

**AN ARBITRATION**

**UNDER THE UNCITRAL RULES (AS REVISED IN 2010)**

**B E T W E E N :**

**RUBY ROZ AGRICOL LLP**

**Claimant**

**- and -**

**THE REPUBLIC OF KAZAKHSTAN**

**Respondent**

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**AWARD ON JURISDICTION**

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**The Tribunal**

Mr. Bruno Boesch

Mr. Joseph Neuhaus

Mr. Alan Redfern (Chairman)

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## **I Introduction**

### **A. The Parties**

1. The Claimant is Ruby Roz Agricol LLP, a corporation constituted under the laws of the Republic of Kazakhstan, with legal domicile in the Republic of Kazakhstan, 040606, Almaty Oblast, Zhambyl District, Village of Balgabek Kadyrbekuly. It is referred to in these proceedings as “Ruby Roz” or, from time to time, as “the Claimant” or as “RRA”.

2. The “Notice of Arbitration” in this case was dated 8 October 2010 and was lodged by the U.S. law firm of Crowell & Moring LLP of 1001 Pennsylvania Avenue, Washington DC. At that time, there were two Claimants – Ruby Roz and its owner, Kassem Abdullah Omar. In October 2011, Mr. Omar withdrew from the proceedings and the arbitration then continued with Ruby Roz as the Claimant.

3. Ruby Roz is now represented in this arbitration by:

Dr Hamid Gharavi, Derains & Gharavi, 25, rue Balzac, 75008, Paris, France

Tel: 00 33 1 40 555 100

Fax: 00 33 1 40 555 105

Email: [hgharavi@derainsgharavi.com](mailto:hgharavi@derainsgharavi.com)

[mvanleeuwen@derainsgharavi.com](mailto:mvanleeuwen@derainsgharavi.com)

[sadell@derainsgharavi.com](mailto:sadell@derainsgharavi.com)

[ssalekhim@derainsgharavi.com](mailto:ssalekhim@derainsgharavi.com)

4. The Respondent is the Republic of Kazakhstan, a sovereign state. It is referred to in these proceedings as “the Republic” or “the Respondent”.

5. The Respondent is represented in this arbitration by:

Mr. Peter Wolrich, Curtis, Mallet-Prevost, Colt & Mosle LLP, 6 Avenue Vélasquez, 75008 Paris, France

Tel: 00 33 1 42 66 39 10  
fax: 00 33 1 42 66 39 62  
Email: [pwolrich@curtis.com](mailto:pwolrich@curtis.com)  
[glyonnet@curtis.com](mailto:glyonnet@curtis.com)  
[galvarez@curtis.com](mailto:galvarez@curtis.com)  
[amoukhitdinov@curtis.com](mailto:amoukhitdinov@curtis.com)

**B. Brief Description of the Dispute**

6. Ruby Roz's main activity was the production, breeding and marketing of poultry for the Kazakh market. Ruby Roz was founded in Kazakhstan in 1998 by Mr. El-Badaoui and his wife, Li Shu Hadidja Abdullah Li. In September 2004, Ruby Roz was sold to Mr. Kassem Omar, in circumstances which are disputed in this arbitration and which will be briefly described later.
7. The Claimant alleges that, commencing in 2007, the Republic caused very substantial losses to the Claimant and to Mr. Kassem Omar through actions which were in violation of the law of Kazakhstan and the principles of international law. These actions are alleged to have included unlawful interference by governmental agencies and authorities in the management of the Claimant and the operation of its business; and they are said to have resulted in the expropriation of Ruby Roz's assets.<sup>1</sup>
8. The Respondent denies that the actions carried out by governmental agencies and authorities were unlawful; and it denies that it is responsible for any losses suffered by the Claimant. The Respondent has also raised objections to the jurisdiction of the Tribunal. The issue of jurisdiction is the primary focus of this Award, but a description of the background facts, the arbitral proceedings to date, and the many and varied arguments put forward by the parties, together with both factual and expert evidence, is useful for the proper understanding of this case and of this Award.

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<sup>1</sup> Notice of Arbitration, paragraphs 1 and 2; Statement of Claim paragraphs 191 to 363.

### C. The Contract

9. On 5 March 1999, Ruby Roz and the Republic entered into a contract relevant to this dispute (the “Contract”). Its introductory provisions make it clear that it is an investment contract. They state:

“The present contract for provision of investment incentives and government support of investment activities in the Republic of Kazakhstan is concluded between the Agency on Investments of the Republic of Kazakhstan (hereinafter referred to as the “Agency”), represented by the Chairman of the Agency on Investments of the Republic of Kazakhstan Anvar Galimullaevich Saydenov and ‘Ruby Roz Agricol’ Limited Liability Partnership (hereinafter referred to as the ‘Investor’), represented by the Director Shihade Ali Kassem.

Taking into consideration the facts, that:

- a) The Legislation of the Republic of Kazakhstan on state support of direct investments, based on the Constitution of the Republic of Kazakhstan, is aimed at creating a favourable investment climate to promote the production of goods and services in the priority sectors of the economy;
- b) The Agency is authorized to effect negotiations, set terms and sign contracts – it is the only state agency that is authorized to represent the Republic of Kazakhstan before Investors who invest directly in the Republic of Kazakhstan;
- c) The Agency and the Investor have agreed that the present contract will regulate their mutual rights and responsibilities in investment activities.”

10. The “Investor” is defined in Article 1 (the definitions section of the Contract) as “‘Ruby Roz Agricol’ Limited Liability Partnership”; and an “Approved Investor” is defined as “the Investor who has signed a contract with the Agency”.
11. The “Governing Law” is defined in Article 1 as “the legislation of the Republic of Kazakhstan as well as international treaties ratified by the Republic of Kazakhstan”.
12. Article 2 of the Contract (“Purpose of the Contract”) states: “The present Contract determines the legal framework in Agency-Investor relations under the laws of the Republic of Kazakhstan with the aim to provide various incentives and government support to carry out investment activities in the sphere of agricultural production”.

13. Article 3.1 describes the “Subject of Investment Activity” under the Contract as: “the production set-up of broiler incubation, farming and slaughter in Dzhambulskiy District of Almaty Region, including:

Reconstruction of poultry-houses	300,000 USD
Purchase of additional equipment	113,000 USD
Purchase of land lots	75,000 USD
Purchase of real estate	10,400 USD
Purchase of equipment	<u>4,229,300 USD</u>
Total:	<b>4,727,700 USD</b>

Capital Investments:

Current capital – 4,284,170 USD”

14. And in Article 3.2, the “overall value of direct investments (fixed capital investments)” was said to be US\$4,727,700.

15. In Article 4, the “Subject of the Contract” was said to be the “exemption procedure” extended by the Republic to the Investor, namely, the reduction of tax from the standard rate for income tax by 100% until 1 March 2004 and by 50% until 1 March 2005; for property tax by 100% until 1 March 2004 and 50% until 1 March 2005; and for land tax by 100% until 1 March 2004 and by 50% until 1 March 2009.

16. Article 15, entitled “Contract Stability Guarantee”, provides as follows:

“In case any changes or amendments to the legislative acts of the Republic of Kazakhstan are made after the date of the Contract, making further adherence to initial Contract specifications impossible or causing substantial changes to its economic terms, the Approved Investor and the Agency make changes or amendments to the Contract by mutual consent.”

17. Article 16 states the “Governing Law” in slightly different terms from those used in the “Definitions Section” of the Contract, though apparently to the same effect. Article 16 says:

“For the Contract and other agreements that have been signed on the basis of the Contract the legislation of the Republic of Kazakhstan is applied, unless otherwise provided for by International Treaties ratified by the Republic of Kazakhstan.”

18. Article 18 contains the following provision for Changes and Amendments to the Contract:

“18.1 The provisions of the Contract remain unchanged for the entire period of the Contract, unless otherwise provided for by the present Contract.

18.2 The Parties have the right to introduce changes and amendments to the Contract through mutual negotiations and consultations.

Such changes and amendments enter into force from the moment of registration of the changed and/or amended text of the Contract in the Agency, unless other later dates are agreed upon by the Parties.”

19. Article 19 states that the Contract “is terminated at the end of the last day of February 2009, starting from the effective date of the contract”, unless terminated earlier (in circumstances which do not apply to the present case).
20. Finally, at Article 14 of the Contract, there is an important provision entitled “Arbitration”, which will be set out in full in a later section of this Award (para. 26 below).
21. The Contract will be considered again later in this Award, in discussing whether – as the Claimant contends – it provides an alternative basis for the Tribunal’s jurisdiction. However, it is appropriate to make two comments at this stage.
22. First, it is evident from Article 4 that the purpose of the Contract was to confer certain privileges upon Ruby Roz, in accordance with the Republic’s policy of encouraging investment in Kazakhstan. The most important of these privileges appear to be the tax privileges, which begin with a 100% exemption from income tax, property tax and land tax until 1 March 2004 and decrease to a 50% exemption for income tax and property tax until 1 March 2005 and for land tax, until 1 March 2009. In short, the tax exemptions, although no doubt valuable, are of limited extent and duration.

23. Secondly, the “Contract Stability Guarantee” in Article 15 of the Contract appears to be of little value to the Investor, since even if legislative acts of the Republic affect the Contract by causing “substantial changes to its economic terms”, the Investor’s only contractual remedy is for the Investor and the Agency to “make changes or amendments to the Contract by mutual consent”.

**D. The 2002 Amendment**

24. On 14 August 2002, Ruby Roz and the Republic entered into an “Amendment Agreement to Contract No. 0097-03-99 dated March 5, 1999”. This Amendment Agreement (“the 2002 Amendment”) was a short, two page document that amended the Contract by reference to specific provisions of the Contract. For instance, it stated:

- “2) Item 3.1 of the Contract should read:

‘The subject of investment activity under the present contract is the production setup of broiler incubation, farming and slaughter’ in Dzhambulskiy, Karasayskiy, Iliyskiy, Enbekshikazakhskiy, Talgarskiy and Uygurkiy Districts of Almaty Region, including:

Purchase and reconstruction of poultry-houses and purchase of a land lot – 385,000 USD

Equipment delivery and installation – 12,135,800 USD

Purchase of additional equipment for poultry production – 928,000 USD

Item 3.2 shall read as follows: ‘The overall capital investment volume – 14,278,900 USD’

- 3) The following paragraph shall be added to item 4.2:

‘relief from duty on imported goods necessary for carrying out investment activities according to Appendix No. 2 to the present Contract’.

- 4) In item 6.2, the words ‘to create 45 jobs’ shall be substituted by the words ‘to create 1000 jobs’.”

25. The 2002 Amendment concluded:

“The present Agreement is an integral part of Contract No. 0097-03-99 dated March 5, 1999, concluded between the Agency on Investments of the Republic of Kazakhstan and the ‘Ruby Roz Agricol’ Limited Liability Company.

The Agreement is signed in the City of Astana, Republic of Kazakhstan by the authorized representatives of the parties.”

**E. The Notice of Arbitration**

26. The Notice of Arbitration dated 8 October 2010, to which reference has already been made, states at paragraph 10:

“10. The arbitration agreement pursuant to which this action is brought is contained in Article 14 of the Contract. It provides:

‘14.1 The Parties undertake to do everything dependent upon them to resolve all disputes and differences connected with the investment activities or arising out of the performance or interpretation of any provisions of this Contract provision by means of negotiations between each other.

14.2 In case the Parties do not reach an agreement within two months from the date of written request by one Party to another Party, the dispute is removed:

a) to the judicial organs of the Republic of Kazakhstan vested with the authority of the laws of the Republic of Kazakhstan to hear such disputes;

b) or to the various foreign arbitration organs, if interests of a foreign Investor are affected and there is a written objection by him against having the dispute be resolved in Kazakh courts.

The procedure for review of disputes with the Investor arising out of the Contract is determined in accordance with the laws of the Republic of Kazakhstan.

14.3 The Parties are not excused from performing their obligations under the Contract until a full resolution of disputes and differences arising thereunder.’ ”

27. The Notice of Arbitration continues:

“Article 14.1 of the Contract thus requires the parties to attempt to reach an amicable resolution of any disputes.

Ruby Roz notified Kazakhstan in writing of the existence of a dispute arising under the Contract on 9 June 2010 and provided written objections to the resolution of this dispute by Kazakh judicial

bodies.<sup>2</sup> More than two months passed without a response by Kazakhstan. Thus, on 31 August 2010, Ruby Roz notified the Republic that Ruby Roz would proceed to commence an international arbitration against the Republic.<sup>3</sup>

The plain language of Article 14 of the Contract gives the investor the choice to go to international arbitration if it chooses (by objecting to litigation in Kazakhstan); it also leaves the choice of forum to the investor (referencing foreign arbitration bodies). Further, the clause confirms that 'the procedure for review of disputes with the Investor arising out of the Contract is determined in accordance with the laws of the Republic of Kazakhstan'.

At the time of the Contract's execution, the legislation of the Republic of Kazakhstan relating to the 'procedure for review of disputes' was contained in Article 27 of the 1994 Law on Foreign Investment. Article 27(2) of the 1994 Law on Foreign Investment states as follows:

'2. If such disputes cannot be resolved through negotiations within three months from the date of a written request of any party to the other, the dispute shall, at the option of either party, be transferred for resolution, with the written consent of a foreign investor:

1) to the judicial authorities of the Republic of Kazakhstan;

2) in accordance with the agreed procedure for settling disputes, including those set out in the contract or any other agreement between the parties to the dispute, to one of the following arbitral bodies:

a) International Center for Settlement of Investment Disputes (hereinafter – the Center), established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on March 18, 1965 (ICSID Convention), if the state of the investor is a party to this Convention;

b) Additional Body of the Center (functioning under Additional Body Rules), if the state of the investor is not party to the ICSID Convention;

c) arbitration bodies established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);

d) arbitration in the Arbitration Institute of the Chamber of Commerce in Stockholm;

e) arbitration commission in the Chamber of Commerce of the Republic of Kazakhstan.'

In the case a foreign investor selects the procedure set forth by subparagraph 2) of paragraph 2 of this article, the consent

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<sup>2</sup> Letter from Crowell & Moring LLP, dated 9 June 2010. Exhibit C-9.

<sup>3</sup> Letter from Crowell & Moring LLP, dated 31 August 2010. Exhibit C-10.

of the Republic of Kazakhstan is considered to be secured. The consent of the foreign investor may be given at any time, by written request to the authorized state body or at the time of arbitration.”

28. This introductory section of the Notice of Arbitration concludes, at paragraph 13:

“Accordingly, Claimants hereby initiate recourse to arbitration with the submission of this Notice of Arbitration against Kazakhstan pursuant to Articles 14 and 15 of the Contract, Article 27 of 1994 Law on Foreign Investment, Article 17 of the 1997 Law on State Support of Direct Investment, Articles 4 and 9 of the 2003 Law on Investments and Articles 3 and 20 of the *Arbitration Rules of the United Nations Commission on International Trade Law*, adopted by the U.N. General Assembly on 15 December 1976 (‘UNCITRAL Arbitration Rules’).”<sup>4</sup>

29. Finally, the Notice of Arbitration proposed that there should be an arbitral tribunal of three arbitrators chosen in accordance with the UNCITRAL Arbitration Rules, that the proceedings should be conducted in English and that the arbitral tribunal should have its seat in the City of New York, NY, United States of America.

