International Centre for Settlement of Investment Disputes

Caratube International Oil Company LLP

and

Mr. Devincci Salah Hourani

Claimants

v.

Republic of Kazakhstan

Respondent

ICSID Case No. ARB/13/13

AWARD

Rendered by an Arbitral Tribunal composed of

Dr. Laurent Lévy, President
Prof. Laurent Aynès, Arbitrator
Dr. Jacques Salès, Arbitrator

Secretary of the Tribunal
Ms. Milanka Kostadinova

Assistant to the Tribunal
Dr. Silja Schaffstein

Date of Dispatch to the Parties: September 27, 2017

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TABLE OF ABBREVIATIONS

AWP	Annual Work Program
BIT or Treaty	Bilateral Investment Treaty; specifically, the Bilateral Investment Treaty concluded between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, dated 19 May 1992
Caratube	Caratube International Oil Company LLP
Caratube I arbitration	Caratube International Oil Company LLP v Republic of Kazakhstan; ICSID Case No. ARB/08/12
CCC	Consolidated Contractors (Oil and Gas) Company S.A.L.
CDC	The Central Committee on Development of Deposits of the MEMR (the Central Development Committee)
CER	Caspian Energy Research Limited Liability Company
CIOC	Caratube International Oil Company LLP
Claimants	Up to the decision on jurisdiction: Caratube International Oil Company LLP and Mr. Devincci Salah Hourani. Thereafter: Caratube International Oil Company LLP
Contract	Contract [No. 954] for the Exploration and Production of Hydrocarbons within Blocks XXIV-20-C (partially); XXIV-21-A (partially), including Karatube Field (oversalt) in Baiganin District of Aktobe Oblast of the Republic of Kazakhstan between Ministry of Energy and Mineral Resources (Competent Authority) and Consolidated Contractors (Oil and Ga) Company S.A.L. (Contractor), dated 27 May 2002
Counter Memorial	The Respondent's Counter Memorial on Jurisdiction and the Merits dated 20 March 2015
CRP	Cessation risk premium
Decision on Provisional Measures	The Tribunal's Decision on the Claimants' Request for Provisional Measures dated 4 December 2014
Decision on "Leaked Documents"	The Tribunal's Decision on the Claimants' Request for the Production of "Leaked Documents" dated 27 July 2015
Defense on Jurisdiction	The Claimants' Defense on Jurisdiction dated 17 September 2015
DCF	Discounted cash flow
DLOM	Discount for lack of marketability
Exh. C-	Claimants' Exhibits

Exh. CLA-	Claimants' Legal Exhibits
Exh. R-	Respondent’s Exhibits
Exh. RL-	Respondent’s Legal Exhibits
Extended MWP	Revised Minimum Work Program agreed between CIOC and MEMR for the two-year extension period, dated 23 April 2007
FCP	First Calgary Petroleum
FET	Fair and equitable treatment
FIL	Foreign Investment Law
FMV	Fair market value
fn	Footnote
FRV	Full reparation value
FSU	Former Soviet Union
Geology Committee	The Committee on Geology and Subsoil Resources Management
GT	Grant Thornton
ICSID	International Centre for Settlement of Investment Disputes
IFM	IFM Resources, Inc.
ILA	International Law Association
ILC Articles	International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with comments*, November 2001, Supplement No. 10 (A/56/10), chap. IV.E.1
IRR	Internal rate of return
JOR	JOR Investment Inc. SAL
KNB	National Security Service of the Republic of Kazakhstan
Law on Oil	Kazakh Law on Oil of 28 June 1995
Memorial	The Claimants' Memorial dated 19 September 2014
MEMR	The Ministry of Energy and Mineral Resources of the Republic of Kazakhstan
MFN	Most-Favored Nation clause
MT	Metric tonnes

MWP	Minimum Work Program
NPV	Net present value
p./pp.	Page(s)
para./paras.	Paragraph(s)
PCIJ	Permanent Court of International Justice
PO1	Procedural Order No. 1 dated 20 June 2014
PO2	Procedural Order No. 2 on the Claimants' Document Production Requests on Jurisdiction dated 24 July 2015
PO3	Procedural Order No. 3 on the Parties' Remaining Document Production Requests dated 31 August 2015
PO4	Procedural Order No. 4 on the Respondent's Supplemental Document Production Requests dated 14 September 2015
Request for Arbitration	The Claimants' Request for Arbitration dated 5 June 2013
Respondent	The Repulic of Kazakhstan
Respondent's First Post-Hearing Brief	The Respondent's First Post-Hearing Brief dated 4 March 2016
Respondent's Reply Post-Hearing Brief	The Respondent's Reply Post-Hearing Brief dated 13 May 2016
Revised Work Program	Revised Minimum Work Program agreed between CIOC and MEMR for the two-year extension period, dated 23 April 2007
SPE-PRMS	Society of Petroleum Engineers Petroleum Resources Management System
Tr. [page:line]	Transcript of the hearing on jurisdiction and the merits
TU Zapkaznedra	The Western Kazakhstan Territorial Administration of Geology and Subsoil Use, based in Aktobe
UNCITRAL	United Nations Commission on International Trade Law
US	United States of America
Vienna Convention	Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969
World Bank Guidelines	The World Bank Group, Legal Framework for the Treatment of Foreign Investment: Volume II, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment dated 21 September 1992

TABLE OF CASES

Short Name	Full Name	Exhibit Number
AAPL v Sri Lanka	*Asian Agricultural Products Ltd. v Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Final Award, 27 June 1990	As cited in *Rumeli,* CLA-16
AES v Kazakhstan	*AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary,* ICSID Case No. ARB/07/22, Award, 23 September 2010	RL-141
AIG	*AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v Republic of Kazakhstan,* ICSID Case No. ARB/01/6, Award, 7 October 2003	CLA-4
Aguas del Tunari v Boliva	*Aguas del Tunari S.A. v Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005	CLA-245
Alan Craig	*Alan Craig v Ministry of Energy of Iran; Water Engineering Service (Mahab); Khuzestan Water and Power Authority (KWPA); Khadamat Iran-Zemin Engineering Consultant Services Company (KIZ),* Iran – United States Claims Tribunal Case No. 346, Award, 2 September 1983	CLA-205
AMCO II	*Amco Asia Corporation and others v Republic of Indonesia,* ICSID Case No. ARB/81/1, Award, 5 June 1990	CLA-98
Apotex III	*Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014	RL-49
Arif	*Franck Charles Arif v Republic of Moldova,* ICSID Case No. ARB/11/23, Award, 8 April 2013	RL-160
Ascom	*Anatolie Stati, Gabriel Stati, Ascom Group S.A., Terra Raf Trans Trading Ltd. v Republic of Kazakhstan,* SCC Case No. 116/2010, Award, 19 December 2013	CLA-33
Aucoven	*Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27	CLA-257

	September 2001	
Azurix v Argentina	*Azurix Corp. v Argentine Republic,* ICSID Case No. ARB/01/12, Award, 14 July 2006	CLA-86
Barberie v Venezuela	*Ann Eulogia Garcia Cadiz (Loretta G. Barberie) v Venezuela,* American-Venezuela Commission, 1890	As cited in *Gentini*, CLA-204
Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Award, 27 August 2009	RL-122
Benvenuti & Bonfant v Congo	*S.A.R.L. Benvenuti & Bonfant v People's Republic of the Congo,* ICSID Case No. ARB/77/2, Award, 8 August 1980	CLA-123
Biwater Gauff v Tanzania	*Biwater Gauff (Tanzania) Limited v United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008	CLA-101
Cable Television Nevis	*Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v Federation of St. Kitts and Nevis,* ICSID Case No. ARB/95/2, Award, 16 December 1996	CLA-131
Caratube I arbitration	*Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012	CLA-8
CCL v Kazakhstan	*CCL v Republic of Kazakhstan,* SCC Case 122/2001, Jurisdictional Award, 2003	CLA-288
Cementownia "Nowa Huta" S.A. v Turkey	*Cementownia "Nowa Huta" S.A. v Republic of Turkey,* ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009	RL-31
Chorzów Factory	*Case Concerning the Factory at Chorzów (Germany v Poland),* ICJ Reports Series A. No. 17, 13 September 1928	CLA-102
CME v Czech Republic	*CME Czech Republic B.V. (The Netherlands) v Czech Republic,* UNCITRAL, Final Award, 14 March 2003	RL-199
CMS	*CMS Gas Transmission Company v Argentine Republic,* ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003	CLA-188
DLP v Yemen	*Desert Line Projects LLC v Republic of Yemen,* ICSID Case No. ARB/05/17, Award, 6 February 2008	CLA-34

Europe Cement	*Europe Cement Investment and Trade S.A. v Republic of Turkey,* ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009	RL-30
Exxon Mobil	*Venezuela Holdings B.V. and others v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award, 9 October 2014	RL-181
Gemplus v Mexico	*Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v United Mexican States,* ICSID Case No. ARB(AF)/04/3, and *Talsud, S.A. v United Mexican States,* ICSID Case No. ARB(AF)/04/4, Award in Conjoined Arbitrations, 16 June 2010	CLA-115
Genin	*Alex Genin and others v Republic of Estonia,* ICSID Case No. ARB/99/2, Award, 25 June 2001	RL-136
Gentini	*Gentini Case (of a general nature),* Italian-Venezuelan Mixed Commission, 1903	CLA-204
Goetz	*Antoine Goetz and others v Republic of Burundi,* ICSID Case No. ARB/95/3, Award, 10 February 1999	CLA-301
Gold Reserve v Venezuela	*Gold Reserve Inc. v Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014	CLA-307
Henderson v Henderson	*Henderson v Henderson, High Court of Chancery,* 3 Hare 100, [1843] EngRC 917, (1843) 67 E.R. 313, Sir James Wigram VC, 20 July 1843	RL-38
Inceysa	*Inceysa Vallisoletana S.L. v Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, 2 August 2006	As cited in *Europe Cement*, RL-30
Interocean v Nigeria	*Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on Preliminary Objections, 29 October 2014	CLA-207
James M Saghi v Iran	*James M. Saghi, Michael R. Saghi and others v Islamic Republic of Iran,* Iran – United States Claims Tribunal Case No. 298, Award, 22 January 1993	CLA-305
KT Asia Investment Group	*KT Asia Investment Group B.V. v Republic of*	RL-83

B.V.	*Kazakhstan,* ICSID Case No. ARB/09/8, Award, 17 October 2013	
Lahoud v DRC	*Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v Democratic Republic of the Congo,* ICSID Case No. ARB/10/4, Award, 7 February 2014	Link provided in Claimants' Statement of Costs
Lemire v Ukraine	*Joseph C. Lemire v Ukraine,* ICSID Case No. ARB/06/18, Award, 28 March 2011	CLA-106
LETCO	*Liberian Eastern Timber Corporation v Republic of Liberia,* ICSID Case No. ARB/83/2, Decision on Rectification, 17 June 1986	CLA-129
Metal-Tech	*Metal-Tech Ltd. v Republic of Uzbekistan,* ICSID Case No. ARB/10/3, Award, 4 October 2013	RL-97
Micula v Romania	*Ioan Micula, Viorel Micula and others v Romania,* ICSID Case No. ARB/05/20, Award, 11 December 2013	CLA-108
MTD v Chile	*MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile,* ICSID Case No. ARB/01/7, Award, 25 May 2004	CLA-82
National Gas v Egypt	*National Gas S.A.E. v Arab Republic of Egypt,* ICSID Case No. ARB/11/7, Award, 3 April 2014	RL-82
Nova Scotia Power Incorporated	*Nova Scotia Power Incorporated v Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014	RL-84
Occidental v Ecuador	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador,* ICSID Case No. ARB/06/11, Award, 5 October 2012	CLA-55
Pac Rim	*Pac Rim Cayman LLC v Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012	CLA-225
Petrobart	*Petrobart Limited v Kyrgyz Republic,* SCC Case No. 126/2003, Award, 29 March 2005	CLA-181
Phoenix	*Phoenix Action Ltd v Czech Republic,* ICSID Case No. ARB/06/5, Award, 15 April 2009	RL-29
PSEG v Turkey	*PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of*	CLA-126

	Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007	
Romak	*Romak S.A. (Switzerland) v Republic of Uzbekistan,* PCA Case No. AA280, Award, 26 November 2009	RL-28
RSM et al v Grenada	*RSM Production Corporation and others v Grenada,* ICSID Case No. ARB/10/6, Award, 10 December 2010	RL-39
Ruby Roz	*Ruby Roz Agricol LLP v The Republic of Kazakhstan*, UNCITRAL, Award on Jurisdiction, 1 August 2013	CLA-17
Rumeli	*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008	CLA-16
Saba Fakes	*Saba Fakes v Republic of Turkey,* ICSID Case No. ARB/07/20, Award, 14 July 2010	RL-20
Sapphire v NIOC	*Sapphire International Petroleums Ltd. v National Iranian Oil Company, ad hoc* Tribunal, Award, 1963	CLA-110
Siag v Egypt	*Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt,* ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007	CLA-297
SOABI v Sénégal	*Société Ouest Africaine des Bétons Industriels v Republic of Senegal,* ICSID Case No. ARB/82/1, Jurisdictional Decision, 1 August 1984, and Award, 25 February 1988	CLA-116
Soufraki	*Hussein Nuaman Soufraki v United Arab Emirates,* ICSID Case No. ARB/02/7, Award, 7 July 2004	RL-12
Spader	*Spader et al. Case*, American-Venezuela Commission, 1903	CLA-203
SPP v Egypt	*Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Award, 20 May 1992	CLA-117
Spyridon Roussalis v Romania	*Spyridon Roussalis v Romania,* ICSID Case No. ARB/06/1, Award, 7 December 2011	CLA-77
Suez	*Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios*	CLA-299

	Integrales de Agua S.A. v Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006	
Tecmed v Mexico	*Técnicas Medioambientales Tecmed, S.A. v United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003	CLA-76
TSA v Argentina	*TSA Spectrum de Argentina, S.A. v Argentine Republic,* ICSID Case No. ARB/05/5, Award, 19 December 2008	RL-19
Usmonov	*Usmonov v the Department of Justice*, Ruling No. 3k-88 of the Panel on Civil Law Cases of the Supreme Court of the Republic of Kazakhstan, 18 July 2001	RL-89
Vaccum Salt v Ghana	*Vacuum Salt Products Ltd. v Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994	RL-80
Vivendi v Argentina	*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic,* ICSID Case No. ARB/97/3, Award, 20 August 2007	CLA-36
Vivendi II	*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005	RL-48
Waste Management v Mexico	*Waste Management, Inc. v United Mexican States,* ICSID Case No. ARB(AF)/00/3, Mexico's Preliminary Objection concerning the Previous Proceedings, Decision of the Tribunal, 26 June 2002	RL-60
Wena	*Wena Hotels Limited v Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award, 8 December 2000	RL-165
Yukos v Russia	*Yukos Universal Limited (Isle of Man) v the Russian Federation,* PCA Case No. AA 227, Final Award, 18 July 2014	RL-187

I. INTRODUCTION

A. The Parties and other actors

1. The Claimants

1. The Claimants are (i) Caratube International Oil Company LLP ("**Caratube**" or "**CIOC**"), a Kazakh-incorporated company that is a limited liability partnership, with foreign ownership, and (ii) CIOC's majority shareholder, Mr. Devincci Salah Hourani, a US national (jointly "**the Claimants**").[1]

2. CIOC's registered and principal office is located at (Exh. C-3):

92A Polezheva St.
Zhetysusskiy Region
Almaty
050050
Republic of Kazakhstan

3. The Claimants are represented in this arbitration by Dr. Hamid G. Gharavi, Ms. Nada Sader and Mr. Sergey Alekhin (until 30 August 2017), whose contact details are as follows:

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[1] Exh. C-3; Request of Arbitration dated 5 June 2013, para. 1; Claimants' Memorial dated 19 September 2014, para. 34. It is noted that the Respondent has put into question Mr. Devincci Hourani's US nationality in this arbitration (see, e.g., the Respondent's Counter Memorial on Jurisdiction and the Merits dated 20 March 2015, para. 372; Respondent's First Post-Hearing Brief dated 4 March 2016, para. 69). Furthermore, the term "Claimants" jointly refers to CIOC and Mr. Devincci Hourani only up to the decision on jurisdiction. Thereafter, it will only refer to CIOC.

2. The Respondent

4. The Respondent is the Republic of Kazakhstan ("**the Respondent**" or "**Kazakhstan**" or "**the Republic**").

5. The Respondent is represented in this arbitration by Mr. Peter M. Wolrich, Mr. Geoffroy Lyonnet, Ms. Gabriela Alvarez Avila, Mr. Jérôme Lehucher, Ms. Svetlana Evliya (no longer with the firm), Ms. Anna Kouyaté (no longer with the firm), Mr. Yerzhan Mukhitdinov, Ms. Marie-Claire Argac, Ms. Lisa Arpin-Pont and Ms. Olena Stasyk, whose contact details are as follows:

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Mr. Geoffroy Lyonnet
Mr. Jérôme Lehucher
Ms. Marie-Claire Argac
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3. The Ministry of Energy and Mineral Resources of the Republic of Kazakhstan

6. The Ministry of Energy and Mineral Resources of the Republic of Kazakhstan ("**MEMR**") negotiated, executed and performed the contract underlying the dispute in the present Arbitration on behalf of the Respondent. As will be seen in further detail below,[2] this contract was initially entered into on 27 May 2002 between the MEMR and the international construction company Consolidated Contractors (Oil and Gas) Company S.A.L. ("**CCC**"). It was subsequently assigned to CIOC on 26 December 2002 by way of Amendment No. 1 to the Contract (Exh. C-1) (Memorial, paras. 85-87).[3]

7. As will be seen in further detail in the relevant parts of this Award, the role of the MEMR in the present dispute is disputed between the Parties. According to the Respondent, in matters of subsoil use, it is the MEMR's Monitoring Division that is responsible for monitoring the performance of contractors and their compliance with subsoil and petroleum regulations as well as with their contracts and work programs. It does so, *inter alia*, on the basis of the so-called 2-LKU Reports, which are prepared quarterly by all subsoil contractors (Counter Memorial, paras. 463-466). In the event of breaches by the subsoil user, it is further the Monitoring Division that has the power to sanction such non-performance and to terminate the subsoil user's contract (Counter Memorial, paras. 458-459).

8. While the Claimants do not dispute the MEMR's responsibility in the monitoring and supervision of subsoil contractors in the performance of their contracts, they dispute the importance of the MEMR's authority and thus its role in the present dispute, namely in relation with other monitoring and supervising authorities of the Respondent, in particular the competent regional centers of the Committee on Geological and Subsoil Resource Use, the Kaznedras. According to the Claimants, these Zapkaznedras are constituent parts of the MEMR and have the power to modify the contractors' annual work programs. Importantly, the Claimants note that the MEMR's monitoring of the subsoil contractors' activities is based on targets

[2] See *infra* paras. 14 et seq.

[3] The Claimants describe the subsequent reorganisation of the MEMR in their Memorial under footnote 106.

decided in conjunction with the Zapkaznedras (Claimants' Reply Post-Hearing Brief, para. 161).

4. The Committee on Geology and Subsoil Resources Management

9. The Committee on Geology and Subsoil Resources Management (the "**Geology Committee**") is the organ of the Republic of Kazakhstan that controls and supervises subsoil use and is responsible for reviewing and approving projects for the exploration and development of oilfields. It is described by the Claimants as "the key decision-making body within the framework" (Memorial, para. 115.a). As just seen, the Geology Committee is based in Astana but has regional centers, the Kaznedras.

5. The Western Kazakhstan Territorial Administration of Geology and Subsoil Use

10. The Geology Committee's regional center that was competent with respect to CIOC was the Western Kazakhstan Territorial Administration of Geology and Subsoil Use (the "**TU Zapkaznedra**"), based in Aktobe. According to the Claimants, it was CIOC's "main contact point for all reporting and performance issues in relation to the Contract" (Memorial, para. 115.a). The Claimants further submit that the TU Zapkaznedra received and reviewed quarterly reports from CIOC (the "**LKU Reports**"), detailing the latter's actual expenditures over the period on operations and physical performance related to geological exploration and development (see Exh. C-79). Upon review, the TU Zapkaznedra would then transfer the LKU Reports to the Geological Committee and they would then be further transferred to the Monitoring Division of the Department for Direct Investments of the MEMR (see Memorial, para. 115.b). Furthermore, according to the Claimants, there were meetings in December each year between CIOC and the TU Zapkaznedra to review and approve the work progress and to adopt the annual work program[4] for the following year (Memorial, para. 115.a). Finally, the Claimants state that the TU Zapkaznedra also received from CIOC (i) Well Drilling Designs for approval prior to commencing drilling operations; (ii) annual Geologic Reports, which detailed activities related to drilling, re-entry and logging of wells and oil production levels (Exh. C-80); and (iii) monthly oil production and well stock reports (Exh. C-81) (Memorial, para. 115.a).

[4] See *infra* para. 30.

11. As just seen, the role and involvement in the present dispute of the TU Zapkaznedra is disputed between the Parties. In particular, the Respondent disagrees with the Claimants' allegation that the TU Zapkaznedra played an important role in the monitoring and supervision of the subsoil users' performance and compliance with their contract. They disagree with the allegation that the TU Zapkaznedra had the power to modify the contractors' obligations under the work programs. According to the Respondent, the TU Zapkaznedra is not responsible to high-level monitoring of the subsoil users' performance and compliance with their contract, but rather with the day-to-day work of the contractors. In addition, it reviews and approves annual work programs. The Respondent stresses that the TU Zapkaznedra "has no competence in matters of official approval or disapproval of the contractors' performance, as it has no power to sanction the underperforming contractors". In the event of non-performance of obligations under the annual work program, it has no choice but to roll-over the contractors' unfulfilled and outstanding obligations into the next calendar year, a step which therefore cannot be interpreted as an approval or a waiver of the contractors' past performance (Counter Memorial, paras. 460-462; Respondent's First Post-Hearing Brief, paras. 161-162).

6. JOR Investment Inc. SAL

12. JOR Investment Inc. SAL ("**JOR**") is a Lebanese offshore company created in 2002 and held by Mr. Kassem Omar (Exh. C-215). As of 2002, JOR agreed to provide financing to CIOC through several loan agreements (see, e.g., Exhs. C-214, C-216, C-217, C-156). According to the Respondent, JOR was owned and managed by Mr. Issam Hourani between 2003 and 2007 (Counter Memorial, para. 1338). By contrast, it is the Claimants' position that Mr. Issam Hourani has never been the owner of JOR (Claimants' First Post-Hearing Brief, para. 10).

II. THE FACTS

13. This section summarizes the factual background of this Arbitration. More detailed facts will be referred to in Chapter V entitled "Discussion" when appropriate.

A. The Contract

14. As mentioned above in paragraph 6, Contract No. 954 for the Exploration and Production of Hydrocarbons was entered into between CCC and the MEMR on 27

May 2002 (the "**Contract**"). It was assigned to CIOC by means of Amendment No. 1 to the Contract dated 26 December 2002.

15. The following provisions of the Contract are relevant to the present Arbitration.

16. Following the Preamble, Clause 1 contains several definitions of terms used in the Contract and Clause 2 defined the purposes of the Contract.

17. Clause 3 is entitled "Validity Term of the Contract" and calls for full quotation:

> 3.1 This Contract shall be effective from the moment of its state registration with the authorised State Agency upon obligatory issuance of the certificate of the registration of this Contract ("Effective Date of this Contract").
>
> 3.2 The Exploration period shall be for a period of 5 years (up to 2007) beginning from the Effective Date of this Contract and the Production period shall be for a period of 25 years (up to 2032) beginning from the date of commercial Production for each deposit.
>
> 3.3. The Validity term of this Contract shall include the Exploration and Production periods in accordance with Section 3.2 plus all extensions unless this Contract is earlier terminated as provided in this Contract.
>
> 3.4 The Validity Term of this Contract can be extended in accordance with the terms and conditions of this Contract and the procedures provided by the current legislation of the State.
>
> 3.5 In case of Production, the Contractor shall have the exclusive right to extend the Validity Term of this Contract for such period of time as the Contractor requires to realise the full commercial Production of the Deposit(s) and such extension shall be agreed by the Parties by written amendment to this Contract.
>
> 3.6 In case the Validity Term of this Contract is extended, this Contract must be amended in writing by both Parties, provided that such amendments do not contradict the terms and conditions of this Contract.

18. Clause 7 lists the Parties' "General Rights and Obligations" under the Contract. In particular, the "Contractor"'s general rights and obligations are listed under Clauses 7.1 and 7.2, and the general rights and obligations of the "Competent Authority", i.e. the MEMR, are listed under Clauses 7.3 and 7.4.

19. Clause 8 of the Contract contains provisions with respect to the "Work Program", for instance providing under Clause 8.3 for the possibility to amend or agree additions to the Work Program.

20. Clause 9 deals with the "Exploration Period", providing under Clause 9.1 for the possibility to extend this period in the following terms:

> 9.1 The period of Exploration shall consist of five consecutive years as agreed in this Contract and the Contractor shall have the right to extend the period of Exploration twice with a duration of each period of up to two years in accordance with the Legislation on Subsoil Use. The Parties shall in advance determine the areas for continued Exploration in the Contract Area and agree on the respective amendments to the Work Program.

21. Clause 10 regulates the event of a "Commercial Discovery" in the following terms:

> 10.1 In the event that the Contractor discovers a Hydrocarbon Deposit which in its sole opinion is economically and technically suitable for Production, it shall immediately inform the Competent Authority and shall within 120 days prepare a report for an estimation of its reserves for submission to the authorised State Agency for confirmation of the reserves of the Deposit.
>
> 10.2 The Exploration Stage can be extended as provided in Section 9.1 for the period the Contractor determines necessary to properly evaluate the Deposit.
>
> 10.3 The authorised State Agency shall, pursuant to the procedure established by the legislation on Subsoil Use, provide a State expert evaluation of the reserves of the Deposit.
>
> 10.4 After confirmation by the authorised State Agency as provided in Section 10.3 above, the Contractor shall within 120 days prepare a feasibility study of the efficiency of the development of the discovered Deposit ("Development Plan") within the framework of the Work Program and shall submit it to Competent Authority.
>
> 10.5 A Commercial Discovery gives the exclusive right to the Contractor to proceed to the Production stage.
>
> 10.6 Upon a Commercial Discovery the Contractor shall be entitled to reimbursement of its expenses in connection with Exploration and shall be reimbursed during Production of the Commercial Discovery in accordance with this Contract and the Legislation of the Republic of Kazakhstan.
>
> 10.7 If, as a result of Exploration, there is no Commercial Discovery, the Contractor shall have no right to reimbursement of its expenses incurred by the Contractor during Exploration. However, the Contractor shall have the right to deduct those expenses against any revenues or income received in connection with activities under this Contract.

22. With respect to the "Period of Production", Clause 11.1 granted the Contractor "the exclusive right of Production in the Contract Area for 25 consecutive years, plus any extensions".

23. Clause 15 is entitled "Financing" and provides under Clause 15.1 that "[t]he Contractor assumes the responsibility for complete financing of its activities under this Contract in accordance with the Work Program agreed by the Parties".

24. Clause 16 contains several provisions with respect to the taxes and other payments to be made by the Contractor.

25. Clause 25 is entitled “Assignment of Rights and Obligations” and provides as follows:

> 25.1 Assignment of rights and obligations under this Contract to a Third Party, other than pledging the right for Subsoil use, shall be allowed only upon written consent of the Competent Authority. The Competent Authority may not deny assignment of the Subsoil use right to a Subsidiary, if the Contractor has given to the Competent Authority a guarantee of full performance of the obligations under the Contract jointly and severally with the Subsidiary.
>
> 25.2 The expenses related to the assignment of rights and obligations under this Contract shall be borne by the Contractor and shall not be reimbursed by the State.
>
> 25.3 If the Contractor assigns such rights and obligations under this Contract to a Subsidiary, registered in the territory of the Republic of Kazakhstan, then such Subsidiary will have all the rights and obligations and exemptions under this Contract.
>
> 25.4 As long as the Contractor keeps any participation in the Contract, the Contractor and the Third Party to whom the Contractor has assigned its rights and obligations, shall bear joint and several liability under the Contract.

26. Under the heading “Applicable Law”, Clause 26 contains the following choice-of-law clause:

> 26.1 This Contract and other agreements signed on the basis of this Contract shall be governed by the law of the State unless stated otherwise by the international treaties to which the State is a party.
>
> 26.2 The Contractor shall comply with the international standards for protection of the environment in the Contract Area.

27. Clause 27 is entitled “Procedure for Dispute Resolution” and calls for full quotation:

> 27.1 The Parties shall take all measures to resolve all disputes ~~and~~ arising from the Contract by negotiations.
>
> 27.2 **Referral to Arbitration**. In the event that any dispute cannot be resolved by amicable settlement within sixty (60) days after notice in writing of such by one Party to the other Party, the Parties agree that their exclusive means of dispute resolution shall be (a) to submit the matter to arbitration for final settlement in accordance with the then current Rules of Conciliation and Arbitration of the International Centre for Settlement of Investment Disputes ("ICSID") if the Competent Authority has become a party to the ICSID Convention at the time a proceeding is instituted, or (b) to submit the dispute for resolution according to the Arbitration (Additional Facility) Rules of ICSID if the Competent Authority has not become a party to the ICSID Convention at the time when any proceeding is instituted. Any arbitral tribunal constituted pursuant to this Contract shall consist of three arbitrators, one appointed by the Contractor and one appointed by the Competent Authority, and a third arbitrator, who shall be president of the Tribunal and shall not be a resident of Kazakhstan, appointed by agreement of the Parties, or failing such agreement, by the Chairman of the Administrative Council of ICSID. In the event that the Contractor or the

Competent Authority fails to appoint an arbitrator within ninety (90) calendar days after the notice of registration of a request for arbitration has been sent the remaining arbitrators shall be appointed in accordance with the Rules under ICSID.

27.3 If for any reason the request for the arbitration proceeding is not registered by ICSID or if ICSID fails or refuses to take jurisdiction over any matter submitted by the Parties under this Section 27, such matter shall be referred to and resolved by arbitration in accordance with the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules in effect at the date of submission of the matter. The seat of Arbitration shall be London, England. In such event the Parties hereby consent to the jurisdiction of the London Court of International Arbitration and all the provisions of this Article 27 shall equally apply to such arbitration.

27.4 **Proceedings**. The English language shall be used throughout the arbitral proceedings and the proceedings shall be held in London, England unless Otherwise agreed by the Parties. The Parties shall be entitled to be legally represented at the arbitration proceedings, however the absence or default of a Party shall not prevent or hinder the arbitration proceedings at any stage. All notices given by one Party to the other in connection with the arbitration shall be given in accordance with this Contract.

27.5 **Arbitral Award**. Any arbitral award made in respect of any matter submitted to arbitration pursuant to Section 27.2 shall be final and binding upon the Parties. Any award of a monetary sum shall be rendered in hard currency, free of any tax or any other deduction. The award shall include interest from a date determined by the arbitrators, at a commercial rate to be fixed by the arbitrators. Within three (3) months from the date determined by the arbitrators, full payment of any arbitral award shall be made. The arbitral award may provide for specific performance or any other remedy awarded by the arbitral tribunal.

27.6 **Costs**. The costs of the arbitration, including legal costs, shall be borne by the unsuccessful Party or, if neither Party is wholly successful, shall be borne by the Parties in such proportions as may be specified in the arbitral award or, if no such specification is made, shall be borne by the Parties in equal shares. Any costs, fees or Competent Authority charges incidental to enforcing the arbitral award shall, to the maximum extent permitted by law, be borne by the Party against whom such enforcement is made.

27.7 **Enforcement and Consent**. Each of the Parties hereby consents to submit to ICSID any dispute, controversy or claim arising out of or in connection with this Contact. Each of the Parties agrees that any judgement rendered by the arbitrators against it and entered in any court of record in London, England or any other competent court, may be executed against its assets in any jurisdiction. The Parties consent to being sued for enforcement of the award and any costs, fees or other charges for which they may be liable under this Article. Each of the Parties hereby agrees that all of the transactions contemplated by this Contract shall constitute and shall be deemed to constitute an investment within the jurisdiction of ICSID. The Competent Authority warrants that it is a structural subdivision and agent of the Government of the Republic of Kazakhstan.

27.8 Furthermore, it is hereby agreed that the Contractor is a resident of Lebanon, or in the event of assignment as a national of the resident country of the assignee, and therefore the Contractor shall be treated as a

resident of Lebanon, or other country if appropriate, for purposes of the ICSID Convention.

27.9 **Waiver of Immunity**. Each of the Parties expressly and irrevocably waives any claim to immunity (including, but not limited to, sovereign immunity, immunity from service of process, immunity of property from award) from suit, execution, set-off, attachment or other legal process under any applicable law or in respect of any arbitral award rendered.

27.10 **Continued Performance**. If a matter is submitted to arbitration pursuant to Section 27.3 of this Contract the Parties shall, during the period of such arbitral proceedings and pending the resolution of such matter or the making of the arbitral award, continue to perform their respective obligations under this Contract so far as circumstances will allow and such performance shall be without prejudice to any final agreement, judgement or award made in respect of that matter. To the extent that the circumstances do not allow the performance of obligations under this Contract then the period for the performance of those obligations and any obligations relevant thereon shall be extended by the period between the date of the notice of arbitration to the date of compliance with the award.

28. Clause 28 provides for the following "Guarantees of Contract Stability":

28.1 The provisions of the Contract shall remain unchanged during the Validity Term of this Contract.

28.2 Changes and additions to the Legislation of the Republic of Kazakhstan that deteriorate the position of the Contractor, made after the conclusion of the Contract shall not apply to the Contract.

28.3 In case of any changes and additions specified in Section 28.2, the Parties will, by a written agreement amend the Contract accordingly as to restore the initial economic interests of the Parties.

28.4 The Contractor shall enjoy all guaranties and protections provided by the Law on Foreign Investments.

29. Finally, Clause 29, entitled "Conditions of Termination and Suspension of Contract Validity", also calls for full quotation:

29.1 The Competent Authority will mandatorily suspend the Contract if there was a direct threat to life or to health of people working or living in the zone of impact of works, conducted under the Contract.

29.2 The Competent Authority shall have the right to suspend the validity of this Contract in cases:

- of performance by the Contractor of the activity which is not stipulated by the Contract;

- of violation by the Contractor during its activity of the current legislation of the State regarding protection of Subsoil and environment and safety of works;

- of violation by the Contractor during its activity of the procedure regarding payment of taxes and other obligatory payments established by this Contract;

- of assignment by the Contractor in full or in part of the rights under the Contract to a Third Party with [sic] in violation of Article 25 of this Contract;

- of interruption by the Contractor of production within the framework of the Work Program for a period exceeding 180 (one hundred and eighty) days except for the cases related to Acts of God (force-majeure);

- of violation of the terms and conditions related to the observance of confidentiality of the geological and geophysical information under this Contract.

29.3 In case of suspension of the effect of this Contract, the Competent Authority shall notify the Contractor in writing about the reasons of such suspension and shall establish a reasonable period of time for their elimination. The Contractor shall have the right, in the event that it finds it impossible to eliminate the reasons for the suspension within the time period established by the Competent Authority, to apply to the Competent Authority for a longer time, providing justification for the additional time requirements and then the Competent Authority will consider the extension if the Competent Authority considers the justification reasonable. Provision of such extension for the Contractor may not be unreasonably denied.

29.4 Upon elimination of such reasons for the suspension of the Petroleum Operations and the Contract, the Petroleum Operation and the Contract shall be immediately resumed.

29.5 The Contract shall be terminated ahead of schedule only in the following cases:

- if the Contractor refuses to eliminate the reasons which caused the decision to suspend Exploration and Production, or if it does not eliminate such reasons within the time period sufficient for their elimination.

- if the Contractor fails to commence Petroleum Operations within the terms established by the Contract and does not provide a reasonable explanation;

- if it is impossible to eliminate the reasons which caused the suspension of Petroleum Operations, related to a threat to health and life of people.

-if the Contractor substantially violates[5] the obligations established by the Contract or Work Program;

- if the Contractor is recognised as bankrupt according to the current legislation of the State, except for the case when the right of Subsoil use is the subject of a pledge according to the current legislation of the State.

29.6 If either Party to the Contract commits a material breach of the Contract, the other Party to the Contract shall have the right to demand that such breach be remedied within a reasonable specified period of time. If such breach is not remedied within such period of time, the complaining Party shall have the right to terminate this Contract by giving ninety (90) days' written notice to the defaulting Party. However, if the defaulting Party contests such material breach of the Contract, no termination shall occur unless an unremedied material breach shall have

[5] The Parties agree that “substantially violates” must be interpreted in the sense of “material breach” (Memorial, para. 10; Counter Memorial, para. 794).

been judged by the final award of arbitration in accordance with Article 27 of this Contract.

29.7 The effect of this Contract may be terminated before the expiry of its Validity Term on the initiative of the Contractor at any time and on any ground, including ahead-of-schedule relinquishment of the whole Contract Area.

29.8 The Contract shall terminate for the reasons specified in Section 29.5 of the Contract, 60 days after the Contractor receives a written notice from the Competent Authority stating that the Contract is terminated ahead of time based on the decision of the Court.

29.9 The Parties shall not be exempt from performing current obligations which are already due upon termination of this Contract and which remain unfulfilled upon termination of this Contract. Upon termination of this Contract for any reason, including at the initiative of the Contractor as described in Section 29.7, the Contractor shall not be liable for any obligation which is not yet due, including any unexpended portion of its Work Program.

29.10 The authorised State Agency on emergencies shall have the right to submit proposals to the Competent Authority to suspend the Contract in the event of repeated violations by the Contractor of norms and rules of safe conduct of work.

B. The Work Programs under the Contract

30. CIOC's "**Minimum Work Program**" (also referred to as "**MWP**" or "**Five-Year Work Program**") for the exploration period was attached as Appendix 6 to the Contract (Exh. C-16) (Memorial, paras. 99 et seq. and paras. 130 et seq. See also Counter Memorial, paras. 451 et seq.). The MWP defined the essential works to be realized during the first five years and provided for a budget of USD 36,580,000 (Memorial, paras. 99-100. See also Counter Memorial, para. 451). The Respondent points out that the MWP was first outlined by CCC in its bid and then negotiated between the Respondent and CCC; it became an integral part of the Contract pursuant to Clause 1.5 of the Contract (Counter Memorial, paras. 451 and 455). It was not renegotiated following the assignment of the Contract to CIOC (Counter Memorial, para. 649).

31. According to the Claimants, "[o]ne of the primary objectives of the Minimum Work Program was to demonstrate the commerciality of the supra-salt oil reservoirs discovered and partly appraised in the 1960's. [...] Another objective [...] was to further explore the sub-salt reservoirs through the carrying out of a 3D seismic survey and the drilling of two sub-salt exploration wells" (Memorial, paras. 131-132).

32. The Respondent submits that as the MWP was "a 'minimum' work program, contractors can and often do more than this minimum core work and contribute more than the minimum investment levels. In addition to making these minimum

investments, contractors should foresee additional side infrastructure expenditures required for the successful operation of any oilfield project". Moreover, it is the Respondent's position that the MWP's "key objectives were […] to further explore and develop the shallow supra-salt reservoirs, to carry out a 3D seismic study over the Contract Area in Contract Year 2 and to further explore the sub-salt reservoirs by drilling the two deep subsalt wells […] in Contract Years 3 and 4 respectively" (Counter Memorial, paras. 453 and 455).

33. The MWP states that "[d]uring the subsequent years, the Work Program will be determined annually under the initial field development plan, as well as the appraisal work draft of the subsalt deposit". The Claimants explain that, based on this statement, the MWP was discussed between CIOC and TU Zapkaznedra every year by means of the "**Annual Work Program**" (or "**AWP**") to determine a more detailed work program and budget for the coming year and to reflect the reality on the ground both in terms of work and costs. The AWP also contained a summary of work and related investments undertaken during the previous year (Memorial, paras. 101 and 115.a). The Respondent specifies that the AWP is usually prepared by the contractor and then approved by a government agency. While the MWP is based on contract years, the AWPs are based on calendar years (Counter Memorial, para. 452).

34. As will be seen in further detail later in the Award, the Parties disagree as to whether an AWP may modify the obligations set forth in the MWP. According to the Respondent, this is not the case, the AWP constituting an additional source of obligations for the contractor, which means that the latter must comply with the provisions of both the MWP and the AWP pursuant to Section 8.1 of the Contract (Respondent's First Post-Hearing Brief, paras. 158 et seq.). By contrast, it is the Claimants' position that "AWPs can and do modify the obligations set forth in the MWP" (Claimants' First Post-Hearing Brief, para. 327).

35. On 27 November 2006, CIOC requested a two-year extension of the exploration period and, on 20 January 2007, sent a proposed work program for the extension period to the MEMR (Exh. C-25).

36. On 23 April 2007, CIOC and MEMR agreed and signed the minimum work program for the two-year extension period (the "**Revised Work Program**" or "**Extended MWP**"). This Revised Work Program replaced the previous Minimum Work Program (Exh. C-23; C-26; Memorial, para. 103).

37. On 27 July 2007, CIOC and the MEMR entered into Amendment No. 3 to the Contract, which extended the exploration period by two years until 27 May 2009.

C. The performance of the Contract

38. Following the assignment of the Contract to CIOC on 26 December 2002, CIOC took over the Caratube field in January 2003 (Exh. C-203; Memorial, paras. 88, 113 and 117).

39. The performance of the Contract by CIOC is a major point of contention between the Parties. The Claimants submit that the Respondent was at all stages fully informed of CIOC's performance and progress with respect to the Contract, and the supervision and monitoring by the Respondent of CIOC and the project were carried out by various organs and authorities of Kazakhstan (Memorial, paras. 114 et seq.). In particular, it is the Claimants' position that the performance of the Contract by CIOC was closely monitored by TU Zapkaznedra, who was in charge of the day-to-day and year-to-year supervision of CIOC's performance and who approved the latter's activities on an ongoing basis (Memorial, paras. 152 et seq.).

40. According to the Claimants, they spent more than five years to "de-risk" the "Contract Area"[6], which was in a "deplorable state"[7] when CIOC took it over in January 2003, making it ready to produce oil on a commercial scale, investing over USD 39 million between December 2002 and March 2008, and a further USD 18 million during the two-year extension of the exploration period (Memorial, paras. 80 et seq. and 118).[8]

41. In particular, the Claimants allege that they started to prepare the performance of the Contract even before CIOC was granted access to the Contract Area in January 2003, hiring a full team of experienced supervisors to supervise and organize the works to be undertaken (Memorial, paras. 119 et seq.). It is the Claimants' position that the MWP, which had been scheduled to begin in May 2002, was delayed due to the Respondent approving the assignment of the Contract and granting CIOC access to the Contract Area only at the end of December 2002 and January 2003

[6] For a definition of the term "Contract Area", see Clause 1.7 of the Contract. See also Memorial, paras. 80 et seq.

[7] Memorial, para. 126.

[8] This is disputed by the Respondent who argues, *inter alia*, that the Claimants did not de-risk the Contract Area and did not expend USD 39 million of capital. Rather, CIOC incurred only USD 20 million of capital expenditures (Respondent's Reply Post-Hearing Brief, para. 146).

respectively. As soon as the Claimants took over the project site, they commenced "a large scale rehabilitation" of the Caratube field, which was not provided for in the MWP but necessary for CIOC to commence its operations, spending "substantial funds to develop the Contract Area, including for the installation of key infrastructure" (Memorial, paras. 125 et seq.).

42. With respect to financing, on 5 August 2002, CIOC obtained a loan amounting to USD 200,000 from JOR. A second financing agreement was concluded in December 2002 for a total amount of USD 15 million, including the initial loan of USD 200,000. And in November 2004, JOR agreed to award CIOC an additional loan for ten years in the total amount of USD 25 million for the completion of the Contract. The Claimants assert that the Respondent was aware of the fact that CIOC had secured the funds for the investment via JOR (Memorial, para. 129).

43. Concerning the activities anticipated under the MWP, the Claimants assert that by 2007 (i) CIOC had completed the development of 34 wells (as opposed to the 30 wells anticipated in the MWP) in the supra-salt formations in the Contract Area, drilling 24 new supra-salt wells of a total depth of 22,627 meters and re-entering 10 existing supra-salt wells, it being specified that 29 of these 34 wells were drilled in oil bearing deposits and capable of producing oil by the end of 2007; (ii) undertaken a full study of the subsoil water reserves, for which CIOC had commissioned the company Aktobegidrogeologiya OJSC, whose report on CIOC's activities in relation to the water reserves was approved by TU Zapkaznedra on 28 March 2006 (Exh. C-105); (iii) completed a pilot oil production program, namely a preparatory exploratory study of the production capacity and characteristics of wells in the Contract Area, undertaken prior to taking the field to commercial production. The final version of the pilot program was approved by TU Zapkaznedra on 28 February 2003 and by the MEMR on 26 June 2003, say the Claimants. Upon recommendations by the MEMR and TU Zapkaznedra respectively, the pilot program was initially extended by two years to last until 2006 and again until the end of 2007, and its scope was expanded from 10 to 19 wells to obtain more data. An audit conducted at the conclusion of the pilot production testing phase allegedly confirmed that the pilot production program had achieved its necessary technical targets; (iv) completed a 3D seismic examination of the Contract Area, it being specified that the 3D survey was postponed, allegedly with TU Zapkaznedra's approval, to 2004 in order for CIOC to conduct an analysis of old seismic data and to find a qualified geophysical company to perform the survey. According to the Claimants, TU Zapkaznedra also approved

the important increases in the budgeted expenses for the 3D seismic study. On 11 February 2006, CIOC retained Saratov, a Russian company, for the performance of the 3D seismic study, for an amount of USD 1.050 million, including taxes. The Claimants submit that the 3D seismic study was approved by Saratov in August 2007 and by CIOC, with some points of criticism, in September 2007. Following an independent review by Aral Petroleum Capital, the 3D seismic report was approved by TU Zapkaznedra on 1 November 2007; and (v) was in the process of drilling two exploratory deep wells in the deeper sub-salt formation (having already taken several steps in this regard), it being alleged by the Claimants that CIOC and the MEMR had already agreed that this work, as anticipated in the MWP, would be carried out under the Revised Work Program, after the completion of the 3D seismic study.

44. In addition to the foregoing points, the Claimants further assert that CIOC had also completed, on 1 December 2007, an estimate of the supra-salt field reserves, which was confirmed, on 29 February 2008, by the MEMR's Geology Committee. According to the Claimants, under Clause 10.4 of the Contract, the Claimants were thus entitled to prepare a field development plan, i.e. a firm plan of the efficient development of the hydrocarbon discoveries, after which commercial production could commence. On this basis, CIOC allegedly retained Caspian Energy Research ("**CER**"), the same Kazakh company that had prepared the estimation of the supra-salt field reserves, to prepare this field development plan, which was completed in March 2008. The Claimants argue that the MEMR then refused to approve the field development plan because the Contract had already been terminated (Memorial, paras. 133-151; Claimants' First Post-Hearing Brief, para. 261).

45. The Respondent disagrees with the Claimants' representation of CIOC's performance of the Contract. As will be seen in further detail below,[9] it is the Respondent's position that CIOC systematically committed material breaches throughout the life of the Contract and was in a persistent state of material breach of its obligations under the Contract, the MWP and the AWPs. According to the Respondent, CIOC's non-performance affected virtually all areas of its activity, including financial commitment, 3D seismic study, deep drilling, shallow drilling, trial production and completion and adequacy of the installations. Furthermore, it is the Respondent's position that it notified CIOC of its breaches and gave it reasonable

[9] See *infra* paras. 736 et seq.

time to cure (Counter Memorial, paras. 438 et seq. See also Counter Memorial, paras. 644 et seq.).

46. In particular, the Respondent submits that, from the beginning, CIOC was only interested in taking advantage of the known supra-salt deposits and the existing Soviet wells to immediately produce oil for its own benefit, rather than to fulfill its contractual obligations and to carry out essential exploration works. The Respondent states that as early as 2003, CIOC was in material breach of the Contract, the MWP and the 2003 AWP. The Respondent points out that, on 8 December 2003, TU Zapkaznedra notified CIOC that the latter's performance at the end of the 3rd quarter of 2003 was only 44.1% of its minimum obligations and raised the issue of the delay in the implementation of the 3D study. Furthermore, during CIOC's annual performance review on 29 December 2003, TU Zapkaznedra expressed several points of criticism with respect to CIOC's performance (Counter Memorial, paras. 646-660).

47. According to the Respondent, CIOC was also in breach of its obligations under the 2004 and 2005 AWP. TU Zapkaznedra strongly criticized CIOC for its faulty performance in 2004. Moreover, on 17 January 2005, the MEMR sent CIOC a Notice of Breach, pointing out numerous breaches. For the Respondent, none of CIOC's explanations set forth in its letter dated 9 March 2005 are valid. With respect to CIOC's failure to conduct the 3D study, the Respondent states that CIOC assured the MEMR that the 3D seismic study would be carried out in full and that the first deep subsalt well would be drilled in 2005. According to the Respondent, the MEMR relied on CIOC's assurances and on the fact that the Contract was only half way through the initial 5-year exploration phase in its decision to not take further action. However, the Respondent submits that, in spite of its assurances and guarantees, by the end of 2005, CIOC had not conducted the 3D study or even started to drill the first deep sub-salt well, prompting further criticism by TU Zapkaznedra, *inter alia*, with respect to CIOC's continued focus on production over exploration (Counter Memorial, paras. 661-677).

48. Furthermore, the Respondent submits that in 2006, CIOC was at a record low of its performance and in material breach of its obligations under the MWP and the 2006 AWP. The Respondent asserts that, on 28 February 2006, TU Zapkaznedra sent a Notice to CIOC, warning the latter that non-fulfillment of its outstanding obligations would entail appropriate actions in accordance with Kazakh legislation. A further Notice was allegedly sent to CIOC on 18 August 2006. According to the

Respondent, as a result of further breaches that were revealed during an inspection by the Aktobe Department of Environmental Protection, on 11 October 2006, CIOC was fined and ordered to suspend trial production activities until it obtained the State environmental expertise on the project for the development of the Caratube field (supra-salt). But CIOC allegedly never complied with this Order, prompting the initiation of court proceedings and the confirmation of the suspension by the Specialized Inter-Departmental Economic Court of Aktobe. The Respondent submits that, at the same time, on 20 October 2006, the MEMR strongly criticized CIOC's failures in matters of trial production and extended the term of the trial production until 31 December 2007 for CIOC to fulfill its trial production obligations. In a meeting held on 29 November 2006, TU Zapkaznedra noted CIOC's breaches with respect to the 2006 performance and, on 11 December 2006, it notified CIOC that the latter would be put on the list of companies whose performance of financial obligations amounted to less than 30% (Counter Memorial, paras. 678-690).

49. With respect to CIOC's performance in 2007, the Respondent points out, *inter alia*, that by May 2007, CIOC still had not completed the 3D study. Moreover, CIOC could not fulfill its financial obligations even though they had been reduced by 51%. According to the Respondent, CIOC's under-performance during the first four contract years until 2006 was critical, as there was only one year left under the initial MWP to complete and cure CIOC's overdue obligations. Hence, on 25 March 2007, the MEMR allegedly notified CIOC of all of its breaches at the time, granting CIOC one month to cure them, subject to unilateral termination. Given CIOC's failure to respond to the Notice of Breach, on 24 September 2007, TU Zapkaznedra once again sent the Notice of Breach to CIOC. Moreover, on 7 September 2007, the Aktobe Prosecutor's Office issued a "Recommendation on elimination of disregard of the rule of law". And on 1 October 2007, given CIOC's continued under-performance, the MEMR sent a Notice of Termination of Operations, expressly mentioning the Notice of Breach dated 25 March 2007, which allegedly had been received by CIOC on 28 March 2007 (a fact which the Claimants denied). The Respondent also states that, in a meeting held on 1 November 2007, TU Zapkaznedra found the 3D study presented by CIOC to be deficient and requiring correction and follow-up formatting. However, based on the explanations given in the Claimants' letter of 3 October 2007, the MEMR authorized CIOC, by Notice of Resumed Operations dated 27 November 2007, to resume operations, while at the same time demanding the cure of the on-going material breaches within one month. The Respondent further states that on 3 December 2007, the MEMR sent a Notice

of Breach of Obligations to CIOC "as part of a general standard action taken for non-performing contractors" at the end of 2007. This Notice was followed by another Notice dated 7 December 2007, by which TU Zapkaznedra warned CIOC that, in case of the non-fulfillment of work targets for 2007, the appropriate corrective actions would be taken (Counter Memorial, paras. 691-706).

50. Finally, with respect to CIOC's performance during 2008, the Respondent submits that due to CIOC's "persistent and uncured material breaches", the MEMR ordered the termination of the Contract on 30 January 2008 and sent the Notice of Termination to CIOC on 1 February 2008, it being specified that TU Zapkaznedra was not copied to this correspondence, which explains why TU Zapkaznedra still sent a notice to CIOC regarding the latter's financial obligations on 20 February 2008 (Counter Memorial, paras. 707-712).

D. The two-year extension of the Exploration Period in 2007

51. In November 2006, Mr. Devincci Hourani, in his capacity as CIOC's President, requested a two-year extension of the Contract's exploration period pursuant to Clauses 9.1 and 10.2 of the Contract and Article 43(1) of the 2004 Subsoil Law (Exh. C-21) (Memorial, para. 164).[10] According to the Respondent, CIOC, *inter alia,* represented at the time that "a new well will be drilled in the subsalt zone, as per CDP-3D data" (Counter Memorial, paras. 416-418).

52. As was seen, on 20 January 2007, CIOC submitted a proposed minimum work program for the extension period (2007-2009) (Exh. C-25) (Memorial, para. 164).[11]

53. On 16 February 2007, the MEMR approved the two-year extension of the exploration period, with the Revised Work Program, and notified this decision to CIOC on 21 February 2007 (Exh. C-22). On the same day, CIOC concluded a contract for the estimation of the oil reserves at the Caratube field with CER (Exh. C-159).

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[10] Article 43(1) of the 2004 Subsoil Law (Exh. CLA-44) states as follows: "Exploration Contracts shall be valid for six years. The Contractor shall have the right to extend the period of validity of a Contract, provided the Contractor carries out the obligations as defined in the Contract work program and annual work programs. The term of Contract validity shall be extended twice for up to two years in each period of extension. The Term of the Contract shall be extended if a Contractor applied for extension no later than three months prior to the end of the Contract term".

[11] The Respondent specifies in this regard that the proposed draft work program provided for the drilling of two subsalt wells and two overhang wells for a budget of USD 16.4 million out of a total of USD 18 million, containing however no indication as to works related to the 3D seismic study (Counter Memorial, para. 419).

54. On 23 April 2007, the requested extension and the Revised Work Program were approved by TU Zapkaznedra (Exh. C-23). According to the Claimants, the extension was further approved by the MEMR Working Group on 6 June 2007 (Exh. C-24) and by the MEMR's Geology Committee on 29 June 2007 (Exh. C-232). The Revised Work Program (Exh. C-26) thus replaced the previous framework.

55. As will be seen later in further detail later in this Award, it is the Respondent's position that CIOC made misrepresentations of key facts, in particular regarding the successful completion of the 3D seismic study and its capacity of drilling deep wells shortly after the extension, throughout the 2007 extension process (Memorial, para. 165; Counter Memorial, paras. 420-424; Claimants' First Post-Hearing Brief, paras. 193-195).[12]

56. On 27 July 2007, Amendment No. 3 to the Contract, which provided for the extension of the exploration period until 27 May 2009, was entered into between CIOC and the MEMR, represented by the Minister of Energy and Mineral Resources (Memorial, para. 166; Counter Memorial para. 425; Claimants' First Post-Hearing Brief, para. 196).

57. The Revised Work Program set forth "the major objectives of works to be performed during the extension period 2007-2009 (27.05.2007 - 27.05.2009)" in the following terms:

> Under the Work Program, the following scope of works was performed in 2006:
>
> 1. Drilling of persalt wells is almost completed (except for the one, as per recommendations of the Designer's supervision ad MEMR CDC).
>
> 2. Main stage of logging and CDP-3D seismic survey is completed: field works, processing and interpretation. Based on the results of these works, new data on structural and tectonic structure of the entire section were obtained (persalt, subcornice and subsalt) and prospective objects

[12] It is worth mentioning here that, in September 2007, i.e. shortly after the finalization of the extension of the exploration period in July 2007, CIOC received and reviewed the 3D seismic study. According to the Respondent, CIOC realized (but did not notify the Respondent) that this 3D seismic study "was a failure" and this allegedly was also confirmed, says the Respondent, by an independent geophysical expert commissioned by CIOC (Counter Memorial, paras. 428-431). The Respondent further alleges that it found out in November 2007 that the 3D seismic study had not been successfully completed prior to the finalization of the extension of the Contract, prompting criticism of the 3D study by TU Zapkaznedra and a request for the study to be corrected. As a result, in the 2008 AWP, CIOC included a budget of USD 150,000 for the reprocessing and reinterpretation of the 3D seismic study (Counter Memorial, paras. 432-433). By contrast, the Claimants submit that on 1 November 2007, TU Zapkaznedra approved the 3D seismic report, merely noting that it required "some follow-up formatting" (Claimants' First Post-Hearing Brief, para. 261).

are to be drilled in the licensed area (including the main block - South-eastern flank) (Figure 5).

3. Lab analyses of core, bottomhole and surface samples are almost finished. Thereby, a basis for reserves estimation of all subsalt pay strata of the field upon pilot exploitation completion (December 2007) are almost completed.

During the extension period, it is planned to complete works on follow-up exploration of persalt, subcornice and subsalt complexes of formations in the Caratube field and adjacent territories of the licensed area: required drilling and logging suite, testing and lab analyses and other works, necessary for implementation of the Caratube field development stage.

[…]

As per the extension work program for 2007-2009, main emphasis will be laid on follow-up exploration and study of lower parts of the section: **subcornice and subsalt complexes** (Figure 6).

Main geologic-geophysical objectives of this stage:

1. Delineation and defining of potential structures of subcornice and subsalt complexes, prospectivity of which was confirmed by oil shows in wells ## G-69, G-25, G-38 and others.

2. Performance of Full Logging Suite (including hydrodynamic survey and geotechnical study) and a complex of lab analyses of core, samples from well productive strata.

To implement the aforesaid geologic-geophysical tasks, construction of deep wells is planned:

1. Subcornice complex:

- 2 wells (TD 2800-3200 m) in the western part of the license territory. Total drilling volume is 6000 linear m.

2. Subsalt complex:

- 2 wells (TD 4800-5200 with penetration of subsalt horizons P1, P2) in the area of a big subsalt uplift (N-S trend). Total drilling volume is 10000 linear m.

3. Implementation of this program also provides for a certain volume of drilling to study persalt and salt section within the Caratube licensed area:

- 4 wells/4500 linear m.

Thus, implementation of the Work Program during the extension period for 2007-2009 will almost complete the following stages:

1) Exploration stage

2) Pilot exploitation stage

3) Stage of final reserves estimation in the Caratube field

4. And it will give a start to the stage of commercial exploitation of the field within the Caratube licensed area up to 2032 as per the Contract.

> 5. It cannot be excluded that under certain circumstances, if additional surveys are required, pursuant to RoK Law "On subsoil" (Article 43), exploration extension for more 2 years is possible.[13]

58. On 30 July 2007, CIOC submitted to TU Zapkaznedra the 2007 revised AWP (Exh. C-94).[14]

E. Termination of the Contract

59. As with the performance of the Contract, the facts surrounding the termination of the Contract are also disputed between the Parties.

60. On 7 September 2007, the Prosecutor's Office of Aktobe Oblast sent to the MEMR a "Recommendation on elimination for disregard of the rule of law" (Exh. C-35; Memorial, paras. 236 et seq.; Counter Memorial, paras. 696-698; Claimants' First Post-Hearing Brief, paras. 224 et seq.). This Recommendation concluded as follows (Exh. C-35):

> As the results of this audit demonstrate, despite the continued nonperformance of the terms of the Contract and of the work programs by the Contractor ("Caratube International Oil Company LLP"), the Technical Council of the Authorized Agency (i.e. TU "Zapkaznedra") annually approves work programs and, moreover, carries over part of the unfulfilled obligations of the current year to the following year. This shows the Competent Authority, i.e. the Ministry of Energy and Mineral Resources of the Republic of Kazakhstan's lack of appropriate monitoring of the activities of the subsoil user and failure to take measures to rectify noncompliance with the terms of the Contract.
>
> Given the preceding, on the basis of Article 83 of the Constitution of the Republic of Kazakhstan, Article 25 of the Law of the Republic of Kazakhstan "On the Prosecutor's Office",
>
> YOU ARE INVITED to:
>
> Review this recommendation on the elimination of disregard of the rule of law, in order to:
>
> 1. Take measures to notify Caratube International Oil Company LLP of the necessity to address the abovementioned breaches for the elimination of the discovered legal breaches and for prevention in the future.
>
> 2. Settle an issue of unilateral termination of the Contract in connection with the existing breaches of obligations provided in the work programs.

[13] Exh. C-26 at 100.002.455. See also the 2007 revised AWP (Exh. C-94) p. 19, and the 2008 AWP (Exh. C-95), pp. 20-21.

[14] The Respondent has pointed out in this regard that the 2007 revised AWP does not contain any "provisions or budget for 3D work for the second half of the year". As will be seen in further detail later in this Award, the Respondent also alleges that it "contains the same misrepresentation that the 3D work had been done and that new wells are to be drilled", "contain[ing] alleged drilling locations for the two deep subsalt wells" (Counter Memorial, paras. 425-427).

61. On 24 September 2007, CIOC received a letter from TU Zapkaznedra (signed by the acting head of TU Zapkaznedra, Mr. Nadyrbaev[15]), to which the following "Notice of Breach of Obligations under Contract No. 954 of May 27, 2002" from the MEMR (signed by Mr. Akchulakov), dated 25 March 2007, was attached (Exh. C-37):

> The Ministry of Energy and Mineral Resources of the Republic of Kazakhstan as the authority empowered to execute and fulfill subsoil use contracts, according to Article 70 of the Law of the Republic of Kazakhstan On Subsoil and Subsoil Use, hereby notifies you that:
>
> You have violated the following terms and conditions of Contract for Exploration and Production of Hydrocarbons within the Blocks XXI-20-C (partly) and XXN-21-A (partly) including the Karatube Field (oversaline) in Baiganin District, Aktobe Region, No. 954 of May 27, 2002:
>
> - the working program has not been fulfilled (cl. 8.1);
>
> - long-term environmental forecast under the Contract has not been submitted to the Competent Authority (cl. 7. 2.18);
>
> - risk, property and liability insurance program has not been submitted for approval of the Competent Authority (cl. 18.1);
>
> - the program for annual remittance of 3% of capital costs to the liquidation fund has not been fulfilled in full (cl. 19.5).
>
> Therefore, you are required to remedy all Contract violations specified above within one month and to provide the Competent Authority with all the appropriate documents confirming that the violations have been remedied. You are also required to report on the measures taken in order to remedy and prevent failure to fulfill your contractual obligations.
>
> Should you fail to remedy the above Contract violations, in accordance with the Law of the Republic of Kazakhstan On Subsoil and Subsoil Use, the Competent Authority may unilaterally dissolve the Contract for Exploration and Production of Hydrocarbons within the Blocks XXI-20-C (partly) and XXN-21-A (partly) including the Karatube Field (oversaline) in Baiganin District, Aktobe Region, No. 954 of May 27, 2002.

62. The Claimants submit that they did not receive the 25 March 2007 Notice prior to 24 September 2007 and the Respondent had never before referred to it (Memorial, para. 244). The Claimants point out that the 25 March 2007 Notice (which was drafted in the Kazakh language, rather than in Russian or English as prescribed by the Contract and the practice between the Parties) also did not contain any reference to the approval in February 2007 of the extension of the Contract's exploration phase by the same Ministry, i.e. the MEMR.

[15] The Claimants allege that Mr. Nadyrbaev had participated, in his capacity as Deputy Chief of TU Zapkaznedra at the time, in the meeting of the Technical Committee which decided to approve CIOC's request for a Contract extension until 27 May 2009 and recommended it for final approval on 23 April 2007, i.e. one month after the alleged date of the Notice of 25 March 2007 (Memorial, para. 243).

63. It is the Claimants' position that the 25 March 2007 Notice was "concocted" and backdated by the MEMR, upon the receipt of the Prosecutor's instruction to terminate CIOC's Contract.

64. Assuming that the 25 March 2007 Notice was sent, it is the Claimants' position that it was waived by the subsequent approvals of the Contract extension dated 23 April, 6 June and 29 June 2007, which were confirmed by the 27 July 2007 Amendment No. 3 to the Contract (Claimants' First Post-Hearing Brief, paras. 237-249).

65. By contrast, the Respondent insists that the 25 March 2007 Notice was not backdated. Rather, the Respondent argues that, as evidenced by the MEMR's log book (Exh. R-186), the Notice was sent by registered mail with return receipt requested on 25 March 2007 and received by CIOC on 28 March 2007. The Respondent further alleges that CIOC chose not to respond to the 25 March 2007 Notice because it was seeking to obtain the extension of the Contract and did not want to jeopardize the finalization of the extension by drawing the Respondent's attention to CIOC's various breaches of the Contract (Counter Memorial, para. 701. See also the Respondent's Post-Hearing Brief, paras. 186 et seq.).[16]

66. On 28 September 2007, CIOC received the so-called "Prescriptive Order" (Exh. C-129). It was signed by Mr. Baikadamov, who was part of the TU Zapkaznedra's Technical Committee that had approved CIOC's AWPs for 2004 and 2005 (Memorial, para. 249).

67. On 1 October 2007, the MEMR notified to CIOC a "Notice of Termination of Operations" (Exh. C-38), stating as follows:

> The Ministry of Energy and Mineral Resources of the Republic of Kazakhstan, as the competent authority for execution and performance of subsoil use contracts, in accordance with Article 70 of Law No. 2828 of the Republic of Kazakhstan "On Subsoil and Subsoil Use" dated January 27, 1996 (hereinafter referred to as the Law) has sent you a notice of your violation of the terms of Contract No. 954 of May 27, 2002 for the exploration and production of raw hydrocarbons within the blocks XXIV-20-C (partial) and XXIV-21-A (partial), including the Caratube suprasalt field in the Baiganinsky district of the Aktyubinsk Region (The Ministry of Energy and Mineral Resources reference No. 14-02-2498 of March 25, 2007). You received this notice on March 28, 2007.
>
> The notice stated the timeframes for submission of the information on the reasons for your failure to fulfil the contractual obligations, as well as on remediation of the violation and the actions taken. Appropriate information

[16] See also the MEMR's Notice of Termination of Operations dated 1 October 2007 (Exh. C-38), which states that the Notice of 25 March 2007 was received by CIOC on 28 March 2007.

> and the documents confirming remediation of the violations have not been submitted to the Competent Authority within the timeframe established.
>
> For this reason, in accordance with Article 45-2, clause 2 of the Law, the Competent Authority is hereby requesting immediate termination of operations under Contract No. 954 of May 27, 2002, pending decision on unilateral termination of the contract.

68. On 3 October 2007, Mr. Hussam Hourani, in his capacity as director of CIOC, replied to the Respondent's Notices of 25 March and 1 October 2007, rejecting the Respondent's allegations of breach of CIOC's obligations (Exh. C-39). CIOC also claimed that it had not received the Notice dated 25 March 2007 before 24 September 2007 and that it should not be possible to rely on such Notice as the basis for the termination of the Contract. Moreover, CIOC referred to the fact that the MEMR had agreed to and approved the extension of the Contract and the revised Work Programs earlier in 2007.

