01/1, Award, 31 March 2003, ¶¶53-63, 83.

<sup>128</sup> C-Mem. M. ¶411 citing *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶69.

established boundaries. To the Respondent, “[to] do otherwise would undermine the intentions of the Contracting Parties when agreeing to such parameters, and would allow a claimant not otherwise entitled to any protections under a treaty to enjoy both the benefits of that treaty and a more favorable third-party treaty.”<sup>129</sup> The Respondent points out that the Claimant had not identified any case where an investor was permitted to expand the definition of investment through an MFN clause.<sup>130</sup> The Respondent insists that consistent with the decision of the tribunal in *Plama* and in later cases, an MFN clause should not be read to expand the definition of investment unless the Contracting Parties’ “clearly and unambiguously expressed” their intent to authorize such an approach.<sup>131</sup>

141. According to the Respondent, the Claimant rests its MFN argument on an erroneous interpretation of the exceptions under Article 7 of the Treaty. Article 7(c) of the Treaty was included to address Israel’s concerns regarding repatriation provisions appearing in several of its pre-1992 BITs.<sup>132</sup> When Article 7(c) of the Treaty is viewed along with other investment treaties containing similar MFN exceptions specifically identifying the repatriation provisions of the Poland, Hungary, and Romania BITs, it becomes clear that by including Article 7(c) in the Treaty, Israel sought to avoid extending the MFN clause in the Treaty to the repatriation provisions in these pre-1992 BITs. This position is also confirmed by commentary which states that the intent was to preclude the application of the pre-1992 currency transfer restrictions through the operation of the MFN clause.<sup>133</sup> The reference in Article 7(c) of the Treaty to the definition of the term “investment” must be read in this context.
142. In any event, according to the Respondent, the international legal principle of good faith precludes the application of an MFN clause to circumvent the definition of investment in an investment agreement. A requirement that investments are to be made in accordance with law is implied in investment treaties whether or not they contain an express legality clause.<sup>134</sup> Thus, the *Phoenix* tribunal observed that “this condition – the

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<sup>129</sup> C-Mem. M. ¶412.

<sup>130</sup> C-Mem. M. ¶412.

<sup>131</sup> C-Mem. M. ¶413 citing *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶204; *Telenor Mobile Communications v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶91 and other authorities.

<sup>132</sup> C-Mem. M. ¶417.

<sup>133</sup> C-Mem. M. ¶422 citing Efraim Chalamish, *An Oasis in the Desert: The Emergence of Israeli Investment Treaties in the Global Economy*, 32 Loy. L.A. Int’l & Comp. L. Rev. 123, 157 (2010).

<sup>134</sup> C-Mem. M. ¶427.



conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT.”<sup>135</sup> Tribunals in *Hamester* and *Plama* have found the same.<sup>136</sup> Consequently, according to the Respondent, the Claimant cannot rely on the Greece-Uzbekistan BIT to bypass the requirement that Claimant’s investment be made in accordance with host State law.

### **c. Analysis**

143. Article 3 of the Treaty provides for MFN treatment of investments and investors in the following terms:

“1. Neither Contracting Party shall, in its territory, subject investments or returns or investors of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of investors of any third state.

2. Neither Contracting Party shall, in its territory, subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to . . . investors of any third state.”

144. The question that must be resolved here is whether this MFN obligation extends to the definition of investment in Article 1(1) of the BIT, which requires that investments be "implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made". For the reasons given below, the Tribunal finds that this is not the case.
145. As a general matter, the Tribunal notes that, ordinarily, an MFN clause cannot be used to import a more favorable definition of investment contained in another BIT. The reason is that the defined terms “investments” and “investors” are used in the MFN clause itself, so that the treatment assured to investments and investors by Article 3 necessarily refers to investments and investors as defined in Article 1 of the BIT. In other words, one must fall within the scope of the treaty, which is in particular circumscribed by the definition of investment and investors, to be entitled to invoke the

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<sup>135</sup> C-Mem. M. ¶428 citing *Phoenix* ¶101.

<sup>136</sup> C-Mem. M. ¶428 citing *Gustav Hamester F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (hereafter “*Hamester*”), ¶¶123-24 and *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (hereafter “*Plama*”), ¶¶138-139.

treaty protections, of which MFN treatment forms part. Or, in fewer words, one must be *under* the treaty to claim *through* the treaty.

146. The tribunal in *Société Générale v. Dominican Republic* applied the same reasoning. There, the claimant contended that, although it did not meet the definition of investment as contained in the Dominican Republic-France BIT, it met the one contained in the DR-CAFTA. The *Société Générale* tribunal found that the investor had made an investment under the basic treaty, but rejected the proposed alternative: “[e]ach treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, *resort to the specific text of the MFN clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of ‘investment’ itself*” (emphasis added).<sup>137</sup> Indeed, the Claimant itself concedes that an MFN clause will ordinarily not extend to the definition of an investment.<sup>138</sup> In the same vein, the tribunal in *Berschader v. Russia*, interpreting a MFN clause applying to “all matters covered by the present Treaty”, considered that definitions “deal with matters which have no relations to the treatment of investors”, with the result that it was “very difficult to see how a MFN clause could possibly apply to these provisions”.<sup>139</sup>
147. Here, the Claimant argues that Article 7(c) of the BIT changes this position. To the Claimant, Article 7(c) shows the Parties’ intention to extend the MFN clause to the definition of investment (including the legality requirement), or else they would not have made an exception for pre-1992 treaties. The Respondent denies this position and submits that the reference to “the definition of investment” in Article 7(c) cannot be isolated from the rest of Article 7(c) and must be understood in the context of the repatriation provisions referred to in that sub-article.
148. To resolve the issue, the Tribunal must interpret Article 7(c) of the BIT, for which it turns to the Vienna Convention. Under the Vienna Convention, a treaty must 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(1)). To confirm the meaning established pursuant to this rule (among other

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<sup>137</sup> *Société Générale* ¶41.

<sup>138</sup> Mem. M. ¶228 (“normally one might not consider the definition of ‘investment’ as ‘treatment’ under an MFN provision”).

<sup>139</sup> *Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, ¶188.

purposes), one may have recourse to supplementary means of interpretation, which include the circumstances of the treaty's conclusion (Article 32 of the VCLT).

149. Article 7 of the BIT, which was already quoted in part above, reads in full as follows:

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or of any third state shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:

(a) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation;

(b) any existing or future customs union, free trade area agreement or similar international agreement to which either Contracting Party is or may become a party;

(c) the definitions of "investment" (Article 1, paragraph 1) and "reinvestment" (Article 1, paragraph 2) and the provisions of Article 6 contained in Agreements entered into by the State of Israel prior to January 1, 1992.

150. To the Tribunal, the Claimant's interpretation carves out the reference to "the definition of investment" from the text of Article 7(c). This is contrary to Article 31(1) of the VCLT that requires the interpreter to take account of the context of the terms, a concept that is defined in broad terms in paragraph 2 of that same provision.

151. Article 7(c) does not end at "the definition of investment." Rather, it goes on to refer to "the definition of reinvestment" and also to "the provisions of Article 6...", i.e. the repatriation provisions. If, as the Claimant contends, the reference to "the definition of investment" is to be given a separate and independent meaning, it is unclear why it would appear in the context of "reinvestment" and repatriation, both of which are concepts intricately linked to and dependent on the definition of investment. Indeed, the concept of reinvestment and repatriation both first require an investment. On a textual and contextual basis, therefore, investment, reinvestment and repatriation used in the same provision appear linked to each other.

152. The Tribunal's conclusion is further strengthened if one looks at the overall structure of Article 7. Article 7(a) and (b) both list the avenues through which investors are

foreclosed from claiming beneficial treatment: an international agreement relating to taxation (7(a)) and a customs union or free trade agreement (7(b)). These are thus distinct concepts arranged in separate subparagraphs. There is no reason why the definition of investment could not have been addressed in a separate subparagraph as well, if, as the Claimant suggests, the reference to “investment” is to be considered independently of the rest of the text of Article 7(c) of the Treaty.

153. Still within the context of the terms of the treaty, the Tribunal’s view is also supported by looking at Article 7(c) in relation to Article 3. Article 3 of the BIT states two negative propositions: that neither Contracting Party shall subject investors of the other Contracting Party, or their investments, to less favorable treatment than it accords to investors of other states, or their investments. A definition is not a form of treatment; it simply establishes the baseline of what is entitled to MFN treatment. The fact that one form of investment may be entitled to MFN treatment under one treaty, while a different form of investment is entitled to MFN treatment under another treaty, does not mean that there is a breach of the MFN standard.
154. The Claimant contests this view by relying on Article 7(c). It contends that as Article 7(c) expressly excludes the definition of investment from treaties entered into by Israel prior to 1 January 1992, *a contrario* it impliedly includes the definition of investment from treaties entered into by Israel after 1 January 1992. However, there is no reason why this should be the case. The fact that the Contracting Parties contemplated that the MFN clause of the Treaty could be argued to apply to the definition of investment in other treaties entered into by Israel before 1992, at least in the context of the repatriation clauses of those treaties, does not necessarily mean that they intended to endorse such an application for all other treaties.
155. This is all the more so as the repatriation provisions of the pre-1992 Israel BITs that are removed from the scope of the MFN clause by Article 7(c) are peculiar provisions that reflect particular exchange controls in effect when those BITs were entered into. The State of Israel may have wished to foreclose complications that could have been introduced into later treaties by those provisions and their accompanying definitions of investment. This does not necessarily mean that it intended for the definitions in other treaties to become interchangeable by means of the MFN clauses in later treaties.
156. This understanding also appears correct considering that the requirement of legality of the investment is spelled out in the clearest terms in Article 1 of the BIT and that it is

common ground that, as a general matter at least, the existence of an investment falling within the scope of that provision is a condition *sine qua non* of treaty protection. Any exception to these clear rules would have to be stated in no uncertain terms, which is obviously not so here.

157. In sum, the ordinary meaning of the terms interpreted in their context lead the Tribunal to conclude that Article 7(c) does not provide for the application of MFN treatment to the definition of investment under Article 1(1) of the BIT.
158. The object and purpose of the Treaty is neutral for present purposes. The Preamble emphasizes, on the one hand, “economic cooperation to the mutual benefit of both countries” as well as an “increase [of] prosperity in both states”, and, on the other, an intention to create “favorable conditions for greater investments by investors” as well as “the promotion and reciprocal protection of investments” and “the stimulation of individual business initiative”. In other words, the Preamble refers to both the private interests of the investor as well as the public interests of the state. It is thus of little assistance in the present context.
159. Another consideration, however, is more helpful. While the Tribunal does not benefit from any *travaux préparatoires* of the BIT, it notes that other investment treaties entered into by Israel confirm the meaning of Article 7(c) as it results from the foregoing analysis. In the Tribunal's view, these other treaties on the same subject matter can be taken into account as supplementary means of interpretation pursuant to Article 32 of the VCLT.<sup>140</sup>
160. A number of Israeli BITs contain a provision similar to Article 7(c) of the Treaty. Interestingly, these BITs clearly indicate that the reference to “investment” and “reinvestment” is meant in the limited context of the repatriation provisions of the pre-1992 treaties. This is so for instance of the 1997 Israel-Moldova BIT the pertinent annex of which reads as follows:

“Taking into consideration the provisions of Article 6 [the repatriation provision] of the Agreements for the Promotion and Reciprocal

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<sup>140</sup> This is confirmed by scholars, e.g. A. Aust, *Modern Treaty Law and Practice* (Cambridge Univ. Press, 2<sup>nd</sup> Ed., 2007), p.248, and cases, e.g. *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No. ARB 87/3, Final Award, 27 June 1990, ¶40 .

Protection of Investments entered into by the Government of the State of Israel with the Governments of Poland, Hungary and Romania in 1991;

The provisions of Article 3 [the MFN provision] shall not be construed so as to oblige the State of Israel to extend to investors of the Republic of Moldova the benefits of any treatment, preference or privilege resulting from the definitions of 'investment' or 'reinvestment' and the provisions of Article 6 contained in the [BITs] entered into by the Government of the State of Israel with the Governments of Poland, Hungary and Romania in 1991."<sup>141</sup>

161. The link between investment and repatriation in the pre-1992 treaties is even more striking in the Israel-Thailand BIT. That treaty contains an Article 7(d) essentially identical to Article 7(c) of the (Uzbek) BIT.<sup>142</sup> More importantly, the treaty contains an annex, which explains the rationale behind including Article 7(d):

"In the latter part of 1991 the State of Israel entered into Agreement for the Reciprocal Promotion and Protection of Investments with Poland, Hungary and Romania.

Since 1991, a process of liberalisation has modified the regulations to the point where the language of those three agreements no longer reflect the current right of repatriation provided in the regulations.

That being the case and in order to avoid the need to constantly revisit and modify these agreements, the State of Israel has undertaken negotiations to modify those three agreements by replacing the language of Article 6 therein with the current Article 6.

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<sup>141</sup> Annex, Exh. RL-109, p.11 (emphasis added). See also 1998 Israel-Croatia BIT, Protocol, Exh. RL-104, p. 7.

<sup>142</sup> "The provisions of this Agreement relating to the grant of treatment not less favorable than that accorded to the investors of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of d) the definition of "investment" (Article 1, paragraph 1) and the reference to "reinvestment" (Article 1, paragraph 2) and the provisions of Article 6 contained in agreements entered into by the State of Israel prior to January 1, 1992 with Poland, Romania and Hungary" (Article 7(d), Exh. CL-62, p.6.).

The Government of the State of Israel shall notify the Government of the Kingdom of Thailand when the said agreements will be (modified) amended so as to render Article 7(d) unnecessary. Upon such notification, Article 7(d) shall become null and void." <sup>143</sup>

162. This rationale confirms the Tribunal's understanding of the Israel-Uzbekistan BIT. It is clear that Article 7(c) of the Treaty is to be limited to the repatriation provisions in the pre-1992 Israeli BITs. Thus, contrary to what the Claimant suggests, the reference to "definition of 'investment'" in Article 7(c) does not have a life of its own. It is not independent of the repatriation provisions in the pre-1992 treaties. Quite the opposite: the intention behind the reference to "definition of 'investment'" was to limit the application of the MFN obligation with respect to the repatriation provision in the pre-1992 treaties.

163. For these reasons, the Tribunal concludes that the Claimant cannot rely on Article 3(2) of the Treaty to avoid the express requirement of compliance with host state law provided in Article 1(1) of the Treaty. Having reached this conclusion, the Tribunal can dispense with reviewing whether there exists an implied requirement of compliance with host State law or with the good faith principle.

### **3. Scope of the Legality Requirement**

164. Article 1(1) of the BIT defines investments as "any kind of *assets, implemented* in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made" (emphasis added). In other words, it contains a legality requirement, the scope of which is circumscribed in terms of subject-matter (laws and regulations) and time (the time of implementation). While the former raises no specific issues in the present context (sub-section (a)), the latter is heavily disputed (sub-section (b)).

#### ***a. Subject Matter of the Legality Requirement***

165. There is no relevant divergence between the Parties concerning the subject-matter of the legality requirement. It is not contested that the provisions of Uzbek law prohibiting corruption fall within the subject-matter scope of the legality requirement contained in

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<sup>143</sup> Annex, Exh. CL-62, p.12.

Article 1(1) of the Treaty.<sup>144</sup> The Tribunal agrees with this view. In general, on the basis of existing case law, it considers that the subject-matter scope of the legality requirement covers: (i) non-trivial violations of the host State's legal order (*Tokios Tokelés*<sup>145</sup>, *LESI*<sup>146</sup> and *Desert Line*<sup>147</sup>), (ii) violations of the host State's foreign investment regime (*Saba Fakes*<sup>148</sup>), and (iii) fraud – for instance, to secure the investment (*Inceysa*<sup>149</sup>, *Plama*<sup>150</sup>, *Hamester*<sup>151</sup>) or to secure profits.<sup>152</sup> There is no doubt that corruption falls within one or more of these categories.

166. The Tribunal is certainly aware that the Respondent alleges instances of illegal conduct other than corruption, which other instances may or may not fall within these categories. In light of the weight that the corruption issue gained in the later part of the proceedings, the Tribunal will focus its analysis on that type of unlawful behavior. And in light of the conclusion that it will reach on the corruption defense, it will dispense with reviewing the other allegations of illegality.

## **b. Time of the Legality Requirement**

### **i. Respondent's Position**

167. According to the Respondent, Article 1(1) of the BIT uses the word “implemented” to define the type of investments to which the Treaty's protections apply. Interpreting this provision leads to the conclusion that an investor forfeits any right under the BIT in

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<sup>144</sup> At the January Hearing, the Claimant observed: “if there was proof of corruption here, if there was specific and credible evidence before this Tribunal, that would be relevant to the question of jurisdiction in this case” (Tr. 27:1-3).

<sup>145</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (hereafter “*Tokios Tokelés Jurisdiction*”), ¶86.

<sup>146</sup> *LESI Spa et Astaldi S.p.A. v. People's Democratic Republic of Algeria*, Decision on Jurisdiction, 12 July 2006, ¶83(iii).

<sup>147</sup> *Desert Line Projects LLC v. Republic of Yemen*, Award, 6 February 2008, ¶104.

<sup>148</sup> *Saba Fakes* ¶119.

<sup>149</sup> *Inceysa Vallisoletana v. Republic of El Salvador*, Award, 2 August 2006, ¶¶236-238.

<sup>150</sup> *Plama* ¶¶133-135.

<sup>151</sup> *Hamester* ¶¶129, 135.

<sup>152</sup> The Tribunal finds further support of these views in *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶140, which was issued after the submission of the post hearing briefs and is thus mentioned as mere confirmation of the views already reached.



respect of investments that are “made, carried out, or operated in an unlawful manner”.<sup>153</sup>

168. In support of this proposition, the Respondent submits that Article 1(1) uses and juxtaposes both the words “implemented” and “made” in the same sentence, suggesting that the drafters understood and wished to emphasize the difference in meaning between these two terms. To the Respondent, “[w]here two words with overlapping but different meanings appear in the same sentence, they should not be interpreted synonymously.”<sup>154</sup> The proper interpretation of Article 1(1) of the BIT, therefore, is that the law of the place where the investment is made or established governs the question of whether the investment has been implemented, i.e., made, carried out, or operated, legally.
169. Further, the Preamble to the BIT explains that the Contracting Parties desired to “intensify economic cooperation to the mutual benefit of both countries,” “create favorable conditions for greater investments,” and “increase prosperity in both states.” Seen in this wider context, there is no legitimate purpose in protecting investments that are implemented unlawfully, because such investments do not benefit or otherwise increase the prosperity of the host State.
170. Moreover, according to the Respondent, Uzbekistan’s concern that foreign investors comply with Uzbekistan’s laws is underscored in its Foreign Investment Law which emphasizes the foreign investor’s duty to comply with Uzbek laws in the following terms:

“When execut[ing] investment activity on the territory of the Republic of Uzbekistan, the foreign investor [is obligated] to observe the current legislation of the Republic of Uzbekistan [and] to pay taxes and effect other payments in accordance with the legislation of the Republic of Uzbekistan.”<sup>155</sup>

171. The Respondent also submits that the BIT was made in English, Uzbek, and Hebrew, all three texts being “equally authentic”, but the English prevailing “[i]n case of differences in interpretation”. The Uzbek and Hebrew texts of the BIT confirm that the legality requirement obliges the investor to make and operate its investment lawfully.

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<sup>153</sup> R-PHB 1 ¶360.

<sup>154</sup> C-Mem. M. ¶398 citing WTO Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/R, 31 October 2005, ¶7.169.

<sup>155</sup> C-Mem. M. n. 1285 citing Article 11, Law of the Republic of Uzbekistan No. 609-I “On Foreign Investments” dated 30 April 1998 (Exh. R-14).

The verb in the Uzbek text is “қўлланилади,” which translates as “used”. The Hebrew text contains the word “סימיומה” which translates as “applied” or “put to use.” Like “implemented”, the words “used” and “applied” connote ongoing action: if an investment must be used or applied in accordance with law, it must be operated in compliance with law and remain compliant with law.

172. Finally, the Respondent insists that the Claimant has conceded that the ordinary meaning of the term “implement” includes both the idea of establishing or making, on the one hand, and of performing, effecting, executing, or fulfilling, on the other.<sup>156</sup>
173. In response to the Claimant’s reference to the term “implemented” in Article 6(1) of the Treaty, the Respondent submits that the presence of the word implement in Article 6(1) does not alter the ordinary meaning of the term in Article 1(1) of the Treaty. Article 6(1) refers to something in place on a certain day. In that particular context, “implemented” takes a meaning akin to “made” or “put into effect”. In Article 1(1) of the BIT, the term “implemented” is used in an entirely different context. There is no “on the day” clause in Article 1(1) of the BIT, which would suggest that the same interpretation must be given to the word “implement” in Articles 1(1) and 6 of the BIT. Further, unlike the English version of the BIT, which uses the term “implemented” in both provisions, the Uzbek text employs two different words. The Uzbek words used in Article 6(1), “амалга оширилган,” are the ones that appear in Article 1(1) for the English word “made,” not for the word “implemented”.
174. In reply to the Claimant’s submission that the Respondent’s interpretation renders treaty protection illusory, the latter argues that denial of jurisdiction does not prevent a tribunal from hearing both jurisdictional and merits arguments together in appropriate circumstances. In cases in which the legality of the investment is intertwined with the merits, tribunals may join jurisdiction to the merits. Further, there is no serious risk that *de minimis* violations of law could be exploited by a host State as a jurisdictional bar. Tribunals have rejected the possibility that trivial violations of host State law may bar jurisdiction.<sup>157</sup> Finally, where (as here) “a treaty explicitly limits its protection to investments established and carried out in accordance with the law, the investor cannot be heard to complain about having to establish or defend the legality of its operations.”<sup>158</sup> According to the Respondent, such a requirement is all the more

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<sup>156</sup> C-Mem. M. ¶395.

<sup>157</sup> C-Mem. M. ¶406, citing *Tokios Tokelès Jurisdiction* ¶86.

<sup>158</sup> R-PHB 1 ¶367.

fundamental here in light of Uzbekistan's Foreign Investment Law, which requires foreign investors to observe its laws and comply with contractual undertakings.

175. For all these reasons, the Respondent concludes that since the Claimant has made and operated its investment in violation of Uzbek laws, it may not invoke the Treaty's protections in respect of its investment. Consequently, the Tribunal lacks jurisdiction over the Claimant's claims.

ii. ***Claimant's Position***

176. The Claimant argues that Article 1(1) of the BIT refers only to the establishment of an investment (not its operation) and that there is no evidence that the establishment of Uzmetal was illegal.
177. A careful review to the relevant language shows that the legality requirement in the BIT focuses on the establishment of the investment. The phrase "implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made" in Article 1(1) does not modify the term "investment" but applies to the word "assets." The word "implement" is defined in the Oxford English Dictionary as "to complete, perform, carry into effect (a contract, agreement, etc.)." Consequently, "[t]he most reasonable interpretation of the language in Article 1(1) [of the BIT] is that an asset that is "completed," "performed," or "carried into effect" in accordance with local law is an asset that, at a single point in time, has been established according to local law."<sup>159</sup>
178. Further, the Claimant submits that the ordinary meaning of the word "implemented" in Article 1(1) of the BIT, when viewed in context and in light of the object and purpose of the Treaty, covers all assets established in accordance with local law. Articles 6(1) and 8(1) of the BIT provide important context in this regard.
179. Referring first to the context, the Claimant points to Article 6(1) of the BIT which provides that "[e]ach Contracting Party, shall, in respect of investments, guarantee to investors of the other Contracting Parties all the rights and benefits . . . which were in force on the day the current investment was implemented." In Article 6, the parties used the word "implement" to refer to the initiation of an investment at a single point in time. It would be wrong to assume that the parties intended the word "implemented" to mean something entirely different in Article 1(1), particularly when "implemented" is used in both articles to describe an action taken with respect to investments. The

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<sup>159</sup> Mem. M. ¶216.

Hebrew text of the Treaty leads to the same conclusion, as there the same word for “implemented” is used in both Articles 1(1) and 6(1). The Uzbek text does use two different words in Articles 1(1) and Article 6(1) respectively, “but given the use of identical terms in the English and Hebrew versions of Articles 1(1) and 6, the most reasonable interpretation of the Uzbek text is that these words express the same concept in both Article 1(1) and Article 6.”<sup>160</sup>

180. In further relation with the context, under Article 8(1) of the BIT, the parties agreed to submit to arbitration “any legal dispute” arising between a Contracting Party and an investor of the other Contracting Party “concerning an investment of the latter in the territory of the former”. Article 8(1) thus applies to “any legal dispute”. It is not limited to disputes concerning the application of the treaty. If the Respondent’s jurisdictional argument was accepted, it would mean that a tribunal would lack jurisdiction to consider “any legal dispute” between the parties if the tribunal accepted that the claimant at any point in time had violated any provision of Uzbek law. This logic, to the Claimant, is flawed as by following it, “any breach of contract claim between a foreign investor and any party in Uzbekistan could be used to effectively deny the foreign investor protection under the BIT, even where that party is not a state actor and the alleged breach has nothing to do with the state action.”<sup>161</sup> The Claimant submits that such an interpretation would render the substantive protections under the BIT meaningless. The Claimant insists that the definition of “investment” in Article 1(1) of the Treaty should not be interpreted in a manner “that limits consent to jurisdiction and requires all local law claims to be heard only at the jurisdictional stage of the proceedings.”<sup>162</sup>

181. Turning then to the object and purpose of the Treaty, the Claimant insists that, contrary to the Respondent’s contention that its interpretation of Article 1(1) of the BIT is in line with the Preamble of the BIT, Uzbekistan’s interpretation would allow the State to avoid a hearing on the merits merely by raising violations of its laws perpetrated in the course of the investment. This is inconsistent with promoting foreign investment, as it renders a foreign investor’s right to pursue arbitration against the host state illusory.

182. The Claimant adds that the circumstances surrounding the conclusion of the Treaty confirm its interpretation of Article 1(1) as a traditional legality clause. The fact that the definition of investment in the BIT is the same as that in the Israel Model BIT, and that

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<sup>160</sup> Reply M. ¶268.

<sup>161</sup> Reply M. ¶272.

<sup>162</sup> Reply M. ¶271.

Israel's policy at the time was to protect as many Israeli investments abroad as possible, supports an interpretation of "investment" in Article 1(1) in the BIT as all referring to investments established in accordance with law.

183. Finally, the Claimant underlines that Uzbekistan has not cited a single case in which a tribunal denied jurisdiction based on a finding that the investor had violated some local law in the operation of an investment. Replying to the Respondent's argument that "implemented" and "made" being used in the same sentence must have distinct meanings, the Claimant submits that the only case relied on by the Respondent in this respect is inapposite, and, in fact, supports the fundamental principle that treaty language must be interpreted in its context.<sup>163</sup>
184. In connection with the Respondent's reliance on the Uzbek and Israeli versions of the BIT, the Claimant submits that the words used in Hebrew and Uzbek have a wide range of potential meanings, "some of which connote an ongoing action and some of which designate an action at a single moment in time."<sup>164</sup> When the word "implement" is interpreted in the relevant context, the only logical conclusion is that Article 1(1) refers to those investments established in accordance with local law.