#### **F. Appointment of the Tribunal**

30. The procedure for the appointment of an arbitral tribunal is set out in Section II of the 1976 UNCITRAL Arbitration Rules. Article 5 of these Rules provides that if there is no agreement on the number of arbitrators (one or three) within fifteen days after receipt by the Respondent of the Notice of Arbitration, three arbitrators shall be appointed; and Article 7 provides that each party shall appoint one arbitrator and the two arbitrators thus appointed “shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal”.

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<sup>4</sup> The UNCITRAL Arbitration Rules were revised in 2010 and, as will be described later in this Award, the parties agreed that these revised Rules should govern the conduct of this arbitration. However, the reference to the UNCITRAL Arbitration Rules in the Notice of Arbitration is to the previous (1976) Rules. Article 3 of these Rules states that the party initiating recourse to arbitration (“the Claimant”) shall give the other party (“the Respondent”) a notice of arbitration; and that this notice should include certain particulars, such as the names and addresses of the parties and a reference to the arbitration clause or separate arbitration agreement that is invoked. Article 20 of the 1976 Rules allows either party to the arbitration to amend or supplement its claim or defence (unless the arbitral tribunal considers this inappropriate), provided that the claim as amended does not fall outside the scope of the arbitration clause or separate arbitration agreement.

31. The present arbitral tribunal (“the Tribunal”) was constituted as follows:

- (1) Mr. Joseph Neuhaus, a partner in the New York law firm of Sullivan and Cromwell, was appointed as arbitrator by the Claimants on 18 November 2010.
- (2) Mr. Bruno Boesch, a partner in the London office of the Swiss law firm of Froriep Renggli, was appointed as arbitrator by the Respondent on 24 December 2010. (In the fax notifying the Claimants of this appointment, the Respondent stated that it was made without prejudice to the Respondent’s right to raise objections in the proceedings, including objections to jurisdiction, the applicability of the UNCITRAL Arbitration Rules and the place of arbitration proposed by the Claimants, which was New York, U.S.A.)
- (3) On 14 March 2011, Mr. Alan Redfern, barrister and international arbitrator of One Essex Court, Temple, London EC4Y 9AR was named by the co-arbitrators as third arbitrator to act as presiding arbitrator of the Tribunal.

32. The contact details of the arbitrators are as follows:

- (1) Mr. Joseph Neuhaus  
Sullivan and Cromwell, 125 Broad Street, New York NY 10004-2498  
Tel: +1 212 558 4000  
Fax: +1 212 558 3588  
Email: [neuhausj@sullcrom.com](mailto:neuhausj@sullcrom.com)
- (2) Mr. Bruno Boesch  
Froriep Renggli, 17 Godliman Street, London EC4V 5BD  
Tel: +44 20 7236 6000  
Fax: +44 20 7248 0209  
Email: [bboesch@froriep.ch](mailto:bboesch@froriep.ch)
- (3) Mr. Alan Redfern  
One Essex Court, Temple, London EC4Y 9AR

Tel: +44 20 7583 2000  
Fax: +44 20 7583 0118  
Email: [aredfern@oeclaw.co.uk](mailto:aredfern@oeclaw.co.uk)

33. The Tribunal's Terms of Appointment were proposed in a letter of 7 April 2011 from the Tribunal and agreed in a letter of 4 May 2011, written by the Respondent's lawyers on behalf of both Parties.
34. Amongst the proposals put forward by the Tribunal in its letter of 7 April 2011 was (i) a proposal that the seat of the arbitration should be London, United Kingdom; (ii) a proposal that the rules governing the arbitration should be the revised (2010) version of the UNCITRAL Rules; and (iii) a proposal as to the Applicable Law (proposal 3 of the letter) which reads as follows:

“According to the Applicable Law clause of the Contract, it would seem that the substantive matters in dispute are governed by the Laws of the Republic of Kazakhstan, unless otherwise provided for by International Treaties ratified by the Republic of Kazakhstan and subject to the Contract Stability Guarantee in Article 15 of the Contract.”

35. By letter of 4 May 2011, the Respondent's lawyers set forth the joint response of the parties to the proposals made by the Tribunal. The joint response stated *inter alia*:

“1. The Parties agree to adopt the latest version of the UNCITRAL Rules (as revised in 2010) provided that the Republic is not required to file a Response to Claimants' Notice of Arbitration (as foreseen in Article 4 of the 2010 UNCITRAL Rules).

2. The Parties agree that the English language shall be the language of the arbitration.

3. Claimants agree with the Tribunal's proposal on Applicable Law, as set out in proposal 3 of your letter, which they believe accurately reflects the parties' agreement on this matter. The Republic, however, is not prepared to agree that the proposal accurately reflects the parties' agreement on this matter and considers that the points raised in proposal 3 should be addressed by the Parties in their pleadings and decided thereafter by the Arbitral Tribunal.

4. The Parties agree to London as the seat of the arbitration.

7. Claimants choose not to treat their Notice of Arbitration as a Statement of Claim, and the Parties agree that Claimants will file

their Statement of Claim, together with witness statements and supporting documents, on or before September 15, 2011.

8. The Parties agree that the Republic will file its Statement of Defense, together with witness statements and supporting documents, on or before January 31, 2012.”

## **II. The Factual Background**

36. The Parties have each advanced numerous arguments on the issue of jurisdiction during the course of these proceedings; and they have supported these arguments not only by reference to the arbitration provisions on which the Claimant relies, but with expert evidence of the laws of Kazakhstan and of Lebanon, with references to English Law as the law of the seat of the arbitration, and with documentary evidence and the written testimony of witnesses.

37. In order to understand the reasons for the Tribunal’s decision, as set out in this Award, it is necessary to refer not only to the arbitration provisions relied upon by the Claimant, and to the relevant law or laws, but also to the factual background against which the issue of jurisdiction assumed significance – at a comparatively late stage in the proceedings.

38. In giving an account of the factual background, the Tribunal must necessarily refer to the written reports and evidence put before it by the parties; but the Tribunal emphasises that in doing so, the Tribunal does not intend to make a finding as to whether or not what is said represents the true position since the factual witness statements have not been tested in cross examination and examination by the Tribunal.

### **A. The Establishment of Ruby Roz in Kazakhstan**

39. As already stated, Ruby Roz was established in Kazakhstan by Mr. El-Badaoui and his wife, Li Shu Hadidja Abdullah Li. The company’s operations consisted of a

single poultry facility, known as a *ptitsefabrica*, located in the Almaty Region of Kazakhstan, on land which is said to have been bought from Mr. Issam Hourani.<sup>5</sup>

40. On 5 March 1999, Ruby Roz entered into the Contract with Kazakhstan's State Investment Agency, providing for an investment of approximately US\$4.7 million in return for certain tax concessions and preferences; and in August 2002, Ruby Roz entered into the 2002 Amendment Contract, undertaking to invest a further US\$14 million in the development of its business.
41. Mr. Badaoui asserts<sup>6</sup> that by mid-2002, Ruby Roz "was already a modern type, vertically integrated, poultry business and not a soviet style *ptitsefabrica*"; that by the summer of 2004, Ruby Roz was employing "many hundreds of employees"; and that it was close to achieving the objectives set out in the 2002 Amendment Contract, when it was "raided by Issam Hourani".<sup>7</sup>

**B. The Sale of Ruby Roz by Mr. Badaoui**

42. Two written witness statements from Mr. Badaoui have been submitted by the Republic during the course of this arbitration. The Tribunal has not had an opportunity to hear from Mr. Badaoui in person, or to test his evidence in any way, but he asserts – in brief – that during his ownership of Ruby Roz he was obliged to pay "protection money" to Mr. Issam Hourani, the brother-in-law of Mr. Rakhat Aliyev who was married to Ms. Dariga Nazarbayeva, the eldest daughter of the President of Kazakhstan; that on 6 August 2004<sup>8</sup>, he and his wife were stopped at Almaty airport and prevented from entering Kazakhstan; that he was forced into discussions with Mr. Issam Hourani and given to understand that he should sell Ruby

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<sup>5</sup> Claimant's Statement of Claim, para. 13 and footnote 25. It is not important in the present context, but Mr. Badaoui does not agree that the land was bought from Mr. Hourani. Mr. Badaoui states that the "land was owned by the state and this plot was sold at auction" – Badaoui, first witness statement, para. 14.

<sup>6</sup> Badaoui first witness statement at para. 17.

<sup>7</sup> *Id.* at paras. 23 and 24.

<sup>8</sup> Mr. Badaoui, second witness statement, at footnote 10 (correcting the date to 6 August 2004 from the date of 4 July 2004 that Mr. Badaoui gave in his first witness statement)

Roz; and that on 2 September 2004, at the Kazakh Consulate in Beirut, Lebanon, he and his wife sold Ruby Roz for the sum of US\$9.6 million to Kassem Omar, Issam Hourani's brother-in-law.<sup>9</sup>

43. Mr. Issam Hourani vigorously disputes Mr. Badaoui's statements. He says, for instance, in his first witness statement, that when Kassem Omar purchased Ruby Roz "it was a company facing several management problems as a result of Mr. Al Badaoui's failure to continue to invest in the company and to run it properly".<sup>10</sup> In his second witness statement, Mr. Issam Hourani denies extorting "protection money" from Mr. Al Badaoui; he says that he had "no involvement in the alleged detention of Mr. Al Badaoui in the Almaty airport in 2004"; and that he did not meet with Mr. Al Badaoui "in Beirut in August 2004", or at any other time, to purchase Ruby Roz.<sup>11</sup>

### C. Ruby Roz in 2007

44. According to the Claimant, Ruby Roz prospered under its new ownership since the summer of 2004, and, in April 2007:

"[it] was a flourishing enterprise, already producing thousands of tons of poultry meat per annum for the Kazakh market and having achieved the potential production capacity for thousands of tons more. Ruby Roz's success was the direct result of its investment of over US\$40 million in fulfilment of an expansive investment plan it had set out to achieve (with express Government recognition) in 2002. As a result of this significant injection of capital, Ruby Roz had managed to become the biggest producer of poultry meat in Kazakhstan, and was well on its way to increasing its production even further in the coming years. As with other Kazakh companies in which its owner, Kassem Omar, held an equity interest, Ruby Roz employed thousands of Kazakh citizens. Neither Ruby Roz, any of Kassem Omar's other businesses, nor Mr. Omar himself had ever had any significant problems with the police, financial police, tax inspectors, prosecutors, Committee for National Security ('KNB', the Kazakhstan KGB), or any other agencies or officials of the Kazakh Government – collectively, the 'Kazakh Authorities'."<sup>12</sup>

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<sup>9</sup> *Id.* at paras. 28 to 45.

<sup>10</sup> Mr. Issam Hourani, first witness statement at para. 22.

<sup>11</sup> Second witness statement at para. 7.

<sup>12</sup> Statement of Claim of 27 September 2011 at para. 3; footnotes omitted.

45. Professor Scott Horton, an expert witness for the Claimant, in his written statement refers to a breakdown of relations between the President of Kazakhstan and his son-in-law, Mr. Rakhat Aliyev, and says that matters deteriorated to such an extent that in May 2007, Mr. Aliyev was stripped of all his governmental positions<sup>13</sup> and that thereafter “a campaign of persecution”<sup>14</sup> was launched against him and those associated with him. These included the Hourani family who, again according to Professor Horton,<sup>15</sup> “operated significant and diverse businesses but was currently under attack by the Nazarbayeva government because they were viewed as close associates of Rakhat Aliyev and their assets were presumed somehow to be controlled by or available to fund Rakhat Aliyev”.
46. Mr. Issam Hourani for his part describes, in his First Witness Statement, the “very public falling out in May 2007 between President Nazarbayeva and Mr. Rakhat Aliyev” and claims that “since then there was a ‘concerted campaign’ to purge me and my family from Kazakhstan and to expropriate our business investments in that country”.<sup>16</sup> He describes a range of alleged infringements on and threats to businesses owned by members of the family.<sup>17</sup>
47. Mr. Issam Hourani left Kazakhstan in April 2007. His brother Mr. Devincci Hourani remained and, in his First Witness Statement<sup>18</sup>, wrote of his growing concern at what he describes as “unusual governmental interest in and interference with my family and their businesses”. He states:<sup>19</sup>

“It was becoming clear that my family was being targeted by the Kazakh authorities, apparently because of the family connection with Mr. Aliyev through marriage. My

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<sup>13</sup> Professor Horton’s First Report at page 71, para. 129.

<sup>14</sup> *Id.* at page 74, para. 132.

<sup>15</sup> *Id.* at page 80, para. 144.

<sup>16</sup> First Witness Statement at para. 4.

<sup>17</sup> *Id.* at paras. 31-35.

<sup>18</sup> *Id.* at para. 16.

<sup>19</sup> *Id.* at para. 19.

brother Issam, in particular, was a target, but so was I and so were my other family members and colleagues.”

48. Mr. Devincci Hourani continues:<sup>20</sup>

“My fears were confirmed on 27 June 2007, when armed police, led by a Colonel Alexander Sergeivich Kim and a Major Igor, raided the offices at 92A Pdezhaera Street, Almaty, the building from which virtually all of my family’s companies in Kazakhstan are managed, including Ruby Roz ...

The raid was a wholly unexpected and incredibly frightening experience for me and all those present in our offices. I had never faced police action like this before, and I do not think that anyone else in the building had, either. I knew we had done nothing wrong, but we were still being treated like criminals, with the use of armed police being particularly upsetting and unnecessary. It is of course difficult for anyone who was not there, or who has not experienced a police raid of this kind before, to imagine just how frightening it is to be confronted and ordered around by numerous heavily armed men. There is no way to describe this raid, and the behavior of the police during the process, as anything other than intimidating and aggressive. It seemed calculated to frighten us, and it succeeded.”

49. Mr. Devincci Hourani did not leave Kazakhstan until September 2007.<sup>21</sup>

50. Colonel Kim has made two written witness statements in these proceedings.<sup>22</sup> He describes carrying out a criminal investigation into a complaint and deposition filed with the Almaty Police in May 2007 by Mr. Sami Sabsabi, who accused Mr. Issam Hourani of having assaulted him, abducted him and extorted property from him at the offices of Ruby Roz in November 2005.<sup>23</sup> (The property allegedly included a Mercedes Benz car belonging to Mr. Sabsabi and a Lexus RX-300 belonging to his wife.)

51. Colonel Kim describes the search conducted by himself and his team of police officers. He says that he was given various items mentioned by Mr. Sabsabi in his deposition, including “Motorola cell phones in black and silver colour and an

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<sup>20</sup> *Id.* at paras. 20 and 23.

<sup>21</sup> *Id.* at para. 56. He returned in mid-January 2008 to visit his daughter, but left again in March, 2008. *Id.* at paras. 58 and 59.