69. By letter dated 17 October 2007 (Exh. C-145), the MEMR requested CIOC to give "detailed information on fulfillment of the prescriptive order", i.e. the Notice of 25 March 2007. On behalf of CIOC, Mr. Hussam Hourani replied on 18 October 2007 (Exh. C-146), reiterating the explanations provided in CIOC's letter dated 3 October 2007.

70. On 22 November 2007, Mr. Batalov, as the Executive Secretary of the MEMR, wrote to the Aktobe Regional Prosecutor's Office, stating in particular as follows (Exh. R-178; Claimants' First Post-Hearing Brief, paras. 262-264):

> Given that the delivery receipt of the registered letter [i.e. the Notice of 25 March 2007], by which the notice of violation of contractual obligations was sent to the Contractor, has no precise information as to on whom it was served and in order to comply with the procedures prescribed by Section 29 of the Contract, the Ministry of Energy decided to resend to the Contractor the notice of violation of the Contract and of the resuming of operations under the Contract, having duplicated it by fax.

71. Thereafter, on 27 November 2007, Mr. Batalov notified to CIOC a "Notification for Resumed Operations", allowing CIOC to resume operations under the Contract. At the same time, the letter listed several further alleged breaches by CIOC of its obligations under the Contract, requesting the latter to remedy such breaches within one month of receipt of the Notification (Exh. C-148). The Claimants point out, *inter alia*, that no mention was made of the extension of the exploration phase of the Contract, of CIOC's comments as expressed in its letter dated 3 October 2007, or of why a thirty-day period, rather than a "reasonable period" as commanded by the

Subsoil Law and the Contract, was given to CIOC to cure alleged breaches (Claimants' First Post-Hearing Brief, paras. 265-267).

72. On 3 December 2007, Mr. Batalov, as the Executive Secretary of the MEMR, notified to CIOC the "Notice of non-performance of obligations", stating in relevant part as follows (Exh. C-41):

> […] [Y]ou are in violation of your obligations under Contract No. 954 of May 27, 2002 for the exploration and production of hydrocarbons within the blocks XXIV-20-C (partial) and XXIV-21-A (partial), including the Caratube post-salt field in the Baiganinsky district of the Aktyubinsk Region (hereinafter referred to as the Contract).
>
> For this reason, you shall:
>
> - within ten days of receipt of the present notice, submit to the Competent Authority the information on the reasons for your failure to fulfil the contractual obligations;
>
> - Within one month of receipt of the present notice, remedy the failure to fulfil the obligations under the Contract and submit all the required documents to confirm such remediation.
>
> In event of your failure to fulfil the requirements of the present notice within the allowed time, the Competent Authority will take the steps to terminate the Contract as provided for by the legislation of the Republic of Kazakhstan.

73. On 7 December 2007, TU Zapkaznedra sent a further notice of breach to CIOC (Exh. R-49), indicating that CIOC's performance of its financial obligations under the Contract was below 50%.

74. On 13 December 2007, CIOC responded to the Notice of non-performance of obligations, concluding, *inter alia*, that CIOC "does not demonstrate any backlog in implementation of the 2007 Work Program (the program has been completed in its entirety) or in other aspects of operation" (Exh. C-42).

75. On 29 December 2007, TU Zapkaznedra reviewed the 2007 AWP and approved the AWP for 2008, rolling over CIOC's non-performed obligations to the next year (Exh. C-43) (Claimants' First Post-Hearing Brief, para. 271; Respondent's First Post-Hearing Brief, para. 167).

76. On 30 January 2008, the MEMR issued an Ordinance, ordering to "[t]erminate Contract No. 954 of 27 May 2002, signed with Caratube International Oil Company LLP […] due to failure of completion of notice requirements within the specified period" (Exh. C-44).

77. The Ordinance was notified to CIOC's regional office in Aktobe by letter dated 1 February 2008 and signed by Mr. Batalov of the MEMR. According to the Claimants, CIOC's head office in Almaty received the notification of the termination of the Contract on 11 February 2008, and Mr. Hussam Hourani, as CIOC's director, responded to it by letter dated 12 February 2008 (Memorial, paras. 263-264; Exh. C-28).

78. According to the Respondent, various letters were exchanged and a (unscheduled) meeting took place (the content of which is disputed) between the Claimants and the Respondent after the termination of the Contract. However, the MEMR confirmed its position to terminate the Contract by letter dated 14 May 2008 (Exh. C-170; Counter Memorial, paras. 717-719). By contrast, the Claimants assert that they protested against the termination of the Contract by letters dated 4 and 11 March 2008. According to the Claimants, these letters remained unanswered. In particular, the Claimants insist that no meeting took place following their letters, and they never received the Respondent's letter dated 14 May 2008 (which, in any event, merely dismissed the Claimants' arguments), but saw it for the first time during the *Caratube International Oil Company LLP v Republic of Kazakhstan* (ICSID Case No. ARB/08/12) arbitration (the "***Caratube I* arbitration**") (Claimants' First Post-Hearing Brief, paras. 274-276).

79. Following the termination of the Contract, CIOC retained physical control of the Contract site until April 2009, say the Claimants. According to the Claimants, in April 2009, CIOC lost the effective control of the Caratube oilfield, which became *de facto* controlled by KNB officers. In particular, the latter allegedly seized documents, electronic storage media and computers belonging to CIOC on the grounds of an investigation into the alleged misappropriation by Mr. Issam Hourani of CIOC from a certain Mr. Adonis Derbas. According to the Claimants, there is no evidence that such documents, disks and computers were ever returned to CIOC. The Claimants further submit that, in parallel to the confiscations of CIOC property by the KNB, Kazakh authorities confiscated the land belonging to CIOC. As of mid-April 2009, all oil wells at the Caratube field have been sealed and the site is under the supervision of the KNB, say the Claimants (Memorial, paras. 287-296; Claimants' First Post-Hearing Brief, para. 277).

F. Political context

80. On 23 May 2007, Mr. Rakhat Aliyev, then son-in-law of the President of the Republic of Kazakhstan, Nursultan Nazarbayev, was accused of being involved in the kidnapping of two bankers of the Kazakh bank, Nurbank, and the Ministry of Internal Affairs commenced criminal proceedings against him. According to the Claimants, this happened upon the personal instructions by President Nazarbayev to the Prosecutor General and the Minister of Interior.

81. The Claimants submit that on the next day, 24 May 2007, commenced a harassment campaign against Mr. Aliyev and those who were perceived of as assisting him, including the Hourani family. During the course of this campaign, Mr. Aliyev was allegedly stripped of his diplomatic immunity and removed by President Nazarbayev from his post as the Kazakh Ambassador to Austria. The Claimants allege that these and several other actions against Mr. Aliyev were motivated by the falling out in April 2007 between President Nazarbayev and Mr. Aliyev (Memorial, paras. 173 et seq.; Claimants' First Post-Hearing Brief, paras. 197 et seq.).

82. The Claimants argue that the Hourani family thus became "collateral damage" of this alleged dispute between President Nazarbayev and Mr. Aliyev (Memorial, paras. 177-183). In particular, the Claimants allege that the Respondent engaged in various acts of harassment against the Claimants and disrupted their activities (Memorial, paras. 184 et seq.; Claimants' First Post-Hearing Brief, paras. 199 et seq.; Claimants' Reply Post-Hearing Brief, paras. 100 et seq.). The Claimants point out that the same Prosecutor General's office that declared that "the economic foundation of the Aliyev criminal group in Kazakhstan has been effectively liquidated" also allegedly instructed a local prosecutor to expropriate the Claimants in September 2007 (Memorial, para. 182).

83. Furthermore, the Claimants allege that on 24 May 2007, in conformity with President Nazarbayev's personal instructions, the Prosecutor General's Office suspended the KTK TV Channel's broadcasting for three months and permanently shut down the Karavan newspaper "on obscure grounds", it being specified that Mr. Devincci Hourani is a minority shareholder in KTK TV, and his sister-in-law, Ms. Gulshat Hourani, is a shareholder in Karavan (Claimants' First Post-Hearing Brief, paras. 199-201).

84. According to the Claimants, on 28 May 2007, Mr. Sami Sabsabi filed a short and unsubstantiated criminal complaint against Mr. Issam Hourani for an alleged beating

and extortion that Mr. Sabsabi claimed to have occurred at an unidentified date in 2005. The Claimants submit that on this basis, on 1 June 2007, the Respondent initiated a criminal case, "without even proof that any beating or extortion took place, nor evidence of the underlying circumstances". The Claimants point out that Mr. Derekh, who owed Mr. Sabsabi money, cannot be considered as an independent witness in support of Mr. Sabsabi's case, the testimonies of Messrs. Derekh and Sabsabi given to Colonel Kim at the time were fraught with unexplainable inconsistencies, and Colonel Kim's investigations were seemingly limited to Mr. Issam Hourani. However, on 20 June 2007, Colonel Kim allegedly ordered the search, not of Ruby Roz, where the beating had allegedly taken place, but of Universal Oilfield Supply Holdings LLP, owned by Mr. Kassem Omar, not by Mr. Issam Hourani (Claimants' First Post-Hearing Brief, paras. 203-215; Claimants' Reply Post-Hearing Brief, paras. 102-103).

85. The Claimants further submit that, on 22 October 2007, Almaty police seized the legal and accounting documents of 16 separate legal entities located at Polezhaeva St., 92 A, including CIOC, taking around 1,380 binders of documents, including over 100 binders of CIOC's documents.[17] In March 2008, documents were returned to Ruby Roz and some of the other companies, including CIOC, it being however alleged by the Claimants that the seized documents were returned incompletely and without any order (Memorial, paras. 229 et seq.).

86. Moreover, the Claimants submit that from June 2007 onwards, CIOC was subjected to a disruptive "avalanche of State inspections and audits checking [CIOC's] compliance with laws and regulations, in particular with respect to environment, customs, tax, immigration, and labor laws, and safety", some of which culminating in further measures against CIOC or its management, such as the initiation of criminal proceedings, the seizure of documents, the detention of equipment or the freezing of bank accounts (Memorial, paras. 234 et seq.; Claimants' First Post-Hearing Brief, paras. 216-221).

87. The Claimants argue that the alleged harassment of the Hourani family by the Respondent continued after the termination of the Contract (see, e.g., Memorial, paras. 299 et seq.).

[17] See also the Claimants' First Post-Hearing Brief (paras. 258-260), where the Claimants refer to and comment on seizure orders dated 10 and 12 October 2007. According to the Claimants, none of the seizure orders contained any explanation or justification as to why the documents of 19 companies were seized.

88. The Claimants also point out that the Respondent's alleged acts of harassment were not limited to CIOC, but were also directed against all of the other investments of the extended Hourani family. For the Claimants, this, coupled with the timing and reasons given to justify these other takings, confirms that the alleged taking of CIOC was motivated by reasons not attributable to CIOC or the Houranis, nor any of their companies.[18]

89. The Claimants submit that there is direct written and oral evidence proving that the taking of CIOC had nothing to do with CIOC or Mr. Devincci Hourani themselves, but rather was motivated by the broader, unrelated dispute between President Nazarbayev and Mr. Aliyev, which fact alone establishes a breach of international and Kazakh law, say the Claimants.[19]

90. The Respondent rejects the Claimants' above-mentioned allegations of a politically motivated harassment campaign by the Respondent against the Claimants. It avers that there was no harassment of the Claimants, no expropriation of CIOC and no violation of FET or any other treaty obligation by the Respondent (assuming that the Respondent had such obligations toward CIOC), insisting that CIOC's Contract was terminated for CIOC's material breaches, without there being any State action or political motivation behind the termination (for a summary on the Respondent's position, see *infra*, paras. 783 et seq. See also Counter Memorial, paras. 918 et seq.).

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[18] In particular, the Claimants allege that, on 6 September 2007, Universal Oil Supply was deprived of its regional airline, Kokshetau Airlines, following a petition from a regional Prosecutor to the Kazakh State Property Committee and a regional court to declare unlawful and cancel the result of a July 2001 public auction for the sale of the 100% shareholding in Kokshetau. Moreover, the Claimants assert that the Presidential Administration specifically targeted Mr. Issam Hourani, who was stripped of his Kazakh nationality in January 2008 due to the lack of a HIV-negative certificate. As a further example, the Claimants allege that Pharm Industry Corp, owned jointly by Messrs. Devincci and Issam Hourani, was deprived during the course of the year 2008 of parts of its land plot on which it had been authorized by Kazakhstan to construct a pharmaceutical plant. Finally, the Claimants assert that Ruby Roz Agricol was also harassed and progressively taken starting from 20 June 2007 (Claimants' First Post-Hearing Brief, paras. 280-284).

[19] In particular, the Claimants rely on (i) an email from Mr. Gerry O'Shaugnessy to Mr. Devincci Hourani dated 21 April 2008 (Exh. C-164); (ii) a draft email prepared by the Adviser to the Executive Secretary of the Ministry of Justice to Mr. Peter Garske, the Managing Director of Arcanum, a consulting firm, referring to Messrs. Rakhat Aliyev, Issam Hourani and Devincci Hourani as targets 1, 2 and 3 and discussing potential legal claims against them and the possibility to establish that Mr. Rakhat Aliyev was the real owner of the Hourani family's businesses in Kazakhstan; (iii) an email by Mr. Alastair Campbell dated 22 December 2013 to a civil servant at the Kazakh Ministry of Justice, stating that the Hourani family are serious business people and that they are not linked to Mr. Rakhat Aliyev (Claimants' First Post-Hearing Brief, paras. 285-290). Furthermore, the Claimants rely on the witness testimonies of (i) Mr. Issam Hourani; (ii) Mr. Yasser Mahmoud Abbas; (iii) Mr. Devincci Hourani, namely about his meeting with Ms. Dariga Nazarbayeva; and (iv) Mr. Kravchenko (Claimants' First Post-Hearing Brief, paras. 291-297).

G. Dispute resolution procedures in relation with the present dispute

91. The factual context underlying the present dispute has given rise to several dispute resolution procedures, in particular ICSID arbitrations opposing the Respondent, including *Devincci Salah Hourani and Issam Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/15/13) (pending) and UNCITRAL case *Ruby Roz* (finished with a negative award on jurisdiction). Most importantly, on 16 June 2008, CIOC alone brought ICSID arbitration proceedings against the Respondent under the Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, dated 19 May 1992 (the "**BIT**") - the *Caratube I* arbitration. The *Caratube I* tribunal dismissed the case for lack of jurisdiction in an award dated 5 June 2012 (the "***Caratube I* award**"; Exh. CLA-8), and ordered CIOC to pay costs to the Respondent. The dispositive part of the *Caratube I* award reads as follows:

> The Tribunal decides and orders that:
>
> 1. The Tribunal does not have jurisdiction over the Claimant's claims herein.
>
> 2. Costs: The Claimant pay the Respondent USD 3.2 million, comprising USD 3 million for its legal costs and USD 200,000 to recoup part of monies paid for ICSID deposit.

92. The *Caratube I* award was challenged, but ultimately upheld, in annulment proceedings before an *Ad Hoc* Committee. Following the *Ad Hoc* Committee's order dated 14 March 2013 for the continued stay of enforcement of the *Caratube I* award, on 21 February 2014, the *Ad Hoc* Committee rendered its Decision on the Annulment Application of Caratube International Oil Company LLP (Exh. CLA-127), unanimously deciding as follows:

> 1. The application of Caratube International Oil Company LLP for annulment of the Award issued by the Tribunal on June 5, 2012 is dismissed.
>
> 2. Each of the Parties shall bear its own legal fees and expenses, and Caratube International Oil Company LLP shall bear the direct costs of the proceeding, comprising the fees and expenses of the Committee and the costs of using the ICSID facilities, in their entirety.
>
> 3. The stay of enforcement of the Award is declared automatically terminated in accordance with Rule 54(3) of the ICSID Arbitration Rules.

93. As will be seen in further detail in the later sections of this Award, both the Claimants and the Respondent have relied in this Arbitration on the *Caratube I* award, in particular for purposes of asserting or denying this Tribunal's jurisdiction.

As will also be seen in further detail below, each Party contests the reliance by the adverse Party on the *Caratube I* tribunal's findings.

III. PROCEDURAL HISTORY

94. On 5 June 2013, the Claimants submitted their Request for Arbitration, requesting the institution of arbitration proceedings against the Respondent "in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated March 18, 1965 (the '**ICSID Convention**'), the Law of the Republic of Kazakhstan on Foreign Investments, dated December 27, 1994 (the '**FIL**'), the Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, dated May 19, 1992 (the '**BIT**' or the '**Treaty**'), and the Contract No. 954 between the Ministry of Energy and Mineral Resources of the Republic of Kazakhstan and [CIOC], dated May 27, 2002 (the '**Contract**')" (Request for Arbitration, para. 1). In their Request for Arbitration, the Claimants based the jurisdiction of this ICSID Tribunal on - and asserted rights under - the FIL, the Contract, and the BIT (Request for Arbitration, paras. 89 et seq.).

95. On 28 June 2013, the ICSID Secretary-General registered the Request for Arbitration under the ICSID Convention.

96. The Parties made efforts but failed to agree on the method of constitution of the Tribunal. By letter dated 1 October 2013, the Claimants informed ICSID that it opted for the formula provided in Article 37(2)(b) of the ICSID Convention. In accordance with that provision, the Claimants appointed Professor Laurent Aynès, and the Respondent appointed Mr. Bruno W. Boesch. Both party-appointed arbitrators accepted their appointments.

97. By letter of 20 December 2013, Counsel for the Claimants confirmed that the Parties had agreed to appoint Dr. Laurent Lévy as President of the Tribunal. By letter dated 27 December 2013, Dr. Laurent Lévy accepted the nomination to act as President of the Tribunal.

98. On 7 January 2014, the ICSID Secretary-General confirmed the constitution of the Tribunal and the beginning of the arbitration proceedings pursuant to ICSID Arbitration Rule 6. She further informed the Parties that Ms. Milanka Kostadinova, ICSID Senior Counsel, would act as Secretary of the Tribunal.

99. By letter of 15 January 2014, the Claimants requested Mr. Boesch to resign from the Tribunal pursuant to Article 8 of the ICSID Arbitration Rules. In the same letter, the Claimants expressed their intention to submit a proposal for Mr. Boesch's disqualification, should he fail to resign from the Tribunal, pursuant to Articles 57 and 14(1) of the ICSID Convention.

100. On 21 January 2014, the Tribunal informed the Parties that Mr. Boesch considered himself independent and impartial and therefore did not intend to resign from the Tribunal. By separate letter of the same day, the Tribunal further informed the Parties that Prof. Laurent Aynès had become partner in the law firm Darrois Villey Maillot Brochier beginning 1 January 2014 and that Prof. Aynès did not consider these circumstances to affect his independence and impartiality.

101. By email of 22 January 2014, the Claimants confirmed their intention to file a proposal for the disqualification of Mr. Boesch. The Proposal for Disqualification was submitted by the Claimants on 28 January 2014, in conformity with the Tribunal's letter of 21 January 2014.

102. On 29 January 2014, the arbitration proceeding was suspended pursuant to ICSID Arbitration Rule 9(6).

103. On 12 February 2014, the Respondent filed its observations on the Claimants' Proposal for Disqualification, in conformity with the calendar set forth in the Tribunal's letter of 4 February 2014.

104. On 13 February 2014, Mr. Boesch provided his explanations in accordance with ICSID Arbitration Rule 9 and the calendar in the Tribunal's letter of 4 February 2014.

105. On 28 February 2014, the Parties simultaneously filed further observations with respect to the Proposal for Disqualification.

106. On 20 March 2014, the Unchallenged Arbitrators, i.e. Dr. Lévy and Prof. Aynès, issued their Decision on the Proposal for Disqualification of Mr. Bruno Boesch, deciding to uphold the Claimants' Proposal.

107. By letter dated 20 March 2014, the Secretary-General communicated the Unchallenged Arbitrators' Decision to the Parties and invited the Respondent to appoint a new arbitrator, pursuant to ICSID Arbitration Rule 11(1). The Parties were further invited to consent to the publication of said Decision.

108. By letter of 28 April 2014, Dr. Jacques Salès accepted his appointed as arbitrator nominated by the Respondent.

109. On 2 May 2014, the Secretary to the Tribunal confirmed the reconstitution of the Tribunal and the lifting of the suspension of the proceedings as of 29 April 2014. Moreover, the Secretary informed the Parties of the Tribunal's wish to use an assistant and to appoint Dr. Silja Schaffstein to that effect, with the specification, *inter alia*, that she would work at all times under the specific instructions and continuous control and supervision of the President of the Tribunal, and that she would also be subject to the same confidentiality obligations as the Members of the Tribunal and would sign a declaration to that effect. Dr. Schaffstein's CV was submitted to the Parties for approval.

110. The first session of the Tribunal was held on 4 June 2014 at the World Bank Paris Conference Centre. Present at the session were:

Members of the Tribunal:

Dr. Laurent Lévy
Prof. Laurent Aynès
Dr. Jacques Salès

ICSID Secretary :

Ms. Milanka Kostadinova

Assistant to the Tribunal:

Dr. Silja Schaffstein

Attending on behalf of the Claimants:

Dr. Hamid G. Gharavi, Derains & Gharavi
Ms. Nada Sader, Derains & Gharavi
Mr. Sergey Alekhin, Derains & Gharavi

Attending on behalf of the Respondent:

Mr. Peter M. Wolrich, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Geoffroy Lyonnet, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Gabriela Alvarez Avila, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Jérôme Lehucher, Curtis, Mallet-Prevost, Colt & Mosle LLP

111. Following the first session, on 20 June 2014, the President of the Tribunal issued Procedural Order No. 1 ("**PO1**").

112. By letter of 14 July 2014, the Claimants submitted a request for provisional measures based on Article 47 of the ICSID Convention and Rule 39 of the ICSID

Arbitration Rules. In paragraph 82 of their letter, the Claimants set forth the following request for relief:

> 82. […] Claimants request the Arbitral Tribunal to order the Republic of Kazakhstan to:
>
> 82.1. Disclose any role it had, whether as direct or indirect funder or instigator, as well as all associated internal and external documents (be it emails, letters, memos, notes, minutes, invoices, instructions and the like), in relation to the two websites, www.justicefornovikova.com and www.rakhataliyev.com, the "protests" that occurred in London on June 19, 2014, including correspondence with the company Envisage Promotions Ltd. and/or any other company, individual or the like and to take all measures required for the immediate closure of these websites;
>
> 82.2. Justify the fierceness and timing of the prosecution by Kazakhstan of the allegations of murder against the Houranis and the associated lobbying before Lebanese authorities, including Ministers, prosecutors and ambassadors regarding the investigations relating to the death of Ms. Anastasya Novikova, which were closed multiples times;
>
> 82.3. Undertake that Kazakhstan will refrain from taking any direct or indirect measures or any action that would aggravate the dispute and/or jeopardize the integrity and the legitimacy of this arbitration and the equality of the Parties, including any assault or the like or threats and intimidation against the Hourani family and any potential witnesses and their families, including Messrs. Issam Hourani, Omar Antar, Kassem Omar, Hussam Hourani, and Nader Hourani (Mr. Devincci's cousin) and Ms. Hiam Hourani (Mr. Devincci's sister); and
>
> 82.4. Undertake that Kazakhstan comply with the fundamental principle of the presumption of innocence of the Hourani family and of the prohibition of unlawful attacks on one's honor and reputation, and refrain from taking any direct or indirect measures or any action that would violate these principles, including but not limited to refraining from directly or indirectly organizing, instructing, funding, encouraging and/or the like of protests, articles, books, and websites alleging murder perpetrated by Hourani family.

113. On 14 August 2014, the Respondent submitted its response to the Claimants' request for provisional measures, in conformity with the Tribunal's letters dated 17 and 25 July 2014. In the conclusion to its response, the Respondent requested the Tribunal to reject in their entirety all of the Claimants' requests for provisional measures and to be awarded the costs the Respondent incurred in connection with the Claimants' request, including but not limited to legal fees and expenses and expert fees and expenses.

114. On 26 August 2014, the Claimants requested that a hearing on provisional measures be held on 8 October 2014, in conformity with the Tribunal's letter dated 19 August 2014.

115. By letter of 28 August 2014, Dr. Jacques Salès informed the Parties that he had been nominated on the initiative of Curtis, Mallet-Prevost, Colt & Mosle LLP (by partners different from the partners handling the present case) to act as co-arbitrator in two related ICC arbitrations. Dr. Salès further informed the Parties that at its session of 12 June 2014, the ICC International Court of Arbitration had decided to confirm his appointment in one, but not the other ICC case. Finally, Dr. Salès declared that his appointment in the mentioned ICC case would not affect his independence and impartiality in the present Arbitration.

116. On 2 September 2014, the Tribunal confirmed that a hearing on provisional measures would take place at the World Bank Paris Conference Centre on 8 October 2014.

117. On 19 September 2014, the Claimants submitted their Memorial (the "**Memorial**"), in conformity with the Tribunal's email of 17 September 2014. The Memorial was accompanied by fact witness statements of (i) Mr. Devincci Hourani; (ii) Mr. Omar Antar; and (iii) Mr. Harvey Jackson. The Memorial was further accompanied by two expert reports of Mr. Sven Tiefenthal and the Damages Report of Grant Thornton ("**GT**").

118. On 8 October 2014, the hearing on provisional measures took place in Paris. In attendance at the hearing were:

Members of the Tribunal:

Dr. Laurent Lévy
Prof. Laurent Aynès
Dr. Jacques Salès

ICSID Secretary:

Ms. Milanka Kostadinova

Attending on behalf of the Claimants:

Dr. Hamid G. Gharavi, Derains & Gharavi
Ms. Nada Sader, Derains & Gharavi
Mr. Sergey Alekhin, Derains & Gharavi
Ms. Elina Vilchinskaya, Derains & Gharavi
Mr. Fadi Hajjar, Derains & Gharavi
Mr. Etienne Vimal du Monteil, Derains & Gharavi

Parties:

Mr. Devincci Hourani

Attending on behalf of the Respondent:

Mr. Peter M. Wolrich, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Geoffroy Lyonnet, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Gabriela Alvarez Avila, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Jérôme Lehucher, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Mira Suleimenova, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Anna Kouyaté, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Marie-Claire Argac, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Inna Khlystova, Curtis, Mallet-Prevost, Colt & Mosle LLP

Witnesses:

Mr. Andrey Kravchenko
Prof. Martha Olcott

Parties:

Mr. Marat Beketayev, Ministry of Justice of the Republic of Kazakhstan
Mr. Almat Madaliyev, Ministry of Justice of the Republic of Kazakhstan
Mr. Kazbek Shaimerdinov, Ministry of Justice of the Republic of Kazakhstan
Mr. Kairgeldy Sakenov, General Prosecutor Office of the Republic of Kazakhstan

119. On 10 October 2014, pursuant to the Tribunal's instructions at the hearing of 8 October, the Claimants amended their request for relief as initially set forth in their request for provisional measures. The amended request for relief read as follows:

> 2. Claimants request the Arbitral Tribunal to order to Republic of Kazakhstan to:
>
> 2.1. Withdraw as "partie civile" from the criminal proceedings launched with Ms. Novikova's family on July 24, 2012 against three (i.e. Messrs. Issam, Devincci and Hussam Hourani) out of the four (being Mr. Rakhat Aliyev) persons specifically accused of the murder of Ms. Novikova, and cease any direct or indirect interference with or before the Lebanese authorities in relation to these criminal proceedings, unless expressly required by the Lebanese judges in relation to Kazakhstan's status as "partie civile," including encouraging directly or indirectly, be it financially or otherwise, members of the family of Ms. Novikova or any third parties to initiate, maintain or provide testimonies in the criminal proceedings against the Hourani family, until a Final Award is rendered, or to order any other measures that the Tribunal deems appropriate.
>
> 2.2. Proceed with investigations, before all organs of the State, including the KNB, the Prosecutor General's Office, and the Ministry of Interior in relation to their direct or indirect involvement with the websites (www.justicefornovikova.com and www.rakhataliyev.com) and the demonstrations carried out in London on June 19, 2014 against the Hourani family and to report as soon as possible in writing to the Tribunal as to the conclusions:
>
> - If Kazakhstan confirms that the State has direct or indirect involvement with the websites and the demonstrations, ORDER Kazakhstan to take all the measures for the immediate closing of all the websites;

> - If Kazakhstan finds that the State has no direct or indirect involvement therewith, ORDER Kazakhstan (i) to make a declaration that Kazakhstan has no involvement in the websites or the demonstration held in London on June 19, 2014, and that it condemns these acts as being in violation of the presumption of innocence, for Mr. Devincci Hourani to use if and when appropriate and (ii) to make all necessary investigations to find out who is at the origin of same, including with Ms. Novikova's family, who Kazakhstan has access to, and to take every measure necessary so that the instigators and/or authors of these websites and demonstrations cease the same;
>
> 2.3. Undertake that Kazakhstan will refrain from taking any direct or indirect measures or any action that would aggravate the dispute and/or jeopardize the integrity and the legitimacy of this arbitration and the equality of the Parties, including any assault or the like or threats and intimidation against the Hourani family and any potential witnesses and their families, including Messrs. Kassem Omar, Hussam Hourani, and Nader Hourani (Mr. Devincci's cousin) and Ms. Hiam Hourani (Mr. Devincci's sister);
>
> 2.4. Undertake that Kazakhstan comply with the fundamental principle of the presumption of innocence of the Hourani family and of the prohibition of unlawful attacks on one's honor and reputation, and refrain from taking any direct or indirect measures or any action that would violate these principles, including but not limited to refraining from directly or indirectly organizing, instructing, funding, encouraging and/or the like of protests, articles, books, and websites alleging murder perpetrated by Hourani family; and
>
> 2.5. To order any other measures that the Tribunal deems appropriate, including any variations to the above requested orders.

120. On 16 October 2014, the Respondent commented on the Claimants' amended requests for provisional measures.

121. Thereafter, by correspondence of 13, 16 and 18 November 2014 and 2 December 2014, the Claimants submitted additional information on new developments with respect to the Claimants' allegations of harassment by the Respondent, on which the Claimants relied in relation to their request for provisional measures. The Claimants amended items 2.2 and 2.3 of their amended alternative requests for provisional measures in accordance with the alleged new developments and stressed the urgency of the matter. Moreover, in their correspondence of 2 December 2014, the Claimants also enquired whether the evidentiary hearing could be held already in July or August 2015, should the Claimants choose to waive their right to file a Reply Memorial.

122. By letter dated 3 December 2014, the Tribunal confirmed its availability, in principle, for an evidentiary hearing in July 2015.

123. On 4 December 2014, the Tribunal issued its Decision on Provisional Measures, deciding to deny the Claimants' Amended Request for Provisional Measures. The Tribunal also decided that "[e]ach Party shall bear its own costs, whereas the Tribunal's costs will be determined in the Final Award".

124. On 5 December 2014, the Respondent objected to the Claimants' proposal to waive their Reply Memorial.

125. On 9 December 2014, the Claimants submitted to the Tribunal a copy of the Notice of Dispute re Pharm Industry Corporation/Mr. Devincci Hourani and Mr. Issam Hourani v Republic of Kazakhstan. The Notice of Dispute indicated that the Claimants would propose the same Tribunal to handle this new arbitration.

126. By letter dated 12 December 2014, the Claimants requested leave from the Tribunal to exercise their right to waive their Reply Memorial within 15 days of receipt of the Respondent's Counter Memorial on Jurisdiction and the Merits. The Claimants also suggested a revised procedural calendar should they choose to waive their Reply Memorial.

127. By email of 16 December 2014, the Respondent reiterated its objections to the possibility of the Claimants waiving their Reply Memorial and the suggested procedural calendar.

128. By letter dated 23 December 2014, the Tribunal granted the Claimants' request to provisionally reserve hearing dates for a 5-day hearing on the merits. The Tribunal also granted the Claimants' request for leave to exercise their right to waive their Reply Memorial.

129. On 21 January 2015, the Tribunal further informed the Parties that it had provisionally reserved the weeks of 2 and 9 November 2015 for an evidentiary hearing on the merits, while also keeping the hearing dates in February 2016 reserved, which were fixed in PO1.

130. By letter of 3 February 2015, the Claimants informed the Tribunal of further allegations of harassment by the Respondent and requested the Tribunal to take certain measures.

131. In conformity with the Tribunal's letter dated 5 February 2015, by letter of 13 February 2015, the Respondent provided its comments on the Claimants' letter of 3 February and asked the Tribunal to deny the measures requested by the Claimants.

Also on 13 February 2015, the Claimants provided further comments on the Respondent's communication of the same day.

132. In conformity with the Tribunal's letter dated 18 February 2015, on 24 February 2015, the Respondent commented on the Claimants' letter of 13 February 2015.

133. Also on 24 February 2015, the Claimants informed the Tribunal of yet further allegations of harassment by the Respondent and reiterated their request that the Tribunal take appropriate measures. In particular, the Claimants informed the Tribunal of the death of Mr. Rakhat Aliyev.

134. On 27 February 2015, the Tribunal noted in particular the Parties' "agreement with and unfailing commitment to the fundamental premise that any party to an arbitration must adhere to certain procedural duties, including to conduct itself in good faith and not to aggravate the dispute". The Tribunal further drew the Parties' attention to their obligations as expressed in paragraph 154 of the Tribunal's Decision on the Claimants' Request for Provisional Measures dated 4 December 2014.

135. On 20 March 2015, the Respondent submitted its Counter Memorial on Jurisdiction and the Merits (the "**Counter Memorial**"), in conformity with the Tribunal's letter of 4 March 2015. The Counter Memorial was accompanied by fact witness statements of (i) Mr. Mirbulat Ongarbaev; (ii) Mr. Andrey Kravchenko; (iii) Ms. Natalya Galantsova; (iv) Ms. Olga Semenishina; (v) Mr. Aleksandr Kim; and (vi) Mr. Sami Derekh. The Counter Memorial was further accompanied by expert reports of (i) IFM on Compliance; (ii) IFM on Reserves; (iii) Mr. Mangat Thapar; (iv) Prof. Kulyash Ilysova; (v) Prof. Martha Brill Olcott; (vi) Prof. Hadi Slim; and (vii) Vladimir Brailovsky. Moreover, the Counter Memorial contained a request that the Tribunal bifurcate the proceedings and decide the issue of jurisdiction in a separate award.

136. Also on 20 March 2015, the Claimants informed the Tribunal of further alleged acts of harassment by the Respondent, namely relating to the Respondent's alleged involvement in demonstrations targeting the Hourani family that took place in London on 19 June 2014 and 16 November 2014, and made a corresponding application for provisional measures.

137. On 31 March 2015, the Respondent replied to the Claimants' correspondence dated 20 March 2015, requesting the Tribunal to deny any provisional measures and instruct the Claimants to stop aggravating the present dispute by filing

unsubstantiated allegations. The Claimants commented on the Respondent's communication by email of 2 April 2015.

138. By letter dated 3 April 2015, the Claimants objected to the Respondent's request for bifurcation and exercised their option to waive the Reply Memorial. The Claimants also proposed a procedural calendar providing for the evidentiary hearing to take place in November 2015.

139. Concerning the Claimants' request for provisional measures as formulated in their correspondence of 20 March and 2 April 2015, as well as the Respondent's request set forth in its email of 31 March 2015, the Tribunal denied both Parties' requests by letter dated 9 April 2015.

140. Concerning its request for bifurcation, on 13 April 2015, the Respondent commented on the Claimants' objections to bifurcation and submitted that if the Respondent's request were denied, the Tribunal should split the hearing in two to safeguard the Respondent's due process rights, with the Claimants' opening statement and examination of fact and expert witnesses taking place in November 2015 and the Respondent's opening statement and examination of fact and expert witnesses, followed by cross-examinations, taking place in February 2016.

141. By letter dated 27 April 2015, the Tribunal denied the Respondent's requests to bifurcate the proceedings and to split the hearing in two. As an alternative solution, the Tribunal proposed the submission by the Parties of Skeleton Arguments prior to the evidentiary hearing.

142. By letter of 13 May 2015, the Respondent rejected the Tribunal's alternative suggestion of Skeleton Arguments and reiterated its request to split the hearing in two. By letter of the same day, the Claimants accepted the Tribunal's proposal for Skeleton Arguments and suggested a procedural calendar for the ensuing conduct of the proceedings up until the hearing.

143. On 20 May 2015, the Tribunal confirmed its decision to deny splitting the hearing in two and granted the Respondent a further opportunity to express its view on the Claimants' proposal for a procedural calendar.

144. On 26 May 2015, the Parties agreed on a schedule limited to the document production phase, which was approved by the Tribunal on 28 May 2015.

145. On 5 June 2015, pursuant to Section 15 of PO1, as amended by the Tribunal's letter of 28 May 2015, the Parties exchanged requests for the production of documents.

146. By letter dated 30 June 2015, the Respondent requested an extension of its 3 July 2015 deadline until 24 July 2015 "to provide responses along with any applicable objections to Claimants' over 150 requests".

147. On 1 July 2015, the Tribunal granted the Claimants leave to comment on the Respondent's request of 30 June 2015 and suspended the 3 July 2015 deadline "for now", extending it until 13 July 2015.

148. In conformity with the Tribunal's letter of 1 July 2015, on 6 July 2015 the Claimants objected to the extension of the Respondent's deadline. However, the Claimants stated that "[a]lternatively, the Arbitral Tribunal is requested to reject the Respondent's request for an extension of time, at least insofar as documents pertaining to jurisdiction are concerned, namely Claimants' Requests 1 to 3, and grant a part of the extension requested by Respondent for the remaining documents […]".

149. By letter of 8 July 2015, the Tribunal modified the procedural timetable for this arbitration, including for the document production procedure, providing for separate document production procedures for documents pertaining to jurisdiction, on the one hand, and the remaining documents, on the other hand. At the end of the document production procedure on jurisdiction, on 24 July 2015, the Tribunal issued Procedural Order No. 2 on the Claimants' Document Production Requests on Jurisdiction ("**PO2**").

150. In parallel to the document production procedure on jurisdiction, by letter of 3 June 2015, the Claimants requested leave to produce on the record certain documents that were allegedly publicly available on the internet and that were part of around 60,000 documents that were obtained through the hacking of the Respondent's government systems and later leaked on a publicly available website known as "KazakhLeaks". The Respondent immediately objected to the transfer of the Claimants' letter to the Tribunal.

151. On 8 June 2015, the Secretary to the Tribunal informed the Parties that the Claimants' letter of 3 June 2015 had been transmitted to the Tribunal, albeit without attachments, upon the Tribunal's request.

152. In conformity with the Tribunal's letter of 10 June 2015, on 17 June 2015, the Respondent submitted its comments to the Claimants' letter of 3 June 2015, together with a legal opinion by Monsieur le Bâtonnier Bernard Vatier on the admissibility of the leaked documents (which the Respondent referred to as "stolen documents"). At the end of its letter of 17 June 2015, the Respondent requested that the Tribunal:

> • Order that all of the Stolen Documents, including the 11 Stolen Documents, are inadmissible in this Arbitration;
>
> • Order specifically that the Privileged Stolen Documents, including the 4 Privileged Stolen Documents, are inadmissible in this Arbitration;
>
> • Order that Claimants, as well as their experts and witnesses, may not rely upon, refer to or make use of any of the Stolen Documents, including the 11 Stolen Documents;
>
> • Order specifically that Claimants, as well as their experts and witnesses, may not rely upon, refer to or make use of any of the Privileged Stolen Documents, including the 4 Privileged Stolen Documents;
>
> • Declare that the summaries of the 11 Stolen Documents in Claimants' Letter are inadmissible and will not be taken into account or relied upon by the Tribunal and cannot be relied upon by Claimants; and
>
> • Should the Tribunal grant Claimants an opportunity to respond to this letter prior to the Tribunal's decision on admissibility, order Claimants to address only the issue of the admissibility of the Stolen Documents without any further reference to or discussion of the contents of those documents.

153. In conformity with the Tribunal's letter of 22 June 2015, on 29 June 2015 the Claimants commented on the Respondent's letter of 17 June 2015. Enclosed with the Claimants' letter was the legal opinion of Monsieur le Bâtonnier Jean-Marie Burguburu.

154. On 3 July 2015, the Respondent submitted further comments on the Claimants' letter of 29 June 2015, together with an additional legal opinion by Monsieur le Bâtonnier Vatier. The Respondent maintained its request for relief as set out in its letter of 17 June 2015.

155. On 6 July 2015, the Claimants commented on the Respondent's letter of 3 July 2015.

156. On 27 July 2015, the Tribunal issued its Decision on the Claimants' Request for the Production of "Leaked Documents", authorizing the submission by the Claimants on the record of non-privileged leaked documents, but not of privileged leaked documents (namely privileged attorney-client communications).

157. On 31 July 2015, the Respondent wrote that it would not be able to comply with document production request No. 2 in PO2, because the documents responsive to this request were privileged (namely the so-called "Client-Attorney Email") and confidential.

158. Following the Respondent's letter of 31 July 2015, by letter dated 3 August 2015, the Claimants requested a clarification with respect to the Tribunal's Decision on the Claimants' Request for the Production of "Leaked Documents", namely as to whether particular documents, namely the so-called "Requested Email", should be considered as admissible non-privileged documents, or rather non-admissible privileged documents.

159. In response to the Respondent's letter of 31 July 2015, on 12 August 2015, the Tribunal confirmed that, as a privileged document, the "Client-Attorney Email" was inadmissible as evidence in this arbitration. The Tribunal invited the Claimants to provide further comments with respect to the other allegedly confidential documents responsive to document production request No. 2 (on jurisdiction) in PO2.

160. By letter of 14 August 2015, the Respondent submitted a Supplemental Request for the Production of Documents by the Claimants.

161. By letter of the same date, with respect to the Claimants' Document Request No. 2 (on jurisdiction), the Claimants put into question the privileged nature of the Client-Attorney Email and requested the production of an earlier version of said email, the so-called "Non-Privileged Email". The Claimants set forth the following prayer for relief:

> On the basis of the foregoing, Claimants respectfully request that, with respect to Claimants' Document Request No. 2:
>
> i. Respondent be ordered to produce the Non-Privileged Email (i.e. the earlier non-privileged version of the Client-Attorney Email identified by Claimants) and alternatively, that Claimants be allowed to place on the record this Non-Privileged Email, which should be declared admissible for the reasons set out in the Tribunal's decision of July 27, 2015;
>
> ii. Respondent be ordered to produce a privilege log, as originally ordered by the Tribunal, for all documents in respect of which the Respondent can establish the existence of attorney-client privilege; and
>
> iii. Respondent be ordered to produce all Documents that are not attorney-client privileged, redacting, if necessary and with full explanations, the portions of the documents that are privileged.

162. In the same letter, regarding their Document Request No. 3 (on jurisdiction), the Claimants reserved their right to request negative inferences.

163. On 19 August 2015, the Respondent commented on the Claimants' request for clarification of 3 August 2015. In particular, the Respondent submitted that the Tribunal should consider the so-called Requested Email as privileged and thus inadmissible as evidence. The Respondent set forth the following prayer for relief:

> […] the Republic respectfully requests the Tribunal to:
>
> o Declare that the Requested Email, including both the Cover Email and the Attached Documents, is inadmissible on the record and will not be taken into account or relied upon by the Tribunal and cannot be relied upon by Claimants in the Arbitration; and
>
> o Should the Tribunal grant Claimants an opportunity to respond to this letter prior to the Tribunal's decision on admissibility of the Requested Email, order Claimants to address only the issue of the admissibility without any further reference to or discussion of the contents of this document.

164. Moreover, by letter of 21 August 2015, the Respondent commented on the Claimants' letter dated 14 August 2015. Concerning in particular the Claimants' Document Request No. 2 (on jurisdiction), the Respondent reiterated that both the Client-Attorney Email and its earlier version (the so-called "Non-Privileged Email") were covered by attorney-client privilege and thus inadmissible as evidence. The Respondent further stated that it would not be in a position to produce a privilege log as requested by the Claimants. Regarding the Claimants' possible future request for negative inferences in relation to their Document Request No. 3 (on jurisdiction), the Respondent also reserved its right to respond thereto.

165. On 25 August 2015, the Claimants replied to the Respondent's letter of 19 August 2015 regarding the Requested Email. In particular, the Claimants reiterated that the Requested Email was not protected by any privilege and requested the Tribunal to admit it in its entirety.

166. On 26 August 2015, the Tribunal issued its decision on the admissibility of the Client-Attorney Email/the Non-Privileged Email. The Tribunal reconfirmed its earlier decision to afford privileged documents the utmost protection. On this basis, the Tribunal confirmed its decision that the Client-Attorney Email/the Non-Privileged Email should not be admissible as evidence and relied upon in this arbitration, subject however to the Claimants choosing to submit such documents to an independent expert for assessment. Moreover, the Tribunal took note of the Parties'

respective reservations of rights regarding possible future requests for negative inferences in relation to the Claimants' Document Request No. 3 (on jurisdiction).

167. By letter of 27 August 2015, the Claimants commented on the Respondent's request for the production of additional documents, submitting that such additional requests were inadmissible and unjustified.

168. By letter dated 28 August 2015, the Claimants requested the Tribunal to order the Respondent to produce a privilege log in conformity with the Tribunal's orders in PO2.

169. On 29 August 2015, the Respondent submitted further comments on the Claimants' letter of 25 August 2015 regarding the admissibility as evidence of the Requested Email. In particular, the Respondent insisted that the Requested Email was covered by attorney-client privilege and thus inadmissible as evidence. The Respondent also confirmed the prayer for relief set forth in its letter of 19 August 2015.

170. In addition to PO2 on the Claimants' Document Production Requests on Jurisdiction dated 24 July 2015 and its Decision on the Claimants' Request for the Production of "Leaked Documents" dated 27 July 2015, on 31 August 2015, Tribunal issued its Procedural Order No. 3 on the Parties' Remaining Document Production Requests ("**PO3**").

171. By letter of 1 September 2015, the Tribunal granted the Claimants' request set forth in their letters dated 3 and 25 August 2015 and authorized the production of the Requested Email, including its attachments. The Respondent's request for the Tribunal to declare the Requested Email inadmissible was denied. However, the Tribunal stated that it would accept the submission of the Requested Email to an independent expert for assessment.

172. In its letter of 2 September 2015, the Respondent reiterated its position regarding its refusal to produce a privilege log with respect to certain confidential information.

173. In response to the Tribunal's decision dated 1 September 2015, on 7 September 2015 the Respondent informed the Tribunal of its intention to submit the Requested Email to an independent expert for assessment. At the same time, the Respondent asked the Claimants to refrain from producing the Requested Email pending the resolution of this matter.

174. Concerning the issue of the privilege log, on 8 September 2015, the Tribunal confirmed its order in PO2 with respect to the Claimants' document production Request No. 2 (on jurisdiction) that the Respondent should produce a privilege log for the documents for which it claimed confidentiality.

175. Following a request for clarification by the Claimants, also on 8 September 2015, the Tribunal clarified that the Claimants should not produce the Requested Email pending the independent expert's assessment as to the confidential nature of the Requested Email.

176. Furthermore, on 8 September 2015, the Claimants wrote to the Tribunal to inform it of further alleged acts of harassment by the Respondent against the Claimants. In their letter, the Claimants set forth the following request for relief:

> Based on the foregoing, Claimants:
>
> - (i) Submit that the launch of any further criminal procedures or the expansion thereof, or investigations since the Decision on Provisional Measures dated December 4, 2014, targeting the Houranis, in London, the U.S. or elsewhere, would constitute a breach of Kazakhstan's obligation not to aggravate this dispute and/or jeopardize Claimants' preparation of the Hearing, and (ii) request the Tribunal to order Respondent to disclose any such criminal complaints and/or investigations;
>
> - Request the Tribunal to order Respondent to produce any direct and/or indirect communications between government officials, including the KNB, and Mr. Adonis Derbas and/or Mr. Serik Medetbekov that led Mr. Medetbekov to send the messages to Mr. Adonis Derbas referred to in his voice message of August 25, 2015. These documents are relevant and material to further demonstrate that Kazakhstan is still harassing the Hourani family worldwide and moreover to protect Claimants' procedural safeguards; and
>
> - Request the Tribunal to direct Respondent to refrain from taking any measures that would further aggravate the dispute or impair in any way the right of Claimants to prepare their claims and defenses in view of the upcoming submissions and hearings.

177. On 11 September 2015, the Parties simultaneously informed the Tribunal on the progress of the production of documents and the due diligence undertaken in this respect, in conformity with the Tribunal's orders in PO3.

178. On 14 September 2015, the Tribunal issued Procedural Order No. 4 on the Respondent's Supplemental Document Production Requests ("**PO4**").

179. Also on 14 September 2015, the Claimants filed a Supplemental Request for the Production of Documents by the Respondent.

180. Thereafter, by letter dated 16 September 2015, the Claimants informed the Tribunal that they were not aware of any further leaked documents aside from the ones that the Tribunal was made aware of through the Claimants' letter of 3 June 2015. Therefore, the Claimants declared that they would not make any application for the production of any further leaked documents.

181. On 17 September 2015, the Claimants submitted their Defense on Jurisdiction (the "**Defense on Jurisdiction**"), pursuant to the Tribunal's instructions of 8 July 2015.

182. On 18 and 22 September 2015 respectively, the Respondent and the Claimants commented on the adverse Parties' alleged compliance or failure to comply with their respective document production obligations and made requests for corresponding negative inferences.

183. In conformity with their agreement, on 25 September 2015, each Party put on the record the documents it wished to produce arising out of the document production phase. Moreover, on 28 September 2015, the Claimants produced further documents that it had inadvertently failed to produce on 25 September 2015.

184. Also on 28 September 2015, each Party identified the factual and expert witnesses of the Adverse Party whom it intended to examine at the evidentiary hearing. Furthermore, the Claimants requested the Tribunal to order the production of two additional witnesses, namely Messrs. Akchulakov and Batalov, which the Respondent had not presented before the Tribunal as witnesses.

185. In a further letter dated 28 September 2015, the Respondent responded to the Claimants' requests for provisional measures set forth in their letter of 8 September 2015 and to their Supplemental Request for the Production of Documents dated 14 September 2015. In the letter's conclusion, the Respondent requested the Tribunal to

> (i) Reject in their entirety Claimants' requests for provisional measures;
>
> (ii) Reject Claimants' Supplementary Document Request in its entirety;
>
> (iii) Strike Ex. C-348 to Ex. C-350 from the record; and
>
> (iv) Should the Tribunal decide to entertain Claimants' allegations that Adonis Derbas is somehow seeking to extort the Houranis upon instructions of the Republic, the Republic respectfully requests that the Tribunal order forensic analysis of all the communications involving the Houranis, Adonis Derbas and Serik Medetbekov. This should include the production of all the "WhatsApp" and other messages of Devincci Hourani's mobile phones to check all relevant elements. Such production

> could be made in the hands of the Tribunal which would order a forensic expert to proceed with all the appropriate examinations.
>
> The Republic further respectfully requests that it be awarded the costs it has incurred in connection with Claimants' requests for provisional measures, including but not limited to legal fees and expenses and expert fees and expenses.

186. In another letter dated 28 September 2015, the Tribunal addressed the issues that arose out of the Parties' respective communications concerning the Parties' compliance with their disclosure obligations pursuant to PO3. Moreover, the Tribunal noted the Parties' respective requests for negative inferences, referring a decision thereon to the Award.

187. On 29 September 2015, following the receipt of the Claimants' Defense on Jurisdiction dated 17 September 2015, the Tribunal granted leave to the Respondent to comment by no later than 7 October 2015 on two jurisdictional issues which appeared new, namely regarding (i) the Tribunal's discretionary powers to extend (restore) the time-bar period under Article 185 of the Kazakh Civil Code; and (ii) the submission of two legal opinions by members of the Republic of Kazakhstan's Working Group on the FIL with respect to the alleged registration requirement of foreign investors under the FIL. By letter of the same date, the Claimants commented on the Tribunal's 29 September 2015 letter.

188. By letter of 2 October 2015, the Respondent requested the Tribunal to allow the Respondent's expert, Dr. Thapar, to testify at the evidentiary hearing and participate in an expert conferencing with the Claimants' expert, Mr. Tiefenthal, even though the Claimants had chosen not to call Dr. Thapar. In addition, the Respondent offered the Tribunal the possibility to call its other expert, Professor Slim, who also had not been called by the Claimants, in order to make a presentation. Finally, regarding yet another of the Respondent's experts, Professor Olcott, the Respondent asked the Tribunal to rely on her expert report, without it being necessary to hear her at the hearing.

189. In a separate letter of 2 October 2015, the Respondent informed the Tribunal that, on 25 and 28 September 2015, the Claimants had produced on the record not only documents that arose out of the document production phase, but also several additional documents that did not arise out of this phase, in violation of the Parties' agreed upon rules in PO1 and principles of due process. The Respondent objected to the Claimants' filing of such additional documents and requested the Tribunal to

strike these documents from the record, except for one document which had already been produced by the Respondent earlier in the proceeding.

190. By letter of 5 October 2015, the Respondent requested the Tribunal to deny the Claimants' request to order the Respondent to cause the production of Messrs. Akchulakov and Batalov as witnesses at the evidentiary hearing, submitting, *inter alia*, that such request was untimely, that Messrs. Akchulakov and Batalov were no longer under the Respondent's control and authority, and that their testimonies were not relevant and material.

191. By simultaneous, separate letters of 5 October 2015, both Parties reconfirmed to the Tribunal their inability to produce certain documents pursuant to PO3.

192. By letter dated 6 October 2015, the Tribunal informed the Parties that it would be minded to grant the Respondent's request to hear Dr. Thapar's expert opinion at the evidentiary hearing, subject to the Claimants' substantiated objection. However, the Tribunal stated that it would not wish to order *ex officio* to hear Professor Slim's expert testimony, and confirmed that the oral testimony of Professor Olcott would not be necessary. In the same letter, the Tribunal rejected the Respondent's request of 2 October 2015 to have several documents excluded from the record of the arbitration and granted the Claimants leave to produce such documents.

193. Also on 6 October 2015, in a letter that was transmitted to the Tribunal after the latter rendered its decision of the same date, the Claimants objected to the Tribunal calling Dr. Thapar and Professor Slim as witnesses at the hearing. In the conclusion to their letter, the Claimants requested the Tribunal:

> (i) to dismiss Respondent's request contained in its letter of October 2, 2015; (ii) to adhere to the agreed-upon procedure of calling and examining the opposing Party's witnesses as embodied in Procedural Order No. 1; and (iii) and not to allow *post facto* defenses of Kazakhstan and supporting oral testimonies such as those of Dr. Thapar and Professor Slim, moreover that have been contradicted by the acts and omissions of Kazakhstan contemporaneous with the facts in dispute and/or which are irrelevant to the points in dispute, to divert the Tribunal's attention from the material points in dispute.

194. In a separate letter also dated 6 October 2015, which considered the Tribunal's 6 October decision, the Claimants reiterated their objections expressed in their prior letter, but stated that they would not object to the Tribunal hearing Dr. Thapar if the Tribunal so insisted upon consideration of the Claimants' earlier letter.

195. By letter of 7 October 2015, the Tribunal confirmed its decision of 6 October 2015 to hear Dr. Thapar's expert advice at the hearing and to not order *ex officio* to hear Professor Slim's expert testimony. In the same letter, the Tribunal granted the Claimants' request to extend the Parties' deadline to file their Skeleton Arguments until 14 October 2015. As a result, the Tribunal also granted the Respondent's request to post-pone the pre-hearing conference call until the week of 19 October 2015.

196. Also on 7 October 2015, in conformity with the Tribunal's instructions, the Respondent submitted its comments on the two jurisdictional issues highlighted by the Tribunal in its letter dated 29 September 2015.

197. On 8 October 2015, the Tribunal wrote to the Parties regarding the nomination of a person to act as an expert to assess whether the Requested Email, including the attachments thereto, was privileged and confidential. In particular, the Tribunal suggested several persons it would be ready to appoint as expert.

198. By letter of 9 October 2015, in conformity with the Tribunal's letter of 6 October 2015, the Claimants reiterated their request that the Tribunal order the Respondent to cause Messrs. Akchulakov and Batalov to appear for examination at the hearing.

199. On 12 October 2015, the Respondent requested the Tribunal to order the Claimants to cause the production of Messrs. Kassem Omar, Fadi Hussein and Hussam Hourani to testify at the hearing and to draw negative inferences should the latter fail to do so.

200. By letter dated 13 October 2015, the Tribunal ordered the Respondent to cause Messrs. Akchulakov and Batalov to appear as witnesses at the hearing.

201. By a separate letter of the same date, the Tribunal confirmed that the pre-hearing conference call would take place on 23 October 2015 at 18:30 (Paris time). In the same letter, the Tribunal also decided several hearing organizational matters, *inter alia*, that the hearing time would be split equally between the Parties and that each Party would have a total time at the hearing of 29 hours.

202. On 14 October 2015, following the Tribunal's decision to grant each Party 29 hours of hearing time, the Respondent notified the Tribunal and the Claimants that it would call Professor Slim on its own time so that he would be able to make a presentation and answer the Tribunal's questions.

203. Also on 14 October 2015, the Parties simultaneously submitted their respective Skeleton Arguments, in conformity with the Tribunal's letter of 7 October 2015.

204. By letter dated 16 October 2015, the Claimants requested the Tribunal to deny the Respondent's request for an order to cause the Claimants to produce Messrs. Kassem Omar, Fadi Hussein and Hussam Hourani to testify at the hearing.

205. In a separate letter of the same date, the Claimants requested the Tribunal to dismiss the Respondent's request contained in its letter of 14 October 2015 as to the participation of Professor Slim in the hearing.

206. On 19 October 2015, the Tribunal invited the Parties to each submit a list of 15 exhibits that the Parties considered most fundamental to their respective case and that they wished the Tribunal to have studied and to have available for review during the hearing.

207. Also on 19 October 2015, the Respondent submitted an errata sheet with respect to certain matters in its submissions that needed correction. The Respondent also requested the authorization to produce the registration card of the MEMR log book for the outgoing 25 March 2007 Notice of Breach, filed as Exh. R-121 in the *Caratube I* arbitration.

208. In a separate letter of the same date, the Respondent confirmed that Messrs. Akchulakov and Batalov would be available and willing to testify at the hearing. In the same letter, the Respondent reiterated its request that the Tribunal order the Claimants to cause the production of Messrs. Kassem Omar, Fadi Hussein and Hussam Hourani to testify at the hearing and to draw negative inferences if they failed to appear.

209. Moreover, on 19 October 2015, the Parties communicated to the Tribunal their joint agreement on the expert to be appointed by the Tribunal to assess whether the Requested Email, together with the attachments, was privileged and confidential.

210. By letter dated 20 October 2015, the Tribunal informed the Parties that it would be minded to grant the Respondent's request to produce the registration card of the MEMR log book for the outgoing 25 March 2007 Notice of Breach, subject to the Claimants' objections.

211. In a separate letter of the same date, the Tribunal decided to not prevent the Respondent from calling on Professor Slim to make an oral presentation at the hearing "as part of the Respondent's team and on the Respondent's own time".

212. In yet another letter of 20 October 2015, the Claimants submitted their comments on the Respondent's letter of 28 September 2015 concerning the Claimants' request for provisional measures and their Supplementary Document Production Request. In the conclusion to their letter, the Claimants requested that the Tribunal

> - grant in full Claimants' Supplementary Document Production Request as detailed at paragraph 7 of Claimants' Letter dated September 14, 2015;
>
> - preserve Exhibits C-348 to C-350 on the record;
>
> - reject Respondent's request for the Tribunal to order a forensic analysis of all communications between, inter alia, Messrs. Devincci Hourani and Adonis Derbas; and
>
> - strike out from the record Exhibit R-182 introduced by Respondent with its September 28, 2015 letter.

213. By letter of 21 October 2015, the Tribunal decided to order the Claimants to cause Messrs. Kassem Omar and Fadi Hussein to appear as witnesses at the hearing, but not Mr. Hussam Hourani.

214. On the same day, the Respondent reacted to the Tribunal's letter of 20 October 2015 to clarify that Professor Slim would not act as part of the Respondent's Counsel team, but as an independent expert, and that he would not take part in the Respondent's opening statement as suggested by the Claimants. The Respondent further clarified that it requested Professor Slim to be allowed to make a 30 minute expert's presentation or warm-up at the hearing, on the Respondent's own time, and be available for questions from the Tribunal and from the Claimants.

215. Also on 21 October 2015, the Claimants accepted the production by the Respondent of the registration card of the MEMR log book for the outgoing 25 March 2007 Notice of Breach. At the same time, the Claimants requested leave to produce as evidence a letter from President Mahmoud Abbas to Dr. Hamid Gharavi dated 4 December 2014. The Respondent promptly agreed to the Claimants introducing said letter into the record, which they did on 22 October 2015.

216. On 22 October 2015, the Tribunal decided to allow Professor Slim to make a 30 minute expert presentation at the hearing, on the Respondent's own time, and be available for questions from the Tribunal and the Claimants.

217. By a separate letter of 22 October 2015, the Tribunal denied the Claimants' Request for Provisional Measures as set forth in their letter of 8 September 2015. With respect to the costs incurred in connection with this request for provisional measures, the Tribunal found that each Party should bear its own costs, whereas the Tribunal's costs would be determined in the Final Award. The Tribunal also denied the Claimants' Supplemental Document Production Request set forth in their letter dated 14 September 2015. Moreover, the Tribunal denied the Respondent's request to strike Exhibits C-348 to C-350 from the record, as well as the Claimants' request to strike Exhibit R-182 from the record. Finally, the Tribunal also denied the Respondent's request for an order of a forensic analysis of all the communications involving the Houranis, Adonis Derbas and Serik Medetbekov.

218. By letter dated 23 October 2015, the Claimants informed the Tribunal that Mr. Kassem Omar would be willing, under certain conditions, to appear at the hearing. However, Mr. Fadi Hussein refused to appear at the hearing.

219. In conformity with the Tribunal's letter of 13 October 2015 and the Parties' agreement, the pre-hearing conference call took place on 23 October 2015 at 18:30 (Paris time). The participants in the conference call were as follows:

Members of the Tribunal:

Dr. Laurent Lévy
Prof. Laurent Aynès
Dr. Jacques Salès

ICSID Secretary:

Ms. Milanka Kostadinova

Assistant to the Tribunal:

Dr. Silja Schaffstein

Participating on behalf of the Claimants:

Dr. Hamid G. Gharavi, Derains & Gharavi
Ms. Nada Sader, Derains & Gharavi
Mr. Sergey Alekhin, Derains & Gharavi
Ms. May Khoury, Derains & Gharavi
Ms. Iryna Glushchenko, Derains & Gharavi

Participating on behalf of the Respondent:

Mr. Peter M. Wolrich, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Geoffroy Lyonnet, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Gabriela Alvarez Avila, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Jérôme Lehucher, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Jeremy Eichler, Curtis, Mallet-Prevost, Colt & Mosle LLP

220. Among other issues, the Parties agreed during the telephone conference to the appointment of Mr. Marc-Olivier Langlois as independent confidentiality advisor to assess the privileged and confidential nature of the Requested Email, including the attachments thereto.

221. As also agreed during the pre-hearing conference call, by letter dated 24 October 2015 the Respondent expressed its wish to assure the Tribunal and Mr. Fadi Hussein that the Respondent would welcome Mr. Hussein's appearance as a witness at the hearing and that such appearance would not and could not have any negative effects upon him.

222. Following-up on the pre-hearing conference, on 26 October 2015, the Tribunal rendered a decision with respect to the scope of witness examinations by the Parties during the hearing.

223. On the same day, the Parties submitted their lists of exhibits, pursuant to the Tribunal's letter dated 19 October 2015.

224. Also on 26 October 2015, the Claimants applied to (i) request leave to put on the record and rely at the hearing on four additional legal authorities; (ii) request leave to put on the record for informational purposes the witness statement produced by Mr. Fadi Hussein in the *Caratube I* arbitration; (iii) warn against the Tribunal's decision to broaden the scope of the witness examination of Mr. Issam Hourani's; (iv) address the Tribunal's decision dated 22 October 2015 to allow Professor Slim to speak as an expert during the hearing, in particular request that the scope of Professor Slim's expert presentation be limited to questions of Lebanese law that he addressed in his capacity as a legal expert; and (v) provide bullet points of the Claimants' preliminary remarks as announced at Section I of their Skeleton Argument.

225. By email of 27 October 2015, the Claimants requested that the Respondent issue a letter assuring that it would "refrain from harassing, threatening or prosecuting Mr. Kassem Omar and his family on the basis of any act that took place prior to, and during, his testimony".

226. By letter dated 28 October 2015, the Respondent commented on the Claimants' requests set forth in their letter of 27 October 2015. In particular, (i) the Respondent had no objections to the Claimants' request to produce four additional legal authorities into the record; (ii) the Respondent also had no objections to the

Claimants' request to put on the record Mr. Fadi Hussein's *Caratube I* witness statement, provided however that the latter would testify at the hearing; (iii) with respect to the Claimants' concerns regarding the scope of Mr. Issam Hourani's examination at the hearing, the Respondent submitted a list of issues for Mr. Issam Hourani's cross-examination based upon documents signed by or referring to him; (iv) with respect to the scope of Professor Slim's presentation, the Respondent insisted that Professor Slim be allowed to present his three expert opinions and be available for questioning with respect thereto. The scope of his presentation should therefore be limited by what he developed in his reports, rather than by "questions of Lebanese law"; and (v) regarding the appearance of Mr. Kassem Omar, the Respondent stressed that it would stand by its international obligations as set out in the ICSID Convention. The Respondent also confirmed that it would welcome Mr. Kassem Omar's appearance as a witness at the hearing and that such appearance would not and could not have any negative effects upon him.

227. By communications of the same date, the Claimants identified the topics on which they wished to examine Messrs. Akchulakov and Batalov; the Respondent identified the topics on which it wished to examine Mr. Kassem Omar.

228. Also by letter of 28 October 2015, the Tribunal formally requested Mr. Fadi Hussein to appear as a witness at the hearing.

229. By email of 29 October 2015, the President of the Tribunal (i) granted the Claimants' request to produce four additional legal authorities into the record; (ii) granted the Claimants' request to put on the record Mr. Fadi Hussein's *Caratube I* witness statement, provided however that Mr. Fadi Hussein appeared to testify at the hearing; (iii) decided to limit the scope of Professor Slim's presentation to his expert reports; and (iv) took note of the Respondent's assurances with respect to Mr. Kassem Omar's appearance as witness at the hearing.

230. On 30 October 2015, Me Langlois issued his Report on the Application of Legal Privilege to the "Requested Email", concluding that while the "Cover Email" was not covered by privilege, the two documents attached to the Cover Email (the "Attached Documents") were indeed protected by the attorney-client privilege and the work product doctrine.

231. Moreover, by email of 30 October 2015, Mr. Fadi Hussein informed Counsel for the Claimants that he would not appear at the hearing.

232. By letter dated 31 October 2015, the Claimants requested leave from the Tribunal to place four further documents on the record. The Claimants further requested the Tribunal to rule on their request in time so as to allow the Claimants to rely on these documents during their opening statement on 2 November 2015. Furthermore, the Claimants requested that Professor Slim not be allowed to attend the hearing until his turn has come to testify.

233. By email of the same day, the President of the Tribunal made use of his powers under PO1 to render an urgent decision, subject to later reconsideration by the full Tribunal. In particular, the President provisionally authorized the Claimants, until the Respondent had commented on the Claimants' request and the full Tribunal rendered a decision, to make use of the documents in question, in particular during the opening statement, subject to a decision of reconsideration and provided that the Claimants made available at the opening of the hearing a sufficient number of copies of the documents.