### iii. ***Analysis***

185. Essentially, the question is whether "implemented" means "established" or "established and operated". The Tribunal reaches the conclusion that it means the former for the following reasons.
186. First and foremost, one must recall the precise language of Article 1(1) in its relevant part. Article 1(1) provides that "[t]he term 'investments' shall comprise any kind of assets, implemented in accordance with the laws and regulations" (emphasis added). The controversial word "implemented" applies to "assets" and not to "investments". That wording is consonant with definitions found in many treaties that refer to investments as "any kind of assets invested". Without the benefit of *travaux préparatoires* showing the contrary, the reader is naturally inclined to assimilate the two formulas. It indeed comes to mind that the drafters of this BIT may have sought to avoid the tautology inherent in the usual definition by using a word different from the

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<sup>163</sup> Reply M. ¶270 (referring to the WTO Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/R, 31 October 2005).

<sup>164</sup> Reply M. ¶267.

one they were defining. They may have replaced “invested” by “implemented” for the sake of good drafting without changing the substance of the definition.

187. Looking at the ordinary meaning of “implemented”, it is true that the word can mean “made, carried out, operated, completed, performed, carried out into effect” and the Parties do not disagree in this respect. But the question is not simply what implement means but rather what it means in its context in relation to “assets”. *When* is an asset “made, carried out into effect, operated, completed”?
188. Looking to the Hebrew and Uzbek versions to elucidate the ordinary meaning is not more helpful. The Hebrew word is translated as “applied” and the Uzbek term as “used”. When affixed to the term “assets”, the first one tends to indicate a one time action such as established, while the second would rather signify a continuous action analogous to operate.
189. By contrast, a review of the context of the term being interpreted provides more indications. First, as the Claimant points out, Article 6(1) of the Treaty which deals with repatriation of investment, guarantees to investors “the rights and benefits regarding the unrestricted transfer of their investments and returns which were in force *on the day the current investment was implemented*” (emphasis added). In this phrase, the word implemented clearly identifies the one-time initial action of establishment. The Respondent objects that the context is different and, therefore, unhelpful to interpret the term in Article 1(1). The Tribunal does not find this objection convincing. Indeed, the language in Article 6(1) undoubtedly demonstrates that the word “implement” can be used to designate initial establishment at a particular point in time. Similarly, Article 1(2) speaks of “assets invested”, which tends to support the idea that, in the context of the Treaty, the word “implemented” is used as a synonym for “invested.”
190. The Respondent has also drawn the Tribunal’s attention to the fact that, in addition to “implement,” Article 1(1) uses the word “made” (“The term “investments” shall comprise any kind of assets, *implemented* in accordance with the laws and regulations of the Contracting Party in whose territory the investment is *made*” (emphasis added)). It infers from the use of distinct words that they must necessarily have a different meaning. The Tribunal cannot follow this argument. Further to the reasons expressed above, it notes that the word “made” is always juxtaposed to “investment” in the treaty (e.g. Art. 1(1), 1(2), 1(3), 2(2), 12, 14). It is not employed to characterize assets, which are said to be “implemented” ((Art. 1(1)) or “invested” (Art. 1(2) and Art. 6 which refers to “capital invested”). Significantly, as was emphasized above, investments are also

deemed “implemented”, which tends to confirm that there is no difference of substance between “implemented” and “made”.

191. Having followed the textual and contextual approach prescribed by the VCLT to interpret the meaning of the word “implement” in Article 1(1) of the Treaty, the Tribunal does not see the need to address the Respondent’s argument that the word “implement” should be interpreted in a manner consistent with Uzbekistan’s foreign investment laws.
192. Last, the Tribunal notes that the object of purpose of the Treaty, which also comes into play in the interpretation under the VCLT, is of no assistance for present purposes. As it underlined above, the object and purpose is a balanced one that takes into account both the private interests of the investor and the public interest of the State. It is true that the Claimant relies on Israel’s policy to secure broad protection for its investors. Even though it reaches a conclusion that is in line with this policy, the Tribunal does so on other grounds, as it is not persuaded that this policy reflects the common intention of the Contracting States.
193. In summary, on the basis of its reading of Article 1(1) taken in its context, the Tribunal concludes that the term “assets implemented” refers to the time when the investment was made. In other words, the Treaty requires that the investment must be legal when it is initially established. Article 1 simply does not address whether or not the investment must be operated lawfully after it is in place.

#### **4. Key Facts**

194. The Tribunal will now turn to reviewing whether the Claimant’s investment in Uzbekistan was made in compliance with the law at the time when it was established. Before doing so, however, the Tribunal will set forth the main facts related to corruption in the present section, and will also address a number of threshold matters relevant to the assessment of the evidence in the record in sub-section (5). Thereafter, it will examine whether the investment complied with host state law in sub-section (6) and then with international law principles and international public policy in sub-section (7), prior to providing its conclusion in sub-section (8).
195. According to the Respondent, by promising to pay several individuals to obtain or influence the Government’s approval of its investment project, the Claimant violated

Uzbek laws on bribery as well as transnational principles and international public policy prohibiting corruption.<sup>165</sup>

196. In this section, the Tribunal provides an overview of the main facts in the record that it considers determinative of the outcome of these proceedings. It will revert to them in more detail where appropriate in connection with the application of the relevant rules.

**a. Payment**

197. The Tribunal recalls that at the January Hearing, Mr. Rosenberg, the Claimant's Chairman and CEO, was shown a prospectus issued by the Claimant on 9 May 2005 in connection with a public financing at that time.<sup>166</sup> The prospectus disclosed that the Claimant had paid consultants for assistance with the operation of the joint venture in Uzbekistan, including production and delivery of products. In the course of examination, Mr. Rosenberg admitted that the Consultants were paid for services other than those set out in that prospectus. Mr. Rosenberg also conceded that the Consultants were paid a total of approximately USD 4 million during the period from 2001 to 2007:

“Q. How much money have you paid these gentlemen, and over what period of time?

A. We paid about \$4 million in the span from 2001 until 2007.”<sup>167</sup>

[...]

“PRESIDENT KAUFMANN-KOHLER: You mentioned, if I took my notes correctly, that you paid them 4 million from 2001 to 2007. Is that correct? Can you confirm that?

THE WITNESS: Yes, I can confirm that.”<sup>168</sup>

198. Later, from the Payment Schedule submitted by the Claimant, it emerged that Claimant had actually paid USD 3.5 million to the Consultants and had paid further sums totalling USD 900,000 to Mr. Ibragimov.

**b. Amounts of Payments**

199. The size of the payments made to the Consultants is another striking fact, especially when seen in connection with the amount of the Claimant's capital investment and in

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<sup>165</sup> R-PHB 1 ¶40.

<sup>166</sup> Exh. R-101.

<sup>167</sup> Tr. 353:15-18.

<sup>168</sup> Tr. 478:5-9.



the local context.<sup>169</sup> The Claimant paid USD 3.5 million to the Consultants<sup>170</sup> and USD 900,000 to Mr. Ibragimov. By comparison, Resolution No. 15 provided for an initial capital contribution from Metal-Tech of USD 500,000 or 60,500,000 Uzbek Soum.<sup>171</sup> Subsequently, the Claimant claims to have made an additional capital contribution of USD 2 million.<sup>172</sup> Moreover, pursuant to Resolution No. 29-F, the value of the Project was USD 19,398,000.<sup>173</sup> Thus, the total payments made by the Claimant to the Consultants exceeded its initial cash contribution to the venture and amounted to nearly 20% of the entire project cost. The proportion – or rather the disproportion – is striking. It is also worth noting that Uzmetal never paid any dividends.<sup>174</sup>

200. When assessing these amounts, one should further bear in mind that the Consultants were three Uzbek citizens allegedly hired to provide services “on the ground” in Uzbekistan,<sup>175</sup> where the cost of living is lower than in other countries. For instance, Mr. Rosenberg testified that Mr. Mikhailov’s salary at Uzmetal was less than USD 100 per month.<sup>176</sup> Mr. Mikhailov’s employment contract with Sanavita GmbH, his full-time employer, similarly provided for a monthly salary of 4,500 Uzbek Soum.<sup>177</sup> Yet, for services rendered to Metal-Tech, Mr. Mikhailov received a “bonus” of USD 5,000 per month, fifty times his salary from Uzmetal.<sup>178</sup> Similar “bonus” payments were made to Messrs Sultanov and Chijenok.<sup>179</sup>

201. The appearance created by the high level of the payments is not dispelled by the reasons which the Claimant puts forward to explain these amounts. The Claimant’s explanation that the Consultants were lobbyists and lobbyists do not work for Uzbek minimum wage is unhelpful. It was not disputed that Uzbek law does not recognize the

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<sup>169</sup> In fact, the Claimant’s counsel himself admitted that while not “suspiciously high”, “a lot of money” was indeed paid by Metal-Tech to the Consultants (Tr. 1299:14-18).

<sup>170</sup> The Tribunal notes that while the Claimant’s payment schedule indicates only payments totalling USD 3,532,689.40 to the Consultants, Mr. Rosenberg later admitted that an additional payment of USD 30,000 had been made to MPC Tashkent (Tr.1583:1-15). Thus, the total payments made to the Consultants would be USD 3,562,689.40. Further, an additional payment of USD 240,803.97 to Lacey International has been contested between the Parties, but is not relevant for the present purposes. Indeed, whether or not these additional payments were made does nothing to alter the Tribunal’s findings in respect of the payments of USD 3,562,689.40 which are admitted.

<sup>171</sup> Article 2 and Appendix No. 2 Exh. R–21.

<sup>172</sup> Reply M. n. 313.

<sup>173</sup> Exh. R-22.

<sup>174</sup> Rej. M. ¶237; see C-Mem. M. ¶¶59-74, 169-232, 307-22.

<sup>175</sup> Rosenberg WS III ¶3.

<sup>176</sup> Tr. 476:12-15.

<sup>177</sup> Art. 4.1.3, Kanyazov WS II Attachment 13, p. 25.

<sup>178</sup> Art. 3.2, Exh. C–224, p. 1; Tr. 1751:11-13.

<sup>179</sup> Art. 3.2, Exh. C–223, p. 1; Art. 3.2, Exh. C–225, p. 1; Tr. 1751:14-17.

concept of a lobbyist. More important, none of the Consultants was qualified to render lobbying services. Mr. Rosenberg himself described Mr. Chijenok as “an office man who advised on administrative issues such as tax and insurance” and who “provided analytical marketing reports and information on local regulations”<sup>180</sup> and not principally as a lobbyist. Similarly, the Claimant did not advance any evidence that Mr. Sultanov or Mr. Mikhailov was competent to provide lobbying services.

202. Further, if the Consultants had engaged in lawful lobbying, they would have rendered their services in a transparent manner – not under consulting contracts shrouded in secrecy.<sup>181</sup> Payments too could have been made and received directly rather than through interconnected offshore companies.

203. Similarly, for the reasons discussed below (see e.g., ¶¶205, 262), the Tribunal is unable to follow the Claimant’s next explanation for the large payments made to the Consultants according to which the work that the Consultants performed extended back to 1998 and that the Consultants provided “immense assistance”.<sup>182</sup> Witnesses from the molybdenum industry testified that they had never even heard of Mr. Sultanov being involved in the industry, and Mr. Mikhailov’s qualifications pertain largely to the pharmaceutical industry (see e.g., ¶¶212, 343). Indeed, despite repeated requests (see section IV.B.5(b)), the Claimant was unable to produce any meaningful contemporaneous documentation establishing that the Consultants did provide assistance.

### ***c. No Services or Proof of Services***

204. A third fact that caught the Tribunal’s particular attention is that the consulting agreements required payments to be made to the Consultants irrespective of services provided. For instance, under the 15 December 2000 contract (pursuant to which the Claimant paid about USD 2.4 million to MPC<sup>183</sup>), Mr. Rosenberg testified that “none of the consultants had to prove any documents or supply any documents to the services.”<sup>184</sup> Similarly, under the three contracts executed between the Claimant and each of the three Consultants in 2004 (pursuant to which the Claimant paid USD

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<sup>180</sup> Rosenberg WS III ¶18.

<sup>181</sup> Most of the consulting contracts prohibited disclosure of their contents. See for e.g., the contract dated 15 December 2000 (Exh. C-221) which provided that MPC was to “treat any information related to this agreement but also to further contracts which may result, as fully secret and confidential.”

<sup>182</sup> Rosenberg WS III ¶12.

<sup>183</sup> Exh. C-228.

<sup>184</sup> Tr. 1645:12-14.

95,000 each to Messrs Chijenok and Sultanov, and USD 105,000 to Mr. Mikhailov<sup>185</sup>), Mr. Rosenberg admitted that “we didn’t ask for any proof of services”<sup>186</sup>. He further conceded that “[the Consultants] didn’t have any documents supporting any services... because it wasn’t required.”<sup>187</sup> Further, for the payments made under the contracts with MPC Tashkent (pursuant to which the Claimant paid USD 90,000 to MPC Tashkent<sup>188</sup>), the Claimant was unable to establish any link between the payments and any services.

205. The documents which the Claimant produced in an effort to establish “the types of services provided by [the Consultants]”<sup>189</sup> do not support the submission that legitimate services were rendered by the Consultants since 1998. First, most of the services evidenced by these documents were services which could only be performed after 2000, when Uzmetal was established. For instance, services such as assistance with standard certifications,<sup>190</sup> hiring of guards,<sup>191</sup> getting VAT exemptions<sup>192</sup>, could only be performed once Uzmetal was operational. Indeed, Mr. Rosenberg himself admitted that some of these documents concerned services rendered after Uzmetal was established.<sup>193</sup> Second, some of the documents are either undated,<sup>194</sup> or are dated much after 1998.<sup>195</sup> The only exception to this is the letter of 30 July 1998 written by Mr. Rosenberg to Messrs Ibragimov and Mikhailov,<sup>196</sup> which Mr. Rosenberg conceded does not concern Uzmetal.<sup>197</sup>
206. Among other requests for evidence, the Tribunal specifically invited the Claimant in PO 10 to specify the services rendered in return for each payment to the Consultants. For each payment, the Tribunal asked Metal-Tech to explain “[w]hat service was the payment intended to remunerate.” The Claimant failed to provide this information, accepting that “[t]he nature of the contracts were such that Metal-Tech cannot provide the Tribunal with a detailed chart of the information requested.”<sup>198</sup>

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<sup>185</sup> Exh. C-228.

<sup>186</sup> Tr.1631:18-22.

<sup>187</sup> Tr.1632:4-5.

<sup>188</sup> Exh. C-228.

<sup>189</sup> Rosenberg WS III ¶10.

<sup>190</sup> Exh. C-236-238.

<sup>191</sup> Exh. C-243.

<sup>192</sup> Exh. C-230.

<sup>193</sup> Rosenberg WS III ¶10(f) referring to Exh. C-230-231;233-237, 242.

<sup>194</sup> Exh. C-241-248.

<sup>195</sup> Exh. C-230-240.

<sup>196</sup> Exh. C-229.

<sup>197</sup> Tr. 1583:16-1584:6.

<sup>198</sup> Rosenberg WS III ¶2.

207. In this context, the Tribunal notes with concern the Claimant's repeated failure to provide evidence justifying the services rendered by the Consultants in return for their substantial compensation. Although the Claimant had several opportunities to do so, and was on notice that the evidence requested would be of importance to the Tribunal's determination, it was nonetheless unable to establish that the Consultants actually performed any legitimate services for the Claimant at the time of establishment of the Claimant's investment.

**d. Lack of Qualification of the Consultants**

208. As a fourth factor, it struck the Tribunal that none of the Consultants possessed any professional qualification to perform the services for which they were allegedly retained. According to the Claimant, the Consultants were hired to provide "the same services that Washington lobbyists provide every day."<sup>199</sup> Further, Mr. Rosenberg testified that the "main thing" of interest to Metal-Tech was that the Consultants had been dealing in the molybdenum industry prior to being involved with Uzmetal.<sup>200</sup> He also alleged that the Consultants provided assistance on technical and financial matters. The contracts entered into with the Consultants provided that the Consultants were to "perform marketing investigations in ... Uzbekistan",<sup>201</sup> "perform negotiations with the Uzbek experts and different organizations",<sup>202</sup> "give the consulting services concerned with application of the legislation and statutory acts".<sup>203</sup> A review of the qualifications of the Consultants demonstrates, however, that they lacked the necessary background to perform such services. None of them had any prior experience with the molybdenum industry, much less technical credentials in that field.

209. At the time of the establishment of the Claimant's investment, Mr. Chijenok was responsible for human resources functions at the Office of the President of Uzbekistan,<sup>204</sup> with responsibilities such as examining the qualifications of applicants for vacancies.<sup>205</sup> This hardly qualifies Mr. Chijenok to assist with technical and financial matters. He lacked any prior experience in the molybdenum industry, or indeed in any

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<sup>199</sup> Tr. 1300:9-11.

<sup>200</sup> Tr. 447:22-448:2.

<sup>201</sup> See Art. 2.1.2, Exh. C-221; Art. 2.1, Exh. C-223.

<sup>202</sup> See Art. 2.4, Exh. C-223; Art. 2.3, Exh. C-225. See also Art. 2.1.1, Exh. C-221.

<sup>203</sup> See Art. 2.1.2 Exh. C-226. See also Art. 2.1.6, Exh. C-221; Art. 2.1, Exh. C-225.

<sup>204</sup> Kanyazov WS II Attachment 5, Attachment 9.

<sup>205</sup> Kanyazov WS II, Attachment 8, p. 3; see also Mikhailov WS III ¶9.

field other than government administration, as Mr. Rosenberg later admitted.<sup>206</sup> It is therefore more than surprising that the Claimant employed him to “explain the basic tendencies and directions of economic policy of Uzbekistan”<sup>207</sup> and “to perform negotiations with Uzbek experts”.<sup>208</sup> It is also surprising that, in the absence of relevant qualifications, the Claimant paid USD 95,000 to Mr. Chijenok personally, plus his shares in the USD 2,492,908 paid to the MPC Companies and the USD 774,781 paid to Lacey International (designated as payee by the Consultants under the consultancy agreement of 28 February 2005<sup>209</sup>).

210. Similar observations apply to Mr. Sultanov. Mr. Sultanov was a police investigator who retired after achieving the rank of Police Colonel; he had not worked in any capacity since April 1992.<sup>210</sup> Despite the Claimant’s allegations that Mr. Sultanov was retained to provide lobbying services,<sup>211</sup> the Claimant failed to produce any evidence that he was qualified to do so. Moreover, Deputy Minister Kanyazov testified that Mr. Sultanov was not and had never been listed in any of the State registries for providing advocacy or tax consulting services.<sup>212</sup> His testimony was not rebutted.
211. Further, despite initially testifying that only Mr. Sultanov worked in the molybdenum industry, Mr. Rosenberg himself later admitted that he had only heard of Mr. Sultanov’s experience and did not know and never asked whether Mr. Sultanov was an engineer, a metallurgist, or had any other expertise relevant to the Claimant’s investment.<sup>213</sup> There is no evidence on record that Mr. Sultanov had any experience in the molybdenum industry. It is therefore again difficult to understand that the Claimant employed him to “advise by preparation of the necessary documentation, elaboration of the feasibility studies”;<sup>214</sup> “to perform negotiations with the Uzbek experts”.<sup>215</sup> It is equally surprising that, despite his lack of qualifications, Mr. Sultanov received substantial amounts: USD 95,000 was paid to him personally plus his shares in the USD 2,492,908 paid to the MPC Companies and the USD 774,781 paid to Lacey International (designated as payee by the Consultants under the consultancy

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<sup>206</sup> Tr. 1610:1-3 (“I don’t think that if Mr. Chijenok was working at the Government in Uzbekistan, he had business in molybdenum.”). See also Tr. 1606:8-12; 1603:11-14, 1604:11-14.

<sup>207</sup> Art. 2.2, Exh. C-223.

<sup>208</sup> Art. 2.4, Exh. C-223.

<sup>209</sup> Rosenberg WS III ¶25.

<sup>210</sup> Kanyazov WS II, Attachment 4, pp. 9-15; Kanyazov WS II, Attachment 3, p. 3.

<sup>211</sup> Tr. 1300:9-11; C-PHB 2 ¶27.

<sup>212</sup> Kanyazov WS II ¶21.

<sup>213</sup> Tr.1636:10-1637-21.

<sup>214</sup> Art. 2.2, Exh. C-225.

<sup>215</sup> Art. 2.3, Exh. C-225.

agreement of 28 February 2005<sup>216</sup>). The only possible basis for such payments to Mr. Sultanov, it seems to the Tribunal, would have been his relationship to the Prime Minister of Uzbekistan, which is discussed below.

212. Finally, as to Mr. Mikhailov, he himself denied having performed many of the services the Claimant alleges he rendered.<sup>217</sup> He also admitted that he was not qualified to perform some these services.<sup>218</sup> Mr. Mikhailov's qualifications pertain largely to the pharmaceutical industry. For instance, Mr. Mikhailov had held a position as pharmaceutical science advisor at Hoechst AG, Germany. When he started as the Claimant's consultant, he was the Head of the Representative Office of Sanavita GmbH of Germany.<sup>219</sup> In fact, before it referred to Mr. Mikhailov as "consultant to Metal-Tech Ltd. and a senior member of the Uzmetal management team",<sup>220</sup> Metal-Tech itself had downplayed Mr. Mikhailov's importance, relying on his testimony where he had described himself as "a manager of a newspaper business in Uzbekistan."<sup>221</sup> In sum, the Tribunal finds that Mr. Mikhailov was largely unqualified to provide the consulting services that the Claimant alleges he provided. Here again, although unqualified for the task, Mr. Mikhailov was paid USD 105,000 personally plus his shares in the USD 2,492,908 paid to the MPC Companies and the USD 774,781 paid to Lacey International (designated as payee by the Consultants under the consultancy agreement of 28 February 2005<sup>222</sup>).

#### ***e. Sham Consulting Contracts***

213. Since the analysis is limited to events surrounding the establishment of the Claimant's investment (¶193 above), the Tribunal does not deem it necessary to review each of the consulting contracts. Rather, the Tribunal will focus on the December 2000 Contract between the Claimant and MPC, which, by its own terms, refers to past activities including the preparation of the Feasibility Studies.<sup>223</sup>

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<sup>216</sup> Rosenberg WS III ¶25

<sup>217</sup> Mikhailov WS III ¶¶15, 17, 18.

<sup>218</sup> Mikhailov WS III ¶15.

<sup>219</sup> Kanyazov WS II, Attachment 11, p.7; Attachment 10, p.3; Attachment 12, p.3.

<sup>220</sup> Claimant's letter of 28 February 2012, ¶2.

<sup>221</sup> Reply M. n. 111.

<sup>222</sup> Rosenberg WS III ¶25

<sup>223</sup> Exh. C-221, Art. 1.1. and 2.1.3.

214. The December 2000 Contract was the first written contract between the Claimant and MPC. Under this contract, MPC undertook a wide range of obligations, which are described as follows:

"2.1 MPC has taken and will take the following obligations:

2.1.1 MPC and its management will negotiate and coordinate all matters related to Uzbekistan Government and/or official bodies.

2.1.2 To perform marketing investigations in the Republic of Uzbekistan in the interest of Metek and to provide Metek with all information concerning prices as received by the Uzbek Partner from competitors, supporting assistance during all negotiations which have resulted in the optimal conditions for 'the contract' as well as local action to secure timely and full financial settlement of 'the Contract' and other contracts related thereto.

2.1.3 MPC has fully participated in the preparation of the Feasibility Studies which form an integral basis for 'the contract' and other agreements related thereto.

2.1.4 To keep providing Metek with all relevant information on the legal and economical implication of 'the contract' and agreements related thereto, in accordance with Uzbek legislation.

2.1.5 To inform Metek full details of any payment made by the Uzbek Partner under 'the contract' within 2 days after any transfer made by the Uzbek Partner.

2.1.6 To advise of any change of regulations and/or activities, which may jeopardize Uzmetal's and/or Metek's interest in Uzbekistan.<sup>224</sup>

215. Metal-Tech's obligation was to pay "consultancy fees" or "commissions" to MPC whenever debt was repaid by the "Uzbek Partner" in amounts specified in Annex I totalling USD 3,226,000 (later updated in Annex I(a) to USD 3,032,883).<sup>225</sup> The December 2000 Contract would be cancelled if the performance of the EPC Contract stopped.<sup>226</sup> Finally both parties to the December 2000 Contract agreed to keep any information related to the contract "fully secret and confidential".<sup>227</sup>

216. Several elements in the December 2000 Contract attract the Tribunal's attention:

- (i) First, neither Mr. Sultanov nor Mr. Mikhailov (who allegedly required the Claimant to enter into the contract with MPC) was qualified to fulfill most of the "obligations" listed in the contract. For instance, while the Contract provides that "MPC has fully participated in the Feasibility Studies", the Tribunal has found

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<sup>224</sup> Exh. C-221, Art. 2.1.

<sup>225</sup> Exh. C-221, Art. 2.2.

<sup>226</sup> Exh. C-221, Art. 3.3.

<sup>227</sup> Exh. C-221, Art. 2.3.

that neither Mr. Mikhailov nor Mr. Sultanov had the qualifications to do so (see e.g., ¶¶209-212). In fact, Mr. Mikhailov specifically denied that he prepared or assisted with preparing the Claimant's feasibility studies, and added that he, "like Mr. Sultanov and Mr. Chijenok, did not have this expertise."<sup>228</sup> Thus, the obligations provided in the December 2000 Contract appear to be nothing more than a smokescreen – neither MPC, nor Messrs Sultanov or Mikhailov were qualified to fulfill the obligations assumed through in the contract. Nor, for that matter, was Mr. Chijenok (the Tribunal has established that Mr. Chijenok was involved in the Project since 1998; see ¶¶312-319).

- (ii) Second, under the December 2000 Contract, Metal-Tech was to make periodic payments to MPC. These payments were not contingent on the fulfilment of the obligations listed in the contract. In effect, the payments were "automatic" and their amount was predetermined: once Uzmetal received monies from Bank Leumi, on receipt of invoices from MPC, payments were due within ten days. MPC was not required to provide proof of services to receive payment. Mr. Rosenberg confirmed this understanding at the hearing:

"Q. But the three consultants did not have to submit any evidence of their performance to obtain the payment under Annex 1 of the December 2000. It was, as you testified, the success of the venture.

A. The Agreement, as you saw it, doesn't require any supporting document to their service."<sup>229</sup>

[...]