<sup>22</sup> Witness Statements of 25 February 2012 and 12 November 2012.

<sup>23</sup> First Witness Statement at paras. 9 to 12. Mr. Sabsabi had made a business visit to China to purchase equipment for Ruby Roz and was paid commission from the Chinese suppliers, with which he purchased motor vehicles for himself and his wife. Mr. Sabsabi did not disclose the receipt of commission to Ruby Roz.

electroshocker in a black case.”<sup>24</sup> Colonel Kim states that he then proceeded with a search of the premises:

“The entire search operation was conducted in approximately three hours, and in a serene atmosphere. Concordant indices found on the scene of the alleged crime tended to confirm the depositions of the victim and of the three other witnesses.”<sup>25</sup>

52. Both Mr. Devincci Hourani and Colonel Kim were due to appear at the February Hearing and to be questioned by Counsel and the Tribunal on their respective witness statements, but for the reasons described later in this Award, this did not happen.

#### **D. The Sale of Ruby Roz to Ms. Nazarbayeva**

53. On 29 June 2007, an agreement for the sale of Ruby Roz was signed in Almaty, Kazakhstan between Mr. Kassem Omar as the Seller and Ms. Dariga Nazarbayeva as the Buyer, for the price of 5,913,000,000 tenge, to be paid by instalments to the Seller by the Buyer.<sup>26</sup>
54. Mr. Kassem Omar says<sup>27</sup> that he did this to protect the business. At about the same time, Claimant alleges that various members of the family signed other family businesses over to Government-affiliated persons.<sup>28</sup> Claimant alleges that each of these transfers occurred under duress.

#### **E. The Present Situation of Ruby Roz**

55. On 5 January 2009, Ruby Roz suspended operations.
56. On 16 April 2009, a further agreement was signed between Ms. Nazarbayeva and Mr. Omar, again in Almaty, providing for the rescission of the June 2007 sale

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<sup>24</sup> First Witness Statement at para. 26.

<sup>25</sup> *Id.* at para. 30.

<sup>26</sup> Exhibit C-26.

<sup>27</sup> First Witness Statement at paras. 52-54.

<sup>28</sup> Statement of Claim at para. 97.

agreement.<sup>29</sup> On the same date, the Charter of Ruby Roz was approved by Mr. Omar and he became the owner of Ruby Roz once again.

57. It is common ground between the Parties that Ruby Roz is still under the ownership of Mr. Kassem Omar.

### **III. The Arbitral Proceedings**

#### **A. The Claimant's Statement of Claim**

58. On 8 June 2011, the Tribunal issued its First Procedural Order in this arbitration. This Order provided *inter alia* for:

- (1) Written submissions from each of the Parties, accompanied by witness statements, exhibits and expert reports beginning with a Statement of Claim from the Claimant.
- (2) A Procedural Meeting to be held between the Tribunal and representatives of the Parties, at a time and place to be arranged following submission of the Respondent's Statement of Defence.

59. On 27 September 2011, the Statement of Claim was submitted. This is a long and all-embracing document, consisting of 191 pages, accompanied by witness statements, exhibits and expert reports.

60. The Statement of Claim recorded, at paragraph 2, that Mr. Kassem Omar withdrew any claims stated by him personally in the proceedings. This left the company, Ruby Roz itself, as the sole Claimant.

61. The Statement of Claim was principally devoted to arguments on the merits. It was accompanied by the witness statements of eight factual witnesses, including Kassem

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<sup>29</sup> Exhibit C-29.

Omar himself; Bassem Warrie who was General Director of Ruby Roz from October 2004 to November 2006 and again from February to June 2007; Devincci Hourani, a brother-in-law of Kassem Omar; and Issam Hourani, who wrote of the “expropriation of his family business by the Kazakh Government” and of his involvement with Ruby Roz.

62. One expert report which is of particular relevance to this Award is that of Dr. Aset Abzhanov, who wrote of the provisions of Kazakh law and the principles underpinning the Claimant’s claims.
63. There were also 213 documentary exhibits, all of which had been submitted with the Notice of Arbitration.<sup>30</sup> It was only towards the end of the Statement of Claim (from page 174 onwards) that the issue of jurisdiction was addressed, under the heading: “Confirmation of the Tribunal’s Jurisdiction”.
64. In the Notice of Arbitration, the Claimants, as they then were, based the request for arbitration upon the Contract and in particular on Article 14, which (as has been seen) is entitled “Arbitration”. There was reference to various laws of Kazakhstan, including the Foreign Investment Law of 27 December 1994, but the principal focus of the Notice of Arbitration was on the Contract.
65. This changed. At paragraph 364 of the Statement of Claim, the Claimant stated:

“As noted in the preceding sections, Claimant’s claims in this arbitration are brought under two separate instruments of consent: (1) the dispute resolution provision in the Foreign Investment Law; and (2) the arbitration clause in the Investment Contract.”
66. The Statement of Claim dealt first with the Foreign Investment Law of December 1994. The Claimant asserted that, under Article 27 of the Foreign Investment Law, “investment disputes” could be referred by either Party with the written consent of a foreign investor, to the judicial authorities of the Republic of Kazakhstan or, “in

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<sup>30</sup> Exhibit C-63, submitted with the Notice of Arbitration, was withdrawn, as its authenticity was challenged by the Republic in other proceedings.

accordance with the agreed procedure for settling disputes, including those set out in the contract or other agreement between the parties to the dispute, to one of the following arbitral bodies”.<sup>31</sup>

67. The reference in the Foreign Investment Law to the submission of disputes to arbitration, “in accordance with the agreed procedure for settling disputes, including those set out in the contract”, might be understood as a reference to the dispute resolution procedures set out in Article 14 of the Contract (“Arbitration”), with the implication that it was Article 14 which led to the dispute resolution provisions of the Foreign Investment Law; and that the reference to “various foreign arbitration organs” in Article 14.2(b) of the Contract could be made more specific by reference to Article 27 of the Foreign Investment Law.
68. However, this is not what the Claimant is asserting. This is made plain in subsequent paragraphs of the Statement of Claim, where it is asserted that the existence of a separate arbitration agreement<sup>32</sup> “was not a requirement for the invocation of Article 27.2(2)”.<sup>33</sup> In support of this assertion, the Claimant refers to the expert opinion of Dr. Abzhanov and to the decision of the arbitral tribunal in *Rumeli Telekom A.S. et al v. Republic of Kazakhstan* ICSID Case No. ARB/05/16 (Award of 29 July 2008).
69. In short, the Claimant’s case is that Article 27 of the Foreign Investment Law “contains Kazakhstan’s standing offer of consent to international arbitration”<sup>34</sup> and so constitutes an *alternative* basis for the jurisdiction of the Tribunal to that provided by the Contract.

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<sup>31</sup> The “arbitral bodies” referred to in Article 27 included “arbitration bodies established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)”.

<sup>32</sup> Such as the arbitration clause in the Contract.

<sup>33</sup> Statement of Claim at para. 367; Dr. Abzhanov’s Report at para. 25.

<sup>34</sup> *Id.* at para. 368.

## **B. The Foreign Investment Law**

70. The “Law of the Republic of Kazakhstan on ‘Foreign Investments’ dated December 27, 1994” (“the Foreign Investment Law” or “the FIL”) was amended seven times by Presidential Decree<sup>35</sup> ; and it was repealed and replaced on 8 January 2003 by the “Law of the Republic of Kazakhstan on Investments” (“the 2003 Investment Law”).
71. The 2003 Investment Law is clear as to the repeal of the FIL. The 2003 Law states in Article 24 that the “following legislative acts of the Republic of Kazakhstan shall be deemed to have lost force”: the first of these “legislative acts” to be named was the Foreign Investment Law.
72. The Claimant argues<sup>36</sup> however that despite its repeal in January 2003, reliance may still be placed upon the FIL, for two reasons. First, because “a foreign investor that made an investment in Kazakhstan during the time in which the Foreign Investment Law was in force in effect acquired a firm right to submit any disputes related to that investment to arbitration under Article 27 of the Foreign Investment Law: a right which could not be abrogated by the Law’s subsequent repeal”.<sup>37</sup> Second, because “the continued validity of such foreign investors’ rights to submit disputes to arbitration under Article 27 is further confirmed by the stabilization provision in the Foreign Investment Law itself, which requires that all the legal benefits and protections in effect at the time of the making of an investment remains applicable thereto for a minimum period of ten years”.<sup>38</sup>

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<sup>35</sup> Notably on 2 August 1999, as will be discussed later in this Award.

<sup>36</sup> Statement of Claim at para. 369.

<sup>37</sup> In footnote 719, the Claimant refers again to the decision of the arbitral tribunal in *Rumeli Telecom A.S et al v. Republic of Kazakhstan* and says: “Although the *Rumeli* tribunal was constituted under the ICSID Convention, its reasoning with respect to the effects of Article 27 of the Foreign Investment Law is equally applicable to disputes being adjudicated under the UNCITRAL Rules.”

<sup>38</sup> Statement of Claim at para. 369.

### *The FIL Stabilisation Clause*

73. Article 6 of the Foreign Investment Law, entitled “Guarantees against Changes in Legislation” and herein referred to as the “stabilisation clause,” provides as follows:<sup>39</sup>

“6.1 In the case of the deterioration of the foreign investor’s position, resulting from changes in legislation and (or) entry into effect and (or) change of the conditions of international treaties, foreign investments are treated within 10 years in accordance with the legislation in force at the time of investment, and investments under long-term (over 10 years) investment contracts with authorized state bodies – until the expiration date of the contract unless the contract provides otherwise. [...]

In the case of the improvement of the foreign investor’s position resulting from changes in legislation and (or) entry into effect and (or) change of the conditions of international treaties, certain contract terms between the foreign investor and the authorized state body, representing the republic may be changed by the mutual consent of the parties in order to achieve a balance of economic interests of the participants.

6.2 In carrying out investment activities under the license, the guarantee provided by the first paragraph of this Article remains in force within the time limits established by paragraph one, before license termination, and in the case of the extension – until the end of the license renewal period.

6.3 These requirements do not apply to changes of the legislation of the Republic of Kazakhstan in the field of defence, national security, in the sphere of environmental safety and health, and morality. When the changes in legislation result in the deterioration of the foreign investor’s position in these areas, the foreign investor must receive immediate adequate and effective compensation in the currency of the investment or the foreign currency as established by the agreement between the foreign investor and the Republic of Kazakhstan.

6.4 The guarantees established by paragraph 1 of this Article shall not apply to changes in the legislation of the Republic of Kazakhstan and (or) the entry into effect, and (or) changes in international treaties with the participation of the Republic of Kazakhstan, which change the terms and conditions (including taxation issues and other government regulation measures) of import

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<sup>39</sup> As noted below, the parties both proposed amendments to this translation, and particularly to paragraph 6.1, but we are here setting forth the full text as originally submitted to us to provide an overview of the Clause.

and (or) production and (or) sale of excisable goods, as well as imports of goods intended for sale without processing.”

74. The meaning, duration and effect of the stabilisation clause will be discussed later in this Award. For the present, it is sufficient to state that there are disputes between the Parties as to whether or not the stabilisation clause survived the repeal of the FIL. Put briefly, the Republic’s case is that the Foreign Investment Law is a piece of domestic legislation that the Government, as a sovereign state, could amend or repeal as it wishes; and the Claimant’s case is that the right to arbitrate under Article 27 of the Foreign Investment Law could not be taken away by the repeal of that Law and that this is confirmed by the stabilisation clause.
75. As to the stabilisation clause, assuming that it survived the repeal of the FIL, there is an issue between the parties as to the date on which the ten-year period applicable under the clause expired:
- (i) Did it expire (as the Respondent claims) on 5 March 2009, being ten years after the Contract was made or:
  - (ii) Did it expire (as the Claimant initially claimed) on 13 August 2012<sup>40</sup>; being ten years after the 2002 Amendment Contract was made;
  - (iii) or, as the Claimant contended at the hearing on jurisdiction in April 2013<sup>41</sup>, did time only begin to run not when the relevant contract was made but only when *investments* were made, it being understood that such investments would almost necessarily be made at different periods of time.
76. Counsel for the Claimant was asked by the Tribunal to stipulate a date on which the *investments* were made and said:

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<sup>40</sup> Statement of Claim at para. 129.

<sup>41</sup> Counsel for the Claimant said that an earlier agreement between the Parties’ experts, to the effect that time began to run when a contract was made, was wrong, because the experts “were working on the wrong translation”. Transcript, April Hearing 2013, Day 2 at page280, lines 11-13.

“To give you a date, we would suggest until 2006. There were investments also made in 2007 and until the time we had control of the company, but we would say the bulk of the investments until the end of 2006.”<sup>42</sup>

77. Accordingly, the Claimant’s case as finally pleaded is that the stabilisation clause does not expire until the end of 2016.
78. Finally, insofar as concerns the stabilisation clause, there is an issue between the Parties as to whether or not the transfer of ownership of Ruby Roz to Ms. Dariga Nazarbayeva on 29 June 2007 brought Ruby Roz into the ownership of a national of Kazakhstan and so deprived the company of any claim it might have had to be a foreign investor entitled to the protections (including the arbitration and stabilization clauses) of the FIL.

**C. Summary of the Claimant’s Jurisdictional Arguments**

79. The Claimant summarises its jurisdictional arguments in its Statement of Claim as follows:

“401. In summary, there are two independent and coterminous bases for this Tribunal’s jurisdiction. First, Article 27 of the Foreign Investment Law contains Respondent’s consent to arbitration of investment disputes with foreign investors before this Tribunal, and that consent remains valid with respect to all such disputes related to investments made during the period in which the Law was in effect. In this regard, Ruby Roz is a “foreign investor” and is thus entitled to invoke Article 27; and the dispute at issue here qualifies as an “investment dispute” directly relating to the investment enterprise undertaken by Ruby Roz in August 2002, and thus comes within the scope of that provision. As a result, the Tribunal has jurisdiction to consider all of Ruby Roz’s claims under Article 27 of the Investment Law, including claims for violations of law, as well as for violation of the Agreements.

402. Furthermore, Article 14 of the Investment Contract constitutes a valid arbitration agreement that may also be invoked by Ruby Roz, and which also confers subject matter jurisdiction over all the claims at issue here. This arbitration agreement survives termination of the Agreements and stipulates the exact same

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<sup>42</sup> Transcript April Hearing 2013, Day 2 at pages 301 and 302, lines 6 to 25, 1 to 20.

procedure for arbitration as that set out in Article 27 of the Foreign Investment Law.”