234. By letter also dated 31 October 2015, the Respondent requested the Tribunal to deny the Claimants' requests of 31 October 2015. Alternatively, the Respondent set forth the following relief:

> If for any reason the Tribunal were to grant Claimants' request, the Republic requests, as a simple matter of due process, that it be accorded the right to respond to these documents properly after the hearing and requests the Tribunal to grant to Republic the following:
>
> 1) The right to provide a written reply with respect to these documents;
>
> 2) The right to produce documents and expert evidence in rebuttal;
>
> 3) The right to conduct its own forensic expertise of HS-38 as to the signing by Hussam Hourani of this document, including an order from the Tribunal requesting Claimants to produce whatever original documents the forensic expert requires for this purpose.
>
> In light of the Republic's objection, we respectfully submit that Claimants should not be allowed to use these new documents in any manner until the Tribunal shall have decided the matter.

235. By email of 1 November 2015, the President of the Tribunal confirmed the full Tribunal's agreement to the President's decision to allow the Claimants' filing of the documents. The Tribunal further granted the Claimants leave to comment during the hearing on the Respondent's alternative requests for relief as set forth in the Respondent's letter of 31 October 2015.

236. The evidentiary hearing took place from 2 to 13 November 2015 at the ICC Hearing Centre in Paris. Attending the hearing were:

Members of the Tribunal:

Dr. Laurent Lévy, President
Prof. Laurent Aynés, Co-Arbitrator
Dr. Jacques Salès, Esq., Co-Arbitrator

ICSID Secretariat:

Ms. Milanka Kostadinova, Secretary of the Tribunal

Assistant to the Tribunal:

Dr. Silja Schaffstein

On behalf of the Claimants:

Counsel:

Mr. Hamid Gharavi, Derains & Gharavi
Ms. Nada Sader, Derains & Gharavi
Mr. Sergey Alekhin, Derains & Gharavi
Mr. Solomon Ebere, Derains & Gharavi
Ms. May Khoury, Derains & Gharavi
Ms. Iryna Glushchenko, Derains & Gharavi
Mr. Iacopo Maravigna, Derains & Gharavi
Ms. Anastasia Medvedskaya, Derains & Gharavi
Mr. Lukas Palecek, Derains & Gharavi
Ms. Carmela Viccaro, Derains & Gharavi
Ms. Maritsa Aronstein, Derains & Gharavi

Parties:

Mr. Devincci Salah Hourani

Witnesses:

Mr. Omar Antar
Mr. Issam Hourani
Mr. Harvey Jackson
Mr. Kassem Omar

Experts:
Mr. Sven Tiefenthal
Mr. Colin Johnson, Grant Thornton
Ms. Pascale Pasquer, Grant Thornton
Mr. Sylvain Quagliaroli, Grant Thornton

On behalf of the Respondent:

Counsel:

Mr. Peter M. Wolrich, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Geoffroy Lyonnet, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Gabriela Alvarez-Avila, Curtis, Mallet-Prevost, Colt & Mosle LLP

Mr. Jérôme Lehucher, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Mira Suleimenova, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Svetlana Evliya, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Anna Kouyaté, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Yerzhan Mukhitdinov, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Marie-Claire Argac, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Lisa Arpin-Pont, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Olena Stasyk, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Abraham Sosa, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Jeremy Eichler, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Elizabeth Sadiq, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Veronica Akimkanova, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Naira Barsegyan, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Vincent Bouvard, Curtis, Mallet-Prevost, Colt & Mosle LLP

Parties:

Mr. Erlan Tuyakbayev, Director of the Department of State Property Rights of the Ministry of Justice of the Republic of Kazakhstan
Mr. Kazbek Shaimerdinov, Senior Expert of the Department of State Property Rights of the Ministry of Justice of the Republic of Kazakhstan
Mr. Rustem Umurzakov, Senior Assistant to the Prosecutor General of the Republic of Kazakhstan

Witnesses:

Mr. Bolat Akchulakov, General Director of Almex Petrochemical LLP
Mr. Askar Batalov, General Director of Kazinvest Adviser LLP
Mr. Samir Derekh, Honorary Consul of the Syrian Arab Republic in Kazakhstan
Mr. Aleksandr Kim, Retired
Mr. Andrey Kravchenko, Deputy Prosecutor General of the Republic of Kazakhstan
Ms. Natalya Galantsova, Public notary
Mr. Mirbulat Ongarbaev, Retired
Ms. Olga Seminishina, General Director of K&C Audit Consulting LLP

Experts:

Professor Hadi Slim, Professor of Law at François-Rabelais University; Member of the Beirut Bar Association
Professor Kulyash Ilyasova, Professor and Chief Researcher at Caspian University
Mr. Suresh Chugh, IFM Resources, Inc.
Dr. Mihir Sinha, IFM Resources, Inc.
Ms. Victoria Baikova, IFM Resources, Inc.
Dr. Mangat Thapar, International Geophysical Company, Inc.
Mr. Vladimir Brailovsky, Economía Aplicada, S.C.

Court Reporter:

Mr. Trevor McGowan, Court Reporter – The Court Reporter Ltd.

Interpreters:

Ms. Helen Bayless, Interpreter (Russian)
Ms. Ekaterina Dersin, Interpreter (Russian)
Ms. Olga Tammi, Interpreter (Russian)
Mr. Magdy Rizk, Interpreter (Arabic)
Ms. Sarah Rossi, Interpreter (French)

237. By letter of 20 November 2015, the President of the Tribunal confirmed the various matters discussed and decided at the close of the hearing on 13 November 2015 ("**Post-Hearing Order**"). In particular, in the Post-Hearing Order the Tribunal asked the Parties to address the following questions in their Post-Hearing Briefs:

> **Question 1**: What are the implications of Exhibit C-155 of June 1, 2004 according to which Devincci Hourani (i) undertook to "pay, from his own personal income gained as net profit from the sale of the mentioned production, to [JOR] annual instalments of 20 % of the loan amount in addition to 14% interest rate on the above 20%" and (ii) undertook in addition "to pay all loans with the 14% annual interest within 10 years from the beginning of the 2nd year of commercial production."
>
> **Question 2**: What conclusion should the Tribunal draw from (i) the testimony of Samir Ali Derekh (who testified to be the Honorary Consul of Syria in Kazakhstan), who testified that the Hourani family were modest people who operated a restaurant in either Almaty or Astana when they arrived in Kazakhstan in the late 80's or early 90's, and (ii) the testimony of either Issam or Devincci Hourani, who affirmed that they came from a wealthy Palestinian family?
>
> **Question 3**: The Parties are invited to specify whether and how an Annual Work Program (AWP) may modify the obligations set forth in the Minimum Work Program (MWP), and, if so, what specific obligations as extended by the successive AWPs would be breached.
>
> **Question 4**: The Respondent may wish to specify which breaches of the extended MWP were committed, namely between 27 May 2007 and the Notice of the Termination of the Contract (assuming that the Respondent could not complain of violations of contractual obligations prior to the extension of the Contract). The fact that this question is addressed more specifically to the Respondent does of course not bar the Claimants from addressing it.
>
> **Question 5**: Why do neither Respondent nor CIOC make any reference, in correspondence between them prior to September-October 2007, to the Notice of Breach of March 25, 2007?
>
> In particular:
>
> - why did CIOC not respond to the Notice of Breach of March 25, 2007 before October 3, 2007?
>
> - what probative value should be given to the computer log and the acknowledgement of receipt of the Notice of Breach of March 25, 2007?
>
> - why did the Republic not react, prior to September 2007, to CIOC's failure to respond to the Notice of Breach of March 25, 2007?
>
> **Question 6**: The Contract was extended for two years by the signing of Amendment N° 3 of July 27, 2007, just four months after the Notice of Breach of March 25, 2007 and seven months before the Notice of Termination of February 1, 2008? What comments do the Parties submit on that chronology?

> **Question 7**: Did the Claimants, in the period preceding the signing of Amendment N° 3 of July 27, 2007, misrepresent to Respondent that a good quality 3D seismic study had been completed? (Assuming, which is in dispute, that the 3D seismic study was defective).
>
> **Question 8**: What did the testimonies bring forth with respect to CIOC's readiness, capacity and willingness to drill deep wells (location, financing, etc.)?
>
> **Question 9**: Based on the facts of this case, with respect to the activities carried out by the Claimants during the time the Contract was performed, were such activities in conformity with the Contract and do they qualify as activities of exploration, development and/or production? If it were admitted arguendo that the performance of the Contract by the Claimants was unsatisfactory during the period from 27 May 2002 until 27 May 2007, what is the position of each Party as to how the Claimants' performance of the Contract has or would have evolved during the extended period until 27 May 2009, as well as a possible further two-year extension of the Contract until 27 May 2011? What legal consequences do the Parties draw from the foregoing?
>
> **Question 10**: Explain and comment on the curve presented by Mr. Tiefenthal with respect to the expected oil production starting from the production phase (see Mr. Tiefenthal's Reserves Report, Figure No. 27): what would have happened during the period between the beginning of 2008 and the commencement of production to justify the ascent of that curve, compared to the results achieved by CIOC at the time of the termination of the Contract?
>
> **Question 11**: Is it possible to request the reparation of moral damages with respect to the loss of an investment within the framework of Article 25 of the ICSID Convention? If not, before which court or tribunal should this reparation be requested, assuming that the existence of moral damages is established?

238. By email of the same date, the Claimants clarified that there was "an 'element' of contingency fee, ie a partial one, as opposed to a pure or exclusive contingency fee".

239. On 23 November 2015, the Respondent wrote to inform that the Assistant of the General Prosecutor of Kazakhstan had been contacted by a person claiming to be Mr. Adonis Derbas, wishing to schedule a meeting to provide information regarding money laundering activities. He also claimed to have received threats and was offered money, including by members of the Hourani family, with a view to convincing him to testify against the Republic of Kazakhstan.

240. On 15 January 2016, the Secretary of the Tribunal, Ms. Kostadinova, communicated to the Tribunal the corrected final Transcripts of the Hearing, agreed on by the Parties ("**Tr.**").

241. Also on 15 January 2016, with reference to the Tribunal's Post-Hearing Order, the Respondent submitted comments on the Claimants' Exhibits C-459 to C-462, together with expert evidence and legal authorities. In particular, the Respondent submitted that the Claimants' documents did not show that Exhibit HS-38, an exhibit attached to Prof. Had Slim's Second Expert Report, was a fraudulent document.

242. With reference to the Tribunal's letter dated 19 January 2016, on 25 January 2016 the Claimants commented on the Respondent's letter dated 15 January 2016 regarding the Claimants' Exhibits C-459 to C-462. In particular, the Claimants submitted that the Tribunal should accord Exhibits C-359 to C-462 high evidential value in assessing Exhibit HS-38, which the Claimants considered to be inauthentic.

243. With reference to the Tribunal's letter of 27 January 2016, on 2 February 2016, the Respondent commented on certain statements in the Claimants' letter of 25 January 2016.

244. In conformity with paragraph 13.1 of PO1 and the Post-Hearing Order, on 4 March 2016, the Parties submitted their first Post-Hearing Briefs, together with annexes containing the Parties' respective quotes and references. On 13 May 2016, the Parties submitted their Reply Post-Hearing Briefs, together with annexes containing the Parties' respective quotes and references.

245. On 17 May 2016, the Claimants requested leave from the Tribunal to place on the record six new documents, which they argued had been recently published on-line and thus discovered by the Claimants. The Respondent objected to the Claimants' request by letter of 25 May 2016. By letter dated 26 May 2006, the Tribunal granted the Claimants' request and the Claimants thereafter produced the six new documents on 31 May 2016.

246. On 13 July 2016, the Parties filed their respective Statement of Costs in accordance with the Tribunal's Post-Hearing Order and the Parties' agreement of 12 July 2016 to extend the relevant time limits set forth in the Post-Hearing Order.

247. On 25 July 2016, the Respondent submitted its Comments on Claimants' Statement of Costs in accordance with the Post-Hearing Order and the Parties' agreement of 12 July 2016. By email of 26 July 2016, the Claimants confirmed that they did not intend to provide comments on the Respondent's Statement of Costs dated 13 July 2016.

248. By email of 2 August 2016, the Claimants requested leave from the Tribunal to comment on the Respondent's Comments on Claimants' Statement of Costs dated 25 July 2016. By email of 3 August 2016, the Respondent objected to the Claimants' request.

249. On 4 August 2016, the Tribunal granted the Claimants leave to file their comments on the Respondent's Comments on Claimants' Statement of Costs by no later than 15 August 2016. The Respondent was granted leave to rejoin by no later than 26 August 2016.

250. On 15 August 2016, the Claimants filed their comments on the Respondent's Comments on Claimants' Statement of Costs in accordance with the Tribunal's email of 4 August 2016. Moreover, in conformity with the same email, on 26 August 2016, the Respondent submitted its comments on the Claimants' letter of 15 August 2016. The Tribunal declared the proceedings closed on 12 September 2017.

IV. THE PARTIES' PRAYERS FOR RELIEF

A. The Claimants' Prayer for Relief

251. In their Request for Arbitration (para. 136) the Claimants request the Tribunal to:

> - declare that Kazakhstan has breached its obligations toward Claimants under Customary International Law, the FIL, the BIT and/or the Contract;
>
> - order Kazakhstan to pay damages in favor of Claimants as a result of its breaches in an amount provisionally quantified at above 1 billion US dollars, representing loss of profits and/or loss of shareholder value, representing the fair market value of the seized assets, and for any alternative or supplementary claims that Claimants may raise;
>
> - award moral damages in favor of Claimants for injury to its reputation and for the harassment and percussion they have been, and continue to be, subjected to by Kazakhstan;
>
> - order Kazakhstan to immediately cease its breaches and adverse actions against Claimants;
>
> - order Kazakhstan to pay in favor of Claimants the costs of this arbitration, including all expenses that Claimants have incurred, including all of the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants, as well as internal costs;
>
> - order Kazakhstan to pay interest pre-award and post-award at a rate of LIBOR +2 per cent, compounded semi-annually, on the above amounts as of the date these amounts are determined to have been due to Claimants; and

- order any other relief that the Tribunal deems appropriate.

252. In their Memorial, the Claimants no longer base their claims on the BIT (Memorial, paras. 5-7). Their amended prayer for relief reads as follows (Memorial, para. 584):

> 584. Claimants respectfully request the Arbitral Tribunal, without prejudice to any other/further claims Claimants might be entitled to in this arbitration, to:
>
> 584.1. Find that it has jurisdiction over Mr. Devincci Hourani's claim under the FIL, and Caratube's claims under the FIL and/or the Contract;
>
> 584.2. Find that Respondent has breached its obligations towards Claimants under international law, the FIL, the Contract and/or Kazakh law;
>
> 584.3. Order Respondent to pay Claimants damages in the amount of USD 941.05 million for lost profits due to Respondent's breaches of its obligations under international law, the FIL, the Contract and/or Kazakh law, which resulted in the taking of Claimants' investment;
>
> 584.3.1. Alternatively, should the Tribunal deem that Claimants are not entitled to compensation on the basis of lost profits, to award Claimants compensation on the basis of the loss of opportunity or chance of making these profits, which Claimants submit is 99% (or any other figure the Tribunal deems appropriate);
>
> 584.4. Order Respondent to compensate Claimants in the amount of USD 50,000,000 their moral damages resulting from Respondents' [sic] breaches;
>
> 584.5. Order Respondent to pay Claimants the costs of this arbitration, including all expenses that they have incurred, and including all of the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants, as well as Claimant's [sic] expenses in pursuing this arbitration;
>
> 584.6. Order Respondent to pay Claimant [sic] compound interest at a rate of LIBOR +2 compounded semi-annually, to be established on the above amounts as of the date these amounts are determined to have been due to Claimant [sic];
>
> 584.7. Order Respondent to pay the above amounts outside of the Republic of Kazakhstan without any right of set-off to Mr. Devincci Hourani, as Claimant and/or majority shareholders; and
>
> 584.8 Order any other and further relief as the Arbitral Tribunal shall deem appropriate.

253. Furthermore, in their Defense on Jurisdiction (paras. 712-713) the Claimants submit the following prayer for relief:

> The Relief Sought in relation to Respondent's Preliminary Objections and Jurisdictional Defenses is simply to reject each and every single one of them with full costs.

254. Finally, in their Post-Hearing Briefs, the Claimants request the Tribunal to grant the relief sought "at Section X of Claimants' Memorial" (Claimants' First Post-Hearing Brief, para. 580; Claimants' Reply Post-Hearing Brief, para. 346).

B. The Respondent's Prayer for Relief

255. In its Counter Memorial (para. 1690) the Respondent requests the following relief:

> For the reasons set forth above and to be developed during the further course of these proceedings, all of Claimants' claims should be rejected in their entirety for lack of jurisdiction. The Republic respectfully requests that the Tribunal decide to bifurcate these proceedings and decide the issues of jurisdiction in a separate Award. In the event that the Tribunal were to find jurisdiction with respect to the claims asserted by either of the Claimants, those claims should nevertheless be dismissed for the substantive reasons set forth above and in this Counter Memorial. Should the Tribunal nonetheless find that the Republic has any liability to either of the Claimants, which the Republic firmly denies, the Tribunal should reject Claimants' exaggerated damage claims. In addition, Claimants should be ordered to reimburse the Republic for all reasonable costs and expenses relating to this Arbitration including without limitation legal fees and expert fees.

256. In its First Post-Hearing Brief (p. 136), the Respondent slightly modified its Prayer for Relief to state as follows:

> For the reasons set forth above, in the Republic's Counter Memorial and at the Hearing, CIOC and Devincci Hourani's claims should be rejected in their entirety for lack of jurisdiction. In the event that the Tribunal were to find jurisdiction with respect to the claims asserted, those claims should nevertheless be dismissed for the substantive reasons put forward by the Republic. Should the Tribunal nonetheless find that Claimants are entitled to damages, which the Republic firmly denies, the Tribunal should reject the exaggerated damage claims of Claimants and only award damages for sunk costs as demonstrated by the Republic. In addition, Claimants should be ordered to reimburse the Republic for all reasonable costs and expenses relating to this Arbitration, including without limitation legal fees and expert fees, and to pay the Republic interest on the amount awarded to the Republic at a reasonable commercial rate as from the date of the Award.

257. Finally, in their Reply Post-Hearing Brief (para. 178), the Respondent sets forth the following Prayer for Relief:

> For the reasons set forth in the course of this Arbitration, the Republic respectfully requests that the Tribunal:
>
> A) dismiss Claimants' claims based upon the Republic's preliminary objections on any one or more of the following grounds:
>
> - Claimants' claims constitute an abuse of process;
> - Claimants' claims are time-barred;

- Claimants' claims are precluded on the basis of the res judicata principle; and/or

- Claimants' claims are precluded on the basis of the collateral estoppel principle;

B) if the Tribunal were to find that Claimants' claims are not to be dismissed on any of the above-mentioned grounds, dismiss:

- CIOC's claims on any one or more of the following grounds: (i) CIOC did not meet the requirements of Article 25(2)(b) of the ICSID Convention; and/or (ii) CIOC did not make an investment within the meaning of Article 25(1) of the ICSID Convention;

- Devincci Hourani's claims on the ground that Devincci Hourani did not make an investment within the meaning of Article 25(1) of the ICSID Convention; and

- Claimants' claims under the FIL on any one or more of the following grounds: (i) Claimants did not make an investment under the FIL; (ii) Claimants do not qualify as a Foreign Investor under the FIL; (iii) there is no binding offer to ICSID arbitration in the FIL; and/or (iv) the FIL was repealed and cannot serve as a basis for ICSID jurisdiction;

C) if the Tribunal were to find that Claimants' claims are not to be dismissed on any of the grounds mentioned in A) or B) above, dismiss all of Claimants' claims on any one or more of the following grounds:

- CIOC obtained the extension of the Contract through misrepresentation; and/or

- The Republic rightfully terminated the Contract both as a matter of substance and procedure;

D) if the Tribunal were to find that it has jurisdiction, that CIOC did not obtain the extension of the Contract through misrepresentation and that the Republic wrongfully terminated the Contract:

- determine that Claimants are not entitled to any material damages on the ground that the termination of the Contract did not cause the Claimants any harm;

- in the alternative, dismiss Claimants' claim for damages for Lost Profits and Lost Opportunity on the ground that Claimants failed to meet their burden of proof with respect to the existence and quantum of such damages;

- also in the alternative, determine (i) that CIOC's material damages could under no circumstances exceed its sunk investment costs in the amount of USD 4.2 million or (ii) that Devincci Hourani's material damages could under no circumstances exceed his sunk investment costs in the amount of USD 6,500 under the Full Reparation Standard or 92% of CIOC's material damages under the FMV Standard, provided that there shall be no double recovery between CIOC and Devincci Hourani;

- reduce any material damages awarded to Claimants by at least 50% to account for their contribution to their alleged losses;

- reduce any damages awarded to Devincci Hourani to account for CIOC's liability estimated at over USD 30 million; and

- dismiss Claimants' claim for moral damages;

E) dismiss any and all other requests for relief made by Claimants, including inter alia Claimants' requests for interest and for an award of costs as well as Claimants' request that any amounts due to Claimants be paid to Devincci Hourani outside of the Republic without any right of set-off;

F) order Claimants to jointly and severally pay to the Republic all costs and expenses it incurred in relation to this Arbitration, including without limitation the fees and expenses of the Tribunal, legal fees and expert fees, plus interest; and

G) grant the Republic any other relief that the Tribunal deems to be appropriate.

V. DISCUSSION

258. Following the analysis of preliminary issues (**A.**), including the applicable substantive law (**1.**) and the burden of proof (**2.**), the Tribunal will examine the Respondent's objections to jurisdiction (**B.**) before discussing the Claimants' claims (**C.**) and requests for damages (**D.**).

259. In the course of its deliberations, the Tribunal has considered the positions of the Parties as summarized in the relevant sections of the present Award and as further detailed in their written submissions and oral arguments. The Tribunal has in particular noted the clarifications and specifications made by the Parties during the Hearing. That said, in the analysis that follows, the Tribunal has not considered it necessary to address expressly each and every one of these submissions and arguments for the purpose of this Award. Therefore, to the extent that any of the Parties' submissions or arguments, relevant for the Tribunal's findings, are not referred to expressly below, it should not be assumed that these have not been considered by the Tribunal but must be treated as being subsumed into this analysis.

A. PRELIMINARY MATTERS

1. Law applicable to the merits

a. The Claimants' position

260. The Claimants submit that the merits of their case are governed by international law and/or the Contract, and alternatively by Kazakh law, regardless of the legal basis of this Tribunal's jurisdiction.

i. Customary international law

261. According to the Claimants, customary international law with respect to the treatment of foreign investors and their investments must apply. In particular, the Claimants submit that such rules constitute mandatory rules of international law and form a minimum standard of protection. As such they must apply regardless of any choice of law by the Parties (Memorial, para. 316). The Claimants further argue that under Articles 4(1) and 8 of the Kazakh Constitution, norms of international law are incorporated into Kazakh law (Memorial, paras. 318-319; Claimants' Reply Post-Hearing Brief, para. 17). This is further confirmed by Article 1084(1) of the Kazakh Civil Code which provides for the application of "international customs" to "civil relations with participation of foreign individuals or foreign legal entities or involving other foreign element" (Exh. CLA-22).

262. According to the Claimants, the applicable international law rules include the duty to provide fair and equitable treatment and full protection and security, as well as protection against arbitrary measures and expropriation save for a public purpose and subject to effective, prompt and adequate compensation, and compliance with the principle of proportionality (Memorial, para. 321; Claimants' Reply Post-Hearing Brief, para. 17).

ii. The Foreign Investment Law

263. For the Claimants, "[t]he substantive provisions of the FIL apply whether or not jurisdiction is based thereon or on the Contract", because the Contract provides expressly for the application of the FIL (Exh. CLA-2) under Clause 28.4 according to which "[t]he Contractor shall enjoy all guaranties and protections provided by the

Law on Foreign Investments" (Memorial, paras. 322 and 559); Claimants' First Post-Hearing Brief, para. 299).

264. According to the Claimants, the applicable substantive provisions of the FIL include (i) the stability clause in Article 6(1) FIL which, in the present case, stabilizes the investors' investment position for the entire contractual term, namely for at least 32 years; (ii) Article 7 FIL, which protects the Claimants against nationalization, expropriation or any other measure having the same effects on foreign investments without "due process of law", "without discrimination", and "in the payment of immediate, adequate and effective compensation"; (iii) Article 8 FIL, which protects the Claimants against unlawful actions of State bodies and officials; and (iv) Article 9 FIL, which, in combination with Article 7 FIL, provides for a guarantee for compensation in case of expropriation for "losses caused by illegal suspension, restriction or termination of the business activities of a foreign investor" (Memorial, para. 323; Claimants' First Post-Hearing Brief, para. 300).

265. The Claimants submit that the FIL's Most-Favored Nation clause ("**MFN**") in Article 4(1) FIL is also applicable. It extends to the Claimants' investments and triggers the application of further rights by virtue of the Respondent's obligations under other international legal instruments, including the obligation (i) to ensure fair and equitable treatment; (ii) to ensure full protection and security to the Claimants' investments; (iii) to afford the Claimants' investments a treatment no less than that required by international law; and (iv) to protect against expropriation, except in certain situations and under certain conditions (Memorial, para. 325; Claimants' First Post-Hearing Brief, para. 300).

iii. The Contract

266. The Claimants argue that the Contract may be relied upon regardless of whether the Tribunal will ultimately accept its jurisdiction under the FIL or the Contract, because the FIL imposes, indirectly through the MFN clause, on the Respondent the obligation to "observe any obligations it may have entered into with regard to [the Claimants'] investments" (Memorial, paras. 327 *et seq.*).

iv. Kazakh law

267. For the Claimants, "[a] number of Kazahk legislative acts are also relevant to the dispute at hand, including the Kazakh Constitution, the Kazakh Civil Code, the Law

on Subsoil, and the Law on Oil" (Memorial, paras. 330 et seq.; Claimants' First Post-Hearing Brief, paras. 301-303). With respect in particular to the Subsoil Law, the Claimants submit that the applicable version is the one applicable at the time of the signature of the Contract, namely the Subsoil Law as amended in 1999 (the "**1999 Subsoil Law**") (Exh. CLA-43). The subsequent amendments of the Subsoil Law are not applicable by virtue of the stabilization clause in Clause 28 of the Contract and several other stabilization guarantees contained for instance in the Subsoil Law itself (Article 71), the FIL (Article 6), and the Kazakh Constitution (Articles 4 and 383(2)).

268. The Claimants insist that the 1999 Subsoil Law provides very limited grounds for the termination of the Contract, including failure to commence contractual performance on time and substandard production levels. By contrast, the 2004 Subsoil Law, on which the Respondent relies, provides for a "sweeping right to terminate subsoil contracts following *any* violation, upon failure to conform to notice, granting a reasonable time to cure" (Memorial, para. 335; Claimants' First Post-Hearing Brief, para. 302).

269. The Claimants point to Article 45 of the 1999 Subsoil Law, which allegedly provides for separate procedures for the case of the suspension of a contract, on the one hand (Article 45(1)), and its unilateral termination by the Competent Authority, i.e. the MEMR, on the other hand (Article 45(2)) (Memorial, paras. 336 et seq). Because the Contract was never suspended, only Article 45(2) is relevant in the present case.[20]

270. In relation with Article 45(2) of the 1999 Subsoil Law, the Claimants also refer to Article 70 of the same law. In particular, according to the Claimants, only if the subsoil user fails to comply with the written notice pursuant to Article 70 of the 1999 Subsoil Law "within the established period", can the MEMR terminate the Contract under Article 45(2) of the 1999 Subsoil Law (Memorial, para. 341).

271. To determine the meaning of the term "substantial violation" (which the Claimants read as "material breach"), the Claimants rely on Article 401 of the Kazakh Civil Code (Exh. CLA-22), according to which "[a] violation of the agreement by one of the parties shall be deemed material if it entails for the other party such damage that

[20] The MEMR sent a suspension notice to CIOC on the basis of an alleged breach of the Contract in January 2005. However, following CIOC's response to such notice, the Contract was never suspended (Memorial, paras. 337 et seq.).

it to a substantial degree loses something on which it had the right to count when concluding the agreement" (Memorial, para. 342).

272. According to the Claimants, Kazakh scholars generally do not approve of the practice of unilateral termination of contracts by the State, considering it to violate the principle of equality of parties in civil-law relations (Memorial, paras. 343-344).

273. The Claimants submit that the Kazakh Law on Oil of 28 June 1995 ("**Law on Oil**") (Exh. CLA-72) is also applicable, in particular Article 29 which regulates the modification and termination of oil contracts.

274. Finally, the Claimants refer to the substantive and procedural safeguards provided in the 2006 Kazakh Law on Private Entrepreneurship (Exh. CLA-65) (Claimants' First Post-Hearing Brief, para. 301).

b. The Respondent's position

275. According to the Respondent, the law governing the merits of the Claimants' claims depends on the Tribunal's jurisdictional basis. In particular, the Respondent argues that (i) the Claimants having withdrawn the BIT as a jurisdictional basis, they cannot create a right to BIT standards through customary international law, the FIL and the Contract, while at the same time avoiding any analysis of these instruments (under which they actually claim rights); (ii) the Claimants cannot assert rights under Kazakh law, international law and the Contract regardless of the Tribunal's jurisdictional basis. If jurisdiction is found only under the Contract, Mr. Devincci Hourani's claims must be dismissed as he is not a party to this Contract and therefore has no rights thereunder. Likewise, CIOC's international law and FIL claims would have to be dismissed as they do not arise from the Contract. This means that the Claimants cannot claim breach of the BIT or of another instrument on the basis of which this Tribunal does not have jurisdiction (Counter Memorial, paras. 1149-1152).

276. In any event, it is the Respondent's position that, whatever this Tribunal's jurisdictional basis may be, neither of the Claimants have any of the rights they allege, namely under customary international law, the FIL and the Contract. In this respect, the Respondent points out that the Claimants assert the alleged rights under customary international law, the FIL and the Contract not to plead any breach of them per se, but rather to assert through them a subsidiary right to plead claims under the standards set out in the BIT. However, the Claimants' assertion of BIT

rights or any other international law rights is necessarily premised on Kazakh law: those rights only exist if the Tribunal first finds that Kazakh law incorporates customary international law or that the Claimants have rights under the FIL and that the FIL incorporates the BIT standards. For the Respondent, neither is true (Counter Memorial, paras. 1154-1157).

277. In particular, with respect to the Claimants' claims under customary international law, the Respondent submits that customary international law is not incorporated into Kazakh law (although the principles of Kazakh law are consistent with international law) and it does not include the rights asserted by the Claimants. The Respondent rejects the Claimants' interpretation of the Kazakh Constitution as directly incorporating certain principles of international law into the Kazakh legal system, and asserts to the contrary that neither Article 4(1) nor Article 8 of the Constitution has the effect of incorporating international principles and norms into Kazakh law. The Respondent points out that the Claimants' claims are brought under the FIL and the Contract, which includes an express agreement that Kazakh law is the applicable law. For the Respondent, in conformity with Article 42(1) of the ICSID Convention, it is thus clear that only Kazakh law applies to the consideration of the Claimants' claims under the FIL and the Contract and that customary international law does not apply in this case. Hence, the Claimants' claims under customary international law are baseless and must fail (Counter Memorial, paras. 1160-1170).

278. In addition, the Respondent argues that customary international law is limited: first, in the absence of a treaty or other instrument granting rights to an investor equivalent to those granted to states under customary international law (as is the case here), claims based thereon cannot be brought directly by an investor, because customary international law rights, as stand-alone rights, belong to states and must be brought by a state against another state; the investor has no standing to pursue such claims. Second, customary international law does not have the breadth the Claimants contend, the threshold for a finding of a violation of the international minimum standard remaining very high. The Respondent concludes that even if customary international law could apply in this case, it could not be a basis for the Claimants' claims (Counter Memorial, paras. 1171-1179; Respondent's Reply Post-Hearing Brief, para. 125).

279. Furthermore, with respect to the Claimants' claims under the FIL, it is the Respondent's position that the provisions in the FIL on which the Claimants rely do

not provide for the application of customary international law (Respondent's Reply Post-Hearing Brief, para. 125). Moreover, as seen in further detail below under paragraph 792, the Respondent submits that neither of the Claimants has any rights under the FIL and in any event the FIL does not include a right to the BIT standards.

280. Based on the foregoing, the Respondent contends that the only rights at issue in this case are CIOC's rights under the Contract and rights arising from general principles of Kazakh law (Counter Memorial, paras. 1194-1195).

c. Analysis

281. This Arbitration is governed by (i) the ICSID Convention; (ii) the 2006 ICSID Arbitration Rules (the "**Arbitration Rules**"); and (iii) the rules set forth in PO1.

282. Article 42(1) of the ICSID Convention reads as follows:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

283. As was seen earlier, Clause 26 of the Contract contains the following choice-of-law clause:

> 26.1 This Contract and other agreements signed on the basis of this Contract shall be governed by the law of the State unless stated otherwise by the international treaties to which the State is a party.
>
> 26.2 The Contractor shall comply with the international standards for protection of the environment in the Contract Area.

284. The Parties agree that Clause 26.1 of the Contract provides for the application of Kazakh law. Therefore, in accordance with the terms and specifications set forth in Article 42(1) of the ICSID Convention and Clause 26.1 of the Contract, as well as the considerations set forth below at paragraphs 286 et seq., the Tribunal finds that it must apply Kazakh law to resolve disputes arising under the Contract.

285. It is recalled that Mr. Devincci Hourani is not a party to the Contract and, thus, the choice of law in Clause 26.1 does not apply to him. That said, for the reasons set forth below in paragraphs 689 et seq., the Tribunal finds that it does not have jurisdiction over Mr. Devincci Hourani's claims. Therefore, the question of the law governing his claims becomes moot.

286. The Claimants do not object to the application, as a matter of principle, of Kazakh law. Indeed, at the Hearing, Counsel for the Claimants stated that "Kazakh law […] [is] a good law […] it's a wonderful law, and we ask you to apply it" (Tr. Day 1, p. 166, lines 14-15 and p. 167, line 3). However, the Parties are in dispute over the specific provisions of Kazakh law to be applied by this Tribunal, as well as their interpretation. The Tribunal will determine the applicable provisions of Kazakh law, their content, scope and interpretation in the relevant passages of this Award.

287. Moreover, the Claimants object to the Respondent's contention that this Tribunal must *only* apply Kazakh law, to the exclusion of customary international law and the FIL. As was seen above, the Claimants submit that this Tribunal must also apply customary international law and the FIL, irrespective of whether this Tribunal finds jurisdiction under the Contract or the FIL.[21]

288. Regarding **customary international law**, at first sight Article 42(1) of the ICSID Convention would appear to suggest that international law cannot be applied in the presence of a choice of law clause in favor of a particular domestic law, without any mention of international law. However, in accordance with the opinions expressed by a number of authors, including Professor Schreuer (Exh. CLA-53), this Tribunal opines that it would not be appropriate and in accordance with the context, system and goals of the ICSID Convention to disregard international law as a consequence of the choice of law clause in Clause 26.1 of the Contract. Observing "a general reluctance [among Tribunals applying Article 42(1) of the ICSID Convention] to abandon international law in favor of the host State's domestic law", Professor Schreuer pertinently states as follows:

> The complete exclusion of standards of international law as a consequence of an agreed choice of law pointing towards a domestic legal system would indeed lead to some extraordinary consequences. It would mean that an ICSID tribunal would have to uphold discriminatory and arbitrary action by the host State, breaches of its undertakings which are evidently in bad faith or amount to a denial of justice as long as they conform to the applicable domestic law, which is most likely going to be that of the host State. It would mean that a foreign investor, simply by assenting to a choice of law, could sign away the minimum standards for the protection of aliens and their property developed in customary international law. Such a solution would hardly be in accordance with one of the goals of the Convention, namely '…promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it'.
>
> […]

[21] See *supra* paras. 261 et seq.

> The weight of the arguments outlined above strongly militates in favour of the preservation of the international minimum standards, even in the absence of a reference to international law in a choice of law clause. Apart from the highly undesirable results that may arise from a complete disregard for international law and the incompatibility of such a course of action with the purpose and overall system of the Convention, it is doubtful whether this problem can be adequately dealt with in terms of choice of law. The mandatory rules of international law, which provide an international minimum standard of protection for aliens, exist independently of any choice of law made for a specific transaction. They constitute a framework of public order within which such transactions operate. Their obligatory nature is not open to the disposition of the parties. This assertion is quite different from questions of applicable law under the conflict of laws. International law does not thereby become the law applicable to the contract. The transaction remains governed by the domestic legal system chosen by the parties. However, this choice is checked by the application of a number of mandatory international rules such as the prohibition of denial of justice, the discriminatory taking of property or the arbitrary repudiation of contractual undertakings".[22]

289. In support of his opinion, Professor Schreuer points to a number of ICSID cases where international law was thus taken into consideration, even in the presence of a choice of law in favor of a domestic law. Professor Schreuer further states that "ICSID tribunals have frequently applied rules of customary international law either under the first or second sentence of Art. 42(1)".[23]

290. Accordingly, the Tribunal finds that it cannot disregard, but must take into account international law, in particular mandatory rules of international law, when deciding the present dispute. In accordance with Clause 26.1 of the Contract, this Tribunal will apply Kazakh law to the merits of the dispute as the law chosen by the Parties. However, in doing so, it will afford a supplemental and corrective function to international law, supplementing and informing the Parties' choice of law by the application of relevant international law rules.[24]

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[22] Christoph Schreuer, The ICSID Convention: A Commentary, 2nd ed., 2009, ad Article 42 of the ICSID Convention, paras. 112 and 115.

[23] Idem, para. 177.

[24] It is observed that the *Caratube I* tribunal found that, in accordance with Article 42 of the ICSID Convention, it would decide the dispute "on the basis of the [substantive] law of Kazakhstan and of such rules of international law as may be applicable [including in particular] […] rules of customary international law" (Exh. CLA-8, para. 230). In coming to this conclusion, the *Caratube I* tribunal observed that the Respondent had conceded that international law was applicable to the dispute, "e.g. by relying on principles of public international law in its argument, such as […] the Draft Articles on State Responsibility of the International Law Commission" (Exh. CLA-8, para. 226). It is further observed that, while the *Caratube I* award was not based on the Contract, the Parties relied on Clause 26 of the Contract for all questions concerning the Contract. As in the *Caratube I* arbitration, in the present arbitration, the Respondent also relied in its submissions on international law, namely the ILC Draft Articles on State Responsibility, always insisting however on Kazakh law being the applicable law.

291. Given that this Tribunal finds that it can take into consideration international law on the basis of Article 42(1) of the ICSID Convention, in addition to applying the law chosen by the Parties, the Tribunal considers that it can take into account international law irrespective of whether it finds jurisdiction under the Contract or the FIL.

292. The Tribunal will determine the applicable customary international law principles as well as their content and scope in the relevant passages of this Award.

293. The Parties have debated the question of whether international law, in particular customary international law, could also be applied on the basis that it forms part of Kazakh law, namely by means of Articles 4(1) and 8 of the Kazakh Constitution or Article 1084(1) of the Kazakh Civil Code.

294. In the opinion of the Tribunal, the issue can ultimately remain undecided as the Tribunal finds that it can take into consideration international law, namely customary international law, on the basis of Article 42(1) of the ICSID Convention.

295. Finally, regarding the **FIL**, it is undisputed that the Contract provides in Clause 28.4 that "[t]he Contractor shall enjoy all guaranties and protections provided by the Law on Foreign Investments". For the reasons set forth below in paragraphs 627 and 652 et seq., the Tribunal finds that, by means of Clause 28.4 of the Contract, the substantive guarantees and protections provided under the FIL in any event apply between CIOC and the Respondent in their contractual relations in the capacity of supplementary contractual provisions. For the Tribunal, it can thus dispense with examining whether the FIL also applies independently of the Contract.

2. Burden of proof

a. The Claimants' position

296. The Claimants assert that the Respondent has the burden of proof of all preliminary objections, namely the affirmative defenses of collateral estoppel, *res judicata*, statute of limitations and abuse of process. However, the Claimants disagree with the Respondent's position as regards the latter's other jurisdictional objections, that is *ratione personae, ratione materiae* and *ratione voluntatis*. According to the Claimants, in light of the circumstances of this case, especially the ICSID clause contained in the Contract and the fact that Mr. Devincci Hourani has been a US national since July 2001 and registered as the owner of CIOC since 2004, there is a

quasi-irrefutable presumption in favor of this Tribunal's jurisdiction. It is therefore the Respondent who bears the burden of proof to overcome this presumption and successfully raise a challenge to jurisdiction.

297. Furthermore, the Claimants submit that, contrary to the Respondent's allegation, the *Caratube I* award does not contradict the Claimants' position but rather supports it. It discussed the burden of proof issue exclusively in relation to the BIT and also flagged that in the presence of an ICSID clause, there is a strong presumption in favor of jurisdiction so that it would be for the Respondent to challenge jurisdiction.

298. For the Claimants, this presumption in favor of jurisdiction is reinforced by the fact that the Respondent argued in the *Caratube I* arbitration, that is after the dispute had been in existence for some time already, that CIOC should have based jurisdiction on the ICSID clause in the Contract rather than on the BIT. The Respondent further threatened during the annulment proceedings that it would bring a counterclaim in an arbitration based on the Contract's ICSID clause. Moreover, the Claimants submit that the Respondent's reliance in the *Caratube I* arbitration on the Contract's ICSID clause constitutes a waiver by the Respondent of its right to raise a jurisdictional challenge based on that clause (Defense on Jurisdiction, paras. 40-49).

b. The Respondent's position

299. The Respondent distinguishes between the burden of proof (or burden of persuasion) and the burden of producing evidence. The burden of proof requires the party who submits a claim, an affirmative defense or a counterclaim to prove the facts it alleges in support of its claim, affirmative defense or counterclaim. The burden of proof as to the Claimants' claims thus lies exclusively with the Claimants throughout this case; and it never shifts. They have a duty to show that it is more probable than not, by a preponderance of evidence, that the facts they allege are true. In other words, they have to prove the factual basis of each of their claims as a whole and the Tribunal should decide, in consideration of the evidence presented by both Parties, whether the Claimants have discharged their burden of proof. If the Claimants fail to successfully discharge their burden of proof on an issue, such issue should be decided to their detriment (Counter Memorial, paras. 25-31; Respondent's First Post-Hearing Brief, paras. 21-26).

300. In response to the Claimants' argument that this Tribunal should take "limited access to documents into consideration when assessing the evidence and the

question of the burden of proof", the Respondent argues that the Claimants have the burden of proving their allegations (which the Respondent disputes) that relevant documents on which they seek to rely were seized by the Respondent, that they did not have access to those documents and that those documents were never returned to the Claimants (Counter Memorial, paras. 32-34). According to the Respondent, in any event, even if the Tribunal were to admit that certain specific and relevant documents were in the sole possession of the Respondent, the Claimants would still have the burden of proof with respect to all of their claims, while the burden of presentation of evidence with regard to those documents could be on the Respondent (Counter Memorial, paras. 35-36).

301. According to the Respondent, while it has the burden of proving the four affirmative defenses to jurisdiction (i.e. abuse of process, statute of limitations, collateral estoppel and *res judicata*), the Claimants must show that this Tribunal has jurisdiction over the present dispute pursuant to the instruments under which the Claimants bring their claims. This was also confirmed by the *Caratube I* tribunal. This is not altered by the fact that the Respondent has raised objections to this Tribunal's jurisdiction (Counter Memorial, paras. 37-44; Respondent's Reply Post-Hearing Brief, para. 41).

302. In particular, the Respondent submits that CIOC must demonstrate that (i) the parties agreed to treat CIOC as a foreign national and that Mr. Devincci Hourani has control over CIOC; (ii) CIOC made an investment within the meaning of Article 25(1) of the ICSID Convention; and (iii) CIOC meets the jurisdictional requirements under the FIL and/or the Contract. In turn, Mr. Devincci Hourani has the burden to prove that, *inter alia*, (i) he made an investment in CIOC within the meaning of the ICSID Convention; and (ii) he meets the jurisdictional requirements under the FIL (Counter Memorial, paras. 45-46). In this respect, the Respondent points out that the *Caratube I* tribunal found that there was "not sufficient evidence of exercise of actual control over CIOC by Devincci Hourani" (Counter Memorial, para. 48) and that he did not make an investment within the meaning of the ICSID Convention. It is the Respondent's position that the Claimants have not satisfied their burden of proof in that they have not even established a *prima facie* case for jurisdiction. Moreover, a mere showing of *prima facie* jurisdiction does not shift the burden of proof, which remains with the proponent. When all of the evidence is submitted to the Tribunal by the parties, after the shifting of the burden of producing evidence, the Tribunal must

decide, in light of all of the evidence, whether the moving party has met its burden of proof by a preponderance of the evidence.

303. The Respondent rejects the Claimants' argument according to which the Respondent has the burden of proof as regards jurisdiction because there would be some allegedly quasi-irrefutable presumption of jurisdiction. According to the Respondent, even if the existence of such a presumption were established, this would only shift the burden of producing evidence, but not the ultimate burden of proof by a preponderance of the evidence, which continues to lie unchangeably with the Claimants (Counter Memorial, paras. 48-49; Respondent's First Post-Hearing Brief, paras. 24-26; Respondent's Reply Post-Hearing Brief, para. 41).

304. The Respondent further argues that the Claimants must prove the merits of their claims, in particular that the Respondent has committed the alleged breaches on which the Claimants' claims rest. This implies proof, not only that the Respondent breached its obligations, but also that the Respondent owed such obligations to the Claimants in the first place (Counter Memorial, paras. 50-53).

305. Moreover, according to the Respondent, the Claimants also have the burden of proving that they suffered the alleged damages and that those damages are the consequence of the alleged breaches. They also have the burden of proof with respect to the quantum of the alleged damages, in particular that such damages are not speculative and uncertain (Counter Memorial, paras. 54-58).

306. In summary, the Respondent submits that the Claimants have the burden of proving that "(i) the Tribunal has jurisdiction over the dispute, (ii) the Contract was wrongfully terminated by the Republic, (iii) this wrongful termination by the Republic was due to State action and not to the Republic's actions as a co-contractor, (iv) the Republic acted in contravention of each of the various substantive provisions of the FIL or the Contract under which Claimants are bringing their claims and (v) any damages allegedly suffered by Claimants was caused by the Republic's conduct and actually existed in the amount claimed by Claimants" (Counter Memorial, para. 60). It is the Respondent's position that the Claimants have not met their burden of proof with respect to any of the above (Respondent's Reply Post-Hearing Brief, para. 42).

c. Analysis

307. Regarding the issue of the burden of proof, the Parties agree that the Respondent has the burden of proof with respect to its affirmative defenses of collateral estoppel,

res judicata, statute of limitations and abuse of process. The Parties also agree that, in general, the Claimants have the burden of proof of the merits of their claims, including the alleged damages.

308. The Parties are in disagreement over which Party has the burden of proving this Tribunal's jurisdiction *ratione personae, ratione materiae* and *ratione voluntatis* pursuant to the jurisdiction granting instruments relied upon by the Claimants, namely the ICSID Convention coupled with the Contract and the FIL. In other words, the question is which Party bears the burden of proving that the requirements set forth in those instruments are met in the present case. While the Claimants submit that "the burden of proof is squarely on the [Respondent]" (Defense on Jurisdiction, para. 47), namely in the presence of a "quasi-irrefutable" presumption in favor of jurisdiction, the Respondent on the other hand insists that "the burden of proof lies squarely on Claimants to demonstrate that this Tribunal has jurisdiction", namely that "the jurisdictional requirements under Article 25 of the ICSID Convention and under the consent-granting documents, i.e., the FIL and the Contract, are satisfied" (Counter Memorial, para. 43).

309. For the reasons set forth below, the Tribunal finds that the Claimants have the burden of proving that this Tribunal has jurisdiction.

310. The Claimants do not appear to dispute the general premise that a claimant has the burden of proving that all the requirements for the tribunal's jurisdiction are met. They do not take issue with the authorities relied upon by the Respondent in support of this general premise. However, the Claimants suggest that, in the circumstances of the present case, the burden of proof has shifted to the Respondent, in particular in the presence of "the crystal-clear ICSID clause contained in the Contract", the Respondent's reliance in the *Caratube I* arbitration on the "exclusive jurisdiction clause in the contract"[25] and its affirmation that it would bring counterclaims in an arbitration based on that clause,[26] and the undisputable fact that Mr. Devincci Hourani is of US nationality and the registered owner of CIOC since well before the occurrence of the present dispute. For the Claimants, in these circumstances there is a "quasi-irrefutable" presumption in favor of this Tribunal's jurisdiction and the Respondent thus has the burden of proof to overcome it.

[25] See, *e.g.*, Exh. C-351, p. 194, line 15.

[26] See Exh. C-352, p. 84, lines 9-24.

311. The Claimants do not rely on any authorities in support of their position. Rather, they assert that their position is confirmed by the *Caratube I* tribunal who allegedly found that "in the presence of an ICSID clause there is a strong presumption in favor of jurisdiction, and therefore that the burden of proof is on the Respondent to challenge jurisdiction in the presence of such a clause" (Defense on Jurisdiction, para. 46).

312. The Tribunal cannot follow the Claimants' line of argument. The *Caratube I* award merely declared in general terms that in many cases an ICSID arbitration clause contained in an investment contract has been held to imply an agreement to treat a locally incorporated company as a national of another Contracting State and that such an agreement has been considered to give that company standing in the dispute. The *Caratube I* tribunal further stated that, unlike an investment contract, the acceptance of an offer to arbitrate contained in an investment treaty "cannot create an assumption that the claimant fulfills the conditions of that offer" (Exh. CLA-8, para. 331). However, the *Caratube I* tribunal did not go beyond such general statements. In particular, it did not pronounce itself on the question of whether the ICSID clause in the Contract in the present case would create any presumption (let alone a "strong" or "quasi-irrefutable" one) in favor of jurisdiction. Rather, it pointed out that the ICSID clause in the Contract had not been relied upon by the Claimants.

313. Moreover, the *Caratube I* tribunal did not find that the existence of a "strong presumption" in favor of jurisdiction would give rise to a shift of the burden of proof to the Respondent to show that the jurisdictional requirements are not met. To the contrary, with respect to the burden of proof, the *Caratube I* tribunal rejected the argument of the strong presumption in favor of the specific question of existence of foreign control and concluded that "the burden is on Claimant to show that it fulfils the criteria set out by Article 25(2)(b) of the ICSID Convention and Article VI(8) of the BIT". The *Caratube I* tribunal therefore endorsed the general premise (undisputed by the Claimant in the *Caratube I* arbitration) "that Claimant bears the burden of proof to establish that the Tribunal has jurisdiction over the present dispute" (Exh. CLA-8, paras. 363-368).

314. In light of the foregoing, the Tribunal finds that the Claimants have provided no persuasive reason that would justify shifting to the Respondent the burden of proving this Tribunal's jurisdiction. That said, the Tribunal observes that the Parties seem to agree that the burden of producing evidence, defined by the Respondent as the "obligation of each party to produce evidence in support of its arguments as a case progresses" (Counter Memorial, para. 28), may shift between the parties

depending on the nature and strength of the evidence presented by each party in support of their respective arguments.

315. The Claimants have submitted that "they have limited and incomplete case documentation in their possession and no inventory even of the missing documents" and that this Tribunal should take such limited access to documents into consideration when assessing the evidence and the question of the burden of proof "to the extent necessary, when and where appropriate" (Memorial, para. 32). While the Respondent has not taken issue with the *Rumeli* and *Vivendi* cases relied upon by the Claimants in support of their assertion, it stresses however that the Claimants must demonstrate (but failed to do so) that relevant documents on which they seek to rely were seized, that they did not have access to those documents and that those documents were never returned to them. Furthermore, the Respondent stresses that, in any event, the burden of proof is still on the Claimants to prove their claims and does not shift to the Respondent, although the latter could be held to bear the burden of presenting specific, relevant documents in its sole possession (Counter Memorial, paras. 32-35).

316. It is noted that the tribunal in the *Vivendi* case found that the evidence produced by the claimants was incomplete, but that "it is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred" and that when settling damages "approximations are inevitable".[27] In the *Rumeli* case, on the other hand, the tribunal was faced with the question of the weight to be given to circumstantial evidence, particularly with regard to allegations of collusion, and found that "[i]t is undisputable that submission of direct evidence on these points is very difficult". The *Rumeli* tribunal also referred to the case in *AAPL v Sri Lanka* where an ICSID tribunal listed international rules regarding evidence and concluded that "in cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e. prima facie evidence". Finally, the *Rumeli* tribunal noted that it would consider the party's attitude in the proceedings, namely as to drawing adverse inferences from the parties' behavior.[28]

317. Concerning first of all the assessment of evidence, this Tribunal generally refers to Article 34(1) of the ICSID Arbitration Rules according to which the Tribunal shall be the judge of the probative value of any evidence adduced.

[27] Exh. CLA-36, para. 8.3.16.

[28] Exh. CLA-16, paras. 444-445.

318. With respect to the Claimants' allegation that their access to documents has been limited and incomplete in this case due to the behavior of the Respondent, namely various alleged acts of harassment, including the seizure of documents belonging to CIOC, the Tribunal agrees in principle with the Respondent that the Claimants must prove their allegations. At the same time, the Tribunal finds that it may take into consideration a party's diligence in discharging its burden of proof, as well as the good faith or lack thereof on the part of the other party. In this regard, it is worth noting that both Parties have a duty to contribute to the manifestation of the truth, including a duty to abstain from any behavior designed to prevent the other party from proving its case. The Tribunal may thus take into consideration the fact that a party did not have access to its documents and give the appropriate weight to this circumstance when assessing the evidence produced on the record. As was just seen, this approach is corroborated by the decisions in the *Rumeli* and *AAPL* cases. Having said this, the Tribunal will determine in the relevant passages of this Award whether the Claimants have met their burden of proof in light of the foregoing considerations "if and to the extent necessary, when and where appropriate" (Memorial, para. 32).

319. In line with the foregoing, the Tribunal further agrees in principle with the Respondent that while the burden of proof thus is on the Claimants to prove their claims, the Respondent could be held to bear the burden of presenting specific and relevant documents in its possession. In this regard, as noted by the tribunal in the *Rumeli* case, negative inferences may be drawn as a result of a Party's failure to abide with their burden to produce specific, relevant documents. The Tribunal refers to its earlier correspondence (e.g. its second letter of 28 September 2015) where it declared that it would consider in its Award any motivated requests for negative inferences as set forth in the post-hearing briefs. Both Parties have made such requests in their post-hearing briefs. The Tribunal has considered these requests where appropriate in this Award, even though it has not considered it necessary to address expressly each and every one of them. Therefore, to the extent that any of the Parties' requests for negative inferences, relevant for the Tribunal's findings, are not referred to expressly below, it should not be assumed that these have not been considered by the Tribunal but must be treated as being subsumed into the Tribunal's analysis.

320. Finally, the Claimants argue that the Respondent has waived its right to object to the Tribunal's jurisdiction, namely by arguing that the Respondent itself "affirmatively

and officially clearly relied on the ICSID clause that it executed, and that such reliance occurred moreover once the dispute had arisen" (Defense on Jurisdiction, paras. 10 and 48).

321. In particular, the Claimants refer to the following extract of the Respondent's Counter Memorial in the *Caratube I* arbitration where the Respondent allegedly relied on the ICSID clause in the Contract to object to the *Caratube I* tribunal's jurisdiction under the BIT:

> This provision [Clauses 27.2 and 27.3 of the Contract] shows that the Parties fully intended that all disputes arising from this Contract would be resolved via the means provided for in the Contract and not through the Treaty. This freely negotiated provision memorializes the agreement of the parties presently before this Tribunal and as such it is evidence of their mutual intent to be bound by an agreement to settle all disputes arising from the Contract in one of two arbitral fora. Specifically, the Contract provides that such disputes should be resolved in an ICSID arbitration or, if for some reason ICSID arbitration is not possible, in an ad hoc arbitration under the UNCITRAL Rules. The Parties' careful planning and clear intent to commit to settling disputes arising from the Contract pursuant to the Contract is abundantly shown by the fact that not only is ICSID arbitration included, UNCITRAL arbitration is also included as a back-up provision. The comprehensive structure of this dispute resolution mechanism proves that the Parties intended to leave nothing open to surprise and intended to provide a mechanism to resolve all disputes arising from the Contract.
>
> (Exh. R-24, para. 58).

322. The Claimants further rely on the following extract of the hearing transcript in the *Caratube I* arbitration:

> […] if you find that this was a contractual wrongful termination as opposed to a sovereign act, is that there is an exclusive jurisdiction clause in the contract, and we submit that that clause should apply to ordinary contractual claims. This Tribunal does have jurisdiction over treaty claims, but we submit that any decision on ordinary contractual claims would be ultra vires as this Tribunal has been constituted.
>
> […]
>
> Finally, we've also maintained as a jurisdictional objection that CIOC has waived its right to bring contract claims in the treaty arbitration, to the extent that you were to find that these are contract claims as opposed to treaty claims, and that's because of the exclusive jurisdiction clause in the contract which I mentioned to you earlier by which CIOC waived its right to bring claims arising from the contract in a treaty claim forum as opposed to a contract claim forum.
>
> (Exh. C-351, p. 190, lines 13-21 and p. 194, lines 10-19)

323. Finally, the Claimants rely on the following extract of the hearing transcript in the annulment proceedings:

> The other point that I should mention in passing: they are implying that the reason they didn't bring the suit under the contract was because it was so obvious that there was jurisdiction under the ICSID Convention. Well, we all know very well that if you are suing under a BIT under the ICSID Convention, the state cannot make counterclaims in the same proceeding, whereas if you are suing under a contract, the state can make counterclaims in the same proceeding. My own interpretation is that that was the reason why the contract wasn't raised as a source of jurisdiction. And in this new case there will be counterclaims by the state -- I can assure you of that -- and that's something which obviously they hoped to avoid by trying to convince the Tribunal that there was ICSID jurisdiction. But that's speculation.
>
> (Exh. C-352, p. 84, lines 9-24)

324. In the opinion of the Tribunal, a waiver by the Respondent of its right to challenge this Tribunal's jurisdiction cannot be admitted lightly and must be based on a clear and unambiguous statement in this sense by the Respondent.

325. The Tribunal agrees that the Respondent's reliance in the *Caratube I* arbitration on the ICSID clause in the Contract is significant and cannot be ignored, the Respondent insisting that the parties before the *Caratube I* tribunal, i.e. CIOC and the Republic of Kazakhstan, had clearly expressed their agreement in that clause to settle all disputes arising out of the Contract in an ICSID arbitration or, alternatively, an UNCITRAL arbitration. However, the Tribunal cannot quite follow the Claimants' argument that in objecting to the *Caratube I* tribunal's jurisdiction by relying on the ICSID clause in the Contract the Respondent waived its right to raise any objection to this Tribunal's jurisdiction based on that clause. In particular, for the Tribunal, while the Respondent's reliance on the ICSID clause in the *Caratube I* arbitration certainly goes far, it does not go as far as asserting that there would have been jurisdiction had the tribunal been established under the ICSID clause in the Contract. In other words, while the Respondent argued in the *Caratube I* arbitration that CIOC should have initiated an ICSID arbitration based on Clause 27 of the Contract, in doing so, the Respondent did not clearly and unambiguously accept the validity of that Clause or state that it would accept the jurisdiction of an ICSID tribunal seized on the basis of Clause 27 of the Contract. To the contrary, as in this Arbitration, in the *Caratube I* arbitration the Respondent argued that the conditions under Article 25(2)(b) of the ICSID Convention were not met, such as the requirement of actual control by Mr. Devincci Hourani over CIOC.

326. Therefore, the Tribunal will examine the Respondent's jurisdictional objections in the following chapter of this Award.

B. JURISDICTION

327. As a preliminary remark, the Tribunal points out that it has adopted the Parties' characterizations and thus subsumes under the heading "jurisdiction" what they have themselves dealt with under that heading.

328. In the present chapter, the Tribunal will first examine whether it is precluded from examining its jurisdiction based on one of the preliminary "jurisdictional" objections raised by the Respondent, namely (**1.**) abuse of process; (**2.**) statute of limitations; (**3.**) collateral estoppel; or (**4.**) *res judicata*. Assuming that this is not the case, the Tribunal will then examine whether it has (**5.**) jurisdiction over CIOC's claims based on Article 25 of the ICSID Convention and one of the consent-granting instruments, i.e. the Contract and/or the FIL; and (**6.**) jurisdiction over Mr. Devincci Hourani's claims based on Article 25 of the ICSID Convention and the FIL.

329. Before delving into this analysis however, the Tribunal notes that there is a dispute between the Parties as to whether the Respondent has raised its objections to the Tribunal's jurisdiction in a timely fashion (see Memorial, para. 521. See also the Tribunal's letter of 27 April 2015 and the Parties' preceding exchange of correspondence, namely the Claimants' letter of 3 April 2015 and the Respondent's letter of 13 April 2015 regarding the Respondent's request for bifurcation).

330. The Respondent claims that this is the case and that its four preliminary objections have been submitted in accordance with paragraph 14.3 of PO1 and Rule 41 of the ICSID Arbitration Rules. In addition, the Respondent insists that its jurisdictional objections are "very serious indeed and were clearly identified at the First Session" (Counter Memorial, paras. 61-65).

331. Paragraph 14.3 of PO1 reads as follows:

> The Respondent reserved the right to request bifurcation of jurisdictional issues after the first round of pleadings. If this matter is raised by the Respondent and accepted by the Claimants or the Tribunal, an alternative calendar shall be prepared at that time.

332. Furthermore, Rule 41(1) of the ICSID Arbitration Rules provides as follows:

> Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General not later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—

> unless the facts on which the objection is based are unknown to the party at the time.

333. Based on these provisions, the Tribunal finds that the Respondent was entitled to file its jurisdictional objections – at the latest – with its Counter Memorial, as it did. The Tribunal therefore considers that the Respondent's jurisdictional objections were raised in a timely fashion.

1. Abuse of process

a. The Respondent's position

334. According to the Respondent, the Claimants' claims constitute an abuse of process in that (i) the Claimants have abused the international arbitration system by engaging in improper claim-splitting and bringing repetitive claims where those claims could and should have been brought in one proceeding; and (ii) Mr. Devincci Hourani is bringing a claim even though no investment in good faith from him exists (Counter Memorial, para. 106; Respondent's First Post-Hearing Brief, paras. 27-35).

335. The Respondent submits that a tribunal acting under the ICSID Convention can apply the doctrine of abuse of process and declare a claim inadmissible in order to prevent the abusive exercise of a valid procedural right and the resulting abuse of the ICSID system. The Respondent points to Articles 41 and 44 of the ICSID Convention, which, according to the Respondent, have often been referred to by ICSID tribunals when analyzing the abuse of process doctrine. Referring to several cases where tribunals have applied general international law, in particular the principles of good faith and abuse of right, the Respondent asserts that "there can be no doubt that the doctrine of abuse of right is not only applicable in an ICSID arbitration, it is a duty of a tribunal sitting pursuant to the ICSID Convention to protect the integrity of the ICSID system and thus to enforce the doctrine of abuse of process" (Counter Memorial, paras. 107-120).

336. It is the Respondent's position that the Claimants' claims in this arbitration are brought in violation of the abuse of process principle because both of the Claimants could and should have brought all of their claims in the *Caratube I* arbitration. The claim to ICSID jurisdiction in the *Caratube I* arbitration turned on essentially the same subject matter as in the present one. And the facts underlying the two cases on which the claim to ICSID jurisdiction is based are identical, i.e. that CIOC is controlled by Mr. Devincci Hourani and that the latter made an investment in an

objective sense. Moreover, the Respondent alleges that at the time of bringing the *Caratube I* arbitration, both of the Claimants were already aware of and able to bring all of their claims, which arose from the same alleged facts as the ones now relied on, but they chose not to do so for no explicable reason. Therefore, it is the Respondent's position that the Claimants did not bring all of their claims already in the *Caratube I* arbitration "for no apparent reason other than to preserve its opportunity to bring the serial claim it now has brought", and such conduct constitutes an abuse of the system of international arbitration. This applies to both of the Claimants, with the Respondent pointing out that Mr. Devincci Hourani, who was not a party to the *Caratube I* arbitration, was nevertheless an active participant in that arbitration, attending the First Session, submitting written witness statements, and attending the hearing on jurisdiction and the merits during which he was also examined. It is on this basis that the Respondent requests this Tribunal "to dismiss CIOC's claims, because CIOC could have invoked the FIL and the Contract as bases for ICSID jurisdiction during the *Caratube I* Arbitration and by electing not to invoke them committed an abuse of process. Similarly, Mr. Devincci Hourani, who actively participated during the *Caratube I* Arbitration, tactically chose not to be a Claimant and his claims must equally be dismissed to avoid an abuse of process". For the same reasons, the Tribunal should also declare the withdrawal of Mr. Devincci Hourani's claim under the BIT as having been with prejudice (Counter Memorial, paras. 121-132).

337. The Respondent rejects the Claimants' argument according to which they are entitled to bring their claims again because the *Caratube I* tribunal denied jurisdiction. For the Respondent, the fact that the Claimants' substantive underlying rights were not affected by the *Caratube I* award does not explain their failure to bring all the bases of alleged consent to ICSID jurisdiction at once. The Respondent insists that the additional bases of consent to ICSID jurisdiction do not cure the flaws that made the *Caratube I* tribunal dismiss ICSID jurisdiction and therefore there is no justification for the Claimants' serial jurisdictional claims (Respondent's First Post-Hearing Brief, paras. 29-30).

338. Furthermore, for the Respondent, Mr. Devincci Hourani is abusing the ICSID system by asserting jurisdiction based on an alleged investment arising from his ownership of CIOC when there is already a finding by the *Caratube I* tribunal that Mr. Devincci Hourani did not make an investment in CIOC. Moreover, it is the Respondent's position that Mr. Devincci Hourani's claims should be dismissed because he is

nothing more than a frontman and his purported acquisition of CIOC was a transaction devoid of bona fides, with the result that the present Arbitration constitutes an attempt by Mr. Devincci Hourani to abuse the ICSID system. In support of this position, the Respondent points to *Cementownia "Nowa Huta" S.A. v Turkey* (Exh. RL-31) and *Europe Cement Investment & Trade S.A. v Republic of Turkey* (Exh. RL-30), which the Respondent describes as "of particular importance in the analysis of the doctrine of abuse of process" (Counter Memorial, paras. 133-140; Respondent's First Post-Hearing Brief, paras. 32-33). In the *Cementownia* case, the tribunal concluded that

> The Claimant has intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case. This constitutes indeed an abuse of process. In addition, the Claimant is guilty of procedural misconduct: once the arbitration proceeding was commenced, it has caused excessive delays and thereby increased the costs of the arbitration. (Exh. RL-31, para. 159)

339. Moreover, in the *Europe Cement* case, the tribunal, referring to the *Inceysa* and *Phoenix* cases, noted that:

> In [those] cases, the lack of good faith was present in the acquisition of the investment. In the present case, there was in fact no investment at all, at least at the relevant time, and the lack of good faith is in the assertion of an investment on the basis of documents that according to the evidence presented were not authentic. The Claimant asserted jurisdiction on the basis of a claim to ownership of shares, which the uncontradicted evidence before the Tribunal suggests was false. Such a claim cannot be said to have been made in good faith. If, as in Phoenix, a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process. (Exh. RL-30, para. 175)

340. The Respondent observes that the *Caratube I* tribunal already assessed the evidence of Mr. Devincci Hourani's alleged investment, which is the same evidence as now before this Tribunal, and found that such investment did not exist. In this regard, the Respondent draws special attention to the following findings of the *Caratube I* tribunal:[29]

341. First, Mr. Devincci Hourani, as a newly naturalized US citizen, acquired his stake in CIOC for the total amount of USD 6,500, and the *Caratube I* tribunal observed that when this transaction (on paper) took place, CIOC was already a holder of the

[29] The Respondent rejects the Claimants' argument that the *Caratube I* tribunal did not make any determination, but merely interpreted evidence. According to the Respondent, all tribunals have to assess evidence and make a decision based on such evidence. The Respondent insists that in doing so, the tribunals' findings remain determinations (Respondent's First Post-Hearing Brief, para. 31).