"A. As I said in the Agreement of December 2000, none of the consultants had to prove any documents or supply any documents to the services."<sup>230</sup>

- (iii) Third, the Claimant was unable to show that any services were actually rendered in return for the payments. For instance, in support of its submission that Mr. Mikhailov assisted in the preparation of the Feasibility Study, Mr. Rosenberg initially relied on a letter of 13 January 1998. However, as he later admitted, the feasibility study contemplated in the letter was not for the Uzmetal project.<sup>231</sup> Additionally, although the Draft Feasibility Study and the Revised Feasibility Study list the various individuals involved in their preparation, none of

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<sup>228</sup> Mikhailov WS III ¶15.

<sup>229</sup> Tr. 1623:4-9.

<sup>230</sup> Tr. 1645:12-14.

<sup>231</sup> Tr. 1583:16-1584:6.



the Consultants is mentioned.<sup>232</sup> The Claimant's inability to produce convincing evidence is reviewed later in this award and the Tribunal refers to that review (section IV.B.5(b)).

217. This said, it is true that the Claimant has produced some documents that, according to it, "[are] illustrative of the types of services provided by [the Consultants]." <sup>233</sup> Some of these documents, according to the Claimant, establish that the Consultants actually carried out activities under the December 2000 Contract. The Tribunal finds it difficult to agree with this position. Indeed, for the reasons mentioned (¶¶205, 262), the Tribunal has found that *none* of the documents on which the Claimant relies (whether under the December 2000 Contract or otherwise) convincingly show that the Consultants rendered any legitimate services at the time of establishment of the Claimant's investment.

218. For all these reasons, the Tribunal comes to the conclusion that the December 2000 Contract cannot be regarded as a genuine agreement and must be deemed a sham designed to conceal the true nature of the relationship among the parties to it.

***f. Lack of Transparency of Payee***

219. Another troubling circumstance lies in the lack of transparency of the Consultants' payment arrangements. The Payment Schedule produced by the Claimant evidences that less than 8% of the payments were made to the Consultants directly. The balance, more than 92%, was paid to companies established in Switzerland (MPC), Tashkent (MPC Tashkent) and the British Virgin Islands (Lacey International). <sup>234</sup>

220. The Consultant's company, MPC, was established in Switzerland on 20 July 1998. <sup>235</sup> Its major shareholders were B.V. Chemie Pharmacie Holland in Amsterdam ("CPH") and Bordeaux Intertrade Inc. ("Bordeaux") of Tortola, which each owned 45% of MPC's shares. <sup>236</sup> Bordeaux was a BVI company incorporated on 9 June 1998. <sup>237</sup> The founders

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<sup>232</sup> Exh. R-121, p. 118 (stating that "Feasibility study has been prepared by" Bateman's director, Mr. Gdalyakhu, Bateman's chief engineer, Mr. Jonathan, Claimant's chief engineer, Mr. Sela, and Claimant's chief examiner, Professor Tarakanov); Exh. R-20, p. 4 (stating that "[t]he feasibility study has been conducted by" Mr. Jonathan, Mr. Gdalyahu, Mr. Sela, and also Mr. Maimon).

<sup>233</sup> Claimant's letter of 30 April 2012.

<sup>234</sup> Exh. C-228.

<sup>235</sup> Kanyazov WS II Attachment 15, p. 9; Exh. R-679; see Kanyazov WS II Attachment 14, p. 35.

<sup>236</sup> Kanyazov WS II Attachment 15, p. 9; Exh. R-679.

<sup>237</sup> Exh. R-663, pp. 5, 7-10.

of Bordeaux were Messrs Chijenok, Mikhailov and Sultanov, each of whom held one third of the shares.<sup>238</sup>

221. The Claimants paid more than USD 2.4 million to MPC. No cogent reason was given why payments to the Consultants were made through a Swiss company in which the Consultants' ownership interest was concealed by the use of a BVI holding company. Mr. Rosenberg testified that payments by the Claimant to Switzerland did not arouse suspicion because "[w]e were working with many Swiss companies, and Switzerland is a safe place to work."<sup>239</sup> This explanation hardly dispels the troubling impression created by these payment arrangements. There is no reason why three Uzbek nationals (Messrs Chijenok, Mikhailov and Sultanov) rendering services to an Israeli company (Metal-Tech) in respect of a joint venture in Uzbekistan (Uzmetal) should be paid through a company established in a wholly unrelated country. Further, it is not disputed that, although MPC is registered in Switzerland, it does not have a physical presence there. Rather, the registered address for MPC is that of a service company, Henley & Partners Trust Company (Switzerland) AG.<sup>240</sup>
222. The case is the same with respect to Bordeaux. Bordeaux was incorporated on 9 June 1998 in the BVI.<sup>241</sup> It appears to have only a mailing address, but no physical presence in the BVI. The Claimant's only objection – that the document relied on by the Respondent to establish that Messrs Chijenok, Mikhailov and Sultanov were the founders of Bordeaux was dated April 2009, which is much later than the establishment of Bordeaux in 1998 – seems immaterial. The fact remains that the Consultants (or, at least, Messrs Sultanov and Chijenok) used off-shore companies to route payments in respect of services allegedly rendered in Uzbekistan.
223. As for Lacey International, it was established in 2003 in Tortola, BVI.<sup>242</sup> Lacey and Bordeaux had the same registered address, i.e. c/o Overseas Management Company Trust (BVI) Ltd. at P.O. Box 3152, Road Town, Tortola, BVI.<sup>243</sup> Lacey was administratively dissolved in 2010.<sup>244</sup>

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<sup>238</sup> Exh. R-659, pp.1 and 5 bearing Mr. Chijenok's signature. See also R-661.

<sup>239</sup> Tr. 1592:10-14.

<sup>240</sup> Aviv Report ¶9.

<sup>241</sup> Exh. R-663, pp. 5, 7-10.

<sup>242</sup> Arts. 2-3, Exh. R-664, p. 11.

<sup>243</sup> Exh. R-664, p. 15; Exh. R-663, p. 14.

<sup>244</sup> Exh. R-664, p. 1; see also Aviv Report ¶19.

224. The Claimant paid USD 774,781 to Lacey. As in the case of MPC, Mr. Rosenberg testified that he knew nothing about Lacey's shareholding structure or what was done with payments made to Lacey.<sup>245</sup> He also said that he did not suspect corruption.<sup>246</sup>

***g. Connections with Public Officials in Charge of Claimant's Investment***

225. While the Consultants lacked obvious qualifications to advise the Claimant about the molybdenum industry, two of them had significant connections with Uzbek Government officials responsible for the approval, establishment and operation of the Claimant's investment. One of the Consultants, Mr. Chijenok, worked in the Office of the President of Uzbekistan. His responsibilities included examining candidates to head various ministries and Government departments. Thus, besides being himself a government official, Mr. Chijenok obviously had contacts with other officials in the Uzbek Government. He was in a position to influence appointments of candidates to official positions. At the January Hearing, when asked whether he knew that Mr. Chijenok was working in the Office of the President, Mr. Rosenberg replied: "I know that he was working in a high position in an official position [...]".<sup>247</sup> These facts were later corroborated by Mr. Mikhailov.<sup>248</sup> Indeed, in 1997, it was Mr. Chijenok's office that requested Prime Minister Sultanov's opinion on the Claimant's proposed investment in Uzbekistan.<sup>249</sup>

226. Another Consultant, Mr. Sultanov, was the brother of the Prime Minister of Uzbekistan, who had the delegated authority to monitor and oversee the Claimant's investment.<sup>250</sup> The Prime Minister was also the official in charge of the establishment and operation of Uzmetal.<sup>251</sup> Here too, the Claimant admitted that, because Mr. Sultanov was the brother of the Prime Minister, one of the "main figures", Mr. Sultanov had a "very good network"<sup>252</sup> and a "very good connection with different Government bodies".<sup>253</sup> In fact, Mr. Rosenberg explained frankly that Mr. Sultanov's brother "was the Prime Minister at

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<sup>245</sup> Tr.1586:10-18.

<sup>246</sup> Tr.1592:15-20.

<sup>247</sup> Tr. 452:21-453:7.

<sup>248</sup> Mikhailov WS III ¶9.

<sup>249</sup> Exh. R-470.

<sup>250</sup> Exh. R-17, pp. 2 and 3.

<sup>251</sup> Exh. R-21, p.9.

<sup>252</sup> Tr. 350:15-19.

<sup>253</sup> Tr. 450:10-22.

the time, so it really was *one of the persons that could facilitate closing red tapes when the [Uzmetal] was initiated.*"<sup>254</sup>

227. The Tribunal finds it significant that Metal-Tech made its last payments to both of the entities controlled by the Consultants, MPC and Lacey, in April 2006, the very month when President Karimov dismissed Mr. Sultanov's brother from his then position as Deputy Prime Minister.<sup>255</sup>

## **5. Factors Relevant to the Assessment of Evidence**

### **a. Burden and Standard of Proof**

228. The Parties disagree on the applicable burden and standard of proof. While the Respondent submits that the burden is on the Claimant to establish the absence of corruption and that corruption may be proved through *prima facie* or circumstantial evidence, the Claimant submits that the Respondent must prove corruption through "clear and convincing evidence".

### **i. Respondent's Position**

229. The Respondent submits that the evidence in this case gives rise to a strong presumption that the Claimant engaged in corruption. It further submits that the Claimant has the burden of proving the facts necessary to support a finding of jurisdiction. In light of the inherent difficulty in proving claims of corruption due to the tendency of the parties involved to conceal evidence, as numerous tribunals have recognized, the Claimant should have the burden to rebut the presumption and to produce evidence to explain its payments of more than USD 4.4 million in alleged consulting fees.<sup>256</sup> In fact, according to the Respondent, this was the rationale behind the Tribunal's POs Nos. 3, 7, and 10 which directed the Claimant to produce evidence to demonstrate that the Consultants rendered legitimate services in return for the payments made by the Claimant. The Respondent submits that, by failing without any credible explanation to produce evidence that the Tribunal deemed relevant and material to the resolution of the Respondent's corruption defense, the Claimant has

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<sup>254</sup> Tr. 450:19-22.

<sup>255</sup> See Exh. C-228 (showing last payment to MPC of USD 182,054.50 on 4 April 2006 and its last payment to Lacey of USD 33,460.40 on 24 April 2006); see also Kanyazov WS II Attachment 2, p. 25; Kanyazov WS II Attachment 1, p. 4.

<sup>256</sup> R-PHB 1 ¶308 citing *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (hereafter "*EDF*"), ¶221; ICC Case No. 8891, Final Award, 1998, reprinted in 4 *Journal du Droit International* 1076, 1079 (2000).

failed to discharge its burden of proof and, therefore, the Tribunal should draw the conclusion that the Claimant agreed to pay and did pay kickbacks to Government officials.<sup>257</sup> Tribunals in *Feldman* and *Europe Cement* drew strong inferences from similar non-production of documents that those tribunals directed to be produced.<sup>258</sup>

230. In the alternative, the Respondent submits that certain facts are inherently difficult to prove. Therefore, the Party alleging such facts may sustain its burden of proof through *prima facie* evidence,<sup>259</sup> i.e. evidence which if “unexplained or uncontradicted, is sufficient to maintain the proposition affirmed.”<sup>260</sup> A party alleging a fact may satisfy its burden of proof through *prima facie* evidence where, as here, the other party has control of the relevant evidence but has failed to produce it to respond to the allegations against it.

231. Further in the alternative, the Respondent relies on *AAPL v. Sri Lanka*, to conclude that international tribunals are “not bound to adhere to strict judicial rules of evidence”, but rather have “free evaluation of evidence.” It also refers to *Oostergetel v. The Slovak Republic*, where it was held that, regardless of the standard of proof, corruption may be proved by circumstantial evidence.<sup>261</sup>

232. The Respondent challenges the Claimant’s submission that the appropriate standard of proof for allegations of corruption is “clear and convincing evidence or more.” According to the Respondent, several ICSID tribunals have noted the uncertainty of the standard of proof for allegations of serious illegality. Some have required proof that the allegation is “more likely than not to be true.”<sup>262</sup> Finally, the Respondent submits that in this case “there is no need to apply burden shifting principles”, because Mr.

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<sup>257</sup> R-PHB 1 ¶¶308-309.

<sup>258</sup> R-PHB 1 ¶¶304, 306 citing *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶178; *Europe Cement Investment & Trade SA v. Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009 (hereafter “*Europe Cement*”), ¶152.

<sup>259</sup> R-PHB 1 ¶300.

<sup>260</sup> R-PHB 1 ¶301 citing Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 324 (1953).

<sup>261</sup> R-PHB 1 ¶303 citing *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, ¶56 and R-PHB 2 n. 26 citing *Oostergetel v. The Slovak Republic*, UNCITRAL Final Award, 23 April 2012 (hereafter “*Oostergetel*”), ¶303.

<sup>262</sup> R-PHB 2 n. 4 citing *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, ¶124; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶399.

Rosenberg's testimony and statements against interest "are decisive evidence" that the Claimant engaged in corrupt practices.<sup>263</sup>

## **ii. Claimant's Position**

233. According to the Claimant, the burden of proving all of the Respondent's objections and defenses rests on the latter. The Respondent must prove its corruption allegations by clear and convincing evidence or more.
234. The Claimant submits that a party alleging corruption or fraud bears a particularly heavy burden: "[T]here is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption."<sup>264</sup> Most municipal legal systems apply a high burden of evidence in respect of allegations of corruption and fraud. According to the Claimant, "[a]n over-readiness by international arbitrators to accept illegality defenses may harm an international mechanism which benefits numerous countries that rely on access to international funding, technology and trade."<sup>265</sup>
235. The Claimant submits that there is no precedent in investor-state arbitration supporting the Respondent's argument that a *prima facie* showing of potential misconduct shifts the burden to the Claimant "to demonstrate that its payments were legitimate and not for corrupt purposes".<sup>266</sup> For the Claimant, the cases cited by the Respondent are inapposite as none of them considered whether the burden of proof could be shifted for allegations of corruption or fraud.<sup>267</sup>

## **iii. Analysis**

236. The Parties diverge considerably on burden and standard of proof to sustain an allegation of corruption. Put simply, according to the Claimant, as the allegation of corruption was made by the Respondent, the Respondent bears the burden of proof. Further, given the seriousness of the allegations raised, the appropriate standard of

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<sup>263</sup> R-PHB 1 ¶307; R-PHB 2 ¶2 citing *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award (hereafter "*World Duty Free*"), 4 October 2006.

<sup>264</sup> C-PHB 1 ¶117 citing *EDF* ¶221.

<sup>265</sup> C-PHB 1 ¶117 citing *Himpurna California Energy v. PT Perusahaan Listrik Negara*, Award, 4 May 1999, ¶169.

<sup>266</sup> C-PHB 2 ¶8 citing R-PHB 1 ¶300-10, 324-33.

<sup>267</sup> C-PHB 2 n. 38.

proof is “clear and convincing evidence or more.” On the contrary, the Respondent submits that the Claimant has the burden of proving the facts necessary to support a finding of jurisdiction and that the standard of proof of serious illegality is that the allegation is “more likely than not to be true.”

237. As a general matter, since the claims brought in this arbitration seek to establish the responsibility of a State for breach of the latter's international obligations, it is appropriate to apply international law to the burden of proof. The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals. The International Court of Justice as well as arbitral tribunals constituted under the ICSID Convention and under the NAFTA have characterized this rule as a general principle of law.<sup>268</sup> Consequently, as reflected in the maxim *actori incumbat probatio*, each party has the burden of proving the facts on which it relies.
238. Here, the question is whether for allegations of corruption, the burden should be shifted to the Claimant to establish that there was no corruption. Rules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing inferences from a lack of proof are generally deemed to be part of the *lex causae*. In the present case, the *lex causae* is essentially the BIT, which provides no rules for shifting the burden of proof or establishing presumptions. Therefore, the Tribunal has relative freedom in determining the standard necessary to sustain a determination of corruption. Both Parties subscribe to this view: both have relied on case law to convince the Tribunal that their respective positions – a high standard advocated by the Claimant and a low standard advocated by the Respondent – should be adopted.
239. While the debate about standards of proof and presumptions is an interesting one, the Tribunal finds that it does not require the application of the rules on burden of proof or presumptions to resolve the present dispute. In this case, facts emerged in the course of the arbitration. Because those facts raised suspicions of corruption, the Tribunal required explanations.
240. At the January Hearing, Mr. Rosenberg admitted that sums of about USD 4 million had been paid to the Consultants.<sup>269</sup> He also admitted that the 2005 consulting agreement was an amendment or replacement of earlier agreements that had been in place since

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<sup>268</sup> See e.g. *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1984, p. 437, ¶101.

<sup>269</sup> Tr. 353: 15-18.

1998.<sup>270</sup> Further, it was contended that the Consultants were primarily engaged in “lobbying” activities.<sup>271</sup> These facts were not alleged by the Respondent; they emerged during the Hearing in the course of the examination of the Claimant’s principal witness.

241. The payment of such substantial sums having been admitted, the Tribunal considered it its duty to inquire about the reasons for such payment. First, at the January Hearing itself, the Tribunal observed that, given the disclosure of facts unknown until then, it needed more information from the Parties. In the exercise of its *ex officio* powers under Article 43 of the ICSID Convention, the Tribunal therefore invited the Parties in PO 7 to provide that information. In PO 10, the Tribunal once again exercised its *ex officio* powers to call for additional testimony and evidence.
242. A similar situation arose in *World Duty Free v. Kenya*. There, an ICSID arbitral tribunal was called on to decide a claim brought against Kenya for not fulfilling an agreement for the construction, maintenance and operation of duty free complexes at Nairobi and Mombasa airports. Kenya argued that the agreement had been procured by paying a bribe to the then President of Kenya, and, therefore, that the agreement was illegal and could not be enforced. The CEO of the Claimant himself admitted that he had handed over the equivalent of USD 2 million in cash to the President and others. The *World Duty Free* tribunal (as the Tribunal did here) invited the parties to present additional submissions and evidence on the issue of corruption.<sup>272</sup> Faced with these circumstances, the *World Duty Free* tribunal noted that “this is not a case which turns on legal presumptions, statutory deeming provisions or different standards of proof [...]. Indeed the decisive evidential materials came from the Claimant itself.”<sup>273</sup>
243. 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.<sup>274</sup>

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<sup>270</sup> Tr. 348: 16-21.

<sup>271</sup> Tr. 1300: 9-11.

<sup>272</sup> *World Duty Free* ¶52.

<sup>273</sup> *World Duty Free* ¶166.

<sup>274</sup> *Oostergetel* ¶303.



**b. Claimant's Failure to Substantiate Services Rendered by the Consultants**

244. Parties to an arbitration have a good faith obligation to cooperate in procedural matters. In relation to the production of evidence, this duty is expressed in Rule 34(3) of the ICSID Arbitration Rules in the following terms:

“(3) The Parties *shall* cooperate with the Tribunal in the production of evidence [...]. The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure” (emphasis added).

245. Further, Article 9(5) of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, to which the Tribunal may look for guidance pursuant to the Minutes of the First Session, provides that “[i]f a Party fails without satisfactory explanation to produce any Document ... ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.” It follows that the Tribunal may draw appropriate inferences from a party's non-production of evidence ordered to be provided. In a number of cases, tribunals have indeed stated that they would draw inferences from non-production.<sup>275</sup>

246. Faced with the admission at the hearing that substantial payments had been made, the Tribunal sought to understand what services these payments were intended to compensate. By doing so, it meant in particular to give the Claimant an opportunity to substantiate the reality and legitimacy of the services for which payments were made. The Claimant, however, was unable to provide that substantiation. This section outlines the Tribunal's requests for evidence and the Claimant's failure to comply with those requests.

247. At the January Hearing, three facts came to light of which the Tribunal had previously been unaware: (i) the February 2005 Consulting Agreement between Metal-Tech and the Consultants was an amendment to or a replacement of earlier agreements that had been in place since 1998; (ii) the Consultants were primarily or exclusively engaged in what was described as “lobbyist activity” rather than in the activities set out at page 107 of Exhibit R-101, namely, assistance with the operation, production, and delivery of the joint venture's products; and (iii) the Consultants had been paid approximately USD 4 million. Consequently, the Tribunal indicated, at the close of the January Hearing, that

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<sup>275</sup> See *Waste Management v. Mexico II* (Additional Facility), Award, 30 April 2004, ¶30; also *Europe Cement* ¶152.

it would order the Parties to produce additional information and documents, which would be reflected in a procedural order to be issued after the hearing.

248. Accordingly, the Tribunal issued PO 7 on 10 February 2012, inviting the Claimant to produce four categories of information and documents, as follows:

“(a) The February 2005 Consulting Agreement, as well as any earlier agreements whether formal or informal among (i) Metal-Tech, Ltd. and/or any affiliate of Metal-Tech, Ltd. and (ii) the Consultants, any MPC company, and/or any other person who may have been the recipient of payments forming part of the U.S.\$4,000,000 [paid to the Consultants];

(b) A schedule listing all of the payments made to the Consultants, any MPC company, and/or any person who may have been the recipient of payments forming part of the U.S.\$4,000,000 [paid to the Consultants];

(c) Any invoices that exist with respect to [the payments of U.S.\$4,000,000 to the Consultants]; and

(d) Any other documents supporting the information in the schedule referred to [...] above.”

249. In response to a request made by the Claimant at the January Hearing, PO 7 also allowed the Claimant to indicate the positions held by each of the Consultants during the respective time periods as well as the persons in office as Prime Minister from 1998 onwards. The Claimant did not submit this information.

250. The Claimant subsequently proposed to limit its production of the four categories of information contemplated by PO 7. In particular, the Claimant proposed to produce:

“i. Unredacted copies of any consulting contracts with MPC;

ii. Copies of any consulting contracts with specific individuals, with the names of individuals redacted. Mr. Daly would confirm that the redactions cover only the names of Consultants (as defined in Procedural Order No. 7); and

iii. A schedule of payments, with the names of individuals and their banking information redacted, and all other information being produced.”

251. In PO 8, dated 13 March 2012, the Tribunal clarified the information required to be produced by the Claimant under the terms of PO 7 as follows:

“34. In the Tribunal’s view, insofar as it is not meant to be exclusive, Claimant’s proposed production of unredacted copies of consulting contracts with MPC, accords with the terms of Procedural Order No. 7. Accordingly, the Tribunal is not required to make any determination in that respect.

35. Claimant’s proposal regarding the copies of consulting contracts with specific individuals with the names of the individuals redacted,

however, merits further consideration. It is clear from the Parties' submissions that different people were involved in the Claimant's investment at different times. So far, it appears that all of Mr. Ibragimov, Mr. Sultanov, Mr. Chijenok, and Mr. Mikhailov may have played a role. In the Tribunal's view, in order for the Respondent to sustain its corruption defence, it would be necessary for the Respondent to match the individuals that were "consulted" with the services that they provided. Each of these individuals may have provided different services at different points in time. Therefore, each case may require a specific, tailor-made defence, for which the Respondent would need all of the necessary details of the relevant payments. Merely providing the contracts (while redacting the names of the individuals) would not enable the Respondent to develop its corruption defence. Accordingly, the Tribunal rejects Claimant's proposal with respect to this item.

[...]

37. In the view of the Tribunal, for the purposes of the present production, the Claimant may be allowed to redact from the schedule of payments, information regarding "the bank account sending and the bank account receiving the money." For the purposes of this arbitration, the Tribunal believes that it would be sufficient to know (a) the date on which the payments were made; (b) the amount paid; and (c) who paid whom. Per se, the bank account numbers would not further the resolution of the relevant issues in this case. The Tribunal is sensitive to the Respondent's submission that the Claimant's consultants may have worked as conduits to transmit payments to others. However, even if this were to be true, the Tribunal does not see how the disclosure of bank account numbers would aid the Respondent's case. The Respondent may have an interest in ascertaining the bank account numbers (such as for their possible use in criminal proceedings), but this cannot be grounds for disclosure in the present proceeding. The Tribunal is also aware that in Procedural Orders Nos. 3 and 5, it directed disclosure of banking details, including bank account information. However, disclosure there was in respect of Mr. Ibragimov, who, inter alia, was the Claimant's representative and Uzmetal's General Director for a period of two years from January 2000 to January 2002. None of Messrs Sultanov, Chijenok, or Mikhailov, whose banking details are now requested to be disclosed, have any similarly close connection with the Claimant (Mr. Sultanov was the brother of the former Prime Minister of Uzbekistan, Mr. Chijenok was a former official in the Uzbek administration, and Mr. Mikhailov was the Deputy General Director for Government Relations of Uzmetal).

38. In light of the Tribunal's determination above, and for the sake of clarity, the Tribunal directs the Claimant by Friday, 16 March, 2012, to provide the schedule contemplated in Procedural Order No. 7 containing the following information: (i) the payments made to each of the Consultants; (ii) the dates on which payments were made; and (c) who paid whom."

252. As the information provided following PO 7 and PO 8 was still inconclusive, the Tribunal made another attempt to obtain the relevant evidence. In PO 10, dated 17

April 2012, the Tribunal once again exercised its *ex officio* powers and made the following observations:

“71. As regards...documents reflecting the amount paid to each Consultant through the MPC companies and Lacey International, the Tribunal believes that it would benefit from knowing the amounts paid to (as well as the services rendered by (see below)) each Consultant. As regards the MPC Companies, the contracts signed by them with the Claimant have been disclosed. The Respondent is thus aware of the services which were to be provided by these companies and the total cost of these services. However, the amounts paid to each individual Consultant have not been disclosed. A similar position exists in respect of payments made to Lacey International. *The Tribunal believes that knowledge of the amounts received by each individual Consultant may aid the Tribunal in coming to a conclusion about the Respondent's corruption defence (for example, if substantial payments have been made to one Consultant, then the services rendered by that Consultant, the period at which those services were rendered, etc., would deserve greater scrutiny). The Tribunal notes the Claimant's submission that it does not have possession, custody, or control of MPC's documents or Lacey International's documents. While the Tribunal has, for this reason, not confined its request for further information to documents, the Tribunal finds it difficult to understand how this would affect the Claimant's ability to make the additional disclosure contemplated by this Order. Payments may have been made to the MPC Companies or Lacey International, but the Claimant should have some record or knowledge of the services rendered by each individual Consultant and the payment made (to these entities on behalf of that Consultant) in consideration for that service.*

[...]

73. Nonetheless, the Tribunal believes that it would benefit from knowing (a) the nature of the service provided, (b) which Consultant provided the service, and (c) when the service was provided. As the Tribunal recognised in Procedural Order No. 8 above (albeit in a different context), different individuals may have been involved at different times in providing different services. *The Claimant, which received these services and paid for them, should be aware of the individuals who provided them. The Claimant's submission that it does not have possession, custody, or control of MPC's documents or Lacey International's documents is beside the point, for the reasons explained in ¶ 71 above. Details of the nature of the services rendered, by whom, and when should be within the knowledge of the Claimant. The Tribunal does not request production of documents from these companies; rather it directs the Claimant to specify the nature of the services rendered, by whom, and when.*

74. Additionally, the Tribunal believes that it would be prudent to invite the Claimant to substantiate its submission that services were rendered by the Consultants. The Claimant has disclosed that payments of US\$ 3,532,689.40 were made for services, but the Claimant has neither substantiated the nature of the services nor that these services were actually rendered. The Tribunal notes that several contracts produced by the Claimant themselves require the concerned entity “immediately to inform ‘M-T’ about the work and

services executed in its interests” and also require the Claimant “to instruct regularly [the entity concerned] about the required works and services” (see, e.g., Ex. CE-223, ¶¶ 2.5, 3.1; Ex. CE-224, ¶¶ 2.5, 3.1; Ex. CE-225, ¶¶ 2.5, 3.1; Ex. CE-226, ¶¶ 2.1.6, 2.2.1). Relevant contemporaneous documents (including those contemplated by the contracts as described above) substantiating the Claimant’s submission that services were rendered by the Consultants would assist the Tribunal in reaching a conclusion regarding the Respondent’s corruption defence” (emphasis added).