**D. The Claimant’s Request for Relief**

80. In its Statement of Claim, the Claimant states:

“403. For all the foregoing reasons, Ruby Roz hereby respectfully requests:

(1) an order declaring that Kazakhstan has unlawfully expropriated Ruby Roz’s investments, in violation of Article 7 of the Foreign Investment Law and customary international law;

(2) an order declaring that Kazakhstan has violated several provisions of Kazakh and international law, including Article 8 of the Foreign Investment Law;

(3) an order directing Kazakhstan to pay to Ruby Roz the sum of US\$214,705,778<sup>43</sup> as compensation for the loss and damage resulting from Respondent’s violations listed in paragraphs (1) and (2), above, as determined in accordance with the DCF method of valuation of Ruby Roz’s investment as at 5 January 2009;

(4) an order directing Kazakhstan to pay to Ruby Roz interest, compounded quarterly, calculated from 5 January 2009 up to payment in full of the Tribunal’s Award;

(5) an order directing Kazakhstan to pay all costs incurred in connection with these arbitration proceedings, as well as legal and other expenses incurred by Ruby Roz on a full indemnity basis, plus interest thereon, from the date on which such costs are incurred to the date of payment in full; and

(6) such other relief as the Tribunal may deem just and proper.”

**E. The Respondent’s Statement of Defence**

81. On 14 March 2012, the Respondent submitted its Statement of Defence (“the Defence”). The Defence was accompanied by witness statements of eight fact witnesses, including Mr. El-Badaoui, the founder, former owner and majority

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<sup>43</sup> This claim was subsequently reduced to the sum of US\$63,000,000, plus interest compounded quarterly from 5 January 2009 until payment. *See* Claimant’s Reply of 31 July 2012 at para. 229.

shareholder of Ruby Roz, and by expert reports from seven expert witnesses. It was also accompanied by photographs of Ruby Roz's poultry facilities at various dates and by volumes of exhibits, including legal authorities.

82. Like the Statement of Claim, the Defence is a voluminous document running to some 187 pages. However, it can be dealt with more briefly, without intending any disrespect to counsel for the Republic and his legal team, since there is no need to repeat the legal and factual background, and the opposing submissions, which have been set out in relation to the Statement of Claim (paras. 58-69 above).
83. The issue of jurisdiction is dealt with at pages 150 to 169 of the Defence, with additional sections on "Admissibility" at pages 171 to 173 and "Applicable Law" at pages 174 to 184. The Tribunal should comment first on the section entitled "Admissibility".

**F. Admissibility**

84. Under the heading of "Admissibility", the Republic claims that Ruby Roz "was in effect stolen from Mr. El-Badaoui by Kassem Omar acting at the behest of Issam Hourani"; and that to allow Ruby Roz's claim into this arbitration "would have the effect of allowing RRA and by extension Kassem Omar to benefit from bad faith illegal behaviour".<sup>44</sup> The Republic goes on to say that "to the extent that RRA has any right to arbitrate its claims by virtue of ownership by Kassem Omar, the Tribunal should deny RRA the opportunity to exercise that right and as such should deny jurisdiction".<sup>45</sup>
85. The issue raised by the Republic in this section of its Defence was not raised at the April Hearing; and in view of the Tribunal's disposition of the issue of jurisdiction, this Award does not deal with it.

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<sup>44</sup> Defence at para. 326.

<sup>45</sup> *Id.*

## **G. Zhalkamys Farm**

86. The Claimant states that in July 2006, Kassem Omar purchased an entity called Altyn-Aydar from his brother-in-law, Issam Hourani; that Altyn-Aydar owned a “Soviet-era” farm at Zhalkamys; that Ruby Roz “invested millions of dollars to upgrade and modernize” the poultry facilities there; and that by the end of 2006, “the Zhalkamys farm was ready to operate with a production capacity of 15 million chicken heads a year ...”<sup>46</sup> The Claimant adds that Kassem Omar intended to merge Altyn-Aydar with Ruby Roz but that the merger never took place, “as it was interrupted by the offensive actions of the Kazakh Authorities against Ruby Roz’s business ...”<sup>47</sup>
87. The Respondent contends that the Tribunal has no jurisdiction over claims relating to the Zhalkamys farm and Altyn-Aydar, which were not owned by Ruby Roz.<sup>48</sup>
88. The Tribunal finds no need to address this issue, given its decision in this Award.

## **H. Jurisdiction under the FIL**

89. The Republic submits that the Tribunal does not have jurisdiction over Ruby Roz’s claims under the FIL for the following reasons:
- (1) The FIL which came into force in 1994 was repealed by the Republic in 2003 and replaced by “the more balanced” 2003 Law on Investments. As a result of that Law, which entered into force on 22 January 2003, “the 1994 FIL lost its effect pursuant to the provisions of Kazakhstani law that mandate that a law becomes ineffective when a new law is adopted to replace it”.<sup>49</sup>
  - (2) Notably, the 1994 FIL was repealed in full and none of its provisions were preserved. Rather, the 2003 Law in Article 24 specifically states that the 1994

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<sup>46</sup> Statement of Claim at para. 37 (at page 23)

<sup>47</sup> *Id.*

<sup>48</sup> Defence at para. 321.

<sup>49</sup> *Id.* at para. 290.

FIL shall be deemed ineffective in its entirety, and thus provides that no provisions of that law would continue to operate. Had the legislators wanted to preserve any provisions of the 1994 FIL, they could have done so. The fact that they did not do so is indicative of a clear intent not to preserve any provisions of the law and to render it completely ineffective after the date of its repeal, i.e., after January 22, 2003.<sup>50</sup>

- (3) Even if the FIL could somehow be a basis for the Republic's consent to arbitrate, it does not cover Ruby Roz's claim because any rights that Ruby Roz might have had, under the stabilisation clause, expired on 5 March 2009; and the arbitration was not commenced until 8 October 2010.
- (4) It is wrong to suggest that the trigger date for the start of the ten-year period in the stabilisation clause was the date of execution of the 2002 Amendment. This was merely an amendment to the existing Contract and formed part of that Contract. The investments made under the 2002 Amendment Contract were merely the continuation of "the long planned expansion" of Ruby Roz's activities.<sup>51</sup>
- (5) Furthermore, Ruby Roz has failed to show that it was a "foreign investor" within the meaning of the FIL. For a company such as Ruby Roz to be deemed a "foreign investor" under the FIL, its share capital must be owned by a foreign investor. Simple ownership by a stateless person such as Kassem Omar is not sufficient to make Mr. Omar or Ruby Roz a "foreign investor" under the FIL. It must also be shown that Mr. Omar "is registered to conduct economic activities in [his] country of citizenship or permanent residence. Mr. Omar has not defined for the Tribunal his country of permanent residence;

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<sup>50</sup> *Id.* (footnotes omitted).

<sup>51</sup> *Id.* at para. 297.

nor has he shown that he is duly registered to ‘conduct economic activities’ in that country.”<sup>52</sup>

- (6) Even if Mr. Omar were found to be a foreign investor, the Tribunal would still lack jurisdiction. Once Ruby Roz had been transferred to Ms. Dariga Nazarbayeva on 29 June 2007, it ceased to be a foreign investment, since Ms. Nazarbayeva is a citizen of Kazakhstan.
- (7) The contention that the transfer to Ms. Nazarbayeva was a “fake” or a “sham” should be disregarded by the Tribunal. Under the law of Kazakhstan, the legal effect of a contract cannot be undone by claiming, years later, that the transaction was a fake. Invalid transactions are voidable, but not void – that is to say, the transaction is valid until found to be invalid by the Kazakhstani courts. No such court finding was sought in this case and the time for doing so has long passed: thus, as a matter of Kazakhstani law, the transfer of Ruby Roz from Kassem Omar to Ms. Nazarbayeva has full legal effect.<sup>53</sup>
- (8) Finally, the claim that the transfer was made under duress is wrong, both as a matter of fact and as a matter of Kazakhstani law.<sup>54</sup>

## **I. Jurisdiction under the Contract**

90. The Republic submits that the Tribunal does not have jurisdiction over Ruby Roz’s claims under the Contract for the following reasons:
91. Article 14 of the Contract, which contains the dispute resolution clause, is pathological and unenforceable. The flaw in the clause is that it refers to “various

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<sup>52</sup> *Id.* at paras. 299 to 301.

<sup>53</sup> *Id.* at paras. 302 to 304.

<sup>54</sup> *Id.* at paras. 307 and 308.

foreign arbitral organs”, without defining what those organs are or to which arbitral institution or rules the Parties have agreed.<sup>55</sup>

92. The argument advanced by Professor Abzhanov that the clause should be construed in accordance with Article 27 of the FIL<sup>56</sup> is wrong. If the Parties had wished to incorporate the terms contained in Article 27 of the FIL, they could have done so – but they did not. Rather, Article 14 refers only to “the laws of the Republic of Kazakhstan”. This cannot be assumed to be a reference to the FIL, which had been repealed for more than seven years when the arbitration was commenced.
93. Finally, even if one accepts that Article 14 is an operable arbitration clause and should be interpreted via the terms of Article 27 of the FIL, then the standards of the FIL must be applied to Article 14’s requirement that the interests of a “foreign investor” are concerned; and, for the reasons already given, the Claimant does not qualify as a foreign investor.<sup>57</sup>

#### **J. Respondent’s Request for Relief**

94. Respondent requests that Ruby Roz’s claims “be rejected in their entirety for lack of jurisdiction or for inadmissibility.”<sup>58</sup> In the event the Tribunal finds jurisdiction and admissibility for any of the claims, Respondent requests that the claims be dismissed for substantive reasons. And Respondent requests that Ruby Roz “be ordered to reimburse the Republic for all reasonable costs and expenses relating to the Arbitration, including without limitation, legal fees and expenses and expert fees.”<sup>59</sup>

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<sup>55</sup> *Id.* at para. 316.

<sup>56</sup> Which, it will be remembered, lists four “foreign arbitral organs”.

<sup>57</sup> *Id.* at para. 320.

<sup>58</sup> *Id.* at para. 596.

<sup>59</sup> *Id.*

**K. The First Procedural Meeting**

95. Following submission of the Respondent's Defence, a procedural meeting was held in London on 27 March 2012 between the Tribunal and counsel for the Parties.

96. One of the questions raised by the Tribunal prior to this meeting was whether or not the Parties required a partial award on any issue, including that of jurisdiction.<sup>60</sup>

97. Counsel for the Claimant<sup>61</sup> said<sup>62</sup>:

“We offered the respondent the idea that we would bifurcate this hearing at the beginning of the case, before even the Tribunal had been appointed, or I think, perhaps the wing arbitrators had been appointed. They decided that that wouldn't be necessary from their point of view. We filed our arguments on jurisdiction, Mr Wolrich and his team filed theirs. I think he has just indicated that there is no interest in having a separate phase or partial award on jurisdiction. We would agree.

MR WOLRICH: That's not exactly what I said, but it's all right.

MR VASANI: Okay, well, you are perfectly entitled to clarify once I've finished. And we see the fact that we are so far down the road now that with only two filings and a hearing left, perhaps procedural economy would dictate that we don't have a partial award.”

98. Mr. Wolrich, for the Respondent, then said<sup>63</sup>:

“Yes, exactly what I said was that we would not insist upon bifurcation as to jurisdiction; unless the Tribunal thought that this would be useful and would function towards the efficient resolution of this case, and if the Tribunal had that view, then we would be in favour of it, otherwise we would not insist upon it.”

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<sup>60</sup> One of the mandatory provisions of the English Arbitration Act, 1996, which is applicable since England is the seat of this arbitration, is Section 31. This states that, where objection is taken to an arbitral tribunal's substantive jurisdiction, the Tribunal has power to rule on its own jurisdiction and may do so either (i) in an award as to jurisdiction or (ii) in its award on the merits. If the Parties agree which of these courses the Tribunal should take, the Tribunal must proceed accordingly.

<sup>61</sup> Crowell & Moring were still acting for the Claimant at this time.

<sup>62</sup> Transcript of Procedural Meeting, page 30, lines 19 to 25.

<sup>63</sup> *Id.* at page 31, lines 1 to 11.

**L. The Tribunal's Second Procedural Order**

99. On 30 March 2012, following the First Procedural meeting in London, the Tribunal issued its Second Procedural Order. This provided for the case to be dealt with as a whole, without any bifurcation into separate issues, and for the submission by the Claimant of a Statement of Reply on Jurisdiction and the Merits, followed by a submission by the Respondent of a Rejoinder Memorial on Objections to Jurisdiction and the Merits.
100. The Tribunal's Second Procedural Order also provided for two separate Hearings of two weeks each, to be held in the early part of 2013. The first Hearing ("the February Hearing") was intended to be devoted to opening statements by counsel and to the examination of the factual witnesses. The second Hearing ("the April Hearing") was to be devoted to the examination of the Parties' experts, including their legal experts. Each Party was then to submit post-hearing briefs, on a basis to be decided subsequently.

**M. The Claimant's Reply**

101. The Claimant's Reply ("the Reply") was submitted on 31 July 2012.<sup>64</sup>
102. It is again a lengthy document. The issue of jurisdiction is dealt with at pages 69 to 83 and includes a section on the Zhalkamys farm, with which the Tribunal is not concerned in this Award, for the reasons already given.

***The Claimant's Reply on the FIL***

103. The Claimant argues that, as the Respondent had conceded, the FIL was enacted to attract foreign investors to invest in Kazakhstan by extending certain guarantees to

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<sup>64</sup> At the same time, the Claimant submitted a Request for Interim Measures which the Tribunal considered and adjudicated upon, after submissions from each Party. The Request for Interim Measures did not relate to the issue of jurisdiction.

them. Ruby Roz had been “owned and controlled by a foreign investor since its creation in 1998” and Kassem Omar “is still the owner of record of the shares of [Ruby Roz] today”.<sup>65</sup> The Respondent’s attempt to take away Ruby Roz’s right to arbitrate because its foreign shareholder was not personally registered to conduct business activities in Kazakhstan was “a complete red herring”. The registration requirements did not apply to Mr. Omar. It was the corporation itself that was conducting business activities and the corporation *was* registered to conduct business in Kazakhstan.<sup>66</sup>

104. In a footnote (fn. 406), the Claimant asserted that:

“Kassem Omar resides in Lebanon, and is registered to conduct business there.”

105. In support of this assertion, the footnote referred to a Legal Opinion dated 27 July 2012 by Ms. Farida Hamed, made at the request of the Claimant, which stated that “Mr. Omar was registered to conduct economic activities in Lebanon”.

106. As to the duration of the stabilisation clause, the Reply argued<sup>67</sup> that the ten-year stabilisation period under the FIL started again on the date on which the 2002 Amendment Contract was made and so:

“this Tribunal’s jurisdiction could have been triggered at any time up to this very year, 2012.”

107. Finally, the Reply contends that the transfer of Ruby Roz to Ms. Dariga Nazarbayeva, and the consequent breach in foreign ownership, was only done to protect the interests of Ruby Roz. It was a *legal trust* under Kazakh law and the transfer should be treated as if it had never occurred.<sup>68</sup> Even if this is not correct, the FIL did not require *continuous* foreign ownership. It is sufficient if there is foreign ownership when the

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<sup>65</sup> Reply at para. 134.

<sup>66</sup> Reply at para. 138.

<sup>67</sup> Reply at para. 141.