Contract for which it had allegedly paid USD 9.4 million and in relation with which CIOC sought relief of around USD 1 billion. The Respondent points out that this prompted the *Caratube I* tribunal to express doubts as to Mr. Devincci Hourani's investment in CIOC, and specifies that CIOC never submitted evidence of payment of this amount by Mr. Devincci Hourani or as to whether this transaction was ever perfected (Counter Memorial, paras. 142-143).

342. Second, the Respondent submits that Mr. Devincci Hourani had no know-how or expertise to offer CIOC and that the *Caratube I* tribunal noted that Mr. Devincci Hourani admitted himself that "[o]ther than when I was the Director of CIOC I have not been actively involved in the day to day running of CIOC". In addition, new evidence now shows that Mr. Devincci Hourani did not have the right to be a Director of CIOC as he held a business visa at the time, which expressly prohibited him from being employed in Kazakhstan (Counter Memorial, para. 144).

343. Third, with respect to the Claimants' argument that they contributed significant capital, including in the form of loans from JOR to CIOC, the Respondent alleges that neither of the Claimants ever provided any financing of CIOC's operations and they knew that the loans from JOR could not be considered "significant contributions". The Respondent points out that the *Caratube I* tribunal, after examining all the evidence regarding JOR, concluded as follows:

> From the above considerations it follows that, even if Devincci Hourani acquired formal ownership and nominal control over CIOC, no plausible economic motive was given to explain the negligible purchase price he paid for the shares and any other kind of interest and to explain his investment in CIOC. No evidence was presented of a contribution of any kind or any risk undertaken by Devincci Hourani. There was no capital flow between him and CIOC that contributed anything to the business venture operated by CIOC. (Exh. CLA-8, para. 455)

344. The Respondent alleges that "CIOC was wholly financed, on incredulous financing terms by the Lebanese Company JOR which was at all relevant times owned and controlled by Kassem Omar and Issam Hourani and which Claimants now characterize as a 'family company'" (Counter Memorial, para. 147). In this regard, the Respondent draws the Tribunal's attention to several financing agreements entered into between CIOC and JOR. For instance, JOR and CIOC concluded an agreement on 5 August 2002, by which JOR agreed to provide financing to CIOC, it being specified that at that time CIOC was owned by Mr. Fadi Hussein whom the Houranis claim to be a distant relative. The Respondent alleges that Mr. Hussein incorporated CIOC with charter capital of only USD 7,000 and that he only actually

contributed USD 3,500 of his own fund. The Respondent further draws the Tribunal's attention to the fact that CIOC allegedly agreed during a board meeting held on 5 September 2002 to subsume the previously agreed on loan into a larger financing agreement with JOR, even though the latter was only incorporated on 10 September 2002. Therefore, according to the Respondent, "CIOC received funds from an entity that had yet to be legally incorporated and before it could legally hold a bank account" and "under the law applicable to Lebanese off shore companies such as JOR, such companies were prohibited from providing financing to foreign companies" (Counter Memorial, para. 148).

345. The Respondent alleges that on 2 December 2002, JOR and CIOC entered into the first of the financing agreements memorialized in the September 2002 board minutes (Exh. C-217), namely an agreement for a loan from JOR to CIOC in the amount of USD 15 million at an interest rate of 14 percent. The Respondent points to three provisions in particular of this agreement, namely paragraphs six, eight and nine, which it alleges give actual control over CIOC and the Contract to JOR and render Messrs. Fadi Hussein's and Devincci Hourani nominal ownership over CIOC meaningless (Counter Memorial, para. 149).

346. The Respondent further notes that JOR and CIOC entered into another financing agreement on 3 November 2004 in the amount of USD 25 million at an interest rate of zero percent (Exh. C-156), it being pointed out that the interest rate in the first financing agreement was subsequently reduced to zero percent also and that zero interest rate agreements are not typical in Lebanon with the prevailing rate being significantly higher (Counter Memorial, para. 150).

347. The Respondent quotes the following passage from the *Caratube I* award in relation with the above mentioned financing agreements:

> From the time of its establishment JOR was the main capital provider to CIOC. It was contributing to CIOC before CIOC finalised the transfer of the Contract from CCC and before JOR itself was formally registered in Lebanon. At the time Devincci Hourani purchased his share in CIOC, JOR provided CIOC with open credit lines of USD 15 million. The loan was granted at 14% interest p.a. but CIOC never paid any interest under the loan agreements. (Tr., day 4, p. 169) The interest was ultimately cancelled. (Exh. CLA-8, para. 453)

348. For the Respondent, there is no rational business motive underlying the financing agreements between JOR and CIOC. In particular, it cannot be motivated by Mr. Devincci Hourani's alleged personal guarantee contained in an agreement between JOR and Mr. Devincci Hourani purportedly dated 1 June 2004 (Exh. C-155), in

which the latter apparently agrees to repay the loan at fourteen percent interest from his personal profits during the production phase of the Contract. The Respondent points out that this agreement therefore presumes that CIOC would reach the production phase and that Mr. Devincci Hourani would make a profit from that production. The document in Exh. C-155 must in any event be treated with the greatest skepticism as it is so flawed that it does not in fact create any obligations for Mr. Devincci Hourani.

349. The Respondent quotes the following passages from the *Caratube I* award with respect to Mr. Devincci Hourani's alleged personal guarantee:

> From the above it follows that the evidence presented does not confirm that Devincci Hourani's alleged contribution to CIOC as his investment included a substantial personal guarantee of CIOC's debt to JOR. His alleged personal guarantee referred to a loan that was annulled by the parties. Even assuming that the loan was still in place, it was already secured on the same assets and revenue stream. Devincci Hourani's alleged personal guarantee did not contribute anything to the economic arrangement existing between CIOC and JOR. (Exh. CLA-8, para. 450)
>
> […]
>
> Another aspect of Devincci Hourani's 'personal guarantee' of CIOC's debts is that no evidence was provided that JOR ever tried to enforce the security against him or against CIOC, once the problems with the Caratube project started. (Exh. CLA-8, para. 448)

350. It is the Respondent's position that neither Mr. Fadi Hussein nor Mr. Devincci Hourani was a bona fide owner of CIOC and that the real parties in interest are JOR and those who controlled JOR, namely Messrs. Kassem Omar and Issam Hourani (Counter Memorial, paras. 156-157). JOR as a Lebanese company has no right to ICSID jurisdiction and could not benefit from a bilateral investment treaty between Kazakhstan and Lebanon as no such treaty was in place during the relevant time period. At the time CCC assigned the Contract to CIOC, Lebanon was not a party to the ICSID Convention. Moreover, Mr. Issam Hourani is not a Kazakh citizen and Mr. Kassem Omar is a stateless or Palestinian person. Therefore, they could not benefit from ICSID jurisdiction or treaty protection (Counter Memorial, para. 158).

351. Finally, the Respondent points out that there exists a contradiction between the Claimants' abuse of process and statute of limitations arguments in that, as a defense regarding abuse of process, the Claimants assert that their BIT, FIL and Contract based claims are different, but when they argue that the statute of limitations was interrupted they assert that those claims are identical (Respondent's Reply Post-Hearing Brief, para. 44).

b. The Claimants' position

352. It is the Claimants' position that their claims do not constitute an abuse of process. The Claimants' first argument in support of their position is that the Respondent has the burden of proving any alleged abuse of process, it being recalled that the applicable threshold is very high and that tribunals in investment arbitrations have only very rarely upheld abuse of process objections, namely in very specific circumstances, typically involving fraud, misrepresentation or bad faith, such as the involvement of mock or puppet investors, last-minute artificial corporate restructuring for the sole purpose of internationalizing a dispute or asserting specific rights and protections before a particular dispute settlement body, or even fraudulent transactions. For the Claimants, the Respondent has not satisfied its burden of proof regarding its abuse of process defense.

353. In particular, the Respondent has not proven that the abuse of process doctrine applies to this type of proceeding, and the Claimants submit that it does not: there is no general basis (neither in the ICSID Convention, nor in the FIL, nor in the Contract) for denying jurisdiction or rendering an investor's claim inadmissible on the basis of non-textual grounds, such as the abuse of process doctrine.

354. In any event, the Claimants point out that, in the exceptional cases where tribunals have applied the abuse of process doctrine in international proceedings, this was done to bar the exercise of an existing jurisdiction and not to bar the existence of the tribunal's jurisdiction.

355. Concerning in particular the *Cementownia* and *Europe Cement* cases relied upon by the Respondent, the Claimants argue that the circumstances of the present case are materially different and do not warrant a finding of abuse of process. The Claimants recall, among other facts, that Mr. Devincci Hourani has been a US national since 2001 and a majority shareholder in CIOC since 2004, i.e. years before the present dispute arose. In addition, the Claimants insist that their good faith is presumed.

356. Moreover, the doctrine's application must be supported by positive authority. It must be applied restrictively as it clashes with an ICSID tribunal's mandatory obligation to exercise its jurisdiction when it exists. (Defense on Jurisdiction, paras. 206-212 and 259-270; Claimants' Reply Post-Hearing Brief, para. 7).

357. Second, the Claimants argue that the Respondent's abuse of process defense on the basis of "serial pleadings" must be dismissed, because (i) the Contract provided

for and anticipated multiple proceedings on jurisdiction (indeed Article 27.3 of the Contract allows the Parties to re-litigate the matter in the event of a negative finding on jurisdiction with respect to claims asserted before an ICSID tribunal). The Respondent itself endorsed the Contract's dispute resolution mechanism during the *Caratube I* arbitration (Defense on Jurisdiction, paras. 214-215); (ii) neither the ICSID Convention, nor the FIL, nor the Contract, preclude the Claimants from bringing the present claim. The Claimants point to the *Petrobart* case where the tribunal allegedly rejected a similar defense (Defense on Jurisdiction, paras. 228-229); (iii) the concept of "improper claim splitting" or "serial proceedings" does not apply in investment arbitration. The rule in *Henderson v Henderson*, relied upon by the Respondent, has never been applied in investment arbitration. In the rare occasion that is has been applied in commercial arbitration, this was done by domestic enforcement or annulment courts (in countries that recognize this rule) and not by the arbitral tribunal, it being specified that the application of this rule is in any event wholly discretionary. Moreover, the Respondent cannot rely on the *RSM et al v Grenada* case in support of its position, as this case is completely irrelevant in that it did not address the question of abuse of process on the basis of "serial proceedings" (Defense on Jurisdiction, paras. 216-227); (iv) the present case in any event falls outside the scope of application of the *Henderson v Henderson* rule, were it found to be applicable. According to the Claimants, the rule commands a party to submit its entire case before a court of competent jurisdiction. However, the *Caratube I* tribunal found that it did not have jurisdiction based on Article VI(8) of the US-Kazakhstan BIT. Furthermore, it is established that a dismissal of a claim for lack of jurisdiction does not prejudice underlying rights, which may be asserted in separate proceedings (Defense on Jurisdiction, paras. 230-234); (v) there can be no abuse of process as the Claimants had not asserted claims under the FIL and the Contract in the *Caratube I* arbitration, nor have they waived their right to do so in subsequent proceedings (which was confirmed by the *Caratube I ad hoc* committee). The Claimants point out in this respect that ICSID tribunals (e.g. the *CME* tribunal) have rejected the existence of abuse of process and allowed parallel proceedings relating to the same claims but brought on the basis of different legal instruments. Moreover, there is no risk of conflicting outcomes in the present case, as the *Caratube I* arbitration was not brought on the basis of the Contract or the FIL and Mr. Devincci Hourani was not a party to that arbitration (Defense on Jurisdiction, paras. 235-242); (vi) in any event, "claim splitting" applies only to claims, and the question of whether a particular claim is a new or a same one depends upon whether a new right is asserted in that claim. According to the Claimants, the

present arbitration concerns a new right (that is to settle the dispute between CIOC and Mr. Devincci Hourani, on the one hand, and Kazakhstan, on the other hand, under the Contract and the FIL), and this new right was not asserted before the *Caratube I* tribunal (Defense on Jurisdiction, paras. 243-245); and (vii) in any event, the Respondent did not show any evil intent to abuse on the part of the Claimants. In the *Caratube I* arbitration the Respondent raised its jurisdictional objection to CIOC's BIT claim (which the Claimants had brought in good faith) only in its Counter Memorial and thus prevented CIOC from presenting an alternative jurisdictional basis in that arbitration, it being observed that the introduction of an alternative jurisdictional basis at that late stage of the proceedings, in any event, would not have been rational, fair or cost-effective. The Claimants explain that Mr. Devincci Hourani's withdrawal of his BIT claim was motivated exclusively by a concern to allow this arbitration to proceed to the merits without any interruptions and time-consuming debates on *res judicata* issues. Furthermore, the Claimants – not the Respondent - are the ones carrying the burden of this second arbitration in that they have sustained further delay in securing an award on the merits and compensation and are shouldering the costs of this arbitration (Defense on Jurisdiction, paras. 246-254; Claimants' Reply Post-Hearing Brief, paras. 8-9).

358. Third, the Claimants submit that the Respondent's abuse of process defense on the basis that Mr. Devincci Hourani's investment lacks *bona fides* must be rejected. In response to the Respondent's argument, according to which the *Caratube I* tribunal has already found that Mr. Devincci Hourani did not make an investment in CIOC and, as a result, Mr. Devincci Hourani is engaging in an abuse of process by bringing this arbitration, the Claimants stress that the question of the existence of an investment is different from the question of abuse of process. If this Tribunal finds that Mr. Devincci Hourani has not made an investment, such finding does not entail a finding of abuse of process. However, if this Tribunal finds that it has jurisdiction, it must at the same time reject the Respondent's abuse of process allegations (Defense on Jurisdiction, paras. 255-257; Claimants' Reply Post-Hearing Brief, para. 10). In relation with the Respondent's abuse of process doctrine, but also more broadly with regard to the Respondent's argument that jurisdiction must be denied for lack of a *bona fides* investment and lack of actual control within the meaning of Article 25(2)(b) of the ICSID Convention, the Claimants aver that Mr. Devincci Hourani is a *bona fide* investor and that the Claimants' investment is also *bona fide*.

359. First, the Claimants point out that the Respondent's theory that Mr. Devincci Hourani is a mere puppet fronting for his brother Mr. Issam Hourani has evolved since the *Caratube I* arbitration, where the Respondent alleged that the Houranis had obtained ownership of CIOC via corporate raids and bullying, using their influence and relations with Mr. Aliyev, and suggesting that Mr. Devincci Hourani was fronting for Mr. Aliyev (Defense on Jurisdiction, paras. 273-274).

360. Second, the Claimants submit that the Respondent has not explained why Mr. Devincci Hourani would front for his brother Mr. Issam Hourani, and why, if CIOC belonged to Mr. Issam Hourani since the outset, there would have been a need to change the legal ownership from Mr. Fadi Hussein to Mr. Devincci Hourani, it being specified that both are foreigners for purposes of the ICSID Convention (Defense on Jurisdiction, para. 275).

361. Third, the Claimants allege that the Respondent's theory of Mr. Devincci Hourani acting as a frontman is not supported by any evidence. For instance, the Respondent relies on the unsubstantiated personal opinion of Ms. Natalya Galantsova, a former employee of the Almaty Prosecutor's Office, who has never worked for CIOC but for a company owned by Mr. Kassem Omar, Universal Oilfield Supply Holdings LLP, during the limited time period between March 2007 and February 2008. The Claimants further point to the "unsubstantiated insinuation" by the Respondent that the share transfer agreement, whereby Mr. Devincci Hourani acquired CIOC's shares for USD 6,500, may well never have been perfected. These insinuations are wrong and do not prove the Respondent's allegations of abuse of process. The Claimants point out that, at the relevant time, the Respondent acknowledged Mr. Devincci Hourani's status as CIOC's shareholder. For instance, on 7 July 2004, the Almaty Department of Justice re-registered CIOC, following Mr. Devincci Hourani's acquisition in May 2004 of 85% of CIOC's shares. Moreover, the Almaty Department of Justice once again re-registered CIOC in June 2005, shortly after Mr. Devincci Hourani acquired further 7% of CIOC's shares from Mr. Waheeb Antakli in April 2005. The Claimants stress that this Tribunal is not bound by determinations made *obiter dicta* (and on the exclusive basis of the BIT) by the *Caratube I* tribunal in relation to any alleged doubts as to Mr. Devincci Hourani's *investment* (as opposed to his ownership of the shares, which was never contested) in CIOC. Rather, this Tribunal must make its own determinations of fact and law based on the evidence before it (Defense on Jurisdiction, paras. 276-289).

362. The Claimants further underline that it is overly simplistic to argue, as does the Respondent, that Mr. Devincci Hourani paid merely USD 6,500 for his shares in CIOC, only to now claim USD 1 billion. The Claimants stress, *inter alia*, that they invested tens of millions of US Dollars during Mr. Devincci Hourani's ownership of CIOC, in a speculative, risky and high-return petroleum industry subject to extensive and costly obligations (Defense on Jurisdiction, paras. 290-291).

363. Moreover, for the Claimants, the fact that the money ultimately invested by CIOC was borrowed from JOR is irrelevant, as it is generally recognized in ICSID case law that a loan is an investment, and investing through loans is common practice. It is undisputed that the loans from JOR to CIOC exist and were used by CIOC for the purposes of the investment in dispute. There was nothing irregular or irrational about these loans, it being further specified that the loans were not interest-free. Rather, the Claimants point out, among other facts, that the interest rate of 14% provided for in the loan agreement of 2 December 2002 was later replaced and secured by a personal guarantee by Mr. Devincci Hourani (see Exhs. C-373, C-155 and C-158). As regards the loan of USD 25 million (which was never drawn), it must be taken into consideration, *inter alia*, that it was entered into at a time when JOR and CIOC were controlled by the same brothers-in-law and when the need for the loan was merely prospective. The fact that no interest was provided for with respect to this loan is in any event irrelevant. What matters is the undisputed fact that a USD 15 million loan was genuinely contracted, drawn and spent for purposes of the investment, and this was disclosed, known and approved by the Respondent (Defense on Jurisdiction, paras. 292-301). The Claimants also reject the Respondent's allegation that the loan agreement of 2 December 2002 shows that CIOC was actually controlled by JOR. To the contrary, the provisions in the agreement with which the Respondent takes issue (and which constitute boilerplate clauses) confirm the *bona fide* nature of the transaction (Defense on Jurisdiction, para. 302).

364. For the Claimants, the patent typographical errors in the agreement dated 1 June 2004 (Exh. C-155), pointed out by the Respondent, have no impact as the agreement clearly defines Mr. Devincci Hourani on behalf of CIOC as the borrower and JOR as the lender. Moreover, the reference to a meeting dated 25 November 2006 is the result of a desire for full transparency rather than bad faith. The Claimants point out that a meeting did in fact take place on 25 November 2006 between Mr. Devincci Hourani, on behalf of CIOC, and JOR. During this meeting,

the reimbursement of the loans granted by JOR was discussed, as well as JOR's renunciation of interest in exchange for a personal guarantee of the payment by Mr. Devincci Hourani. JOR has claimed reimbursement of the loan and, by way of an agreement between JOR and Mr. Devincci Hourani dated 2 December 2014 (Exh. C-372), on 21 February 2015 Mr. Devincci Hourani has started reimbursing by paying USD 3 million (Defense on Jurisdiction, paras. 303-306).

365. For the Claimants, the Respondent's allegation that Mr. Devincci Hourani had no know-how or expertise to offer CIOC is irrelevant. In particular, a contribution by Mr. Devincci Hourani of know-how or expertise is not required to satisfy the investment test and investors need not have direct knowledge or expertise in the industry at hand in order to qualify as investors (Defense on Jurisdiction, para. 307).

366. Fourth, the Claimants insist that Mr. Devincci Hourani is no sham investor, but acquired the CIOC shares in 2004 and 2005 (i.e. 3 years before the dispute arose) and obtained the US nationality in 2001 (i.e. 6 years before the dispute arose). The Claimants are thus not attempting to unduly fall within ICSID jurisdiction (Defense on Jurisdiction, para. 309).

367. Fifth, the Claimants assert that Mr. Devincci Hourani was an occupying executive and always played an active or apparent role as an investor with the full knowledge of the Respondent, it being pointed out that this is not a requirement under the ICSID Convention. The Respondent cannot claim *ex post facto* that Mr. Devincci Hourani did not have the right to be a Director of CIOC because he held a business visa that does not allow employment. The Respondent knew at the time that Mr. Devincci Hourani was CIOC's Director and, in any event, the Respondent's allegation is not supported by any evidence, but is based solely on the allegations of Ms. Galantsova. The Respondent's allegation is further contradicted by Article 7.1.13 of the Contract and Article 25(1) of the FIL, which allow CIOC to hire foreign personnel (Defense on Jurisdiction, paras. 310-315).

368. Sixth, the Claimants underline that the present dispute was international from day one. Therefore, the assignment of the Contract to CIOC and Mr. Devincci Hourani's acquisition of CIOC's shares did not internationalize the dispute or create any new rights. This also means that Mr. Devincci Hourani's alleged fronting for JOR would not have created a new ICSID jurisdiction because this jurisdiction would have existed in any event under the FIL or the Contract as CIOC would have been

controlled by a foreign national all the same (Defense on Jurisdiction, paras. 316-320).

369. Seventh, the Claimants submit that the *Saba Fakes* case must be distinguished in several regards, including in light of the fact that Mr. Devincci Hourani was known to the Respondent at all material times and blessed as a foreign investor (not only in CIOC, but also in other oil projects and other strategic industries), including by President Nazarbayev and his daughter, Ms. Dariga Nazarbayeva, until the dispute arose (Defense on Jurisdiction, paras. 321-325).

370. Eighth and finally, the Claimants argue that even if it were admitted *arguendo* that Mr. Devincci Hourani acted as a puppet, this would not allow the Tribunal to dismiss jurisdiction, in the absence of a showing that it was done at the time the dispute arose to gain access to ICSID jurisdiction. The Claimants repeat that Mr. Devincci Hourani has been a US national and majority shareholder of CIOC since well before the present dispute (or even the probability of a dispute) arose (Defense on Jurisdiction, paras. 326-330).

c. Analysis

371. The Tribunal is faced with the preliminary questions whether it has the authority to apply the doctrine of abuse of process and, if so, how it should apply this doctrine in the circumstances of the present case.

372. Regarding the first question, the Parties do not seem to dispute the general premise that the abuse of process doctrine may be applied by international tribunals in order to preserve the integrity of the tribunal and avoid the abuse by one party of the arbitral procedure.

373. However, the Claimants submit that the abuse of process doctrine cannot be relied upon by an international tribunal as the sole basis for dismissing an entire case for lack of jurisdiction. In other words, the doctrine of abuse of process does not apply in situations where a respondent requests the tribunal to deny jurisdiction or declare a claim inadmissible. Rather, an international tribunal may only decline to *exercise* a jurisdiction that it has assumed, because it considers that the arbitral process is being abused to the extent that it would be improper to proceed to hear the merits of the dispute. In support of this position, the Claimants rely *inter alia* on the *Pac Rim* decision on jurisdiction, quoting the following passage (Exh. CLA-225, para. 2.10):

> [T]he Respondent's jurisdictional objection based on Abuse of Process by the Claimant does not, in legal theory, operate as a bar to the existence of the Tribunal's jurisdiction; but rather, as a bar to the exercise of that jurisdiction, necessarily assuming jurisdiction to exist.

374. It is observed that the *Pac Rim* tribunal then added: "For present purposes, the Tribunal considers this to be a distinction without a difference".

375. The Tribunal agrees that the distinction made by the Claimants is irrelevant in the present case, given that the Respondent in any event has not established the existence of an abuse of process by the Claimants to the point of convincing this Tribunal that it would be improper for it to assume or exercise its jurisdiction over the dispute brought before it. In reaching this conclusion the Tribunal has considered the following elements:

376. First, the Tribunal agrees that the general principle of the prohibition of abuse of process applies in the context of multiple proceedings before international tribunals. The Respondent has invoked as legal bases for the application of the abuse of process doctrine, *inter alia*, Article 41 of the ICSID Convention (according to which the Tribunal is the judge of its own jurisdiction) and Article 44 of the ICSID Convention (which grants broad procedural powers to the Tribunal to conduct the arbitration proceedings). Moreover, the Respondent has invoked several general principles of international law, such as the principles of good faith and the prohibition of abuse of right. In the opinion of the Tribunal, the application of the abuse of process doctrine may be based on the Tribunal's power to determine the conduct of the arbitration proceedings and the principles regarding the Parties' general obligation to participate in the proceedings in good faith and not abuse the rights granted to them, for example the right to rely on an arbitration agreement to commence an arbitration.

377. Second, regarding the specific content of the abuse of process doctrine, both Parties have referred among other sources to both the Interim and the Final Reports on *Res Judicata* and Arbitration by the International Law Association ("**ILA**").[30] With respect to the abuse of process doctrine, the Tribunal refers to the ILA Interim Report on *Res Judicata* which states that "[i]nternational law recognizes a doctrine

[30] The Tribunal observes that the ILA Reports on *Res Judicata* and Arbitration apply only to international commercial arbitration (CLA-176, para. 17). However, with respect to investment arbitration (in particular BIT arbitrations), the Final ILA Report states that "the Recommendations may still have some indirect relevance for BIT arbitrations". The Parties seem to agree with this statement as they have both relied on the ILA Reports in support of their respective positions. Therefore, the Tribunal deems appropriate to rely on these Reports for the purposes of the present Award.

of abuse of process, but it is extremely rarely applied" (Exh. RL-36, p. 60). Moreover, in the ILA Final Report on *Res Judicata*, the ILA International Commercial Arbitration Committee expressed its preference for a cautious approach to the abuse of process doctrine (CLA-176, para. 60):

> The Recommendations have also chosen a cautious approach to procedural unfairness or abuse. In arbitration, party autonomy to a large extent reigns and parties and their counsel should be given wide discretion in determining their strategies. Costs, psychological influences, relational elements, cross-cultural considerations, persuasiveness, political constraints and other aspects may be responsible for not instituting certain claims or for not raising certain causes of action or issues of fact or law, and caution is in order to avoid res judicata amounting to a patronizing review of what parties and counsel ought to have done in managing their case.

378. This cautious approach is reflected in international law and practice and the Parties do not dispute that the abuse of process doctrine is only rarely applied by international tribunals and subject to a high threshold to prove an abuse of process. In particular, the Parties do not seem to dispute that there has been no case to date where an investment arbitral tribunal qualified as abusive the assertion of related claims in multiple proceedings (RL-40, para. 7.30). Professor Lowe confirms that the fact of bringing multiple proceedings as such does not constitute an abuse of process. According to this author "[the] [abuse of process] doctrine arises not from the fact of multiple proceedings but rather from the inherently vexatious nature of the particular proceedings in the forum" (Exh. CLA-233, pp. 202-203).

379. Against this background, the Tribunal finds that it is not enough to argue for the purposes of applying the abuse of process doctrine that a claimant could have asserted a particular claim already in earlier proceedings. The assertion of a particular claim that could have been raised in another or earlier arbitration proceeding must also qualify as abusive. In this regard, it is worth mentioning that the doctrines of *res judicata* and collateral estoppel are built on the general premise that a party is not precluded from asserting, but rather has the right to raise a claim or issue in further or other proceedings where that claim or issue has not already been finally decided between the same parties in an earlier decision, under pains of suffering a denial of justice. In this respect, it is worth mentioning that many civil law countries do not generally recognize the abuse of process doctrine, but may subscribe to a doctrine of abuse of right (Exh. RL-36, p. 50). For the Tribunal, this further confirms the cautious approach to the abuse of process doctrine, focusing not on the fact of multiple proceedings or on whether a particular claim or issue

could have been raised in earlier proceedings, but on whether the assertion of such particular claim or issue in further proceedings constitutes an abuse.

380. For the Respondent, CIOC could have raised its FIL and Contract claims in the *Caratube I* arbitration and Mr. Devincci Hourani could have been a party already to that arbitration. But the Claimants deliberately chose not to raise all of their claims in the *Caratube I* arbitration for no reason other than to preserve such claims for a future, serial and abusive action.

381. While the Tribunal would be minded to agree that the Claimants could have raised their claims already in the *Caratube I* arbitration, it is not persuaded that the Claimants deliberately omitted to raise the entirety of their claims in the *Caratube I* arbitration in a bad faith attempt to preserve such claims for further arbitration proceedings should the *Caratube I* arbitration not go in their favor and to misuse this Arbitration to get a second bite at the cherry.

382. The Claimants give several explanations to reject any allegations of abuse of process. For instance, they explain that CIOC in good faith initiated the *Caratube I* arbitration under the BIT only, being convinced that jurisdiction existed under that instrument and that it was therefore not necessary to raise the FIL and Contract as alternative bases for jurisdiction. The Claimants further note that when the Respondent in the *Caratube I* arbitration raised a jurisdictional defense in its counter memorial, it was no longer possible to amend the claim to introduce an alternative jurisdictional basis. For the Claimants, it was also not rational, fair or efficient to file separate proceedings in parallel to the *Caratube I* arbitration. The Claimants point out that it is them, not the Respondent, who have paid for the *Caratube I* and the present Arbitration.

383. In the opinion of the Tribunal, the fact that the Claimants raised their FIL and Contract claims only in this Arbitration and not already in the *Caratube I* arbitration does not amount as such to an abuse of process. For the Tribunal, there is not sufficient evidence to show that the Claimants deliberately withheld claims in a bad faith attempt to get a second bite at the cherry by bringing serial, vexatious and abusive proceedings against the Respondent. Raising all potential jurisdictional bases against the Respondent in the *Caratube I* arbitration likely would have significantly increased the costs of that earlier arbitration, which were borne by

CIOC. CIOC thus had a legitimate strategic interest in not raising claims that it deemed unnecessary.[31]

384. The Respondent further argues that the Claimants committed an abuse of process by asserting jurisdiction based on Mr. Devincci Hourani's alleged investment in CIOC when the *Caratube I* tribunal has already found that Mr. Devincci Hourani did not make an investment in CIOC within the inherent meaning of that term. According to the Respondent, Mr. Devincci Hourani is nothing more than a frontman and his acquisition of CIOC was devoid of good faith. For the Respondent, the present Arbitration therefore constitutes an abuse of the ICSID system.

385. Again, the Tribunal cannot follow the Respondent's line of argument. Rather, the Tribunal agrees that the question of the existence of an investment is different from the question of the existence of an abuse of process. Even if this Tribunal were to conclude that Mr. Devincci Hourani did not make an investment in CIOC, it does not necessarily follow that the Claimants committed an abuse of process by bringing this Arbitration on the basis of Mr. Devincci Hourani's alleged investment in CIOC. Accordingly, in the opinion of the Tribunal, the relevant question is whether the Claimants rely in this Arbitration on the existence of an alleged investment in order to obtain access to ICSID arbitration in a way that qualifies as abusive. The Tribunal considers that this is not the case, in particular for the following reasons.

386. First, the *Caratube I* tribunal examined whether CIOC satisfied the requirements of Article VI(8) of the BIT, defining the applicable test as follows (Exh. CLA-8, para. 361):

> Thus, in the circumstances of the present case, the conditions in Article VI(8) for treating CIOC as a U.S. company require that:
>
> a) CIOC is a company legally constituted under the applicable laws and regulations of Kazakhstan;
>
> b) it is an investment of a U.S. national, where:
>
> i. "investment" is defined in Article I.1(a) [of the BIT] and requires evidence of:
>
> 1. ownership or control by a U.S. national,

[31] The Tribunal has noted the Respondent's request that the Tribunal declare Mr. Devincci Hourani's withdrawal of his BIT claims as having been with prejudice (Counter Memorial, para. 131). The Tribunal has also noted the Claimants' response to this request (Defense on Jurisdiction, para. 248). The Tribunal agrees that the question of whether the abuse of process doctrine should prevent Mr. Devincci Hourani from reintroducing his BIT claims before a new tribunal is to be decided by such new tribunal.

> 2. being an investment (an economic arrangement requiring a contribution to make profit, and thus involving some degree of risk),
>
> ii. the U.S. nationality is determined under the U.S. law;
>
> c) conditions defined in sub-section (b) were present immediately before the occurrence of the events that give rise to the dispute.

387. The *Caratube I* tribunal did not analyze the existence of an investment for the purposes of access to ICSID jurisdiction under the Contract and/or the FIL. In its Decision on the Annulment Application of Caratube International Oil Company LLP the *ad hoc* Committee held as follows (Exh. CLA-127, para. 300):

> On June 5, 2013, CIOC and Mr. Hourani initiated a new ICSID arbitration against the Republic of Kazakhstan, involving the Contract. A question which may arise in that proceeding is whether, when applying the Contract, CIOC should be considered a national of another ICSID Contracting State for the purposes of access to ICSID jurisdiction. That is a question for the new ICSID tribunal to determine. Any issue on the meaning and interpretation of the Contract is beyond the scope of decision of the original ICSID Tribunal (and of this Committee).

388. The same considerations apply *mutatis mutandis* with respect to the question of the existence of an investment for the purposes of access to ICSID jurisdiction under the Contract and/or the FIL. Therefore, this Tribunal finds that the Respondent cannot argue that the Claimants initiated the present arbitration based on the alleged existence of an investment under the Contract and/or the FIL when they knew that no such investment existed. The *Caratube I* award did not finally decide that no investment for the purposes of access to ICSID jurisdiction existed, including under the Contract and/or the FIL. The *ad hoc* Committee's decision confirms that the Claimants could believe in good faith that this Tribunal would have the authority to decide such questions. Therefore, the Tribunal finds that the initiation of the present Arbitration on the basis of the Contract and the FIL does not qualify as abusive.

389. Second, the evidence on the record does not establish that the Claimants planned to make the alleged investment for the sole purpose of gaining access to ICSID jurisdiction and, e.g., not for the purpose of engaging in commercial activity. In particular, the Tribunal finds that the Respondent has not sufficiently established that Mr. Devincci Hourani was merely a frontman for the real parties in interest, namely JOR and the persons controlling JOR, and was placed in the position as CIOC's majority shareholder only for the purpose of obtaining access to ICSID jurisdiction. As noted by the Claimants, Mr. Devincci Hourani became a US national

in 2001 and the majority shareholder in CIOC in 2004, several years before the termination of the Contract and the initiation of ICSID arbitration proceedings against the Respondent. It is not disputed that Mr. Devincci Hourani and his position in CIOC has always been known to the Respondent. It is also not disputed that the Almaty Department of Justice re-registered CIOC on 7 July 2004 (Exh. C-361) and on 28 June 2005 (Exh. C-362) following the acquisition by Mr. Devincci Hourani of CIOC's shares and the approval of this acquisition by the general meeting of shareholders.

390. The Respondent has raised doubts as to the legality of Mr. Devincci Hourani's acquisition of the US nationality. Indeed, the Respondent requested this Tribunal to draw negative inferences from Mr. Devincci Hourani's failure to produce certain naturalization documents and to conclude that Mr. Devincci Hourani obtained his US nationality illegitimately on the basis of false statements, namely that he was married at the time of his naturalization. The Tribunal has noted the explanations given by the Claimants with respect to their efforts to obtain, albeit unsuccessfully, the requested naturalization documents, as well as their comments regarding the relevance and merits of the Respondent's request for negative inferences.

391. The Tribunal agrees that in the circumstances of the present Arbitration the Respondent's request for negative inferences is not justified. The Tribunal does not have the power to decide that Mr. Devincci Hourani illegally obtained the US nationality and, thus, should not have obtained this nationality in 2001.The Tribunal agrees that this matter is for the competent US authorities to decide. However, the Tribunal finds that it may consider whether it must recognize Mr. Devincci Hourani's US nationality and consider him as a US citizen for the purposes of the present Arbitration. The Tribunal finds that this is the case.

392. The Respondent did not contest or express any doubt as to the legality of Mr. Devincci Hourani's US nationality in the *Caratube I* arbitration (Exh. CLA-8, para. 378). While the alleged discrepancies in Mr. Devincci Hourani's naturalization documentation are indeed peculiar, they do not suffice to persuade the Tribunal to draw the consequences that the Respondent is asking it to draw, namely to decline jurisdiction on all of the Claimants' claims on the ground that the Claimants have not established the legality of Mr. Devincci Hourani's US nationality. Even admitting that proof of the legality of the acquisition of a given nationality is required under the ICSID Convention (which the Respondent has not established and which the Claimants deny), the Tribunal accepts the Claimants' explanations as to their failure

to obtain and produce the requested naturalization documents. Therefore, the Tribunal denies the Respondent's request for negative inferences. As a result, it cannot conclude that the Claimants are abusively relying on Mr. Devincci Hourani's US nationality, knowing that such nationality has been obtained fraudulently, in order to gain an undue access to ICSID jurisdiction.

393. The Respondent has also raised doubts regarding the reality of Mr. Devincci Hourani's shareholding and control in CIOC, arguing that the latter obtained the shares in CIOC for the "nominal price" of only USD 6,500, without there being any evidence that even this nominal amount was ever paid and the share transfer to Mr. Devincci Hourani thus perfected. In this respect, the Respondent questions whether the notarized documents relating to the share transfer agreement were forged by the notary, Mr. Ostroy.

394. Based on the evidence on the record and the respective arguments of the Parties, the Tribunal has not seen evidence that would allow it to conclude that the share transfer agreement was forged and that in 2004 Mr. Devincci Hourani was constituted as majority shareholder in CIOC (whether or not he did actually pay USD 6,500 for the shares) in a bad faith attempt to obtain an undue access to ICSID jurisdiction should the need for such jurisdiction arise at some yet unknown time in the future.

395. Based on the foregoing, and in light of the fact that the Tribunal has found that it must adopt a cautious approach when applying the abuse of process doctrine and a high threshold regarding the burden of proof, the Tribunal concludes that the Respondent has not convincingly shown that the Claimants are committing an abuse of process by asserting their claims based on the Contract and the FIL in this Arbitration. As a result, the Tribunal finds that it cannot dismiss the Claimants' claims based on the abuse of process doctrine. The Respondent's request in this regard is therefore denied.

2. Statute of limitations

a. The Respondent's position

396. It is the Respondent's position that all of the Claimants' claims under the FIL, the Contract and customary international law are time barred as a matter of Kazakh law and thus inadmissible. Even though the Claimants could have brought their

customary international law, FIL and Contract claims already in the *Caratube I* arbitration, they filed those claims for the first time on 5 June 2013 with the submission of the Claimants' Request for Arbitration.

397. The Respondent relies on Article 178(1) of the Kazakh Civil Code (Exh. RL-43), according to which "[t]he general term of the statute of limitations shall be three years". This provision applies to the Claimants' claims as per Article 177(1) of the Civil Code in that those claims arise out of the alleged violation of the Claimants' rights or interests protected by law. The Respondent argues that the statute of limitations has started to run from the moment the Claimants learned or should have learned of the alleged violation of their rights under the FIL, the Contract and even customary international law, in conformity with Article 180(1) of the Kazakh Civil Code (Counter Memorial, paras. 161-165).

398. The Respondent notes that it is not disputed that the Claimants received the notification of the termination of the Contract on 11 February 2008 (Exh. C-44 and C-45; Counter Memorial, para. 166). Therefore, the Claimants learned of the alleged violation of their rights under the Contract on that date at the latest. Consequently, the three-year statute of limitations for CIOC's claims under the Contract expired on 11 February 2011, i.e. prior to the submission of the Request for Arbitration on 5 June 2013 (Counter Memorial, paras. 166-167).

399. Concerning the alleged violations of rights under the FIL and customary international law, the Respondent argues that the Claimants rely in this regard on the termination by the Respondent of the Contract, on the one hand, and on the alleged interference by the Respondent with the Claimants' alleged investment, as well as the alleged harassment against the Claimants between June 2007 and April 2009, on the other hand. It is the Respondent's position that the applicable statute of limitation for such claims expired in April 2012 at the latest (Counter Memorial, para. 168).

400. In further support of their position, the Respondent draws the Tribunal's attention to the fact that the Claimants' statements in this arbitration prove that they knew about the relevant acts underlying the alleged violations of the Claimants' rights under the FIL, the Contract and customary international law at the time of the occurrence of these acts, and the Claimants themselves have stated that "the dispute between the Parties exists since June 2007" (Counter Memorial, para. 169).

401. In response to the Claimants' argument that domestic time-bar principles do not apply in international arbitration, the Respondent argues that the cases relied upon

by the Claimants are inapposite. Rather, these cases support the application by this Tribunal of time-bar principles. Furthermore, the Claimants' claims involve breaches of national law; they are Kazakh law claims based exclusively on the FIL and the Contract. Even the Claimants' customary international law claims are based on the Kazakh Constitution and, thus, Kazak law. The Respondent submits that, in any case, the Claimants confirmed at the Hearing that Kazakh law applies in the present case, and the Kazakh statute of limitations therefore must also apply (Respondent's First Post-Hearing Brief, paras. 36-39; Respondent's Reply Post-Hearing Brief, para. 46).

402. The Respondent also rejects the Claimants' argument according to which the Order of Contract Termination (Exh. C-44) was a normative act to which statutes of limitations do not apply. It is the Respondent's position that the Order was not an act of general application, but rather an act of individual application. Therefore, it is not a normative act under Kazakh law (Respondent's First Post-Hearing Brief, para. 40).

403. Contrary to the Claimants' position, the Respondent argues that the statute of limitations was not interrupted: because the *Caratube I* tribunal denied jurisdiction over the Claimants' claims, the initiation of the *Caratube I* arbitration cannot be deemed the filing of a claim in the "established procedure" within the meaning of Kazakh law and thus cannot serve as a basis for interruption of the statute of limitations in this case. In any event, the Claimants are wrong to argue that the interruption of the statute of limitations leads to its suspension for the period of the duration of the arbitral proceedings. Suspension and interruption are "two absolutely different things" under Kazakh law and are regulated by different provisions of the Kazakh Civil Code: Article 183 governs interruption and Article 182 governs suspension. It is the Respondent's case that there are no grounds for suspension in the present case and the statute of limitations would therefore have lapsed on 16 June 2011, i.e. prior to the filing of the present case, even if interrupted by the *Caratube I* arbitration (Respondent's First Post-Hearing Brief, paras. 41-44; Respondent's Reply Post-Hearing Brief, para. 46).

404. Finally, the Respondent rejects the Claimants' argument that this Tribunal could restore the statute of limitations under Article 185 of the Kazakh Civil Code, as none of the necessary conditions are met, including the conditions set out in the Kazakh Supreme Court decisions, e.g. that Article 185(1) applies only to individuals. Similarly, the Respondent also argues that Article 280 of the Kazakh Civil Procedural Code does not apply in the present case and therefore does not allow

this Tribunal to disregard the expiration of the statute of limitations (Respondent's First Post-Hearing Brief, paras. 45-46; Respondent's Reply Post-Hearing Brief, para. 46).

b. The Claimants' position

405. It is the Claimants' position that their claims are not time-barred. The Claimants' first argument is that the Respondent has not satisfied its burden of proving that the Kazakh statute of limitations rules apply in international proceedings. To the contrary, the Claimants submit that it is a well-established principle that domestic statutes of limitations are inapplicable to international proceedings. The *Spader* and *Alan Craig* cases, as well as the ICSID cases referred to by the Claimants, are relevant and confirm the Claimants' position (Defense on Jurisdiction, paras. 179-185; Claimants' First Post-Hearing Brief, paras. 62-63; Claimants' Reply Post-Hearing Brief, paras. 13-17).

406. Even admitting *arguendo* that the Kazakh statute of limitations rules could apply in international proceedings, the Claimants submit that this statute cannot apply to this specific dispute in that it relates to a normative act of Kazakhstan, which is excluded from the scope of the statute of limitations. In particular, the MEMR's Termination Order dated 30 January 2008 (Exh. C-44) constitutes such a normative act. In support of their position, the Claimants rely on legal doctrine and the practice of the Supreme Court of the Russian Federation, whose Civil Code is nearly identical to the Kazakh one and served as the model thereof (Defense on Jurisdiction, paras. 186-187).

407. Alternatively, the Claimants argue that their claims are in any event not time-barred under Kazakh law. The Claimants describe the objectives underlying the statute of limitation rules in the Kazakh Civil Code (in particular Articles 178(1) and 179(3)) as follows:

> (i) to aid in the stabilization of civil relations, elimination of uncertainty in the interactions between the participants of civil relations, and the most prompt resolution of disputes between these parties as regards civil rights;
>
> (ii) to facilitate the determination by judges of the objective truth of the case, and therefore to assist with the rendering of correct judgments; and

(iii) to help strengthen contractual discipline, stimulate the contracting parties' activities and reinforce the mutual control in performing the obligations (Defense on Jurisdiction, para. 190).

408. For the Claimants, applying the Kazakh three-year statute of limitations would be contrary to the statute's stated objectives, considering that the dispute between the Claimants and the Respondent remains unsettled to this day and that the record of this Arbitration is abundant with factual evidence and detailed witness testimony (Defense on Jurisdiction, para. 191).

409. The Claimants also draw the Tribunal's attention to Article 183 of the Kazakh Civil Code which provides for the interruption of the statute of limitation, namely by "the filing of an action in the established order". It is the Claimants' position that the bringing of any claim, including an arbitration claim, falls within the scope of "the filing of an action in the established order". The fact that the *Caratube I* arbitration concerned BIT claims is irrelevant in this respect as Article 183(1) of the Kazakh Civil Code merely speaks of filing an "action in the established order" without specifying that such action must be filed under a certain legal instrument. In any event, the *Caratube I* award also concerned contract claims (Defense on Jurisdiction, paras. 192-195; Claimants' First Post-Hearing Brief, paras. 64-65). The Claimants conclude that the three-year statute of limitations period, which started to run on the date of the termination of the Contract on 30 January 2008, has not lapsed in the present case, because it was interrupted on several occasions as described by the Claimants as follows (Defense on Jurisdiction, para. 196):

> […] since Caratube filed a notice of dispute consenting to ICSID Arbitration on May 8, 2008 and then initiated arbitration proceedings by filing a request for arbitration on June 6, 2008 – well within the general three-year statute of limitations under Kazakh law, assuming it applies – the lapse of the statute of limitations was interrupted on that date (i.e. on May 8, 2008, or on June 6, 2008 at the latest). After the June 5, 2011 Award was rendered and Caratube's claims against the Republic of Kazakhstan undecided by the Tribunal and therefore outstanding, Caratube filed an Application for Annulment on October 3, 2012 (ultimately dismissed on February 21, 2014) and served together with its owner Mr. Devincci Hourani a notice of dispute dated October 18, 2012 for a new claim under the Contract and the FIL. Then on June 5, 2013, both Mr. Devincci Hourani and Caratube filed under these new instruments a Request for Arbitration with ICSID.

410. For the Claimants, the Respondent's distinction between "interruption" and "suspension" under Article 183 of the Kazakh Civil Code, as well as its interpretation of the term "interruption" in the sense of "reset", rather than freezing, must be rejected. The Claimants submit that the Respondent's position would lead to the illogic result that once a claim is filed before a court, if the proceedings last more

than the prescription period of three years, a claimant that has received a negative decision, but still has an actionable claim, would be left in legal limbo (Claimants' Reply Post-Hearing Brief, para. 18).

411. Moreover, the Claimants assert that the Tribunal has discretionary powers under Article 185(1) of the Kazakh Civil Code to extend (restore) the time-bar period. According to the Claimants, despite the wording of Article 185(1), which suggests that it is only applicable to natural persons (i.e. Mr. Devincci Hourani), Kazakh courts (including the Kazakh Supreme Court) have broadly applied this provision also to companies, favoring extensions of the time-bar period, and this interpretation has also been favored by foreign courts. This Tribunal should exercise its discretion to restore the time-bar for both CIOC and Mr. Devincci Hourani (if it were to deem the three-year statute of limitations to be applicable and have lapsed), namely for reasons of fairness and considering the fact that the dispute has not been settled and the Claimants have at all times reacted promptly and diligently. For the Claimants, not doing so would constitute a denial of justice (Defense on Jurisdiction, paras. 201-204; Claimants' First Post-Hearing Brief, para. 66; Claimants' Reply Post-Hearing Brief, paras. 19-20).

c. Analysis

412. The Tribunal is faced with the questions of whether the Kazakh statute of limitations applies to the Claimants' claims and, if so, whether those claims are time-barred under this statute of limitations.

413. The Parties' respective arguments suggest that they view the question of whether the Claimants' claims are time-barred as a matter pertaining to the merits. Indeed, the Parties seem to agree that the Kazakh statute of limitations would not govern the Claimants' claims if such claims had arisen under international law, thus suggesting that the law governing the merits of the claim should also determine the relevant statute of limitations to assess whether such claims are time-barred.

414. That said, the Parties disagree whether the Claimants' claims are international claims (as is argued by the Claimants) or whether they are purely contractual claims, arising under a contract that is governed by a national law, namely Kazakh law, with the result that such contractual claims are governed by the Kazakh statute of limitations (as submitted by the Respondent). As a result, the Parties disagree on the applicable statute of limitations: the Respondent argues that the general three-

year statute of limitations provided under Kazakh law applies. By contrast, the Claimants rely on international law principles set forth in the decisions of international tribunals, including ICSID tribunals.

415. For the reasons set forth in further detail below,[32] a majority of this Tribunal finds that the Claimants' claims sound in expropriation in that the Claimants allege that the Respondent – making abusive use of its sovereign powers and resources – took the Claimants' investment in violation of the Respondent's obligations under international law, the FIL, the Contract and/or Kazakh law. For a majority of the Tribunal, the Claimants' claims do not constitute purely contractual claims to be governed exclusively by Kazakh law. As was seen earlier in this Award,[33] the Tribunal has found that even with respect to claims arising under the Contract and governed by Kazakh law pursuant to Clause 26.1 of the Contract, the Tribunal cannot disregard international law when deciding the present dispute. While this Tribunal will apply Kazakh law to the merits of the dispute as the law chosen by the Parties, in doing so it will inform this choice by the application of customary international law. Such relevant international law rules include principles pertaining to the statute of limitations.

416. The Tribunal finds that its approach is corroborated by international case law. For instance, in the *Alan Craig* case (Exh. CLA-205) the dispute arose out of a contract governed by Iranian law, the claimant requesting certain payments allegedly due under that contract. The Tribunal held that the statute of limitations in the Iranian Code of Civil Procedure was not applicable, holding in relevant part as follows:

> Whether or not Craig's claim comes under Article 740 is an issue which the Tribunal need not resolve. Municipal statutes of limitation have not been considered as binding on claims before an international tribunal, although such periods may be taken into account by such a tribunal when determining the effect of an unreasonable delay in pursuing a claim. See, J. Simpson and H. Fox, International Arbitration 124 (1959). In the Claims Settlement Declaration, the Governments have provided for a period in which claims may be filed (Article III, paragraph 4). In the instant case, there was no unreasonable delay in pursuing the claim. Therefore, even assuming that Craig's claim was covered by the statute of limitations in Article 740, this would not bar the claim in this Tribunal.

417. In the *Wena* case, the dispute arose out of the investment treaty entered into in 1976 between the UK and Egypt. Nevertheless, the case is relevant even for disputes arising out of a contract governed by national law. Indeed, the tribunal

[32] See *infra* paras. 815 et seq.

[33] See *supra* paras. 281 et seq.

found the Egyptian statute of limitations to be inapplicable based on the "well-established international principle […] that municipal statutes of limitation [even if applicable] do not bind claims before an international tribunal (although tribunals are entitled to consider such statutes as well as equitable principles of prescription when handling untimely claims). In particular, the *Wena* tribunal held as follows (Exh. RL-165, para. 107):

> Egypt contends that Article 42(1) of the ICSID Convention mandates that the Tribunal must apply Article 172(i)'s three-year statute of limitation. The Tribunal does not agree. Article 42(1) of the ICSID Convention provides that a Tribunal shall apply domestic law "and such rules of international law as may be applicable." As Wena notes, the decision in the *Amco Asia* case advised that one situation where a tribunal should apply rules of international law is "to ensure the precedence of international law norms where the rules of the applicable domestic law are in collision with such norms." Here, strict application of Article 172(i)'s three-year limit, even if applicable, would collide with the general, well-established international principle recognized since before the *Gentini* case: that municipal statutes of limitation do not bind claims before an international tribunal (although tribunals are entitled to consider such statutes as well as equitable principles of prescription when handling untimely claims).

418. The *Wena* tribunal therefore confirmed the relevance of international law, including with respect to questions of statute of limitations, in cases where a national law would normally be applicable.

419. In the *Interocean* case, the tribunal also found that the Nigerian statute of limitations was inapplicable to the claimant's international law claims arising under the Nigerian Investment Promotion Commission Act, holding in relevant part as follows (Exh. CLA-207):

> 123. The Tribunal has found nothing in the NIPC Act which indicates the time frame for bringing a claim for breach of that Act. Rather, the limits under Nigerian law which have been drawn to the Tribunal's attention address court actions related to contract claims or claims against the government.
>
> 124. Although limits under Nigerian law exist with respect to court actions related to contract claims and court actions against the government, none proves relevant to this arbitration, which relates to violation of international law. By their nature, the Claimants' requests sound in expropriation of property, alleging that the government conspired with Mr. Fadeyi to wrest control of Pan Ocean from its rightful owners.
>
> 125. Of course, no tribunal would look positively on a claim filed after the Claimants had waited unduly, sitting on its rights for an inordinate amount of time. Statutes of "limitation" and of "repose," which cut off certain legal rights if they are not acted on by a certain deadline, are common to many legal systems.

> 126. In this instance, however, the Claimants were anything but "in repose" about their rights. The Respondent does not deny that the Claimants attempted to rectify the perceived wrongs by litigation.

420. In *Barberie v Venezuela*, relied upon by the Respondent, the tribunal also found that "narrow and strict procedures" applied in national courts are not binding on international tribunals. It then referred to the "universally recognized principle" that "a stale claim does not become any the less so because it happens to be an international one". However, the extract cited from the *Barberie v Venezuela* decision by the *Gentini* tribunal does not confirm that an international tribunal must apply domestic statutes of limitation, but rather suggests the application of generally recognized prescription principles. Indeed, quoting the *Barberie v Venezuela* decision, the *Gentini* tribunal confirmed that while domestic statutes of limitation cannot bar international claims, international tribunals may apply equitable prescription principles to dismiss untimely claims (Exh. CLA-204).

421. Based on the foregoing, the Tribunal will therefore take Kazakh law into consideration regarding the question of whether the Claimants' claims are time-barred. However, the Tribunal will not consider itself bound by the provisions in Kazakh law regarding statutes of limitation, but will take them into consideration when applying the international law principle that a claimant must bring its claims within a reasonable time.

422. In the present case, the Tribunal has considered Article 178(1) of the Civil Code of the Republic of Kazakhstan, which provides for a general statute of limitations of three years. Under Article 180(1) of the Kazakh Civil Code, this statute of limitations starts running from the moment a person learned or should have learned that its rights have been violated. As was seen above, for the Respondent, the statute of limitations expired on 11 February 2011 (with respect to CIOC's claims under the Contract) and in April 2012 at the latest (with respect to the Claimants' claims under the FIL and customary international law), i.e. well before the Claimants commenced the present arbitration in June 2013. According to the Respondent, given that the *Caratube I* tribunal denied jurisdiction, the *Caratube I* arbitration proceedings did not interrupt the three-year statute of limitations and, even if it did, the consequence of such interruption would not have been a suspension of the statute of limitations, but rather a reset of the three-year time period, which would then in any event have expired on 16 June 2011, i.e. three years after the filing of the *Caratube I* arbitration. Moreover, for the Respondent, Article 185 of the Kazakh Civil Code does not allow this Tribunal to exercise discretion to restore the statute of limitations because this

provision only applies to physical persons and the requirements set forth in Article 185 are in any event not met. Likewise, the requirements set forth in Article 280 of the Kazakh Code of Civil Procedure, which authorizes courts to disregard the expiration of the statute of limitations in certain situations, are also not met.

423. The Tribunal is not persuaded by the evidence aiming to establish that, under Kazakh law, the three-year statute of limitations would not be interrupted where a claim was filed before a court or (arbitral) tribunal that ultimately (after more than three years) denied jurisdiction over the claim. In particular, having considered the evidence on the record and the Parties' respective arguments, the Tribunal is not persuaded that, under Kazakh law, the legal consequence would be that the claimant in this scenario would thus be time-barred from bringing its claim before the competent court or tribunal, especially in situations where the lack of competence of the first court seized was not manifest and where the claimant initiated the first proceedings promptly and diligently. Moreover, even if this were to be the case, based on the evidence on the record and the respective arguments of the Parties, the Tribunal is not persuaded that Article 185(1) of the Kazakh Civil Code is applied in practice as strictly as its wording might suggest.

424. Be that as it may, as was just stated, this Tribunal does not consider itself bound by the Kazakh statutes of limitations with respect to the Claimants' claims, but will weigh these statutes of limitation against international prescription principles and take them into consideration when assessing the timeliness of such claims.

425. As was submitted by the Claimants (and not disputed by the Respondent), CIOC filed a notice of dispute consenting to ICSID Arbitration on 8 May 2008 and then initiated arbitration proceedings by filing a request for arbitration on 6 June 2008, i.e. within months after the termination of the Contract and thus well within the general three-year statute of limitations under Kazakh law. On 5 June 2011, the *Caratube I* tribunal denied jurisdiction over CIOC's claims and therefore did not proceed on the merits. CIOC filed an Application for Annulment on 3 October 2012, which was dismissed on 21 February 2014. On 18 October 2012, CIOC – together with Mr. Devincci Hourani – served a notice of dispute for a claim under the Contract and the FIL. Finally, on 5 June 2013, both Mr. Devincci Hourani and CIOC commenced the present proceedings by filing a Request for Arbitration with ICSID.

426. With respect to CIOC, the Tribunal finds that CIOC acted promptly and diligently upon learning of the termination of the Contract and initiated the *Caratube I*

arbitration well within the three-year time period provided in Kazakh domestic law. In the words of the *Interocean* tribunal, CIOC was thus anything but "in repose" about its rights and attempted to rectify the perceived wrongs by arbitration. Following the *Caratube I* tribunal's negative award on jurisdiction, CIOC again did not remain idle but initiated annulment proceedings and the present Arbitration within a reasonable time. The Tribunal finds that, in the circumstances of the present case, it would be incompatible with international prescription principles to bar CIOC from bringing the present Arbitration on the basis that the *Caratube I* tribunal took more than three years to deny its jurisdiction, even though CIOC had acted promptly and diligently to initiate the *Caratube I* arbitration on a jurisdictional basis that was not manifestly unfounded.

427. With respect to Mr. Devincci Hourani, for the reasons set forth below, the Tribunal considers that it does not have jurisdiction over Mr. Devincci Hourani's claims under the FIL.[34] Therefore, the question of whether his claims are time-barred does not fall for decision.

3. Collateral estoppel

a. The Respondent's position

428. The Respondent argues that the "Claimants' claims and assertions of ICSID jurisdiction in this Arbitration are premised on the supposition that Devincci Hourani controlled CIOC and that Devincci Hourani made an investment in Kazakhstan. The Caratube I Tribunal thoroughly examined these two issues and explicitly found neither to be true and as a consequence found that it did not have jurisdiction". According to the Respondent, the Claimants' claims must be dismissed on the ground of the principle of collateral estoppel (or issue preclusion/issue estoppel) to prevent the Claimants from attempting to circumvent the legal effects of the *Caratube I* award through the present proceedings (Counter Memorial, paras. 170-171; Respondent's First Post-Hearing Brief, paras. 48-64).

429. It is the Respondent's position that the doctrine of collateral estoppel is "a firmly established 'principle of law applicable in the international courts and tribunals'" (Counter Memorial, paras. 173-176). The Respondent identifies the relevant

[34] See *infra* paras. 689 et seq.

elements of the doctrine of collateral estoppel as follows (Counter Memorial, para. 177):

> A judgment in a prior case gives rise to collateral estoppel if: (a) it was made by a court of competent jurisdiction; (b) it is a final and conclusive decision on the merits; (c) it necessarily decided an issue that is directly or substantially at issue in the current case and (d) the current case involves the same parties or privies of those parties.

430. According to the Respondent, these elements are present in this Arbitration with respect to the findings made by the *Caratube I* tribunal, in particular that (i) Mr. Devincci Hourani did not exert actual control over CIOC, a Kazakh company, such that CIOC can take advantage of Mr. Devincci Hourani's US nationality for the purposes of Article 25(2)(b) of the ICSID Convention; and (ii) Mr. Devincci Hourani did not make a contribution of assets or take a personal risk such that he could be deemed to have made an investment under any "inherent meaning" of that term (Counter Memorial, paras. 178-182).

431. First, for the Respondent it cannot be disputed that the *Caratube I* tribunal was competent, under Article 41 of the ICSID Convention, to decide whether it had jurisdiction over the claims brought by CIOC (Counter Memorial, para. 183).

432. Second, the Respondent submits that the *Caratube I* award was a final and binding decision on the merits for purposes of collateral estoppel, pursuant to Article 53 of the ICSID Convention, and this is corroborated by the ICSID tribunal's decision in *RSM Production Corporation v Grenada* (Exh. RL-39). In any event, the final and binding nature of the *Caratube I* award cannot be questioned because CIOC filed an application for annulment on 2 October 2012 pursuant to Article 52 of the ICSID Convention, and on 2 February 2014 the *ad hoc* Committee upheld the *Caratube I* award and rejected CIOC's application to annul it (Counter Memorial, paras. 184-187).

433. According to the Respondent, an award declining jurisdiction must be considered a final award for the purposes of the collateral estoppel doctrine, and this is corroborated by the ICSID tribunal's decision in *Vivendi II*. It is the Respondent's position that "[w]ithin the context of collateral estoppel, the Caratube I award constitutes a decision on the merits, the jurisdictional conclusions of which should be barred from re-examination by the present Tribunal" (Counter Memorial, paras. 188-189).

434. Third, the Respondent submits that the issues to be precluded were necessarily decided in the *Caratube I* arbitration and are directly at issue in the current case. Indeed, CIOC's claims in the *Caratube I* arbitration were premised on the allegation that the *Caratube I* tribunal had jurisdiction over its claims under Article 25(2)(b) of the ICSID Convention, as well as under the BIT, by virtue of Mr. Devincci Hourani's US nationality. Accordingly, before the *Caratube I* tribunal, the following two central issues were "distinctly put in issue and directly determined", namely whether (i) Mr. Devincci Hourani exerted the requisite control over CIOC as required by Article 25(2)(b) of the ICSID Convention; and (ii) CIOC was an investment of Mr. Devincci Hourani and whether the latter made a contribution or took a personal risk with regard to CIOC. It is the Respondent's position that the same issues are directly and substantially at issue before this Tribunal as they are at the heart of the Claimants' case in this arbitration (Counter Memorial, paras. 190-191; Respondent's First Post-Hearing Brief, para. 48; Respondent's Reply Post-Hearing Brief, para. 47).

435. In this regard, the Respondent notes that the determination of the existence of control pursuant to Article 25(2)(b) of the ICSID Convention must be assessed objectively and thus depends on the facts of the case rather than the instrument upon which consent is based. This means that "the question of control in this case is objectively identical now when CIOC and Devincci Hourani are invoking the FIL and the Contract to what it was when CIOC first invoked the consent in the US-Kazakh BIT". The fact that in the *Caratube I* arbitration the consent-granting instrument was different to the one at issue in this Arbitration is irrelevant according to the Respondent (Counter Memorial, para. 192; Respondent's First Post-Hearing Brief, paras. 50 et seq.).

436. With respect to Mr. Devincci Hourani's claims, the Respondent asserts that "[i]n the context of the analysis of whether Devincci Hourani made an investment under the BIT and the ICSID Convention, the *Caratube I* Tribunal found that any 'inherent meaning' of the term 'investment' necessarily requires that one make a contribution and take risk regardless of whether the term is being interpreted for the purpose of the BIT, the Convention or any other document". The Respondent recalls that the *Caratube I* tribunal found that, as a matter of fact, Mr. Devincci Hourani made no contribution and took no risk (Counter Memorial, para. 193). According to the Respondent, this Tribunal must determine whether Mr. Devincci Hourani made an investment as an objective matter under the ICSID Convention, independently of the alleged consent-granting instrument at issue. Therefore, the exact same questions

that were finally decided by the *Caratube I* tribunal are at issue again before this Tribunal (Counter Memorial, para. 194; Respondent's First Post-Hearing Brief, paras. 50 et seq.). For the Respondent, its position is confirmed by the *RSM v Grenada* case (Counter Memorial, para. 195).

437. Fourth, the Respondent submits that the "identity of party" requirement is satisfied for both of the Claimants in this Arbitration. Concerning Mr. Devincci Hourani, the fact that he was not a party to the *Caratube I* arbitration does not mean that the collateral estoppel effects of the *Caratube I* award do not extend to him, and this is confirmed by the *RSM v Grenada* case. Mr. Devincci Hourani and CIOC are privies for the purposes of the collateral estoppel doctrine, as is apparent from Mr. Devincci Hourani's 92% shareholding of CIOC and also from the mutuality of interests between the two in the outcome of the dispute. Moreover, the Respondent submits that "[b]ecause (i) Devincci Hourani's only alleged indirect investment is the Contract to which CIOC is a party and Devincci Hourani is not and (ii) Devincci Hourani is seeking compensation for damage he contends to have suffered indirectly, through CIOC, for violations of CIOC's legal rights, Devincci Hourani is bound by the adverse determination of the *Caratube I* Tribunal. Furthermore, although Devincci Hourani was not a direct party to the *Caratube I* Arbitration, the *Caratube I* Tribunal was forced to extensively evaluate his standing because CIOC asserted jurisdiction *ratione personae* through his U.S. citizenship. Moreover, *Devincci Hourani* actively participated throughout the *Caratube I* Arbitration. He attended the First Session, presented written statements and attended and was heard by the *Caratube I* Tribunal at the hearing on jurisdiction and merits" (Counter Memorial, para. 199).

438. Finally, the Respondent submits that there is no doubt that CIOC is the same Claimant as in the *Caratube I* arbitration (Counter Memorial, para. 200).

439. The Respondent rejects the Claimants' argument that the *Caratube I* tribunal's findings with respect to "foreign control" cannot be considered as final and binding holdings for collateral estoppel (or *res judicata*) purposes because it was made based on a lack of evidence. According to the Respondent, following the Claimants' position would mean that the *Caratube I* award is an award without holdings. Rather, facts are determined by applying the burden of proof and, once so determined, are used in the holding (Respondent's First Post-Hearing Brief, paras. 55-56; Respondent's Reply Post-Hearing Brief, para. 47).

440. The Respondent also rejects the Claimants' arguments that the *Caratube I* tribunal's holding on Article 25(2) of the ICSID Convention is not a stand-alone finding and that it can in any event not preclude this Tribunal from examining the requirements in Article 25(2) of the ICSID Convention in that the *Caratube I* tribunal's holdings were based on the BIT. The Respondent argues that the *Caratube I* tribunal's reference to "actual control" was taken from the Respondent's reliance on the *Vacuum Salt* award, rather than from the BIT. Moreover, the *Caratube I* tribunal analyzed ownership and control separately and that there is no reference to the BIT in the *Caratube I* award's section on control. The Respondent draws the conclusion that the *Caratube I* tribunal's holding of lack of control was based on Article 25(2)(b) of the ICSID Convention and that this requirement must be met independently of the consent-granting document.