253. The Claimant was thus put on notice that: (i) if substantial payments were made to one Consultant, then the services rendered by that Consultant would deserve greater scrutiny; (ii) it was expected that the Claimant should have some record or knowledge of the services rendered by the Consultants and the payments made in consideration for those services; (iii) where different individuals may have been involved at different times in providing different services, it was expected that the Claimant, which received these services, would be aware of the individuals who provided them and of the nature of the services; (iv) so far the Claimant had substantiated neither the nature nor the reality of the services; and (v) contemporaneous documents supporting these facts would assist the Tribunal in reaching a conclusion regarding the Respondent’s corruption defense.
254. To facilitate submission of the information requested in PO 10, the Tribunal directed the Claimant to submit a new witness statement by Mr. Rosenberg particularly addressing the questions set forth in paragraph 92 above.
255. PO 10 required Mr. Rosenberg’s new witness statement to be accompanied by (i) a brief submission limited to the issues contained in the statement; and (ii) relevant contemporaneous documents concerning the Claimant’s submission that services were rendered by the Consultants. Together with its submission, the Claimant was invited to supplement the Payment Schedule to reflect the additional information sought by the Tribunal concerning payments made to the Consultants and the services provided by them. The Respondent was given an opportunity to submit a rebuttal witness statement, which could also be accompanied by (i) a brief submission limited to issues contained in the revised statement by Mr. Rosenberg and the Claimant’s submission; and (ii) contemporaneous documents concerning the Claimant’s submission that services were rendered by the Consultants. Further, the Parties were given the liberty to request an additional hearing for the purpose of examining Mr. Rosenberg and/or a possible additional witness produced by the Respondent.

256. Thus, the Tribunal made a considerable effort to ensure that it had all the relevant evidence that it needed to decide on the corruption allegations. In fact, even before the January Hearing, the Tribunal had already addressed allegations of payments made by the Claimant to Uzbek Government officials. In PO 3 of 13 December 2011, in the context of the Respondent's allegations against Mr. Ibragimov, the Tribunal directed the Claimant to conduct a "further comprehensive search" for documents evidencing payment to any official or employee of the Government since 1994 and to "report on the actions taken in conducting the search". In spite of the Tribunal's efforts after the January Hearing to establish the facts related to the payments about which Mr. Rosenberg had testified, the Claimant was unable to substantiate its contention that actual services had been carried out for legitimate purposes in return for those payments. The Claimant's explanations for its non-compliance with the Tribunal's directions to provide additional evidence (described below) remain unconvincing.
257. First, the Claimant submitted that because "the invoices received from the Consultants did not enumerate specific services", the Claimant was unable to supplement the Payment Schedule to reflect the additional information sought by the Tribunal in PO 10.<sup>276</sup> That explanation is hardly satisfactory. While it may be true that the invoices themselves do not reflect specific services, the Claimant could rely on other elements to describe the services provided by the Consultants. For instance, under some of its consulting contracts, the Consultants were to visit Israel<sup>277</sup> and were also to participate in management meetings,<sup>278</sup> among other tasks. The records of such visits or meetings (expense reports, minutes of those meetings, reports submitted by the Consultants, etc.) or statements or notes from participants would enable the Claimant to supplement the Payment Schedule. Further, as noted by the Tribunal, several contracts produced by the Claimant themselves require the concerned entity "immediately to inform 'M-T' about the work and services executed in its interests"<sup>279</sup> and also require the Claimant "to instruct regularly [the entity concerned] about the required works and services."<sup>280</sup> The information, reports, correspondence provided by the Consultants in compliance with these provisions would also enable the Claimant to supplement the Payment Schedule.

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<sup>276</sup> Claimant's letter of 30 April 2012.

<sup>277</sup> See e.g. Art. 2.7, Exh. C-223.

<sup>278</sup> See e.g. Art. 9, Exh. C-222.

<sup>279</sup> See e.g. Art. 2.5, Exh. C-223.

<sup>280</sup> See e.g. Art.3.1, Exh. C-224.

258. The Claimant also submitted that its “records related to the Uzmetal JV [were] incomplete both due to the passage of time and the fact that many documents were left behind in Uzbekistan”.<sup>281</sup> Here too, the Tribunal is unable to accept the Claimant’s explanation. There is no reason why any relevant documents should have been left “in the JV’s premises in Uzbekistan”. Uzmetal did not contract with the Consultants or the MPC Companies; only the Claimant did. Mr. Rosenberg admitted that the Consultants submitted their invoices for payment to Metal-Tech – not to Uzmetal.<sup>282</sup> The consulting contracts themselves provided that the Consultants were to report directly to the Claimant. The Claimant’s address in the consulting contracts is its address in Israel. Thus, if the Consultants had performed any services, they would have had an obligation to report to the Claimant in Israel, not to Uzmetal in Uzbekistan. The December 2000 contract, for instance, contains three separate provisions requiring MPC to submit information to “Metek”, which is defined as “Mssrs. Metek Metal Technology Ltd., Ramat Hovav, P.O. Box 2412, Emek Sarah, Beer-Sheva 84874, Israel”.<sup>283</sup> The direct link between the Consultants and Israel was also confirmed by Mr. Mikhailov, who submitted that all contracts and invoices “were exchanged between Switzerland and Israel, not Uzbekistan.”<sup>284</sup>

259. Further, it was not contested that none of the minutes of the 16 General Meetings of Participants of Uzmetal from 2000 to 2007 refers to MPC or to any consulting activity being carried out on behalf of the Claimant.<sup>285</sup> In fact, most of the contracts themselves imposed a strict confidentiality obligation. For instance, under the December 2000 contract, the Parties were “[t]o treat any information related to this agreement but also to further contracts, which may result, as fully secret and confidential.”<sup>286</sup> It is, therefore, unlikely that a record of services performed under a confidential contract was maintained (or left behind) at Uzmetal’s premises in Uzbekistan, especially when the services were rendered for the exclusive benefit of the Claimant. As noted above, the Consultants were to visit Israel, and participate in management meetings. Mr. Rosenberg testified that meetings took place several times a year in Uzbekistan, once

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<sup>281</sup> Claimant’s letter of 30 April 2012; Rosenberg WS III ¶1.

<sup>282</sup> Rosenberg WS III ¶13 (referring to “[t]he invoices Metal-Tech received” from MPC); ¶25 (referring to joint invoices from the Consultants “instruct[ing] Metal-Tech to pay Lacey”).

<sup>283</sup> Arts. 2.1.2, 2.1.4, 2.1.5, Exh. C–221, pp. 1-2.

<sup>284</sup> Mikhailov WS III ¶30.

<sup>285</sup> See e.g., Exh. R–25, 26, 140, 151, 161, 38, 39, 43, 192, 45, 47, 64; Exh. C–167.

<sup>286</sup> Art. 2.3, Exh. C–221; Art. 5.3, Exh. C–221 (“[t]he present agreement and all its annexes and other documents forming a part of it are strictly confidential.”).

per year in Europe, and “from time to time” in Israel.<sup>287</sup> There is no reason why the records of (at the least) the meetings held outside Uzbekistan should have been kept in Uzbekistan.

260. Finally, Mr. Rosenberg testified that “[e]lectronic mail was not very common for our Company in the early days of this project,” and the Claimant thus “communicated with the consultants by facsimile transmissions or by telephone conversations,” but did not maintain “much record of all of those transmissions and telephone calls.”<sup>288</sup> Again, this position is difficult to follow. At least some of the Claimant’s correspondence from 1999 onwards contains its email address at that time – mtkmetal@netvision.net.il.<sup>289</sup> But even assuming that e-mail was “not very common” and that communications with the Consultants were primarily by fax, the Claimant has not explained why it did not keep records of these faxes. For instance, in support of its submissions on the collection of rhenium gases in Almalik, the Claimant introduced a series of faxes.<sup>290</sup> It is surprising that the Claimant was able to produce faxes relating to rhenium – which, according to the Claimant, the Claimant had no obligation to capture – but was unable to produce any facsimile transmissions to or from the Consultants to whom the Claimant admittedly paid USD 3.5 million.

261. Nevertheless, the Claimant did submit some documents<sup>291</sup> which, it argues, are “illustrative of the types of services provided by [the Consultants].”<sup>292</sup> The Tribunal’s review of these documents is incorporated into its analysis of the section titled “Key facts” above (section IV.B.4). For present purposes, the Tribunal only notes that these documents do not sufficiently illustrate what services were rendered by the Consultants, especially at the commencement of the Claimant’s investment. To the contrary, they suggest that no legitimate services were performed at the time.

262. In respect of some of these documents, Mr. Rosenberg himself admitted that they do not relate to the Uzmetal project. For instance, while the Claimant initially relied on a letter of 30 July 1998<sup>293</sup> to justify services provided under the consulting contract of 15 December 2000, Mr. Rosenberg later accepted that the letter dealt with another

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<sup>287</sup> Rosenberg WS III ¶15.

<sup>288</sup> Rosenberg WS III ¶14.

<sup>289</sup> See e.g., Exh. R-20, p. 144; Exh. R-129, p. 1; Exh. R-132, p. 1.

<sup>290</sup> See e.g., Exh. C-139, 155, 162.

<sup>291</sup> Exh. C-229-248.

<sup>292</sup> Claimant’s letter of 30 April 2012.

<sup>293</sup> Exh. C-229.



project: “[t]his letter is talking about a feasibility study which is a precursor to the Uzmetal project.”<sup>294</sup> Second, it is not correct to suggest that a letter of 22 July 2003 provides proof of marketing services.<sup>295</sup> In fact, this letter does not refer to marketing at all; rather it deals with the possible sale of UzKTJM to an Afghan company. Third, some of the documents do not evidence or require the performance of any services. For instance, an 18 April 2004 letter (Exh. C-235) merely refers to a restructuring of Uzmetal’s loans – it does not call for any services to be rendered in respect of “opening the letter of credit to Uzmetal or signing the interbank agreement”.<sup>296</sup> Similarly, another document (Exh. C-230) is not addressed to the Consultants or to MPC, does not refer any of the Consultants or MPC, and moreover does not contain a transmission date. Further, it appears to only list various problems faced by Uzmetal, without requiring any action. Yet another document (Exh. C-244) appears to be copied from publicly available sources, and does not seem to consider matters then of relevance to the Claimant or to Uzmetal.

263. The Tribunal must also mention here that the Claimant did not proffer any witness (other than Mr. Rosenberg) in support of its submission that legitimate services were rendered by the Consultants. The consulting contracts were signed by Mr. Maimon, the Claimant’s CEO at the time. Mr. Rosenberg testified that Mr. Maimon “travelled to Uzbekistan several times a year to meet...the consultants”<sup>297</sup> and that Mr. Maimon submitted “timely reports” on the work of the Consultants. The Tribunal could have benefited from learning more about the discussions which Mr. Maimon had with the Consultants. Further, the Tribunal could also have benefited from the testimony of Mr. Klein of CPH, who allegedly introduced the Claimant to the Consultants in 1998, and of Mr. Müller, who served as a director of MPC from 2001 and as a director of Lacey International (designated as a payee by the consultants under the February 2005 contract) from 2003 to 2010. Mr. Rosenberg himself testified that “Mr. Muller, the Director of MPC and Lacey International, also informed me *as recently as February 2012...*” (emphasis added).<sup>298</sup> Thus, the record shows that Mr. Rosenberg was in contact with Mr. Müller as late as February 2012.

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<sup>294</sup> Tr. 1583:16-1584:6.

<sup>295</sup> Rosenberg WS III ¶10(l) citing Exh. C-232.

<sup>296</sup> Rosenberg WS III ¶10(c).

<sup>297</sup> Rosenberg WS III ¶15.

<sup>298</sup> Rosenberg WS III ¶26.

264. The Claimant explained that it could not offer testimony from these witnesses because “people are very concerned about their well-being and going and suing the Government of Uzbekistan”.<sup>299</sup> This is not convincing. None of Messrs Maimon, Klein and Müller live in Uzbekistan. To the extent they feared for their safety, the Tribunal could have made necessary arrangements.
265. The Tribunal is thus unable to accept the Claimant’s justifications for not providing evidence, be it documentary or testimonial. This is more striking as Mr. Rosenberg conceded that the Consultants provided “immense assistance”<sup>300</sup> and that “Metal-Tech ... [was] aware of the activities of the consultants on an ongoing basis.”<sup>301</sup> While the Tribunal does not believe that the Claimant sought to conceal evidence, the inference that inexorably emerges from this dearth of evidence is that the Claimant can provide no evidence of services, because no services, or at least no legitimate services at the time of the establishment of the Claimant’s investment, were in fact performed. The Tribunal will bear this inference in mind when further assessing the facts.
266. In reaching this conclusion, the Tribunal is aware of the Claimant’s submission that it has been prejudiced because, despite having prior knowledge of the relevant facts, the Respondent waited until the January Hearing to raise its corruption allegations.<sup>302</sup> The Tribunal is unable to share this view. Rather than the Respondent raising corruption allegations at the January Hearing, facts came to light in the course of the Claimant’s witness evidence, which prompted the Tribunal to make further inquiries, to which it gave the Claimant ample opportunity to respond.

***c. Timing of Payments to the Consultants***

267. As the Tribunal interprets Article 1(1) of the BIT, the legality requirement covers only the establishment of the investment, not its operation once established. The facts analysed by the Tribunal are thus limited to events leading to the establishment of the investment. Yet, all the payments to the Consultants were made between 2001 and 2006, i.e. the payments post-dated the establishment of the Claimant’s investment. Because of this timing, the Claimant has submitted that none of its payments to MPC can be viewed as compensation for obtaining the approval of its investment.<sup>303</sup> The

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<sup>299</sup> Tr. 1664:8-10.

<sup>300</sup> Rosenberg WS III ¶12.

<sup>301</sup> Rosenberg WS III ¶13.

<sup>302</sup> See e.g., Claimant’s letter of 16 May 2012, 27 March 2012; Tr. 337:6-340:2.

<sup>303</sup> Tr. 1589:13-20.

Tribunal nevertheless considers it appropriate to consider such payments for the following reasons.

268. First, at the January Hearing, Mr. Rosenberg testified that the Consultants – not the Claimant – originally came up with the idea of establishing a joint venture to produce molybdenum products.<sup>304</sup> This dates the involvement of the Consultants to, at least, September 1998.<sup>305</sup> In any event, the bulk of the services alleged to have been provided by the Consultants appears to have been provided at the time of establishment of the investment. In his third witness statement, Mr. Rosenberg testified that Metal-Tech decided to contract with MPC Switzerland “at the beginning of its investment in Uzbekistan.”<sup>306</sup> In addition, he stated that Messrs Sultanov and Mikhailov assisted “with the preparation of the feasibility study”, ensured that the investment would be included in the approved investment program, and represented the Claimant in negotiations with the Government that resulted in “opening the letter of credit to Uzmetal and signing the interbank agreement between the Israeli Bank and the NBU.”<sup>307</sup> By their nature, all of these services must have been rendered prior to or at the time of the establishment of the Claimant’s investment.<sup>308</sup>
269. When asked whether the Consultants “were a crucial part of putting together the deal right from the very beginning”, Mr. Rosenberg answered that “[t]hey were a substantial part in putting the deal together, yes.”<sup>309</sup> He also said that the Consultants had been “assisting - they would have been part of the project from, as I said, ‘98 until – or ‘99, until the end...”<sup>310</sup> and that they had been “helping the implementation of the project from the very early stages. [...] initiation through the feasibility studies [...] checking the feasibility studies, advising us about the feasibility studies, directing us through all the red tape...”<sup>311</sup> When asked whether the compensation paid to the Consultants between

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<sup>304</sup> Tr. 349:13-350:8; 481:8-15.

<sup>305</sup> See Rosenberg WS I ¶9.

<sup>306</sup> Rosenberg WS III ¶6.

<sup>307</sup> Rosenberg WS III ¶¶10(a), 10(b), 10(c).

<sup>308</sup> The Claimant should have begun drafting its Feasibility Study in December 1998 (Exh. R-20, p.136). In the same month, the Cabinet of Ministers resolved to include the Claimant's proposed investment project in molybdenum in the approved investment program (Exh. R-17). The Claimant prepared and revised its Feasibility Study for eight months, until August 1999 (Exh. R-20, p.3). From September 1999 to December 2000, the Claimant negotiated with the Ministry of Finance and the National Bank, the bodies responsible for deciding whether to finance the project (Exh. R-20, pp.180-189, Exh. R-133, Exh. R-474).

<sup>309</sup> Tr. 448:17-21.

<sup>310</sup> Tr. 477:21-478:4.

<sup>311</sup> Tr. 351:2-22; See also Tr. 351:17-352:5 (“they were actually the initiator of all the structure of the Uzmetal, and so they were really very helpful in actually building the Uzmetal company”).

2001 to 2007 would cover earlier years as well, Mr. Rosenberg replied: “Of their work, yes.”<sup>312</sup>

270. Second, the various agreements entered into between the Claimant and the Consultants pursuant to which payments were made to the Consultants either substituted previous agreements or refer to prior services that the Consultants are alleged to have rendered. Mr. Rosenberg described the 2005 Consulting Agreement as a “substitute [to] some previous agreements which were made and clarified the duties of the Parties, both parties, and they are type of payments to the duties of those Parties.”<sup>313</sup> The December 2000 contract<sup>314</sup> for instance expressly records that the Consultants “fully participated in the preparation of the Feasibility Studies which form an integral basis for [the EPC Contract] and other agreements related thereto.”<sup>315</sup> These services too predated the establishment of the investment.<sup>316</sup> It is counterintuitive to suggest that the Consultants worked on all these matters without a prior agreement that Claimant would pay them for doing so, particularly when Mr. Rosenberg testified that “*in the beginning*, we had sort of all our Agreements in case this project will mature and be implemented, *they’ll get compensation...*”<sup>317</sup> and that all of the money paid to the Consultants “*was agreed to up front.*”<sup>318</sup>

271. Third, these facts are corroborated by Mr. Mikhailov. At the May Hearing, Mr. Mikhailov confirmed that the Consultants were *inter alia* paid for obtaining Resolution No.15, i.e. the Resolution establishing the Claimant’s investment.<sup>319</sup> Mr. Mikhailov specifically testified that, in 1998, the Claimant agreed to pay USD 3 million to the Consultants to guarantee the protection of Claimant’s investment in Uzbekistan:

“Our agreement back in mid-98 was that if we were able to come up with a mechanism that would guarantee protection of Metal-Tech’s investments in Uzbekistan, MPC would be entitled to something like 3 million through its

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<sup>312</sup> Tr. 478:20-22-479:1. The Claimant also conceded during its closing argument at the January Hearing that “the work for which these gentlemen were being compensated extended back to 1998” and that they “were helping put this deal together” (Tr. 1299:19-1300:3).

<sup>313</sup> Tr. 348:18-21.

<sup>314</sup> Exh. C–221. According to the Claimant, this was the first contract with the Consultants (Tr. 1599:11-16).

<sup>315</sup> Art. 2.1.3, Exh. C–221, p. 1.

<sup>316</sup> See n. 309.

<sup>317</sup> Tr. 478:13-19 (emphasis added).

<sup>318</sup> Rosenberg WS III ¶4 (emphasis added).

<sup>319</sup> See Tr. 1688:14-19; 1694:14-18.

office in Switzerland, just under 3 million, if memory serves me right. \$3 million. The reference to 3 million was 3 million U.S. dollars.”<sup>320</sup>

272. Finally, under Uzbek law, a promise to pay a public official, in exchange for the performance or non-performance of certain action is unlawful, even if the payment itself is not made until a later date.<sup>321</sup>
273. On this basis, the Tribunal concludes that Metal-Tech had promised as early as 1998 to pay the Consultants if and when the Claimant’s investment was established. In consequence, the actual date of the payments does not prevent the Tribunal’s consideration of those payments as relating to the implementation of the Claimant’s investment when assessing the evidence in respect of the corruption allegations.

***d. Evidence of Mr. Mikhailov***

274. One of the Consultants hired by the Claimant, Mr. Mikhailov, submitted three witness statements in the present proceeding.<sup>322</sup> Mr. Mikhailov’s third witness statement was submitted in response to the Tribunal’s invitation in PO 10 to the Respondent to submit witness testimony rebutting the testimony of Mr. Rosenberg. The Respondent relies on Mr. Mikhailov’s written testimony as contained in his third witness statement and his oral testimony at the May Hearing to substantiate its corruption allegations. However, the Claimant submits that Mr. Mikhailov’s testimony is not credible, and should not be relied on.
275. The Tribunal concludes that the Claimant’s position is reasonable. Mr. Mikhailov has been held in prison by the Uzbek authorities since 13 July 2011. He was incarcerated when he submitted his second and third witness statements (16 November 2011 and 14 May 2012 respectively). Four days after the Tribunal issued PO 10 inviting the Respondent to produce a witness statement rebutting Mr. Rosenberg’s testimony, Mr. Mikhailov was tried and sentenced on separate charges. Although those charges were said to be unrelated to Metal-Tech,<sup>323</sup> Mr. Mikhailov confirmed that he was providing testimony to this Tribunal in the hope that his cooperation with Uzbekistan in this arbitration would secure a reduction in his sentence.<sup>324</sup> Moreover, prior to the January Hearing, Mr. Mikhailov had already submitted two witness statements – including one

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<sup>320</sup> Tr. 1750:20-1751:6.

<sup>321</sup> Art. 3, Kanyazov WS II Attachment 30, p. 6.

<sup>322</sup> First Witness Statement dated 23 May 2011, Second Witness Statement dated 16 November 2011 and Third Witness Statement dated 14 May 2012.

<sup>323</sup> Tr. 1685:18-1686:3.

<sup>324</sup> Tr. 1686:19-1687:5.

submitted after his arrest, when he was already cooperating with Uzbekistan. In those first two statements, he said nothing about the Claimant's relationship with the Consultants and made no suggestion of corruption.

276. Consequently, the Tribunal does not rely on Mr. Mikhailov's written or oral testimony to establish any contested issue of fact. It nevertheless notes various points at which Mr. Mikhailov's evidence tends to corroborate other evidence in the record. In doing so, the Tribunal is mindful of the fact that, at least on some occasions, the Claimant appears to have itself relied on portions of Mr. Mikhailov's testimony.

277. Having set out the factors relevant to its assessment of the evidence, the Tribunal will now proceed to analyse the Claimant's conduct in the context of the Uzbek law prohibiting bribery.

## **6. Violation of Uzbek Laws on Bribery**

### ***a. Respondent's Position***

278. At the outset, the Respondent submits that Uzbekistan's anti-bribery provisions are consistent with international treaties and the laws of many other States, including Israel (the Claimant's home State), the United Kingdom (where the Claimant trades its public securities on the London Stock Exchange), and Switzerland (the jurisdiction to which the Claimant made many of its payments).<sup>325</sup>

279. The Respondent alleges that, in making its investment in Uzbekistan, the Claimant violated Articles 210-212 of the Uzbek Criminal Code. Those articles prohibit the giving or taking of bribes, directly or through an intermediary, in exchange for the performance or non-performance of an action. The Respondent submits that, under Uzbek law, (i) it is unlawful "to give or to promise anything of value to a public official or an intermediary of that public official, in exchange for the performance or non-performance of certain action that the official must have performed or could have performed";<sup>326</sup> (ii) it is unlawful "to enrich a third party, in particular a family member of the public official, for the purpose of inducing the official's performance or non-performance of certain action";<sup>327</sup> and (iii) the time of the payment is irrelevant as it is unlawful to "promise to provide anything of value to a public official, directly or through an intermediary, in exchange for performance or non-performance of certain action, even if the payment or

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<sup>325</sup> R-PHB 1 ¶12.

<sup>326</sup> R-PHB 1 ¶10.

<sup>327</sup> R-PHB 1 ¶10.

other thing of value is not given until a later date".<sup>328</sup> Applying these rules to the facts of the present dispute, the Respondent submits that the Claimant "violated ... the Republic's Criminal Code by promising to pay – and later paying – more than USD 4.4 million in alleged consulting fees to a senior Government official at the apparatus of the President, the brother of the Prime Minister, their business partner, and a fourth individual in return for the Government's approval of its investment and the Prime Minister's repeated intervention on Claimant's behalf."<sup>329</sup>

280. The Respondent relies on commentaries to the Uzbek Criminal Code to support its submission that, as a matter of Uzbek law, it was unlawful to pay Mr. Chijenok, a Government official, to take steps toward the performance of an action, even if he did not have the delegated authority to perform that action. The Respondent also submits that the commentaries stand for the proposition that, if the Tribunal concludes that the Claimant made its payments to Mr. Sultanov for the purpose of inducing Prime Minister Sultanov to act or to refrain from acting in favor of the Claimant, then the Respondent has proven its corruption defense, regardless of whether Mr. Sultanov ever transmitted part or all of the money to his brother, the Prime Minister.

***b. Claimant's Position***

281. The Claimant counters that the Respondent has failed to show any breach of Uzbek law and that the commentaries which the Respondent invokes do not establish that the conduct alleged by the Respondent constituted bribery under Uzbek law. Moreover, the Claimant argues that the Respondent has mischaracterized the commentaries as emanating from the Ministry of Justice and Ministry of Internal Affairs, when they are in fact academic works, not authoritative interpretations of Uzbek law.

***c. Analysis***

282. The relevant provisions of the Uzbek Criminal Code read as follows:

- "Article 210. Bribe-taking

"Bribe-taking, e.g. obviously illegal obtaining by an official, personally or through an intermediary, of valuables or the extraction of wealth or property benefit for the performance or non-performance in the interest of giving a bribe a specific action that the official must have committed or could have committed using his official position, -

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<sup>328</sup> R-PHB 1 ¶11.

<sup>329</sup> R-PHB 1 ¶16.

shall be punished by a fine of fifty to one hundred minimum monthly wages or imprisonment up to five years with deprivation of certain right.

[...]"

- "Article 211. Bribe-giving

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 non-performance 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.

[...]"

- Article 212. Intermediation in Bribery

"Intermediation in bribery, that is, activity carried out to arrive at an agreement about acceptance of or giving a bribe as well as immediate delivery of a bribe upon instructions of the persons concerned –

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.