<sup>68</sup> Reply at paras. 143 to 145.

arbitration is commenced<sup>69</sup> and Kassem Omar continues as the owner of Ruby Roz today.

*The Claimant's Reply on the Contract*

108. In any event, the Claimant argues,<sup>70</sup> the effect of the temporary transfer of ownership to a Kazakh citizen made no difference to the Tribunal's jurisdiction. This is because the Contract executed between the State and Ruby Roz in 1999 vested the Tribunal with jurisdiction to remedy *all* of Claimant's damages sustained at the hands of the Respondent State – from 1999 to the present day.
109. By its plain text (the Reply continues<sup>71</sup>), Article 14 of the Contract calls for disputes to be heard either (a) by the judicial organs of the Republic or:

“at the investor's choosing by (b) ‘the various foreign arbitration organs ... determined in accordance with the laws of the Republic of Kazakhstan’. The purpose of this Article of the Parties' contract was to allow an investor to arbitrate its investment disputes with the State – indeed, Article 14 of the contract is simply titled ‘Arbitration’.”

When this contract was negotiated, signed and executed between the Parties, the ‘laws of the Republic of Kazakhstan’ relative to investment arbitration were abundantly clear. ‘Foreign Investors’ like Ruby Roz were entitled to constitute arbitration against the State before ICSID, UNCITRAL, SCC or KCC arbitral bodies. The law even specifically acknowledges that ‘contracts or other agreements between the parties to the dispute’ can lead to arbitration before ‘one of the[se] arbitral bodies.’”

110. The Reply concludes on the issue of jurisdiction<sup>72</sup> with the statement that, when a Tribunal is faced with a contractual provision that may have more than one interpretation, “it should favour the outcome that preserves meaning for each provision and upholds the validity of the contract”. The Claimant illustrates this

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<sup>69</sup> Reply at para. 146.

<sup>70</sup> Reply at para. 149.

<sup>71</sup> Reply at paras. 150 and 151, footnotes omitted.

<sup>72</sup> Reply at para. 154.

proposition by reference to the U.S. Restatement 2(d) of Contracts 203 (1981) which states<sup>73</sup>:

“An interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.”

## **N. The Respondent’s Rejoinder**

111. The Respondent’s Rejoinder (“the Rejoinder”) was submitted on 14 December 2012. It is again a lengthy document (229 pages), with the issue of jurisdiction being dealt with at pages 121 to 147.<sup>74</sup>

### ***The Respondent’s Rejoinder on the FIL***

112. The Rejoinder concentrates on the issue of whether or not the Claimant is a “foreign investor” within the meaning of the FIL. The Respondent argues that ownership by a foreigner is not sufficient to make a company incorporated in Kazakhstan into a “foreign investor”. More than this is required. The foreign owner must be not only someone with a permanent residence abroad, but also someone who is “registered to carry out business activities in [her or his] country of permanent residence”.<sup>75</sup> The Rejoinder insists that there are no exceptions to this requirement, which was confirmed by the decision of the Supreme Court of Kazakhstan in *Usmonov v The Department of Justice*.<sup>76</sup> The Court referred to Article 1 (‘Key Terms and Concepts’) of the Foreign Investment Law and said:

“It follows from the above-mentioned provisions of the [FIL, Article 1] that the definition of a ‘foreign citizen’ and ‘foreign investor’ are

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<sup>73</sup> Reply at footnote 472.

<sup>74</sup> The closing sections dealing with “Admissibility” and the Zhalkamys farm are, for the purposes of this Award, disregarded by the Tribunal, for the reasons already given.

<sup>75</sup> Rejoinder at para. 190, quoting Foreign Investment Law, Article 1.

<sup>76</sup> *Usmonov v the Department of Justice*, ruling of the Panel on Civil law cases of the Supreme Court of Kazakhstan No. 3K-88 dated 18 July 2001.

not identical. A foreign citizen may be deemed a foreign investor only if he is registered to carry out business activities in the country of his citizenship.”

113. The Respondent challenges the Claimant’s statement<sup>77</sup> that Mr. Kassem Omar is registered to conduct business activity in Lebanon; and states<sup>78</sup> that, according to the Lebanon Commercial Register itself: “Kassem Omar is not and never has been registered to conduct business activity in Lebanon”.
114. The Respondent goes on to contend<sup>79</sup> that, in any event, the FIL lost all legal effect when it was repealed in 2003; and that any rights that the Claimant might have had were extinguished by this repeal. Even if somehow the FIL continued to survive after its repeal, the transfer of the ownership of Ruby Roz to Ms. Dariga Nazarbayeva on 29 June 2007 meant that the Claimant (Ruby Roz) ceased to be a foreign investor at that date.<sup>80</sup> When the company was re-transferred to Kassem Omar in 2009, the FIL had been repealed and the company “just as any other company who gained or regained foreign status in 2009, fell under the context of the 2003 Law on Investment”.<sup>81</sup>
115. In relation to the date at which the ten year stabilisation period under the FIL should be deemed to begin, the Rejoinder argues that it should run from the date when the Contract was made and not from the date of the 2002 Amendment Contract, which is simply an amendment to an existing Contract and not the start of a new investment project.<sup>82</sup>

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<sup>77</sup> See paragraph 103 of this Award, noting Claimant’s assertion that Mr. Kassem Omar resides in Lebanon and is registered to conduct business there.

<sup>78</sup> Rejoinder at paras. 193 to 195.

<sup>79</sup> Rejoinder at paras. 197 to 203.

<sup>80</sup> Rejoinder at para. 204.

<sup>81</sup> Rejoinder at para. 207.

<sup>82</sup> Rejoinder at para. 226.

### *The Respondent's Rejoinder on the Contract*

116. In relation to Article 14 of the Contract, the Respondent maintains its contention that<sup>83</sup>:
- (1) the clause is “pathologically flawed” and “not enforceable” because it lacks certainty as to the arbitration forum or the method of choosing such a forum; and
  - (2) this lack of certainty cannot be cured by reference to the FIL:
    - (a) first, because the FIL was not in force by the time the arbitration arose;
    - (b) secondly, because the agreement to arbitrate contained in the Contract does not refer to any of the arbitral bodies referred to in the FIL;
    - (c) thirdly, in any event the Claimant cannot benefit from Article 27 of the FIL because it is not a “foreign investor”, for the reasons already given.

## **IV. December 2012 and After**

### **A. Close of Pleadings**

117. The submission of the Rejoinder on 14 December 2012 was intended to mark the end of the Parties' Pleadings. The next procedural step on the calendar was a Pre-Trial Meeting between the Tribunal and Counsel for the Parties to be held at the ICC Hearing Rooms in Paris<sup>84</sup> on 9 January 2013; and the purpose of that Meeting was to finalise arrangements for the substantive Hearings, which in accordance with the Tribunal's Second Procedural Order were to be held for two weeks' each in February and April 2013.

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<sup>83</sup> Rejoinderat paras. 235 to 243.

<sup>84</sup> London is and remains the seat of the arbitration, but for the convenience of Counsel and the witnesses it was agreed to hold the Pre-Trial Meeting and the subsequent Hearings in Paris.

118. However, on 21 December 2012, the Claimant applied to the Tribunal for leave to file a further submission on the issue of jurisdiction, arguing that it was “entitled to have the last word” and that the Rejoinder had brought in new arguments and new evidence, to which the Claimant was entitled to reply. The Respondent opposed this application. The Respondent argued that the Tribunal’s Second Procedural Order, made on 12 March 2012, had laid down the procedural rules to be followed in the arbitral proceedings and that those rules made no provision for the filing of new submissions.

**B. The Tribunal’s Third Procedural Order**

119. The Tribunal refused the Claimant’s request. Instead, the Tribunal considered that it would be sufficient for the Claimant to deal with the issue of jurisdiction in its oral opening submissions at the February Hearing and in the written “skeleton argument” that would accompany those oral submissions; and the Tribunal issued its Third Procedural Order of 7 January 2013 to this effect.

120. The Third Procedural Order also provided for written submissions to be made in relation to certain additional documents which the Claimant applied to enter into the record, an application which the Respondent had also opposed.

**C. The Tribunal’s Fourth Procedural Order**

121. Following the Pre-Trial Meeting between the Tribunal and Counsel for the Parties on 9 January 2013, the Tribunal issued its Fourth Procedural Order on 16 January 2013.

122. In the introductory section to the Order, the Tribunal stated:

“1. This Fourth Procedural Order is issued by the Tribunal following the Procedural Meeting with the parties’ representatives in Paris on 9 January 2013, as discussed and agreed at that meeting.

2. To the extent that this Order differs from the Tribunal’s previous Orders, this Order prevails.

3. The purpose of this Order is to set down Directions for the Hearing to begin in Paris on 11 February 2013 (‘the February

Hearing’) and for the resumed Hearing to begin in Paris on 8 April 2013 (‘the April Hearing’).

4. The parties have agreed, with the approval of the Tribunal that, as a matter of convenience, both the February Hearing and the April Hearing shall take place in Paris, but London, England is and remains the seat of the arbitration.

5. The parties have arranged, with the approval of the Tribunal, for both Hearings to take place in the ICC Hearing Rooms in Paris and for court reporters and interpreters to be available. Interpretation will be simultaneous. If there is a material error in any interpretation, the parties are free to point this out at the time.”

123. The Order then gave certain agreed Directions, including Directions for the preparation of Core Documents, the procedure for calling fact and expert witnesses, time limits and other matters.

124. The Tribunal also directed that, as agreed by the Parties, the February Hearing would be devoted to (i) opening oral submissions by Counsel, including submissions on jurisdiction, and (ii) the questioning of the witnesses of fact to be called by each Party; and that the April Hearing would be devoted to (i) opening statements and (ii) the questioning of the expert witnesses to be called by each Party.

#### **D. A Dramatic Turn of Events**

125. There was then a dramatic development which upset all these carefully laid plans.

126. On Wednesday 6 February 2013 (five days before the February Hearing was due to commence) the Claimant requested that the testimony of its principal fact witnesses – Messrs. Issam Hourani, Devincci Hourani and Hussan Hourani – should be postponed to the April Hearing, on account of what Counsel described as “recent material developments”. These were described as follows:

“(1) Not later than January 17, 2013 Messrs. Issam, Devincci and Hussam Hourani were served with a summons to appear before the Lebanese *juge d’instruction* following a charge by the State Prosecutor of Kazakhstan for alleged premeditated murder of Ms. Anastasia Novikova (who died in Lebanon in June 19, 2004 by fall from the balcony of the apartment in Lebanon where she resided at

the time), which is punishable, pursuant to Article 549 of the Lebanese Code, by death penalty.

(2) By way of background, the investigation following the death of Ms. Anastasia Novikova led the *juge d'instruction* to close the case and to conclude, on August 9, 2010, that there was no evidence establishing the existence of a crime surrounding Ms. Novikova's death, which was ruled by the competent Lebanese courts to be the result of suicide induced by psychological problems. Kazakhstan's appeal of this decision before the '*Chambre d'accusation*' was dismissed on the merits on October 5, 2010. Yet Kazakhstan, which had until now attempted to associate Mr. Aliev with the death of Ms. Novikova, has now managed to somewhat 'reopen' the case, this time also directly against Messrs. Issam, Devincci and Hussam Hourani, and this on the very eve of their testimony in this arbitration and just few months after our firm has sent the attached notice<sup>85</sup> on behalf of Mr. Devincci Hourani and his company Caratube (in which Mr. Kassem Omar is a minority shareholder) to start further proceedings against the Republic of Kazakhstan.

(3) A hearing took place this very Monday February 4, 2013 before the *juge d'instruction* in Lebanon. Messrs. Issam, Devincci and Hussam Hourani have filed a request for dismissal of the case. The *juge d'instruction* will be deciding, possibly within the very next weeks, on whether the matter should be closed or pursued.

(4) In other words, the next weeks may be outcome determinative.

(5) Given the overall timing, the risk of further developments of this nature during their testimony and travels to Paris, and the anguish caused by these criminal proceedings initiated by Kazakhstan, Messrs. Issam, Devincci and Hussam Hourani are not in any condition to testify during the February 11-22, 2013. This is even more so as they are concerned that their declarations in the arbitration be used against them in the Lebanese proceedings and/or cause further harassment."

127. Following this statement by Claimant's counsel, the following events – as described in the Tribunal's Fifth Procedural Order – took place:

“(1) Claimant requested that the testimony of the three witnesses be postponed to the April Hearing and that the Tribunal order Respondent ‘to refrain from taking (any further) measures that would aggravate this dispute or prejudice in any manner Claimant’s due process rights, including its right to present its case’.

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<sup>85</sup> This was a letter of 18 October 2012 concerning claims against Kazakhstan quantified at over 1 billion US dollars.

(2) By email on 7 February 2013, Respondent's counsel responded that he was looking into the allegations and would respond 'as soon as possible'.

(3) By email also on 7 February 2013, the Tribunal noted the foregoing, requested the Respondent's response by a set time, and advised the parties, 'At present, ... our disposition is to go ahead with the hearing of all the factual witnesses at the February Hearing'.

(4) By a further email also on 7 February 2013, Claimant's counsel informed the Tribunal of the following further developments:

(5) Yesterday, the Greek Intelligence Services contacted Mr. Jaafar Attari, Mr. Kassem Omar's representative and business partner in Greece, and had a meeting with Mr. Attari instantly. Mr. Attari was interrogated several hours about:

- (i) Mr. Kassem Omar;
- (ii) Mr. Issam Hourani;
- (iii) Mrs. Anastasia Novikova (the deceased who is at the centre of the murder allegations, in respect of which a hearing took place before the Lebanese juge d'instruction on Monday February 4, 2013);
- (iv) Mr. Sergey Klishinkov, who worked for the Greek company Sugar Center that was owned by Mr. Kassem Omar between 2002 and 2006, and died in Kazakhstan in January 2006;
- (v) the personal and business relations between Mr. Kassem Omar and Mr. Issam Hourani;
- (vi) the business interests of Mr. Kassem Omar in Greece; and
- (vii) the business interests of Mr. Issam Hourani in Greece.

(6) Mr. Attari was told by the Greek Intelligence Services that the inquiries were made at the request of the Kazakh authorities, which had contacted the Greek authorities repeatedly over the past months.

(7) Today, Mr. Attair was convened for a meeting at the Greek Intelligence Services again, where he was further examined about the same topics listed above.

(8) As a result of the foregoing, the latest criminal charges of murder launched by Kazakhstan against the Hourani brothers, the nature and extent of past intimidations, as well as the fact that investigations are now being opened in other countries too, none of the non-European witnesses presented by Claimant, including Mr. Kassem Omar himself, now wish to appear to testify at the hearing for fear of further reprisals against them and their families (some of which are in Kazakhstan).