441. In any event, it is the Respondent's position that Articles 25(2)(b) of the ICSID Convention and the BIT have the same control requirement. The factual and legal question of whether Mr. Devincci Hourani had control over CIOC thus remains the same and it was definitely decided by the *Caratube I* tribunal based on the same evidence that is now before this Tribunal. The same applies with respect to the factual and legal question of the existence of an investment based on the conditions of contribution and risk, as they remain the same whether based on the BIT, Article 25(1) or 25(2)(b) of the ICSID Convention, or outside the ICSID framework (Respondent's First Post-Hearing Brief, paras. 58-62).

442. Finally, according to the Respondent, the Claimants' case in this arbitration must fail since they argued that JOR could be the foreign investor that controls CIOC. The Respondent submits that this is a different case that is not before this Tribunal, and the Claimants cannot change their claim for ICSID jurisdiction now to argue that JOR would be the investor that controls CIOC. In any event, the requirements under Article 25(2)(b) of the ICSID Convention would still not be met because of a lack of agreement to treat CIOC as a foreign national (Respondent's First Post-Hearing Brief, para. 63).

b. The Claimants' position

443. It is the Claimants' position that the principle of collateral estoppel does not preclude the Claimants from bringing their claims. In particular, the *Caratube I* tribunal rejected jurisdiction based exclusively on the provisions of the BIT, whereas this arbitration is based on the ICSID clause in the Contract and the FIL. For the

Claimants, this fact alone is reason enough to reject the Respondent's collateral estoppel defense (see Defense on Jurisdiction, paras. 50-71; Claimants' Reply Post-Hearing Brief, para. 24).[35]

444. That said, the Claimants argue that, in any event, the doctrine of collateral estoppel does not apply in investment arbitration and thus in these ICSID proceedings. The sole case relied upon by the Respondent, *RSM et al. v Grenada*, is entirely inapposite because (i) the parties in that case were in agreement as to the application of collateral estoppel, and (ii) it wrongly relied on the *AMCO II* case, which not only did not refer to the collateral estoppel doctrine, but also rejected its application (Defense on Jurisdiction, paras. 76-78). Furthermore, the doctrine is unanimous that the principle of collateral estoppel is not generally recognized and thus difficult to apply on the international level, it being pointed out that the ILA does not recognize it as an applicable principle in international arbitration (Defense on Jurisdiction, paras. 76-80).

445. The Claimants further assert that applying the doctrine of collateral estoppel in an ICSID arbitration would contradict Rule 47 of the ICSID Arbitration Rules, which requires arbitral tribunals to make their own findings of fact, and this has been confirmed by ICSID tribunals (e.g. *SPP v Egypt and Biwater Gauff v Tanzania*) (Defense on Jurisdiction, paras. 81-83).

446. For the Claimants, the application of the collateral estoppel doctrine is especially misplaced in the context of a tribunal's jurisdiction, it being generally accepted in international law that a dispute can be resubmitted to a forum that has jurisdiction and even that the same dispute can be submitted before different tribunals having jurisdiction (Defense on Jurisdiction, para. 84).

447. In addition to the foregoing, the Claimants submit that none of the cumulative conditions for the application of the collateral estoppel doctrine is met in the present case.

448. First, as regards the requirement that the previous judgment be rendered by a court of competent jurisdiction, the Claimants assert that this requirement is not met precisely because the *Caratube I* tribunal denied jurisdiction to hear the dispute (Defense on Jurisdiction, paras. 90-93).

[35] The Tribunal notes that, in their Post-Hearing Briefs, the Claimants examined the Respondent's arguments with respect to collateral estoppel and *res judicata* together in one section.

449. Second, with respect to the requirement that the prior judgment is final and conclusive on the merits, the Claimants submit that the *Caratube I* award is not a final decision on the merits of the dispute or on jurisdiction on the basis of instruments other than the BIT. Moreover, while a negative award on jurisdiction may well be final for purposes of further recourse options against that award, the same is not true with respect to the application of the collateral estoppel or *res judicata* doctrines, which is demonstrated by the fact that a dispute that was dismissed for lack of jurisdiction may be resubmitted to a tribunal of competent jurisdiction (Defense on Jurisdiction, paras. 94-99).

450. Third, regarding the condition that the prior judgment must have necessarily decided an issue that is directly or substantially at issue in the current case, the Claimants argue that the very issues "decided" by the *Caratube I* tribunal fall outside the scope of collateral estoppel. The Claimants specifically reject the Respondent's allegation that this Tribunal's jurisdiction is necessarily premised on the answers to questions that were decided by the *Caratube I* tribunal. The *Caratube I* tribunal did not decide (or "directly determine") – on an objective or independent basis – whether Mr. Devincci Hourani exerted actual control over CIOC as required by Article 25(2)(b) of the ICSID Convention or whether Mr. Devincci Hourani made an investment *as per* the inherent (or objective and independent) meaning of that term, including a contribution and some degree of risk with regard to CIOC. The issue before the *Caratube I* tribunal was whether CIOC, a Kazakh company, qualified as a "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention because of "foreign control". In this respect, the *Caratube I* tribunal was thus requested to examine Article VI(8) of the BIT. According to the Claimants, the *Caratube I* tribunal rejected jurisdiction on the single ground that there was insufficient proof (rather than a substantive failure to meet the requirement) of an investment by Mr. Devincci Hourani in CIOC within the meaning of Article VI(8) of the BIT exclusively (Claimants' First Post-Hearing Brief, paras. 68-92).

451. According to the Claimants, their understanding of the *Caratube I* award was confirmed by the *ad hoc* Committee, which confirmed in relevant part as follows (Claimants' First Post-Hearing Brief, para. 75; this excerpt being already quoted above at paragraph 387):

> On June 5, 2013, CIOC and Mr. Hourani initiated a new ICSID arbitration against the Republic of Kazakhstan, involving the Contract. A question which may arise in that proceeding is whether, when applying the Contract, CIOC should be considered a national of another ICSID

> Contracting State for the purposes of access to ICSID jurisdiction. That is a question for the new ICSID tribunal to determine. Any issue on the meaning and interpretation of the Contract is beyond the scope of decision of the original ICSID Tribunal (and of this Committee).

452. The Claimants submit that, in determining whether CIOC satisfies the "control" requirement under Article 25(2)(b) of the ICSID Convention, this Tribunal should take into account the ICSID arbitration clause in the Contract, which was not at issue before the *Caratube I* tribunal and which creates a presumption of foreign control, as well as the FIL. For the Claimants, this is a different question to those decided by the *Caratube I* tribunal.

453. In any event, it is the Claimants' position that the *Caratube I* tribunal did not deny jurisdiction on the basis of a lack of actual control over CIOC by Mr. Devincci Hourani (Defense on Jurisdiction, para. 114). The question of whether Mr. Devincci Hourani exercised actual control over CIOC was in fact not debated by the Parties or "actually arbitrated" in the *Caratube I* arbitration; it was not essential or fundamental to the *Caratube I* award's dispositif. However, for an issue to successfully give rise to a collateral estoppel, it must be actually debated by the parties (Defense on Jurisdiction, paras. 115-121).

454. The Claimants also argue that the *Caratube I* tribunal did not decide the issue of "actual control", but rather determined that there was not sufficient evidence of actual control. For the Claimants, this is a question of interpreting evidence rather than finally deciding an issue of fact or law. Such interpretational issues cannot have preclusive effects in further proceedings. They are for this Tribunal to make as mandated by the ICSID Arbitration Rules and case law (Defense on Jurisdiction, para. 122; Claimants' Reply Post-Hearing Brief, para. 28).

455. Moreover, the Claimants aver that the *Caratube I* tribunal did not actually decide that Mr. Devincci Hourani had made no investment in the objective sense (i.e. one that involves a contribution or risk) under Article 25(2)(b) of the ICSID Convention, independently of the consent-granting instrument. To the contrary, the *Caratube I* tribunal's findings were made in express reliance on the BIT and its interpretation thereof. This is confirmed by the *ad hoc* annulment committee's decision. According to the Claimants, the Respondent cannot usefully rely on the *Vacuum Salt* case in this respect, as the *Caratube I* tribunal made no mention of this case in its reasoning on actual control. This Tribunal has to decide whether Mr. Devincci Hourani made an investment in Kazakhstan within the meaning of the FIL and the Contract (Defense on Jurisdiction, paras. 123-126).

456. Furthermore, the *Caratube I* tribunal did not finally decide (for collateral estoppel purposes) that Mr. Devincci Hourani had made no contribution or taken any risk, but rather noted a lack of evidence of a contribution or risk. The issue whether Mr. Devincci Hourani had made an investment in CIOC also was not actually arbitrated or pleaded by the Parties in the *Caratube I* arbitration, as is required for the collateral estoppel doctrine to apply (Defense on Jurisdiction, paras. 127-131; Claimants' Reply Post-Hearing Brief, paras. 25-28).

457. Fourth and finally, as regards the requirement that the current case involves the same parties or privies of those parties, the Claimants assert that this requirement is not met with respect to Mr. Devincci Hourani, who was not a named party in the *Caratube I* arbitration. There is no rule according to which the mere presence at hearings or the giving of witness testimony elevates a person to the level of a party in an arbitration. Moreover, Mr. Devincci Hourani and CIOC cannot be considered as "privies", as the *RSM* case relied upon by the Respondent in support for this contention is inapposite, and the prevailing view is that the concept of "privies" is not applicable in investment arbitration (whether it be in the context of collateral estoppel or *res judicata*). The Claimants insist that the right of a shareholder, that is Mr. Devincci Hourani, to sue the Respondent independently from CIOC, on the basis of a different legal instrument (that is the FIL and the Contract), cannot be precluded (Defense on Jurisdiction, paras. 132-141).

c. Analysis

458. The Tribunal must decide whether the doctrine of collateral estoppel applies in investment arbitrations and, if so, whether the requirements for its application are met in the present case with the result of barring this Tribunal from considering the Claimants' claims.

459. Concerning the first question of the general applicability of the doctrine of collateral estoppel in investment arbitration, the Tribunal cannot follow the Respondent's allegation that "the doctrine of collateral estoppel, also known as 'issue preclusion' or 'issue estoppel,' is a firmly established 'principle of law applicable in the international courts and tribunals'" (Counter Memorial, para. 173). In support of this allegation, the Respondent relies on the ICSID award rendered in *RSM et al. v Grenada* (Exh. RL-39). However, unlike in the present case, in the *RSM* award, the parties did not dispute that the doctrine of collateral estoppel should be considered as a well-established general principle of law applicable by international courts and

tribunals. Furthermore, in support for its position, the *RSM* tribunal relied on the *AMCO II* decision on jurisdiction. However, the Claimants have correctly pointed out that in that case the tribunal expressly stated that it was by no means clear that a decision's *res judicata* effect should extend to reasons or preliminary or incidental determinations.

460. That said, the Tribunal finds that the general applicability by international courts and tribunals of the doctrine of collateral estoppel – while not firmly established – may find support in the award of the *Apotex III* tribunal, which, after an analysis of the issue, including a survey of international case law, found that "[i]t is clear that past international tribunals have applied forms of issue estoppel, without necessarily using the term". The *Apotex III* tribunal also concluded that "international tribunals regularly look to the prior tribunal's reasons and indeed also to the parties' arguments, in order to determine the scope of what was finally decided in that earlier proceeding" (Exh. RL-49, paras. 7.18 and 7.30). With respect to this latter conclusion, it may be observed however that relying on a decision's underlying reasons in order to determine the meaning and scope of that decision's operative part (and *res judicata* effect) is not the same as giving issue preclusive effect directly to that decision's underlying reasons.

461. With this observation in mind, the finding of the *Apotex III* tribunal regarding collateral (issue) estoppel is confirmed by the ILA Final Report on *res judicata* and arbitration, which states that "[the ILA Recommendations on *res judicata*] endorse a more extensive notion of *res judicata*, which is also followed in public international law, under which *res judicata* not only is to be read from the dispositive part of an award but also from its underlying reasoning" (Exh. CLA-176, para. 52). Indeed, the ILA Recommendation No. 4 specifically provides that "[a]n arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to […] issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award".

462. The Tribunal has taken note of the Claimants' reference to paragraph 59 of the ILA Final Report concerning the US doctrine of collateral estoppel. However, the Tribunal observes that paragraph 59 only concerns the application under US law of the doctrine of collateral estoppel by third parties against a party to the prior proceedings. However, such an extensive application by a third party is not at issue in the present case and paragraph 59 of the ILA Final Report is thus inapposite.

463. The Tribunal cannot follow the Claimants' argument that applying the doctrine of collateral estoppel would be contrary to the ICSID Arbitration Rules, namely Rule 47, according to which an award shall contain a statement of the facts as found by the tribunal. For the Tribunal, Rule 47 of the ICSID Arbitration Rules does not prohibit a tribunal, when determining the facts necessary to decide the case before it, from implementing in this determination the final and binding decisions on identical issues rendered by another ICSID tribunal in a related case. In the opinion of the Tribunal, this applies also to the issue of jurisdiction. A tribunal has the right to determine its own jurisdiction but, in its assessment, it may be called to implement in its decision on jurisdiction the final and binding determinations on identical issues of another ICSID tribunal.

464. Based on the foregoing, the Tribunal is prepared to accept that there may be room for applying the doctrine of collateral estoppel in investment arbitration. This said, the issue ultimately may be left open. Indeed, for the reasons set forth below, the Tribunal finds that the requirements for applying the doctrine of collateral estoppel would in any event not be met in the present case.

465. Regarding these requirements, it is reminded that the Respondent states as follows (Counter Memorial, para. 177):

> A judgment in a prior case gives rise to collateral estoppel if: (a) it was made by a court of competent jurisdiction; (b) it is a final and conclusive decision on the merits; (c) it necessarily decided an issue that is directly or substantially at issue in the current case and (d) the current case involves the same parties or privies of those parties.

466. The Claimants counter that the application of the doctrine of collateral estoppel further requires that the issue to be precluded must have actually been arbitrated and determined in an award and such determination must have been essential or fundamental to the dispositive part of the arbitral award (Defense on Jurisdiction, para. 88).

467. The Tribunal agrees that the *Caratube I* tribunal was competent to decide on its own jurisdiction and to determine the various underlying jurisdictional issues. The Tribunal also has no doubt that the *Caratube I* award constitutes a final and binding decision on the question of jurisdiction in general. However, this does not mean that all jurisdictional issues raised in that award were finally decided by the *Caratube I* tribunal and fundamental to its negative jurisdictional award with the effect of precluding reconsideration of such issues in the present arbitration. For instance, as will be seen below, the Tribunal agrees that the *Caratube I* tribunal did not render a

final and binding decision with respect to the issue of "actual control" by Mr. Devincci Hourani over CIOC. Moreover, this Tribunal further agrees that a final decision on a jurisdictional issue can only have preclusive effect in further or other arbitration proceedings if that jurisdictional determination was fundamental to the prior award on jurisdiction and only if the identical jurisdictional issue arises again in the further or other proceedings.

468. Regarding in particular the requirement of the identity of issues to be determined, the Tribunal disagrees with the Respondent that the issues to be precluded were necessarily decided in the *Caratube I* arbitration and are directly at issue in the current case. Indeed, from a plain reading of the *Caratube I* award it emerges that the *Caratube I* tribunal clearly distinguished the situation where a claim is brought on the basis of an investment *treaty* from the situation where a claim is brought on the basis of an investment *contract*. According to the *Caratube I* tribunal, while the parties' ICSID arbitration agreement contained in a contract may suffice to give the claimant standing in the arbitration, the same does not apply in cases where the parties' agreement is contained in a treaty. That treaty must allow for the application of Article 25(2)(b) of the ICSID Convention. It is therefore necessary that the jurisdictional requirements of both Article 25(2)(b) and the ICSID arbitration clause in the treaty are met. This is also why the requirements under Article 25(2)(b) cannot be examined independently from the requirements set forth in the treaty. The following extract from the *Caratube I* award, albeit long, is instructive and thus worth quoting (Exh. CLA-8, paras. 330-338):

> In most of the previous ICSID proceedings concerning Article 25(2)(b) [of the ICSID Convention], its provisions were applied to an investment contract signed between a locally incorporated company (claimant) and a host State (respondent). In such cases the agreement was negotiated directly between the parties to the dispute, with the host State's awareness of the identity of the locally incorporated company. In many of those cases, the agreement to treat the locally incorporated company as a national of another Contracting State was implied from an ICSID arbitration clause contained in the investment contract. In such circumstances, the existence of an express or implied agreement to treat the locally incorporated company as a foreign national gave that company standing in the dispute. In the present dispute, the investment contract between the parties (the Contract) contains an ICSID arbitration clause. However, Claimant is relying on the BIT, not the Contract, to establish the Tribunal's jurisdiction.
>
> If a tribunal's jurisdiction is based on an investment treaty, claimant does not negotiate an individual agreement with the host State but accepts a non-negotiable offer addressed to persons or entities that fulfil its conditions. That offer is contained in an investment treaty and its conditions are agreed between the parties to that investment treaty. Unlike in the context of investment contracts, the acceptance of an offer

> contained in an investment treaty cannot create an assumption that the claimant fulfils the conditions of that offer.
>
> If a claimant wants to rely on Article 25(2)(b) of the ICSID Convention in the context of an investment treaty arbitration, that investment treaty must allow for the application of Article 25(2)(b). The decision of the parties to the investment treaty to allow application of Article 25(2)(b) in their bilateral relations is an exercise of their ultimate discretion, expressly reserved in the ICSID Convention, to consent to submit disputes to ICSID jurisdiction granted to the Contracting States.
>
> Article VI(8) of the BIT contains the decision of Kazakhstan and the United States to allow application of Article 25(2)(b) to disputes arising out of the BIT. However, Article VI(8) contains more than that. It spells out conditions of application of Article 25(2)(b) to disputes based on the BIT. In Article VI(8) of the BIT, Kazakhstan and the United States exercise their discretion, as parties to the ICSID Convention, to agree on the Convention's interpretation or application in a particular area of their bilateral relations. Such agreements are allowed, as long as they do not contradict the meaning of the treaty to which they pertain. The Tribunal is obliged to take any such subsequent agreement between the parties into account, to the same extent as the treaty's context. […].
>
> […]
>
> It follows from the above, that the ICSID Convention Contracting States can agree on the conditions of their submission to ICSID jurisdiction as long as their agreement does not contradict the meaning of the Convention. Article 25(2)(b) sets 'foreign control' as such 'outer limit', an objective requirement that cannot be replaced by an agreement. It is a floor below which the parties' agreement cannot reach. On the other hand, it gives the parties flexibility within those 'outer limits'. As stated by Broches, it leaves "the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a 'national of another Contracting State'", which means that "any stipulation (...) which is based on a reasonable criterion should be accepted." This interpretation is uncontroversial and accepted by ICSID tribunals and commentators. Hence, it is correct to say that the term 'foreign control' is 'flexible and deferential' and is meant "to accommodate a wide range of agreements between parties as to the meaning of 'foreign control'".
>
> The factual element of foreign control under Article 25(2)(b) of the ICSID Convention cannot be examined independently from the agreement on nationality contained in the applicable investment treaty, because it is the investment treaty that would normally contain the test by which such foreign control is established in the circumstances of the case. However, if the agreement plainly contradicts the meaning of the ICSID Convention, e.g. by stipulating that any locally incorporated company should be treated as a foreign national, the tribunal cannot go beyond the mandatory limits established by Article 25 of the Convention. Therefore, at least to the extent to which the agreement contradicts the Convention, the Tribunal must find that there is no agreement providing jurisdiction under Article 25(2)(b).
>
> For the above reasons the Tribunal must first turn to Article VI(8) of the BIT.

469. The *Caratube I* tribunal then examined the requirements in Article VI(8) of the BIT. In doing so, the *Caratube I* tribunal applied the BIT's own definitions of the terms

"company", "investment", "foreign control" and "national". Concerning in particular the term "investment", the *Caratube I* tribunal found that it had to interpret the term in conformity with Article 31 of the Vienna Convention. It is in this context that the *Caratube I* tribunal found that the parties to the BIT did not intend to give this term special meaning, but rather were following "a familiar pattern of investment definitions in bilateral investment treaties". Moreover, in relation with the question of the existence and relevance of a certain inherent meaning of the term "investment", the *Caratube I* tribunal examined the preamble of the BIT and, more generally, the drafting history of US Model BITs. The *Caratube I* tribunal concluded that such an inherent meaning of the term "investment", namely in that it includes the existence of a contribution over a period of time and a degree of risk, was also reflected in the term as stipulated in the BIT.

470. Furthermore, still with respect to the definition of the term "investment" as used in the BIT, the *Caratube I* tribunal observed that under the BIT an investment requires the evidence of "ownership or control by a U.S. national". The parties in the *Caratube I* arbitration disagreed on the existence of the requirement of "actual control". While the *Caratube I* tribunal was not persuaded that a legal capacity to control a company, without evidence of an actual control, was enough for there to be an investment within the meaning of the BIT, it did not finally decide on the existence of this requirement of "actual control". Indeed, a decision on this issue was not necessary in that the BIT provided for "ownership or control" (Exh. CLA-8, para. 407; emphasis added). Finding that Mr. Devincci Hourani could be regarded as owning CIOC, the *Caratube I* tribunal assumed *arguendo* the existence of control (however, not of "actual control"). It then examined whether CIOC was an "investment" of Mr. Devincci Hourani within the meaning of the term as stipulated in the BIT and determined earlier in the *Caratube I* award. The *Caratube I* tribunal concluded that "Claimant failed to discharge its burden of proof with regard to the fact that CIOC was an investment of U.S. national (Devincci Hourani) as required by Article VI(8) of the BIT" (Exh. CLA-8, para. 457).

471. In light of the foregoing, this Tribunal finds that the jurisdictional issues decided in the *Caratube I* award are not identical to the issues to be determined in this arbitration. In particular, the Tribunal finds that the *Caratube I* tribunal did not decide such jurisdictional issues as "stand-alone" or objective issues, independently of the underlying consent-granting instrument. To the contrary, the *Caratube I* tribunal expressly stated that it could not examine the jurisdictional requirements of Article

25(2)(b) of the ICSID Convention independently of the requirements set forth in the BIT. What is more, as was seen above, the *Caratube I* tribunal distinguished in this regard the situation prevailing under an investment treaty as opposed to the situation where the consent-granting instrument is a contract, as is the case here.

472. As was seen above, this conclusion is corroborated by the *ad hoc* committee in its decision on annulment in that it confirmed that a new ICSID tribunal could examine CIOC's access to ICSID jurisdiction under the Contract.[36] The same considerations apply *mutatis mutandis* with respect to the question of Mr. Devincci Hourani's access to ICSID jurisdiction under the FIL.

473. In addition, for the reasons set out above, the Tribunal finds that the *Caratube I* tribunal did not render a final decision on the issue of (actual) control and any findings by the tribunal on this issue were in any event not fundamental for its negative decision on jurisdiction.

474. Finally, based on the above, the requirement of the identity of parties and the question of the applicability of the concept of "privies" in international law, namely with respect to Mr. Devincci Hourani, does not require determination. As will be seen in further detail below, this applies in particular as the Tribunal finds that it does not have jurisdiction over Mr. Devincci Hourani's claims.[37]

475. Therefore, the Tribunal concludes that the cumulative requirements for the application of the doctrine of collateral estoppel are not met and, as a result, it is not precluded from examining its jurisdiction based on the Respondent's collateral estoppel defense.

4. Res judicata

a. The Respondent's position

476. It is the Respondent's position that the Claimants' claims must be dismissed in application of the *res judicata* doctrine, "in light of the final and binding effect of the Caratube I Award" (Counter Memorial, para. 202). The Respondent identifies the relevant elements of the doctrine of *res judicata* as follows (Counter Memorial, para. 205):

[36] See *supra* para. 387.

[37] See *infra* paras. 689 et seq.

> A judgment in a prior case gives rise to res judicata if: (1) it was made by a court of competent jurisdiction, (2) it is a final and conclusive decision on the merits, and (3) there is identity of the parties, (4) subject matter, and (5) cause of action in the two disputes.

477. With respect to the first three elements, the Respondent refers to the developments made regarding the application of the collateral estoppel doctrine.[38]

478. The Respondent further argues that the requirements of identity of subject matter and of cause of action are satisfied in the present case. In particular, the Respondent submits that "[a]rbitral tribunals have applied a broad approach to avoid claim splitting, barring 'claimants from raising closely related claims that they could and should have raised in an earlier arbitration'" (Counter Memorial, para. 208). The Respondent relies, *inter alia*, on the tribunal's decision in the *Apotex III* case, in support of its contention that the division between the elements of object and cause of action is problematic in practice as it may lead to claim splitting, pointing out that in *Apotex III,* the tribunal shared the same concern and thus preferred a two-part test for *res judicata*, requiring only party and issue identity (Counter Memorial, para. 209). The tribunal in *Apotex III* also found that "a prior tribunal's reasoning, and the arguments it considered, [are examined] in determining the scope, and thus the preclusive effect, of the prior award's operative part" (Counter Memorial, para. 210; Respondent's First Post-Hearing Brief, para. 61). It is the Respondent's position that the "simplified res judicata test advocated by the *Apotex III* Award" is met in the present case as "the issues that were necessary to resolve the parties' dispute on jurisdiction in the Caratube I Arbitration are the same as those necessary to resolve the dispute in the present Arbitration" (Counter Memorial, para. 211).

479. The Respondent submits that the elements of identity of subject matter and cause of action are in any event met. The identity of subject matter refers to the relief sought in the competing sets of proceedings. The Tribunal should find that there is identity of subject matters because the *Caratube I* tribunal had to decide the so-called "key-hole" test in light of the ICSID Convention requirements under Article 25, and this Tribunal necessarily would need to address the same key-hole test. Both proceedings thus have the same subject matter, i.e. the requirements of Article 25 of the ICSID Convention. In particular, the *Caratube I* tribunal had to decide whether Mr. Devincci Hourani exerted the requisite control for CIOC to be considered as a

[38] It is noted that in its Post-Hearing Briefs, in order to avoid repetition, the Respondent addressed the arguments on *res judicata* and collateral estoppel in one section, always pointing out however, that they remain two separate preliminary objections (see Respondent's First Post-Hearing Brief, paras. 48 et seq.; Respondent's Reply Post-Hearing Brief, para. 47).

US national pursuant to Article 25(2)(b) of the ICSID Convention, and this Tribunal is now required to decide the same question. However, the *Caratube I* tribunal already concluded that there was "not sufficient evidence of exercise of actual control over CIOC by Devincci Hourani" (Counter Memorial, para. 214; Respondent's First Post-Hearing Brief, paras. 50 et seq.). The Respondent points out that the *ad hoc* Committee upheld the *Caratube I* award on this issue, holding that "Article 25(2)(b) of the Convention requires foreign control of the local corporation, the existence of such control represents an outer limit and is a requirement that cannot be replaced by an agreement, and Mr. Hourani was unable to prove that he actually controlled CIOC". For the Respondent, "the fact that CIOC now invokes the FIL and the Contract as a basis for consent to ICSID arbitration, instead of the US-Kazakhstan BIT that was invoked in the *Caratube I* Arbitration, and the fact that Devincci Hourani is no longer invoking the BIT, has no bearing on the analysis of the first 'key-hole' of the 'double key-hole' test. These instruments need only be considered if the Tribunal finds that is has jurisdiction under the Convention, and it should not, and reaches the 'second key-hole'" (Counter Memorial, paras. 215-217; Respondent's Reply Post-Hearing Brief, para. 47).

480. According to the Respondent, there also is subject matter identity because the *Caratube I* tribunal already rendered a decision on the "inherent meaning of the term investment", holding that a contribution over a period of time and some degree of risk are included in any objective understanding of that term; and this objective understanding applies not only within the ICSID framework, but in investment treaty arbitration in general. The *Caratube I* tribunal concluded that Mr. Devincci Hourani had not made a contribution nor taken any risk and that, as a result, CIOC was not an investment of his, both for purposes of the ICSID Convention and the BIT. For the Respondent, the relevant holding in the present Arbitration is that Mr. Devincci Hourani did not make an investment as an objective matter, including for purposes of Article 25(1) of the ICSID Convention. The Respondent again points out that the *ad hoc* Committee upheld the *Caratube I* award on this issue. The Respondent draws the conclusion that also with respect to Mr. Devincci Hourani, this Arbitration has the same subject matter as the *Caratube I* arbitration, and finding otherwise would allow claim splitting. Finally, based on a more flexible approach to *res judicata*, claimants in other arbitrations have even been banned from raising closely related claims in subsequent proceedings that they could have raised in prior proceedings (Counter Memorial, paras. 218-222; Respondent's First Post-Hearing Brief, paras. 59 et seq.).

481. Concerning the identity of cause of action requirement, the Respondent argues that the relevant test is "whether or not 'the fundamental basis of a claim' sought to be brought before the international forum is autonomous of claims to be heard elsewhere", and there is identity of causes where the same rights and legal arguments are relied upon in both proceedings (Counter Memorial, para. 223). It is the Respondent's position that there is identity of causes: CIOC alleges a right to be considered as a US national because Mr. Devincci Hourani allegedly exerts control under Article 25(2)(b) of the ICSID Convention and Mr. Devincci Hourani claims a right to ICSID arbitration on the basis that he made an investment for purposes of ICSID jurisdiction under Article 25(1) of the ICSID Convention. The same alleged rights were already claimed in the *Caratube I* arbitration on the basis of similar legal arguments (Counter Memorial, paras. 224-225). The only difference is that the Claimants rely on different legal instruments for purposes of consent, but they raise the same underlying jurisdictional causes of action under the ICSID Convention. The Respondent submits that this difference is artificial and the different consent-granting instruments invoked by the Claimants are all based on "the same normative source", i.e. the ICSID Convention (Counter Memorial, paras. 226-230; Respondent's First Post-Hearing Brief, paras. 58 et seq.).

b. The Claimants' position

482. The Claimants submit that their claims are not precluded on the basis of *res judicata*. In particular, the doctrine of *res judicata* does not apply to negative findings on jurisdiction, and even less so to a negative finding on jurisdiction based on a consent-granting instrument that is different from the one used to initiate the new arbitration. The Claimants underline in this regard that an arbitral tribunal has the obligation to decide upon its own jurisdiction. The Claimants further stress that the present dispute between the Parties has not been finally resolved, there being no decision on the merits of the dispute and no decision on jurisdiction under the Contract and the FIL (Defense on Jurisdiction, paras. 142-150).

483. According to the Claimants, in any event, the conditions for the application of the *res judicata* doctrine are not met in the present case. The Claimants refer to their argument regarding the collateral estoppel doctrine with respect to the requirements that the prior judgment must have been rendered by a court of competent jurisdiction, must be final and conclusive on the merits, must have necessarily decided an issue that is directly or substantially at issue in the current case, and

must have been between the same parties (Defense on Jurisdiction, paras. 151-152; Claimants' First Post-Hearing Brief, paras. 67-92).

484. In addition, the Claimants argue that two further requirements that are specific for the *res judicata* doctrine are also not met, namely the requirements of the identity of subject matter (or object) and cause of action between disputes. The Claimants specify at the outset that an award's *res judicata* effects are limited to what was decided in the award's *dispositif*, to the exclusion of the award's underlying reasons. Moreover, the scope of an award's *res judicata* effect is limited to the tribunal's findings in relation to claims made by the parties. This means that the *Caratube I* award's *res judicata* effect, if any, does not extend to the general question whether the tribunal had jurisdiction pursuant to Article 25(2)(b) of the ICSID Convention, as the tribunal did not make such a general finding, be it in the dispositive part of the award or in the reasoning leading thereto, let alone in reliance on the ICSID clause contained in the Contract or in the FIL (Defense on Jurisdiction, paras. 153-156).

485. Regarding in particular the requirement of the identity of subject matter (or object), the Claimants argue that this requirement is not met for principally two reasons: first, the Respondent applies a test that is fundamentally flawed in that the *Caratube I* award's *res judicata* effect is limited to the tribunal's findings in relation to claims. These findings were in turn limited to the fact that there was not sufficient evidence before the *Caratube I* tribunal to admit jurisdiction over the dispute before it, that is that CIOC was an investment of a US national (Devincci Hourani) as required by Article VI(8) of the BIT (Defense on Jurisdiction, para. 158). Second, and in any event, while the Claimants must indeed satisfy the jurisdictional requirements under Article 25(2)(b) of the ICSID Convention, these requirements cannot be considered outside the framework of the Contract and the FIL, but must be examined together. Therefore, the object in the *Caratube I* award (where jurisdiction was asserted within the framework of the BIT) is different to the object in the present Arbitration (where jurisdiction is asserted within the framework of the Contract and the FIL) (Defense on Jurisdiction, paras. 160-164).

486. With respect to the requirement of the identity of the cause of action, the Claimants assert that this requirement is not met because the "Claimants' claimed entitlements in these proceedings (namely the right to have their claims decided by this Tribunal on the basis of the Contract and the FIL) do not have the same normative source as those in the *Caratube I* arbitration (which was exclusively brought under the U.S.-Kazakhstan BIT)". The different, separate legal instruments relied upon in the

Caratube I arbitration and the present proceedings are by definition separate causes of action. They provide for different rights than those in the BIT and are not textually identical, it being specified that even texts that are identically worded can still lead to different outcomes. In addition, the Claimants rely on arbitration case law in support of their contention that different legal instruments signify different causes of action (Defense on Jurisdiction, paras. 165-176).

c. Analysis

487. As was seen above at paragraph 476, the Respondent has stated the requirements for the application of the *res judicata* doctrine as follows: a judgment may have *res judicata* effect in further or other arbitration proceedings if (1) it was made by a court of competent jurisdiction, (2) it is a final and conclusive decision on the merits, and (3) there is identity of the parties, (4) subject matter, and (5) cause of action in the two disputes.

488. While the Claimants do not dispute this list of requirements, they do however disagree with respect to the interpretation of these requirements and the way in which they should be applied by this Tribunal, in particular regarding the requirements of identity of subject matter and cause of action.

489. The Claimants also insist that a decision's *res judicata* effect extends only to its operative part. For the Claimants this means that the *Caratube I* award's *res judicata* effect is strictly limited to the tribunal's finding that the "Claimant failed to discharge its burden of proof with regard to the fact that CIOC was an investment of U.S. national (Devincci Hourani) as required by Article VI(8) of the BIT" (Defense on Jurisdiction, para. 58).

490. As with the doctrine of collateral estoppel, the Tribunal will start with the requirements of the identity of subject matter in dispute and cause of action.

491. For essentially the same reasons as those expressed above with respect to the doctrine of collateral estoppel, the Tribunal finds that the identity of subject matter and cause of action requirements are not met in the present case, whether they are applied as a single (identity of issue) or as two separate (identity of object and cause of action) requirements.

492. Regarding the requirement of identity of subject matter (object), the relevant question is whether the relief sought in both sets of proceedings is identical. As was

already seen, the *Caratube I* tribunal was asked the question of whether CIOC had access to ICSID jurisdiction under Article VI(8) of the BIT coupled with Article 25(2)(b) of the ICSID Convention. The *Caratube I* tribunal did not render a final, free-standing decision on the allegedly stand-alone question whether the requirements set forth in Article 25(2)(b) – considered independently and in isolation of the BIT – were met. To the contrary, the *Caratube I* tribunal expressly and unambiguously stated that the requirements in Article 25(2)(b) of the ICSID Convention could not be examined independently from the requirements set forth in the BIT. And this is clearly reflected in the tribunal's analysis of the various jurisdictional issues, which centers around the requirements as stipulated in the BIT.

493. Therefore, the Tribunal finds that the subject matter or object in dispute in the *Caratube I* arbitration is not identical to the subject matter in the present Arbitration, which concerns the question of whether the Claimants have access to ICSID jurisdiction under the Contract and/or the FIL. As observed above, this conclusion appears to be corroborated by the *ad hoc* committee's annulment decision.[39]

494. Concerning the requirement of the identity of cause of action, the relevant question here is whether the Claimants have submitted their request for relief on the basis of the same legal foundation, relying on the same rights and legal arguments. It is true that a strict application of the identity of cause requirement has sometimes been criticized as artificial and leading to unsatisfactory results, namely where identity of cause of action was refused because the claimant's claim was based on formally different instruments, even though such different instruments contained substantially identical rules. On the other hand, it is also true that a strict application of the identity of cause requirement has been supported by others on the ground that the application of provisions contained in different instruments may call for different results in practice, even though such provisions are similar or even identical in wording. This is so, namely in light of differences in respective contexts, purposes, subsequent practices of the parties, etc.

495. The Tribunal finds that there is no identity of cause of action in the *Caratube I* arbitration and the present one. The fundamental basis invoked in the *Caratube I* arbitration was the BIT. By contrast, in the present Arbitration, the Claimants rely on the Contract entered into between CIOC and the Respondent and on the FIL. Accordingly, the legal foundations relied upon in the two sets of proceedings are of

[39] See *supra* para. 387.

an entirely different nature, i.e. an international treaty entered into between two sovereign states, a contract concluded between a private company and a state authority, and a domestic law adopted unilaterally by a state legislator. Not only are the parties to these instruments different, these instruments are also different as regards, *inter alia*, their respective negotiation and drafting history, contexts, underlying purposes and the rules of interpretation applicable to those instruments. Not to mention the fact that the provisions contained in these instruments are neither identical, nor similar.

496. In this context, it is also worth recalling – once again – that the *Caratube I* tribunal examined the requirements in Article 25 (2)(b) of the ICSID Convention in the light of and in conjunction with the provisions in the BIT, and it specifically distinguished the situation where the legal instrument relied upon in support of the claim is a contract, rather than an international treaty, evoking the differences regarding the parties, the context, and the negotiation and drafting history.

497. In these circumstances, concluding that the cause of action is different because the Claimants' claims in this Arbitration are based on the Contract and the FIL is not artificial and does not lead to the unsatisfactory solution to allow the Claimants to submit the same dispute again based on essentially the same rights and legal arguments. Rather, it ensures the Claimants' right of access to ICSID jurisdiction and their right to be heard with respect to a claim that has not already been finally decided in a prior arbitration, namely the *Caratube I* arbitration.

498. Moreover, the Tribunal has considered the Respondent's argument that, under a more flexible and pragmatic approach to the doctrine of *res judicata*, a claimant should not be allowed to raise closely related claims that could and should have been raised in prior proceedings. However, the Respondent has not established that such a flexible approach, reflecting the position of US *res judicata* law, applies in international law, unless the omission of raising a particular claim or of splitting a claim amount to an abuse of process. However, the Tribunal has already decided that the Claimants did not commit an abuse of process by not raising their claims based on the Contract and the FIL in the *Caratube I* arbitration and by asserting these claims in the present Arbitration.[40]

499. In the absence of an identity of subject matter and cause of action, the question of the identity of parties does not require determination. As mentioned above and as

[40] See *supra* paras. 371 et seq.

will be seen in further detail below, this applies in particular as the Tribunal finds that it does not have jurisdiction over Mr. Devincci Hourani's claims.[41]

500. Therefore, the Tribunal concludes that the cumulative requirements for the application of the doctrine of *res judicata* are not met and, as a result, it is not precluded from examining its jurisdiction based on the Respondent's *res judicata* defense.

501. Accordingly, the Tribunal will now proceed to examine, first, whether it has jurisdiction over CIOC's claims and, second, whether it also has jurisdiction over the claims brought by Mr. Devincci Hourani.

5. Jurisdiction over CIOC's claims

a. The Claimants' position

i. Under the ICSID Convention

502. For the reasons set forth below, it is the Claimants' position that **this Tribunal has jurisdiction under Article 25 of the ICSID Convention**, the requirements of Article 25(2)(b) of the ICSID Convention being met.

503. First, **both Parties have consented to ICSID jurisdiction** as required by Article 25 of the ICSID Convention and Article 2(1)(c) of the ICSID Institution Rules. In particular, the Claimants have expressed their consent in their notice of dispute dated 18 October 2012 (Exh. C-2) and again in their Request for Arbitration. The Respondent has consented to ICSID jurisdiction on the date of the signature of the Contract and on the date of the entry into force of the FIL (Memorial, para. 569).

504. Second, Mr. Devincci Hourani is a US national and thus a "national of another contracting State" within the meaning of Article 25 of the ICSID Convention, the exception in Article 25(2)(a) not being applicable. Equally, CIOC is a company constituted in accordance with the laws of Kazakhstan and owned to 92% by Mr. Devincci Hourani. CIOC has complied with Article 25(2)(b) of the ICSID Convention and Rule 2(1)(d)(iii) of the ICSID Institution Rules, because the Parties agreed to treat CIOC as a national of another Contracting State and because CIOC was under foreign control within the meaning of Article 25(2)(b) of the ICSID Convention.

[41] See *infra* paras. 689 et seq.

505. In particular, the Claimants allege that **the Respondent explicitly agreed to treat CIOC as a national of another Contracting State** within the meaning of Article 25(2)(b) of the ICSID Convention by way of Clauses 27.2 and 27.8 of the Contract and Amendment No. 1 to the Contract, which assigned the Contract from CCC to CIOC. Clause 27.8, in the governing Russian version, provides that "the Contractor is a national [rather than 'resident'] of Lebanon, or in the event of an assignment a national of the country of residence of the assignee, and the Contractor will accordingly be considered a national [rather than 'resident'] of Lebanon or other relevant country for the purposes of the ICSID Convention" (Exh. C-1) (Memorial, para. 576). For the Claimants, the reference to foreign nationality in Clause 27.8 of the Contract thus is evident.

506. The Claimants reject the Respondent's argument according to which the Parties agreed in Clause 27.8 of the Contract to treat CIOC as a national of Kazakhstan. The Respondent's argument is based on the incorrect English version of the Contract, even though the Russian version indisputably is the authoritative version in accordance with Clause 30.2 of the Contract. The Claimants insist that "the express and exclusive purpose of Clause 27.8 [is to have the Respondent] acknowledge and consent expressly, unconditionally and at all times (including in the event of an assignment) to, as it did, the foreign nationality of the Contractor (Caratube) for purposes of the ICSID Convention so as to allow it to bring an ICSID claim" (Defense on Jurisdiction, para. 343). The Claimants note that the Contractor has always been under foreign ownership.

507. Moreover, it is the Claimants' position that, even if the Respondent's interpretation of Clause 27.8 of the Contract were admitted, it is clear that the Parties intended by this clause to confer foreign nationality upon the Contractor as otherwise there would have been no reference to ICSID. This is further illustrated by the fact that the Contract was entered into by the Kazakh entity of CCC. The Respondent agreed that it would be treated as a Lebanese national for purposes of the Contract and ICSID jurisdiction. In other words, the Parties agreed to internationalize any potential investment disputes through the foreign ownership of the Contractor, including in the case of an assignment (which situation was explicitly contemplated). The Claimants point out that the assignment of the Contract to CIOC was done with the full knowledge and approval of the Respondent, who knew that CIOC was a Kazakh entity under foreign control. The Parties nevertheless agreed not to modify the Contract's provisions, except for replacing all references to CCC for CIOC. In

particular, they did not remove the Contract's references to the FIL and its substantive protections, or to the ICSID dispute resolution mechanism, but rather confirmed the validity of the Contract's un-amended provisions (Defense on Jurisdiction, paras. 344-349).

508. Finally, the Claimants submit that the Respondent's interpretation of Clause 27.8 of the Contract would deprive of any meaning other clauses of the Contract, such as Clause 27.7 (which contains an express agreement to ICSID jurisdiction), and Clauses 16(13)(1), 7(1)(13) and 28(4) (which provide for benefits solely available to foreigners) (Defense on Jurisdiction, para. 350; Claimants' First Post-Hearing Brief, paras. 105-106; Claimants' Reply Post-Hearing Brief, paras. 48-51).

509. It is the Claimants' position that, in conformity with ICSID case law and doctrine, **the Respondent has at the very least implicitly agreed to treat CIOC as a national of another Contracting State** within the meaning of Article 25(2)(b) of the ICSID Convention via the ICSID clause in Clause 27 of the Contract. The Respondent has further implicitly agreed to treat CIOC as a national of another Contracting State in that the Contract incorporated certain rights and benefits available solely to foreigners, e.g. by means of Clause 16(13)(1) of the Contract which refers to Article 22 of the FIL and thus to certain tax exemptions available only to foreigners. Clauses 7(1)(13) and 28(4) of the Contract constitute other examples (Memorial, para. 575; Defense on Jurisdiction, paras. 352-361; Claimants' First Post-Hearing Brief, paras. 107-108).

510. According to the Claimants, the Respondent also agreed to treat CIOC as a national of another Contracting State by means of the FIL. The FIL "provides that local Kazakh entities controlled by foreign investors shall have the status of a foreign investor pursuant to Article 1 of the FIL, and allows Kazakh companies with foreign ownership to benefit from the ICSID clause contained in Article 27 of the FIL". For the Claimants, the definition of "foreign investments" allows foreign investors that *de facto* or indirectly control Kazakh companies (as opposed to only shareholders) to fall within the FIL's scope. The same applies with respect to Article 4.5 of the FIL. This, coupled with the fact that the FIL provides protection exclusively to foreign investors and the option of resolving investment disputes before ICSID, evidences the Respondent's intention to treat Kazakh local entities as foreign investors, when owned or controlled by foreigners, for the purpose of Article 25(2)(b) of the ICSID Convention (Memorial, para. 577; Defense on Jurisdiction, paras. 362-363; Claimants' First Post-Hearing Brief, para. 109).

511. For the reasons set forth below, the Claimants submit that CIOC was under Mr. Devincci Hourani's control. The **foreign control** requirement of Article 25(2)(b) of the ICSID Convention is thus met.

512. First, the Claimants submit that the Respondent's position, i.e. that CIOC was not under Mr. Devincci Hourani's effective (namely objective and actual) control and thus not under "foreign control" within the meaning of Article 25(2)(b) of the ICSID Convention, has no basis in the ICSID Convention, the Contract or the FIL. Through his ownership of 92% of CIOC's shares, Mr. Devincci Hourani controls CIOC within the meaning of Article 25(2)(b) of the ICSID Convention, for the purposes of which legal control over a company is sufficient; access to ICSID must not be limited through a restrictive interpretation of the word "control". This is confirmed by an interpretation according to the ordinary meaning of the term "control", in the light of the object and purpose of the ICSID Convention (Article 31 of the Vienna Convention on the Law of Treaties). According to the Claimants, this is further confirmed by ICSID case law (Defense on Jurisdiction, paras. 368-381; Claimants' First Post-Hearing Brief, paras. 113-115).

513. Second, the Claimants argue that the Contract expressly confers foreign control status by means of the nationality of the owners, without reference to "effective" control or any other requirement. The Contract records in Clause 27.8 the Parties' agreement that this test based on the nationality of the owner shall apply even in the event of an assignment (Defense on Jurisdiction, para. 367; Claimants' First Post-Hearing Brief, paras.113 and 115).

514. Third, the Claimants insist that Mr. Devincci Hourani's ownership of CIOC's shares must be considered to satisfy the ICSID Convention's foreign control requirement by means of the Parties' agreement. According to the Claimants, it is well settled that the parties may agree on the definition of foreign control within the meaning of Article 25(2)(b) of the ICSID Convention. As long as the criteria agreed upon by the parties to define foreign control are reasonable and do not deprive the requirement of its objective significance, there is no reason to disregard the parties' agreement. The Claimants further submit that shareholding has been accepted in case law as a reasonable criterion for foreign control. The FIL also allows foreign investors that *de facto* or indirectly control Kazakh companies to fall within the scope of the FIL; Mr. Devincci Hourani had the power to determine CIOC's decisions in his capacity as CIOC's 92% shareholder. In the same vein, Mr. Devincci Hourani also fulfills the requirement under Article 4.5 of the FIL (Defense on Jurisdiction, paras. 381-386;

Claimants' First Post-Hearing Brief, paras. 113-115; Claimants' Reply Post-Hearing Brief, para. 42).

515. Fourth, the Claimants submit that, even if it were accepted that the legal capacity to control CIOC is not sufficient, it is in any event well settled (and undisputed) that share ownership creates a presumption of control, and the Respondent thus has the burden of proving that Mr. Devincci Hourani does not control CIOC. The Respondent fails to do so in that its line of argument is based on the unsubstantiated allegations that Mr. Devincci Hourani was merely a "puppet".

516. The Respondent's argument that Mr. Devincci Hourani had acquired his shares in CIOC for a nominal value is equally flawed, *inter alia* because the shares' purchase value has no impact on Mr. Devincci Hourani's status as a majority shareholder and control. The Claimants recall that at the time of the share purchase, the oil reserves were not confirmed and Mr. Fadi Hussein had spent USD 8.5 million, which had been drawn under an outstanding USD 15.2 million loan from JOR, while also being a debtor of "tens of millions of USD of obligations towards Kazakhstan in relation to exploration under the Contract, at risk, without any guarantee that the resources would be confirmed" (Defense on Jurisdiction, para. 391). In addition to the share purchase price, Mr. Fadi Hussein thus also received the right to receive a part of the profits in the event of a commercial production, should the reserves be confirmed.

517. Furthermore, the Respondent has not produced any evidence to counter the fact that, by virtue of his shareholding, Mr. Devincci Hourani was vested with the highest authority to govern CIOC and had the legal power to take decisions unilaterally pursuant to CIOC's Charter. The Respondent's allegations pertaining to a lack of education in the oil industry and financing are not only wrong, but also irrelevant for purposes of the ICSID Convention's foreign control requirement, say the Claimants (Defense on Jurisdiction, paras. 387-393; Claimants' First Post-Hearing Brief, paras. 116-124).

518. Fifth, it is the Claimants' position that CIOC in any event satisfies the foreign control requirement under Article 25(2)(b) of the ICSID Convention. They insist that the Respondent has the burden of proving that CIOC was not under foreign control, given that the Parties' agreement in the Contract and the FIL on foreign nationality entails the presumption of foreign control of CIOC. The Claimants specifically reject the Respondent's allegations of CIOC being controlled by JOR and JOR (and/or CIOC) being controlled by Mr. Issam Hourani (Defense on Jurisdiction, paras. 394-

396). For the Claimants, the Respondent's theory that JOR is the investor assumes that a lender could have exclusive control over the majority legal shareholder of CIOC, by virtue of financing, and of the investment. However, the Respondent has not submitted any evidence in support of this assumption, nor has it clarified its precise position on this theory (Claimants' First Post-Hearing Brief, paras. 125-126; Claimants' Reply Post-Hearing Brief, para. 45).

519. Sixth, the Claimants argue that even if CIOC were controlled by JOR, it would still have to be considered as under foreign control, namely Lebanese control. This conclusion would not change even if CIOC were controlled through JOR by Mr. Issam Hourani, because the ICSID Convention, the Contract or the FIL do not allow piercing the corporate veil to determine the ultimate controlling party behind a foreign company. According to the Claimants, the cases relied upon by the Respondent, namely *TSA v Argentina* and *National Gas v Egypt*, are inapposite as they are materially different to the case at hand. The Claimants insist that even if JOR's corporate veil could be pierced, the Respondent has failed to prove that JOR was indeed controlled by Mr. Issam Hourani. Moreover, even if JOR's corporate veil could be pierced and the Respondent had established that Mr. Issam Hourani was behind JOR, the Respondent cannot establish that the latter was a Kazakh national at the relevant times, *i.e.* at the date of consent to ICSID in October 2012. However, Mr. Issam Hourani had been stripped of his Kazakh nationality already by early 2008 (Defense on Jurisdiction, paras. 397-400; Claimants' First Post-Hearing Brief, paras. 127-130; Claimants' Reply Post-Hearing Brief, paras. 46-47).

520. Seventh and finally, the Claimants reiterate that, in any event, the Respondent always considered CIOC as a company with "foreign participation", as confirmed by the Certificates of State registration of a legal entity, issued by the Kazakh Ministry of Justice, together with the registration of Mr. Devincci Hourani as CIOC's majority shareholder by the Almaty Department of Justice on 7 July 2004. For the Claimants, the Respondent thus is estopped from raising the argument of the absence of foreign control (Defense on Jurisdiction, para. 401; Claimants' First Post-Hearing Brief, para. 131).

521. The Claimants submit that **CIOC has made an investment within the meaning of Article 25 of the ICSID Convention**. In particular, given that the Claimants have made an investment within the meaning of the FIL, they must also be considered to have made an investment within the meaning of Article 25 of the ICSID Convention. However, for the sake of completeness, the Claimants argue that their investment

constitutes in any event an investment within the meaning of Article 25 of the ICSID Convention because the Claimants' investment (i) was made for a significant duration (as of 2002 and expected until at least 2034 for the production period); (ii) was substantial (USD 39 million in capital in addition to a significant contribution in know-how, training and management), including the shareholding in CIOC with the associated liabilities and obligations; (iii) was risky, due to the fluctuating oil prices and the possibility of lower than expected oil reserves, and the risk of having to bear the exploration expenses in case of no discovery; and (iv) was of strategic importance for the development of Kazakhstan's natural resources and economy (Memorial, para. 581).

522. The Claimants point out that the source or origin of the investment is irrelevant for purposes of assessing the investment requirement under Article 25(1) of the ICSID Convention. The Claimants further submit that, in any event, loans constitute an investment for the same purpose, and the Respondent does not contest that investments were made through loans from JOR (Memorial, para. 582).

523. The Claimants reject the Respondent's argument that CIOC has not made an investment under Article 25 of the ICSID Convention because it failed to prove that it made a contribution and took a risk in connection with the Contract. The Claimants stress that the Respondent expressly agreed in Clause 27.7 of the Contract that CIOC has made an investment for the purposes of Article 25 of the ICSID Convention, and this is reason alone to reject the Respondent's objection, not only as regards jurisdiction under the ICSID Convention but also under the FIL (Defense on Jurisdiction, paras. 404-406; Claimants' First Post-Hearing Brief, para. 133). The Claimants insist that the ICSID arbitration clause in the Contract creates a quasi-irrefutable presumption that an investment within the meaning of Article 25 of the ICSID Convention exists, and the Respondent has failed to prove its allegations to the contrary. The very nature of the operation in this case is a textbook example of an investment, say the Claimants. The *Salini* test relied upon by the Respondent does not provide for mandatory requirements, but rather guidelines, which are unjustified in the present case given the Respondent's express agreement that the Contract meets the definition of an investment for purposes of the ICSID Convention. In any event, the *Salini* guidelines have been met, including the guidelines as to contribution and risk. The Claimants reject the Respondent's allegation that the Claimants did not make contributions or take risks for the purposes of Article 25 of the ICSID Convention because CIOC allegedly did not pay

CCC for the assignment of the Contract. According to the Claimants, this allegation is both factually wrong and legally irrelevant because (i) CCC was paid in full (Defense on Jurisdiction, paras. 420-421); (ii) even if CIOC had not repaid CCC, this would be a problem between CCC and Mr. Fadi Hussein (or at best between CCC and CIOC) and is irrelevant to the Respondent and to the question of whether the investment requirement under the ICSID Convention is met. It is a fact that obligations were contracted (such as the commitment to pay outstanding loans under the loan agreements and to take exploration obligations under the Contract) and that such obligations sufficiently qualify as an investment, even more so given the extensive and costly nature of these contracted obligations. For the Claimants, the existence of extensive obligations give rise to liability and this includes the element of risk.

524. The Claimants add that the Respondent is wrong in arguing (and case law contradicts the Respondent's argument) that a claimant must prove that it used its own financial means and at its own financial risk to acquire a contract in order for there to be an investment. To the contrary, a contribution does not have to be made by the claimant (but can be made by a predecessor in rights), nor does the acquisition of a contract have to be made for value. The Claimants highlight in this context that several extensive and outcome-determinative investments were carried out by CIOC during the Devincci Hourani era, and reserves were confirmed during this era by CER (hired by CIOC), which was acknowledged by the Respondent. For the Claimants, this explains the important increase of the value of the Claimants' investment.

525. Distinguishing the cases relied upon by the Respondent (namely *KT Asia Investment Group B.V.*, *Romak* and *Nova Scotia Power Incorporated*), the Claimants also stress that CIOC is not a mere shell company, but has over a hundred employees and was fulfilling a long-term concession contract (Defense on Jurisdiction, paras. 422-450; Claimants' First Post-Hearing Brief, paras. 135-139; Claimants' Reply Post-Hearing Brief, paras. 52-56).

526. Finally, the Claimants submit that **the Respondent's "no interest on JOR loans and no repayment defense" is "extraordinary and untenable"** for eight independent reasons. First, the Claimants reiterate that a loan undisputedly constitutes an investment, and the source of financing is irrelevant for the definition of an investment. The loan received from JOR was used by CIOC for purposes of

the investment with the knowledge and approval of the Respondent (Defense on Jurisdiction, para. 452; Claimants' First Post-Hearing Brief, para. 138).

527. Second, the Claimants recall that it is wrong for the Respondent to argue that JOR's loans did not provide for interest (Defense on Jurisdiction, para. 453; Claimants' First Post-Hearing Brief, para. 138).

528. Third, according to the Claimants, the fact that a loan may not be repaid and/or that interest thereon may not be due or repaid is in any event irrelevant (Defense on Jurisdiction, para. 454). The Claimants criticize the Respondent for challenging jurisdiction on the ground that the loan may not have been repaid, it being pointed out that if such were the case, this would be due to the Respondent's acts and omissions that prevented payments from being made. In any event, a partial repayment of the loan was made in 2015 (Claimants' First Post-Hearing Brief, para. 139).

529. Fourth, the Claimants submit that the debt and liability remain outstanding, are claimed by JOR and are acknowledged by Mr. Devincci Hourani, including interest (Defense on Jurisdiction, para. 455).

530. Fifth, the Claimants argue that the fact that the debt has not been pursued litigiously by its creditor nor reimbursed yet by its debtor is explained by the fact that the payment term has not yet been reached and that the lender and creditor are brothers-in-law and "shared at the hand of Kazakhstan the bitter common fate of expropriation and exile" (Defense on Jurisdiction, para. 456).

531. Sixth, the Claimants submit that the Respondent cannot rely on the Claimants' default on the loan (to argue a lack of risk), because it has itself caused this default through the expropriation of the Claimants' investment (Defense on Jurisdiction, para. 457; Claimants' First Post-Hearing Brief, para. 139).

532. Seventh, it is the Claimants' position that "the mere fact of contracting obligations towards both Kazakhstan and financers for purposes of the investment constitutes risk and an investment, and this even more so as no return was guaranteed". What matters is whether the venture itself (rather than the means by which the venture is financed) includes some element of risk for the claimant, such as a risk of not making any profits or being liable for losses (Defense on Jurisdiction, paras. 458-462; Claimants' First Post-Hearing Brief, para. 140).

533. Eighth, the Claimants reiterate that whether and to what extent the venture was financed by an interest-free loan is irrelevant for the venture's qualification as an investment because (i) the question of whether a contribution was made is not limited only to a venture's underlying means of financing, but rather examines the venture as a whole, including all forms of activities that may qualify as a contribution and thus confirm the existence of an investment; (ii) a venture can qualify as an investment even when the financing is made through assets that are not the investor's own if other contributions in money or in kind exist; and (iii) a mere commitment to make a contribution, namely a payment, may be sufficient to constitute a contribution and thus an investment. CIOC's venture – a project of significant importance and magnitude – viewed as a whole, was a hydrocarbons exploration and production concession, financed not only by loans, but also by reinvestments from the revenues from the pilot oil production. The Claimants submit that their venture was "therefore unquestionably a 'quintessential' investment" (Defense on Jurisdiction, paras 463-477; Claimants' First Post-Hearing Brief, paras. 141-142).

ii. Under the Contract

534. The Claimants argue that the Respondent is a party to the ICSID Convention and therefore grants CIOC access to ICSID arbitration (Memorial, para. 566).

535. Moreover, the Claimants submit that the existence, validity and effectiveness of the ICSID clause in Clause 27 of the Contract is not disputed between the Parties, but has even been relied upon by the Respondent in the *Caratube I* arbitration. The Respondent has thus accepted ICSID jurisdiction both in the Contract and after the dispute has arisen (Memorial, paras. 520 and 567).

536. The Claimants reject the Respondent's argument that, under Article 27.8 of the Contract, the Parties agreed to consider CIOC as a Kazakh company for purposes of determining whether it meets the nationality requirements of the ICSID Convention. The Claimants' position on the Respondent's argument is set forth in para. 505 above (Defense on Jurisdiction, paras. 627-623, with cross-reference to paras. 346 et seq. of the Defense on Jurisdiction).

iii. Under the FIL

537. The Claimants allege preliminarily that the provisions of the FIL (Exh. CLA-2) must be interpreted broadly so to "provide the broadest possible protection to all possible investors, even international organizations and stateless persons". The FIL's application has been extended even to companies with 35% foreign ownership or foreign monetary contributions of USD 1 million (Memorial, para. 529). According to the Claimants, the Respondent has failed to prove the contrary. In particular, a state has **the burden of proof** to justify the scope, operation, and meaning of the terms and objectives of the provisions of its own laws. A state's failure to produce evidence in this respect must be construed against it. This general premise applies in the present case because (i) the FIL is a unilateral legal instrument; (ii) the particular circumstances of the present case make it especially burdensome for the Claimants to obtain access to the relevant evidence, thus creating an inequality of arms (Defense on Jurisdiction, paras. 480-487; Claimants' First Post-Hearing Brief, paras. 152-153).

538. For the following reasons, it is the Claimants' position that this Tribunal has jurisdiction under the FIL. First, the Claimants argue that Article 27 of the FIL gives investors the option to choose ICSID as a forum to dissolve investment disputes, **without the need for a separate arbitration agreement with the state**. The Respondent's position to the contrary, namely that the offer in Article 27 FIL must be supplemented by an additional arbitration agreement between the Parties, is supported only by Professor Ilyasova's legal opinion, which itself does not refer to any commentary or case law. However, there is no support in Article 27 of the FIL for the Respondent's allegation that this Article requires two separate levels of consent by the Respondent, namely (i) a consent in favor of arbitration generally in the FIL and (ii) a specific consent in a separate arbitration agreement in favor of a specific arbitration mechanism with a specific party. The Respondent's interpretation of Article 27 FIL also is contrary to ICSID case law which favors the Claimants' interpretation, e.g. the *Rumeli* case, among others. Moreover, the ICSID case law relied upon by the Respondent (namely the cases in *Biwater Gauff* and *Metal-Tech*) is inapposite as it can be easily distinguished from the case at hand (Memorial, para. 531; Defense on Jurisdiction, paras. 565-581; Claimants' First Post-Hearing Brief, paras. 180-181; Claimants' Reply Post-Hearing Brief, paras. 79-85).

539. Second, Mr. Devincci Hourani is a US national and must therefore be considered as a **"foreign investor" under Article 1 of the FIL**. Equally, Mr. Devincci Hourani's

US nationality grants this status of foreign investor to CIOC, as a legal entity controlled by a US national (Memorial, paras. 532-533). The Claimants argue that the notions and terms of the FIL must be interpreted broadly, in light of the historical and socio-economic context in which the FIL was adopted. For instance, the term "investor" under Article 1 of the FIL must be interpreted broadly to include "foreign countries", "international organizations", and "stateless persons". This is explained by the fact that the FIL was adopted against a background of attempting to attract foreign investments. Thus, the FIL must be interpreted to broadly provide benefits and protections to foreign investors (Defense on Jurisdiction, para. 496 and para. 505).

540. With respect to **the registration requirement in Article 1 of the FIL**, the Claimants submit that it applies only to foreign investors directly conducting business in Kazakhstan in their personal capacity, but not to cases such as the present one of investments carried out via the ownership of shares in registered local companies. This is so by way of Article 16 of the FIL operating as a *lex specialis* over Article 1 of the FIL. Article 16 regulates the registration of local companies owned by foreign nationals and does not require proof that the shareholder is "registered to conduct economic activities" in his country of origin. In particular, a foreign physical person, such as Mr. Devincci Hourani, wishing to register a Kazakh company with foreign participation, such as CIOC, is not required to provide documents confirming registration to carry out economic activities in the foreign person's country of citizenship or permanent residence. Rather, Article 16 of the FIL provides that the foreign person only needs to provide a copy of the passport with a notarized translation into the Kazakh or Russian languages. The Claimants submit that their interpretation of Articles 1 and 16 of the FIL is supported by the legal opinions of the drafters of the FIL (Memorial, paras. 534-536; Defense on Jurisdiction, paras. 488-503; Claimants' Reply Post-Hearing Brief, paras. 72-74 and 77. See also Exhs. C-51bis and C-52bis). The Claimants note that Professor Ilyasova was not involved in the drafting of the FIL, nor did she submit any authority in support of her expert opinion that foreign investors enjoy the benefits and protections of the FIL only if they are registered to conduct economic activities in their country of origin or permanent residence. Professor Ilyasova's opinion thus cannot be authoritative (Defense on Jurisdiction, paras. 506-508; Claimants' First Post-Hearing Brief, paras. 155-156).

541. The Claimants take issue with the Respondent's reliance on the *Usmonov* case in support of its contention that the registration requirement in Article 1 of the FIL is mandatory for a Kazakh company with foreign participation. According to the Claimants, the *Usmonov* case cannot outweigh their interpretation of the FIL because (i) Professor Ilyasova criticized the *Usmonov* case in an academic paper of 2011. Her reliance on and contradictory interpretation of that same case in support of the Respondent's position diminish the value of her expert opinion (Defense on Jurisdiction, paras. 510-511. See also the Claimants' First Post-Hearing Brief, paras. 157-159); (ii) in any event, the *Usmonov* case is of little (if any) relevance as this Tribunal has broad autonomy in applying and interpreting the applicable law and is not bound by precedent (especially not by a single, isolated decision with multiple contradictions rendered by the court of the host state in a case involving that host state as party, on a question relating to norms advanced for attracting foreign investors and relied upon by foreign investors). The case may not be applicable in this arbitration as the case file is inaccessible, as has been confirmed by Prof. Ilyasova (Defense on Jurisdiction, para. 512; Claimants' First Post-Hearing Brief, para. 163-166); (iii) case law is not recognized as a source of law in Kazakhstan and thus is not binding (Defense on Jurisdiction, para. 513; Claimants' First Post-Hearing Brief, para. 162); (iv) the factual circumstances underlying the *Usmonov* case are largely unknown (Defense on Jurisdiction, para. 514). To the limited extent that they are known, it is apparent that the factual matrix underlying the *Usmonov* case differs with respect to crucial elements from this Arbitration (Claimants' First Post-Hearing Brief, para. 165); (v) it was the investor in the *Usmonov* case who did not want to qualify as a foreign investor and the arguments raised by the Claimants in this Arbitration were not determined by the Supreme Court in that case (Defense on Jurisdiction, para. 515); and (vi) even the Kazakh General Prosecutor protested against the findings made in the *Usmonov* case to the Supreme Court's Supervisory Board (Defense on Jurisdiction, para. 516; Claimants' First Post-Hearing Brief, para. 160).

542. The Claimants also take issue with the Respondent's reliance on a decision rendered by the Russian Supreme Arbitration Court, arguing that it is irrelevant and deprived of probative value because (i) the investor in that decision was a national of Bulgaria, a former Communist-regime country, where the registration requirement existed; and (ii) the contents of Article 16 of the Russian FIL of 1991 and of Article 16 of the FIL are different (Defense on Jurisdiction, para. 517; Claimants' First Post-Hearing Brief, para. 166). The Claimants observe that the Russian Law on Foreign

Investment had the same registration requirement for physical persons as the FIL under Article 1, and that Article 16 of the Russian FIL provides for the registration requirement in the country of citizenship or residency for the foreign shareholder of a local company. The Claimants underline that the FIL removed this requirement, which confirms that such registration requirement does not apply under Article 16 of the FIL (Memorial, para. 537; Defense on Jurisdiction, para. 517).