[...]”<sup>330</sup>

283. In addition, Resolution No. 19 issued by the Plenum of the Supreme Court of Uzbekistan in September 1999 and entitled "Judicial Practice in Cases of Bribery" gives the following clarifications:

"[R]esponsibility for bribery occurs regardless of when a bribe was given – either before or after the performance of an act or the omission of an act, and without regard to whether a bribe was stipulated in advance or whether any actions were actually performed in the interests of the briber.”<sup>331</sup>

284. The "Applied Research Commentary of the Uzbek Criminal Code" published by the Ministry of Internal Affairs gives the following explanations on these provisions:

"When an official did not possess the powers to perform an action in the interests of the briber but owing to the official position was able to take steps towards the performance of such an action by other officials, the act should also be qualified as bribetaking.”<sup>332</sup>

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<sup>330</sup> Kanyazov WS II, Att. 29, p.4, 5.

<sup>331</sup> Art. 3, Kanyazov WS II Attachment 30, p. 6.

<sup>332</sup> R-682, p. 15-16. See also Resolution No. 19 of the Plenum of the Supreme Court of Uzbekistan, Art. 1, Kanyazov WS II Attachment 30, p. 6 ("As the subject of this crime [of bribery] those officials



285. The Applied Research Commentary goes on to say:

“The way of bribetaking and the form thereof do not matter regarding criminal liability. [A bribe] can be ] overt corruption or disguised by such apparently lawful actions as a gift, sale for nothing, the conclusion of sham employment contracts and payment as per these to the bribetaker, his/her relatives or other authorized representatives for jobs ostensibly made by him/her, ostensibly rendered technical support, etc. The object of bribery can be handed (transferred) either directly to an official who is the bribetaker or with his/her permission to the members of his/her family and other people related to him/her....”<sup>333</sup>

286. The Commentary further confirms that, even if no transfer is ever made from the relatives to the Government official, the party making the payment has committed a criminal offense under Uzbek law.<sup>334</sup> Other commentaries confirm this understanding.<sup>335</sup>

287. When referring to these commentaries, the Tribunal is mindful that they were introduced into the record after the Respondent's first post-hearing submission and that the Claimant opposed such introduction. The Tribunal accepted the commentaries in PO 12, *inter alia* because the Claimant had not contested their relevance or materiality. To ensure that the Claimant had sufficient opportunity to comment on these texts, it extended the page limitation of Claimant's reply post-hearing submission. While the Claimant expressed its views on the commentaries, it did not provide scholarly writings setting forth divergent opinions. In any event, the Tribunal considers that, when it comes to applying the law, including municipal law, as opposed to establishing facts,

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should be also recognised who, though they did not have the authority to perform certain acts for the benefit of the briber but by virtue of their official position were able to take action to commit these acts by other officials for a bribe”) and Exh. R-681, p. 16.

<sup>333</sup> R-682, p. 15-16. See also Exh. R-681, p.15 (“The scopes of bribe may be transferred both directly to the official — taker of bribe and with his knowledge to the members of the family and other persons close to him and may be transferred to the bank to the account of the bribe-taker. The way of bribetaking and the form of its externalization are of no importance for the qualification.”)

<sup>334</sup> Exh. R-682, p. 20 (“[O]ffering the [government] official material values or property benefits, posting these in a letter or a parcel and even transferring to his / his relatives or a mediator, if not followed by the acceptance of the bribe by the person, should be qualified not as a completed offence but as attempted bribery.”). See also Resolution 19 of the Plenum of the Supreme Court of Uzbekistan, Art. 3, 5, Kanyazov WS II Attachment 30, p. 6 (“If the alleged bribe has not been received or rejected by the official, the action of a person who tried to give a bribe, should be qualified as attempted bribery.”), Kanyazov WS II n.2 (“Under the laws of the Republic of Uzbekistan, it is unlawful to give or to accept a bribe (or to attempt to do so), personally or through an intermediary” *inter alia* relying on Article 25 of the Uzbek Criminal Code (“Preparation for Crime and Criminal Attempt”) (Attachment 29)).

<sup>335</sup> See Exh. R-681, p.16 (“the offer of material values or property benefit to a official, sending them by post in an envelope or in a parcel, and also giving them to relatives or to a mediator, if the bribe is not taken, should be treated as an attempt to give a bribe”); see also Exh. R-683, p. 11 (a bribe “can be overt corruption or disguised by such apparently lawful actions as a gift, sale for nothing, the conclusion of sham employment contracts and payment as per these to the bribe taker, his / her relatives or other authorized representatives for jobs ostensibly made by him / her, ostensibly rendered technical support, etc.”).

the principle *iura novit curia* – or better *iura novit arbiter*<sup>336</sup> – allows it to form its own opinion on the meaning of the law. Doing so, it may of course seek guidance from academic writings.

288. The Tribunal understands that the commentaries filed by the Respondent are not authoritative or otherwise binding interpretations of Uzbek law.<sup>337</sup> The Tribunal also understands, however, that the propositions for which the Respondent relies on those commentaries – that a payment to a relative of an official is equivalent to a payment to the official himself that a bribe may be paid before or after the act induced by the bribe, and that an official may be bribed to take an action that he has no actual power to take – are by now largely non-controversial propositions under all modern legal systems.
289. On the basis of the applicable rules just referred to, the Tribunal accepts the following propositions as established under Uzbek law: (i) it is unlawful to give or to promise anything of value to a public official or an intermediary of that public official in exchange for the performance or non-performance of certain action that the official must or could have performed; (ii) it is unlawful to enrich a third party, such as a member of an official's family, for the purpose of inducing an official's performance or non-performance of certain action; and (iii) the timing of payment is irrelevant; it can occur before or after the act or omission sought.
290. It is against this legal background that the Tribunal will now review the facts. Before doing so, it notes that the condemnation of corruption under Uzbek law is in conformity with international law and the laws of the vast majority of States. In addition to early bilateral treaties providing for extradition in cases of corruption, manifestations of the fight against corruption are found at the multilateral level in the Vienna Convention of the Law of Treaties and in the ICSID Convention. In effect, Article 50 of the VCLT allows a State whose consent has been obtained through corruption to invalidate a treaty and Article 52(1)(c) of the ICSID Convention provides for the annulment of an award if there was corruption on the part of a member of an ICSID tribunal. The international community of States has thereafter sought to address the issue of corruption with a targeted effort to eliminate corrupt practices in the public service sector and criminalize corruption in domestic legal orders. For instance, on 17 December 1979 the General Assembly of the United Nations adopted a "Code of

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<sup>336</sup> *Oostergetel* ¶141.

<sup>337</sup> For example, Exh. R-682/C-255, p.3 states: "By issuing this commentary, the publisher would like to stress that certain controversial issues still require practical interpretation and thus legal practitioners, scientists and scholars are invited to express their opinion and wishes with regard to this publication."

Conduct for Law Enforcement Officials". In the same year, the UN prepared a Draft International Agreement on Illicit Payments. Also, in 1997, the General Assembly adopted a Declaration against Corruption and Bribery in International Commercial Transactions.

291. Further, a number of international agreements were adopted mainly seeking to criminalize corruption, but also dealing with administrative and civil law aspects relating to the fight against corruption. These include the 1996 Inter-American Convention against Corruption; the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the 1999 Council of Europe Civil Law Convention on Corruption; the 1999 Criminal Law Convention on Corruption and the 1999 Civil Law Convention on Corruption, both adopted under the aegis of the Council of Europe; the 2003 African Union Convention on Preventing and Combating Corruption; and the 2004 UN Convention against Corruption.
292. In this context, a mention must also be made of the award in *World Duty Free v. Kenya* which held that corruption is "contrary to international public policy of most, if not all, States or, to use another formula, to transnational public policy"<sup>338</sup> and consequently declared the claims inadmissible.
293. For the application of the prohibition of corruption, the international community has established lists of indicators, sometimes called "red flags". Several red flag lists exist, which, although worded differently, have essentially the same content. For instance, Lord Woolf, former Chief Justice of England and Wales, included on his list of "Key Red Flags" among other things" (1) "an Adviser has a lack of experience in the sector;" (2) "non-residence of an Adviser in the country where the customer or the project is located;" (3) "no significant business presence of the Adviser within the country;" (4) "an Adviser requests 'urgent' payments or unusually high commissions;" (5) "an Adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity;" (6) "an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision".<sup>339</sup> As has been

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<sup>338</sup> *World Duty Free* ¶157. This approach was confirmed in the recent *Niko* decision (*Niko Resources Ltd v. Bangladesh, Bapex and Petrobangla*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013, ¶¶431-433).

<sup>339</sup> Woolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in Bae Systems Plc 25-26 (2008).

seen above in the section entitled "Key facts" and as will become further evident in the course of the analysis under Uzbek law, many of these red flags are present here.<sup>340</sup>

294. Returning now to the facts of this case under Uzbek law, the allegations of corruption are directed primarily against Messrs Chijenok, Sultanov and Ibragimov. Other lesser allegations are also made in respect of Messrs Mikhailov, Shwa, Krespel and Gurtovoi. The factual matrix is different for each of these individuals. The Tribunal will thus review the involvement of each person separately to determine whether the evidence establishes that any relevant provision of Uzbek law has been violated.

**i. Mr. Chijenok**

**(i) Respondent's Position**

295. The Respondent essentially submits that Mr. Chijenok has worked for the Claimant since 1998 and was promised future payments while he was a Government official in order to induce him to influence Government officials, including Prime Minister Sultanov, to approve the Claimant's investment through Resolution No. 15.

296. The Respondent alleges that Mr. Chijenok began to work for the Claimant when he was still an official at the Apparatus of the President. In support of its submission that Mr. Chijenok was hired by the Claimant in 1998, the Respondent, *inter alia*, relies on the following testimony of Mr. Rosenberg:<sup>341</sup>

- i. In his direct examination at the January Hearing, in relation to the 28 February 2005 Agreement among Messrs. Sultanov, Chijenok, and Mikhailov, Mr. Rosenberg testified that he "was introduced to them by a business associate, a business customer, a Dutch company" in 1998;<sup>342</sup>
- ii. Further, when asked what he had believed those three individuals could do for the Claimant when he met them in 1998,<sup>343</sup> Mr. Rosenberg testified that:

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<sup>340</sup> The Tribunal has noted the Claimant's objections that the red flags used by the Respondent post-date the impugned conduct of the Consultants, i.e. the red flag lists upon which the Respondent relies were published after the conduct under scrutiny. However, the red flag lists merely assemble a number of factors which any adjudicator with good common sense would consider when assessing facts in relation with a corruption issue whether now or in 1998. This was for instance the approach used in ICC cases No. 6497 and 8891.

<sup>341</sup> R-PHB 1 ¶¶48-54.

<sup>342</sup> R-PHB 1 ¶48 citing Tr. 348:22-349:9.

<sup>343</sup> R-PHB 1 ¶49 citing Tr. 349:10-12.

“...This Mr. Sultanov and his associates were very active in sales and business activities in molybdenum in Uzbekistan during this time. They had connection both to Almalik and to UzKTJM, and they have been exporting — buying, exporting, and doing different — of molybdenum, and they actually proposed that rather than Metal-Tech would be doing the recovering of different metals from the tailings, that we’ll concentrate first on the production of molybdenum from the low-grade raw material of Almalik and implementing a project which is to build high-purity molybdenum oxide from the low-grade raw material. So, it means to help — they knew all the challenges and the problem in doing the business, and they help us in or identify to us the new possibilities in order to solve it.”<sup>344</sup>

According to the Respondent, Mr. Rosenberg’s references to “they” refer back to Mr. Rosenberg’s statement regarding “Mr. Sultanov and his associates”—Messrs Chijenok and Mikhailov. The Respondent asserts that Mr. Rosenberg’s testimony confirms that Mr. Chijenok was “involved from the beginning, when the consultants allegedly came up with the idea for the Claimant to focus on molybdenum, rather than the copper tailings”,<sup>345</sup>

- iii. Similarly, when asked whether the Claimant had agreements with the Consultants since the beginning, Mr. Rosenberg testified that:

“Q. And you had these agreements in place with these three individuals from the very beginning of the project; is that right? I think that's what your testimony was.

A. Yeah, I think – yes.”<sup>346</sup>

According to the Respondent, Mr. Rosenberg’s response specifically applies to “three individuals,” i.e., to Messrs Sultanov, Chijenok, and Mikhailov, and confirms that from the very beginning, the Claimant had entered into agreements with the Consultants, including Mr. Chijenok. Again, when asked where the Consultants were working before the Claimant hired them, Mr. Rosenberg testified that he met all three consultants at the same time:

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<sup>344</sup> R-PHB 1 ¶49 citing Tr. 349:13-350:12.

<sup>345</sup> R-PHB 1 ¶49.

<sup>346</sup> R-PHB 1 ¶50 citing Tr. 447:8-12.

“Q. Where were these individuals working before they began working under this Consultancy Agreement with you?

A. There were three individuals that we grouped together as one unit operating in Kazakhstan [*recte* Uzbekistan]; and, as I said, that they had been introduced to me by a Dutch company, and they have been dealing in pharmaceuticals and later on I learned that they had been dealing with — in other things. But the main thing that was my interest was the fact that they have been dealing in the molybdenum prior to the operation of Uzmetal. They had been buying and selling from Almalik the low grade concentrate, and they had been buying from Uzmetal — UzKTJM, sorry, the finished product, whatever it was, and they exported it, so they had vast experience in this field.”<sup>347</sup>

To the Respondent, Mr. Rosenberg’s testimony is clear in that “he met ‘three individuals’ - Messrs. Sultanov, Chijenok, and Mikhailov - through a Dutch company (CPH), and that the Claimant grouped these three individuals together from the beginning as one operating unit.”<sup>348</sup> The Respondent submits that Mr. Rosenberg himself confirmed this position first when he stated that he could not recall if the Consultants bought and sold molybdenum under “their name, under different names, but it was their – they were the people that did it”<sup>349</sup> and again when he stated that although he did not mention any of the consultants in either of his witness statements, “[t]hey were a substantial part in putting the deal together.”<sup>350</sup>

The Respondent also points out that, in his subsequent testimony at the January Hearing, Mr. Rosenberg did not downplay Mr. Chijenok’s role or suggest that he became involved later than Messrs Sultanov and Mikhailov;<sup>351</sup>

- iv. When asked by the President of the Tribunal to confirm that Messrs Chijenok, Sultanov and Mikhailov “were a team,” and that “each one had special capabilities and on which [he] could rely,”<sup>352</sup> Mr. Rosenberg agreed.<sup>353</sup> When

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<sup>347</sup> R-PHB 1 ¶50 citing Tr. 447:13-448:7.

<sup>348</sup> R-PHB 1 ¶50.

<sup>349</sup> R-PHB 1 ¶50 citing Tr. 448:10-12.

<sup>350</sup> R-PHB 1 ¶50 citing Tr. 448:13-21.

<sup>351</sup> R-PHB 1 ¶51.

<sup>352</sup> R-PHB 1 ¶53 citing Tr. 475:18-476:11.

asked further exactly what Messrs Chijenok, Sultanov and Mikhailov, did for the Claimant to be paid USD 4 million,<sup>354</sup> Mr. Rosenberg replied as follows:

“The way that I have been operating in those countries since I’m not a citizen of those countries — I don’t know the country. I don’t know who is who, and who is my enemy, who is my friend, who is doing what and how to do? I had to have somebody that will assist me at the site. We assumed that since they were actually the businessmen that were dealing in molybdenum, they knew everything. They had been in this business. They actually once we said Uzmetal we actually replaced them, so they could either be our enemies or they could assist us and join us and be our associate. And so this was one thing and by having all their experience in doing the Feasibility Study and arranging — helping us going through. . . .”<sup>355</sup>

He further testified that: “[the Consultants] had been assisting — they would have been part of the project from, as I said, ’98 until - or ’99, until the end. . . .”<sup>356</sup>

The Respondent argues that, throughout his examination, Mr. Rosenberg repeatedly tied all three consultants back to the initiation of the Claimant’s investment in 1998 either by referring to “three individuals” or “three people,” or by using collective terms such as “they,” “them,” “this group of people.”<sup>357</sup>

297. Besides relying on Mr. Rosenberg’s testimony, the Respondent also relies on the testimony of Mr. Mikhailov, which, Respondent says, confirms that Mr. Chijenok was involved in the Claimant’s investment from 1998.<sup>358</sup> The Respondent points out that, at the May Hearing, Mr. Mikhailov emphasized that even Mr. Chijenok himself had admitted that he met Mr. Rosenberg in 1998:

“Q. So, you have testified both in your statement, particularly in Paragraph 3, but also just now, that you, Mr. Sultanov, and Mr.

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<sup>353</sup> R-PHB 1 ¶53 citing Tr. 476:12-15.

<sup>354</sup> R-PHB 1 ¶53 citing Tr. 476:19-477:1.

<sup>355</sup> R-PHB 1 ¶53 citing Tr. 477:2-16.

<sup>356</sup> R-PHB 1 ¶53 citing Tr. 477:21-478:8.

<sup>357</sup> R-PHB 1 ¶54.

<sup>358</sup> R-PHB 1 ¶¶65-69.

Chijenok were introduced to Mr. Rosenberg through friends at CPH;  
is that correct?

A. Absolutely correct.

Q. And Mr. Rosenberg has testified that he did not meet Mr. Chijenok until the year 2003. Are you certain that you meant, you, along with Mr. Chijenok and Mr. Sultanov, that the three of you met Mr. Rosenberg all together in 1998?

A. I'm absolutely sure of that; and, as far as I know, Mr. Chijenok does not object to that either. That is really what happened."<sup>359</sup>

298. The Respondent finds Mr. Rosenberg's attempt at the May Hearing to "clarify the discrepancy" in his earlier testimony about the involvement of all three Consultants since 1998, unconvincing. First, despite being asked whether he had heard or seen anything to refresh his recollection regarding the changes made to his testimony, Mr. Rosenberg stated that he had no documents and could not explain what refreshed his recollection: "I didn't say that my memory is refreshed by documents. I said my memory, what I can recall with my memory, and my memory can recall that I met him [Mr. Chijenok] at about 2003..."<sup>360</sup> Mr. Rosenberg thus based the change in his testimony solely on his memory, which he himself admitted was deficient.<sup>361</sup> Second, nothing in the record supports Mr. Rosenberg's changed testimony. Third, unlike Mr. Rosenberg, who could not furnish an explanation as to why another consultant was needed in 2003, Mr. Mikhailov provided an explanation: Mr. Chijenok helped Mr. Rosenberg to prepare letters to the Government in order to obtain the Government's approval of the Claimant's investment.<sup>362</sup>

299. As to the role played by this Consultant, the Respondent asserts that "Mr. Chijenok ... interviewed the candidates to head various ministries and Government departments and influenced appointments of candidates to these positions."<sup>363</sup> Relying on Mr. Mikhailov's testimony, the Respondent further submits that Mr. Chijenok had good relationships with most senior Government officials. The core purpose of agreeing to

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<sup>359</sup> R-PHB 1 ¶68 citing Tr.1696:1-14.

<sup>360</sup> R-PHB 1 ¶58 citing Tr.1612:10-14 and 1611:15-17.

<sup>361</sup> R-PHB1 ¶58 citing Rosenberg WS III ¶1 ("14 years have passed since many of these events occurred"); Tr.1596:17-18 (Mr. Rosenberg testifying that "certainly my memory fails after so many years").

<sup>362</sup> R-PHB 1 ¶69.

<sup>363</sup> R-PHB 1 ¶33.



pay Mr. Chijenok was thus to influence Government officials, including Mr. Chijenok, to obtain the approval of the Claimant's investment through Resolution No. 15.<sup>364</sup> As the commentaries on the Uzbek Criminal Code and Resolution No. 19 reflect, it was illegal for the Claimant to promise to pay Mr. Chijenok to take steps to obtain Resolution No. 15, even if he personally lacked any authority with respect to that Resolution.<sup>365</sup> The Respondent also submits that, since the Claimant admitted paying more than USD 4.4 million to the Consultants, including Mr. Chijenok, and there is no evidence of any legitimate services having been performed in return for those payments, the Tribunal should conclude that the purpose of these payments was to bribe Government officials in order to obtain and maintain the Claimant's investment.<sup>366</sup>

**(ii) Claimant's Position**

300. The Claimant objects that there is no evidence in the record that Mr. Chijenok worked for the Government during the relevant time period with respect to the Claimant's investment. Nor is it established that Mr. Chijenok did anything for Metal-Tech while he was a government official. In any event, even if Mr. Chijenok did begin to work for Metal-Tech in 1998, the Respondent had not explained how such an arrangement would violate Uzbek law.<sup>367</sup> The Respondent had not alleged that Mr. Chijenok took official action within the scope of his responsibilities for Metal-Tech's benefit in exchange for money or a promise of future payment.<sup>368</sup>
301. As to the start of Mr. Chijenok's involvement, the Claimant contends that it is not established that Mr. Chijenok was introduced to and began his work for Metal-Tech in the spring of 1998.<sup>369</sup> Mr. Rosenberg testified in his third witness statement that "Mr. Chijenok joined the MPC team that Metal-Tech worked with after Uzmetal had been operating for some years and long after the December 2000 contract with MPC was signed."<sup>370</sup> Mr. Rosenberg also stated that he did "not recall the precise date when [he]

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<sup>364</sup> R-PHB 1 ¶41.

<sup>365</sup> R-PHB 2 ¶7 citing Exh. R-682, p. 16 ("When an official did not possess the powers to perform an action in the interests of the briber but owing to the official position was able to take steps towards the performance of such an action by other officials, the act should also be qualified as bribetaking. Such people may be advisors, reviewers, secretaries, assistants to high-ranking officials, chiefs of offices, etc., as well as other officials achieving an action or inaction desirable for the briber by means of the position they fill or the working connections they enjoy."); Exh. R-683, p. 12; Exh. R-681, p. 16; Kanyazov WS II Att. 30, p. 6.

<sup>366</sup> R-PHB 1 ¶174.

<sup>367</sup> C-PHB 1 ¶115.

<sup>368</sup> C-PHB 1 ¶115.

<sup>369</sup> C-PHB 1 ¶132 citing Exh. C-236.

<sup>370</sup> C-PHB 1 ¶128 citing Rosenberg WS III ¶¶8, 18.

first became aware of Mr. Chijenok, but [he] believe[d] it was some time in 2003 or 2004.”<sup>371</sup> At the May Hearing, he recalled that he met Mr. Chijenok in 2003. He also claimed that he first learned at that time in 2003 that Mr. Chijenok had been an official in the Uzbek Government “[s]ometime in the past.”<sup>372</sup>

302. The Claimant argues that no reliance should be placed on Mr. Rosenberg’s testimony at the January Hearing, as it was ambiguous. Mr. Rosenberg did not testify in his native language and spoke of events that had taken place 14 years earlier. It was thus hardly surprising that Mr. Rosenberg referred to the three MPC consultants as a group. The source of Mr. Rosenberg’s confusion was his failure to distinguish between MPC and the three individuals when answering questions about the parties to the February 2005 consulting agreement.<sup>373</sup> It adds that if “[the] Respondent’s counsel had straightforwardly asked Mr. Rosenberg when he first met Mr. Chijenok, there would have been no ambiguity on that score requiring clarification.”<sup>374</sup> The Respondent’s characterization of Mr. Rosenberg’s testimony as an admission of Mr. Chijenok’s involvement since 1998, was nothing more than a confirmation that Mr. Rosenberg’s relationship with the MPC consultancy started that year.<sup>375</sup>
303. In connection with Mr. Chijenok’s role, the Claimant challenges the Respondent’s theory that Mr. Chijenok was promised payment while he was a Government official to obtain the Government’s approval of its investment. The theory is factually incorrect and, even if the facts asserted against Mr. Chijenok were true, they do not establish any wrongdoing by Metal-Tech.<sup>376</sup>
304. As to the facts, the Claimant points out that Mr. Chijenok held the position of Principal Consultant on Organizational and Personnel Policy of the Apparatus of the President of the Republic of Uzbekistan.<sup>377</sup> The information note submitted by Mr. Chijenok described his responsibilities as follows:

“Examination at leadership’s request of business and other qualities of the applicants for vacancies being on the list of the Organisation and Personnel Policy Service; making of personal data files for

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<sup>371</sup> C-PHB 1 ¶129 citing Rosenberg WS III ¶¶8, 18.

<sup>372</sup> Tr. 1588:8-12.

<sup>373</sup> C-PHB 1 ¶129 citing Tr. 1601:8-16.

<sup>374</sup> Claimant’s letter of 27 March 2012, pp. 4-5.

<sup>375</sup> C-PHB 1 ¶128.

<sup>376</sup> C-PHB 1 ¶136.

<sup>377</sup> C-PHB 1 ¶138 citing Kanyazov WS II, Attachment 5.

newly appointed personnel; checking of subordinate employees' (personal assistants) performance, including checking of Inventory Division statisticians employment duties."<sup>378</sup>

305. For the Claimant, this description does not support the submission that Mr. Chijenok "was in a position, through the exercise or non-exercise of powers within the scope of his duties, to secure a government decision guaranteeing Metal-Tech's investment".<sup>379</sup> Mr. Chijenok was responsible for human resources functions at the President's Office; his responsibilities were confined to "low-level personnel matters".<sup>380</sup> He merely used his "general familiarity with the way business was conducted in the Uzbek government to advise Metal-Tech on letter-writing".<sup>381</sup>
306. As to the legal aspects, the Claimant submits that the Respondent does not show any violation of Articles 210 to 212 of the Uzbek Criminal Code. On the basis of Articles 210 and 211, it contends that to establish corruption with respect to Mr. Chijenok, the Respondent would need to demonstrate that (i) the Claimant knowingly paid him for work undertaken on its behalf when he was a government official and (ii) he was paid for the performance or non-performance of a specific action within his duties. The Respondent has failed to establish Metal-Tech's knowledge of Mr. Chijenok's role.<sup>382</sup>
307. The Claimant further notes that there is no allegation that it paid Mr. Chijenok for the performance or non-performance of actions within the scope of his duties, which were unrelated to the Claimant's investment.<sup>383</sup> In particular, whatever advice Mr. Chijenok may have given about letters, the information note referred to above confirms that such advice was outside of the scope of his duties. There was no suggestion either that Mr. Chijenok sought to otherwise exercise authority in this connection.<sup>384</sup>
308. The Claimant also insists that it is not alleged that Mr. Chijenok "intervened directly with other governmental officials responsible for approving Metal-Tech's investment or used his official position to cause them to reach decisions favorable to Metal-Tech".<sup>385</sup> The only document proffered by the Respondent that allegedly links Mr. Chijenok to the

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<sup>378</sup> C-PHB 1 ¶138 citing Kanyazov WS II, Attachment 12.

<sup>379</sup> C-PHB 1 ¶138.

<sup>380</sup> C-PHB 1 ¶142.

<sup>381</sup> C-PHB 1 ¶141.

<sup>382</sup> C-PHB 1 ¶¶137-143.

<sup>383</sup> C-PHB 1 ¶140.

<sup>384</sup> C-PHB 1 ¶141.