(9) Therefore, at next week's hearing only Messrs. Baron and Van der Kaars will appear to testify.<sup>86</sup>

128. Claimant's counsel attached the summons that Claimant stated had been received by Mr. Issam Hourani on 17 January 2013 in connection with the Lebanese proceedings; and a document that appears to be a copy of a complaint filed by the Republic of Kazakhstan and Ms. Novikova's mother against Mr. Rakhat Aliyev and the three aforementioned Houranis for premeditated murder.
129. By letter dated 8 February 2013, Respondent's counsel transmitted its views on these developments. He denied the allegations of reprisals by Kazakhstan and referred the Tribunal to descriptions of the alleged murder of Ms. Novikova in the record. Respondent's counsel said "no one could doubt that any prosecutor anywhere in the world would be obliged to seriously investigate the circumstances of the death of Ms. Novikova". Respondent further maintained that the developments described by Claimant's counsel did not provide a valid reason for the witnesses not to appear for cross-examination. Respondent's counsel said Respondent "had no intention of asking [the witnesses] any questions about the alleged murder of Ms. Novikova, which is irrelevant to this arbitration".
130. Further, Respondent's counsel stated:

"In light of this unprecedented situation, where a Claimant fails at the last minute to produce its own witnesses, the Tribunal will understand why the Republic will not present any of its own witnesses at this Hearing for cross-examination by the Claimant. This is because the Claimant has unilaterally eliminated the standard procedure that guarantees due process whereby Claimant's fact witnesses are presented first for cross-examination by the Respondent, after which the Respondent's fact witnesses may be cross-examined by the Claimant. The Republic in no way considers that cross-examining the two minor witnesses now proffered by the Claimant could in any way substitute for the nine witnesses that have

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<sup>86</sup> The original intention had been that eleven of the Claimants witnesses of fact would be present to give evidence and to answer questions on that evidence. There were now to be only two witnesses, neither of whom could be described as "key witnesses".

been removed or in any way represent a counter-balance to the fact witnesses of the Republic.” (emphasis added)

131. Respondent’s counsel further requested that the witness statements of the nine witnesses for Claimant who were not going to appear to be cross-examined be stricken from the record; and that Claimant be barred from cross-examining Respondent’s witnesses “given their failure to present their own witnesses for cross-examination.”
132. By letter dated 10 February 2013, Claimant’s counsel responded to the Respondent’s letter of 8 February 2013. The Claimant’s letter attached a declaration from the clerk of the Lebanese *juge d’instruction* stating that the criminal proceeding in the matter before the Lebanese court was initiated on 24 July 2012, by the complaint of the Republic of Kazakhstan and the woman identified to the Tribunal as Ms. Novikova’s mother; and that, after a hearing held on 4 February 2013, the date of 5 March 2013 was set to study the case; and a statement from Mr. Jaafar Attari confirming the content of what Claimant’s counsel had said regarding his meetings with the Greek intelligence services (except that Mr. Attari said that “the first meeting lasted about an hour and not several hours”). The letter also argued that the Republic’s alleged conduct in instigating investigations against the Houranis and Mr. Omar was part of a “pattern of conduct,” and in that connection asserted that Respondent’s expert on Kazakhstani law had been forced to withdraw an opinion adverse to Kazakhstan in another case. The letter attached several documents offered to support that allegation and other alleged intimidation of participants adverse to Kazakhstan in that other case.
133. Claimant’s letter requested that the Tribunal make a number of directions, including that Respondent clarify whether its counsel’s denials of reprisals represented the official position of the Republic; that the witness statements of the nine witnesses who were not appearing for cross-examination after having been requested “be maintained on the record and be given the weight that the Tribunal deems appropriate under these circumstances”; that the remaining two witnesses (Messrs. Baron and Van der Kaars) be permitted to testify; that negative inferences be drawn from the conduct of the Republic of Kazakhstan “and more specifically wherever there is disparity between the Parties’ fact witness statements, in favour of the witness evidence, submitted by

Claimant”; and that the report of the Respondent’s expert on the law of Kazakhstan be stricken from the record for “lack of independence.”

134. Over the weekend of 9/10 February 2013, the members of the Tribunal travelled to Paris. On Monday, 11 February 2013 the Tribunal met *in camera* with counsel for the parties to discuss the parties’ recent communications and the conduct of the Hearing scheduled for that week. After that discussion, and further communications with his witnesses and client, Claimant’s counsel informed the Tribunal and Respondent (on 12 February 2013) that Messrs. Awwad and Elmoukahal had reluctantly consented to appear to be examined that week and that, with great reluctance, Mr. Issam Hourani had indicated he would be able to attend the April hearing.

#### **E. The Fifth Procedural Order**

135. The Tribunal decided that the February Hearing, which was scheduled to last for two weeks, could not go ahead in a situation in which (i) key witnesses on behalf of the Claimant were refusing to attend and (ii) in turn, the Respondent was refusing to call its witnesses. Instead, with the members of the Tribunal in Paris, and with the respective teams of lawyers and representatives of the clients in attendance, the Tribunal held discussions between themselves, and with the lead counsel for the parties, to decide what action to take.
136. On 12 February 2013, the Tribunal announced its decision, with a written Order to follow. On 15 February 2013, the Tribunal issued its Fifth Procedural Order. After an introductory section, this Order stated:

“16. Procedural Order No. 2 set forth the procedure for each party to designate witnesses from the other side for cross-examination. The Order stated in Paragraph 21, ‘Neither party shall be able to remove a name from this list, unless there are special circumstances in which case the Party concerned shall explain its reasons to the other Party and the Tribunal.’

17. Article 4(7) of the IBA Rules on the Taking of Evidence in International Arbitration states:

If a witness whose appearance has been requested pursuant to Article 8.1 fails without valid reason to appear for testimony at an

Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

In Procedural Order No. 1, the Tribunal stated that it would look to the IBA Rules for guidance in connection with the giving of documentary evidence, and not in all respects. Nevertheless, the Tribunal finds Rule 4(7) instructive and useful.

18. Having considered the matter with great care, the Tribunal notes the timing of the criminal complaint in Lebanon, of the hearing on that complaint and of the reported investigatory interview in Greece. Respondent has not provided an entirely satisfactory explanation of that timing. The Tribunal is not in a position to ascertain precisely what has been taking place or why, but it accepts the stated fear of reprisals by Claimant's witnesses, whether those fears are in fact justified or not. Accordingly, the Tribunal grants the Claimant's request that the witness statements of the witnesses who, as of now, have declined to appear to be cross-examined, will be maintained on the record and will be given the weight that the Tribunal deems appropriate. However, their failure to attend will have a very serious impact on the weight the Tribunal gives to their testimony.

19. The failure of Claimant's witnesses to appear makes it difficult for the Tribunal to evaluate the testimony provided by those witnesses that appears only on paper. This is particularly true with respect to a wide array of issues in this case, as to which there are often few or no contemporaneous documents to corroborate testimony and starkly conflicting renditions of the same events or circumstances. Thus, the Tribunal will find it difficult to put weight on uncorroborated testimony on an important, contested subject where the witness has not appeared for cross-examination or examination by the Tribunal when called.

20. In addition, on 14 February 2012, in consultation with the parties, the Tribunal declined to strike the reports of Respondent's expert on Kazakhstan law, but in accordance with common practice in international arbitration, it will treat them, along with other submissions on foreign law now in the record, as submissions by counsel akin to a supplement to a party's memorial. The Tribunal has discussed this with counsel for the Parties and they have advised that this is acceptable.

21. Messrs. Baron and Van der Kaars will be permitted to testify. The Tribunal has considered Claimant's further requests and declines to make further rulings in that regard."

137. The Tribunal also decided that, in order to make use of the time set aside for the February Hearing, Counsel should make their oral submissions on the issue of

jurisdiction. Accordingly, the Tribunal met the parties in open session on 12 and 13 February 2013.

138. The Claimant began by outlining its submissions as to the jurisdiction of the Tribunal, which it based both on the Foreign Investment Law and, additionally or alternatively, on the Contract. On the following day, the Respondent replied, denying that the Tribunal had jurisdiction on either of the grounds put forward by the Claimant.
139. Following these oral submissions, it became clear that there were aspects of the case on jurisdiction that were troubling. For instance, there was the question of whether or not Mr. Kassem Omar was indeed registered to conduct economic activities in Lebanon. In its Reply of 31 July 2012, the Claimant asserted that Mr. Kassem Omar *was* registered to conduct business in the Lebanon. This seemed conclusive; but in its Rejoinder of 14 December 2012, the Respondent said that “Kassem Omar is not and never has been registered to conduct business in the Lebanon”.
140. The members of the Tribunal deliberated amongst themselves. They concluded that their concerns about the issue of jurisdiction should be addressed before embarking on long and expensive hearings (assuming that such hearings took place), first, of the fact witnesses, and then of the legal and technical experts.
141. In order to be helpful to the Parties, the Tribunal prepared a note indicating its areas of concern. This note was handed to counsel for the Parties at a private meeting with them on 14 February 2013. (The note has now been entered into the record as Exhibit C-351.)
142. After discussion at this private meeting, the Parties agreed with the Tribunal that it would be sensible to confine the April Hearing to the issue of jurisdiction. The Directions for that Hearing, as set out in the Tribunal’s Sixth Procedural Order, were as follows:

“On or before 21 March 2013, each party will file a submission on jurisdiction together with any and all authorities and other documents on which it relies. The Tribunal requests that the parties make every effort to keep these submissions concise.

On or before 4 April 2013, each party may file any additional authorities and other documents on which it relies in response to new points by the other party in the above submissions.

The hearing shall take place 11-12 April 2013, commencing each day at 10 am, breaking for lunch, and finishing at 4:30 pm , at the ICC Hearing Centre, 112 av. Kleber, Paris.

On the first day of the hearing, each party, commencing with Claimant, will have two hours to present its case on jurisdiction.

There will be no witnesses or cross-examination. All specialist lawyers, whether Kazakh, Russian, Lebanese or otherwise, will be part of the party's legal team open to questions by the Tribunal.

On the second day of the hearing, each party will have the opportunity to respond for up to one hour.”

#### **F. The Memorials on Jurisdiction**

143. On 21 March 2013, each party filed extensive written submissions on Jurisdiction, in accordance with the Tribunal's Sixth Procedural Order. The Claimant's "Memorial on Jurisdiction" was accompanied by exhibits, including legal opinions from two jurists who had served as members of the Republic's Working Group on the FIL. The parties did not request any relief different from their previous requests on the issue of jurisdiction of the Tribunal.

#### **G. The April Hearing**

144. On 11 and 12 April 2013, the Hearing on the issue of jurisdiction took place as planned. On 11 April 2013, leading counsel for each party made oral submissions, with members of their legal team adding their arguments as appropriate; and on 12 April 2013, leading counsel for each party made oral reply submissions, again with the assistance of members of their legal teams, including lawyers from Lebanon. As with all previous hearings, a live-note transcript of the proceedings was made.
145. The Hearing adjourned at lunch-time on 12 April, with the Tribunal promising to begin work on its Award but without, at that stage, being able to give any indication

of how long this would take, having regard to the developing nature of the parties' arguments and the vast amount of material to be studied.

## **V. The Tribunal's Deliberations**

146. The Republic raised an objection to the Jurisdiction of the Tribunal from the outset of this arbitration. Nevertheless, the Republic took part in the proceedings, as did the Claimant. In effect, both parties acknowledged, if only implicitly, the doctrine of competence/competence – that is to say, they acknowledged that an arbitral tribunal has jurisdiction to determine its own jurisdiction. This doctrine, which is internationally recognised, finds expression in English law (the law of the seat of the arbitration) in Article 30.-(1) of the Arbitration Act 1996 which, in material part provides that:

“Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-

(a) Whether there is a valid arbitration agreement, ”

### **A. The Law Governing the Arbitration Agreement**

147. Both Parties have, correctly in the Tribunal's view, argued that the question as to whether or not there is a valid and enforceable agreement to arbitrate is a question of interpreting the relevant provisions of the FIL and the Contract, in good faith and giving full weight to the intentions of the Parties. Consideration has also to be given to Kazakh law – for instance, in so far as concerns the “foreign investor” requirement; and to the law of England, as the law of the seat of the arbitration, agreed by the Parties when these arbitral proceedings began. Insofar as the Tribunal does not believe that any principles of international law would provide jurisdiction,<sup>87</sup> it need not decide whether international law would have some role to play in this arbitration.

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<sup>87</sup> See the discussion of Claimant's theory of “acquired rights” in para. 156 *infra*.

## **B. The Tribunal's Task**

148. The Tribunal's task, briefly stated, is to consider whether or not there is a valid agreement between the Parties to arbitrate the present dispute, such an agreement being said to exist either in the Foreign Investment Law, or in the Contract, or in both.

## **C. The Foreign Investment Law**

149. As noted above, in the Notice of Arbitration, dated 8 October 2010 and brought by both Ruby Roz and Mr. Omar, the Claimants asserted that jurisdiction rested on Article 14 of the Contract. They characterised the FIL as the relevant law of the Republic of Kazakhstan relating to the "procedure for review of disputes" that is referred to in that Article.

150. The Statement of Claim, dated 27 September 2011 and submitted on behalf of Ruby Roz alone (now as sole Claimant), added an additional theory (which is now argued first), namely that jurisdiction could rest entirely on Article 27 of the FIL.<sup>88</sup> That provision states:

2. If such disputes cannot be resolved through negotiations within three months from the date of a written request of any party to the other, the dispute shall, at the option of either party, be transferred for resolution, with the written consent of a foreign investor:

1) to the judicial authorities of the Republic of Kazakhstan;

2) in accordance with the agreed procedure for settling disputes, including those set out in the contract or any other agreement between the parties to the dispute, to one of the following arbitral bodies:

a) International Center for Settlement of Investment Disputes (hereinafter - the Center), established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on March 18, 1965 (ICSID Convention), if the state of the investor is a party to this Convention;

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<sup>88</sup> Statement of Claim at paras. 364 to 392.

b) Additional Body of the Center (functioning under Additional Body Rules), if the state of the investor is not party to the ICSID Convention;

c) arbitration bodies established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);

d) arbitration in the Arbitration Institute of the Chamber of Commerce in Stockholm;

e) arbitration commission in the Chamber of Commerce of the Republic of Kazakhstan.

3. In the case a foreign investor selects the procedure set forth by subparagraph 2) of paragraph 2 of this article, the consent of the Republic of Kazakhstan is considered to be secured. The consent of a foreign investor may be given at any time by written request to the authorized state body or at the time of arbitration.

151. The Claimant argued that, whilst Article 27.2 required the parties to an “investment dispute” to respect any procedure for the resolution of such dispute that they may have agreed upon, Article 27.3, and in particular the phrase, “the consent of the Republic of Kazakhstan is deemed to be granted,” provided the Investor with the option to submit the dispute to arbitration without the need for a separate arbitration agreement.<sup>89</sup> The Claimant continued to press this theory throughout the proceedings on jurisdiction.

152. The FIL was repealed in its entirety in 2003, when Kazakhstan enacted a new law that merged the investment regimens for foreign and domestic investors. As noted above, Claimant argues that the repeal is irrelevant on two grounds: (1) that “a foreign investor that made an investment in Kazakhstan during the time in which the Foreign Investment Law was in effect acquired a firm right to submit any disputes related to that investment to arbitration under Article 27 of the Foreign Investment Law: a right which could not be abrogated by the Law’s subsequent repeal”; and (2) that “the continued validity of such foreign investors’ rights to submit disputes to arbitration under Article 27 is further confirmed by the stabilisation provision in the Foreign Investment Law itself.”<sup>90</sup>

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<sup>89</sup> Statement of Claim at para. 367.