543. The Claimants further criticize the Respondent's argument according to which CIOC cannot be considered as an "enterprise with foreign participation" as defined in the FIL, namely because CIOC is not owned by a "foreign investor" as defined by the FIL (i.e. a person registered to carry out business activities in his country of origin or permanent residence). For the Claimants, this argument is erroneous in that it completely disregards Article 16 of the FIL. Moreover, the Respondent's argument that not any company with foreign participation also constitutes a company with foreign participation under the FIL is flawed. The Claimants assert, *inter alia*, that the Respondent cannot argue, without providing any evidence, that there exist separate types of "enterprises with foreign participation" in Kazakh law, some of which are always considered as "foreign investors" under the FIL, and others exist for other purposes. According to the Claimants, once a company with foreign participation is registered in Kazakhstan in conformity with the specific registration procedure set forth in Article 16 of the FIL, such company is deemed a company with foreign participation and assigned a special code in its company number, thereby benefiting from the protections of the FIL (Defense on Jurisdiction, paras. 518-520; Claimants' Reply Post-Hearing Brief, para. 75). This is confirmed by the fact that Chapter 5 of the FIL, within the scope of which Article 27 FIL is contained, bears the title "Types and Operational Conditions of Foreign Investors and Enterprises with Foreign Ownership" (emphasis added by the Claimants). This shows that Article 27 of the FIL applies to enterprises with foreign participation, which do not require registration, and not just to foreign investors, which require registration (Memorial, para. 538; Defense on Jurisdiction, para. 521). In this respect, the Claimants stress that CIOC was always considered a company with foreign participation and profited from the protections of the FIL, and this did not change following CIOC's reregistration after the purchase of CIOC by Mr. Devincci Hourani (Defense on Jurisdiction, paras. 522-523).

544. The Claimants find further confirmation of their position in the allegation that Article 1 of the Kazakh FIL was "drafted based on the misunderstanding by Kazakhstan

given the Soviet experience that most countries imposed registration as a prerequisite to engage in economic activities", and it was on this basis that the registration requirement was removed from Article 16 of the FIL. This requirement cannot be applied with respect to Mr. Devincci Hourani, whose country of citizenship, namely the United States, along with many others, does not require registration before any trade body or organs as a mandatory means of carrying out business (Memorial, paras. 539-540).

545. In any event, the Claimants submit that **the formal registration requirement of Article 1 FIL has been complied with**. The Claimants point out that the Respondent admits that the United States has no commercial registry. While the Respondent further submits that Mr. Devincci Hourani therefore should have made his investment through a foreign legal entity, the Claimants argue that there is no serious rationale to back up this allegation. Moreover, Mr. Devincci Hourani is registered to conduct business activities in the United States as the shareholder and agent of several US companies. The FIL has not been shown by the Respondent to impose any specific formalities or test, other than that a person must be registered to conduct economic activities in the country of his nationality or permanent residence, which requirement is satisfied by Mr. Devincci Hourani. (Defense on Jurisdiction, paras. 525-529; Claimants' First Post-Hearing Brief, paras. 167-174).

546. The Claimants submit that, alternatively and more importantly, **CIOC has in any event met the intent and purpose of the registration requirement in Article 1 of the FIL** (assuming *arguendo* that it is applicable and has a meaningful purpose): Mr. Devincci Hourani is a businessman in the United States, who is authorized to – and in fact does – carry out economic activities in the United States. It is widely recognized by ICSID tribunals in respect of investment protection claims that they cannot be limited by formalistic requirements and that substance must prevail over form. The Claimants underline that CIOC meets the purposes and objectives of the registration requirement and thus falls within the scope of the application of the FIL; the opposite conclusion would be absurd, say the Claimants, as it would mean that a merchant, who is registered abroad to sell groceries and would invest USD 10,000 in a grocery shop in Kazakhstan, would benefit from the FIL. It would be absurd to disregard the FIL's broad wording and the context in which this law was adopted to deny the FIL's protection to CIOC, whose majority shareholder is an agent and shareholder in foreign companies and who has organized the investment through CIOC of tens of millions of US dollars in the strategic Kazakh oil industry. For the

Claimants, its conclusion is consistent with Article 31(1) of the Vienna Convention on the Law of Treaties (applied by analogy), according to which legal instruments must be interpreted in a manner that gives effect to its intent and purpose and does not lead to absurd results (Defense on Jurisdiction, paras. 533-539; Claimants' First Post-Hearing Brief, paras. 175-176).

547. In addition to the foregoing arguments, the Claimants argue that the Respondent is in any event estopped from and/or has waived the right to rely on Article 1 of the FIL. Indeed, the Respondent considered the FIL applicable to CIOC throughout the entire life of the project. The Claimants note that during the Contract negotiations, the Vice-Minister of Justice requested the exclusion of several contractual provisions as these provisions were duplicative with guarantees contained in the FIL. According to the Claimants, the Contract thus contained numerous references to the FIL, which evidences the fact that the Respondent considered its counterparty a foreign investor. Further support is found in the Contract's detailed assignment clause which allows the Contractor to assign its rights to a third party. As was already seen, when the Contract was assigned to CIOC with full knowledge and approval of the Respondent, CCC was replaced by CIOC and the remainder of the contractual clauses was left intact, including the clauses referring to the FIL or its protections. Again, when the Contract was extended on 27 July 2007 by means of Amendment No. 3, none of the contractual clauses referring to the FIL or its protections were modified (Defense on Jurisdiction, paras. 541-547).

548. For the Claimants, the Respondent is also estopped from or has waived its right to rely on Article 1 of the FIL because the Respondent has treated Mr. Devincci Hourani as a foreign investor. The Claimants rely on several investment cases where tribunals have applied estoppel to dismiss a respondent's jurisdictional and/or substantive defenses. The Claimants further underline that the Respondent cannot deprive CIOC of investment protection based on non-compliance with a formalistic and bureaucratic registration requirement under its own law for investor qualification purposes after having benefited from this investment for years and having approved and re-approved the text of the Contract containing multiple references to the FIL (Defense on Jurisdiction, paras. 548-553).

549. The Claimants submit that the three-month cooling-off period under Article 27(2) of the FIL has been met, it being specified that such provision is not mandatory but constitutes a recommendation. The Parties' dispute exists and is unresolved since June 2007. The Claimants' numerous invitations to the Respondent to find an

amicable resolution of the dispute remained unanswered, there being in any event no chance of finding an amicable solution given the context of other previous and potential proceedings between the Parties and the Respondent's conduct further aggravating the dispute (Memorial, paras. 548-549).

550. Third, the Claimants reiterate that the notions and terms of the FIL must be interpreted broadly, including the term **"investment" under Article 1 of the FIL**. Thus, Mr. Devincci Hourani's 92% stake in CIOC, as well as CIOC's license for exploration and production of hydrocarbons and its rights under the Contract, fall within the broad notion of "investments" under Article 1 FIL (Memorial, paras. 550-551).

551. The Claimants reject the Respondent's allegation that for there to be an investment pursuant to the FIL, there has to be a contribution actually made by the foreign investor and some active behavior on the part of the foreign investor. The Respondent's "textual" interpretation is "a blatant attempt to read into Article 1's definition of 'investment' what is plainly not there", and this reading also is not supported by either academic commentary or case law. Rather, it is contradicted by the broad wording and the historical context of the FIL, which sought to attract foreign investments (Defense on Jurisdiction, paras. 554-555).

552. The Claimants argue that, in any event, the Respondent's alleged additional requirement of an actual and "economically adequate" contribution by the foreign investor is met. In this regard, the Claimants reiterate that CCC was paid in full. Even if it was not repaid, this would be irrelevant from a jurisdictional perspective as CIOC would still have a liability towards CCC. The Respondent cannot rely on the "Preliminary Audit Report of Caratube" (Exh. R-5) to argue that CIOC did not make a contribution, as it is a preliminary report without probative value and the Respondent did not produce on the record the final version of this report. The Respondent also cannot argue that CIOC did not contribute anything of value to its operations as an amount of USD 39.2 million was indisputably invested by CIOC and the loans obtained from JOR are being repaid by Mr. Devincci Hourani (even though this last point is irrelevant for purposes of jurisdiction). It is the Claimants' position that the mere shareholding and contracting of extensive obligations constitutes an investment. The Claimants add that CIOC reinvested more than USD 18 million from the proceeds of the oil sales into the company, which also constitutes an investment. Finally, contrary to Prof. Ilyasova's allegations, for there to be an investment under the FIL there is no additional requirement of an "actual transfer of

money or other property". Nor is there a set minimum contribution (Defense on Jurisdiction, paras. 561-564; Claimants' Reply Post-Hearing Brief, paras. 70-71).

553. According to the Claimants, CIOC, a Kazakh company with foreign ownership, does not need to prove that it holds "foreign investments" and that it is registered pursuant to Article 16 of the FIL. Even if CIOC were to be under an obligation to prove that it holds "foreign investments", as was already seen above, the Claimants submit that this requirement is complied with. Equally, the definition of an "investment dispute" under the FIL is met because it is a dispute between Kazakhstan and "a foreign investor" (Mr. Devincci Hourani and/or CIOC) arising out of foreign investments, "including" a dispute relating to "investments made in the form of participation in the authorized capital of legal entities of the Republic of Kazakhstan" or "actions of authorized state bodies, violating the rights and interests of foreign investors, under th[e] [FIL], other legislation of the Republic of Kazakhstan or an applicable law" or arising out of "any agreement between the Republic of Kazakhstan and a foreign investor" (i.e. the Contract) (Memorial, paras. 541-547; Defense on Jurisdiction, paras. 557-560; Claimants' First Post-Hearing Brief, paras. 177-178).

554. Fourth, the Claimants allege that the FIL was in force from 27 December 1994 until 22 January 2003 and, therefore, **the FIL was applicable when the Contract was entered into on 27 May 2002 and assigned to CIOC on 26 December 2002**. The FIL applies notwithstanding the fact that it was repealed by virtue of the stabilization clauses in (i) Article 6 of the FIL; (ii) Clauses 28.2 and 28.4 of the Contract; (iii) Article 71 of the 1996 Subsoil Law; (iv) Article 383(2) of the Kazakh Civil Code; and (v) the ICSID clause contained in the FIL (Memorial, paras. 552-564). The Claimants underline that CIOC's re-registration following the transfer of its shares to Mr. Devincci Hourani does not affect CIOC's protected status under the FIL. CIOC was registered as a company "with foreign participation" with Mr. Fadi Hussein as its sole foreign shareholder on 29 July 2002. CIOC kept this status thereafter, as confirmed by the official certificates of State registration, issued by the Almaty Department of Justice (Defense on Jurisdiction, paras. 530-532; Claimants' First Post-Hearing Brief, para. 182).

555. With respect to the Respondent's argument that its offer to arbitrate was revoked when the FIL was repealed in January 2003, the Claimants argue that the above-mentioned stabilization clauses apply to the FIL's dispute resolution clause, which therefore is not affected by the repeal of the FIL. In particular, due to the stabilization clauses, the Respondent's offer to arbitrate investment disputes in the FIL was not

revocable. The Claimants rely on authority concerning the case of denunciation of the ICSID Convention, which is applicable by way of analogy to the Respondent's repeal of the FIL, say the Claimants. Furthermore, the Claimants submit that the FIL created legitimate expectations among foreign investors, including CIOC, when making their investments, namely by affording them protection through an offer to arbitrate investment disputes. The repeal of the FIL is ineffective in that it violates these legitimate expectations. The Claimants also submit that the Respondent's position regarding the revocable character of its offer to arbitrate does not take into consideration the fact that the Contract constituted accrued/vested rights, irrevocable per se during the life of the Contract, notwithstanding the FIL's repeal (Defense on Jurisdiction, paras. 582-594).

556. Moreover, the Claimants reject the Respondent's challenge of the stabilization clauses. As regards the stabilization clause in Article 6 of the FIL, its purpose is precisely to provide for the application of the norms covered by it for the duration of the stabilization period. Thus, even after the FIL's repeal, it remains applicable for qualifying individuals and entities by virtue of its stabilization clause, and any other interpretation would render the FIL's stabilization clause meaningless. The Claimants' position is confirmed by the highest Kazakh authorities, including the main drafter of the FIL, as well as case law (namely the *Rumeli* case). In response to the Respondent's arguments as to the timing of the stabilization clause and its revocation, the Claimants submit that they are flawed because (i) the transfer of CIOC's shares from Mr. Fadi Hussein to Mr. Devincci Hourani could not interrupt the lapse of the stabilization period for CIOC. The Claimants underline that it is CIOC, as a company with foreign participation, who benefits from the substantive protections of the FIL. The change of ownership in CIOC did not affect its status as company with foreign participation and thus the protection it benefited from under the FIL; the running of the stabilization clause in Article 6 of the FIL was therefore not interrupted; (ii) Article 6 of the FIL does not speak of the commencement of the investment as the start date to assess the expiration of the stabilization period. Rather, it speaks of the "carrying out" of the investment at such start date. In the case at hand, the investment was carried out continuously. Accordingly, even assuming that the applicable stabilization period under Article 6 of the FIL was 10 years, it would run until at least the end of 2012, by which time the notice of the dispute was given. For the Claimants, in reality the stabilization period applicable to CIOC is much longer, as the Contract must be considered as a long-term contract for purposes of Article 6 of the FIL, and the Claimants honored the stabilization

period by filing their claims under the FIL (and the Contract) in time with this Tribunal (Defense on Jurisdiction, paras. 595-614; Claimants' Reply Post-Hearing Brief, paras. 90-91).

557. Moreover, regarding the stabilization clause in Clause 28.2 of the Contract, the Claimants agree that the scope of this clause's effect is limited to the Contract. However, the Contract contained numerous references to the FIL and expressly incorporated the substantive protections of the FIL in Clause 28.4 (upon the request of the Kazakh Vice-Minister of Justice). Notwithstanding the FIL's repeal, the references to the FIL remained in the Contract and survived the FIL's repeal and the acquisition of CIOC by Mr. Devincci Hourani. Furthermore, the unilateral and unlawful termination of the Contract could not extinguish the validity period of the Contract's stabilization clause (Defense on Jurisdiction, paras. 615-618).

558. Concerning the stabilization clause in Article 383(2) of the Kazakh Civil Code, the Claimants reiterate that they request this Tribunal, by means of Article 383(2), to apply the provisions of the Contract which refer to and incorporate all the substantive protections of the FIL despite the latter's repeal following the signing of the Contract (Defense on Jurisdiction, para. 619).

559. With respect to Article 71 of the 1996 Law on Subsoil, which was applicable at the time of the signature of the Contract, the Claimants insist that CIOC's position would deteriorate in that without the stabilization clause there would be no FIL and thus no access to a neutral arbitral forum via the FIL. Furthermore, the repeal of the FIL has been much criticized by Kazakh academics and practitioners as constituting a deterioration of the position of subsoil users (Defense on Jurisdiction, paras. 620-621).

560. Finally, the Claimants insist that the ICSID clause in the FIL, applicable at the time of the investment and in any event cross-referenced in the Contract, constituted vested or accrued rights, irrevocable per se during the life of the Contract, including under the principle of good faith, estoppel and *venire contra factum proprium*. In support of their position, the Claimants rely on the *Rumeli* case (Defense on Jurisdiction, paras. 622-624; Claimants' First Post-Hearing Brief, para. 183; Claimants' Reply Post-Hearing Brief, para. 92).

b. The Respondent's position

i. Under the ICSID Convention

561. It is the Respondent's position that CIOC must show that it has complied with the requirements *ratione personae, ratione materiae* and *ratione voluntatis* under the ICSID Convention, as well as with the requirements of the consent-granting instrument invoked by CIOC. Concerning the requirements under the ICSID Convention, the Respondent argues that CIOC must establish that under Article 25 of the ICSID Convention, CIOC, a Kazakh company, fulfills the two requirements of Article 25(2)(b) of the Convention in order to be considered a US national, and that CIOC made an investment under the ICSID Convention. It is the Respondent's contention that these requirements are not met, as has already been decided in the *Caratube I* award and upheld by the *ad hoc* committee. As a result, this Tribunal does not need to examine whether the requirements of the consent-granting instruments relied upon by CIOC, namely the Contract and the FIL, are met to provide a basis of consent to ICSID arbitration of CIOC's claims (which in any event they do not). CIOC's claims must thus be dismissed for lack of jurisdiction (Counter Memorial, paras. 231-238).

(a) CIOC does not meet the requirements of Article 25(2)(b) of the ICSID Convention

562. The Respondent submits that the requirements of Article 25(2)(b) of the ICSID Convention constitute a threshold question. It relies on the *Caratube I* award where that tribunal stated as follows (Counter Memorial, para. 240):

> The threshold question is whether a juridical person can be regarded as a national of another Contracting State 'because of foreign control,' in particular, whether 'because of foreign control' the parties have agreed to treat Claimant as national of another Contracting State. Only after this threshold is cleared may the Tribunal move to analyzing whether the conditions of Article 25(1) of the ICSID Convention are satisfied.

563. For the Respondent, the relevant questions are whether the Parties agreed to treat CIOC as a foreign national and, if so, whether Mr. Devincci Hourani had control over CIOC.

564. Regarding the first question, it is the Respondent's position that **the Parties have not agreed to treat CIOC as a foreign national** for purposes of Article 25(2)(b) of the ICSID Convention. According to the Respondent, any consent as to foreign nationality under Article 25(2)(b) must be explicit, which is illustrated, for example, by Clause 7 of the ICSID Model Clauses (Exh. RL-77). While Clause 27.8 of the

Contract contains an explicit agreement, this agreement does not allow CIOC to be treated as a foreign national for purposes of the ICSID Convention. To the contrary, Clause 27.8 of the Contract clearly and explicitly stipulates that CIOC, as an assignee, must be treated "as a national of the resident country of the assignee". This means that CIOC, as a company undeniably incorporated and operating in Kazakhstan, must be treated as a national of its resident country, *i.e.* Kazakhstan (Counter Memorial, paras. 242-249; Respondent's First Post-Hearing Brief, paras. 80-83; Respondent's Reply Post-Hearing Brief, para. 51).

565. Based on the following reasons, the Respondent submits that the Claimants cannot argue that there is an implicit overriding agreement in the Contract to treat CIOC as a foreign national. First, an implicit agreement cannot override the clear and express agreement of the Parties in the Contract to consider the assignee, CIOC, as a Kazakh national. The Parties to the Contract foresaw the possibility of an ICSID tribunal declining jurisdiction, given that at the time the Contract was signed, the ICSID Convention had not been ratified by Lebanon and would thus not have conferred jurisdiction to an ICSID tribunal over claims brought by the Lebanese company CCC. This is confirmed by the fact that the Contract provides for the possibility of UNCITRAL arbitration in the event that an ICSID tribunal should refuse jurisdiction (Counter Memorial, paras. 250-252; Respondent's Reply Post-Hearing Brief, para. 51).

566. Second, the Respondent denies the existence of an implicit agreement to treat CIOC as a foreign national for the purposes of Article 25(2)(b) of the ICSID Convention due to the fact that the Contract contains references to Kazakh laws regarding foreign investors. For the Respondent, it is not possible to infer an agreement to treat a company as foreign "because of foreign control" simply from the existence of Kazakh laws indicating that a company could be considered foreign; because a company may be considered by a local law as foreign for one purpose does not mean that it must be considered as foreign "because of foreign control" for the purposes of Article 25(2)(b) of the ICSID Convention. To the contrary, Clause 27.8 of the Contract contains a specific test for the determination of nationality for ICSID purposes. According to the Respondent, the *LETCO* and *Cable Television Nevis* cases relied upon by the Claimants are inapposite (Counter Memorial, paras. 253-254; Respondent's Reply Post-Hearing Brief, para. 51).

567. Third, the Respondent argues that the Claimants cannot rely on the FIL as a basis for finding an agreement to treat CIOC as a foreign national. Indeed, it is a settled

question, says the Respondent, that an implied agreement can in no circumstances be drawn when the consent-granting document invoked is a law or a treaty. Therefore, the Claimants cannot argue that the concept of foreign investor in Article 1 and the reference to ICSID in Article 27 of the FIL make up for the lack of an agreement by the Respondent to treat CIOC as a US national for purposes of the Article 25(2)(b) of the ICSID Convention (Counter Memorial, paras. 255-256).

568. Fourth, the Respondent denies having admitted ICSID jurisdiction under the Contract during the *Caratube I* arbitration. It simply argued in that arbitration that CIOC was bound by the dispute resolution clause in the Contract, which provides for both ICSID and UNCITRAL arbitration. However, the Respondent's position has always been that CIOC does not meet the requirements in Article 25(2)(b) of the ICSID Convention and thus cannot avail itself of any ICSID clause, be it in the Contract, the FIL or the BIT. Even if there were an admission of some kind (which is denied), this Tribunal is bound to independently assess jurisdiction pursuant to Article 41 of the ICSID Convention (Respondent's Reply Post-Hearing Brief, para. 51).

569. Regarding the second question mentioned above in paragraph 563, it is the Respondent's position that **CIOC was not controlled by Mr. Devincci Hourani**. The Claimants offer no evidence or analysis in support of their position that CIOC satisfies the foreign control requirement of Article 25(2)(b) of the ICSID Convention. Rather, the *Caratube I* tribunal found that it did not. In particular, the Claimants cannot successfully argue that Mr. Devincci Hourani's majority share ownership in CIOC, standing alone, is enough to satisfy the foreign control requirement. The jurisprudence is clear that formal control is not enough and that objective and actual control is required. Share ownership may merely create a presumption of control. The words "because of foreign control" in Article 25(2)(b) of the ICSID Convention are indicative of an objective requirement that cannot be replaced by agreement. Therefore, the Tribunal must look at all relevant factors to determine whether there is real, actual control, rather than merely formal control (Counter Memorial, paras. 258-264; Respondent's Reply Post-Hearing Brief, para. 53).

570. The Respondent submits that **CIOC bears the burden of proving that Devincci Hourani had actual control over it**, but failed to satisfy this burden of proof. It is the Respondent's position that Devincci Hourani did not exert actual control; at best he acquired formal control of CIOC's shares, even though there is no evidence that he ever paid the nominal price of USD 6,500 for such shares, was involved in the

management of CIOC (unlike his brother, Issam Hourani), or has any relevant education or experience in the oil industry (other than his involvement in the Kulandy project, which the Respondent describes as "a spectacular failure"). The Respondent relies on the following passage of the *Caratube I* award (Exh. CLA-8, paras. 406-407):

> As a witness, Devincci Hourani admitted that he did not participate in a day to day running of CIOC in times when he was not a director of CIOC. […] His evidence of control is based on a reference to CIOC's Charter and Incorporation Agreement, which give him certain competences. However, no evidence was shown that such competences and control were actually exercised by him.
>
> Thus, there is not sufficient evidence of exercise of actual control over CIOC by Devincci Hourani. In view of the above considerations, the Tribunal concludes that Claimant has not provided sufficient proof for control as required by Art. 25(2)(b) of the ICSID Convention.

571. For the Respondent, the record in the present case is even clearer in that the Claimants now admit that investments, if any, were made by JOR, which provided all the funds to CIOC on an interest-free basis and took all the risk with regard to CIOC. The Respondent submits that Mr. Devincci Hourani himself admitted at the Hearing that he did not disburse any money in connection with CIOC's Contract. And with none of the money outlays coming from Mr. Devincci Hourani, they cannot serve as a basis to show control by the latter over CIOC (Counter Memorial, paras. 265-269; Respondent's First Post-Hearing Brief, paras. 71 et seq.; Respondent's Reply Post-Hearing Brief, para. 54).

572. The Respondent submits that Clause 28 of the Contract, entitled "Guarantees of Contract Stability", does not contain an agreement between the Parties to treat majority ownership as the proper standard for purposes of the foreign control requirement under Article 25(2)(b) of the ICSID Convention. The Respondent notes that Clause 28 of the Contract does not mention the ICSID Convention. Moreover, the *Aucoven* case relied upon by the Claimants is irrelevant and does not support the Claimants' position; it being further argued that, to the contrary, the *Aucoven* case supports the Respondent's position regarding the double key-hole theory and recognizes the premise that economic realities must not be ignored. For the Respondent, the economic reality is that Mr. Devincci Hourani did not control CIOC and merely had nominal ownership. If anyone was in control of CIOC, the Hearing made clear that this was JOR. The Claimants cannot found this Tribunal's jurisdiction on JOR's control over CIOC, given that JOR is not a party to this Arbitration and that a case based on control by JOR is a completely different case

that is not before this Tribunal. If it is admitted that JOR is in control of CIOC, this would defeat ICSID jurisdiction based on Mr. Devincci Hourani, which is the case before this Tribunal (Respondent's First Post-Hearing Brief, paras. 74-79).

(b) CIOC did not make an investment within the meaning of Article 25(1) of the ICSID Convention

573. According to the Respondent, it is unanimously recognized by tribunals and authors that the elements of contribution and risk must be present for there to be an investment within the meaning of Article 25(1) of the ICSID Convention, and this general premise has also been upheld outside the ICSID Convention (Counter Memorial, paras. 270-277). In particular, concerning the element of contribution, caution is required where only a nominal price was paid for the acquisition of the asset(s) that purportedly amount to an investment. With respect to risk, this element is intimately linked to the contribution requirement. Furthermore, for the element of risk to be present in a transaction, the investor should have committed financial resources at the initial phase of the project (Counter Memorial, paras. 278-279).

574. It is the Respondent's position that CIOC did not make a contribution and did not take any risk in connection with the Contract relied upon as the basis of the Claimants' investment dispute and, therefore, did not make an investment under Article 25(1) of the ICSID Convention. There is evidence that, as of 30 June 2007, the Claimants had not paid CCC for the assignment of the Contract and, thus, did not contribute any money or financial resources. Moreover, CIOC's operations were financed by JOR through various interest-free loans, which CIOC never repaid (Counter Memorial, para. 282; Respondent's Reply Post-Hearing Brief, para. 58).

575. In response to the Claimants' argument that the origin of the capital is irrelevant, the Respondent reiterates that the Claimants ignore the real problem, namely that CIOC itself did not make a contribution and did not take any risk; it did not pay CCC for the assignment of the Contract and the operations of the company were not financed by CIOC. Furthermore, the Respondent points out that Mr. Devincci Hourani's testimony, according to which CIOC had paid CCC for the Contract and such payment was made by Mr. Fadi Hussein, is contradicted by his prior testimony in the *Caratube I* arbitration where he indicated that the money used to pay CCC came from Mr. Fadi Hussein's father. It is also contradicted by the fact that CIOC's books showed the assignment money as owing from CIOC to CCC. The Claimants have not proved that they actually contributed something to acquire the Contract. If they claim nearly one billion dollars on the basis of the Contract for which they never paid

one dollar, and operations were never financed by the Claimants (but exclusively by JOR), then the Claimants have not made an investment, because they did not contribute anything and did not take any risk (Respondent's First Post-Hearing Brief, paras. 84-90; Respondent's Reply Post-Hearing Brief, paras. 57-60).

(c) The Respondent has not consented to ICSID Arbitration of CIOC's claims through the FIL

576. The Respondent has raised several reasons as to the lack of consent to ICSID arbitration vis-à-vis CIOC through the FIL. These reasons are discussed below at paragraphs 579 et seq.

ii. Under the Contract

577. The Respondent argues that the Contract does not provide a basis for the Respondent's consent to ICSID jurisdiction. The Respondent notes that Mr. Devincci Hourani is not a party to the Contract and thus has no rights thereunder. Therefore, to the extent that the Contract should provide a basis for the Respondent's consent to ICSID arbitration (which the Respondent denies), such rights only extend to CIOC. According to the Respondent, the arbitration clause in Clause 27 of the Contract only covers claims arising out of the Contract and, thus, cannot constitute a jurisdictional basis for claims arising out of the FIL or any other basis. However, pursuant to Clause 27.8 of the Contract, CIOC must be considered as a Kazakh national for purposes of ICSID jurisdiction. This means that there is no ICSID jurisdiction over CIOC's claims even if it were admitted that the Respondent consented to ICSID arbitration of the claims arising out of the Contract, because CIOC does not meet the nationality requirements of the ICSID Convention (Counter Memorial, paras. 363-366).

578. The Respondent further rejects the Claimants' argument that the Respondent accepted ICSID jurisdiction under the Contract during the *Caratube I* arbitration: CIOC did not invoke the Contract's ICSID clause prior to the present Arbitration and the Respondent therefore could not express its views on this issue, which was not raised. Moreover, the Claimants cannot reasonably argue that the Respondent accepted ICSID jurisdiction over CIOC's claims under the Contract, when the Respondent prevailed at the same time on its argument that no ICSID tribunal could ever have jurisdiction over CIOC's claims because it cannot meet the threshold requirements of the ICSID Convention. Furthermore, while the Respondent argued in the *Caratube I* arbitration that CIOC was bound by the dispute resolution clause in

the Contract, the Respondent did not express a view as to the validity of the Contract's ICSID clause (Counter Memorial, paras. 367-370).

iii. Under the FIL

579. The Respondent advances "four independent reasons" for its contention that it has not consented to ICSID jurisdiction over CIOC's claims through the FIL (Counter Memorial, paras. 283 et seq.).

580. First, the Respondent argues that **CIOC is not a foreign investor under the FIL** and has no rights under it, including under Article 27 of the FIL, which provides for the dispute resolution mechanisms to settle investment disputes between foreign investors and the Republic of Kazakhstan. The Respondent draws the Tribunal's attention to the definition of "foreign investor" in Article 1 of the FIL. Under Article 1 of the FIL, where the alleged owner of a Kazakh legal entity (such as CIOC) is a natural person (as in this case), that person must show that he has complied with the two mandatory requirements of the FIL to be considered a foreign investor, namely that (i) he is a foreign citizen, stateless person or permanent resident abroad; and (ii) he is "registered to carry out business activities in [his] country of citizenship or permanent residence" (Counter Memorial, para. 286). CIOC does not show that Mr. Fadi Hussein, CIOC's purported founder, meets these two mandatory requirements. Furthermore, the registration status of Mr. Devincci Hourani is irrelevant to CIOC's qualification as a foreign investor under the FIL, because he acquired the shares only in May 2004 and April 2005, i.e. more than a year after the FIL was repealed on 22 January 2003. In any event, Mr. Devincci Hourani was not registered to carry out business activities in his country of citizenship or permanent residence and, therefore, could not qualify as a foreign investor under the FIL, even if it had not been repealed.

581. With respect to **the registration requirement under the FIL**, the Respondent submits that it is a meaningful and mandatory requirement and a failure to comply with it means that the foreign citizen cannot obtain foreign investor status under the FIL, as confirmed by the Supreme Court of Kazakhstan, namely in the *Usmonov* case, as well as by the Supreme Arbitration Court of the Russian Federation when interpreting the identical registration requirement under the Russian FIL of 1991. In particular, the *Usmonov* case is relevant and reflects the major tendencies in Kazakh law and should be taken into consideration by this Tribunal, the criticisms expressed by the Claimants (also with respect to the Russian Supreme Court case)

being unjustified (Counter Memorial, paras. 288-290; Respondent's Reply Post-Hearing Brief, para. 61). Against these preliminary comments, the Respondent argues that only foreign investors as defined by the FIL can invoke Article 27 of the FIL. For CIOC to be considered as such a foreign investor, Mr. Devincci Hourani must comply with the FIL's registration requirement. This is clear from the text of Article 27 of the FIL itself. However, Mr. Devincci Hourani does not meet these requirements. In any event, because Mr. Devincci Hourani does not meet the FIL's registration requirement, and thus cannot be considered as a "foreign investor" under the FIL, CIOC also cannot be considered as an "enterprise with foreign participation" as defined in the FIL (Counter Memorial, paras. 288-294; Respondent's First Post-Hearing Brief, paras. 115-118; Respondent's Reply Post-Hearing Brief, para. 61).

582. Still with respect to the registration requirement, the Respondent argues that, contrary to the Claimants' contention, Article 16 of the FIL is irrelevant to the determination of foreign investor status under the FIL. In particular, the Claimants' argument that Article 16 is a *lex specialis* on the definition of foreign investor in Kazakhstan and prevails over Article 1 of the FIL cannot stand. The wording of Article 16 confirms that it concerns the issue of how to register a legal entity with foreign participation in Kazakhstan, and it clarifies that this registration process is the same for Kazakh legal entities without foreign participation.[42] The registration of companies with foreign ownership is necessary because a number of Kazakh laws restrict the activity of Kazakh companies with foreign ownership, whether or not such companies are also foreign investors within the meaning of Article 1 of the FIL who can benefit from the guarantees in the FIL. The Respondent underlines that the registration of a Kazakh company with foreign ownership pursuant to Article 16 of the FIL does not automatically entail that company being considered as a "foreign investor" as defined by Article 1 of the FIL. Articles 16 and 1 have "completely different purpose[s]" and Article 16 cannot create an exception to the clear and imperative definition of foreign investor, in particular the registration requirement, under Article 1 of the FIL (Counter Memorial, paras. 295-301; Respondent's First

[42] It is the Respondent's position that the literal interpretation is the primary interpretation of legislative provisions under Kazakh law. The Claimants' argument based on the opinions of the FIL drafters must therefore fail. Indeed, doctrinal interpretation, including interpretation provided by a law's drafters, is not a type of interpretation that is binding in Kazakhstan and it does not have precedence over the literal interpretation of the statute. Furthermore, the "legal opinions" of the FIL drafters relied upon by the Claimants are merely letters which have been filed in the context of another case and then re-filed by the Claimants in this Arbitration. In additions, these "opinions" do not truly reflect the legislative history of the FIL and contain several irregularities, says the Respondent (Respondent's First Post-Hearing Brief, paras. 125-126; Respondent's Reply Post-Hearing Brief, para. 61).

Post-Hearing Brief, paras. 119-130). The Respondent draws the conclusion that CIOC's registration as an LLP with foreign participation on 29 July 2002 (Exh. C-3), namely with the participation of Mr. Fadi Hussein, a citizen of Denmark, does not entail Mr. Hussein being a foreign investor under the FIL.

583. Likewise, contrary to the Claimants' contention, the Respondent argues that Mr. Devincci Hourani's listing as an agent or shareholder of US companies does not meet the registration requirement set forth in the FIL. In the absence of the Article 1 registration requirement being complied with, Mr. Fadi Hussein, Mr. Devincci Hourani, and CIOC cannot qualify as foreign investors under the FIL. In any event, even if it were admitted *arguendo* that the registration in 2002 of CIOC as a company with foreign participation were enough to consider it as a foreign investor (which the Respondent denies), CIOC would have lost this status when Mr. Fadi Hussein transferred his shares to Mr. Devincci Hourani after the repeal of the FIL in 2004. Indeed, in 2004, CIOC's initial registration certificate was annulled and a new registration certificate was issued. But by then the FIL had already been repealed. Accordingly, CIOC's subsequent registration could not evidence that Mr. Devincci Hourani or CIOC were foreign investors under the FIL (Counter Memorial, paras. 302-304, Respondent's First Post-Hearing Brief, paras. 127-130).

584. In connection with Article 16 of the FIL and the reference therein to an "enterprise with foreign participation", the Respondent notes that this notion constitutes a term of art defined by Article 1 of the FIL, pointing "to a Kazakh legal entity created either wholly (in the form of a 'foreign enterprise') or partially (in the form of a 'joint enterprise') by a foreign investor as this term is defined in the FIL". The Respondent insists that the enterprise with foreign participation under the FIL will always require ownership of a foreign investor as defined by the FIL. The Claimants cannot rely on the so-called "IU" (or "FP") registration that has been carried out in Kazakhstan for purposes of tracking the foreign owners in Kazakh companies. While all Kazakh legal entities with a foreign owner, including but not limited to enterprises with foreign participation as defined by the FIL, must register, the IU registration has nothing to do with the FIL and does not convey any status set forth therein. The Respondent explains and gives several reasons why there is no link between an entity issued the "IU" registration certificate and foreign investors or enterprises with foreign participation as these terms are used in the FIL (Respondent's First Post-Hearing Brief, paras. 120-124).

585. Further still, with respect to the registration requirement, the Respondent argues that CIOC was never the investment of a natural person who met the registration requirement under Article 1 of the FIL. In particular, Mr. Devincci Hourani has not been registered to conduct business activities in his country of citizenship, the US, which does not have a commercial registry for individuals, and Mr. Devincci Hourani therefore needed to make his investment through a foreign legal entity, but did not do so. The Respondent observes that the Claimants have not shown that Mr. Devincci Hourani held shares in a US company at the time he allegedly purchased shares in CIOC or at the time the FIL was in force; the showing of any listing of Mr. Devincci Hourani as a shareholder or agent for serving of process of US companies is not sufficient for the purposes of the FIL's Article 1 registration requirement (Counter Memorial, paras. 305-307). The Respondent further stresses that the FIL was repealed on 22 January 2003 (well before Mr. Devincci Hourani's alleged acquisition of CIOC's shares in 2004) and that CIOC thus lost any status as a foreign investor that it may have had prior to that date, it being reiterated however that neither Mr. Fadi Hussein, CIOC's purported founder, nor Mr. Devincci Hourani ever met the Article 1 registration requirements. As was already seen, even if CIOC ever had the status of foreign investor under the FIL, this status was lost when CIOC was re-registered in 2004 due to the transfer of shares to Mr. Devincci Hourani (Counter Memorial, paras. 308-311).

586. The Respondent's second reason for arguing that it has not consented to ICSID jurisdiction over CIOC's claims through the FIL is that **CIOC did not make an investment pursuant to the FIL**. In particular, for an investment to be protected under the FIL, there must be a contribution of certain assets (it being pointed out that, contrary to the Claimants' assertion, the requirement of a contribution exists under the FIL and is based on the latter's text). This contribution must be made by a foreign investor in a certain business and must be made in one of the three forms set forth in the definition of "foreign investment" under Article 1 of the FIL. For the Respondent, the FIL's definition of "investment" and "investing" implies an action of bringing value to a business, i.e. an active behavior on the part of a qualifying foreign investor. CIOC did not make any contribution within the meaning of the FIL because it did not pay CCC for the assignment of the Contract and because JOR provided the financing for free (Counter Memorial, paras. 312-319; Respondent's First Post-Hearing Brief, paras. 112-114; Respondent's Reply Post-Hearing Brief, para. 62).

587. Third, the Respondent argues that the FIL alone does not contain a binding offer to arbitrate and, thus, does not provide a basis for ICSID jurisdiction, even if one were to assume that CIOC met the FIL requirements. The wording of Article 27 of the FIL confirms that the Parties must enter into a separate agreement with respect to ICSID arbitration; it does not contain a standing, unilateral consent or offer to ICSID arbitration, but only lists ICSID arbitration as one possible means of dispute resolution. As a result, it does not grant the investor a right to start ICSID arbitration proceedings without Kazakhstan's specific, express and unequivocal consent. According to the Respondent, the *CCL v Kazakhstan* case relied upon by the Claimants actually supports the Respondent's position in that the tribunal confirmed in that case that a separate agreement on the arbitral mechanism either in a contract or otherwise was needed. The other cases relied upon by the Claimants, namely the cases in *AIG*, *AES v Kazakhstan*, and *Rumeli*, are irrelevant and do not support the Claimants' position. Finally, contrary to the Claimants' allegations, the Respondent never relied upon the ICSID clause in the FIL during the *Caratube I* arbitration, which was not based on the FIL (Counter Memorial, paras. 320-332; Respondent's First Post-Hearing Brief, paras. 131-136; Respondent's Reply Post-Hearing Brief, para. 63).

588. Fourth, it is the Respondent's position that even if Article 27 of the FIL could have been construed as a consent to arbitration (which the Respondent denies), it does not provide a basis for ICSID jurisdiction because it was repealed in its entirety in January 2003. As a result, even if Article 27 of the FIL contained an offer to arbitrate (which offer was in any event revocable until accepted by a foreign investor), such offer was withdrawn by Kazakhstan with the FIL's repeal, i.e. ten years before CIOC attempted to accept it by filing its Request for Arbitration on 5 June 2013. The Respondent rejects the Claimants' argument that the date of Mr. Devincci Hourani's share purchase is irrelevant for the purpose of applying the FIL because with the share purchase came the obligations and protections that CIOC had under the FIL. The Respondent insists that "if Devincci Hourani wished to enjoy the protections of the FIL in his personal capacity, he must have made his own investment before the FIL was repealed". The Respondent also contests that Mr. Devincci Hourani can get to the FIL through CIOC's status as a foreign investor or through the Contract, because (i) for CIOC to enjoy the FIL protections, Mr. Devincci Hourani must be a foreign investor in the first place, CIOC's status as a foreign investor under the FIL being dependent on that of Mr. Devincci Hourani; and (ii) the Contract did not provide FIL protection to CIOC and, in any event, Mr. Devincci Hourani is not a party

to the Contract and cannot enjoy rights that CIOC might have had under it (Counter Memorial, paras. 333-337; Respondent's First Post-Hearing Brief, paras. 137-139).

589. The Respondent further argues that CIOC's various attempts to revive the FIL all fail. First, the Claimants cannot revive the FIL through the stabilization clause in Article 6.1 of the FIL. When Mr. Devincci Hourani acquired the shares in CIOC in 2004, he could no longer qualify as a foreign investor in Kazakhstan under the FIL because the FIL and its notion of foreign investor no longer existed. Therefore, even if CIOC could have ever qualified as a foreign investor under the FIL (which the Respondent denies), when Mr. Devincci Hourani acquired the shares, CIOC lost any stabilized rights it may have had under the FIL (Counter Memorial, para. 339). In the same vein, even if the FIL's stabilization clause had survived, CIOC or Mr. Devincci Hourani can in any event not rely on it because they cannot be considered as foreign investors under the FIL. Likewise, pursuant to Article 6.1 of the FIL, the stabilization period started to run on 27 May 2002 (i.e. the date of the signature of the Contract) and, because the Contract constitutes a short-term contract, expired ten years later, i.e. on 27 May 2012, before CIOC attempted to accept the purported offer to arbitrate (Counter Memorial, paras. 340-344). In any event, neither the Claimants' Notice dated 18 October 2012, nor their Request for Arbitration dated 5 June 2013, can be construed as an acceptance of the Respondent's alleged offer to arbitrate (Counter Memorial, paras. 345-349; Respondent's First Post-Hearing Brief, paras. 140-142; Respondent's Reply Post-Hearing Brief, para. 64).

590. Moreover, the Respondent submits that the Claimants cannot rely on the stabilization clause in Clause 28.2 of the Contract to revive the FIL following its repeal, as this provision has no effect on the rights provided to foreign investors under the FIL; contractual stabilization clauses only concern contract stability and, as such, they can only stabilize provisions of a contract, not legislation. In any event, the stabilization period under the Contract ceased to be effective at the moment of the termination of the Contract (Counter Memorial, para. 350; Respondent's First Post-Hearing Brief, para. 143; Respondent's Reply Post-Hearing Brief, para. 64).

591. Furthermore, according to the Respondent, the Claimants also cannot rely on Article 383(2) of the Kazakh Civil Code or on Article 71 of the Subsoil Law. Article 383(2) of the Kazakh Civil Code does not establish a legislative stability rule. Rather, in case of contradiction, it only sets up the priority of the contract provisions over the provisions of laws that have been adopted after the Contract was signed. Article 71 of the Subsoil Law also provides for contract stability, rather than for legislative

stability. In particular, the Claimants cannot rely on Article 71 of the Subsoil Law because they did not show that a newly adopted legislative provision deteriorated their position in comparison to the one stipulated in the Contract (Counter Memorial, paras. 351-353).

592. The Respondent argues that the arbitration clause in Clause 27 of the Contract does not constitute an offer to arbitrate until the end of the production period. Rather, it only extends to the exploration phase, because the Claimants have never reached the production phase and, thus, have no rights arising from that phase. In addition, as was already seen, under Clause 27 of the Contract, CIOC is considered as a Kazakh national for purposes of the ICSID Convention; Clause 27 therefore cannot confer jurisdiction to this Tribunal. In any event, an offer to arbitrate disputes arising out of the Contract can not extend the life of the FIL that was repealed in its entirety (Counter Memorial, para. 354).

593. It is the Respondent's position that Article 27 of the FIL did not confer on the Claimants any vested rights that survived the FIL's repeal. The right to arbitration, including arbitration under domestic investment laws such as the FIL, cannot accrue and does not vest prior to the consent of both the State and the investor. Article 27 of the FIL only contains a presumption of the Respondent's consent to arbitrate and this presumptive consent is nothing more than a revocable offer, which, to be perfected, must be timely accepted by the offeree. The Claimants have no accrued right to arbitrate under the FIL because they did not accept the Respondent's presumptive offer before the FIL was repealed or, alternatively, before the expiration of the applicable stabilization period. The Respondent observes that the *Ruby Roz* tribunal considered this exact issue and rejected the same argument the Claimants now make, quoting the following passage of the *Ruby Roz* award (Exh. CLA-17, para. 156) (Counter Memorial, paras. 355-362; Respondent's First Post-Hearing Brief, para. 144):

> 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 stabilization clause. 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. In other words, the Claimant had no "accrued rights" to arbitration until it accepted in writing the offer of arbitration set forth in the FIL […].

c. Analysis

594. As a preliminary remark, the Tribunal recalls its findings set forth above in paragraphs 320 et seq. that the Respondent is not estopped and has not waived its right to raise a jurisdictional challenge in the present Arbitration. Therefore, the Tribunal must assess its jurisdiction pursuant to Article 41 of the ICSID Convention and examine the jurisdictional requirements set forth in Article 25 of the ICSID Convention.

595. Article 25 of the ICSID Convention reads as follows:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
>
> (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
>
> (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting Convention States. Such notification shall not constitute the consent required by paragraph (1).

596. Accordingly, under Article 25 of the ICSID Convention, the jurisdiction of this Tribunal is subject to the following requirements: (i) the dispute between the Parties must be of a legal nature; and (ii) arise directly from an investment. In addition, (iii) the Parties must have consented to submitting their dispute to arbitration under the

ICSID Convention. Concerning specifically the Parties, (iv) one of them must be a Contracting State and (v) the other a national of another Contracting Party. With respect to this last requirement, and concerning specifically juridical persons which had the nationality of the Contracting State party to the dispute on the date on which the parties consented to submit such dispute to arbitration, Article 25(2)(b) specifies that such juridical persons are considered to have the "nationality of another Contracting State" where, because of foreign control, the parties agreed to treat such person as a national of another Contracting State for the purposes of the ICSID Convention. Accordingly, in addition to the requirements set forth under Article 25(1) of the ICSID Convention, the second part of Article 25(2)(b) requires (vi) foreign control, and (vii) an agreement to treat the investor as a national of another Contracting State.

597. The Parties do not appear to dispute the first two requirements, namely that the dispute between the Parties is of a legal nature and arises directly from an investment, even though the Respondent takes issue with the identity of the investor in that it alleges that the purported investment was not made by either CIOC or Mr. Devincci Hourani (see Tr. Day 2, p. 62, lines 11-17). Moreover, the Parties do not dispute the fourth requirement, i.e. that the Respondent is a Contracting State of the ICSID Convention. All other requirements mentioned above are vehemently disputed between the Parties.

598. The Tribunal will first examine the requirements set forth in Article 25(2)(b) of the ICSID Convention – namely the requirements of the Parties' agreement to treat CIOC as a national of another Contracting State and of foreign control – which the Respondent describes as "threshold requirements". For the reasons set forth below, the Tribunal finds that both of these requirements are met.

599. Regarding the requirement of **the Parties' agreement to treat CIOC as a national of another Contracting State**, for the reasons set forth below the Tribunal finds that by means of Clause 27.8 of the Contract, the Parties agreed to "internationalize" their disputes arising under that Contract. By contrast, the Tribunal cannot follow the Respondent's argument that Clause 27.8 "is an explicit and clear agreement to treat CIOC as Kazakh because of its status as an assignee that is resident in Kazakhstan" (Counter Memorial, para. 249).

600. The Tribunal observes preliminarily that the Contract does not contain any detailed rules regarding its interpretation, except for Clause 30 which reads in relevant part as follows:

> 30.1 The text of this Contract shall be made in the State, Russian and English languages and all signed versions shall have equal legal force.
>
> 30.2 In case of any inconsistency or conflicts among the versions, the versions of the text in Russian and English shall be used to resolve such inconsistency or conflict and both texts will be considered on an equal basis; provided, however, that in case of any conflict between the English and Russian texts in any arbitration under this Contract, the arbitration panel shall conform the two texts to the extent possible and shall revert to the Russian text for the interpretation of any specific provisions, using general principles of fairness.

601. While the Parties have briefed the Tribunal on the interpretation of legislative acts under Kazakh law, their respective positions on the interpretation of contracts under Kazakh law are less explicit. However, the Tribunal understands that under Kazakh law, when interpreting a contract a court will seek to determine the common intention of the parties by considering first the wording of the relevant contractual provisions. Where this wording is unclear, the court will seek to elucidate the parties' common intention in light of other contractual provisions and the agreement considered as a whole and, if necessary, through consideration of the agreement's underlying purpose, taking into account any relevant circumstances such as the contract negotiations, practices established between the parties, the parties' subsequent conduct and trade usages.

602. In light of this preliminary remark, the Tribunal now turns to Clause 27.8 of the Contract.[43] At first blush, the wording of Clause 27.8 – considered in isolation – seems to suggest that CIOC, as an assignee and company incorporated in Kazakhstan, shall be treated as a resident of Kazakhstan. Therefore, Clause 27.8 of the Contract would not contain the Parties' agreement to treat CIOC as a foreign national for the purposes of Article 25(2)(b) of the ICSID Convention. However, the Tribunal finds that the wording of the English version of Clause 27.8 is not clear when compared to the wording of Clause 27.8 in its Russian version which contains the Parties' agreement to treat CCC as a "national" of Lebanon for the purposes of

[43] It is recalled that Clause 27.8 of the Contract reads as follows: "Furthermore, it is hereby agreed that the Contractor is a resident of Lebanon, or in the event of assignment as a national of the resident country of the assignee, and therefore the Contractor shall be treated as a resident of Lebanon, or other country if appropriate, for purposes of the ICSID Convention". Clause 27 of the Contract is quoted in full in paragraph 27 above.

the ICSID Convention. While it is true that Clause 27.8 does not explicitly mention the word "foreign", it nevertheless expresses the Parties' intention not to treat CCC as a local company, but as a foreign national for the purposes of the ICSID Convention. In this respect, the Claimants observed that while CCC is indeed a Lebanese company, it was the Kazakh entity of CCC, i.e. a resident of Kazakhstan, who entered into the Contract (Defense on Jurisdiction, para. 346). The Respondent has not disputed this fact but stressed that CCC is a Lebanese company.

603. In these circumstances, the Tribunal cannot follow the Respondent's allegation that CCC did not need an agreement to be treated as a foreign (i.e. Lebanese) national, since it already was a foreign national. Clause 27.8 clarifies the Parties' intention to treat CCC as a foreign national, despite the fact that the Contract was entered into with the Kazakh entity of CCC. The Respondent has not provided an alternative satisfactory explanation as to why the Parties would have deemed necessary to state the allegedly obvious fact that CCC was to be treated as a Lebanese national.

604. For the Tribunal, Clause 27.8 of the Contract reflects the Parties' agreement to treat the "Contractor" as a foreign national for the purposes of the ICSID Convention, notwithstanding the Contractor's Kazakh residence. The Tribunal cannot follow the Respondent's argument that the use of the word "accordingly" in the Russian version of Clause 27.8 "clearly indicates that the 'relevant country' shall be 'the country of residence of the assignee'". In fact, Clause 27.8 also stipulates that "the Contractor will accordingly be considered a national of Lebanon". Hence, following the Respondent's line of argument would mean that the Parties had intended the "relevant country" to be the country of the seat of CCC's Lebanese parent company (and thus of ownership) in order to determine CCC's nationality (despite the fact that the country of residence of the CCC entity having entered into the Contract was Kazakhstan). At the same time, the Parties would have allegedly intended the "relevant country" to be the country of (the Kazakh) residence of CIOC to determine the latter's nationality. However, there is no indication that the Parties intended to treat CIOC differently to CCC, this even more so in that it is undisputed that the Respondent approved the assignment of the Contract to CIOC, being fully aware that CIOC was under foreign ownership at all relevant times.

605. The Tribunal finds that the other provisions of Clause 27 and of the Contract, considered as a whole, confirm this interpretation of the Parties' common intention. In particular, Clause 27.2 of the Contract expresses the Parties' agreement to submit their disputes arising under the Contract to ICSID arbitration as "their

exclusive means of dispute resolution". While it is true that the Parties provided for UNCITRAL arbitration in Clause 27.3 of the Contract, it is clear that the Parties' primary intention was to resolve their disputes by means of ICSID arbitration and provided for UNCITRAL arbitration as a subsidiary means of dispute resolution "[i]f for any reason the request for arbitration proceeding is not registered by ICSID or if ICSID fails or refuses to take jurisdiction over any matter submitted by the Parties under this Section 27".

606. Moreover, Clause 27.7 of the Contract expresses the Parties' agreement "to submit to ICSID any dispute, controversy or claim arising out of or in connection with this Contract" and to consider "all of the transactions contemplated by this Contract [...] an investment within the jurisdiction of ICSID".

607. For the Tribunal, Clause 27.8 of the Contract must be read in this context and interpreted as an expression of the Parties' intention to have their disputes arbitrated as a general proposition and to pave the way for ICSID arbitration wherever possible, including through an agreement to treat the Contractor as a foreign national for the purposes of the ICSID Convention. This conclusion is not altered by the fact that, under Clause 27.8 of the Contract, the initial Contractor was considered as a national of Lebanon, which was not yet a Member State of the ICISD Convention at the time of CCC's entering into the Contract.[44] The fact remains that Clause 27.8 of the Contract expresses the Parties' intention to consider the Contractor as a foreign national for the purposes of the ICSID Convention and that the other relevant provisions of Clause 27 also express the Parties' intention to submit their disputes arising under the Contract primarily to ICSID arbitration, UNCITRAL arbitration being mentioned only as a subsidiary "back-up" solution to preserve the Parties' desire for arbitration in general. The Respondent has not provided a convincing explanation as to how its interpretation of Clause 27.8 as an explicit agreement to treat CCC as a foreign company and, at the same time, also as an agreement to treat CIOC as a Kazakh company, would reasonably and usefully fit into this context.

608. In the opinion of the Tribunal, interpreting Clause 27.8 of the Contract as an expression of the Parties' intention to treat CIOC as a Kazakh national would not

[44] The Tribunal observes that Lebanon became a Contracting State of the ICSID Convention ten months after the signing of the Contract, namely in March 2003. The ICSID Convention came into force with respect to Lebanon in April 2003. See https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

only be at odds with the Parties' undisputed intention to treat CIOC's predecessor, the Kazakh entity of CCC, as a foreign national, it would also be contrary to the Parties' intention as expressed in the other provisions of Clause 27 to resolve their disputes primarily through ICSID arbitration. In addition, it would deprive several other contractual provisions of their use and purpose, such as Clauses 16(13), 7(1)(13) and 28(4), in that they grant rights only to foreign nationals. In this regard, it is worth mentioning that the Contract from the outset provided for the possibility of the assignment of the Contract, e.g. in Clauses 25 and 27.8. And indeed, shortly after the conclusion of the Contract on 27 May 2002, CCC requested the MEMR's permission to assign the Contract to CIOC on 15 July 2002, i.e. a mere month and a half after the initial conclusion of the Contract. The assignment was then realized five months later through the execution of Amendment No. 1 to the Contract on 26 December 2002. There is no indication that during the five-month assignment process the Parties attempted to modify the relevant provisions in the Contract, namely regarding the Parties' recourse to ICSID arbitration or certain rights being afforded only to foreign nationals, in light of their alleged explicit agreement and understanding to treat CIOC as a Kazakh national.

609. This is further corroborated by the opinion of the *Caratube I* tribunal as quoted in paragraph 468 above. In the quoted passage, the *Caratube I* tribunal considered that, in cases of an investment contract between a locally incorporated company and a host State, it is important to emphasize that such agreements are negotiated directly between the parties to the dispute, with the host state being aware of the identity of the locally incorporated company. The *Caratube I* tribunal opined that in many such cases, the existence of an express or implied agreement to treat the locally incorporated company as a foreign national for purposes of the ICSID Convention was implied from the existence in the contract of an ICSID arbitration clause.

610. Based on the foregoing, the Tribunal concludes that Clause 27.8 of the Contract cannot be interpreted as an explicit agreement to treat CIOC as a Kazakh national but, to the contrary, as an expression of the Parties' agreement to treat CIOC as a foreign national for the purposes of the ICSID Convention.

611. Regarding the requirement of **foreign control** under Article 25(2)(b) of the ICSID Convention, the preliminary question arises whether Article 25(2)(b) requires the existence of objective, actual and effective foreign control, formal or legal control not being enough. In this regard, the Tribunal recalls its prior finding that the *Caratube I*

tribunal did not decide this issue through a final and binding decision and that this Tribunal does not consider itself barred by the doctrine of collateral estoppel from deciding this question (see *supra* para. 470).

612. The Tribunal must interpret Article 25(2)(b) of the ICSID Convention, including the foreign control requirement contained therein, in conformity with Article 31 of the Vienna Convention, i.e. "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

613. The Parties do not appear to dispute that the foreign control requirement in Article 25(2)(b) of the ICSID Convention constitutes an objective requirement that cannot be inferred from the existence of an ICSID arbitration clause in the contract or an agreement on foreign nationality. This seemingly uncontroversial statement is in line both with the *Caratube I* award (para. 336) and with the opinion of Professor Schreuer who states in relevant part that:

> [it is] abundantly clear that foreign control at the time of consent is an objective requirement which must be examined by the tribunal in order to establish jurisdiction. Whereas an agreement on foreign nationality may be readily inferred from a consent agreement, no such inference is possible with regard to foreign control. An agreement on foreign nationality will create a presumption that its factual condition of foreign control exists, but no more. This presumption is rebuttable. Foreign control must actually exist and cannot be construed by the parties or implied from an agreement between the parties.[45]

614. The Parties disagree however as to the form and extent of foreign control required under Article 25(2)(b) of the ICSID Convention and, in particular, whether the requirement is for effective, actual control.

615. There can be no dispute that the wording of Article 25(2)(b) of the ICSID Convention does not specify the required form and extent of foreign control and, more specifically, does not expressly require actual, effective control, rather than legal control. Moreover, the Contract does not contain an agreement by the Parties in this regard other than an agreement to consider the Contractor as a foreign national for the purposes of the ICSID Convention. However, as just seen, according to Professor Schreuer, "[a]n agreement on foreign nationality will create a [rebuttable] presumption that its factual condition of foreign control exists". This general premise does not appear to be disputed between the Parties and it bears emphasis that

[45] Schreuer, The ICSID Convention, 2nd ed., Cambridge 2009, ad Article 25 of the ICSID Convention, para. 825 (Exh. CLA-53/RL-18).

Professor Scheuer insists on the existence of control as a matter of fact. The analysis of cases will confirm this proposition.

616. The Respondent has relied on the following statement by Professor Schreuer, the content of which does not appear to be disputed by the Claimants (RL-18, para. 864):

> On the basis of the Convention's preparatory works as well as the published cases, it is possible to conclude that the existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights and management. In order to obtain a reliable picture, all these aspects must be looked at in conjunction. There is no simple mathematical formula based on shareholding or votes alone.

617. In this context, Professor Schreuer also submits that "for the purposes of ICSID's jurisdiction, the concept of control should be treated with some flexibility" and suggests that control must not be absolute; joint control by different shareholders from different Contracting States should be admissible (RL-18, para. 865).

618. The Claimants point to several cases (e.g. *Vacuum Salt v Ghana* and *Aguas del Tunari v Boliva*) where the tribunal found that where there is 100% ownership or a majority of voting rights, there is almost inevitably control.[46]

619. By contrast, the Tribunal cannot follow without qualifications the Respondent's position that the jurisprudence clearly requires actual and objective control, rather than formal or legal control. In other words, for the Tribunal the jurisprudence relied upon by the Respondent does not establish that a person's legal capacity to control an entity is not enough, but actual exercise of that control is required for the purposes of "foreign control" under Article 25(2)(b) of the ICSID Convention. Rather, the Tribunal agrees with the Claimants that the cases relied upon by the Respondent do not sufficiently establish the latter's allegation. In *Vacuum Salt v Ghana,* the foreign national held only 20% of the shares and Ghanaian nationals held the remaining 80% of the shares. Noting that "100 percent foreign ownership almost certainly would result in foreign control, by whatever standard" the tribunal then found that "it must be true that the smaller […] the percentage of voting shares held by the asserted source of foreign control, the more one must look to other elements". It was in this context that the tribunal examined the foreign national's role in *Vacuum* Salt at the relevant time (Exh. RL-80, paras. 43-44).

[46] See also the cases referred to by Schreuer, The ICSID Convention, 2nd ed., Cambridge 2009, ad Article 25 of the ICSID Convention, paras. 851 et seq.

620. Moreover, in *TSA v Argentina* the question of "foreign control" was raised in connection with the question of the foreign nationality of the investor. In particular, the question ultimately was whether the investor was indeed a national of another Contracting State, rather than a national of the host State: while TSA was wholly owned by the Dutch company TSI, the latter was controlled by an Argentinian national, who held the majority of TSI's shares, "starting with 51%, increasing over time to near totality". By means of the "foreign control" requirement in Article 25(2)(b) of the ICSID Convention, the *TSA* tribunal thus decided to "pierce the corporate veil and reach for the reality behind the cover of nationality". TSA could not provide the required evidence to establish that TSA ultimately was controlled not by a national of Argentina but by a national of another Contracting State. It was in these circumstances that the *TSA* tribunal found that TSA could not be considered as a Dutch national, because it was ultimately controlled by a national of the host State.

621. The award in *National Gas v Egypt* was rendered in the same context in that the evidence on record unequivocally and undisputedly showed that the investor was ultimately owned and controlled not by a national of another Contracting State, but by a national of the host State. It is worth quoting the following passage from the *National Gas* award (Exh. RL-82, paras. 136-137):

> In the Tribunal's view, there is a significant difference under Article 25(2)(b) between (i) control exercised by a national of the Contracting State against which the Claimant asserts its claim and (ii) control by a national of another Contracting State. The latter situation violates no principle of international law and is consistent with the text of the ICSID Convention. On the other hand, the former situation violates the general limitation in Article 25(1) and the first part of Article 25(2)(b) of the ICSID Convention in regard to both Contracting States and nationals (including dual nationals). In other words, the latter is consistent with the object and purpose of the ICSID Convention; but the former is inconsistent: it would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits. […] Hence, it is not surprising to see tribunals (and scholarly commentators) apply the control test favouring jurisdiction in the latter case. Conversely, it is not surprising to see its application rejecting jurisdiction in the former case.

622. In the present case, there is no dispute that CIOC has always been wholly owned by foreign nationals, in particular by (i) Mr. Devincci Hourani, who has been a US national since 2001 and, in April 2005, increased his ownership from 85% (acquired in 2004) to 92% of CIOC's shares; and (ii) Mr. Kassem Omar, a Palestinian national and a resident of Lebanon, who owns the remaining 8% of CIOC's shares. Prior to 2004, CIOC was owned by Mr. Fadi Hussein, a Danish national. While the Respondent has alleged that CIOC in reality was controlled not by Mr. Devincci

Hourani, but by JOR and, ultimately, by Mr. Issam Hourani, there has been no allegation that CIOC was not ultimately controlled by a national of another Contracting State, but rather by a national of Kazakhstan. In the circumstances, the Respondent has provided no evidence to rebut the presumption of "foreign control" based on Mr. Devincci Hourani's undisputable legal capacity to control CIOC, coupled with the Parties' agreement in Clause 27.8 of the Contract to treat the Contractor as a foreign national for the purposes of the ICSID Convention. It is worth noting in this regard that Mr. Devincci Hourani acted as CIOC's Director from August 2006 to June 2007, i.e. prior to the occurrence of the dispute, and that under CIOC's Charter, the Director was the highest figure of the company (Memorial, para. 42).[47]

623. For the Tribunal, the Respondent has not provided sufficient evidence to justify disregarding Mr. Devincci Hourani's 92% ownership of CIOC's shares in favor of piercing the corporate veil and determining "the reality behind the cover of nationality". The Respondent has not convincingly rebutted the presumption that CIOC was at all relevant times under foreign control within the meaning of Article 25(2)(b) of the ICSID Convention.

624. In light of the foregoing, the Tribunal concludes that the two threshold requirements in Article 25(2)(b) of the ICSID Convention are met and that CIOC must thus be considered as a national of another Contracting State, i.e. a US national, for the purposes of Article 25 of the ICSID Convention.[48]

625. The Tribunal now turns to Article 25(1) of the ICSID Convention. Concerning the requirement that **the Parties must have consented to submitting their dispute to arbitration under the ICSID Convention**, for the reasons set forth below the Tribunal finds that such consent exists.

626. First, the Tribunal finds that the Respondent has consented to ICSID arbitration when entering into the Contract with CCC and then agreeing to the assignment of the Contract to CIOC. In particular, this consent is expressed in Clause 27 of the Contract. For the reasons set forth above at paragraphs 599 et seq., the Tribunal

[47] The Tribunal also notes the Respondent's allegation that Mr. Devincci Hourani held a business visa at that time, which allegedly did not allow him to be employed in Kazakhstan and thus to act as CIOC's Director (Counter Memorial, para. 144). The Claimants contest this allegation and submit that not only did the FIL allow CIOC to employ Mr. Devincci Hourani, but the Respondent was also fully aware at the time that Mr. Devincci Hourani was CIOC's Director (Defense on Jurisdiction, paras. 313-315).

[48] The Tribunal recalls its prior finding that the circumstances of the present case do not justify the drawing of the negative inferences requested by the Respondent as to the unlawful acquisition by Mr. Devincci Hourani of his US nationality (see *supra* paras. 390-392).

has already rejected the Respondent's objection according to which Clause 27.8 of the Contract should be interpreted as an explicit agreement to treat CIOC as a Kazakh national. Rather, the Tribunal has concluded that Clause 27.8 of the Contract must be interpreted as an expression of the Parties' agreement to treat CIOC as a foreign national for the purposes of the ICSID Convention. Regarding CIOC's consent to ICSID arbitration, the Tribunal agrees that this consent was not only expressed in the Contract, but thereafter reiterated in the Notice of Dispute dated 18 October 2012 and the Request for Arbitration dated 5 June 2013.

627. Second, the Respondent has submitted that any consent to ICSID arbitration expressed in Clause 27 of the Contract would only cover those claims that arise under the Contract and thus cannot be considered as a basis of jurisdiction for those claims that arise out of the FIL or any other basis (Counter Memorial, para. 365). However, the Tribunal cannot follow the Respondent's argument in that Clause 28.4 of the Contract stipulates that "[t]he Contractor shall enjoy all guaranties and protections provided by the Law on Foreign Investments". The letter no. 3-3-11/717 from the Vice-Minister of Justice of Kazakhstan to the MEMR dated 14 May 2002 (Exh. C-389) confirms the Parties' intention to provide in the Contract for the same guarantees and protections as those set forth in the FIL. As will be seen in further detail below in paragraphs 651 et seq., the Tribunal agrees with the Claimants that the Parties thus incorporated the substantive protections of the FIL in the Contract. Therefore, the Tribunal finds that, regarding the relationship between CIOC and the Respondent, an alleged violation of one of the substantive protections of the FIL thus incorporated into the Contract can give rise to a claim arising out of or in connection with the Contract. The subsequent and unilateral repeal of the FIL by the Respondent does not change this conclusion, namely in light of the Contract's stabilization clauses in Clauses 28.1 and 28.2, according to which

> [t]he provisions of the Contract shall remain unchanged during the Validity Term of this Contract.
>
> Changes and additions of the Legislation of the Republic of Kazakhstan that deteriorate the position of the Contract, made after the conclusion of the Contract shall not apply to the Contract.