<sup>385</sup> C-PHB 1 ¶142.

Claimant's investment is dated June 1997, prior to the date on which the Respondent alleges that Mr. Chijenok began to work for Metal-Tech. The document is a letter from the Office of the President (where Mr. Chijenok worked at the time), but nothing suggests that Mr. Chijenok knew about the letter or participated in writing it. Finally, there is no evidence that Mr. Chijenok is being investigated or has been arrested for any crime.<sup>386</sup>

309. Finally, the Claimant argues that Resolution 19 is inapplicable.<sup>387</sup> Moreover, the resolution of the Cabinet of Ministers of 6 March 1992 entitled "On the List of Officials Forbidden to Engage in Entrepreneurial Activity" submitted by the Respondent is wholly inapposite and its unexplained submission is "just one more example of Respondent's attempt to escape liability for its treaty obligation by creating a smokescreen of investor impropriety."<sup>388</sup>
310. While Mr. Mikhailov testified for the first time at the May Hearing that Metal-Tech paid the MPC consultants, including Mr. Chijenok, "for the firm guarantees for the decisions to be made in Uzbekistan"<sup>389</sup> in respect of the Claimant's investment and that "such a guarantee would be the statement made by the Cabinet of Ministers of Uzbekistan, signed by the President of Uzbekistan",<sup>390</sup> no evidence in the record supports this statement and, in any event, procuring such a decision was not within the ambit of Mr. Chijenok's responsibilities.

### ***(iii) Analysis***

311. For the sake of convenience, the Tribunal will adopt the order followed by the Parties and will first review the timing of Mr. Chijenok's association with the Claimant's investment before examining the role played by him.
312. The timing of Mr. Chijenok's association with the Claimant has been a source of considerable debate. According to the Respondent, at the January Hearing, Mr. Rosenberg clearly testified that he was introduced to Mr. Chijenok in 1998. The Claimant counters that Mr. Rosenberg's "statements about when he started working with the consultants were vague with respect to any particular individual."<sup>391</sup>

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<sup>386</sup> C-PHB 1 ¶17.

<sup>387</sup> C-PHB 1 ¶142.

<sup>388</sup> C-PHB 1 ¶143.

<sup>389</sup> C-PHB 1 ¶139 citing Tr. 1692:14-15.

<sup>390</sup> C-PHB 1 ¶139 citing Tr. 1692:19-21.

<sup>391</sup> Claimant's letter of 27 March 2012, p. 5.

313. The Tribunal has difficulty accepting the Claimant's argument on this point. Rather, it credits Mr. Rosenberg's testimony at the January Hearing that Mr. Chijenok was associated with the Claimant since 1998, which is corroborated by other evidence before it.

314. Turning first to Mr. Rosenberg's testimony, he was asked when he became acquainted with the parties to the 28 February 2005 Agreement, i.e. with Messrs Chijenok, Sultanov and Mikhailov. Mr. Rosenberg replied that he was introduced to them in 1998.<sup>392</sup> Further, when asked by the Tribunal how many years the Consultants had worked for the Claimant, Mr. Rosenberg stated: "They had been assisting – they would have been part of the project from, as I said, '98 until - or '99, until the end...."<sup>393</sup> Further, specific questions were asked to Mr. Rosenberg about *three* Consultants assisting him in the establishment of the investment. He confirmed that the Claimant entered into agreements with all three Consultants, at the very beginning of the project:

"Q. And you had these agreements in place with these *three individuals* from the very beginning of the project; is that right?

A. Yeah, I think – yes."<sup>394</sup>

315. When asked to confirm that the February 2005 agreement between "Mr. Viktor Mikhailov, Mr. Igor, Chijenok, and Mr. Sultanov,"<sup>395</sup> mentioned in the prospectus was actually a successor agreement to other agreements with "these same individuals",<sup>396</sup> Mr. Rosenberg answered: "That's correct."<sup>397</sup>

316. For the Tribunal, these statements leave no room for ambiguity. It is true that Mr. Rosenberg later testified, in relation to the February 2005 Consulting Agreement, that he "didn't pay attention to the group, who is exactly part of the Group."<sup>398</sup> It is also true that there may have been an ambiguity in his testimony, "because for most of the time MPC was made of three persons."<sup>399</sup> Yet, Mr. Rosenberg was unequivocal in answering specific questions, often referenced with names and dates. Any perceived

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<sup>392</sup> Tr. 348:22-349:3 ("Q. Would you tell the Tribunal when you first became acquainted with [the Parties to the 28 February 2005 Agreement]? A. It's beginning to my brain, but it's about 1998.").

<sup>393</sup> Tr. 477:21-478:4.

<sup>394</sup> Tr. 447:8-12.

<sup>395</sup> Tr. 446:11-447:1.

<sup>396</sup> Tr. 447:2-6.

<sup>397</sup> Tr. 447:7.

<sup>398</sup> Tr.1601:7-11.

<sup>399</sup> Tr.1606:3-6.

ambiguity – in the Tribunal's view, there was none – could have been clarified at the time, in particular in redirect examination, which was not done.<sup>400</sup>

317. Neither can the Tribunal agree with the Claimant's suggestion that Mr. Rosenberg's testimony at the January Hearing should be discounted because he "testif[ied] in a non-native language about events that took place some 14 years earlier."<sup>401</sup> In the Tribunal's perception, Mr. Rosenberg appeared to have no difficulty in understanding and answering the questions put to him in English. In fact, he himself expressed a preference for speaking in English and he was also specifically told that, if he had any difficulty understanding or expressing something, he should inform the Tribunal.<sup>402</sup> Moreover, prior to the January Hearing, Mr. Rosenberg had already submitted two witness statements in English.

318. The Tribunal notes that the Claimant has produced no compelling evidence in support of Mr. Rosenberg's subsequent position that he became aware of Mr. Chijenok only during the operation of the project. The letter of 7 June 2004 on which the Claimant relies says nothing in this respect; it merely indicates that Messrs Mikhailov and Chijenok will be in Israel on 24 June 2004.<sup>403</sup> In any event, Mr. Rosenberg himself admitted that his revised testimony (that he met Mr. Chijenok in 2003) was not based on any documents.<sup>404</sup> He relied only on his memory, which he had earlier recognized could fail after so many years.<sup>405</sup> In weighing the evidence, the Tribunal also takes account of the fact that Mr. Rosenberg holds a majority of the shares of Metal-Tech. He has thus a personal stake in this dispute. Similarly, the Tribunal cannot disregard the fact that the Third Witness Statement was submitted more than two months after the January Hearing, with the benefit of the entire record and the knowledge of POs 7 and 8, in which the Tribunal had shown concern in respect of the corruption allegations.

319. Second, even if one were to entirely disregard Mr. Rosenberg's statements, the record confirms Mr. Chijenok's early involvement. According to the record, Mr. Chijenok

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<sup>400</sup> Tr. 453:13-464:14.

<sup>401</sup> C-PHB 1 ¶128.

<sup>402</sup> Tr. 346:15-347:1.

<sup>403</sup> Exh. C-236.

<sup>404</sup> Tr. 1612:10-14 ("I didn't say that my memory is refreshed by documents. I said my memory, what I can recall with my memory, and my memory can recall that I met him [Mr. Chijenok] at about 2003..."); Tr. 1611:15-17 ("Q. The time between 1998, which was the prior testimony, and your testimony today about 2003. I'm saying: Is there anything in writing that would support the clarification you're offering today? A. I don't have any documents, nor [do] I have any recollection of any of anything prior to 2003. That's what I don't have.").

<sup>405</sup> Tr. 1596:14-18 ("Q. And are you saying that your memory may not be perfect and you prefer to rely on contemporaneous documents? A. Certainly my memory fails after so many years.").

founded Bordeaux in 1998 along with Messrs Sultanov and Mikhailov.<sup>406</sup> Through his shareholding in Bordeaux, Mr. Chijenok owned a 15% shareholding in MPC which was also established in that same year. In fact, at the January Hearing, Mr. Rosenberg identified MPC as the Consultants' company to which payments were made.<sup>407</sup> This evidence of the timing of Mr. Chijenok's participation is corroborated by Mr. Mikhailov's testimony that Mr. Rosenberg was aware of the shareholders of MPC (and therefore also aware of Mr. Chijenok's shareholding in MPC through Bordeaux). When asked whether Mr. Rosenberg knew who owned MPC's shares, Mr. Mikhailov testified that "he undoubtedly did".<sup>408</sup>

320. The next issue that arises is the one of the role played by Mr. Chijenok in the context of the Claimant's investment. The Claimant gave confusing explanations about Mr. Chijenok's role. As with Mr. Sultanov, Mr. Rosenberg initially stated that Mr. Chijenok was involved in the molybdenum industry and was being compensated for the fact that the Claimant took his business away. At the May Hearing, Mr. Rosenberg testified that only Mr. Sultanov was previously involved in the molybdenum industry. Thus, by the Claimant's own admission, Mr. Chijenok was not remunerated for losing his molybdenum business.

321. The Claimant then submitted that Mr. Chijenok was employed as a lobbyist. At the January Hearing, the Claimant submitted that the Consultants were being paid mainly to influence government officials and thus were providing "precisely the same services that Washington lobbyists provide every day".<sup>409</sup> In the Tribunal's opinion, this proposition remains unsubstantiated. If Mr. Chijenok was indeed a lobbyist, the Claimant would be expected to have relevant letters, reports and other evidence documenting his activity. However, in spite of several calls for evidence, the otherwise voluminous record remains empty in this respect.

322. The Claimant's next submission, that Mr. Chijenok was "an office man who advised on administrative issues such as tax and insurance" and who "provided analytical marketing reports and information on local regulations"<sup>410</sup> is equally difficult to follow. The record does not show that Mr. Chijenok had any expertise in insurance, tax, and

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<sup>406</sup> Exh. R-663, pp. 5, 12; Exh. R-659, pp. 1 and 5 bearing Mr. Chijenok's signature. See also R-661.

<sup>407</sup> Tr. 353:15-354:6.

<sup>408</sup> Tr. 1697:13-18.

<sup>409</sup> Tr. 1300:9-11.

<sup>410</sup> Rosenberg WS III ¶18.

marketing matters. Indeed, the repeated changes in the Claimant's explanations of Mr. Chijenok's role tend to undermine the credibility of all of them.

323. In the circumstances, the Claimant has been unable to justify its substantial payments to Mr. Chijenok (USD 95,000 to him personally; plus his shares of the USD 2,492,908 paid to the MPC Companies and the USD 774,781.40 paid to Lacey International). This is all the more surprising as Mr. Rosenberg himself explained that the Consultants provided "immense assistance".<sup>411</sup>
324. The Tribunal notes that it is not disputed that Mr. Chijenok was the Principal Consultant on Organizational and Personnel Policy of the Apparatus of the President of the Republic of Uzbekistan.<sup>412</sup> In this capacity, he was responsible for the human resources functions in the President's Office.<sup>413</sup> While in office, his responsibilities included *inter alia*, examination of the qualifications of applicants for vacancies.<sup>414</sup> He thus was in a position to influence appointments of candidates to official positions and would be expected to have had contacts with many officials in the Government. At the January Hearing, when asked whether he knew that Mr. Chijenok was working in the Office of the President, Mr. Rosenberg replied: "I know that he was working in a high position in an official position..."<sup>415</sup> These facts are corroborated by Mr. Mikhailov, who testified that: "Mr. Chijenok accordingly had good contacts and relationships with most senior officials in various ministries and departments of the Government of Uzbekistan."<sup>416</sup> Still other facts are indicative of Mr. Chijenok's role. In 1997, it was Mr. Chijenok's office that requested Prime Minister Sultanov's opinion on the Claimant's proposed investment in Uzbekistan.<sup>417</sup> Moreover, on 3 July 2000, merely *three days* after leaving his position at the Government, Mr. Chijenok took over as Advisor of the Representative Office of MPC in Tashkent.<sup>418</sup> Mr. Chijenok thus started working at MPC five months before Claimant and MPC concluded the first consulting contract in December 2000.
325. On the basis of its assessment of the entire evidentiary record, the Tribunal concludes that: (i) Mr. Chijenok was involved in the Claimant's investment since 1998; (ii) he was

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<sup>411</sup> Rosenberg WS III ¶12.

<sup>412</sup> Kanyazov WS II Attachment 5.

<sup>413</sup> Kanyazov WS II Attachment 5, Attachment 12.

<sup>414</sup> Kanyazov WS II, Attachment 8, p. 3; see also Mikhailov WS III ¶9.

<sup>415</sup> Tr. 452:21-453:7.

<sup>416</sup> Mikhailov WS III ¶9.

<sup>417</sup> Exh. R-470.

<sup>418</sup> Kanyazov WS II Attachment 7, pp. 23-24; Kanyazov WS II Attachment 5, p. 3.



a government official at that time, and for some time thereafter; (iii) Mr. Rosenberg admitted that he knew that Mr. Chijenok was employed in an “official position”; (iv) the Claimant has not provided any plausible reason for making substantial payments to Mr. Chijenok; and (v) Mr. Chijenok was hired as a consultant to use his official position to assist the Claimant’s investment. In the Tribunal’s view, the only conclusion that can be drawn from these facts is that Mr. Chijenok was paid to use his position in the Uzbek government to facilitate the establishment of the Claimant’s investment.

326. These conclusions support the further conclusion that the Claimant acted in breach of Articles 210-212 of the Uzbek Criminal Code. Indeed, contrary to the Claimant’s suggestion, there is no requirement that Mr. Chijenok’s official duties have included the power to secure a government decision approving the investment. As commentaries bear out, it is sufficient that the Claimant paid Mr. Chijenok to use his official position to advance the Claimant’s investment.

327. In summary, by paying Mr. Chijenok, a government official, to exercise his influence in support of the Claimant’s investment, the Claimant breached Articles 210-212 of the Uzbek Criminal Code and, thereby the legality requirement contained in Article 1(1) of the BIT.

**ii. Mr. Sultanov**

**(i) Respondent's Position**

328. In respect of Mr. Sultanov, the Respondent submits that there is no evidence that he “did or was qualified to do anything for Claimant other than to provide the telephone number of his brother, the Prime Minister”.<sup>419</sup> Mr. Sultanov “was not a consultant; he was a conduit to his brother, the Prime Minister”, who “took an unusual interest” in the Claimant’s investment.<sup>420</sup> For the Respondent, the following evidence is relevant in relation to Mr. Sultanov:

- i. When asked whether Mr. Sultanov had specific expertise to render the services Mr. Rosenberg mentioned in his witness statement, Mr. Rosenberg testified that he did not recall Mr. Sultanov’s “education” or “university qualification,” but that “Mr. Sultanov was a very high appreciated person” and “a businessman.”<sup>421</sup> In fact, the Respondent submits, Mr. Sultanov had not

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<sup>419</sup> R-PHB 1 ¶96.

<sup>420</sup> R-PHB 1 ¶¶104-105.

<sup>421</sup> R-PHB 1 ¶99 citing Tr. 1636:13-15, 1636:19-20, 1637:6-7.

worked in any capacity since April 1992. Prior to that he was a police investigator, who had retired with the rank of Police Colonel;<sup>422</sup>

- ii. While he asserted that Mr. Sultanov had business experience in molybdenum, Mr. Rosenberg testified that he knew about this through hearsay and never himself saw evidence of this experience. Further, witnesses in the molybdenum industry had never heard of Mr. Sultanov being involved in the industry;<sup>423</sup>
- iii. Mr. Rosenberg asserted that the Claimant hired its consultants to assist “on the ground”.<sup>424</sup> However, from at least 2003 to 2009, i.e. during the time that he allegedly acted as consultant, Mr. Sultanov lived in Germany, which Mr. Mikhailov confirmed. Mr. Rosenberg himself testified that he would travel to Germany “to meet with Mr. Sultanov, who resided there”,<sup>425</sup>
- iv. When asked in this context how Mr. Sultanov could have rendered services during the period when he resided abroad, Mr. Rosenberg testified that “[h]e had the connections which were required,” and also “was traveling quite often.” Thus, the Respondent submits “even though Mr. Sultanov could not and did not perform independent services for Claimant, Claimant paid Mr. Sultanov for his required connections to his brother, the Prime Minister, who was the designated official in charge of monitoring the implementation of Metal-Tech’s investment.”<sup>426</sup>

329. The Respondent submits that it is not relevant whether Mr. Sultanov kept his share of the payments for himself<sup>427</sup> or whether he transmitted some or all of them to his brother, the Prime Minister, because Mr. Rosenberg admitted that the purpose of paying Mr. Sultanov was to influence the Prime Minister to act in the Claimant’s interests. Metal-Tech’s compensation to Mr. Sultanov amounted to bribery, the Respondent argues, because the ultimate purpose of the compensation was to secure approval of Metal-Tech’s investment.<sup>428</sup>

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<sup>422</sup> R-PHB 1 ¶98.

<sup>423</sup> R-PHB ¶100.

<sup>424</sup> Rosenberg WS III ¶3.

<sup>425</sup> R-PHB 1 ¶102 citing Rosenberg WS III ¶15.

<sup>426</sup> R-PHB 1 ¶103.

<sup>427</sup> R-PHB 2 ¶7.

<sup>428</sup> R-PHB 1 ¶¶317-320. In support of this argument, the Respondent relies on the commentaries filed on 20 July 2012, which, it asserts, stand for the proposition that payment to a relative of a government

***(ii) Claimant's Position***

330. According to the Claimant, the Respondent's submissions are mere inferences. The Respondent implies that Metal-Tech's employment of the Prime Minister's brother as a consultant was somehow unlawful<sup>429</sup> and insinuates that the Prime Minister's decisions in respect of Uzmetal might have been improperly influenced by Mr. Sultanov.<sup>430</sup> However, this is not the actual position. Mr. Mikhailov testified at the May Hearing that there was no evidence that compensation to Mr. Sultanov was paid for any wrongful purpose or that it was shared with his brother, the Prime Minister.<sup>431</sup> He also stated that he knew of no payment made to an Uzbek government official on behalf of Metal-Tech, or for that matter, of any payment to any Government official using Metal-Tech's funds.<sup>432</sup> According to the Claimant, when asked whether payments were made to any of the government officials who submitted written testimony in this case, Mr. Mikhailov confirmed that he was unaware of any such payments.<sup>433</sup> In sum, the Claimant submits that there is no evidence of any payment by Mr. Sultanov to any government official.
331. The Claimant also denies the Respondent's submission that Mr. Sultanov was paid large sums for not rendering any services. According to Mr. Rosenberg, Mr. Sultanov assisted with the preparation of the Feasibility Study, represented the Claimant in negotiations that resulted in opening the letter of credit to Uzmetal, and performed other services.<sup>434</sup>
332. In the Claimant's submission, the Respondent has not come close to proving bribery. To constitute an offense of bribery under Article 211 of the Uzbek Criminal Code, payment must be made or promised to a Government official. As it was not alleged that Mr. Sultanov was a Government official, the payments made to him were obviously not payments to an official for the purposes of the Uzbek Criminal Code. Further, pursuant to the commentaries on which the Respondent relies, the Respondent must show not only a payment to Mr. Sultanov, but also that: "(i) Metal-Tech's direct intention in compensating Mr. Sultanov was to induce favorable action or inaction in its favor by the Prime Minister; [and] (ii) The Prime Minister knew that was the purpose of the payment

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official may constitute a bribe even if it is not transferred to the official. Respondent's letter of 20 July 2012, at 7 (citing Exh. R-681 and R-682).

<sup>429</sup> C-PHB 1 ¶115.

<sup>430</sup> C-PHB 1 ¶144.

<sup>431</sup> C-PHB 1 ¶¶115, 151, 162.

<sup>432</sup> C-PHB 1 ¶147.

<sup>433</sup> C-PHB 1 ¶147.

<sup>434</sup> Rosenberg WS III ¶¶10(a), 10(b), 10(c).

to his brother and gave his approval.”<sup>435</sup> The Claimant submits that the Respondent has not established these necessary elements.

333. First, the Respondent has not shown that the Claimant promised Mr. Sultanov, before Resolution No. 15 was enacted, that he would be paid if the investment was approved. This was confirmed by Mr. Mikhailov, when he testified that that the Claimant's first payments to the Consultants (including Mr. Sultanov) started in 2001.<sup>436</sup> Under the December 2000 agreement, payment was contingent on future events – specifically repayment of Uzmetal's loans. According to the Claimant, “[the Consultants’] agreement to such conditional terms is flatly inconsistent with any earlier unqualified promise of payment in return for securing approval of the investment and explodes the theory that Prime Minister Sultanov acted favorably towards Metal-Tech in the hopes that his brother might receive a conditional forward-looking compensation contract three years in the future.”<sup>437</sup>
334. Second, there is similarly no evidence that "Metal-Tech's intention in paying Mr. Sultanov was to bribe the Prime Minister, or that the Prime Minister approved the Claimant's investment because his brother had been promised payments".<sup>438</sup> The Respondent has adduced no evidence of any inappropriate act of the Prime Minister in connection with Uzmetal. The investment approval was a deliberative process involving "a multitude of officials and institutions,"<sup>439</sup> and none of the officials who appeared as witnesses confirmed the allegations of corruption.
335. The Claimant also notes that the Respondent offered no testimony by Mr. Sultanov himself, "who would have been well-placed to know the purpose of the payments made to him".<sup>440</sup> In this connection, the Claimant relies on an ICC award in Case No. 6497, where the tribunal held that a party who had not called a witness was to bear the consequences.<sup>441</sup>
336. Last, the Claimant submits that the Respondent has failed to prove that Prime Minister Sultanov knew or could have known that, by compensating his brother, Metal-Tech intended "to induce favorable action on his part, and that he approved this

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<sup>435</sup> C-PHB 2 ¶19.

<sup>436</sup> C-PHB 2 ¶20.

<sup>437</sup> C-PHB 2 ¶20.

<sup>438</sup> C-PHB 2 ¶22.

<sup>439</sup> C-PHB 2 ¶22.

<sup>440</sup> C-PHB 2 ¶23.

<sup>441</sup> C-PHB 2 ¶23.

arrangement".<sup>442</sup> In addition, the Claimant also points out that no official was charged with unlawful conduct in connection with its project.<sup>443</sup>

**(iii) Analysis**

337. The Consultant Sultanov, whose first name is Uygur, is the brother of Utkir Sultanov, who was the Prime Minister of Uzbekistan from 21 December 1995 until 10 December 2003, and Deputy Prime Minister from then until 2006.<sup>444</sup> Prime Minister Sultanov was the Government official entrusted with the responsibility of monitoring the execution of Resolution No. 15,<sup>445</sup> which established the Claimant's investment in Uzbekistan. The Respondent alleges that the Claimant paid Mr. Sultanov to use his family and other relationships with Government officials to obtain approval for and protect Metal-Tech's investment. The Claimant objects stating that Mr. Sultanov was paid for legitimate consulting activities.
338. The Claimant made substantial payments to Mr. Sultanov (USD 95,000 to him personally; plus his shares of the USD 2,492,908 paid to the MPC Companies and the USD 774,781.40 paid to Lacey International). A review of the record does not show any legitimate services for which such compensation may have been paid.
339. First, the Tribunal notes that the reasons advanced for paying Mr. Sultanov such large sums are unsupported by the facts on record. At the January Hearing, Mr. Rosenberg testified that Mr. Sultanov was actively involved in the molybdenum business:

*"A. This Mr. Sultanov and his associates were very active in sales and business activities in molybdenum in Uzbekistan during this time. They had connection both to Almalik and to UzKTJM, and they have been exporting--buying, exporting, and doing different--of molybdenum..."*<sup>446</sup>

*"Q. Did they have relationships with officials of the Uzbek Government that you thought would be useful?"*

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<sup>442</sup> C-PHB 2 ¶24.

<sup>443</sup> C-PHB 2 ¶24.

<sup>444</sup> Respondent's letter of 16 March 2012, p.3.

<sup>445</sup> Cabinet of Ministers Resolution No. 15 dated 18 January 2000, Art. 17 (Exh. R-21, p. 9) ("The Minister of the Republic of Uzbekistan, U.T. Sultanov, shall be responsible for monitoring the implementation of this Decree."); see Cabinet of Ministers Resolution No. 29-F dated 18 January 2000 (Exh. R-22, p. 3) (bearing Prime Minister Sultanov's seal).

<sup>446</sup> Tr. 349:18-350:1 (emphasis added).

A. Certainly. One of the main figure in this group of people were *Mr. Sultanov...They have been doing business in this, in the molybdenum.*<sup>447</sup>

"The fact that [the Consultants] have *been dealing in the molybdenum prior to the operation of Uzmetal.* They had been buying and selling from Almalik the low grade concentrate, and they had been buying from Uzmetal – UzKTJM, sorry, the finished product, whatever it was, and they exported it, so they had vast experience in this field."<sup>448</sup>

"Q. What about Mr. Sultanov? What benefits did he provide to the company, to Metal-Tech, as opposed to Uzmetal?

A. First it was a group of these three individuals, *Mr. Sultanov was, as I said before, was very knowledgeable in the molybdenum trading* prior to the establishment of Uzmetal, which actually Uzmetal took--replaced his--their trading with molybdenum...."<sup>449</sup>

340. At the May Hearing as well, Mr. Rosenberg repeatedly testified that Mr. Sultanov had prior experience in molybdenum:

"I said three individuals, but as a matter of fact, and the same one I was asked about the molybdenum project, I said three individuals, but then I actually indicated there was one. *It was Mr. Sultanov that was dealing it.*"<sup>450</sup>

341. He also testified that monies were paid to Mr. Sultanov in consideration for taking away his molybdenum business:

"...*compensation for [the Consultants] losing the--their past operation in the molybdenum.* We will replace them. In that way, Uzmetal replaced them."<sup>451</sup>

"[Y]ou would *compensate them for the fact that you were taking the molybdenum business away from them?* Is that what you're saying?

THE WITNESS: *This is what I said.*"<sup>452</sup>

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<sup>447</sup> Tr. 350:13-21 (emphasis added).

<sup>448</sup> Tr. 448:1-7 (emphasis added).

<sup>449</sup> Tr. 450:10-17 (emphasis added).

<sup>450</sup> Tr. 1606:8-12 (emphasis added). See also 1603:11-14, 1604:11-14, 1607:1-12, 1608:17- 1609:5.

<sup>451</sup> Tr. 478:16-19 (emphasis added).

<sup>452</sup> Tr. 480:9-12 (emphasis added).