<sup>90</sup> Statement of Claim at para. 369.

153. The stabilisation clause of the FIL to which the Claimant referred is Article 6(1) and is quoted above. For convenience, the Tribunal sets forth the critical language here:

“In case of deterioration of the position of foreign investor, which results from the change of legislation and (or) entry into legal force and (or) change of international treaties conditions, the legislation that was in force at the time of carrying out of the investments, is applicable to the foreign investments during 10 years, while to the investments made on the basis of long-term contracts with the authorized governmental agencies (longer than 10 years) – up to the expiry of the contract’s term except as otherwise provided.”<sup>91</sup>

154. The Respondent argued that the FIL did not provide a basis for this Tribunal’s jurisdiction for four separate reasons:

- (1) The Claimant was not a “foreign investor” within the meaning of Article 27 of the FIL, because the definition of that term in Article 1 of the FIL required that a natural person owning a Kazakhstani company such as Ruby Roz must be “registered to carry out business activities in [his] country of citizenship or permanent residence,” and Respondent asserted that Mr. Omar was not so registered in either Palestine or Lebanon.
- (2) Neither the arbitration nor the stabilisation clauses of the FIL survived the repeal of the FIL in 2003.
- (3) Even if the stabilisation clause survived the repeal, the stabilisation period ended prior to the filing of the Notice of Arbitration, because the relevant date of the investment is the date of the investment contract, namely 5 March 1999.
- (4) Ruby Roz lost any status as a foreign investor under the FIL when Mr. Omar transferred the shares to Ms. Nazarbayeva on 29 June 2007.

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<sup>91</sup> This is the translation set out in the Claimant’s Memorial on Jurisdiction at para. 58. As set forth below, Respondent disputes this translation, principally arguing that the term “the legislation that was in force at the time of carrying out of the investments” should read “the legislation which was in effect at the moment of the realization of the investments.” (Respondent’s Submission on Jurisdiction of 21 March 2013 at para. 57.)

155. The Tribunal finds that each of these arguments presents a very substantial hurdle for the Claimant in relying on the arbitration and stabilisation clauses of the FIL. The Claimant argues, for example, for a loose interpretation of the “foreign-investor” registration requirement to conclude either (i) that the requirement does not apply in cases where an investor comes from a country that has no registration requirement such as those in former Soviet States or (ii) that the requirement is satisfied by reference to registrations of companies in which the investor (Mr. Omar) is mentioned as owner or director. In the end, the Tribunal holds that even if the Claimant managed to surmount the other significant hurdles, it stumbles on the third – the Tribunal does not consider that a new stabilisation term was triggered either by the 2002 Amendment or by every investment made until 2006 or 2007.
156. To begin, the Tribunal does not accept the Claimant’s primary argument that it had “accrued rights” to invoke the arbitration clause as of the date of the 1999 investment or as of the date of the alleged breaches prior to March 2009, regardless of the stabilisation clause.<sup>92</sup> The arbitration clause in the FIL calls for the right to arbitration to be perfected by the investor’s written consent, not by an investment or by a claim arising.<sup>93</sup> In other words, the Claimant had no “accrued right” to arbitration *until* it accepted in writing the offer of arbitration set forth in the FIL – and this occurred no earlier than the Claimant’s letter seeking to negotiate the dispute.<sup>94</sup>

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<sup>92</sup> The Claimant’s Memorial on Jurisdiction at paras. 66 and 71.

<sup>93</sup> FIL Art. 27.3 (“The consent of a foreign investor may be given at any time by written request to the authorized state body or at the time of arbitration.”). To this extent, the Tribunal disagrees with the ICSID tribunal in *Rumeli*, which held, as the last of three alternative bases for finding a valid arbitration agreement in that case, “[b]esides Article 6(1), it is also well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application of the principles of good faith, estoppel and *venire factum proprium*.” *Rumeli*, Award of 29 July 2008, para. 335. The *Rumeli* tribunal’s view that, independent of Article 6(1), the foreign investor had “accrued rights” to arbitration ignores the fact that prior to having filed its Notice of Arbitration the investor had only an unaccepted offer to arbitrate, an offer that was repealed before it was accepted. Ordinarily, in ICSID arbitration, “[a]n offer of consent contained in national legislation . . . that had not been taken up by the investor will lapse when the legislation is repealed.” Schreuer et al., *The ICSID Convention: A Commentary* para. 618 (2d ed. 2009). Here, too, the Tribunal finds that Kazakhstan’s offer to arbitrate in Article 27 was by its terms required to be accepted in writing before it was withdrawn.

<sup>94</sup> Exhibit C-9 (referring to intent to resort to arbitration) in June 2010. Claimant does not argue that the March 1999 Contract constituted acceptance of the offer of arbitration in the FIL, presumably

157. Turning to the stabilisation clause, the correct translation of the critical language determining when the 10-year period begins has been in dispute. The Russian is “в момент осуществления инвестиций.” In its initial submission, the Claimant translated the words as “at the time of investment.”<sup>95</sup> At the February Hearing, the Claimant offered a revised translation: “at the time of carrying out of the investments.”<sup>96</sup> The Respondent countered that the correct translation is “at the moment of the realization of the investments.”<sup>97</sup>
158. Under each of these translations of this language, there remains ambiguity about whether the term begins when an investment project is initially undertaken or upon each new investment of funds or assets into a project. Both parties’ experts agreed, however, that the latter interpretation could not have been the intention of the Kazakhstan legislature. In particular, the Claimant’s expert Mr. Aset Abzhanov described at length how an interpretation that triggered the start of the 10-year period with each new investment of funds, which he regarded as a literal interpretation of the clause, would not have made sense:

“36. When pursued to its logical conclusion, it appears that such a literal interpretation does not correspond to the intended object and purpose of Article 6.1 of the Foreign Investment Law. In fact, such an interpretation would seem to deprive Article 6.1 of any meaning at all. How, for example, would one determine the stabilisation period to be applied to ‘know-how’ (an asset expressly mentioned in the definition of ‘investment’ in the Foreign Investment Law), which is contributed to a business on a continuous basis? It would be impossible under a strict literal interpretation. Furthermore, even when the dates of contribution can be determined, it is highly impracticable to calculate distinct stabilisation periods and apply distinct legal regimes for each asset associated with the foreign investor’s overall business operation (from the trademark rights to the pencils and pens).

37. Therefore, in the event of repeated direct investments made in furtherance of a continuing investment project, such as pursuant to an investment contract with the state, the moment of ‘making’ the investment should be determined differently, and

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because, as set forth in para. 178 below, at the time of the Contract the FIL did not extend an offer of arbitration to domestic companies under foreign control.

<sup>95</sup> CLA-1.

<sup>96</sup> Memorial on Jurisdiction at paras. 58 and 67.

<sup>97</sup> Exhibit RL-130.

not by the date of acquisition or contribution of each individual asset, as may follow from the literal interpretation of Article 6.1 of the Foreign Investment Law.”<sup>98</sup>

159. Mr. Abzhanov concluded that the proper interpretation of the clause should be that the 10-year period runs from when the investor undertakes – in the sense of “commences” – the investment project. Mr. Abzhanov found support for this interpretation in the language of the clause dealing with contracts extending for more than 10 years:

“38. It appears that when enacting Article 6.1 of the Foreign Investment Law, the Kazakh legislator intended to create a single stabilisation period for ‘investments.’ In turn, by ‘investments’ the legislator understood *both* (1) simple, single-time investments (*e.g.*, purchase of shares) and (2) complex, multiple-time direct investments made in furtherance of a continuing investment project. In the latter case, it seems that the legislator considered such project to be a single whole ‘investment.’ Where an investment is single-time and is made in single objects, it is made at the time the asset is acquired or contributed. Where, however, complex and continuing direct investments are carried out in furtherance or within the scope of a single investment project, the moment the relevant ‘investment’ is made is when the foreign investor undertakes the overall investment project. In accordance with this interpretation, the specific transactions and expenditures that are subsequently undertaken or incurred by the investor will be considered as contributions to the development, maintenance or expansion of the already made ‘investment’ – *i.e.*, the investment project – rather than as new investments. Such an interpretation is completely in line with the meaning of the second prong of Article 6.1 of the Foreign Investment Law which provides that where the investor has executed a long-term investment contract with the state, *the* stabilisation period - a single one and *not* multiple periods for each individual transaction or contribution made under the contract – shall extend until the expiration of that contract. It seems that although the second prong of Article 6.1 is technically applicable only to long-term (more than ten years) contracts with the state, the embedded idea of a single stabilisation period for all contributions made within a single investment contract should be similarly applicable to complex investment projects which last less than ten years.”<sup>99</sup>

160. Mr. Abzhanov concluded:

“42. In sum, to answer the specific question posed to me, the start date for the ten-year legislation stabilisation period provided for in Article 6.1 of the Foreign Investment Law shall be determined from the moment the investment was made. For single-time investments made in single business objects that shall be the moment when the foreign investor acquires rights to such objects. Where, however, complex, continuing direct investments are made in various objects in furtherance of a single investment project, the moment of ‘making’ the investment shall be when the foreign investor undertakes that investment project, rather than the moment of entering into

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<sup>98</sup> First Abzhanov Reportat paras. 36 and 37.

<sup>99</sup> *Id.* at para. 38 (emphasis added).

each specific transaction or acquiring each individual asset in furtherance of such project. Of course, an exact determination of the date on which an investment project is undertaken will have to be made in view of the specific circumstances of each case.”<sup>100</sup>

161. Mr. Anatoliy Grigoryevich Didenko, Respondent’s expert, concurred. He stated that the beginning of the 10-year period is the “beginning” of each “investment project.”<sup>101</sup>
162. At the April Hearing, the Claimant argued that the statute should properly be read to trigger the 10-year period from the date of any investment of funds. As noted above, the Claimant’s counsel explained that Mr. Abzhanov erred in his submission because he was working from the erroneous translation.<sup>102</sup> But Mr. Abzhanov presumably developed his views based on the original Russian text, which he quotes in the Russian version of his report. Mr. Abzhanov’s *curriculum vitae* states that he has native command of the Russian and Kazakh languages but only “elementary” English. In any case, while the Claimant’s latest construction of the words of the statute is plausible, in varying degrees, under each of the translations before the Tribunal, it faces precisely the difficulties that Mr. Abzhanov mentions. In particular, in the event of continuous investment, or re-investment of profits, which is quite common, the 10-year period would never be triggered. The Tribunal considers it likely that the legislators had in mind that what they were proffering was a stabilisation period that would be 10 years (or longer, if the State was agreeing a longer term contract with any given investor). That reading implies a single trigger point. The Tribunal finds significant support in the fact that all the expert testimony before the Tribunal on Kazakhstan law reached this conclusion.
163. The unreasonableness of finding a new trigger point with each new investment of funds is illustrated by the present Contract. It states that its term is from the effective date – apparently March 5, 1999 or when the contract was registered shortly thereafter – until the last day of February 2009, when the last of the tax holidays was to expire.

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<sup>100</sup> *Id.* at para. 42 (emphasis added).

<sup>101</sup> First Didenko Report at para. 52.

<sup>102</sup> Transcript, April Hearing, 2013 Day 2 at page 280, lines 11-13.

The contract thus had a term just a few days short of 10 years. Under the terms of the stabilisation clause, if the contract had been for a term of 10 years and one day, the stabilisation clause would have expired at the end of that term. It is unlikely that a rational legislator would have provided that a contract such as this, which could be implemented by investments over a prolonged period of time, would be stabilised effectively forever while a contract that ran a week or two longer could not be.

164. Where the parties' experts disagreed is whether the 2002 Amendment initiated a new investment project for this purpose. Mr. Didenko emphasized that in 2002 Ruby Roz and the State entered into what was merely an amendment to the prior contract, and that this was thus simply a continuation of the pre-existing investment project. Mr. Abzhanov, supported by the Claimant's poultry expert Mr. Paul Aho, argued that the 2002 Amendment in fact greatly expanded the scope of the project. The original contract called for a single-location, vertically integrated poultry factory (which the parties term a "Soviet-style *pitsefabrica*") and the 2002 Amendment envisioned a multiple-location poultry operation with each stage of production geographically segregated from the others, along with new tax incentives, an increase in the required monetary investment and a 20-fold increase (from 45 to 1000) in the number of employees required. The Respondent counters that in fact the expansion of the operation to multiple locations had begun before the 2002 Amendment, with the operations already "spread over four or five different pieces of land in three different districts" and employees numbering "in the hundreds."<sup>103</sup> The Claimant does not in its later "Memorial on Jurisdiction" dispute this characterisation of the facts on the ground.<sup>104</sup>

165. The Tribunal agrees with the Respondent that the 2002 Amendment was not the initiation of a new investment project but simply, in Mr. Abzhanov's words, "contributions to the development, maintenance or expansion of the already made 'investment' – *i.e.*, the investment project – rather than . . . new investments."<sup>105</sup> It is

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<sup>103</sup> First El-Badaoui Statement at paras. 17 and 23; Second El-Badaoui Statement at para. 28.

<sup>104</sup> The Claimant's Memorial on Jurisdiction at para. 67.

<sup>105</sup> First Abzhanov Report at para. 38.

clear from a “non-exhaustive” list prepared by the Claimant of properties purchased or acquired by Ruby Roz that the project had acquired, as early as 2000, land beyond the original poultry factory, and those acquisitions had accelerated beginning in early 2002, before the August 2002 amendment.<sup>106</sup> The conclusion by the Claimant’s expert Mr. Aho that the business plan was transformed in 2002 rests entirely on the terms of the 2002 Amendment to the Contract with the State, rather than on any evidence of the facts on the ground.<sup>107</sup> It is plain that, whilst the Contracts set forth the minimum investment required to obtain the indicated tax benefits, they did not describe or limit what was actually being done. *Compare* Ex. C-66 (audit report showing nearly \$6 million of investments as of date of amendment); Ex. C-3 Appx 1(A) (2002 amendment reports 120 jobs had been created by the end of 2001) *with* Ex. C-1 (1999 contract calls for investments of \$4.7 million and creation of 45 jobs). Indeed, the witness statement of Mr. John Baron, a witness for the Claimant who was employed by Mr. El-Badaoui as a consultant for the first six months of 2002, confirms that the expansion of the operation beyond the original Stepnaya complex was underway at that time.<sup>108</sup> That the parties chose to document the increase in tax benefits in the form of an amendment to the earlier contract also has some significance, as it indicates that they viewed the expansion described in the 2002 Amendment as a continuation of the work under the original Contract. In short, the Tribunal considers that both the reality of what was occurring and the form of the 2002 Amendment lead to the conclusion that the 2002 Amendment reflected an

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<sup>106</sup> Exhibit C-68.