628. For the Tribunal, the question of whether the Tribunal, independently of the contractual basis of jurisdiction, would also have jurisdiction directly under the FIL to

decide the Claimants' claims directly arising out of the FIL is a separate question that will be addressed below.[49]

629. Finally, the Tribunal has to decide **whether CIOC made an investment within the meaning of Article 25(1) of the ICSID Convention**. For the following reasons, the Tribunal finds that this is the case.

630. As was seen above, Clause 27.7 of the Contract states in relevant part as follows:

> Each of the Parties hereby agrees that all of the transactions contemplated by this Contract shall constitute and shall be deemed to constitute an investment within the jurisdiction of ICSID.

631. In this regard, it was already stated in paragraph 609 above, but it is nevertheless worth recalling, that Clause 27.7 of the Contract is not a clause contained in an investment treaty, but figures in an investment contract, directly negotiated between the Parties. The Respondent was well aware of the identity of CIOC and approved the assignment of the Contract from CCC to CIOC following a five-month assignment process, without any amendments being made to Clause 27 of the Contract. Moreover, as is shown in the extract from the hearing transcript quoted in paragraph 321 above, in the *Caratube I* arbitration against CIOC the Respondent itself insisted that Clause 27 of the Contract was "carefully planned" and "freely negotiated" by the Parties, who intended "to leave nothing open to surprise".

632. The Tribunal observes that the Respondent did not discuss as such Clause 27.7 of the Contract in its written submissions. Nor did it engage in any detailed discussion of this clause during its opening statement at the Hearing, other than to suggest that the scope of Clause 27.7 should be limited to an agreement by the Respondent and CIOC to only consider the transaction underlying the "CIOC Contract" as an investment, but not to consider CIOC as the corresponding investor (Tr. Day 2, p. 62, pp. 11-17).

633. The Respondent's argument is that, notwithstanding the existence of an agreement between the Parties, the notion of "investment" under Article 25(1) of the ICSID Convention constitutes an objective requirement. This objective requirement

[49] See *infra* paras. 651 et seq. For the reasons set forth above in paragraphs 288 et seq., the Tribunal recalls that it can decide CIOC's claims by reference to customary international law even if it founds its jurisdiction on the Contract. The Tribunal further recalls its earlier finding that it must take into account international law, in particular mandatory rules of international law, when deciding the present dispute. In accordance with Clause 26.1 of the Contract, the Tribunal will apply Kazakh law to the merits of disputes arising out of the Contract, but, in doing so, it will check the Parties' choice of law against the relevant customary international law principles.

allegedly has "outer limits" beyond which the Parties cannot extend the jurisdiction of ICSID by means of an agreement. In its line of argument, the Respondent appears to argue that such "outer limits" of the objective "investment" requirement comprise the "objective elements" of contribution and risk (Counter Memorial, paras. 75 et seq. and paras. 270 et seq.). The Tribunal cannot follow the Respondent's line of argument.

634. In support of their position, the Respondent has relied on various authorities, including Professor Schreuer's commentary of the ICSID Convention. However, Professor Schreuer does not support the Respondent's position. In particular, according to Professor Schreuer,

> [T]he [ICSID] Convention offers no explanation of the concept of investment. It is left to the parties what kinds of investments they wish to bring to ICSID.
>
> […]
>
> The drafting history leaves no doubt that the Centre's services would not be available for just any dispute that the parties may wish to submit. In particular, it was always clear that ordinary commercial transactions would not be covered by the Centre's jurisdiction no matter how far-reaching the parties' consent might be. […] Therefore, while it is clear that the parties have much freedom in describing their transaction as an investment, they cannot designate an activity as an investment that is squarely outside the objective meaning of that concept.
>
> […]
>
> A specific statement in an investment agreement containing an ICSID clause that the planned transaction is an investment may not be necessary but is advisable. It precludes a party from later challenging ICSID's jurisdiction on the ground that the dispute did not really arise from an investment. It demonstrates that the parties have given careful thought to the nature of the project and that, when adopting the ICSID clause, they were aware of the Convention's jurisdictional requirements.[50]

635. Accordingly, where there is an agreement between the parties regarding the existence of an investment, they are generally precluded from later challenging ICSID's jurisdiction based on the alleged absence of an investment. In the present case, there is no allegation that the transaction underlying the Contract was an "ordinary commercial transaction" falling "squarely outside the objective meaning of [the ICSID Convention's concept of investment]". To the contrary, the Respondent admits that an investment was made under the Contract.

[50] Schreuer, The ICSID Convention – A Commentary, 2nd ed., Cambridge 2009, ad Article 25 of the ICSID Convention, paras. 121-123 and 130.

636. For the Tribunal, it cannot be disputed that the Respondent and CIOC agreed in Clause 27.7 of the Contract that any dispute between them arising out of or in connection with the investment that was undisputedly made in execution of the Contract would be resolved through ICSID arbitration. And there is no allegation, let alone sufficient evidence, that the Respondent entered into Clause 27 of the Contract with CIOC based on misrepresentation or fraud.

637. However, at this juncture, the Respondent contests the application of this agreement by arguing that it was not CIOC, but another entity or person who made the investment in dispute. More specifically, it appears that by questioning the identity of the investor, the Respondent attempts to open the debate regarding the existence of an investment. Indeed, the Respondent raises the question of whether CIOC made a contribution and took a risk in connection with the Caratube project. However, this disregards the Respondent's explicit agreement in Clause 27.7 of the Contract "that all of the transactions contemplated by this Contract shall constitute and shall be deemed to constitute an investment within the jurisdiction of ICSID". For the Tribunal, the Respondent is precluded from opening this debate. In that regard, Clause 27.7 does not suffer of any possible ambiguity.

638. The Respondent's declaration that the ICSID arbitration clause in Clause 27 of the Contract was carefully planned and shows that the Parties intended "to leave nothing open to surprise" would further contradict the Respondent's suggestion that the Parties would not also have carefully considered the identity of the investor, i.e. CIOC, when entering into the Contract, including its Clause 27.

639. In this regard, it is recalled – once again – that there is no dispute that the Respondent had approved the assignment of the Contract to CIOC in late 2002 following a five-month approval process. There further is no dispute that the Respondent knew Mr. Devincci Hourani even before his acquisition of CIOC's shares and recognized him as an investor, approving several other investments by Mr. Devincci Hourani in Kazakhstan (Defense on Jurisdiction, paras. 321-325). While the Respondent has questioned whether Mr. Devincci Hourani actually paid what the Respondent describes as a "nominal price" for CIOC's shares, it does not dispute the fact that Mr. Devincci Hourani has indeed been the owner of 85% of CIOC's shares since 2004 and of 92% of the shares since 2005, i.e. well before the occurrence of the dispute (see Counter Memorial, para. 143).

640. Moreover, the Respondent fails to convince the Tribunal that CIOC and Mr. Devincci Hourani were mere puppets fronting for the real parties in interest, i.e. JOR and/or Mr. Issam Hourani, and that the Claimants are unlawfully attempting to misuse Mr. Devincci Hourani's US nationality simply to obtain an undue access to ICSID jurisdiction.

641. Regarding JOR, having considered the Parties' respective arguments and the evidence on the record, the Tribunal notes that there is no dispute that the Respondent was aware at all relevant times of the fact that CIOC received financing through loans from JOR and used these funds for the purposes of performing the Contract. This was disclosed to and approved by the Respondent at the time (see, e.g., Defense on Jurisdiction, paras. 292, 301 and 452 with references). The Tribunal observes that according to Clause 15(2) of the Contract, "[t]he Contractor may freely obtain loans and make payments in any currency within and outside the State for financing its activities provided it does not contradict the current legislation of the State".

642. Furthermore, having considered the Parties' respective arguments and evidence, the Tribunal finds that the Respondent has not convincingly established that JOR acted improperly or unlawfully by providing financing to CIOC for the purposes of the Caratube project.[51] The Respondent does not dispute that investments may be made through loans and that the source of the financing generally is irrelevant. In addition to the evidence produced in this regard by the Claimants (see Defense on Jurisdiction, para. 452 with references; Claimants' First Post-Hearing Brief, para. 137), this rather uncontroversial premise has been pertinently expressed by Professor Schreuer in the following terms:

[51] The Tribunal has taken note of the Respondent's argument that during a board meeting allegedly held on 5 September 2002, JOR agreed to provide a loan to CIOC in the amount of USD 15 million, pointing out that JOR was incorporated only 5 days later, on 10 September 2002. The Respondent states that "CIOC received funds from an entity that had yet to be legally incorporated and before it could legally hold a bank account. Moreover under the law applicable to Lebanese off shore companies such as JOR, such companies were prohibited from providing financing to foreign companies" (Counter Memorial, para. 148). The Tribunal has also taken note of the Claimants' arguments in response to the Respondent's allegations, in particular their assertion (and the evidence produced in support thereof) that "[c]ontrary to what Respondent alleges, no funds were effectively transferred from JOR's bank accounts to Caratube's bank account in Kazakhstan before the date of registration by the Kazakh Central Bank of this transaction, as no funds could be transferred to the Republic without the prior written approval of the Central Bank, as evidenced by the certificate of registration issued by this Bank, which registered the loan on September 24, 2002". The Claimants further assert that JOR was fully authorized under Lebanese law to enter into pre-incorporation contracts (Defense on Jurisdiction, paras. 293-297).

> It follows that the origin of the funds is irrelevant for purposes of jurisdiction. Whether investments are made from imported capital, from profits made locally, from payments received locally or from loans raised locally makes no difference to the degree of protection enjoyed. The decisive criterion for the existence of a foreign investment is the nationality of the investor. An investment is a foreign investment if it is owned or controlled by a foreign investor. There is no additional requirement of foreignness for the investment in terms of its origin. In the same way, the origin of capital from persons who are foreigners but do not enjoy protection under the Convention because they do not meet the nationality requirements is immaterial.[52]

643. There was an investment and this investment was made through CIOC, a company owned and controlled by Mr. Devincci Hourani, a US national since 2001. For the Tribunal, in the circumstances of the present case, the fact that CIOC obtained financing from JOR, a company owned by Mr. Devincci Hourani's brother-in-law, Mr. Kassem Omar, who is also a minority shareholder in CIOC, does not put into question the *bona fide* nature of these loans for the purposes of CIOC's investment, even in light of the Respondent's allegation – which is vehemently disputed by the Claimants – that JOR's loans were granted free of interest and have not been fully repaid so far (it being however specified that Mr. Devincci Hourani allegedly made a partial payment in reimbursement of the loans in February 2015; Claimant's First Post-Hearing Brief, para. 139 with reference to Exh. C-374).

644. For the Tribunal, the Parties' respective arguments and the evidence on the record of this arbitration do not establish that CIOC was in reality controlled by the Lebanese company JOR, rather than by its owner and majority shareholder Mr. Devincci Hourani. Moreover, the Tribunal finds that the evidence on the record does not establish that Mr. Devincci Hourani would have acted as a mere puppet to front for JOR in order to misuse his US nationality to abusively gain an undue access to ICSID jurisdiction. While Lebanon was not yet a Contracting State of the ICSID Convention in December 2002 when the Contract was assigned to CIOC, it became a Contracting State and the ICSID Convention entered into force for Lebanon in April 2003,[53] i.e. over a year prior to Mr. Devincci Hourani's acquisition in May 2004 of 85% of CIOC's shares and almost two years prior to the latter's acquisition of further 7% of CIOC's shares in April 2005. Thus, Lebanon became an ICSID Contracting State many years prior to the occurrence of the dispute in late 2007/early 2008 and the filing of the Request for Arbitration in the present proceedings in June 2013. This notwithstanding, the Tribunal observes that the

[52] Schreuer, The ICSID Convention – A Commentary, 2nd ed., Cambridge 2009, ad Article 25 of the ICSID Convention, para. 187.

[53] See *supra* fn 44.

Contract was initially concluded also with a Lebanese company – CCC – and provided for UNCITRAL arbitration in case ICSID refused jurisdiction, e.g. as a result of the Contractor then being a non-Contracting State of the ICSID Convention. The Respondent has not provided an explanation, let alone evidence, that in 2002 JOR (accepting *arguendo* that JOR was the real party in interest behind CIOC) would not have considered UNCITRAL arbitration to be adequate and would thus have preferred the transfer in 2004 and 2005 of the ownership of CIOC from Mr. Fadi Hussein (even though a national of Denmark, i.e. an ICSID Contracting State) to Mr. Devincci Hourani, despite the fact that Lebanon at the time had already ratified the ICISD Convention.

645. In light of the foregoing, the question of whether, in reality, Mr. Issam Hourani was controlling JOR, rather than Mr. Kassem Omar, does not require a decision by the Tribunal. Suffice it to say that the Tribunal cannot follow the Respondent's allegation that "the record stands firm that from 2003 to 2007, Issam Hourani owned and managed JOR, the main financier and effective investor in CIOC's operations" (Respondent's First Post-Hearing Brief, para. 100). It is observed that, besides this declaration, the Respondent has not much insisted on establishing its allegation regarding Mr. Issam Hourani's involvement in JOR, its main argument being that it was JOR and not Mr. Devincci Hourani who controlled CIOC. The issue of Mr. Issam Hourani's involvement in CIOC is disputed by the Claimants who, *inter alia*, have relied on several documents issued by the Commercial Registry of Lebanon to refute the Respondent's allegations (see, e.g., the Claimants' First Post-Hearing Brief, para. 50 with references).

646. In any event, the Respondent has provided no explanation as to why Mr. Issam Hourani would hide behind his brother Mr. Devincci Hourani in connection with the investment in the Caratube project. Messrs. Devincci and Issam Hourani are recorded as registered shareholders of other companies owned separately and jointly by them. For instance, they each hold 50% of the shares in the Pharm Industry Corporation (see Defense on Jurisdiction, para. 275). Moreover, the question is raised again why Mr. Issam Hourani would need to change CIOC's legal ownership from Mr. Fadi Hussein to Mr. Devincci Hourani in order to obtain an undue access to ICSID jurisdiction, even if it were assumed *arguendo* that Mr. Issam Hourani would not have considered UNCITRAL arbitration to be adequate.

647. Finally, there is no evidence of any undue restructuring, transfers or other schemes on the side of the Claimants to gain access to ICSID jurisdiction following the

occurrence of the dispute or at a time when there was a high probability of a dispute. The facts relied upon by the Respondent in support of its allegation that Mr. Devincci Hourani and CIOC are not the real parties in interest but mere puppets fronting for JOR and possibly Mr. Issam Hourani predate the dispute.

648. Based on the foregoing and the Parties' respective arguments and evidence on the record, the Tribunal concludes that the circumstances of the present case do not justify disregarding the Parties' agreement in Clause 27 of the Contract, in particular Clause 27.7. For the Tribunal, the evidence on the record does not establish an intention of the Claimants to gain undue access to ICSID jurisdiction, for instance by relying on the ICSID arbitration agreement in Clause 27 of the Contract in order to circumvent the "investment" requirement in Article 25(1) of the ICSID Convention. Rather, as stated above, the Respondent seems to attempt to challenge its agreement in Clause 27 of the Contract to submit all disputes arising out of the investment that is the subject of the Contract with CIOC to ICSID arbitration, namely by seeking to open a debate regarding the identity of the investor.

649. Therefore, the Tribunal concludes that an investment was made under the Contract and that the Respondent and CIOC agreed in Clause 27 of the Contract that any dispute arising between them in relation with this disputed investment shall be submitted to ICSID arbitration. The Tribunal finds that the evidence on the record does not establish that the investment was made through an entity other than CIOC. In particular, the evidence does not show that the investment was in reality or ultimately made by JOR or Mr. Issam Hourani.

650. In the light of this conclusion, the Tribunal finds that it has jurisdiction over CIOC's claims under the ICSID Convention and the Contract, the jurisdictional requirements in Article 25 of the ICSID Convention being met.

651. As mentioned above in paragraphs 627 et seq., by means of Clause 28 of the Contract the Tribunal's jurisdiction also extends to CIOC's claims arising under the FIL. As a result, the question – vehemently disputed between the Parties – of whether, in addition to and independently of the Contract, the Tribunal can found its jurisdiction over CIOC's claims also on the FIL, as an "alternative consent-granting instrument" (Defense on Jurisdiction, para. 478), does not call for a decision.

652. In this respect, the Tribunal adds that it cannot follow the Respondent's argument that "the simple reference" to the FIL in Clause 28.4 of the Contract "does not and cannot circumvent the requirements of the FIL itself" and that "the reference to the

FIL in the Contract was rendered meaningless via the assignment of the Contract to a Kazakh company who did not meet the requirements of Article 1 of the FIL" (Counter Memorial, paras. 1184-1185).

653. For the Tribunal, Clause 28.4 of the Contract constitutes not merely a "simple reference" to the FIL, the purpose of which would be limited – as suggested by the Respondent through its legal expert, Professor Ilyasova – to simply "point the parties to laws that are relevant to the area of their agreement and to remind them of associated rights already provided to the parties by law" (Counter Memorial, para. 1186). This position is contradicted by the clear wording of Clause 28.4 itself which explicitly stipulates, using mandatory language, that "[t]he Contractor shall enjoy all guaranties and protections provided by the Law on Foreign Investments". Moreover, the Respondent's explanation that Clause 28.4 of the Contract was drafted for the original Contractor (CCC), who was a "foreign investor" within the meaning of the FIL, cannot convince in light of the wording of Clause 1 of the Contract which explicitly defines the term "Contractor" as CCC "or any legal assignee or successors to the Contractor", i.e. CIOC.

654. Furthermore, the Respondent focuses its argument on the situation in which the FIL may apply to afford its guarantees and protections to foreign investors. In particular, the Respondent submits that CIOC cannot be considered as a "foreign investor" and has not made an "investment" within the meaning of Article 1 of the FIL. As a result, the Respondent's line of argument continues, the FIL does not apply to CIOC and the latter cannot have any rights under the FIL. And the Parties cannot agree under Kazakh law to circumvent the requirements of Article 1 of the FIL to have this law apply in situations in which it does not want to apply. Such an agreement would be null and void, says the Respondent.

655. However, for the Tribunal the question is not whether two private parties by means of a private agreement are entitled under Kazakh law to extend the scope of application of the FIL to persons, entities or transactions not covered by the FIL. Rather, the question is whether a foreign-owned and controlled entity and the Republic of Kazakhstan itself could incorporate into their investment contract the substantive guarantees and protections provided for in the FIL. In this scenario, the question of the FIL's scope of application *stricto sensu* does not arise: the Parties did not intend to make a "simple reference" to the FIL and to provide for the application of the FIL's substantive guarantees and protections in their capacity as statutory provisions, under the condition that such provisions are indeed applicable.

Rather, the wording of Clause 28.4 of the Contract indicates that these substantive guarantees and protections were intended to apply between the Parties in their contractual relationship in the capacity of supplementary contractual provisions. For the Tribunal, it is therefore incorrect to speak – as does the Respondent – of an "attempt to transform a private agreement, a Contract, into law, and by further extension into international law" (Counter Memorial, para. 1183). To the contrary, it is an effort by the Parties to apply statutory provisions as supplementary contractual provisions in their contractual relationship. The situation is not fundamentally different from what it would be if the Parties, rather than referring to and incorporating the FIL into the Contract, had made a "copy and paste" of the FIL's relevant provisions into the Contract, without making any reference to the FIL.

656. As before with respect to the Parties' agreement in Clause 27.7 of the Contract to treat the transactions underlying the Contract as an "investment" for the purposes of ICSID jurisdiction, rather than an attempt by CIOC to circumvent the requirements in Article 1 of the FIL regarding the applicability of that law, the Respondent's argument appears to be an attempt by the latter to challenge its explicit agreement in Clause 28.4 of the Contract to afford CIOC the substantive guarantees and protections provided in the FIL.

657. In passing, the Tribunal observes that Professor Ilyasova cites no legal authorities in support of Section 12 of her Expert Opinion (entitled "What is your opinion as to whether the FIL applies to Caratube LLP through a reference thereto in Section 28.4 of the Contract?"), including her statement that "[a] reference in the contract to the effect that a party to the contract 'enjoy[s] all guaranties and protections provided by the Law on Foreign Investments' cannot override imperative requirements of the law itself and grant protections to which such party is not entitled under that law" (Ilyasova, para. 95). However, the fact that the assignment of the Contract to CIOC was approved after a five-month approval process by the competent Kazakh authorities suggests that the incorporation into the Contract of the FIL's substantive guarantees and protections was in conformity with Kazakh law, despite the Respondent now arguing otherwise. At the very least, this would have created a legitimate expectation and a good faith belief that this was the case.

658. Finally, the Tribunal also cannot follow the Respondent's argument that Clause 28.4 of the Contract, together with other references to the FIL in the Contract, would have become meaningless following the assignment of the Contract to CIOC. As just seen, this is not only contradicted by the clear wording of Clause 28.4, but also by

the fact that the assignment of the Contract to CIOC was approved by the Respondent. It is further contradicted by the general contract interpretation principle of *effet utile* according to which the provisions of a contract shall be interpreted so as to give effect to all of the terms rather than to deprive some of them of effect.

659. In light of the foregoing, the Tribunal confirms its prior conclusion that, regarding the relationship between CIOC and the Respondent, an alleged violation of one of the substantive guarantees and protections of the FIL as incorporated into the Contract can give rise to a claim arising out of or in connection with the Contract, covered by the ICSID arbitration agreement in Clause 27 of the Contract. Because these substantive guarantees and protections would be applied by this Tribunal as supplementary contractual provisions also means that they remain applicable within the Parties' contractual relationship even after the FIL's repeal.

6. Jurisdiction over Mr. Devincci Hourani's claims

a. The Claimants' position

i. Under the ICSID Convention

660. As a preliminary remark, the Claimants take issue with what they describe as the "Respondent's insinuations (not even allegations)" with respect to Mr. Devincci Hourani's marital status and resulting doubts as to the validity of his US nationality. For the Claimants, the Respondent keeps these "insinuations" as potential future objections, to be used to harass Mr. Devincci Hourani. The Claimants stress that Mr. Devincci Hourani validly obtained the US nationality in July 2001, years before the present dispute arose and this Arbitration was commenced. The question of whether or not Mr. Devincci Hourani was married is in any event immaterial as he obtained the US nationality more than 5 years after taking up permanent residence in the US, which is the regular waiting time for naturalization. The Claimants further point out that the Respondent has been in possession of Mr. Devincci Hourani's divorce record since November 2010, but chose to not raise a jurisdictional objection based thereon during the *Caratube I* arbitration. Thus, the only relevant question is whether Mr. Devincci Hourani had the US nationality during relevant times, the answer to which is positive and not disputed. In reliance on the cases in *Soufraki* and *Arif*, the Claimants submit that this Tribunal does not have authority to review the validity of Mr. Devincci Hourani's US nationality. In particular, the Tribunal cannot assess whether or not the United States should have given Mr. Devincci Hourani the US

nationality; nor can this Tribunal assess the consequences, if any, to be drawn therefrom (Defense on Jurisdiction, paras. 630-645).

661. With respect to the Respondent's request for negative inferences to be drawn from Mr. Devincci Hourani's alleged inability to provide the full range of naturalization documents, the Claimants argue that this request is unacceptable and cannot be granted because there is no basis in law pursuant to which a party must prove the legality of its acquisition of nationality, nor is there a requirement under the ICSID Convention that nationality be granted in accordance with the law of the state granting it. The Respondent had ample opportunity to raise its arguments in this respect earlier and its request therefore comes too late. In any event, the Claimants have produced all relevant documents in their possession and have made in a timely and appropriate manner all the necessary efforts to obtain further responsive documents relating to Mr. Devincci Hourani's US nationality. The Claimants underline that the Respondent does not dispute that Mr. Devincci Hourani is and has been a US national at all relevant times (Claimants' Reply Post-Hearing Brief, paras. 34-38).

662. It is the Claimants' position that this Tribunal has jurisdiction over Mr. Devincci Hourani's claims under Article 25 of the ICSID Convention, because he made an investment within the meaning of that Convention. In particular, the Claimants reject the Respondent's argument that Mr. Devincci Hourani must show that he independently took a risk and made a contribution in the Contract (not in CIOC) or the rights granted by the Contract; in other words, he cannot rely on contributions made by JOR or CIOC. The Claimants submit that the Respondent's argument is novel and there is no support for it in case law. There is no requirement under Article 25 of the ICSID Convention that the investment be made by a foreign national in the local investment vehicle to qualify as an investment; because CIOC made an investment within the meaning of Article 25 of the ICSID Convention, the Respondent cannot raise a jurisdictional objection on the basis that Mr. Devincci Hourani allegedly has not made such investment.

663. In the same vein, the Claimants rely on ICSID case law (e.g. the cases in *Suez*, *CMS* and *Goetz*) to argue that the ICSID Convention does not limit the right of shareholders to bring actions for direct, as opposed to derivative claims. Thus, since CIOC has made an investment within the meaning of Article 25 of the ICSID Convention, Mr. Devincci Hourani, in his capacity as a majority shareholder of

CIOC, can rely on this investment and does not have to have independently made such investment.

664. In any event, the Claimants argue that as a 92% shareholder, Mr. Devincci Hourani has made an investment in CIOC within the meaning of Article 25 of the ICSID Convention, it being specified that the *Salini* guidelines are met. Mr. Devincci Hourani had no obligation, in his personal capacity, to contribute any capital to CIOC. It is sufficient that a contribution was made in connection with a project, albeit from a different source than the particular claimant, no link being required between the particular claimant and the capital. According to the Claimants, ICSID case law confirms that once ownership is shown, the origin of capital becomes irrelevant (Defense on Jurisdiction, paras. 646-658; Claimants' First Post-Hearing Brief, para. 143; Claimants' Reply Post-Hearing Brief, paras. 55 and 57-58).

665. The Claimants further insist that Mr. Devincci Hourani did indeed pay for the acquisition of CIOC's shares, the payment having been made in cash as was standard procedure at the time, considering the low amount at stake and the Hourani family's fortune. Even if Mr. Devincci Hourani had not paid for CIOC's shares, this would be a problem between him and his creditors and cannot be relied upon by the Respondent as a defense to this Tribunal's jurisdiction (even more so as the ownership of the shares is not contested). The same applies with respect to the allegation that the Claimants have not provided evidence to prove the payment of the shares, especially in the circumstances of this case where the Respondent always knew with whom it was dealing as far as Mr. Devincci Hourani's majority shareholding in CIOC was concerned (Defense on Jurisdiction, paras. 659-662).

666. Likewise, the Claimants submit that a "nominal price" for the acquisition of CIOC's shares does not constitute a bar to this Tribunal's jurisdiction, since the real test is one of intent to develop economic activities, and not of numerical figures, as confirmed by the tribunals in *Phoenix* and *Saba Fakes*. The Claimants underline that the Contract was always international and contained an ICSID clause, and Mr. Devincci Hourani was CIOC's owner (with the knowledge and approval of the Respondent) well before the dispute arose and well before the confirmation of the reserves.

667. The Claimants further point out that the purchase price of the investment is not the only criterion to be taken into consideration when assessing whether a contribution was made. In particular, ICSID case law confirms that a nominal purchase price of a

claimant's shareholding does not necessarily indicate that no real investment was made by the claimant. The investment in the present case consists of extensive obligations of the highest monetary value and risk. What was at stake in CIOC was not real estate or a conservative investment with a guaranteed rate of return and no commitment, but an oil concession with no confirmed reserves at the time the Contract was signed. This required extensive and costly exploration obligations with no guarantee of a return, but instead a risk to walk away empty-handed, unable to recoup any of the expenditures incurred.

668. The Claimants further stress that Mr. Fadi Hussein did not only receive the purchase price in return for CIOC's shares. In addition, Mr. Devincci Hourani signed a Memorandum of Intent on 5 May 2004 (Exh. C-355), whereby he agreed, after the start of the commercial production, to pay Mr. Fadi Hussein a compensation for the expenditures already incurred along with 5% of the net profit starting from the second year of commercial production. Mr. Devincci Hourani also received important debts and obligations from Mr. Fadi Hussein,[54] it being specified that such obligations were carried out by reinvestments under the Mr. Devincci Hourani era and via loans in relation to which Mr. Devincci Hourani accepted personal liability. Moreover, assignments and sales for a nominal price are common practice in the circumstances of the present case and constitute textbook examples of an investment and risk, as has been recognized by ICSID case law (Defense on Jurisdiction, paras. 663-678; Claimants' First Post-Hearing Brief, paras. 144-149).

669. The Claimants reject the Respondent's arguments that Mr. Devincci Hourani did not personally guarantee JOR's loan to CIOC because this guarantee consisted in payment of dividends from CIOC's profits, and that he did not make an investment because he did not take any risk. The Claimants assert that these arguments do not only lack legal support, they are also factually wrong. Mr. Devincci Hourani ran the serious risk of having to personally repay the loans in case the exploration phase revealed fewer or no reserves. In other words, the risk incurred by Mr. Devincci Hourani is his liability towards JOR in the event CIOC defaulted on its loans;

[54] For details on such debts and obligations received by Mr. Devincci Hourani from Mr. Fadi Hussein, see Claimants' First Post-Hearing Brief, paras. 145-147. According to the Claimants, such obligations as set forth in paras. 145-147 address the Tribunal's **Question 1** in the Post-Hearing Order dated 20 November 2015. See *supra* para. 237 ("**Question 1**: What are the implications of Exhibit C-155 of June 1, 2004 according to which Devincci Hourani (i) undertook to 'pay, from his own personal income gained as net profit from the sale of the mentioned production, to [JOR] annual instalments of 20% of the loan amount in addition to 14% interest rate on the above 20%' and (ii) undertook in addition 'to pay all loans with the 14% annual interest within 10 years from the beginning of the 2nd year of commercial production.'").

whether the funds he would have to draw upon to satisfy this obligation would be from his personal income or from his dividends as shareholder of CIOC makes no difference. Likewise, that his assets subject to liability are limited to those originating from the net profits in CIOC or that the profits were made by an investment partially financed by loans does not make Mr. Devincci Hourani's liability any less personal. Mr. Devincci Hourani's personal guarantee was not contingent on CIOC making profits with the alleged consequence being no liability in case of no profits. The liability existed whether or not commercial production was entered into. This is shown by the fact that Mr. Devincci Hourani did indeed start repaying the loan and reconfirmed the validity of the loan.[55] Moreover, Mr. Devincci Hourani's personal guarantee provided CIOC with the necessary financial means for the performance of the Contract, and the existence of the loan was not only known but also beneficial to the Respondent. Even in case of non-reimbursement of the loan by Mr. Devincci Hourani, this would not exclude liability, it being however specified that reimbursement has been claimed, Mr. Devincci Hourani has made an interim payment of USD 3 million in February 2015 from his personal assets in addition to granting JOR the right to seize any property held directly or indirectly by Mr. Devincci Hourani in case of non-reimbursement, and that the parties agreed on an interest rate of 14% in relation to all outstanding amounts under the loans (Defense on Jurisdiction, paras. 679-683; Claimants' First Post-Hearing Brief, paras. 150-151; Claimants' Reply Post-Hearing Brief, para. 59).

ii. Under the FIL

670. It is the Claimants' position that Mr. Devincci Hourani falls within the substantive protections of the FIL for four principal reasons. First, the Claimants submit that the substantive protections of the FIL survived its repeal and are applicable to Mr. Devincci Hourani and his claims. In particular, the substantive protections of the FIL survived its repeal by virtue of the stabilization clauses in the FIL (Article 6), the Contract (Clauses 28.2 and 28.4), the Law on Subsoil (Article 71 of the 1999 Subsoil Law; Exh. CLA-43), the Kazakh Civil Code (Article 383(2); Exh. CLA-22), as well as by virtue of the concept of vested or accrued rights as held in the *Rumeli* case. The Claimants further submit that Mr. Devincci Hourani did not have to become involved

[55] According to the Claimants, this is one of the implications of Exhibit C-155 arising out of the Tribunal's **Question 1** (See *supra* para. 237 and fn 54) as Mr. Devincci Hourani personally guaranteed repayment of the loan from his personal income, and personally took on the liability of repayment from the proceeds of the Project (Claimants' First Post-Hearing Brief, para. 150). See also the Claimants' Reply Post-Hearing Brief, paras. 60-64.

with CIOC while the FIL was still in force as a legislative act, because with the purchase of CIOC's shares came the benefits and protections that CIOC had by virtue of the FIL, as confirmed by the *Suez* case (Defense on Jurisdiction, paras. 687-690; Claimants' First Post-Hearing Brief, para. 184).

671. Second, the Claimants reiterate that Mr. Devincci Hourani is a foreign investor under the FIL, it being recalled that the registration requirement under Article 1 of the FIL is not applicable to a foreign investor who invests through the ownership of shares in registered local companies, such as CIOC. Article 16 of the FIL applies as a *lex specialis* over Article 1 and does not require registration in the circumstances of the present case. The Claimants further recall that Mr. Devincci Hourani must in any event be deemed registered to conduct economic activities in the US (Defense on Jurisdiction, paras. 691-698).

672. Third, the Claimants stress that Mr. Devincci Hourani made an investment under the FIL by means of his shareholding in CIOC and his active participation in the venture (Defense on Jurisdiction, paras. 699-709).

673. Fourth and finally, the Claimants reiterate that the FIL contains the Respondent's consent to arbitrate disputes arising out of Mr. Devincci Hourani's claims, there being no requirement that the Claimants and Respondent would have had to enter into a separate arbitration agreement to complete the Respondent's offer to arbitrate under Article 27 of the FIL (Defense on Jurisdiction, paras. 710-711).

b. The Respondent's position

i. Under the ICSID Convention

674. As a preliminary remark, the Respondent observes that Mr. Devincci Hourani relies on his US nationality to claim ICSID jurisdiction under the ICSID Convention and the FIL. However, Mr. Devincci Hourani was declared divorced on 18 April 2001, i.e. three months prior to the issuance of his Certificate of Naturalization on 16 July 2001, raising doubts as to the validity of Mr. Devincci Hourani's US nationality. In its Counter Memorial, the Respondent reserved its rights to develop an argument in this respect following the document production procedure (Counter Memorial, para. 372). In its First Post-Hearing Brief, the Respondent then requested this Tribunal to draw negative inferences from Mr. Devincci Hourani's failure to comply with the Tribunal's order to produce additional naturalization documents. According to the

Respondent, "the negative inferences as to the non-produced documents must lead the Tribunal to conclude that Devincci Hourani's U.S. nationality was obtained based upon the false statement that he was married at the time of his naturalization". As a result, the Respondent further requests this Tribunal to decline jurisdiction on all of the Claimants' claims on the ground that the Claimants have not proved the legality of Mr. Devincci Hourani's US nationality (Respondent's First Post-Hearing Brief, para. 69).[56]

675. It is the Respondent's position that Mr. Devincci Hourani did not make an investment within the meaning of the ICSID Convention. In particular, Mr. Devincci Hourani did not meet his burden of proving that he independently made a contribution and took a risk with respect to CIOC. He cannot rely on investments that were made in the Contract or on rights granted by the Contract; he thus cannot rely on contributions that have allegedly been made by CIOC or by JOR. For the Respondent, it clearly emerges from the evidence on the record that Mr. Devincci Hourani did not make any contribution and did not take any risk, given that he acquired his shares in CIOC for an amount of USD 6,500 at most and that this transaction itself raises serious doubts; Mr. Devincci Hourani made no subsequent financial or other contributions to CIOC. The Claimants' argument that the geographic origin of capital is irrelevant for purposes of jurisdiction does not stand in that the question of the capital's origin does not arise, given that there is no evidence that Mr. Devincci Hourani, in his personal capacity, contributed any capital to CIOC in the first place. The Respondent relies on the following passage taken from the *Caratube I* award (Exh. CLA-8, para. 456) (Counter Memorial, paras. 374-378; Respondent's First Post-Hearing Brief, paras. 91-92; Respondent's Reply Post-Hearing Brief, para. 54 and paras. 57-60):

> Claimant [CIOC] insisted that the origin of capital used in investments is immaterial. This is correct, however, the capital must still be linked to the person purporting to have made an investment. In this case there is not even evidence of such a link.

676. The Respondent further rejects the Claimants' argument that a loan can amount to an investment, stressing that the cases relied upon by the Claimants are irrelevant because the loan that constituted the claimants' alleged investments in those cases

[56] It bears mentioning that the Respondent argues that the Tribunal's jurisdiction over both CIOC and Mr. Devincci Hourani "depends entirely upon Devincci Hourani's U.S. nationality". In particular, regarding CIOC, it depends on its assertion that it is controlled by a US national. Regarding Mr. Devincci Hourani, it is based on his assertion that he is a national of an ICSID Contracting State (Respondent's First Post-Hearing Brief, para. 69).

were made by those claimants themselves. However, neither Mr. Devincci Hourani nor CIOC made any loan. Rather, it was JOR who made loans to CIOC. Mr. Devincci Hourani is not a party to those loan agreements and, thus, Mr. Devincci Hourani, did not make any contribution in the form of a loan.

677. The Respondent takes issue with Mr. Devincci Hourani's argument that the 2004 Memorandum of Intent with Mr. Fadi Hussein (by which Mr. Devincci Hourani allegedly promised to reimburse Mr. Fadi Hussein's incurred expenses by means of paying him "5% rate of the net profit starting the second year of commercial production" (Exh. C-355)), constituted part of the price paid for CIOC's shares. This Memorandum of Intent cannot constitute a contribution by Mr. Devincci Hourani to CIOC because it promises a conditional future payment of 5% of CIOC's net profits to Mr. Fadi Hussein. Furthermore, Mr. Devincci Hourani testified that he did not pay any amount to Mr. Fadi Hussein based on this Memorandum, and his testimony further showed that he has no intentions of doing so should this Tribunal award damages for loss of profits. In any event, any payment to Mr. Fadi Hussein based on the Memorandum of Intent would not come from Mr. Devincci Hourani's personal assets, but from CIOC's profits. Therefore, the Memorandum cannot entail a contribution by Mr. Devincci Hourani. The Respondent also points out that, although the Claimants produced the Memorandum of Intent within the context of document production in the *Caratube I* arbitration, they never relied on this document either during the *Caratube I* arbitration or in the Memorial in this Arbitration. This confirms that the Claimants themselves do not consider this document to be proof of an investment by Mr. Devincci Hourani (Respondent's First Post-Hearing Brief, para. 93; Respondent's Reply Post-Hearing Brief, para. 60).

678. For similar reasons, the Respondent contends that Mr. Devincci Hourani also did not take any risk. In particular, he cannot rely on his alleged personal guarantee to JOR of CIOC's loans, it being noted that the only evidence of this personal guarantee is a one page document that contains errors and that confuses the identity of the creditor and the debtor. The Respondent relies once again on the *Caratube I* award, quoting the following passages (Exh. CLA-8, paras. 443, 450-451 and 454-455):

> […] Devincci Hourani's guarantee of the debt does not contain any contribution. He promises to use the profits from the investment to repay the loan. This does not explain how that promise can constitute a contribution to the investment in the first place.
>
> […]

> From the above it follows that the evidence presented does not confirm that Devincci Hourani's alleged contribution to CIOC as his investment included a substantial personal guarantee of CIOC's debt to JOR. His alleged personal guarantee referred to a loan that was annulled by the parties. Even assuming that the loan was still in place, it was already secured on the same assets and revenue stream. Devincci Hourani's alleged personal guarantee did not contribute anything to the economic arrangement existing between CIOC and JOR.
>
> There is also no evidence that Devincci Hourani's contribution constituted of his know-how or managerial skills.
>
> […]
>
> Change of shareholding did not have any impact on the relationship between CIOC and JOR. In January and April 2004, shortly before Devincci Hourani acquired 85% of the shares, JOR transferred USD 6 million to CIOC.
>
> […]
>
> [E]ven if Devincci Hourani acquired formal ownership and nominal control over CIOC, no plausible economic motive was given to explain the negligible purchase price he paid for the shares and any other kind of interest and to explain his investment in CIOC. No evidence was presented of a contribution of any kind or any risk undertaken by Devincci Hourani. There was no capital flow between him and CIOC that contributed anything to the business venture operated by CIOC.

679. In response to the Tribunal's **Question No. 1** in the Post-Hearing Order,[57] the Respondent further addresses the Claimants' argument that Mr. Devincci Hourani personally guaranteed CIOC's loans to JOR and that this purported guarantee amounts to an investment. The Respondent insists that Mr. Devincci Hourani's personal guarantee does not constitute an investment as the text of the guarantee makes clear that the lender does not get paid unconditionally, but out of net profits received by the debtor's shareholder. JOR only gets paid based on this guarantee <u>if</u> CIOC obtains a production license <u>and</u> enters into the production phase <u>and if</u> there are net profits after two years. It is undisputed that CIOC never reached commercial production and that the guarantee does not concern all of Mr. Devincci Hourani's personal assets in that it could only be called with respect to his receipts from commercial production, if any. The Respondent concludes that it was JOR who took the risk with respect to the success of the Caratube project and who made the real investment in CIOC, it being underscored that JOR is not a party to this Arbitration

[57] See *supra* para. 237 ("**Question 1**: What are the implications of Exhibit C-155 of June 1, 2004 according to which Devincci Hourani (i) undertook to 'pay, from his own personal income gained as net profit from the sale of the mentioned production, to [JOR] annual instalments of 20% of the loan amount in addition to 14% interest rate on the above 20%' and (ii) undertook in addition 'to pay all loans with the 14% annual interest within 10 years from the beginning of the 2nd year of commercial production.'").

and thus can make no claims (it being further underscored that the Respondent is not asking the Tribunal to pierce the corporate veil to look behind JOR). Finally, this Tribunal should not lightly contradict the determinations of the *Caratube I* tribunal who carefully examined Exhibit C-155 and found that it did not show that Mr. Devincci Hourani had made an investment (Respondent's First Post-Hearing Brief, paras. 96-98; Respondent's Reply Post-Hearing Brief, paras. 55-56 and para. 60).

680. Moreover, the Respondent rejects the Claimants' argument that Mr. Devincci Hourani took a risk because he acquired the shares before the oil reserves in the Caratube field were confirmed. Mr. Devincci Hourani took no risk: he had nothing to lose because he made no contribution to the project (Respondent's First Post-Hearing Brief, para. 94).

681. The Respondent submits that Mr. Devincci Hourani was not involved in the day-to-day running of CIOC, other than during his short term as director, albeit without being in possession of a valid Kazakh work permit. Rather, it was Mr. Issam Hourani who took the financial decisions. In particular, Mr. Issam Hourani received the alleged KTG offer to purchase CIOC and all other communications with KTG, and it was also Mr. Issam Hourani who conducted the alleged negotiations with KTG for the sale of CIOC's shares, even though Mr. Devincci Hourani was the nominal owner of 92% of the shares. The Respondent points out that from 2003 to 2007, Mr. Issam Hourani owned and managed JOR. Even if it were admitted *arguendo* that it was Mr. Kassem Omar who owned and managed JOR during that period, this would not alter the result because, in any event, Mr. Devincci Hourani had no involvement in JOR. Therefore, it was not Mr. Devincci Hourani, but JOR, who made the contribution and took the risk, Mr. Devincci Hourani acting merely as a frontman (Respondent's First Post-Hearing Brief, paras. 99-100).

682. According to the Respondent, the Claimants cannot argue that Mr. Devincci Hourani made a contribution on the basis of his alleged payment in 2015 of USD 3 million in reimbursement of the loans granted by JOR. The Claimants themselves have vehemently rejected the possibility for the Parties to rely on documents executed at the end of the arbitration and to draw any legal consequences therefrom. This means that this Tribunal should not rely on the alleged 2015 payment for purposes of this Tribunal's jurisdiction. In any event, the 2015 payment is detached from any agreement ever concluded between CIOC and JOR. The Respondent notes that the money was transferred to Mr. Kassem Omar's personal account, rather than to JOR's, and the transfer was not made by Mr. Devincci Hourani, but by a Lebanese

company belonging to his brother, Mr. Hussam Hourani (Respondent's First Post-Hearing Brief, paras. 101-105).

683. Finally, in response to the Tribunal's **Question No. 2** in the Post-Hearing Order,[58] the Respondent submits that the Houranis were not wealthy investors who came into Kazakhstan to invest in multi-million dollar projects. This confirms that Mr. Devincci Hourani did not have personal resources to invest in an oil project such as the Caratube project (Respondent's First Post-Hearing Brief, paras. 106-111).[59]

ii. Under the FIL

684. The Respondent advances "four independent reasons" for its contention that the FIL cannot serve as a basis for this Tribunal's jurisdiction. First, the Respondent submits that this Tribunal does not have jurisdiction under the FIL over Mr. Devincci Hourani's claims, because the FIL was repealed on 22 January 2003, i.e. before Mr. Devincci Hourani allegedly made his investment. The latter cannot benefit from the stabilization clause in the FIL through the Contract, because he is not a party to the Contract. Moreover, Mr. Devincci Hourani does not have any accrued rights under the FIL, because his alleged investment was made after the FIL's repeal (Counter Memorial, paras. 387-388).

685. Second, according to the Respondent, Mr. Devincci Hourani did not qualify as a foreign investor under the terms of the FIL. Relying on the argument put forward with respect to the Respondent's jurisdictional objections regarding CIOC's claims, the Respondent argues that Mr. Devincci Hourani, as a US citizen, did not and could not have complied with the registration requirement under the FIL's Article 1 (and,

[58] See *supra* para. 237 ("**Question 2**: What conclusion should the Tribunal draw from (i) the testimony of Samir Ali Derekh (who testified to be the Honorary Consul of Syria in Kazakhstan), who testified that the Hourani family were modest people who operated a restaurant in either Almaty or Astana when they arrived in Kazakhstan in the late 80's or early 90's, and (ii) the testimony of either Issam or Devincci Hourani, who affirmed that they came from a wealthy Palestinian family?").

[59] To the contrary, it is the Claimants' position that Mr. Devincci Hourani invested significantly in Kazakhstan and that the Hourani family was "wealthy from the beginning". The Claimants insist that this has been asserted by all members of the Hourani family and has never been challenged by the Respondent, prior to Mr. Derekh's allegations to the contrary, to which this Tribunal should give no weight. Moreover, the Claimants assert that the Respondent relies on unsatisfying evidence in support of its allegation that the Hourani family was not wealthy before 2003. The Claimants have not produced evidence on the historical background of the Hourani family's wealth because they say they did not need to, because the issue is irrelevant, it being however specified that the Claimants would be willing to provide documentary evidence should the Tribunal consider it material and wish to draw conclusions from this matter. That said, for the Claimants, the **Tribunal's Question No. 2** is in any event irrelevant whether with respect to jurisdiction, merits or quantum (Claimants' First Post-Hearing Brief, paras 28-32; Claimants' Reply Post-Hearing Brief, paras. 65-68).

thus, benefit from the FIL's provisions), because no registry exists under US law. To benefit from the FIL's provisions, Mr. Devincci Hourani would have needed to set up a foreign company to purchase CIOC's shares.

686. The Respondent rejects the Claimants' argument that the FIL's registration requirement is limited to foreign investors conducting business in Kazakhstan in their personal capacity. The FIL's clear and unambiguous text does not include such limitation and provides for the registration requirement without exceptions. In any event, the Claimants' argument cannot stand because Mr. Devincci Hourani claims to hold shares directly in CIOC, i.e. in his personal capacity. Furthermore, the Claimants cannot argue that Mr. Devincci Hourani complied with the registration requirement in the FIL, because that law no longer existed at the time he allegedly satisfied its requirements. The documents submitted by the Claimants (namely records of share ownership in US companies) date from 2010 and 2013 and, therefore, are completely irrelevant, even if it were admitted that they were adequate and sufficient to establish satisfaction with the registration requirement, which the Respondent denies (Counter Memorial, paras. 389-391).

687. Third, the Respondent argues that Mr. Devincci Hourani, in any event, did not make an investment under the terms of the FIL, i.e. a commitment of resources that are economically adequate to maintain and develop a certain business, a notion which implies some active conduct (rather than a mere passive participation in a venture) on the part of the putative investor. Relying, *inter alia*, on the tribunal's holdings in the *Caratube I* award, the Respondent submits that the evidence in the present case clearly shows that Mr. Devincci Hourani made no contribution, took no risk and made no active investment in CIOC. Moreover, the Respondent stresses once again that Mr. Devincci Hourani first acquired shares in CIOC in 2004, i.e. at a time when the FIL was no longer in force. The Respondent further submits that Mr. Devincci Hourani did not make an investment within the terms of the Kazakh 2003 Law on Investments, because his acquisition of shares in CIOC does not qualify as a "contribution to the charter capital of a legal entity" pursuant to Article 1 of the 2003 Law on Investments (Exh. RL-99). Therefore, Mr. Devincci Hourani cannot benefit from any guarantees and protections provided by the 2003 Law on Investments (Counter Memorial, paras. 392-404).

688. Fourth and finally, the Respondent submits that, even if Mr. Devincci Hourani somehow had rights under the FIL, the FIL does not contain a consent to ICSID arbitration with respect to his claims. As set forth with respect to its jurisdictional

objections over CIOC's claims, the Respondent's position is that Article 27 of the FIL does not constitute a binding offer of ICSID arbitration, but requires a separate agreement entered into between Mr. Devincci Hourani and the Respondent. The only document that could possibly supply such missing agreement is the Contract, to which, however, Mr. Devincci Hourani is not a party. Therefore, he cannot rely on its provisions, including on the dispute resolution clause. In any event, the Contract does not contain an effective agreement to ICSID jurisdiction and Article 27 of the FIL did not survive the FIL's repeal (Counter Memorial, para. 405).

c. Analysis

689. The question for the Tribunal to decide is whether, in addition to CIOC's claims, it also has jurisdiction over Mr. Devincci Hourani's claims under the FIL. The Claimants do not argue that the Tribunal's jurisdiction with respect to Mr. Devincci Hourani's claims could somehow be based on the Contract, to which Mr. Devincci Hourani is not a party (see, e.g., Memorial, para. 584.1; Defense on Jurisdiction, paras. 645 et seq.).

690. For the reasons set forth below, the Tribunal finds that it does not have jurisdiction over Mr. Devincci Hourani's claims, given that the only potentially available consent-granting instrument, i.e. the FIL, was already repealed in January 2003, namely over a year before Mr. Devincci Hourani acquired his shares in CIOC.

691. The Tribunal cannot follow the Claimants' argument that "Mr. Devincci Hourani did not have to 'become involved' with Caratube while the FIL was still in force as a legislative act […] because with Mr. Devincci Hourani's purchase of the Caratube shares in [sic] May 17, 2004 came all the assets, obligations, but most importantly benefits and protections that Caratube had by virtue of the FIL (applicable to it, in turn, through any of the stabilization clauses and/or the accrued or vested rights principle […]" (Defense on Jurisdiction, para. 688).

692. In support of their position, the Claimants have relied on the decision in the *Suez* case (Exh. CLA-299) where the tribunal found that the ICSID Convention does not limit the right of shareholders to bring actions for direct, as opposed to derivative claims. However, the *Suez* tribunal's statement must be placed in its context. To do so, it is worth quoting paragraph 49 (on which the Claimants rely) in its entirety:

> [U]nder the plain language of these [Argentina-France and Argentina-Spain] BITs, the Tribunal finds that Suez's as well as AGBAR's and

> InterAguas' shares in APSF are "investments" under the Argentina-France and Argentina-Spain BITs. These shareholders thus benefit from the treatment promised by Argentina to investments made by French and Spanish nationals in its territory. Consequently, under Article 8 of the French treaty and Article X of the Spanish treaty, these shareholder Claimants are entitled to have recourse to ICSID arbitration to enforce their treaty rights. Neither the Argentina-France BIT, the Argentina-Spain BIT, nor the ICSID Convention limit the rights of shareholders to bring actions for direct, as opposed to derivative claims. This distinction, present in domestic corporate law of many countries, does not exist in any of the treaties applicable to this case.

693. The *Suez* tribunal relied on the plain wording in the applicable BITs which "specifically provide[d] that shareholders are investors and as such are entitled to have recourse to international arbitration to protect their shares from host country actions that violate the treaty" (Exh. CLA-299, para. 50). Thereafter, the tribunal explicitly confirmed its decision in the following terms (Exh. CLA-299, para. 51):

> Relying on the specific language of the Argentina-France BIT, as well as that of the Argentina-Spain BIT which also gives shareholders standing to have recourse to arbitration to protect their shares, the Tribunal finds that Suez, AGBAR, and InterAguas have standing to bring this arbitration.

694. In the present case, the Claimants have not relied on any legal basis, akin to the relevant provisions in the Argentina-France BIT or the Argentina-Spain BIT relied upon by the claimants in the *Suez* case, that would give Mr. Devincci Hourani standing (independently of CIOC) to have recourse to ICSID arbitration to protect his shares, namely by means of any rights that CIOC may have under the FIL.

695. Therefore, the Tribunal cannot follow the Claimants' arguments but rather agrees with the Respondent that even if it were accepted that Mr. Devincci Hourani had to be considered a "foreign investor" and had made an "investment" within the meaning of the FIL, and that Article 27 of the FIL contained a binding offer of ICSID arbitration by the Respondent, it would still remain that the FIL (including its Article 27) was repealed over a year prior to Mr. Devincci Hourani's involvement in CIOC. In the same vein, the Tribunal further agrees that Mr. Devincci Hourani cannot, by means of the various stabilization clauses, revive the FIL in order to found jurisdiction and gain benefits therefrom. Mr. Devincci Hourani never obtained any accrued rights under the FIL, given that his alleged investment was made over a year after the FIL's repeal.

696. For the Tribunal, the Claimants have not met their burden of proof and thus failed to establish that the FIL can operate as a jurisdictional basis for Mr. Devincci Hourani's

claims in the circumstances of the present case.[60] As a result, the Tribunal concludes that it does not have jurisdiction over Mr. Devincci Hourani's claims.

C. CIOC'S CLAIMS FOR ALLEGED BREACHES OF THE RESPONDENT'S OBLIGATIONS

1. The Claimants' position[61]

a. The alleged expropriation

697. In their Memorial, the Claimants submit that their investments are entitled to protection pursuant to the standard set forth in Article III of the BIT (Exh. CLA-1), which deals with expropriation and reads as follows:

> 1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.
>
> 2. A national, or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law.
>
> 3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses.

[60] The Tribunal observes that the FIL was repealed in its entirety on 22 January 2003 with the introduction of the 2003 Law on Investments. The Claimants have not asserted that Mr. Devincci Hourani's investment would fall under the 2003 Law on Investment and the Claimants have made clear that they are not asserting jurisdiction under this Law (Defense on Jurisdiction, para. 707).

[61] The following presentation of the Claimants' position adopts the Claimants' characterizations of the Respondent's alleged breaches and thus subsumes under the headings "expropriation", "compensation", "fair and equitable treatment standard", "protection against arbitrariness, unreasonableness and discrimination", "full protection and security", etc., what the Claimants have themselves dealt with under these headings.

698. According to the Claimants, the Respondent's acts constitute a direct expropriation of their investments, which the Claimants define as a "straightforward taking of an investment by the State", involving "the investor being deprived of property and a corresponding appropriation by the state, or state-mandated beneficiary, of specific property rights" (Memorial, para. 355).

699. Alternatively, the Claimants submit that the Respondent's acts amount to an indirect or creeping expropriation of the Claimants' investments, namely "a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to a State over a period of time culminate in the expropriatory taking of such property". The Claimants further refer to the award in *Spyridon Roussalis v Romania* (Exh. CLA-77), where the tribunal held that "indirect expropriation may occur when measures 'result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor" (Memorial, para. 356).

700. For the Claimants, the taking by the Respondent of the Claimants' investment "is a clear case of an unlawful expropriation" (Memorial, para. 357), as there was no legal justification under the applicable norms. In particular, "there was no purpose behind the taking other than the desire to get rid of those perceived by the State to be associated one way or another with Mr. Aliyev and to seize their assets by fear that they could provide assistance to Mr. Aliyev". Independently of the connection with Mr. Aliyev, the unlawfulness of the taking is further demonstrated by the facts underlying the present dispute as evidenced by the chronology of events, witness testimonies and contemporaneous documentary evidence (Memorial, paras. 358 et seq.; Claimants' Reply Post-Hearing Brief, paras. 100 et seq.). It is the Claimants' position that the Respondent has engaged in a number of acts and omissions (see Memorial, para. 359) that "individually, let alone collectively, constitute an unlawful expropriation (whether direct or creeping) that deprived the Claimants from all perspectives of the use and enjoyment of their investment, thus giving rise to liability and the obligation to compensate" (Memorial, para. 360).

701. With reference to *Tecmed v Mexico* (Exh. CLA-75), the Claimants argue in the further alternative that the measures taken by the Respondent were in any event disproportionate with the justification behind the state's actions, thus rendering the Respondent's actions expropriatory (Memorial, paras. 361-362).

702. At the Hearing and in their Post-Hearing Briefs, the Claimants primarily rely on the FIL, namely Article 7 FIL, and Kazakh law (and, in any event, customary international law) in support of their position that there has been an expropriation in violation of the relevant expropriation provisions: the rights under the Contract were terminated, and Mr. Devincci Hourani and CIOC deprived of the use, enjoyment and benefits of their investment in breach of substantive and procedural law.[62]

703. In particular, regarding specific **substantive violations of the FIL**, the Claimants rely on several acts and omissions by the Respondent, including (i) the "Sabsabi/Ruby Roz saga"; (ii) the Prosecutor's interventions and the "Recommendation" dated 7 September 2007; (iii) several Notices that were sent after 7 September 2007 and that led to the termination of the Contract; and (iv) the Order of Termination of 30 January 2008 and Notice of Termination of 1 February 2008 (Claimants' First Post-Hearing Brief, paras. 304-340; Claimants' Reply Post-Hearing Brief, paras. 122-182).

704. In response to the Tribunal's **Question No. 5** in the Post-Hearing Order,[63] the Claimants submit that there was no reference to the 25 March 2007 Notice in the "Recommendation" of 7 September 2007, or in any correspondence between the Parties prior to the 24 September 2007 letter from the MEMR. The Claimants allege that this is because the 25 March 2007 Notice was a "*post facto* concoction, manufactured upon receipt of the Prosecutor's instruction to terminate Caratube and in an attempt to discover a justification for the termination of Caratube's Contract". In any event, the 25 March 2007 Notice was not received by CIOC until 24 September 2007. According to the Claimants, the explanations given at the Hearing as to the absence of any follow-up on the 25 March 2007 Notice by the MEMR are lies. Moreover, there is no probative value in the computer log and the alleged

[62] The Tribunal has taken note that the Claimants still maintain in their Post-Hearing Briefs that the standard of protection as set forth in Article III of the BIT applies via the MFN clause contained in the FIL. According to the Claimants, under the MFN clause in Article 4(1) and (2) of the FIL, the Claimants can seek the *protection* (as opposed to the *benefits*) that the Kazakh BITs provide (Claimants' First Post-Hearing Brief, para. 300, footnote 366, and para. 382; Tr. Day 1, pp. 160 et seq., lines 21 et seq.).

[63] See *supra* para. 237 ("**Question 5**: Why do neither Respondent nor CIOC make any reference, in correspondence between them prior to September-October 2007, to the Notice of Breach of March 25, 2007? In particular:

- why did CIOC not respond to the Notice of Breach of March 25, 2007 before October 3, 2007?
- what probative value should be given to the computer log and the acknowledgement of receipt of the Notice of Breach of March 25, 2007?
- why did the Republic not react, prior to September 2007, to CIOC's failure to respond to the Notice of Breach of March 25, 2007?").

acknowledgement of receipt of the 25 March 2007 Notice, it being pointed out that the Respondent admitted in November 2007 that there was no precise information as to on whom the Notice was served and that it thus had to be resent (Claimants' First Post-Hearing Brief, para. 248; Claimants' Reply Post-Hearing Brief, paras. 146-152).

705. Replying to the Tribunal's **Question No. 6** in the Post-Hearing Order,[64] the Claimants argue that the fact that there was no reference throughout the Contract extension process to the 25 March 2007 Notice confirms that this Notice did not exist until shortly before the 24 September 2007 letter from the MEMR. If one were to assume *arguendo* that the 25 March 2007 Notice was sent, it was waived by subsequent approvals of the Contract extension. There is no justification as to why the Respondent did not raise the issue of CIOC's lack of responsiveness to the alleged 25 March 2007 Notice for five months, only to suddenly send two letters within five business days, putting CIOC on notice of its alleged breaches, but without there having been any due diligence to ensure that CIOC had actually committed contractual breaches. The Respondent also has provided no explanation in the Notice of termination dated 1 October 2007 as to why the MEMR would have extended CIOC's Contract shortly before in July 2007, following an extensive approval process. According to the Claimants, the chronology of events that took place between the alleged 25 March 2007 Notice and the termination of the Contract on 1 February 2008 is riddled with contradictions and inconsistencies and procedural and substantive violations of Kazakh and international law. It also shows that CIOC was singled out from other subsoil users for reasons other than its alleged non-performance, but rather for reasons attributable to the broader and unrelated dispute between Mr. Aliyev and President Nazarbayev (Claimants' First Post-Hearing Brief, paras. 249-278; Claimants' Reply Post-Hearing Brief, paras. 153-154).

706. With respect to the Notices that were sent after 7 September 2007 and that led to the termination of the Contract (point (iii) in para. 703), the Claimants submit that none of these Notices referred to the several approvals by the Respondent during the course of the year 2007 of the extension of the Contract's exploration phase. The Claimants underline that they referred to the 2004 Subsoil Law, instead of the

[64] See *supra* para. 237 ("**Question 6**: The Contract was extended for two years by the signing of Amendment N° 3 of July 27, 2007, just four months after the Notice of Breach of March 25, 2007 and seven months before the Notice of Termination of February 1, 2008? What comments do the Parties submit on that chronology?").

applicable 1999 Subsoil Law (Claimants' First Post-Hearing Brief, para. 320; Claimants' Reply Post-Hearing Brief, paras. 155-158).

707. Furthermore, replying to **Question No. 3** in the Tribunal's Post-Hearing Order,[65] the Claimants argue that, as a result of the extension of the exploration phase until May 2009, CIOC and the MEMR agreed on the Revised Work Program, which was approved by TU Zapkaznedra on 23 April 2007 and thus replaced the previous framework. As a consequence, two AWPs existed for the year 2007, namely an Initial 2007 AWP and an AWP which aligns the work with the Extended MWP (for the period from 27 May 2007 through 27 May 2009). The 2008 AWP was approved by TU Zapkaznedra on 29 December 2007 (Exh. C-95). The Claimants note that, in the AWPs, CIOC and TU Zapkaznedra agreed on several deviations from the MWP to adjust to changing circumstances. Therefore, the AWPs can and do modify the obligations set forth in the MWP. This is in line with the purpose of the AWPs, as the Contractors would otherwise be stuck with a MWP that does not take into account the reality on the ground. There would also be no reason to provide in the Contract for the possibility to extend the exploration period. Moreover, the Claimants point out that the pilot production phase set forth in the MWP was extended upon recommendations by the MEMR and TU Zapkaznedra, and the AWPs were revised to adapt to this new reality. The Claimants insist that CIOC did not breach its obligations in relation to the AWPs, but some of the works provided for in the AWPs were rolled over to the next year and then agreed to be included in the extension of the exploration phase. In any event, the Respondent cannot rely on any breaches, assuming *arguendo* that there were any (which the Claimants deny) because it agreed to the extension of the exploration phase and amended the Contract (Claimants' First Post-Hearing Brief, paras. 323-329; Claimants' Reply Post-Hearing Brief, paras. 142-176).

708. The Claimants also insist that TU Zapkaznedra "is not as toothless as Respondent portrays it to be", pointing out that TU Zapkaznedra is a constituent part of the MEMR, who in practice conducted the negotiations with CIOC and discussed and agreed upon the AWPs for the next calendar year. TU Zapkaznedra had the power to modify the obligations set out in the AWP, and the LKU reports were based not on the MWP but on the AWPs. This means that the MEMR's monitoring of CIOC's

[65] See *supra* para. 237 ("**Question 3**: The Parties are invited to specify whether and how an Annual Work Program (AWP) may modify the obligations set forth in the Minimum Work Program (MWP), and, if so, what specific obligations as extended by the successive AWPs would be breached.").

activities was based on targets decided in conjunction with TU Zapkaznedra (Claimants' Reply Post-Hearing Brief, paras. 160-162).

709. Replying to **Question No. 4** in the Tribunal's Post-Hearing Order,[66] the Claimants insist that they did not breach any of their obligations under the Extended MWP, namely between 27 May 2007 and the Notice of the Termination of the Contract. The Claimants fulfilled their obligations under the Revised 2007 AWP and the Extended MWP and had no other commitments. Moreover, they did not breach their obligations under the 2008 AWP as the Contract was terminated as early as February 2008. In any event, any failures by CIOC (if any, which the Claimants deny) would have been due to disruptions caused by the Respondent (Claimants' First Post-Hearing Brief, para. 330; Claimants' Reply Post-Hearing Brief, paras. 163-176). With regard in particular to the 3D study, the Claimants argue that the Respondent has come up in its Post-Hearing Brief with a new argument, namely that there was a breach of alleged non-extended obligations. The Claimants further submit that the MEMR did not have a right to terminate the Contract under the initial MWP, as any possible non-performance claims vanished by law with the signature by the MEMR of Amendment No. 3 to the Contract. At no point after the approval of the 3D study in November 2007 did the MEMR or any other Kazakh organ note CIOC's outstanding obligations with respect to the 3D study. This was also not listed as a ground for termination of the Contract (Claimants' Reply Post-Hearing Brief, paras. 171-173).

710. With respect to the Order of Termination of 30 January 2008 and Notice of Termination of 1 February 2008 (point (iv) in para. 703), the Claimants argue that they are flawed for various reasons. The ground for termination the Respondent's notices refer to – i.e. non-compliance with notices – violates both the Contract and Kazakh law. Therefore, the Claimants contest the Respondent's assertion that the MEMR terminated the Contract for material breach. The Respondent never mentioned the existence of a material breach in any of their notices, even though they did so in orders for the termination of numerous other subsoil-use contracts. It is thus irrelevant on what grounds the MEMR *could have* (but did not) terminated the Contract. Moreover, it is the Claimants' position that the Order and Notice of

[66] See *supra*, para. 237 ("**Question 4**: The Respondent may wish to specify which breaches of the extended MWP were committed, namely between 27 May 2007 and the Notice of the Termination of the Contract (assuming that the Respondent could not complain of violations of contractual obligations prior to the extension of the Contract). The fact that this question is addressed more specifically to the Respondent does of course not bar the Claimants from addressing it.").

Termination are inconsistent with the Respondent's waiver of any allegations of non-performance by CIOC. The MEMR extended the exploration phase of the Contract by two years and this means, by law, that it was satisfied with CIOC's performance. TU Zapkaznedra further reviewed CIOC's 2007 performance and approved the 2008 AWP, thereby reconfirming the Respondent's waiver. As an alternative argument, the Claimants submit that the Order and Notice of Termination did not take the reality on the ground into consideration and therefore elevated form over substance. They also submit that the termination of the Contract – on whatever ground – was not only discriminatory and unfair, but also abusive and disproportional (Claimants' First Post-Hearing Brief, paras. 331-340; Claimants' Reply Post-Hearing Brief, paras. 177-182).