342. However, on later questioning, Mr. Rosenberg was less affirmative. He stated that he “was informed”<sup>453</sup> of Mr. Sultanov’s participation in the molybdenum industry and never himself saw evidence of this experience.<sup>454</sup> In fact, Mr. Sultanov’s résumé and service record reflect that he was an internal police investigator who retired after achieving the rank of Police Colonel and that he has not worked in any capacity since April 1992.<sup>455</sup> The record contains no evidence that he had any experience in the molybdenum industry prior to his involvement with the Claimant.
343. Throughout the course of these proceedings, the Claimant has argued that only two entities were involved in the molybdenum industry in Uzbekistan: AGMK and UzKTJM. Given the small size of the industry, one would expect that all the actors in the molybdenum industry would know one another. Mr. Rosenberg testified that Mr. Sultanov was “very active in sales and business activities in molybdenum”<sup>456</sup> that he had “connection both to Almalik and to UzKTJM”<sup>457</sup> and that the Consultants had business dealings with both AGMK and UzKTJM.<sup>458</sup> Yet Mr. Tashmetov, the General Director of UzKTJM in 2002 and 2003, testified that he was unaware of Mr. Sultanov having worked in the molybdenum industry: “If the others had been involved in molybdenum business, then they would have been involved with someone else. I have not worked with these individuals.”<sup>459</sup> Similarly, Mr. Sanakulov, the General Director of AGMK from 2004 to 2007, stated in examination that “[t]hese last names are familiar to me, but I had no idea that they were involved in molybdenum. No idea.”<sup>460</sup>
344. In another effort to justify the substantial payments to Mr. Sultanov, Mr. Rosenberg stated in his Third Witness Statement and at the May Hearing that the Consultants had assisted in preparing the Feasibility Study.<sup>461</sup> However, here too, this assertion appears unsupported by the record. Indeed, the letter on which Mr. Rosenberg’s statement relies does not mention Mr. Sultanov.<sup>462</sup> Similarly, the Draft Feasibility Study and the

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<sup>453</sup> Tr.1637:17-21.

<sup>454</sup> Tr.1607:9-12, 1609:21-22.

<sup>455</sup> Kanyazov WS II, Attachment 4, pp. 9-15; Kanyazov WS II, Attachment 3, p. 3.

<sup>456</sup> Tr. 349:18-20.

<sup>457</sup> Tr. 349:18-350:12.

<sup>458</sup> Tr. 448:1-7.

<sup>459</sup> Tr. 969:11-970:9.

<sup>460</sup> Tr. 1045:1-11.

<sup>461</sup> Rosenberg WS III 10(a); see e.g., Tr. 451:11-12 ; id. 477:13-16.

<sup>462</sup> Exh. C-229.

Revised Feasibility Study list the various individuals involved in their preparation, but Mr. Sultanov is not among them.<sup>463</sup>

345. Moreover, when he was asked whether Mr. Sultanov had any professional qualification to perform the tasks that Mr. Rosenberg described in his witness statement, either as an engineer, a construction manager, a metallurgist, a financial specialist, a tax specialist, or a marketing specialist,<sup>464</sup> Mr. Rosenberg replied that he did not recall Mr. Sultanov's "education" or "university qualification," but that "Mr. Sultanov was a very high appreciated person" and "a businessman."<sup>465</sup> From his Service Record, it is apparent that Mr. Sultanov lacked any professional qualification to perform the services he is alleged to have provided.<sup>466</sup> Further, as mentioned above (¶210), Deputy Minister Kanyazov's statement that Mr. Sultanov was not and had never been listed in any of the State registries for providing advocacy or tax consulting services was not challenged.
346. As in the case of Mr. Chijenok, the Claimant has alleged that Mr. Sultanov was hired to provide lobbying services.<sup>467</sup> The observations made in this respect concerning Mr. Chijenok apply equally to Mr. Sultanov (¶321).
347. In addition, the chronology of events is telling when it comes to assessing the corruption allegations and especially Mr. Sultanov's role. On 5 June 1997, the Apparatus of the President (Mr. Chijenok's office) requested Prime Minister Sultanov's opinion on the Claimant's proposal for a joint venture project.<sup>468</sup> Therefore, as early as 1997, the Claimant knew that Prime Minister Sultanov would likely be involved with its prospective investment. Mr. Rosenberg understood this well. He explained that Prime Minister Sultanov "was important to us since he was at the time elected to be responsible on the foreign investment, and he was directly responsible... to look after our project."<sup>469</sup> With this knowledge, the Claimant hired Mr. Sultanov in 1998 to help it in establishing the joint venture. Mr. Rosenberg himself acknowledged the importance of the family relationship: "[o]ne of the main figure... [was] Mr. Sultanov, who at the time

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<sup>463</sup> Exh. R-121, p. 118 (stating that "Feasibility study has been prepared by" Bateman's director, Mr. Gdalyakhu, Bateman's chief engineer, Mr. Jonathan, Claimant's chief engineer, Mr. Sela, and Claimant's chief examiner, Professor Tarakanov); Exh. R-20, p. 4 (stating that "[t]he feasibility study has been conducted by" Mr. Jonathan, Mr. Gdalyahu, Mr. Sela, and also Mr. Maimon).

<sup>464</sup> Tr. 1636:10-1637:8.

<sup>465</sup> Tr. 1636:22-1637:7.

<sup>466</sup> Kanyazov WS II Attachment 4, pp. 9-15.

<sup>467</sup> Tr. 1300:4-11.

<sup>468</sup> Exh. R-470.

<sup>469</sup> Tr. 1639:15-19.



was the brother of the Prime Minister”.<sup>470</sup> And further: “it was helpful to Metal-Tech that Mr. Sultanov, as the brother of the Prime Minister and a former Ministry of the Interior official, had a direct relationship to many government officials and could open many doors for us.”<sup>471</sup>

348. Later, in June 1999, when faced with difficulties concerning AGMK’s participation in the proposed joint venture, the Claimant approached Prime Minister Sultanov to “personally... meet” with the interested parties and asked him to resolve the issue.<sup>472</sup> In November 1999 (if not earlier, in August that year), the Claimant specifically requested that the JV be supervised by Prime Minister Sultanov. Although this request was later rejected, it is telling that the Claimant actively solicited the involvement of Prime Minister Sultanov.
349. In January 2000, Resolution No. 15 was enacted, assigning to Prime Minister Sultanov the role of supervising Uzmetal.<sup>473</sup> It is also telling that the last payment to MPC (of USD 182,054.50) and to Lacey (of USD 33,460.40) was made in April 2006, which was the same month that Prime Minister Sultanov left his (then) position as Deputy Prime Minister. Finally, it appears significant that Resolution No. 141 was enacted shortly after Deputy Prime Minister Sultanov was released from that position.<sup>474</sup>
350. Failing other justification for the substantial payments to Mr. Sultanov, and taking into account the Prime Minister’s personal involvement with the JV, the conclusion is inescapable that the true motive for the high compensation was Mr. Sultanov’s relationship with the Prime Minister. In fact, Mr. Rosenberg did not conceal the importance of this relationship:

*“One of the main figure in this group of people were Mr. Sultanov, who at the time was the brother of the Prime Minister”*<sup>475</sup>

“Q. What about Mr. Sultanov? What benefits did he provide to the company, to Metal-Tech, as opposed to Uzmetal?

... he had very good connection with different Government bodies. *His brother was the Prime Minister at the time, so it*

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<sup>470</sup> Tr. 350:15-19.

<sup>471</sup> Rosenberg WS III ¶7.

<sup>472</sup> Exh. R-472.

<sup>473</sup> Exh. R-21.

<sup>474</sup> See Kanyazov WS II Attachment 2, p. 25 and Exh. R-110.

<sup>475</sup> Tr. 350:15-19 (emphasis added).

*really was one of the persons that could facilitate closing red tapes when the Company was initiated.”<sup>476</sup>*

*“We didn’t have any connection to the Government authorities [and] needed somebody that will take us by our hand and show us and pass us all these red tapes, institutes”<sup>477</sup>*

*“Needless to say, it was helpful to Metal-Tech that Mr. Sultanov, as the brother of the Prime Minister and a former Ministry of the Interior official, had a direct relationship to many government officials and could open many doors for us.”<sup>478</sup>*

351. On the basis of its review of the record, the Tribunal finds that (i) Mr. Sultanov was the brother of the person who held the offices of Prime Minister and Deputy Prime Minister from 1995 to 2006; (ii) Metal-Tech made substantial payments to Mr. Sultanov; (iii) Mr. Sultanov was not qualified to perform the services for which he was allegedly retained; (iv) there is no meaningful documentary evidence of any services rendered; and (v) the odds turned against the Claimant shortly after Deputy Prime Minister Sultanov left the Government. These facts impose the conclusion that Mr. Sultanov was paid to use his family relationship to facilitate the establishment of Metal-Tech’s investment in Uzbekistan. This conclusion leads to the further conclusion that the Claimant acted in breach of Articles 210-212 of the Uzbek Criminal Code. According to the commentaries of these provisions, it is sufficient that the Claimant paid Mr. Sultanov to use his family relations to further the Claimant’s investment.

352. In summary, by paying Mr. Sultanov, the Claimant breached Articles 210-212 of the Uzbek Criminal Code and, thereby, the legality requirement of Article 1(1) of the BIT.

### **iii. Mr. Ibragimov**

#### **(i) Respondent’s Position**

353. According to the Respondent, the Claimant’s payments to Mr. Ibragimov were suspiciously large (USD 900,000) and were made in return for services that have not been proven or even explained. These payments were remitted through foreign companies in a manner that links them to the payments made to Messrs Sultanov, Chijenok, and Mikhailov. The Respondent emphasizes the following aspects:

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<sup>476</sup> Tr. 450:10-22 (emphasis added), see also Tr. 1635:22-1636:6.

<sup>477</sup> Tr. 351:7-16.

<sup>478</sup> Rosenberg WS III ¶7 (emphasis added). Further, when asked how Mr. Sultanov could have performed services for Claimant if he was living abroad, Mr. Rosenberg testified that “[h]e had the connections which were required” (Tr. 1635:22-1636:6). The Claimant also submitted that the Consultants were mainly paid for “access to the relevant Government officials they afforded and, quite frankly, for their ability to influence those Government officials.” (Tr. 1300:4-9).

- i. An earlier project for which Mr. Ibragimov had managed the Claimant's interests failed. Thus, according to the Respondent, Mr. Ibragimov's business experience was questionable.
- ii. Mr. Rosenberg testified that he met Mr. Ibragimov in 1994, and that they had made an oral agreement that Mr. Ibragimov would receive 15% of Metal Tech's net profit in any project. That understanding was subsequently modified by the Consulting Services Agreement of 17 July 2003 between the Claimant and Mr. Ibragimov, which "substituted [the] oral agreement...made previously, and lock[ed] in a fixed sum of money [payable to Mr. Ibragimov]."<sup>479</sup> The Respondent stresses the following points about this agreement:
  - The agreement does not indicate what services Mr. Ibragimov is to perform. Rather, it defines Mr. Ibragimov as the "consultant," and states that "the consultant is familiar with the company, provided and provides consulting services to Metal-Tech regarding Uzmetal's activity." This description, the Respondent submits, "is so vague as to be meaningless and is *prima facie* evidence that Mr. Ibragimov did not provide legitimate services";<sup>480</sup>
  - The contract contains Mr. Ibragimov's declaration that he had received payments of "the sums due to him" of USD 300,000 prior to 4 March 2002, that he "shall be entitled to part of the payments" to the Claimant under the loan agreements, "if and when received, for a total up to USD 500,000," and that he "shall receive a total of US \$100,000" from 2008 to 2009 in four installments.<sup>481</sup> Thus, according to the Respondent, "[the Claimant] had to pay Mr. Ibragimov – even if he did nothing for the Claimant – as long as Uzmetal continued to make payments under its loans."<sup>482</sup>
- iii. The Claimant itself has provided no clear account of Mr. Ibragimov's services. In his first witness statement, Mr. Rosenberg did not mention Mr. Ibragimov. Then, Mr. Rosenberg testified that Mr. Ibragimov "was instrumental in

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<sup>479</sup> R-PHB 1 ¶165 citing Tr. 355:16-356:7.

<sup>480</sup> R-PHB 1 ¶166.

<sup>481</sup> R-PHB 1 ¶169 citing Exh. R-620.

<sup>482</sup> R-PHB 1 ¶169.

launching the joint venture.”<sup>483</sup> Further, the Claimant’s counsel also noted that Mr. Ibragimov was the “central figure” who helped implement the Claimant’s investment in Uzbekistan. Later, however, Mr. Rosenberg downplayed the importance of Mr. Ibragimov. According to the Respondent, Mr. Rosenberg’s later testimony was effectively that “[Mr. Ibragimov] was incapable of providing the [assistance needed] to initiate the investment, and that [Mr. Rosenberg] therefore turned to Messrs. Sultanov, Chijenok, and Mikhailov, who came up with the idea of investing in the molybdenum industry.”<sup>484</sup>

- iv. Mr. Ibragimov’s yearly income from the consulting contract was approximately USD 500,000. According to the Respondent, such compensation is high, especially because payments were being made to Mr. Ibragimov for several years while the JV struggled with its loan payments and did not make profits.
- v. The Claimant failed to disclose USD 117,946 in payments to Mr. Ibragimov, including USD 54,657 paid on or before 4 March 2002, the date by which Mr. Ibragimov was paid USD 300,000. Further, as of March 2002, Claimant paid all of the money intended for Mr. Ibragimov to a succession of third-party foreign companies. These companies, the Respondent points out, had bank accounts at two banks in Riga, Latvia, but none of them was a legitimate business. For example, Amber Trading Group LLC (to which the Claimant paid at least USD 171,754 from 2002 to 2004), was declared “cancelled/void” in 2007. Similarly, other payees such as Trans Europe LLC and Nedler Trading LLC (to which the Claimant paid at least USD 372,660 from 2005 to 2006) have been administratively dissolved. Further, payments to another company, Vermont Ventures Ltd. (to which the Claimant paid at least USD 92,400 from 2006 to 2007), are also questionable, as that company’s stated purpose is the sale of human hair and wigs. Finally, the Respondent notes that Trans Europe LLC and Nedler Trading LLC are both related to Lacey International, which, being the payee under the February 2005 consulting contract, is in turn related to the Consultants.<sup>485</sup>

354. In light of these observations and of Mr. Rosenberg’s testimony that Messrs. Sultanov, Chijenok, and Mikhailov – and not Mr. Ibragimov – provided all of the assistance “on the ground”, the Respondent submits that the Claimant has not even alleged a

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<sup>483</sup> R-PHB 1 ¶169 citing Rosenberg WS II ¶10.

<sup>484</sup> R-PHB 1 ¶168.

<sup>485</sup> R-PHB 1 ¶¶172-173.

legitimate basis for the amount of USD 900,000 paid to Mr. Ibragimov.<sup>486</sup> Accordingly, the Respondent concludes that the purpose of these payments was to bribe Government officials in order to obtain and maintain the Claimant's investment.

***(ii) Claimant's Position***

355. The Claimant denies that it acted improperly in providing compensation to Mr. Ibragimov. It submits that it paid all of Uzmatal's General Directors an additional salary, as this practice was "customary for large-scale projects that need to attract talented expatriates to places like Uzbekistan, where local salaries do not reflect international market rates."<sup>487</sup> Mr. Ibragimov's compensation was justified, the Claimant says, because he was involved with Uzmatal from the beginning, and moreover was responsible for bringing the project together.<sup>488</sup>
356. The Claimant argues that the Respondent has not identified any violation of Uzbek law in respect of Mr. Ibragimov. For example, in its Reply, the Respondent merely insinuated that Mr. Ibragimov had been paid an "exorbitant consulting fee" for engaging in illicit transactions on Metal-Tech's behalf. In its closing statement at the January Hearing, the Respondent again attempted to create an impression of wrongdoing by Mr. Ibragimov. However, here too, the Respondent did not state what its allegation was.
357. In the Claimant's submission, Mr. Ibragimov was paid for the substantial legitimate consulting services which he provided to Metal-Tech. Mr. Rosenberg testified that Mr. Ibragimov was "instrumental in launching the joint venture" by "bringing together the parties", among other services.<sup>489</sup> Mr. Mikhailov too "acknowledge[d] Mr. Ibragimov as a legitimate business partner of Metal-Tech"<sup>490</sup>, something which, according to the Claimant, is further borne out by the contemporaneous evidence on record.<sup>491</sup>
358. Finally, the Claimant emphasizes that the Respondent admits that it has not made its case against Mr. Ibragimov. Indeed, at the January Hearing, the Respondent admitted that it had not yet been able to determine "whether the payments to Ibragimov went to others, were shared with some of the consulting team, or what happened to them."

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<sup>486</sup> R-PHB 1 ¶168.

<sup>487</sup> Reply M. ¶310.

<sup>488</sup> Reply M. ¶310.

<sup>489</sup> C-PHB ¶123.

<sup>490</sup> C-PHB ¶115.

<sup>491</sup> See C-PHB 1 ¶123 citing CE-229.

Although the Respondent indicated that it was “following up”, no evidence was subsequently produced.<sup>492</sup> As considerable time has since elapsed, the Claimant submits that it can only be concluded that Mr. Ibragimov was a legitimate consultant.

### ***(iii) Analysis***

359. The Respondent's assessment is essentially that, as the Claimant has not accounted for payments of USD 900,000 to Mr. Ibragimov, the Tribunal should conclude that the purpose of these payments was to corrupt government officials. The Tribunal cannot agree with this argument. It is true that the payments of USD 900,000 appear high in relation to the services performed. However, it should be recalled that these payments were first made under an oral agreement which was only later formalized in the Consulting Services Agreement of 17 July 2003,<sup>493</sup> which agreement recognized that payments were due to Mr. Ibragimov for past services.
360. Unlike the case with Messrs Sultanov and Chijenok, Mr. Ibragimov's role in the establishment of the Claimant's investment is well documented. Mr. Ibragimov was Metal-Tech's representative at the initial meetings with Uzbekistan to discuss the creation of a joint venture in December 1998 and in 1999.<sup>494</sup> Mr. Rosenberg testified that Mr. Ibragimov was “instrumental in launching the joint venture,” and “was a special case, as he was involved from the very beginning of this project and was credited with bringing together the parties into...a successful joint venture.”<sup>495</sup> Mr. Ibragimov was also Metal-Tech's representative and Uzmetal's General Director from January 2000 until January 2002, during which period a substantial portion of the payments (USD 245,343) were made. All of the general directors of Uzmetal received additional salary from Metal-Tech.<sup>496</sup>

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<sup>492</sup> C-PHB ¶115 citing Tr. 1433:13-17.

<sup>493</sup> Tr. 355:21-356:1; Exh. R-620 (“As per past agreements, the consultant is entitled to 15% of Metal-Tech's net profit”).

<sup>494</sup> Minutes of Negotiations between the Uzbek and the Israeli Parties on Matters of Processing Heaped Tailings and Molybdenum Middlings of AGMK dated 5 December 1998 (Exh. R-20, p.136) (reflecting attendance by Mr. Ibragimov on behalf of Metal-Tech); Letter from AGMK to the Cabinet of Ministers and Metal-Tech dated 26 June 1999 (Exh. R-128, p.1) (recording that Mr. Ibragimov was present at a meeting held with officials from AGMK on 25 June 1999 concerning creation of a JV for molybdenum middlings processing); Fax from Almalyk Mining and Smelting Works to Mr. Rosenberg (care of Mr. Ibragimov) dated 14 July 1999, proposing a joint venture to organise the production of molybdenum from molybdenum middling (Exh. R-20, p.139).

<sup>495</sup> Rosenberg WS II ¶10.

<sup>496</sup> Rosenberg WS II ¶10.

361. Further, all payments made to Mr. Ibragimov were either made under or documented in the July 2003 Agreement, the existence of which was publicly disclosed.<sup>497</sup> Such disclosure weighs against any inference of an illegal purpose.
362. The Respondent observes that, at Mr. Ibragimov's behest, the payments were made to foreign entities linked to payments made to the Consultants and that the July 2003 contract does not specify the services performed or to be performed by Mr. Ibragimov. While these circumstances raise questions, they do not change the conclusion that arises from the other facts on record. Unlike Mr. Sultanov, it is not alleged that Mr. Ibragimov had relationships with ministers or other government officials. Unlike Mr. Chijenok, Mr. Ibragimov was not a government official himself at the time the Claimant agreed to pay him. Moreover, Mr. Ibragimov's services are documented.
363. Moreover, the Respondent itself has recognized the weakness of its case against Mr. Ibragimov. At the January Hearing, it stated that it did not know yet what had happened to the sums paid to Mr. Ibragimov. Although it added that it expected to "have more on that point",<sup>498</sup> it has not substantiated its allegations since. This is all the more noteworthy as in POs 3 and 5, the Tribunal ordered the disclosure of banking details in respect of Mr. Ibragimov, and invited the Respondent to advise to the Tribunal of relevant information acquired during the investigation that the authorities in Uzbekistan were then pursuing concerning Mr. Ibragimov.
364. In the circumstances, the Tribunal concludes that the Respondent has shown no breach of Uzbek law in respect of the payments to Mr. Ibragimov. Grouping Mr. Ibragimov along with the other Consultants, the Respondent merely makes a blanket assertion that "where there is no evidence of any legitimate services having been performed, the Tribunal should conclude that the purpose of all of these payments was to corrupt Government officials."<sup>499</sup> In the case of Mr. Ibragimov there is evidence of legitimate services. While some facts surrounding payments to Mr. Ibragimov may raise doubts, they are insufficient to show a violation of Uzbek law.

**iv. Mr. Mikhailov**

365. The Tribunal does not understand the Respondent to have extended its allegations of bribery to payments made to Mr. Mikhailov. It is true that the Respondent included Mr. Mikhailov in a general statement asserting that the Claimant has paid more than USD

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<sup>497</sup> The July 2003 Agreement was mentioned in the Metal-Tech Prospectus dated 9 May 2005 (Exh. R-101, p. 107).

<sup>498</sup> Tr. 1433:11-17.

<sup>499</sup> R-PHB 1 ¶174.

4.4 million to Messrs. Sultanov, Chijenok, *Mikhailov*, and Ibragimov, and argued that, “where there is no evidence of any legitimate services having been performed, the Tribunal should conclude that the purpose of all of these payments was to corrupt Government officials in order to obtain and maintain Claimant’s investment project.”<sup>500</sup> However, it has not developed this general statement in respect of Mr. Mikhailov and the facts in the record do not support it. Consequently, the Claimant has understood that, in the Respondent’s submission, Mr. Mikhailov is the “one consultant not bribed by Metal-Tech.”<sup>501</sup>

366. Considering that the Respondent raised no allegation in relation to Metal-Tech’s dealings with Mr. Mikhailov or, if – contrary to the Tribunal’s understanding – the Respondent meant to make an allegation, it has not substantiated it, and considering further that no fact on record calls for *ex officio* scrutiny, the Tribunal will not engage in a review of the Claimant’s dealings involving Mr. Mikhailov.

**v. Messrs Shwa, Krespel, and Gurtovoi**

367. Mr. Shwa was Uzmetal’s General Director from January 2000 until January 2002.

368. Mr. Krespel became Uzmetal’s Acting General Director in August 2002, and was its General Director from November 2002 until September 2006, when he returned to Israel to receive medical treatment. He negotiated and signed Export Contract No. 1 and all of its amendments on behalf of Uzmetal.<sup>502</sup> Criminal proceedings were initiated against him in Uzbekistan on 12 June 2006 on the ground that he had abused his position of authority in Uzmetal and caused damage to Uzbekistan. When he left Uzbekistan in the fall of 2006, Uzbekistan alleges, he was seeking to avoid criminal charges. On 16 October 2006, he was formally charged as a criminal defendant and the investigation was suspended until his return to Uzbekistan.<sup>503</sup>

369. When Mr. Krespel left Uzbekistan in the circumstances just described, no new General Director of Uzmetal was appointed. Instead, Mr. Krespel delegated his powers to Mr. Gurtovoi who, at the time, was Acting General Director. Mr. Gurtovoi continued in this position until 2007, when the external bankruptcy manager took over the management of Uzmetal.

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<sup>500</sup> *Id.*

<sup>501</sup> C-PHB 2 n. 67.

<sup>502</sup> Exh. R-42.

<sup>503</sup> Usmanov WS I ¶¶21-25; Exh. R-74; Mem. J. ¶¶90-93.



370. The Tribunal notes that Messrs Shwa, Krespel and Gurtovoi became associated with the Uzmetal project after it was operational. It is not disputed that they played no role in the establishment of the investment. Since the legality requirement in Article 1(1) of the BIT is limited to conduct at the time when the investment was made, the Tribunal can dispense with reviewing later events and actions, such as those involving Messrs Shwa, Krespel and Gurtovoi.
371. In any event, the Tribunal notes that, in PO 4, in response to a document production request seeking information concerning payments made to Messrs Shwa, Krespel, and Gurtovoi, the Tribunal distinguished the situation of these individuals from the one of Mr. Ibragimov. In particular, it noted that, unlike for Mr. Ibragimov, there were no allegations of substantial payments and no consultancy agreements between Metal-Tech and Messrs Shwa, Krespel, and Gurtovoi. The Tribunal also determined that the Respondent could reasonably have been expected to ascertain whether Messrs Shwa, Krespel or Gurtovoi received payments from the Claimant and, if so, to identify the amounts paid. Subsequent to this determination, the Respondent has not made any corruption allegations in respect of Messrs Shwa, Krespel, and Gurtovoi, and therefore, there is no need for the Tribunal to pursue the matter.

**vi. Conclusion**

372. On the basis of the foregoing analysis, the Tribunal comes to the conclusion that corruption is established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan. As a consequence, the investment has not been "implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made" as required by Article 1(1) of the BIT.
373. Uzbekistan's consent to ICSID arbitration, as expressed in Article 8(1) of the BIT, is restricted to disputes "concerning an investment." Article 1(1) of the BIT defines investments to mean only investments implemented in compliance with local law. Accordingly, the present dispute does not come within the reach of Article 8(1) and is not covered by Uzbekistan's consent. This means that this dispute does not meet the consent requirement set in Article 25(1) of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute.
374. Having reached the conclusion that it lacks jurisdiction over the treaty claims, the Tribunal can dispense with the analysis of the Respondent's other objections to

jurisdiction and admissibility in respect of these claims, including the objections based on the violation of international public policy and transnational principles as well as on fraud.

### **C. JURISDICTIONAL OBJECTIONS TO UZBEK LAW CLAIMS**

375. In addition to the treaty claims, the Claimant has initially raised claims arising from the violation of customary international law as well as claims concerning violations of Uzbek law. In the course of the proceeding, it withdrew the claims derived from customary international law.<sup>504</sup> Thus, the Tribunal will limit its review to the objections against the claims based on violations of Uzbek law.

376. The Claimant submits that "even if Uzbekistan did not violate the standards of treatment set forth in the BIT, Uzbekistan is liable for violating several of its own foreign investment laws, whose standards of treatment are incorporated into the BIT through Article 11."<sup>505</sup> Thus, the Claimant pursues its Uzbek law claims<sup>506</sup> in reliance on Article 11 of the BIT.

377. Article 11 of the BIT states that if Uzbek or international law provide more favorable protections to investments than the Treaty, then these protections shall prevail:

"If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, *entitling investments by Investors* of one Contracting Party to a treatment more favorable than is provided for by the present

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<sup>504</sup> Mem. M. n.314 (acknowledging that "[b]ecause the relevant norms are subsumed within Uzbekistan's BIT obligations, the Tribunal need not determine liability for violations of customary international law separately from its consideration of Metal-Tech's treaty claims.").