<sup>107</sup> First Aho Report at page 25.

<sup>108</sup> Witness Statement of John Baron, 27 July 2012, at para. 27 (“We visited the KARAOY farm [in February 2002]. Correctly it had been decided to de-centralise the stages of production by removing the breeding stock from the STEPNAJA (Taran) complex.”), 28 (noting visits to a feed mill in a “remote area” and to farms that “Mr. Al-Badaoui had recently placed in his property portfolio”). Mr. Baron also corroborates Mr. El-Badaoui’s testimony that the project was intended from early days to extend beyond the limited operation referred to in the 1999 contract:

If therefore we look back to the year 2001, we saw a man with a vision to become a key player in CIS poultry production; with grandparent stock in Russia and integrations spread through Ukraine, Kazakhstan and Azerbaijan. I do believe that this was his vision.

Baron Witness Statement, at para. 37. The Claimant’s witness Mr. Awwad likewise testified that there were two operating farms when he arrived in 2001, and that “the owner, Mr. Al-Badaoui, had plans to expand the business – and eventually did so in 2002.” Witness Statement of Hamzah Ali Abu Awwad, 26 July 2012, at para. 6.

expansion of the prior investment project – one that was already underway – rather than a new investment project that might trigger a new 10-year stabilisation period.

166. That the pre- and post-2002 aspects of the project constituted a single investment is further confirmed by the implications of applying the stabilisation clause separately to the two aspects. The expansion was designed to operate as part of an integrated operation with the pre-existing facilities, so that it would be practically impossible for many – if not most – purposes to apply a different legal regime to each. This is certainly true as to the claim that eventually arose, expropriation of the entire business. No one has suggested, for example, any practical way to apply a discounted cash flow analysis – the Claimant’s preferred form of damages assessment – to an integrated poultry operation, without the core operations purchased in 1999.
167. The Tribunal adds as well that, from the perspective of broader considerations of equity, the stabilisation clause had already been repealed at the time Mr. Omar made his investment in the project in 2004. Whilst this is not by any means determinative, because the allegedly “foreign investor” for purposes of the Claimant’s FIL claim is Ruby Roz, it does mean that Mr. Omar could only claim that he relied on the precise length of the stabilisation clause in making his own investment, if (i) he had both thoroughly investigated the history of Mr. El-Badaoui’s investments, and (ii) he had studied the FIL sufficiently to form a view as to the triggering event for the 10-year period. There is no evidence that Mr. Omar did so; and he does not claim any such reliance.
168. Thus, the Tribunal concludes that the Claimant could claim the benefit of the stabilisation clause only from the date of its initial investment in the poultry operations, which occurred in or around March 1999. As a result, assuming that the provisions of the FIL survived its 2003 repeal for investors who had invested before that date, and that Ruby Roz otherwise could claim the benefit of the FIL, the offer of arbitration in Article 27 expired in 2009, and hence the Claimant cannot rely on the FIL as a basis for jurisdiction of the Tribunal.

#### D. The Contract

169. In its Memorial on Jurisdiction the Claimant reiterated “its position that in addition to the jurisdiction conferred upon the Tribunal by the 1994 FIL, the Tribunal also has jurisdiction over Claimant's claims on the basis of the Contract and the arbitration agreement contained therein ... independently from the 1994 FIL.”<sup>109</sup> The existence of “two legal instruments” as a basis for the Tribunal's jurisdiction was restated by the Claimant's counsel at the April Hearing.<sup>110</sup>

170. The Respondent's objection to the Tribunal's jurisdiction under the Contract is twofold:

“A The Arbitration clause is pathological and cannot be a basis for this Tribunal's jurisdiction” and

“B Since RRA is not a foreign investor, it cannot benefit from the arbitration clause.”<sup>111</sup>

171. The jurisdictional provisions of the Contract are in Article 14. This Article has already been set out in full, but the more relevant provisions are as follows (emphasis added):

“14.1 The Parties undertake to do everything dependent upon them to resolve all disputes and differences connected with the investment activities or arising out of the performance or interpretation of any provisions of this Contract provision by means of negotiations between each other.

14.2 In case the Parties do not reach an agreement within two months from the date of a written request by one party to another Party, the dispute is removed:

(a) To the judicial organs of the Republic of Kazakhstan vested with the authority of the laws of the Republic of Kazakhstan to hear such disputes;

(b) or to the various foreign arbitration organs, **if interests of a foreign Investor are affected** and there is a written objection by him against having the dispute be resolved in Kazakhstan courts.

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<sup>109</sup> Claimant's Memorial on Jurisdiction at para. 84.

<sup>110</sup> Transcript April Hearing 2013, Day 1, page 8, line 25.

<sup>111</sup> Respondent's Submission on Jurisdiction, pages 38 and 44.

The procedure for review of disputes with the Investor arising out of the Contract is determined in accordance with the laws of the Republic of Kazakhstan."

172. The Contract is based on a "model contract" applying equally to foreign and domestic investors.<sup>112</sup> However, the different jurisdictional avenues open to investors depend on whether those investors are domestic or foreign. It is only foreign investors who can choose to have their disputes "removed" to arbitration, rather than being determined in the courts of Kazakhstan.
173. Therefore, the first question to be examined by the Tribunal, in its determination of whether or not arbitration under Article 14.2(b) of the Contract is available to Ruby Roz, is whether the "interests of a foreign Investor are affected".
174. The "Investor" is defined in Article 1.3 of the Contract as "Ruby Roz Agricol Limited Liability Partnership".
175. The word "foreign", which qualifies the Investor eligible for arbitration, must be given meaning. The plain, literal meaning of "foreign" Investor must be an Investor from a foreign country – and, in the case of a corporate body, the most straightforward meaning is a company incorporated under the laws of a foreign jurisdiction. Ruby Roz, being a Kazakh company, is not "foreign" in the plain literal meaning of that word and so, on the face of it, is not eligible to invoke the arbitration provisions of Article 14.2(b) of the Contract.
176. However, since the issue here is one of the arbitrability of investment disputes with foreign investors, and since the FIL – which was in force when the Contract was made – is concerned with "foreign investment", the Tribunal has considered whether or not the FIL provides assistance to the Claimant in construing the word "foreign" as used in the Contract.

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<sup>112</sup> Transcript February Hearing 2013, Day 1, page 59, lines 20 – 25, and page 60, line 1; and Respondent's Submission on Jurisdiction at para. 108.

177. Claimant's argument here was not that the FIL was incorporated into the Contract,<sup>113</sup> but rather that the FIL was a tool or piece of evidence to discern the Contract drafters' intent:

"Again, Claimant is merely relying on Article 27 of the FIL not by incorporation but as one of the many means to establish the intention of the Parties as regards the binding and autonomous provisions of the arbitration clause contained in Article 14.2 of the Contract ..."<sup>114</sup>

178. But even if the parties agreed to the Contract with the FIL's definition of "foreign investor" in mind, that does not help Claimant. On 5 March 1999, the date when the Contract was concluded, the definition of "foreign Investor" under the FIL had *not yet* been extended to include domestic companies such as the Claimant which were under foreign control. The extension to "legal entities of the Republic of Kazakhstan in relation to which foreign investors have the right to determine the decisions made by such legal entities" took place later, by way of amendment of the FIL by Presidential Decree of 2 August 1999 No. 466-1.

179. The dispute resolution provisions of Article 27, which have not been changed or amended, govern "investment disputes". These are defined as disputes between a "foreign investor and the Republic of Kazakhstan", and the term "foreign investor", as at 5 March 1999, the date of the Contract, did not include Kazakh entities. These were not added, as a fifth category, until 2 August 1999. Accordingly, the FIL definition of "foreign investor" does not provide a basis for the Tribunal to hold that the Parties intended on 5 March 1999, when they entered into the Contract, that Ruby Roz could avail itself of the arbitration provisions of the Contract which were open to a "foreign Investor".

180. Article 4.5 of the FIL, which pre-dates the Contract, does not change this conclusion. Article 4.5 states, in material part:

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<sup>113</sup> *E.g.*, Claimant's Memorial on Jurisdiction at para. 87 ("Claimant does not construe Article 14.2 of the Contract as an arbitration clause by incorporation of Article 27 of the 1994 FIL.").

<sup>114</sup> Claimant's Memorial on Jurisdiction at para. 106.

“Guarantees to foreign investors established by Article [27] of this law also apply to the protection of interests of enterprises with foreign participation in the statutory fund of which the share of foreign investors is not less than 35% ...”

181. This issue was raised and discussed at the April Hearing. Counsel for the Republic, Ms. Alvarez, gave an explanation of Article 4.5 which the Tribunal finds to be convincing. Ms. Alvarez said:

“Let me give you an example. In NAFTA, for instance, in NAFTA you have two provisions, 11.16 and 11.17, that give two options to the foreign investor, either to bring a claim on its own behalf or to bring a claim on behalf of its investment, which means that, if there are actions of the State that would affect the interests of the investment, the investor behind the investment can bring a claim for these interests that were affected.”<sup>115</sup>

182. Article 4.5 does not change the meaning of the term “foreign investor” – the party with standing to bring a claim under the FIL. Article 4.5 expands the scope of the claims that the foreign investor can bring so as to include injury to a Kazakh company in which the foreign investor has a sufficient interest. Thus, even if the drafters of the Contract, in making arbitration available to “foreign Investor[s],” had in mind the scope of “foreign investors” who could bring claims under the FIL, Article 4.5 would not have been seen as making foreign-owned Kazakh companies into “foreign investors” themselves – that happened only later in 1999.<sup>116</sup>

183. The Claimant has not alleged that there was a change or amendment to Article 14.2 of the Contract that would have brought in the change to the FIL extending arbitration as a means of investment dispute resolution to domestic companies. In any event, any such amendment would at least have to be explicit. Nothing about the 2002 amendment to the Contract suggests an intent to expand the arbitration rights set forth in the original Contract.

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<sup>115</sup> Transcript April Hearing 2013, day 2, page 314, lines 3 – 12; see also page 313, lines 18- 25 and page 315, lines 1 – 12.

<sup>116</sup> Whether Mr. Kassem Omar might have availed himself of the provisions of Article 4.5 of the FIL is a moot question. Mr. Omar is no longer a party to these proceedings; and the claim before the Tribunal has been put forward as a claim by Ruby Roz for losses allegedly suffered by Ruby Roz itself at the hands of the Republic.

184. Finally, it should be noted that Article 14.2 of the Contract imposes two requirements for the “removal” of a dispute to arbitration. The first is that the “interests of a foreign investor” are affected; the second is that there is a written objection by that investor to the resolution of the dispute in the Kazakhstan courts. This means that the “offer to arbitrate”, made by the Republic in Article 14.2 of the Contract, would have been accepted upon notification by Ruby Roz to the Respondent of the existence of a dispute and Ruby Roz’s objection to the resolution of the dispute by Kazakh judicial bodies, which Claimant says occurred on 9 June 2010.<sup>117</sup> By this time, the FIL was no longer in existence and so it could not be of any assistance in bringing the Claimant within the definition of a “foreign investor”.
185. The Tribunal can leave unanswered whether Article 14(2)(b) of the Contract, if it were otherwise available to Ruby Roz, was – as the Respondent argued – a “pathological” arbitration clause or whether its undoubted vagueness and uncertainty with no stated place of arbitration and no reference to any specific arbitral institution or set of rules (such as those of UNCITRAL) could be cured by incorporating the arbitral provisions of the FIL. As mentioned above, this was in any event an avenue which the Claimant’s Counsel was unwilling to follow.
186. The Tribunal does not find any general principles of law governing the interpretation of arbitration agreements, either in the law of Kazakhstan or in the law of England, as the law of the seat of the arbitration, which would enable the Tribunal to uphold the alleged agreements to arbitrate.
187. The Tribunal does not consider that the *effet utile* principle of interpretation allows, let alone compels, an interpretation to the effect that Ruby Roz must be held to be “foreign” for the purposes of the Contract. The Contract is a form contract intended for use with both domestic and foreign investors. The fact that a clause applies only if a foreign investor is involved does not make the clause ineffectual. Nor does the principle of *contra proferentem*<sup>118</sup> assist. This principle is meant to prevent the author

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<sup>117</sup> Claimant’s letter seeking to negotiate the dispute, Ex. C-9..

<sup>118</sup> Claimant’s Memorial on Jurisdiction at para. 153 in fine, and footnote 183.

of a clause from relying on an ambiguity or obscurity to its own benefit. Here the clause is susceptible of a straight-forward reading – a company is foreign if it is formed outside Kazakhstan; it is only the attempt to give it content by reference to surrounding circumstances that gives rise to any uncertainty, and in the end looking to those circumstances does not give rise to doubts about the validity of the initial reading.

#### **E. Conclusion**

188. This is a case in which the Claimant has made serious allegations against a sovereign government, the Republic of Kazakhstan. The substance of these allegations is that the Republic, through its various agencies, acted illegally and in such a manner as to bring Ruby Roz, a once prosperous enterprise which had been encouraged to invest and expand its business in Kazakhstan, to the verge of bankruptcy.
189. These allegations, which are strenuously pressed by the Claimant, are equally strenuously denied by the Republic. For its part, the Republic asserts that the actions of which the Claimant complains were taken as part of its ordinary and necessary role as a responsible government; and that Ruby Roz ceased operations due to a combination of incompetent management and foreign competition.
190. The Tribunal was ready to deal with these allegations and counter-allegations, and indeed had already studied the witness statements and expert reports in some detail in preparation for the substantive Hearings that were due to take place early in 2013. But the jurisdiction of an arbitral tribunal depends upon a valid agreement to arbitrate. For the reasons given, the Tribunal does not find such an agreement in the present case; and, although it might be tempted to do so, the Tribunal cannot take a “pro-arbitration” stance when, as in this case, there is not a valid arbitration agreement, either under the FIL or under the Contract.

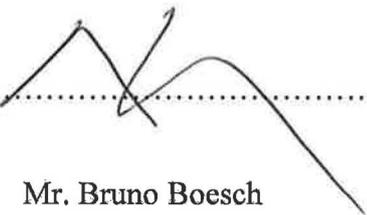
## **VI. Costs**

191. In the course of these proceedings, both parties have requested an Award of Costs in their favour, as part of their respective requests for relief. The Tribunal takes it as axiomatic that, since it has the power to rule on jurisdiction, it also has the power to make an Award in respect of the costs incurred by the parties in obtaining that ruling.
192. Following the making of this Award, the Tribunal will draw up a procedural Order to deal with the issue of costs, having first invited the parties for their comments on the proposed Order.

## **VII. The Tribunal's Award**

193. For the reasons set out fully above, the Tribunal HEREBY FINDS, HOLDS AND AWARDS THAT:
- (1) The Tribunal does not have jurisdiction to determine this dispute;
  - (2) Costs are reserved for further submission and Award.

Signed in London, the place of arbitration, on this 1<sup>st</sup> day of August 2013



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Mr. Bruno Boesch



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Mr. Joseph Neuhaus



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Alan Redfern (Chairman)