<sup>505</sup> Mem. M. ¶200.

<sup>506</sup> The Tribunal notes that in its Request for Arbitration, the Claimant mentioned several violations of Uzbek Law: Articles 9, 10 and 19 on the Law on Foreign Investments, Articles 3 and 5 of the Law on Guarantees and Resolution No. 548 (RA ¶36). In its later submissions, the Claimant added a claim concerning violation of Article 18 of the Law on Foreign Investments, and did not pursue and/or establish its claims concerning Articles 9, 10 and 19 of the Law on Foreign Investments, Article 5 of the Law on Guarantees or Resolution No. 548 (Mem. M. ¶¶200-205 (footnote 378, however refers to Articles 9 and 10 Law on Foreign Investments and 3 and 5 Law on Guarantees); Reply M. ¶¶246 and 253; C-PHB 1 ¶¶108-109). In fact, the Claimant did not specifically object to the Respondent's position that the Claimant had abandoned all its Uzbek law claims excluding the claims in respect of Article 3 of the Law on Guarantees and Article 18 of the Foreign Investment Law (C-Mem. M. ¶560). Thus, the Tribunal understands that there are only two Uzbek law bases for claims advanced by the Claimant: Article 3 of the Law on Guarantees, and Article 18 of the Foreign Investment Law.

Agreement, such rules shall to the extent that they are more favorable prevail over the present Agreement” (emphasis added).

378. The Tribunal understands Article 11 to refer to non-treaty substantive protections and to open the access to dispute settlement under the Treaty, specifically under Article 8 of the BIT, for claims deriving from such substantive protections. Indeed, Article 8 of the Treaty contains the consent of the Contracting Parties to submit to ICSID any "any legal dispute ... concerning an investment of the latter in the territory of the former." Article 8 is thus a broad dispute resolution clause not limited to claims arising under the standards of protection of the BIT.
379. Article 8, like Article 11, refers to investments as defined in Article 1(1) of the Treaty. As was seen above, Article 1(1) contains a legality requirement which the Claimant's investment does not fulfill. Consequently, the Respondent has not given its consent in Article 8 to arbitrate claims based on Article 11 in combination with Uzbek law. Put simply, the illegality in the Claimant's investment bars jurisdiction over claims based on Article 11 of the Treaty. Given this conclusion, there is no need for the Tribunal to engage in a comparison of "favorability" of the protections existing under national law and under the BIT.
380. Therefore, the Claimant cannot rely on Article 11 in conjunction with Article 8 of the BIT as a basis for advancing its Uzbek law claims. Having reached this conclusion, the Tribunal can dispense with analysing the admissibility and/or merits of the Claimant's Uzbek law claims.
381. The Claimant also relies on Article 10 of the Law of Guarantees to submit that "Uzbekistan has consented to ICSID arbitration of claims arising under its Foreign Investment Laws in the Laws themselves."<sup>507</sup> In effect, the Claimant contends that the Tribunal has jurisdiction to entertain the Claimant's Uzbek law claims, not only on the basis of the Treaty, but also of Article 10 of the Law of Guarantees. For its part, the Respondent submits that Article 10 of the Law on Guarantees does not provide the basis for any such jurisdiction.<sup>508</sup>
382. Article 10 of the Law of Guarantees provides:

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<sup>507</sup> Mem. M. ¶280.

<sup>508</sup> C-Mem. M. n.1736.

“Disputes associated with foreign investments (investment dispute) directly or indirectly, can be settled on agreement of the parties by consultation between them. If the parties will not be able to achieve agreed settlement, than such dispute should be settled either by an economic court of the Republic of Uzbekistan or by arbitration in accordance with the rules and procedures of international agreements (conventions) on settlement of investment disputes, to which the Republic of Uzbekistan has been joined.

The parties involved in investment dispute can, on mutual agreement, determine the authority settling such dispute, as well as a county which can execute arbitration legal procedure of investment dispute.”<sup>509</sup>

383. To the Tribunal, Article 10 does not embody Uzbekistan's consent to submit disputes to ICSID arbitration independently of the BIT. Paragraph (1) of Article 10 merely states that a dispute which the Parties are unable to resolve amicably may be resolved by the Economic Court of Uzbekistan or through arbitration. It contains no expression of consent to a particular arbitral mechanism. More specifically, it embodies no offer by the State to submit to dispute settlement in the ICSID framework; ICSID is not even mentioned. The Tribunal notes that statutory provisions more specific than Article 10 – even provisions expressly naming ICSID – have been held not to contain state consent to ICSID arbitration.<sup>510</sup>

384. The second paragraph of Article 10 seems to the Tribunal to make it clear that “mutual agreement” of the Parties is required to determine the arbitral authority to settle a dispute. Thus, an agreement is needed designating an arbitral forum before a dispute can be brought before that forum. In other words, Article 10 does not entitle the investor to commence arbitral proceedings before ICSID, unless the state has consented to ICSID beyond the general mention of arbitration in Article 10(1). As in

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<sup>509</sup> Although the Claimant cites Exh. R-15, which contains the text just quoted, the Claimant reproduces Article 10 in a shorter version, which differs from the longer version for reasons which the Tribunal has not been able to elucidate: “If the parties are not able to reach an amicable resolution, such a dispute shall be resolved by the Economic Court of the Republic of Uzbekistan, or by arbitration in accordance with the rules and procedures of the international agreements (treaties and conventions) on settlement of investment disputes into which the Republic of Uzbekistan has entered.” (Mem. M. ¶280).

<sup>510</sup> See also *Mobil Corp. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010; *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 (both interpreting Article 22 of the Venezuelan Foreign Investment Law of 1999 which provides: “Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which the provisions of [ICSID] are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect”).

*Biwater*, the Tribunal considers that the words "on mutual agreement" preclude relying on the Law of Guarantees as a standing unilateral offer to arbitrate which can be accepted by the investor.<sup>511</sup>

385. One could of course argue that Uzbekistan gave its consent to ICSID jurisdiction as required by Article 10 of the Law on Guarantees through Article 8(1) of the Treaty. This argument would, however, not further the Claimant's case: the Tribunal has already held (section IV.B.6(c)(vi)) that Uzbekistan has not consented to arbitrate this particular dispute in Article 8(1) of the Treaty.
386. In conclusion, the Tribunal finds that Uzbekistan has not consented to ICSID jurisdiction through Article 10 of the Law of Guarantees and, therefore, the Tribunal lacks jurisdiction over claims brought on this basis.
387. The Tribunal notes that in the initial stages of the arbitration, the Claimant seemed to share this view. Indeed, in the Claimant's Request for Arbitration, the Claimant submitted that the Respondent "expressed its consent in Article 8 of the Israel-Uzbekistan Bilateral Investment Treaty."<sup>512</sup> Despite mentioning several provisions of the Law on Guarantees, the Claimant nowhere stated that Uzbekistan had also consented to ICSID jurisdiction under Article 10 of that Law. In fact, in its early correspondence with the Tribunal, the Claimant appeared to have ruled out that the Tribunal's jurisdiction was founded on a domestic investment law.<sup>513</sup>
388. For these reasons, the Tribunal concludes that Article 10 of the Law of Guarantees does not provide the basis of consent to ICSID jurisdiction. Therefore, the Tribunal has no jurisdiction over the Uzbek law claims.

#### **D. CONCLUSION ON CLAIMS**

389. As a result of the foregoing analysis, the Tribunal lacks jurisdiction over Metal-Tech's treaty claims as well as over Metal-Tech's claims based on Uzbek law. While reaching

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<sup>511</sup> *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (finding that Section 23.2 of the Tanzania Investment Act which provided that "A dispute between a foreign investor and the [Tanzania Investment] Centre ... may be submitted to arbitration in accordance with any of the following methods as may be mutually agreed by the parties, that is to say – (b) in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes" did not constitute a standing unilateral offer to arbitrate.)

<sup>512</sup> RA ¶33.

<sup>513</sup> Letter from Claimant to the Tribunal dated 28 July 2010 at 4-5 (stating that this case differs from *Newmont USA Limited and Newmont (Uzbekistan) Limited v. The Republic of Uzbekistan*, ICSID Case No. ARB/06/20, where "the jurisdiction of the ICSID tribunal was based on a domestic investment law, not on a bilateral treaty").

the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.

390. In this context, the Tribunal believes it should acknowledge the co-operative attitude of Metal-Tech and its Chairman and CEO. Mr. Rosenberg was forthcoming and willing to provide responses to the questions raised by the Parties and by the Tribunal. Indeed, the Tribunal has no doubt that the Claimant did all it could to produce relevant and contemporaneous documents to justify the services rendered by the Consultants. The fact is that it was unable to do so, which contributed to the Tribunal's reaching the conclusions set forth above.

## **E. COUNTERCLAIMS**

391. The Respondent's request for relief includes the prayer that "[t]he Tribunal, in addition [to dismissing the claims], *should grant Respondent's counterclaims.*"<sup>514</sup> Accordingly, the Tribunal will now proceed to consider the counterclaims.

### **1. Respondent's Position**

392. The Respondent submits that its counterclaims fall within the Centre's jurisdiction and the Parties' consent to arbitration provided in Article 8(1) of the BIT. It also asserts that the counterclaims arise directly out of the subject matter of the dispute pursuant to Article 46 of the ICSID Convention and Article 40(1) of the ICSID Arbitration Rules. In support of this proposition, the Respondent relies on *Saluka v. Czech Republic*, where the tribunal explained that the "language of Article 8, in referring to 'all disputes,' is wide enough to include disputes giving rise to counterclaims" and that "the need for a dispute, if it is to fall within the Tribunal's jurisdiction, to be 'between one Contracting

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<sup>514</sup> C-Mem. M. ¶2. See also R-PHB 1 ¶594; R-PHB 2 ¶36.

Party and an investor of the other Contracting Party' carries with it no implication that Article 8 applies only to disputes in which it is an investor which initiates claims."<sup>515</sup>

393. It is the Respondent's submission that, as a result of the Claimant's unlawful actions and because the State has an ownership interest in AGMK and UzKTJM, the Respondent has suffered damages due to the Claimant's misrepresentations. Such damages are in the form of "lost revenue that it would have earned had AGMK received market price for its molybdenum middlings; lost revenue that it would have received had Uzmetal manufactured and exported high value-added products; lost revenue that it would have received had Uzmetal extracted rhenium and osmium for AGMK; lost revenue that it would have received had Uzmetal entered into tolling agreements with UzKTJM; revenue lost as a result of UzKTJM's bankruptcy due to Uzmetal's failure to sell it required volumes of trioxide and to enter into tolling agreements; and revenue lost as a consequence of Uzmetal having purchased overvalued goods and services from the Claimant under the Construction Contract".<sup>516</sup> In addition, the Respondent submits that it has suffered direct damage arising from lost tax, custom revenue and foreign exchange as a result of the Claimant's misrepresentations and other violations of Uzbek law, as well as other consequential damages, such as increased unemployment among its citizens.<sup>517</sup>
394. The Respondent denies the Claimant's allegations that its counterclaims are "vague and undeveloped". According to the Respondent, ICSID Arbitration Rule 40(2) merely requires that a counterclaim be presented no later than in the counter-memorial. The rule "does not provide a standard for the amount of factual detail required to maintain a counterclaim."<sup>518</sup>
395. In response to the Claimant's argument that the counterclaims are premised on contractual losses suffered by AGMK or UzKTJM, the Respondent notes that it does not seek recovery of the contractual losses suffered by these entities. The counterclaims seek compensation for losses suffered by the Respondent as a State and as a shareholder in AGMK and UzKTJM. Further, the Respondent's counterclaims do not arise out of contract. They are based on Article 8(1) of the BIT, which is broad

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<sup>515</sup> Rej. M. ¶432, citing *Saluka v. Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004 (hereafter "*Saluka*"), ¶39.

<sup>516</sup> C-Mem. M. ¶565.

<sup>517</sup> *Id.*

<sup>518</sup> R-PHB 1 ¶592.

enough to cover the counterclaims, as “they arise directly out of the investment at issue rather than out of non-compliance with the general law of Uzbekistan.”<sup>519</sup>

396. In answer to the Claimant’s further argument that the Respondent’s counterclaims are premised on the Claimant’s failures to pay certain taxes and custom duties, the Respondent stresses that its claims are not for tax or customs fraud or for the recovery of tax or custom dues. Instead, the counterclaims concern “the damage caused to Respondent by Claimant’s fraudulent misrepresentations, breach of fundamental investment obligations, and fraudulent transfer-pricing scheme”,<sup>520</sup> which misconduct relates to, and arises out of, the investment at issue.
397. The Respondent also submits that it does not seek to enforce its own tax or custom laws. Instead, it is seeking to recover for injuries directly sustained by it on account of the Claimant’s breach of the investment obligations and fraudulent misconduct. Put differently, the counterclaims seek the amounts that the Respondent would have received had the Claimant fulfilled its investment obligations. Consequently, the Claimant’s objection that the counterclaims are “premised on obligations and duties contained in a host state’s domestic law” is wrong. In support, the Respondent relies on the decision in *Amco Asia*.<sup>521</sup>
398. Finally, the Respondent submits that its counterclaims must be admitted “because the reciprocal obligations at the center of both the claims and counterclaims have a “common origin””,<sup>522</sup> namely Resolutions Nos. 15 and 29-F. These instruments were executed to realize a successful joint venture, and both claims and counterclaims arise out of the Claimant’s and the Respondent’s interpretations of these instruments as well as conduct of the Parties concerned with the joint venture.
399. For all of these reasons, argues the Respondent, the Tribunal should “uphold its jurisdiction over Respondent’s counterclaims, find the Claimant liable for the damage caused by its unlawful, fraudulent misconduct and breach of its fundamental investment obligations, and set a date for further briefing on the quantification of the damage owing to the Respondent”.<sup>523</sup>

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<sup>519</sup> Rej. M. ¶433.

<sup>520</sup> R-PHB 1 ¶585.

<sup>521</sup> R-PHB 1 ¶¶588-590 citing *Amco Asia v. Indonesia*, ICSID Case No. Arb/81/1, Resubmitted Case, Award, 5 June 1990.

<sup>522</sup> R-PHB 1 ¶588.

<sup>523</sup> R-PHB 1 ¶594.



## 2. Claimant's Position

400. According to the Claimant, Uzbekistan has failed to state viable counterclaims, simply enumerating seven counterclaims in a single paragraph. The Claimant submits that the Respondent's counterclaims must be rejected for three main reasons: (i) the counterclaims are inadequately pled; (ii) Uzbekistan lacks standing to bring derivative claims on behalf of UzKTJM and AGMK; and (iii) the one counterclaim not brought on behalf of UzKTJM or AGMK is outside the jurisdiction of this Tribunal. In addition, because the counterclaims appear to be premised on the very same arguments that form the basis of Uzbekistan's defense on the merits and objection to jurisdiction, Uzbekistan's counterclaims fail on the merits for the same reasons that Uzbekistan's defenses and jurisdictional objections fail. In any event according to the Claimant, the counterclaims must be dismissed as they are too vague to permit a substantive response. The Claimant would be prejudiced if they are allowed to stand.
401. First, the Claimant insists that the Respondent's counterclaims cannot be maintained because Uzbekistan's articulation in one paragraph of its Counter-Memorial on Merits of seven assorted theories is insufficient to satisfy the requirement of ICSID Arbitration Rule 40(2).<sup>524</sup> That rule requires that counterclaims be presented no later than in the counter-memorial. Uzbekistan's defense that Rule 40(2) "does not provide a standard for the amount of factual detail required to maintain a counterclaim" is not convincing as Rule 40(2) does incorporate a standard of specificity adequate to give the opposing party a fair opportunity to respond.<sup>525</sup>
402. Second, the Claimant contends that Uzbekistan lacks standing to pursue counterclaims for lost revenues on behalf of AGMK and UzKTJM, which are not organs of Uzbekistan or parties to this arbitration. AGMK and UzKTJM may assert claims for lost revenue, if at all, in an appropriate forum. The Respondent's submission that its counterclaims are not brought on behalf of AGMK or UzKTJM, but rather on Uzbekistan's own behalf for losses suffered as AGMK and UzKTJM's shareholder is wrong. In support of its propositions, the Claimant relies on *Hamester v. Ghana*, where the Tribunal denied a counterclaim which arose from the government's losses of its ownership interest in a state-owned corporation.<sup>526</sup>

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<sup>524</sup> C-PHB 1 ¶180.

<sup>525</sup> C-PHB 1 ¶180 citing Rej. M. ¶444.

<sup>526</sup> C-PHB 1 ¶181 citing *Hamester* ¶184.

403. Third, the Claimant submits that the Tribunal lacks jurisdiction to entertain Uzbekistan's counterclaims seeking "lost tax and custom revenue and foreign exchange" and "consequential damages, such as increased unemployment".<sup>527</sup> The legal basis of these counterclaims is the violation of Uzbek law. It involves rights and obligations which are applicable to persons subject to Uzbekistan's jurisdiction. These counterclaims are not directly concerned with the Claimant's investment. Neither are they directly concerned with the subject matter of the dispute which deals with the Respondent's violations of international law. For these reasons, contrary to the Respondent's assertion, Article 8(1) of the BIT is not sufficiently broad to include Uzbekistan's consent to arbitrate these counterclaims.<sup>528</sup>

404. Finally, the Claimant submits that the counterclaims based on "Claimant's misrepresentations and other violations of Uzbek law" are vague and speculative. According to the Claimant, Uzbekistan has not connected the claimed misrepresentations to the losses it allegedly suffered. The Claimant submits that "[t]he generalized references to misrepresentations and the bare listing of alleged losses do not provide enough information regarding the basis for Uzbekistan's counterclaims to allow the Claimant to form a substantive response."<sup>529</sup> The counterclaims should therefore be dismissed as they have been insufficiently pled.

### **3. Analysis**

405. Article 46 of the ICSID Convention allows for counterclaims in the following terms:

"Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

406. Rule 40 of the ICSID Arbitration Rules gives further specifications:

"(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre."

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<sup>527</sup> Reply M. ¶258 citing C-Mem. M. ¶565.

<sup>528</sup> Reply M. ¶¶258-259.

<sup>529</sup> Reply M. ¶260.

(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.”

407. As a result, two conditions must be met for an ICSID tribunal to entertain a counterclaim: (i) the counterclaim must be within the jurisdiction of the Centre, which includes the requirement of consent, and (ii) it must “aris[e] directly out of the subject-matter of the dispute”, the second requirement also being known as the “connectedness” requirement. Essentially, the second requirement supposes a connection between the claims and the counterclaims. It is generally deemed an admissibility and not a jurisdictional requirement.
408. The first requirement relates to jurisdiction and, in this respect, singles out the condition of consent. The conditions for jurisdiction in ICSID arbitration are found in Article 25 of the ICSID Convention and include the existence of a legal dispute and of an investment, nationality, and consent. Subject to consent, these conditions are not controversial here, and rightly so. The Tribunal must thus focus on consent.
409. In treaty arbitration, consent is achieved by the respondent State making an offer to arbitrate when ratifying the investment treaty and the investor accepting that offer in principle when filing the request for arbitration. The scope of the State’s offer is defined in the investment treaty, in particular in the dispute resolution clause of that treaty. When he initiates an arbitration under the treaty, the investor accepts the offer within the scope defined in the treaty. If he chooses to resort to ICSID arbitration as one of the dispute settlement options in the treaty, the investor also accepts the conditions set in the ICSID Convention and Arbitration Rules.
410. In the present case, the dispute resolution provision in the BIT provides that “[e]ach Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes [...] *any legal dispute* arising between that Contracting Party and a national or company of the other Contracting Party *concerning an investment* [...]” (emphasis added). Thus, Article 8(1) of the BIT is not restricted to disputes initiated by an investor against a Contracting Party. It covers *any* dispute about an investment.

411. The next question then is whether the counterclaims "concern an investment". The definition of the term investment is found in Article 1(1) of the BIT. It includes a legality requirement. As the Tribunal has concluded above, the Claimant's "investment" does not meet the legality requirement and thus does not constitute an investment in the meaning of the BIT. In other words, the State's offer to arbitrate did not extend to this "non-investment" and the investor's acceptance included this limitation.
412. The Tribunal notes that its reference to the BIT condition of consent is in conformity with the wording of Article 46 of the ICSID Convention that insists on consent. It is further in line with the *travaux préparatoires* according to which Article 46 of the Convention was "in no way intended to extend the jurisdiction of the arbitral tribunal".<sup>530</sup> It is similarly in accord with the decisions in *Saluka*,<sup>531</sup> *Roussalis v. Romania*,<sup>532</sup> and to a major extent to *Goetz v. Burundi*.<sup>533</sup>
413. It follows from the foregoing discussion that the first requirement set in Article 46 of the ICSID Convention which relates to jurisdiction, including consent, is not met. As a consequence of its having no jurisdiction over the claims, this Tribunal has no jurisdiction over the counterclaims. It will thus abstain from reviewing whether the counterclaims meet the second requirement of Article 46 dealing with admissibility and demanding a connection with the claims. It will also abstain from analyzing whether the counterclaims are well-founded and in particular whether they were sufficiently pled.

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<sup>530</sup> Summary Record of Proceedings, Geneva Consultative Meeting of Legal Experts, February 17-22 1964 in History of the ICSID Convention, Vol. 2 (ICSID 1970) 367, 422.

<sup>531</sup> *Saluka* ¶39 (holding that the dispute resolution clause ("all disputes...concerning an investment"), was "wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met.").

<sup>532</sup> *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, ¶866 ("It is not disputed that Respondent expressed its consent to arbitration in the BIT and that Claimant accepted Romania's offer to arbitrate. Contrary to Claimant however, Respondent considers that such consent included consent to arbitrate counterclaims. Whether it is so must be determined in the first place by reference to the dispute resolution clause contained in the BIT. The investor's consent to the BIT's arbitration clause can only exist in relation to counterclaims if such counterclaims come within the consent of the host State as expressed in the BIT.")

<sup>533</sup> *Antoine Goetz and Consorts and another v Republic v Burundi*, ICSID Case No ARB/01/2, Award, ¶276 et. seq. While *Goetz* refers to the BIT conditions of consent, and in particular to the definition of investment under the BIT, towards the end of its analysis it appears to endorse the dissenting opinion of Professor Reisman in *Roussalis*, according to whom "[w]hen the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor elects to pursue" (*Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of Prof. Reisman, 28 November 2011). The Tribunal understands the endorsement of the *Goetz* tribunal to refer to a situation in which the dispute settlement clause only grants the right to bring claims to the investor.

## V. COSTS

414. The Claimant's total costs incurred in connection with these proceedings amount to USD 1,687,966.86, comprising legal fees and expenses of USD 1,112,966.86 and payments to ICSID of USD 575,000.00. The Respondent's costs in connection with this arbitration were USD 7,985,954.95, comprising legal fees and expenses of USD 7,435,954.95 and payments to ICSID of USD 575,000.00.
415. Each Party has asked that their costs be borne by the other Party. In its Memorial on Costs, the Claimant requested “an award of the costs it has incurred in connection with this arbitration, plus interest accrued until the date any such cost award is paid.”<sup>534</sup> For the event that the Respondent would prevail, the Claimant submitted that the Tribunal “should order the Parties to bear their own costs, with two exceptions: Respondent should be ordered to pay the costs of both Parties, the Tribunal, and ICSID that are attributable to (i) Respondent’s procedural decisions that are directly responsible for the inefficiency and increase in costs of this proceeding and (ii) the untimely and inefficient manner in which Respondent raised its jurisdictional allegations of corruption.”<sup>535</sup>
416. In its Reply submission on costs, the Respondent requested the Tribunal to award the Respondent “all of its costs, plus interest from the date of the Award.”<sup>536</sup>
417. The Parties agree that conduct in the proceedings is a basis to shift costs from one party to the other. Both Parties have pointed to examples of procedural conduct in an endeavor to convince the Tribunal to award their costs. The Claimant requests the Tribunal to adopt a “totality-of-the-circumstances” approach in awarding costs and to bear in mind *inter alia*: “Respondent’s baseless request for a sweeping confidentiality order, its untimely claim to equal time division at the January hearing (despite the Tribunal having already ruled on an allocation of time), its error-ridden submissions, its mischaracterization of the record and failure to produce important exhibits, its 1009 pages of redirect documents, and its tactical decision to submit duplicative witness statements and unqualified fact and expert witness testimony.”<sup>537</sup> Similarly, the Respondent requests the Tribunal to award its costs as *inter alia* the Claimant

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<sup>534</sup> C-CB 1 ¶26.

<sup>535</sup> *Id.* ¶27.

<sup>536</sup> R-CB 2 ¶19.

<sup>537</sup> C-CB 2 ¶20.

demanded arbitration in bad faith and with unclean hands; the Claimant refused the Respondent's request to bifurcate the proceedings requiring the Respondent to defend the Claimant's frivolous claims on merits; and the Claimant was solely responsible for the May Hearing.

418. Under Article 61(2) of the ICSID Convention, "the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid." This provision establishes the Tribunal's discretion in allocating the ICSID arbitration costs and the Parties' costs incurred in connection with the arbitration, including legal fees.
419. Two approaches may be discerned in awarding costs in ICSID arbitrations. Some tribunals apportion ICSID costs in equal shares and rule that each party should bear its own costs. Others apply the principle pursuant to which "costs follow the event", with the result that the party that does not prevail bears all or part of the costs of the proceedings, including those of the other party.<sup>538</sup>
420. In the circumstances of this case, the Tribunal believes that each Party should bear its own costs and the Parties should share the ICSID costs. In this latter respect, it is noted that the ICSID Secretariat will provide the Parties with a statement of the case account in due course.
421. The reasons for the Tribunal's determination on the allocation of costs are essentially the following. It is true that the Respondent prevails. At the same time, it is also true that the Claimant sought to minimize the costs of the proceedings, which is not the case of its opponent, as the disparity of the cost figures shows. The choice not to bifurcate jurisdiction and liability, but only quantum, does not plead against the Tribunal's apportionment. Indeed, if jurisdiction was not bifurcated it is because the Respondent's objections addressed facts that related to both jurisdiction and merits.
422. More important, the Tribunal's determination is linked to the ground for denial of jurisdiction. The Tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear –

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<sup>538</sup> See e.g., *Plama* ¶¶321-322.

and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.

## **VI. DECISION**

423. For the reasons set forth above, the Tribunal makes the following decision:

- a. The Tribunal lacks jurisdiction over the claims and the counterclaims before it;
- b. The costs of the proceedings, including the fees and expenses of the Tribunal and the fees of ICSID, shall be borne by the Parties in equal shares;
- c. Each Party shall bear the legal fees and other expenses it incurred in connection with the arbitration; and,
- d. All other requests for relief are dismissed.



John M. Townsend  
Arbitrator

Date: 24 September 2013



Claus von Wobeser  
Arbitrator

Date: 2 October 2013



Prof. Gabrielle Kaufmann-Kohler  
President

Date: 20 September 2013