711. With respect to various alleged **procedural violations of the FIL**, it is the Claimants' position that the Respondent did not act transparently or in compliance with its obligations to proceed with and afford the Claimants procedural safeguards. The procedure lacked the due process required under the FIL and Kazakh law, was not carried out in good faith, did not allow CIOC an opportunity to comment upon or address and remedy the alleged breaches, and was in any event disproportional. According to the Claimants, the procedural violations also continued after the taking of the Claimants' investment, given that the Claimants' protests and the specific performance safeguards pending the outcome of the dispute resolution were disregarded. The Respondent aggravated the dispute by ordering further seizures. In this respect, the Claimants rely again on the Sabsabi/Ruby Roz matter, the 7 September 2007 "Recommendation", as well as the Notices issued by the Respondent after 7 September 2007. In relation to the latter, the Claimants allege various procedural flaws, including (i) the fact that there is no proper proof of receipt of the Notice dated 25 March 2007; (ii) there is no evidence that the Respondent ever considered the detailed explanations contained in CIOC's letter of 13 December 2007; (iii) no due diligence was allegedly undertaken with respect to the existence of any contractual breaches by CIOC; (iv) the Notices do not identify any specific material breach of the Contract or afford the Claimants a reasonable opportunity and time to cure such breaches; and (v) the MEMR did not first suspend the Contract as required by Article 45-1 of the Subsoil Law, nor did the Order and Notice of Termination comply with the dispute resolution procedure under the Contract, namely Article 29.6 of the Contract (Claimants' First Post-Hearing Brief, paras. 341-364; Claimants' Reply Post-Hearing Brief, paras. 183-188).

712. In response to the Tribunal's **Question No. 7** in the Post-Hearing Order,[67] the Claimants address the Respondent's defense on misrepresentation. The Claimants submit that this argument was made *post facto* to justify the expropriation and had not been relied upon to terminate the Contract. Even if the Respondent's misrepresentation argument could be raised at this late stage (which the Claimants deny), it would still fail for several reasons. First, CIOC could not have misrepresented the status of the 3D seismic study to the Respondent, as the latter approved the two-year extension of the Contract's exploration period with full knowledge of CIOC's progress, which was closely monitored by the Respondent, and without raising any concerns. Second, the Respondent has failed to establish a *prima facie* case of misrepresentation, let alone met its burden of proof in this respect. Third, the Respondent waived its right to any misrepresentation claim (or to rely on any delays in the completion of the 3D seismic study) as it approved the 3D seismic study in November 2007 without any reservations. Fourth, the chronology of facts and documentary evidence for the period between November 2006 and December 2007 not only disproves the Respondent's misrepresentation defense, but rather shows that the Respondent was at all times aware of the status of CIOC's 3D seismic study, approved it and did not raise any alarms at the time of the events as to any alleged misrepresentation. Moreover, the Claimants argue that the Respondent has not provided any evidence to the effect that it conditioned the extension of the Contract upon the completion of the 3D study. It has not shown that the Contract would never have been extended had CIOC informed the MEMR that CIOC did not have "a usable 3D study" (Claimants' First Post-Hearing Brief, paras. 365-381; Claimants' Reply Post-Hearing Brief, paras. 190-194).

b. The alleged breach of the Respondent's obligation to compensate the Claimants

713. According to the Claimants, even admitting *arguendo* that the taking by the Respondent of the Claimants' investments was justified, the Respondent still violated its obligation to provide "prompt, adequate and effective compensation" pursuant to Article 7 of the FIL, Article III of the BIT, and under customary international law. The Respondent's international law obligation to compensate the Claimants for the damage suffered as a result of the taking of their investment is

[67] See *supra* para. 237 ("**Question 7**: Did the Claimants, in the period preceding the signing of Amendment N° 3 of July 27, 2007, misrepresent to Respondent that a good quality 3D seismic study had been completed? (Assuming, which is in dispute, that the 3D seismic study was defective)").

also confirmed by ICSID jurisprudence (Memorial, para. 364; Claimants' First Post-Hearing Brief, para. 382).

c. The alleged breaches by the Respondent of the fair and equitable treatment standard

714. With reference to arbitral jurisprudence, the Claimants identify six principles encompassed by the fair and equitable treatment standard, namely (i) the state must act consistently vis-à-vis the investor and cannot modify the legal framework when specific commitments have been made; (ii) the state's conduct cannot breach the investor's legitimate expectations; (iii) the state must act in a transparent manner; (iv) the state must act in good faith; (v) the state's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; and (vi) the state must ensure that there is a reasonable relationship of proportionality between the charge or weight imposed on the foreign investor and the aim sought to be realized by any expropriatory measure (Memorial, para. 366. See also the Claimants' First Post-Hearing Brief, para. 339).

715. According to the Claimants, a number of the Respondent's acts and omissions taken individually, let alone collectively, violate those principles. First, the Claimants point to **the Prosecutor General's Order dated 7 September 2007** for the "Recommendation on elimination for disregard of the rule of law" (Exh. C-35). Rather than a "recommendation", this was a request "from the highest level of hierarchy" to terminate the Contract, failing a curing of a certain number of alleged breaches. It constitutes an unlawful interference by the Respondent into an investment by a private company, a procedural and substantive violation of international law (and/or the Contract and/or Kazakh law), and a breach of the fair and equitable treatment standard, including the duty of good faith, transparency, protection against arbitrary or discriminatory measures, consistency, proportionality, due process, and the legitimate expectations of the investor. For the Claimants, there is nothing on the record to support Mr. Kravchenko's explanations given at the evidentiary hearing. Furthermore, the testimonies at the hearing of Messrs. Batalov and Akchulakov confirm the Claimants' position as to the unlawfulness of the "Recommendation" of 7 September 2007 (Memorial, paras. 367-372 and para. 375; Claimants' First Post-Hearing Brief, paras. 224 et seq. and paras. 309 et seq.).

716. The Claimants stress that the Prosecutor General's Recommendation was inconsistent with the MEMR's decision dated 27 July 2007 to extend the exploration

period of the Contract by two years until 27 May 2009, and this inconsistency constitutes in and of itself a breach of the fair and equal treatment standard (Memorial, para. 373).

717. Moreover, the Claimants argue that the Recommendation did not take into account the fact that Article 70 of the 2004 Subsoil Law was inapplicable to CIOC, in view of the stabilization clauses contained in the Contract and the 1999 Subsoil Law (Memorial, para. 374; Claimants' First Post-Hearing Brief, para. 316).

718. For the Claimants, the causality between the Recommendation and the damage incurred by the Claimants is obvious from the chronology of correspondence and their content (see Memorial, para. 376).

719. As a second argument in support of their position regarding the Respondent's alleged breach of the fair and equitable treatment standard, the Claimants rely on **the unlawful termination of the Contract and the taking of the Claimants' investment**. In particular, the Claimants allege that the Notice of Termination dated 1 February 2008, and the pre- and post-termination correspondence related thereto, constituted in and of themselves both procedural and substantive violations of international law and/or the Contract and/or Kazakh law (Memorial, paras. 377-378; Claimants' First Post-Hearing Brief, paras. 304 et seq. See also paras. 702 et seq. above).

720. In particular, **the taking of the Claimants' investment was substantively unlawful**, considering that the Respondent had waived any allegations of non-performance of the Contract until the end of the exploration period, as extended until 27 May 2009, or at the very least until 29 December 2007, in view of the fact that the MEMR had approved CIOC's performance for 2007 and the AWP for 2008. The termination of the Contract therefore constitutes a violation of the fair and equitable treatment standard, including the principle of good faith and consistency.[68]

721. Furthermore, the Claimants reiterate that Article 70 of the 2004 Subsoil Law, on which the Termination Notice of 1 February 2008 is based, was not applicable to CIOC, and the limited grounds for contract termination listed in Article 70 of the applicable 1999 Subsoil Law were never alleged by the Respondent (Memorial, para. 381). In any event, the Respondent cannot rely on its domestic law to

[68] The Tribunal has taken note of the Claimants' further argument that the Respondent violated its consistency obligations towards the Claimants also and especially through the Notice dated 25 March 2007 (Memorial, para. 385).

invalidate its international obligations and its specific commitments towards the Claimants as investors, namely its commitments under the Contract, which lists specific conditions for termination, i.e. the existence of a "material breach" by the Claimants. However, the Respondent has not established the existence of a material breach (Memorial, para. 382).

722. According to the Claimants, the termination of the Contract is further flawed as the Respondent did not indicate a factual basis for the termination and it was not preceded by a 90-day written notice of termination pursuant to Clause 26.9 of the Contract. CIOC's responses to the Respondent's notices were left unanswered (Memorial, paras. 383-384).

723. Finally, for the Claimants, the arbitrary, discriminatory and unreasonable nature of the termination of the Contract is further evidenced by the MEMR's conduct, in that the MEMR allowed CIOC to resume its operations by notice of 27 November 2007 (alleging however further breaches of Contract), after having sent a notice of termination of CIOC's operations on 1 October 2007, only to send yet another notice of termination, this time of the Contract as opposed to solely the operations (Memorial, para. 386).

724. As mentioned above in paragraph 719, the Claimants also allege that **the termination was procedurally unlawful**, which in itself constitutes a violation by the Respondent of the fair and equitable treatment standard. In particular, the process leading to the termination decision was not transparent and the Claimants' comments on the allegations of breach were not taken into consideration. The Claimants were not heard, despite their numerous letters, which remained unanswered, and the Contract was terminated without any explanations, in violation of several procedural principles, such as good faith and due process. Even assuming that the Respondent had the right to terminate the Contract on the basis of any breach, including non-material breaches, the Respondent violated its obligation to suspend the Contract prior to termination under Article 45-2 of the 1999 Subsoil Law (Memorial, paras. 390-392).

725. According to the Claimants, in any event, not only did the Respondent fail to give the Claimants reasonable time to cure the alleged breaches, as required by international law and the Contract, by various acts and omissions (which by themselves constitute breaches of the fair and equitable treatment standard) it also prevented the Claimants from doing so. This is aggravated by the fact that the Respondent

breached Clause 29 of the Contract by preventing the Claimants through various acts and omissions (which – again - by themselves constitute breaches of the fair and equitable treatment standard) from continuing to perform the Contract pending a final award on the merits (Memorial, paras. 393-396).

d. The alleged breaches by the Respondent of the standard of protection against arbitrariness, unreasonableness and discrimination

726. The Claimants submit that the fair and equitable treatment standard englobes the right to protection against arbitrary and unreasonable measures. The Respondent's acts and omissions, which are violations of the fair and equitable treatment standard, also constitute a violation of the Claimants' right to protection against arbitrariness, unreasonableness and discrimination, with the same causation (Memorial, para. 397).

e. The alleged breaches by the Respondent of the standard of full protection and security

727. The Claimants submit that the fair and equitable treatment standard englobes the right to full protection and security. The Respondent's acts and omissions, which are violations of the fair and equitable treatment standard, also constitute a violation of the Claimants' right to full protection and security, with the same causation (Memorial, para. 398).

f. The alleged breaches by the Respondent of specific commitments

728. According to the Claimants, the Respondent breached its specific commitments towards the Claimants. In particular, (i) by relying for purposes of the termination of the Contract on the 2004 Subsoil Law, the Respondent breached the stabilization clauses contained in Clause 28.2 of the Contract, Article 6 of the FIL, Article 71 of the 1999 Subsoil Law, and Article 383(2) of the Kazakh Civil Code; (ii) by terminating the Contract, the Respondent breached its commitment to extend the Contract's exploration period under Amendment No. 3 to the Contract; and (iii) the termination of the Contract (including the process of terminating the Contract and the Respondent's conduct thereafter) was in breach of the procedural safeguards specifically agreed upon by the Parties (Memorial, paras. 399-404).

2. The Respondent's position

729. For the Respondent, the Claimants' main claim in this Arbitration is that the Respondent wrongfully terminated the Contract on 30 January 2008. However, it is the Respondent's position that the Claimants' claim for breach of contract, and by extension all of their other claims that depend on a finding of breach of contract, should be rejected for at least two independent reasons, namely because (i) the Claimants obtained the Contract's extension through misrepresentation and (ii) the Respondent rightfully terminated the Contract as a matter of substance and procedure.

a. The Claimants obtained the Contract extension through misrepresentation

730. The Respondent submits that all of the Claimants' claims are based on the extension of the Contract, without which the Contract would have ended on 26 May 2007 and would not have been terminated in 2008. In particular, the Respondent alleges that, under Kazakh law, the Claimants cannot rely on this extension because it was obtained by CIOC through its misrepresentation to the MEMR, during the entire extension process in 2007, that it had successfully completed an adequate 3D seismic study and that, based on this study, it was in a position to identify the location and begin its key exploration obligation of drilling four deep wells shortly after the extension.

731. It is the Respondent's position that the 3D seismic study and drilling of the four deep wells were among CIOC's most essential exploration obligations, that CIOC knew from the beginning that the 3D seismic study was not completed and did not allow CIOC to identify the locations of the deep wells and begin the drilling. CIOC would not have obtained the extension of the Contract but for its alleged misrepresentations in bad faith of these key facts. In fact, CIOC was only entitled to an extension of the exploration period under the Contract and the Subsoil Law, provided that it carried out its obligations under the Contract and the Work Programs. In case of failure to comply with these obligations, the extension of the Contract could be refused (Counter Memorial, paras. 409-437; Respondent's First Post-Hearing Brief, para. 148).

732. In response to the Tribunal's **Question No. 7** in the Post-Hearing Order,[69] the Respondent argues that the chronology of the extension process shows the extent of CIOC's misrepresentation. According to the Respondent, "in light of this chronology and the clear evidence that emerged during the Hearing, there can be no question that CIOC obtained the extension of the Contract based on its misrepresentation that it had a usable 3D study and was able to drill the deep wells, while it knew that this was false. Given the importance of the 3D study and CIOC's exploration obligations under the Contract, the MEMR would never have granted the extension if CIOC had told the MEMR that it did not have a usable 3D study at the time and thus could not begin to drill the deep wells. In these circumstances, the Contract would not have been extended and would have terminated on May 26, 2007". The chronology of CIOC's misrepresentation also shows that the Respondent's allegations related to this misrepresentation are not a *post facto* defense as argued by the Claimants. The Respondent received a copy of the 3D report only at the time of its rejoinder in the *Caratube I* arbitration, namely from Saratov who had prepared the 3D study. It raised the misrepresentation issue immediately once it became apparent after careful study of the 3D report, and it has continued to address this issue ever since (Respondent's First Post-Hearing Brief, paras. 149-153; Respondent's Reply Post-Hearing Brief, paras. 67-70).

733. In response to the Claimants' arguments, the Respondent submits that (i) it does not and cannot monitor the progress and quality of a 3D study during its preparation, but relied on the Claimants' representations; (ii) the main works referred to by CIOC in its letter of 20 January 2007 clearly presupposed the existence of a usable 3D study. Likewise, the Extended MWP presupposes the existence of a usable 3D study in that it no longer contains any reference to such study; (iii) in the final version of their Extended MWP, CIOC expressly stated that all three stages of the 3D study had been completed, that new data relating to all three zones had been obtained, and that, on this basis, drilling locations had been identified throughout the entire Contract Area; (iv) the 2007 Revised AWP does not foresee any 3D works in the 3rd and 4th quarter of 2007, i.e. after the finalization of the extension of the Contract, leading the Respondent to believe that the 3D works had been completed in the 2nd quarter of 2007 (Respondent's Reply Post-Hearing Brief, para. 68).

[69] See *supra* para. 237 ("**Question 7**: Did the Claimants, in the period preceding the signing of Amendment N° 3 of July 27, 2007, misrepresent to Respondent that a good quality 3D seismic study had been completed? (Assuming, which is in dispute, that the 3D seismic study was defective)").

734. Moreover, the Respondent rejects the Claimants' argument according to which the criticism of CIOC's R&D Board and Mr. Vasiliev was merely "formal". CIOC's R&D Board acknowledged that the 3D study was "conducted at a low procedural/technical level" leaving "major geologic tasks practically unresolved". Moreover, Mr. Vasiliev's report stated that the 3D study did not provide a prediction of the geological structure of the Caratube deposit and of the entire licensed area (Respondent's Reply Post-Hearing Brief, para. 68). The Respondent also affirms that the 3D report was never approved by TU Zapkaznedra or the MEMR (Respondent's Reply Post-Hearing Brief, para. 68).

735. Finally, the Respondent submits that the Claimants acknowledged that CIOC had received the results of the express-processing of the 3D seismic data at least in early 2007. This confirms that when CIOC applied for the extension, it knew that the 3D study was a failure. The Respondent argues that CIOC misrepresented the status of the 3D study and actively deceived the MEMR (Respondent's Reply Post-Hearing Brief, para. 69).

b. The Respondent rightfully terminated the Contract

736. The Respondent submits that it rightfully terminated the Contract as a matter of substance and procedure, because CIOC systematically committed material breaches throughout the life of the Contract and was in a persistent state of material breach of its obligations under the Contract, the MWP and the AWPs. For the reasons set forth in further detail below, the Respondent submits that CIOC's non-performance affected virtually all areas of its activity, including financial commitment, 3D seismic study, deep drilling, shallow drilling, trial production and completion and adequacy of the installations. Furthermore, the Respondent asserts that it notified CIOC of its breaches, gave it reasonable time to cure them and correctly followed the applicable termination procedure (Counter Memorial, paras. 438 et seq. See also Counter Memorial, paras. 644 et seq.; Respondent's First Post-Hearing Brief, paras. 154 et seq. and para. 185).[70]

[70] By way of background, the Respondent alleges that CIOC was only able to acquire the Contract via CCC's fronting in the Caratube public tender process. In particular, Mr. Issam Hourani, who had a close relationship with CCC, managed to have CCC front for him and CIOC to be granted the Caratube concession. However, it is the Respondent's position that CIOC's performance was dismal and could not have improved in the future due to incompetence, inexperience, lack of financial means, lack of willingness to undertake the risky, costly and challenging exploration of the Contract Area, namely the deeper zones, and its focus on producing easy oil from the already discovered, known and drilled supra-salt reservoirs (Respondent's First Post-Hearing Brief, paras. 170-175).

737. Concerning in particular the Respondent's allegations as to the various material breaches committed by CIOC, the Respondent argues, first, that **CIOC was in material breach of its exploration obligations**.[71] In particular, the Respondent submits that the Contract Area had already been drilled and studied "for well over 40 years" at the time of the execution of the Contract in 2002. The supra-salt oil deposits in the Caratube field were already well known and discovered. By contrast, the overhang and sub-salt formations in the Contract Area required further exploration, *inter alia*, via a 3D seismic study and the drilling of exploratory wells, in order to discover new oil deposits. Hence, it is the Respondent's position that "a key aspect of CIOC's Contract concerns the exploration and drilling of the sub-salt structure, which is much more complex, risky and costly than drilling in the supra-salt structure" (Counter Memorial, paras. 442-447; Respondent's First Post-Hearing Brief, para. 156).

738. One of CIOC's principal obligations thus was to explore the Contract Area. However, it failed to comply with this obligation with respect to both the deep sections (sub-salt and overhang) and the shallow supra-salt section of the Contract Area. In particular, with respect to the deep sections, CIOC failed to comply with its obligations under the Contract to (i) carry out a 3D seismic study in Contract Year 2; and (ii) drill two deep wells in Contract Years 3 and 4. Likewise, CIOC also did not explore the supra-salt formations of the Contract Area, but rather limited itself to the known and easily accessible deposits located in the so-called "Caratube Field (oversalt)", in order to pursue production. This failure to explore was criticized by TU Zapkaznedra in its end of year reviews of 2004, 2005 and 2006 (Exhs. C-92, C-111 and C-120). CIOC failed entirely to explore the supra-salt section, says the Respondent.

739. Furthermore, at the time of the termination of the Contract, CIOC was still in the exploration period and had neither made nor declared a Commercial Discovery as defined by Section 10.1 of the Contract, or fulfilled any of its other requirements necessary for proceeding to the commercial production phase under the Contract. The Respondent concludes that, at the time of the termination, CIOC had no vested rights to commercial production (Counter Memorial, paras. 448-450 and paras. 478 et seq.). The Respondent thus reiterates that CIOC was in material breach of its fundamental exploration obligations when the Contract was terminated (Counter Memorial, paras. 479-498. See also Counter Memorial, paras. 656-657).

[71] For details regarding the Respondent's definition of the term "material breach", see *infra* paras. 751 et seq.

740. Second, for the Respondent, CIOC's failure to carry out its exploration obligations and to focus on short term production from known deposits may also explain its **material breach in financial terms**. The Respondent argues that, except for the year 2003, CIOC failed to comply with its financial obligations and this even after they were significantly reduced in 2007 (Counter Memorial, paras. 499-509).

741. Third, concerning CIOC's alleged **material breach in matters of 3D study**, the Respondent stresses the essential nature of CIOC's obligation to conduct a 3D seismic study and to properly execute all steps involved therein. However, the Respondent alleges that "CIOC failed in this crucial task in every respect": (i) CIOC's 3D study was a complete failure (a fact of which CIOC was well aware of and acknowledged at the time) and would have had to be redone entirely, which would have taken CIOC a minimum of one year. It failed to meet its essential purpose and did not properly identify the locations for the drilling of deep wells. The Respondent points out that all four main stages of the 3D study were flawed, namely the study's design and the acquisition, processing and interpretation of data (Counter Memorial, paras. 510-560); (ii) CIOC failed to identify the drilling locations for the deep wells or proceed with this drilling (or even start to drill them). The two deep well locations, GD-1 and GD-2, mentioned by CIOC for the first time in July 2007, cannot be taken seriously, *inter alia*, as no prospect or type of prospect was identified in relation with these locations; they have not been shown on a prospect map but rather seem to have been selected randomly by CIOC. CIOC's announcement, on 6 December 2007, in the "Kazakhstanskaya Pravda" newspaper of an open tender for the construction of a 5.200m well also should be taken with extreme caution, in particular in light of the fact that it was made in the midst of the termination procedure and CIOC's failure to drill the wells in over 5 years (Counter Memorial, paras. 561-572); and (iii) CIOC took longer than the initial five years to realize the flawed and unusable 3D study and the Claimants have provided no valid excuse for this delay. Rather, the evidence on record shows that CIOC should have been able to prepare a detailed call for tender at least in November 2003 (instead of February 2006), by indicating the necessary parameters of the 3D seismic survey without any additional preparatory works. The Claimants and their experts themselves admit that a large part of the delays was unjustifiable. It is the Respondent's position that CIOC's inexcusable and long delay in carrying out the 3D seismic study considerably put off the drilling of the two deep wells and constituted a material breach. This is aggravated by the fact that after years of delay, CIOC produced an

unusable 3D study that must be entirely redone (Counter Memorial, paras. 573-601).

742. Fourth, with respect to CIOC's alleged **material breach in matters of trial production**, the Respondent submits that CIOC was able to produce only 35% of the expected volume of the trial oil production provided in the MWP and 36% of the expected volume of the AWPs. Pursuant to Clause 8.1 of the Contract, the Work Programs, including the forecasted trial production volumes provided for therein, are binding on the Contractor, who therefore has an obligation to meet them.[72] The Claimants offer no valid excuses for CIOC's shortfalls in matters of trial production. For instance, any alleged problems relating to the productivity of the wells cannot validly excuse this shortfall as they could and should have been mastered easily and quickly by competent reservoir engineers. Furthermore, the Respondent rejects the Claimants' argument that CIOC's trial production program was "a success", pointing out that the Claimants have admitted CIOC's failure to achieve the trial production targets. Moreover, the MEMR, TU Zapkaznedra and Kazakhstan's environmental protection authorities "repeatedly notified CIOC of its breaches in this domain and CIOC was granted ample time to cure these breaches" (Counter Memorial, paras. 602-622; Respondent's Reply Post-Hearing Brief, paras. 75-77).

743. Fifth, the Respondent argues that **CIOC failed to complete the installation of the field infrastructure facilities and deploy proper equipment**. In particular, due to CIOC's lack of resources, management, competence and prudence, it only invested 31% of what it should have invested in the field infrastructure and left out the essence of the facilities, namely instrumentation which enables the facilities to operate (Counter Memorial, paras. 623-629).

744. Sixth, **CIOC underperformed in matters of drilling**. The Respondent submits that "CIOC's drilling operations were extremely deficient in terms of the number of the wells drilled, drilling time and quality". In particular, CIOC did not drill as many new (and more expensive) wells as required by the MWP, but rather reopened more cheap old wells than was agreed. CIOC took 340% more time to drill shallow wells than it should have according to the data of the Claimants' expert, Mr. Tiefenthal, a factor which must be adjusted to 385% according to the Respondent's expert, Mr. Chug. The Respondent points out that CIOC's long drilling times may cause serious formation damage to the wells, which is a further indicator of CIOC's poor drilling

[72] For details on the Respondent's position that the MWP and AWPs were binding, enforceable and perfectly achievable, see also Counter Memorial, paras. 722-733.

performance, incompetence and lack of determination to explore the Contract Area (Counter Memorial, paras. 630-636).

745. Finally, the Respondent alleges that **CIOC also lacked the necessary competence to manage the Caratube project, as well as financial capabilities**. CIOC was thus bound to fail and would never have become profitable (Counter Memorial, paras. 637-643).

746. The Respondent rejects all of CIOC's excuses for nonperformance and other defenses, describing them as meritless. In particular, the MWP and AWPs were binding, enforceable and perfectly achievable.[73] For the Respondent, the problem is that CIOC lacked competence, financial resources and determination to successfully perform the Contract (Counter Memorial, paras. 722-733). Furthermore, CIOC's alleged cost savings are not an excuse, but rather a translation in financial terms of CIOC's material breaches. They are not the result of good management practice. To the contrary, CIOC's failure to spend the required amounts contributed to the failure of the project (Counter Memorial, paras. 734-738).

747. According to the Respondent, the late access to the field in early 2003 was due to CCC and CIOC's own failures. For instance, during the assignment process, CCC was not exonerated but under an obligation to perform the Contract and could and should have taken steps in order to have access to the oilfield before the assignment, but did not do so. CIOC was well aware of CCC's failure to perform the Contract and accepted responsibility for carrying out the work set out in the MWP and for taking over any lag in performance inherited from CCC. The Respondent observes, *inter alia*, that it was CIOC itself who prepared the 2002 and 2003 AWPs. In any event, the delay in access to the field had only minimal impact (Counter Memorial, paras. 739-751).

748. The Respondent insists that the MEMR did not approve CIOC's past performance or non-performance. It underlines that "the rolling over of obligations by TU Zapkaznedra does not constitute an approval of contractor's performance or non-performance and is done for planning purposes. TU Zapkaznedra has no competence to approve the contractor's performance and has no power to sanction

[73] For further details on the MWP and AWPs and their interplay, see the Respondent's response to the Tribunal's **Question No. 3** in the Post-Hearing Brief (Respondent's First Post-Hearing Brief, paras. 158 et seq. and *infra* para. 764). See also *supra* para. 237 ("**Question 3**: The Parties are invited to specify whether and how an Annual Work Program (AWP) may modify the obligations set forth in the Minimum Work Program (MWP), and, if so, what specific obligations as extended by the successive AWPs would be breached.").

the contractor", this power being reserved to the MEMR. In case of non-performance, the TU Zapkaznedra has no option but to roll over the non-accomplished obligations into the next year. The continuous notices issued to CIOC evidence that the Respondent did not approve, but was dissatisfied with CIOC's performance of the Contract (Counter Memorial, paras. 752-758).

749. According to the Respondent, the 2-year extension of the exploration period did not affect the MEMR's right to terminate the Contract for breach of the MWP. The MEMR did not agree to expressly waive the right to claim non-performance of CIOC's obligations for which the Respondent did not give additional time to perform under the extended MWP, such as the 3D study. The Respondent also cannot be held to have considered CIOC as compliant with such obligations. In any event, the Respondent could not have made a valid waiver in light of the fact that CIOC had obtained the two-year extension of the exploration period based on the misrepresentation that it had completed a good quality 3D seismic study while this was not the case. For the Respondent, CIOC failed to meet the extended deadline for trial production and, thus, also breached its extended obligations (Counter Memorial, paras. 759-774).

750. Against the foregoing, it is the Respondent's position that it rightfully terminated the Contract for material breach and followed the proper procedure: it (namely the MEMR) had the mandatory and non-waivable right to unilaterally terminate the Contract under Article 45-2 of the 2004 Subsoil Law (and Article 46 of the 1999 Subsoil Law) or under the Contract itself. The MEMR terminated the Contract in a manner consistent with the Contract (Counter Memorial, paras. 776-787).

751. In particular, the Respondent submits that **it rightfully terminated the Contract under Article 45-2 of the 2004 Subsoil Law as a matter of both substance and procedure**. Indeed, as just seen, CIOC was in constant material breach of its obligations under the Contract and it failed to cure such breaches notwithstanding the ample time granted to it to do so. The Respondent points out that neither Article 45-2 of the 2004 Subsoil Law nor Article 29.5 of the Contract provide a definition of material breach, and one must therefore apply the definition provided for in Article 401(2) of the Kazakh Civil Code. Under Article 401(2) of the Civil Code, "a breach is deemed to be a material breach when it causes the non-breaching party to lose something to a substantial degree that it had the right to expect to gain when it entered into the contract". The Respondent explains that "[e]ven if a breach caused a minor damage, such breach may be material, if the amount of such damage is

considerable in correlation with what was expected by the other party when concluding the contract. […] When determining whether a material breach was committed by a contractor, it is necessary to consider what the State expected to gain and what interests it pursued when it concluded a specific contract" (Counter Memorial, paras. 790-803).

752. Applying this definition of material breach, it is the Respondent's position that CIOC's breaches of the Contract, the MWP and AWPs constitute material breaches under both Kazakh law and the Contract, and the Respondent was thus entitled to terminate the Contract (Counter Memorial, paras. 797-803). Furthermore, CIOC was in material breach not only of its pre-extension work programs, namely the initial MWP and all related AWPs (including the initial 2007 AWP). It was also in material breach of the Work Programs under the extension period, namely the extended 2007 AWP, failed to complete the trial production program by the extended deadline of 31 December 2007, and during the course of the extension procedure it misrepresented to the MEMR that it had a 3D seismic study allowing it to commence the drilling of the deep wells. CIOC was granted ample time, but failed to cure such material breaches. Since the Respondent did not waive its right to claim the nonperformance of CIOC's obligations, it rightfully terminated the Contract under Article 45-2 of the 2004 Subsoil Law (Counter Memorial, paras. 804-812).

753. With respect to the Respondent's argument that it rightfully terminated the Contract under Article 45-2 of the 2004 Subsoil Law as a matter of procedure, the Respondent specifies that it was entitled to unilaterally and directly terminate the Contract without going to court. The Respondent granted CIOC an opportunity to cure its breaches through multiple notices sent as early as December 2003, even though it was under no obligation under the 2004 Subsoil Law to do so. In particular, CIOC had 10 months (and several years for some of the breaches) to cure its breaches before the termination (Counter Memorial, paras. 813-827).

754. Furthermore, it is the Respondent's position that **the termination of the Contract was also consistent with the provisions of the Contract as a matter of substance**, namely Clause 29.5 of the Contract, which – like the Subsoil Law – provides for the early termination of the Contract for material breaches of the Contract or Work Programs. This means that when the Respondent terminated the Contract under the 2004 Subsoil Law for material breach, this termination also was consistent with the grounds for termination under the Contract (Counter Memorial, paras. 828-832).

755. The Respondent submits that **the termination was consistent with the provisions of the Contract as a matter of procedure**, namely the special procedural regime in Clause 29.6 of the Contract, which concerns only terminations for material breach. The Respondent explains that under Clause 29.6 of the Contract, the breaching party may start an arbitration pursuant to Clause 27 of the Contract within 90 days of the notice of termination of the Contract. If the breaching party does not do so (it being specified that the sending of a simple letter expressing disagreement with respect to the existence of a material breach is not enough to meet this requirement), the Contract would be rightfully terminated based on the unilateral decision of the complaining party, provided that (i) there is in fact a material breach; (ii) the complaining party has given the breaching party a reasonable time to cure such breach; (iii) the breaching party did not cure the breach within this reasonable time; and (iv) the complaining party subsequently gave a 90-day written notice to the breaching party. It is the Respondent's position that all these requirements are met and that it thus rightfully terminated the Contract (by Notice of Termination of 1 February 2008) in a manner consistent with Clause 29.6 of the Contract without going to court or arbitration under Clause 27 of the Contract. CIOC did not start an arbitration against the Respondent under Clause 27 of the Contract until June 2013, i.e. more than five years after the termination (Counter Memorial, paras. 833-852; Respondent's Reply Post-Hearing Brief, paras. 88-91).

756. Again, for the Respondent, **all of the Claimants' defenses raised with respect to the termination are invalid**. In particular, the application of the 2004 Subsoil Law did not deteriorate the position of the Claimants as compared to the 1999 Subsoil Law, as the Respondent was entitled to unilaterally terminate the Contract for material breach of the Contract or the Work Programs, or solely for breach of trial production targets, without going to court, under both the 1999 and the 2004 Subsoil Law (Counter Memorial, paras. 854-865). The Respondent further argues that it was under no obligation (but rather had the right) to suspend the Contract prior to the termination for material breach under either the (1999 or 2004) Subsoil Law or the Contract (namely Clause 29.2 of the Contract) (Counter Memorial, paras. 866-871). It gave CIOC reasonable time to cure the breaches, yet the latter failed to do so (Counter Memorial, paras. 872-873).

757. The Respondent submits that it did not breach its obligation to continue the performance of the Contract pending a final arbitral award on the merits under

Clauses 27 or 29 of the Contract, as the Parties were under an obligation to continue performing the Contract only if the dispute was submitted to arbitration within 90 days pursuant to Clause 27.3 of the Contract or Clause 29 for purposes of Clause 27.10 (which it was not) (Counter Memorial, paras. 874-881).

758. According to the Respondent, all of its notices and other documents clearly referred to CIOC's breaches of the Contract and Work Programs that constituted the basis for the termination and that needed to be cured. CIOC was well-aware of these breaches and specifically and extensively addressed them in its answers to the notices (Counter Memorial, paras. 882-894).

759. The Respondent insists that the 25 March 2007 Notice was received by CIOC on 28 March 2007, and this Notice expressly warned CIOC that the Competent Authority may unilaterally terminate the Contract should CIOC fail to cure the indicated breaches. The Respondent rejects the Claimants' defenses regarding this Notice, *inter alia,* the argument that it could be a forged document that was created later in 2007 and pre-dated by the MEMR (Counter Memorial, paras. 895-903).

760. According to the Respondent, there was no lack of transparency or breach of due process. CIOC provided (mainly unsatisfactory) answers to the Respondent's notices of breach and these answers were considered by the Respondent when making decisions. CIOC was treated in the same way as all other 900 subsoil contractors that were monitored by the MEMR and in accordance with the Contract and Subsoil laws (Counter Memorial, paras. 904-905).

761. The Respondent argues that there was no link between the termination of the Contract by the MEMR and the 7 September 2007 Recommendation of the Aktobe Prosecutor's Office. The Recommendation did not instruct, but rather recommended, in light of CIOC's material breaches, that the MEMR either ensured that CIOC complied with its contractual obligations in the future or decided to terminate the Contract. The Respondent points out that the termination process had started with the 25 March 2007 Notice already 6 months prior to the 7 September 2007 Recommendation (Counter Memorial, paras. 906-908).

762. Finally, the Respondent submits that there was no approval of CIOC's past performance by TU Zapkaznedra through the approval of the 2008 AWP (Counter Memorial, paras. 909-910; Respondent's Reply Post-Hearing Brief, paras. 88-91).

763. It is the Respondent's position that, in any event, **any flaw in the termination procedure would not affect the termination or give rise to damages**. In particular, even if this Tribunal were to find that the Respondent did not correctly follow the applicable termination procedure (which the Respondent claims it did), then any such procedural flaw did not cause any harm to CIOC (and CIOC has not shown otherwise) and thus cannot give rise to damages (Counter Memorial, paras. 912-917).

764. In response to the Tribunal's **Question No. 3** in the Post-Hearing Order,[74] the Respondent notes that both a MWP and an AWP are integral parts of a subsoil use contract and contractually binding. More specifically, the AWP is an additional source of obligations for the contractor in the sense that the contractor must comply with the provisions of both the MWP and the AWP pursuant to Clause 8.1 of the Contract. The contractor is contractually bound to perform the obligations set out in the AWP, including the past year's obligations that were rolled over into the new AWP. CIOC was therefore obliged under the Contract to comply with both the MWP (in Addendum 6 to the Contract) and the AWPs and to do so in conformity with good oil field practices (Counter Memorial, para. 801).

765. The Respondent underlines that the MWP can only be amended by a formal agreement with the MEMR. It is only the MEMR who has the power to decide whether the situation of a particular contractor necessitates a notice of breach or a termination of a contract. By contrast, TU Zapkaznedra has no power to amend the contract, and an approval by TU Zapkaznedra of a new AWP therefore cannot modify CIOC's obligations set forth in the MWP. It can only reflect the realities on the ground, the difference between the calendar years and the contract years and the obligations that had not been fulfilled during the prior year. The Respondent explains that, at year-end, TU Zapkaznedra has to roll over unaccomplished work into the next year. However, this cannot constitute an approval or a waiver with regard to CIOC's past performance, because TU Zapkaznedra does not have the authority to grant such approval or waiver. The rolling over of unaccomplished work does not preclude the MEMR from terminating a contract (even though the MEMR has a policy of tolerance during the early years of a contract).

[74] See *supra* para. 237 ("**Question 3**: The Parties are invited to specify whether and how an Annual Work Program (AWP) may modify the obligations set forth in the Minimum Work Program (MWP), and, if so, what specific obligations as extended by the successive AWPs would be breached.").

766. The Respondent points out that the MEMR's notices of breach are usually based on the 3rd and 4th quarter LKU Reports (which are received by the MEMR by 20 November of a given year and 20 February of the following year, respectively). Therefore, such notices of breach and notices of termination are generally sent to the relevant contractors between November of a given year and March of the following year. This means that while TU Zapkaznedra may consider an AWP for the next year and has to roll over certain non-performed obligations into the next year (typically in December of each year), the MEMR still has the power to sanction a given contractor and even terminate its contract. The present case illustrates this interplay between the MWP and the AWPs and between the MEMR and TU Zapkaznedra in that, in December 2004, TU Zapkaznedra had no choice but to roll over CIOC's non-performed obligations into 2005. Thereafter, in January 2005, the MEMR served CIOC with a notice of breach. Likewise, in November 2006, TU Zapkaznedra rolled over CIOC's non-performed obligations into 2007, and on 25 March 2007, the MEMR served CIOC with a notice of breach. Finally, in December 2007, TU Zapkaznedra rolled over CIOC's non-performed obligations into 2008. However, in January 2008, the MEMR decided to terminate CIOC's Contract, being no longer able to tolerate CIOC's breaches and non-compliance (Respondent's First Post-Hearing Brief, paras. 158-169; Respondent's Reply Post-Hearing Brief, para. 74).

767. In response to the Tribunal's **Question No. 4** in the Post-Hearing Order,[75] the Respondent submits that, between the period of 27 May 2007 and the Notice of Termination, CIOC committed several material breaches of both the pre-extension obligations that had not been specifically extended and the post-extension obligations. Concerning in particular breaches under the Extended MWP, the Respondent alleges that, at the time of the termination of the Contract, CIOC was in breach of its trial production obligations in that it did not complete the trial production program by 31 December 2007. CIOC had also misrepresented to the MEMR that it had completed a proper 3D study that would have allowed it to determine the drilling locations of the deep wells, and the entire Extended MWP is based on the premise that a usable 3D study had been completed (Respondent's First Post-Hearing Brief, paras. 177-178). With respect to breaches of obligations under the initial MWP that

[75] See *supra* para. 237 ("**Question 4**: The Respondent may wish to specify which breaches of the extended MWP were committed, namely between 27 May 2007 and the Notice of the Termination of the Contract (assuming that the Respondent could not complain of violations of contractual obligations prior to the extension of the Contract). The fact that this question is addressed more specifically to the Respondent does of course not bar the Claimants from addressing it.").

were not specifically extended, the Respondent argues that breaches of contractual obligations prior to the extension of a contract under pre-extension work programs can lead to the termination of the extended contract, unless the relevant obligations were specifically extended in an extended work program or were expressly waived. The MEMR had the right to terminate CIOC's Contract under the MWP and the AWPs for breaches of obligations that were not specifically extended and for which CIOC remained liable. The MEMR did not agree to expressly waive the right to claim the non-performance of CIOC's obligations. CIOC's failure to produce a proper 3D study was one such material breach (Respondent's First Post-Hearing Brief, paras. 179-181). The Respondent submits that at the time of termination, CIOC was also in breach of its obligations under the post-extension work programs, even though the 2007 Revised AWP had been drastically reduced (Respondent's First Post-Hearing Brief, paras. 182-183). Finally, CIOC was in anticipatory breach of the Extended MWP as CIOC was clearly not in a position to comply with the obligations under the Extended MWP related to the drilling of deep wells and would thus necessarily be in breach of these obligations (Respondent's First Post-Hearing Brief, para. 184).

768. In response to the Tribunal's **Question No. 5** in the Post-Hearing Order,[76] the Respondent alleges that CIOC was well aware of its breaches under the 2006 AWP before any notice of breach was issued by the MEMR. CIOC applied for the extension of the Contract at a time when the MEMR had not yet received the 4th quarter LKU Report for 2006 (it being pointed out that the LKU Reports are completed and submitted by the contractors themselves) and was thus not in a position to fully appreciate the situation. It was not in CIOC's interest to respond to the 25 March 2007 Notice, which was received by CIOC in the middle of the extension process, as this would have potentially "rocked the boat" and led the MEMR to find out about CIOC's breaches of the work program, thus jeopardizing the finalization of the extension (Respondent's First Post-Hearing Brief, paras. 186-191; Respondent's Reply Post-Hearing Brief, paras. 79-82).

[76] See *supra* para. 237 ("**Question 5**: Why do neither Respondent nor CIOC make any reference, in correspondence between them prior to September-October 2007, to the Notice of Breach of March 25, 2007? In particular:

- why did CIOC not respond to the Notice of Breach of March 25, 2007 before October 3, 2007?
- what probative value should be given to the computer log and the acknowledgement of receipt of the Notice of Breach of March 25, 2007?
- why did the Republic not react, prior to September 2007, to CIOC's failure to respond to the Notice of Breach of March 25, 2007?").

769. With respect to the probative value to be given to MEMR's logbook and the acknowledgement of receipt by CIOC of the 25 March 2007 Notice, it is the Respondent's position that the computer log and acknowledgement of receipt show that the MEMR sent out the Notice on 25 March 2007 and that it was received by CIOC on 28 March 2007. The Respondent further submits that 25 March 2007 was a normal working day in Kazakhstan. The 25 March 2007 Notice was prepared by the Monitoring Division and both Mr. Akchulakov and Mr. Ongarbaev from the Monitoring Division testified at the Hearing that the 25 March 2007 Notice could not have been backdated. The Claimants have failed to establish their allegation that the 25 March 2007 Notice, the record in the log book and the acknowledgement of receipt are false or backdated documents. The only evidence submitted by the Claimants is the oral testimony of CIOC's representatives who have every interest to try to discredit the 25 March 2007 Notice (Respondent's First Post-Hearing Brief, paras. 192-198; Respondent's Reply Post-Hearing Brief, paras. 79-82).

770. As to the question why the Respondent did not react, prior to September 2007, to CIOC's failure to respond to the 25 March 2007 Notice, the Respondent alleges that, among the approximately 1,000 subsoil use contracts monitored by the MEMR, there was nothing special about CIOC's Contract, especially given the fact that the Caratube field was a minor field. CIOC did not receive any special attention but was treated like the other subsoil users. The MEMR does not have any alarm system in place that would indicate that a given notice had not been answered. Rather, the MEMR bases its decision on the next LKU Report that follows the notice. The 2nd quarter LKU Report was received by MEMR's Monitoring Division on 20 August 2007. Because the MEMR was then alerted to CIOC's failure to perform and to respond to the 25 March 2007 Notice, and because the MEMR was unable to otherwise reach CIOC, the 25 March 2007 Notice was reissued to CIOC in September 2007 (Respondent's First Post-Hearing Brief, paras. 199-203; Respondent's Reply Post-Hearing Brief, paras. 81-82).

771. In response to the Tribunal's **Question No. 6** in the Post-Hearing Order,[77] the Respondent reiterates that, at the time when the preliminary approval of the extension was granted in February 2007, the MEMR had not yet received the 4th quarter LKU Report and, thus, did not have full information on CIOC's (non-)

[77] See *supra* para. 237 ("**Question 6**: The Contract was extended for two years by the signing of Amendment N° 3 of July 27, 2007, just four months after the Notice of Breach of March 25, 2007 and seven months before the Notice of Termination of February 1, 2008? What comments do the Parties submit on that chronology?").

performance in 2006. Upon receipt of this LKU Report, the MEMR proceeded with the preparation and issuance of the 25 March 2007 Notice. The Respondent also points out that in April 2007, a Presidential Decree was issued, which required oil and gas related governmental authorities, including the MEMR, to take all appropriate measures to maximize the economic potential of Kazakhstan in the oil and gas sector. Given the experience acquired by Kazakhstan in the oil industry over the past decade and the fact that the initial subsoil use contracts were expiring in 2007, subsoil users were subjected to tighter controls and increased monitoring of their performance by the MEMR.

772. Furthermore, the Respondent argues that when the extension of CIOC's Contract was granted in July 2007, this was done on the basis of CIOC's misrepresentation regarding the 3D seismic study and long before the Respondent discovered the inadequacy of the 3D study and CIOC's failure to complete the trial production program.

773. The Respondent insists that the extension of the Contract did not prevent the MEMR from monitoring the recent and current activities of CIOC and from terminating the Contract if warranted. Upon receipt of the 2nd quarter LKU Report in late August 2007, the 25 March 2007 Notice was re-sent to CIOC. Given the lack of reaction by CIOC, on 1 October 2007 the MEMR sent the Notice of Termination of Operations. However, in the light of CIOC's response thereto, the MEMR allowed CIOC to resume operations by notice dated 27 November 2007. According to the Respondent, this Notice of Resumed Operations shows that the 7 September 2007 Recommendation of the Aktobe Prosecutor to the MEMR was not an order to terminate CIOC's Contract.

774. Moreover, the Respondent submits that the Notice of Breach sent to CIOC in December 2007 was not suspicious, it being pointed out that all underperformers were served with a similar notice based on the 3rd quarter LKU Reports and 87 of them were terminated between November 2007 and January 2008. CIOC was treated in the same way as the other underperformers whose contract was terminated, and the termination of CIOC's Contract was not the result of a political vendetta. The termination of the Contract was not a surprise for the Claimants as it was the result of a series of notices of breach starting from 2003. CIOC was fully aware of the extent of its material breaches, as seen in the LKU Reports that were prepared by CIOC itself. In addition, there is nothing unusual about the notices of breach not containing extensive information regarding a specific contract, such as

references to extensions, previous warnings or suspensions of operations, etc. (Respondent's First Post-Hearing Brief, paras. 205-224; Respondent's Reply Post-Hearing Brief, paras. 83-87).

775. It is the Respondent's position that if the Contract had not been terminated, CIOC would never have been able to comply with its obligations under the Extended MWP and was thus exposed to the termination of the Contract at the end of the extended period. Answering the Tribunal's **Question No. 8** in the Post-Hearing Brief,[78] the Respondent submits that the Hearing confirmed its position in this regard: first, it confirmed that CIOC was not ready to drill the deep wells in time and thus comply with its obligations under the Extended MWP. The readiness to drill expensive deep wells is determined by the quality and reliability of the 3D study, a reliable 3D study being not only a *sine qua non* prerequisite and requirement for deep drilling, but also a requirement under the Contract and good oilfield practice. CIOC did not follow the correct procedure for determining the drilling locations of the deep wells and for preparing the deep drilling. In particular, the Respondent argues that (i) CIOC's 3D study was unusable and would have to be entirely redone; (ii) CIOC did not select the final deep well drilling locations and did not follow the industry procedure for selecting such locations. The two well locations identified by the Claimants, GD-1 and GD-2, were only preliminary locations (as explained by Mr. Antar at the Hearing and admitted by CIOC in its 2008 AWP). In addition, these locations were not (and could not have been) based on the 3D study and do not relate to any prospect. The five additional locations (nos. 102 through 106) proposed in CER's Well Development Program of March 2008 were never referred to as deep well locations in the Claimants' written submissions, cannot be considered as serious locations and were not presented in a professional manner. They were also not based on the 3D study and cannot be associated with any prospect. Mr. Tiefenthal admitted at the Hearing that these were "floating" locations that were not final and could have changed. Furthermore, CIOC had not presented any overhang well locations. The Claimants' allegation that CIOC had intended to drill an overhang well in 2008 "next to G-69" is an unsubstantiated last minute speculation, says the Respondent; (iii) CIOC had not prepared the required well design for the deep drilling; (iv) CER's well design had not been approved by TU Zapkaznedra and the CDC; and (v) CIOC had not conducted a tender to select a subcontractor for the drilling of deep wells

[78] See *supra* para. 237 ("**Question 8**: What did the testimonies bring forth with respect to CIOC's readiness, capacity and willingness to drill deep wells (location, financing, etc.)?").

(Respondent's First Post-Hearing Brief, paras. 117-256; Respondent's Reply Post-Hearing Brief, para. 92).

776. In addition, in response to the Claimants' allegation that CER had finalized a comprehensive and complete well design for the deep wells on 8 March 2008, the Respondent points out that, by this time, the Contract had already been terminated. The Claimants' allegation is false in that the well design was never finalized. Rather, it constituted an incomplete draft, without cover page, date, signature or name of author. Moreover, the Claimants did not mention this document in the *Caratube I* arbitration (Respondent's Reply Post-Hearing Brief, para. 92).

777. As a second argument in response to the Tribunal's Question No. 8, the Respondent submits that CIOC lacked both the technical and the financial capacity to drill the deep wells under the Extended MWP, it being pointed out that Mr. Devincci Hourani has never invested "a penny" in the Caratube project and the Claimants have never provided any evidence as to his alleged fortune. CIOC's budget assumes that all the deep wells drilled would be successful, which was unlikely given the flawed 3D study and the high possibility of dry holes. The JOR loan amount of USD 25 million would thus have been insufficient to finance the drilling of the deep wells (Respondent's First Post-Hearing Brief, paras. 257-275).

778. Still in response to the Tribunal's Question No. 8, the Respondent submits that CIOC was not willing to drill the deep wells: CIOC did not take seriously its contractual obligations, namely to conduct a proper 3D study and drill the deep wells. While CIOC conducted the cheapest possible 3D study, which led to unusable results and floating well locations, it had no intention of redoing the 3D study despite the risk of dry holes. CIOC did everything to delay the drilling of the deep wells and never drilled any exploratory wells. CIOC was not willing to take the risk and proceed with the exploration and was tapping only into the known deposits (Respondent's First Post-Hearing Brief, paras. 276-281).

779. In response to the Tribunal's **Question No. 9** in the Post-Hearing Order,[79] the Respondent argues that it is undisputed that the Contract comprised two phases,

[79] See *supra* para. 237 ("**Question 9**: Based on the facts of this case, with respect to the activities carried out by the Claimants during the time the Contract was performed, were such activities in conformity with the Contract and do they qualify as activities of exploration, development and/or production? If it were admitted arguendo that the performance of the Contract by the Claimants was unsatisfactory during the period from 27 May 2002 until 27 May 2007, what is the position of each Party as to how the Claimants' performance of the Contract has or would have evolved during the

namely the exploration phase and the production phase; there is no development phase. The Respondent underlines that the Contract does not provide for a vested or automatic right to proceed from the exploration phase to the production phase and there is no vested right to production. Rather, CIOC had to comply with the following conditions precedent: (i) make a discovery of a hydrocarbon deposit; (ii) determine whether such deposit is economically and technically suitable for production; (iii) if so, immediately declare a Commercial Production; and (iv) comply with the other conditions precedent provided by the Contract and the law, including the approval of the Field Development Plan by the CDC and the approval of the change of status of the contract from exploration to production by the MEMR's Expert Committee. The Contract terminates if no Commercial Discovery is declared by the end of the exploration phase. The Contract does not attach any contractual significance to the concept of development with respect to obtaining rights to production (Respondent's First Post-Hearing Brief, paras. 283-293).

780. The Respondent further asserts that the activities performed by CIOC were not in conformity with the Contract. In particular, CIOC did not properly carry out its exploration obligations in that (i) it failed to timely carry out a usable 3D study, identify proper drilling locations for the deep wells and drill these deep wells. Rather, CIOC avoided unknown and riskier zones and depths and did not drill a single exploratory well. It was pumping easy oil from known deposits, drilling all the supra-salt wells in a very dense pattern, at about the same depth level, and within a small sub-area of the Caratube field. These failures had been pointed out several times by TU Zapkaznedra; (ii) CIOC failed properly to carry out the trial production program that was contemplated by the Contract as part of the exploration phase. The Respondent rejects the Claimants' "new argument" as to the existence of "constraints" relating to the trial production, which allegedly did not allow the Claimants to produce trial oil in quantities reflecting the potential of the Caratube field. The poor trial production is explained by CIOC's incompetence and low productivity of the reservoirs; and (iii) CIOC was required to carry out other exploration activities under the Contract, such as the drilling of water wells, the construction of the field facilities, etc. These activities were either not performed at all, not properly performed, or performed late (Respondent's First Post-Hearing Brief, paras. 295-307; Respondent's Reply Post-Hearing Brief, para. 75 and paras. 93-98).

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extended period until 27 May 2009, as well as a possible further two-year extension of the Contract until 27 May 2011? What legal consequences do the Parties draw from the foregoing?").

781. Furthermore, still in response to the Tribunal's Question No. 9, the Respondent argues that had the Contract not been terminated, there is no reason to believe that CIOC's performance would have improved during the extended period until May 2009, let alone during a second extension period until May 2012 (if such a second extension would have been granted). According to the Respondent, (i) CIOC's past performance and behavior indicate that its future performance also would have been poor and in breach of the Contract; (ii) CIOC was not in a position to make, nor did it have the intention of seeking to make, a Commercial Discovery either in the supra-salt, the overhang or the subsalt. Under industry standards, in order to make a Commercial Discovery, a contractor must find a new hydrocarbon deposit. In addition, Clause 10.1 of the Contract clearly requires the contractor to promptly inform the Competent Authority of a Commercial Discovery. Thus, in the absence of a Commercial Discovery, CIOC would not have acquired the right to production nor would it have obtained a production license. The Respondent underlines that the purpose of the Contract was not the "exploration/appraisal" of known deposits in order to prove the commercial viability of these old discoveries; the Contract does not define the appraisal or recalculation of known deposits as discoveries. In any event, CIOC never declared a Commercial Discovery and, based on Clause 9.6 of the Contract, the Contract terminates in the absence of a Commercial Discovery at the end of the exploration period. The Respondent rejects that the Expert Opinion on reserves procured by CIOC based on the CIOC/CER Reserves Estimates can be considered as a confirmation of a discovery or that CIOC/CER's Field Development Plan had been or would have been approved by the CDC. Furthermore, even if CIOC had made a Commercial Discovery, the conditions precedent under the Contract and the law for obtaining a production license in any event would not have been met; (iii) CIOC would have continued to be in breach of its obligations since it could not have complied with the 2008 AWP and Extended MWP (Respondent's First Post-Hearing Brief, paras. 308-331; Respondent's Reply Post-Hearing Brief, paras. 93-98).

782. Finally, in response to the third part of the Tribunal's Question No. 9, the Respondent argues that, in the absence of a Commercial Discovery, the Contract would have terminated on 27 May 2009. The termination of the Contract by the MEMR thus did not cause CIOC any harm and the Respondent therefore cannot be held liable for damages (Respondent's First Post-Hearing Brief, para. 332).

c. There was no harassment, no expropriation and no state action

783. According to the Respondent, the MEMR lawfully terminated the Contract due to CIOC's non-performance and material breaches of the Contract, even before the alleged political events of 2007. The Claimants' allegations of harassment and state action are thus irrelevant to the termination (Respondent's First Post-Hearing Brief, para. 334; Respondent's Reply Post-Hearing Brief, paras. 99-123).

784. The Respondent further asserts that it did not engage in any harassment of CIOC, its shareholders, principals or employees, but acted at all times for legitimate purposes and in accordance with applicable laws and procedures, as well as the Contract. The Claimants deliberately confuse (i) the criminal investigations which concerned Mr. Rakhat Aliyev and members of his entourage (including Mr. Issam Hourani), and which were not directed against CIOC; and (ii) regulatory audits and inspections of CIOC and the monitoring actions taken by the MEMR with respect to CIOC's non-performance and material breaches that led to the termination of the Contract. The Claimants thereby try to cover up CIOC's contractual breaches and create the false impression of harassment based on facts and events that are unrelated to these breaches and the termination of the Contract (Counter Memorial, paras. 918-925; Respondent's First Post-Hearing Brief, para. 336).

785. In particular, the Respondent submits that the investigations that concerned Messrs. Rakhat Aliyev and Issam Hourani did not concern CIOC directly and are unrelated to the termination of the Contract and this Arbitration. It rejects the Claimants' argument that the termination of the Contract was part of a harassment campaign against Mr. Aliyev. Rather, Mr. Aliyev and members of his entourage, including Messrs. Issam Hourani and Devincci Hourani, are suspected of serious crimes, including money laundering, kidnapping, sequestration, torture, murder, extortion and corporate raiding (based on serious, sufficient, reliable and concurring evidence), that are being legitimately investigated in accordance with applicable laws and procedures before the competent authorities of Kazakhstan, and in Austria, Cyprus, Greece, Liechtenstein, Malta and Lebanon. These investigations are not before this Tribunal, who cannot form a judgment as to the innocence or guilt of the investigated persons (Counter Memorial, paras. 926-981; Respondent's First Post-Hearing Brief, paras. 338-341).

786. Furthermore, according to the Respondent, the investigations of the Almaty Police related to Mr. Sami Sabsabi's complaint against Mr. Issam Hourani and his accomplices in the summer of 2007, as well as the temporary seizure of past period accounting documents of CIOC and other companies between October 2007 and February 2008, concerned Mr. Issam Hourani and only indirectly concerned CIOC. Following Mr. Sabsabi's complaint against Mr. Issam Hourani and others for assault and extortion, the Almaty Police conducted an on-site search of Ruby Roz's premises (which search was limited to only Mr. Kassem Omar's office and conducted calmly and in compliance with Kazakh law), which are located in the same building as CIOC's offices. The Sabsabi investigation was legitimate and Mr. Sabsabi's delay in filing the complaint is explained by the fact that he was afraid of Mr. Aliyev and the latter's entourage at the time of the events (Counter Memorial, paras. 984-1002; Respondent's First Post-Hearing Brief, paras. 343-344). Moreover, the temporary seizure of CIOC's past period accounting documents in October 2007 concerned an investigation into various crimes allegedly committed by Mr. Issam Hourani and not CIOC itself. The seized documents were returned to CIOC in February 2008. This seizure of documents did not cause any harm to CIOC (Counter Memorial, paras. 1003-1010; Respondent's First Post-Hearing Brief, paras. 345-346). For the Respondent, other miscellaneous harassment allegations made by the Claimants are unsubstantiated and meritless (Counter Memorial, paras. 1011-1024; Respondent's Reply Post-Hearing Brief, paras. 105-113).

787. The Respondent admits that certain regulatory audits and inspections (with respect to, *inter alia*, labor, industrial and fire safety, tax and environmental matters) directly concerned CIOC, but stresses that such audits and inspections were legitimate, normal, ordinary, applied to all subsoil users (including CIOC), and were conducted in accordance with the applicable law and procedure and pursuant to the general supervisory policy then in force in Kazakhstan. CIOC was not targeted and the audits and inspections were not motivated by political events but rather by CIOC's constant violation of various regulations, it being pointed out that they occurred both before and after the alleged political events of mid-2007. The Respondent further submits that the Claimants have exaggerated these regulatory audits and inspections both in terms of quantity and impact. CIOC had access to the Kazakh judicial system and was able to obtain a decision in its favor on 22 November 2007 (i.e. after the alleged political events), namely the cancellation of a significant tax fine that had been imposed prior to the alleged political events (Counter Memorial,

paras. 1025-1071; Respondent's First Post-Hearing Brief, para. 347; Respondent's Reply Post-Hearing Brief, para. 114).

788. The Respondent points out that several investigations and actions that the Claimants have referred to as a basis for their harassment allegations took place after the termination of the Contract; they thus cannot have caused this termination or the damages allegedly resulting therefrom. In particular, the Respondent submits that the following relevant investigations and actions were all legitimate and lawful: (i) criminal investigations concerning CIOC's unauthorized and illegal production and sale of oil after the termination. The authorizations to re-open six wells in August 2008 based on alleged environmental risks were obtained by CIOC through misrepresentation and deception, it being specified that such authorizations did not allow CIOC to produce oil. In April 2009, the Respondent ordered the shutdown of the re-opened wells, having discovered CIOC's deceit (Counter Memorial, paras. 1073-1093); (ii) larger investigations regarding the illegal awarding of contracts in Kazakhstan, including the April 2009 investigations of CIOC and the seizure of CIOC's documents and materials, were temporary, limited, non-disruptive and done in conformity with applicable laws and procedures. The seized materials and documents were returned to CIOC in September 2015 and January 2016 respectively (Counter Memorial, paras. 1094-1108); and (iii) taxes left unpaid by CIOC that led to bankruptcy proceedings of CIOC in December 2010, but which are suspended following a request for provisional measures made by the Claimants in the *Caratube I* arbitration in May 2011 (Counter Memorial, paras. 1109-1111; Respondent's First Post-Hearing Brief, paras. 337-338).

789. The Respondent further points out that there was no state action resulting in harm to CIOC. In particular, the Respondent rejects the Claimants' argument that certain of the Respondent's actions amount to expropriation or FET violations, if applicable. The Respondent underlines that (i) there was no political campaign against the Claimants, and the criminal investigations against Mr. Aliyev and members of the Hourani family were legitimate and therefore cannot be considered as harassment. The Respondent reiterates that great caution must be exercised by tribunals when assessing the legitimacy of a state's criminal investigations. In the present case, such investigations have nothing to do with CIOC or the termination of the Contract; (ii) the audits and inspections of CIOC were all legitimate, lawful, normal, ordinary, limited and non-disruptive; (iii) there was no causal link between the Recommendation dated 7 September 2007 from the Aktobe Prosecutor's Office to

the MEMR (Exh. R-46) and the termination of the Contract, it being stressed that the Recommendation was not an order (Respondent's First Post-Hearing Brief, paras. 355-379; (iv) the alleged private face-to-face meeting between President Nazarbayev and Mr. Yasser Mahmoud Abbas, as a matter of protocol, could not have taken place; (v) the Claimants' allegations with respect to a meeting that Mr. Devincci Hourani tried to arrange with President Nazarbayev in New York in September 2007 are false; (vi) the Claimants allegations of a politically motivated harassment campaign against the Claimants as evidenced, *inter alia*, by alleged expropriations of Kulandy Energy Corporation, Ruby Roz Agricole, Kokshetau Airlines and Pharma Industry, are not only extraneous to this Arbitration but also false; (vii) there is no serious proof for the Claimants' allegations of harassment by the Respondent against the Houranis (especially in relation with the Novikova matter) and the allegedly connected expropriation of CIOC; and (viii) the only pieces of evidence submitted by CIOC in the *Caratube I* arbitration that would have been able to prove its case were withdrawn following allegations of forgery; they were not submitted in this Arbitration (Counter Memorial, paras. 1112-1148; Respondent's First Post-Hearing Brief, paras. 348-353; Respondent's Reply Post-Hearing Brief, paras. 99-104).

d. The Respondent has no liability to the Claimants

790. It is the Respondent's position that, because the Contract was lawfully terminated, the Claimants' liability claims must be dismissed. However, for the sake of completeness, the Respondent argues that (i) the Claimants, having withdrawn the BIT as a jurisdictional basis, cannot create a right to BIT standards through customary international law, the FIL and the Contract, while at the same time avoiding any analysis of these instruments (under which they actually claim rights); (ii) the Claimants cannot assert rights under Kazakh law, international law and the Contract regardless of this Tribunal's jurisdictional basis. If jurisdiction is found only under the Contract, CIOC's international law and FIL claims would have to be dismissed as they do not arise from the Contract (Counter Memorial, paras. 1149-1152; Respondent's Reply Post-Hearing Brief, para. 126).

791. As was seen above in paragraphs 275 et seq., it is the Respondent's position that, **whatever this Tribunal's jurisdictional basis may be, the Claimants do not have any of the rights they allege**, namely under customary international law, the FIL and the Contract. As was already seen, the Respondent asserts that the

Claimants' claims are brought under the FIL and the Contract, which includes an express agreement that Kazakh law is the applicable law. In conformity with Article 42(1) of the ICSID Convention, it is thus clear that only Kazakh law applies to the consideration of the Claimants' claims under the FIL and the Contract. Customary international law is not incorporated into Kazakh law and it does not include the rights asserted by the Claimants. Hence, the Claimants' claims under customary international law are baseless and must fail (Counter Memorial, paras. 1160-1170).

792. With respect to the Claimants' claims under the FIL, the Respondent submits that neither of the Claimants has any rights under the FIL and in any event the FIL does not include a right to the BIT standards. The Respondent recalls that CIOC never had any rights under the FIL because it is a domestic Kazakh company and was never owned by a foreign legal entity or citizen who met the requirements under Article 1 of the FIL. Moreover, CIOC never made an investment pursuant to the terms of the FIL. In any event, any rights that CIOC could somehow have had under the FIL were lost following the repeal of the law and the subsequent acquisition of CIOC by Mr. Devincci Hourani.

793. The Respondent further reiterates that the reference in Clause 28.4 of the Contract cannot circumvent the requirements of the FIL itself, which must be met in order to have rights under the FIL. In any event, the rights provided for by the FIL would not have been incorporated into the Contract by reference. Those rights are not created by the Contract but by the FIL and, therefore, they would have been extinguished by the FIL's repeal and the subsequent transfer of CIOC's shares to Mr. Devincci Hourani. The Contract's stabilization clause did not preserve the FIL after the repeal, as it cannot cure the fact that CIOC never met the FIL's requirements (Counter Memorial, paras. 1180-1189).

794. The Respondent rejects the Claimants' attempt to circumvent the jurisdictional requirements of the BIT by contending that the FIL contains an MFN clause (in Article 4 of the FIL) that affords them all of the rights under the BIT. While Article 4(1) of the FIL sets out a limited MFN regime, Article 4(2) explicitly excludes from that regime international treaties concluded between the Respondent and other countries, the BIT undeniably being one of them (Counter Memorial, paras. 1190-1193; Respondent's First Post-Hearing Brief, para. 382; Respondent's Reply Post-Hearing Brief, para. 126).

795. Based on the foregoing, the Respondent contends that the only rights at issue in this case are CIOC's rights under the Contract and rights arising from general principles of Kazakh law. The Respondent argues that it did not breach any of its obligations under the Contract, but rather was in full compliance therewith (Counter Memorial, paras. 1194-1195).

796. It is the Respondent's position that **the Claimants' allegations of breach are meritless**, namely their allegations of expropriation, failure to compensate, fair and equitable treatment, unreasonable treatment and discrimination, full protection and security and breach of specific commitments (it being reiterated that the Respondent does not acknowledge that the BIT applies in this case or that the Claimants have any rights under the BIT).

797. In particular, as regards the Claimants' allegations of **expropriation**, the Respondent stresses that the termination of the Contract was rightful and proper as a matter of substance and procedure and that, therefore, the Claimants' claims should be dismissed in their entirety. For the sake of argument, the Respondent describes the relevant elements of expropriation as being (i) an unreasonable substantial deprivation of existing rights; (ii) of a certain duration; and (iii) caused by a sovereign act of the host state.

798. With respect to the first element, the Respondent submits that to state a successful claim of expropriation, the Claimants must show that they actually held the rights they allege were expropriated as defined by the law that created them, namely the law of the host state. Only rights that are vested at the time of the alleged expropriatory act (not at some future point) can be the object of an expropriation, and only if the Claimants show that they have been the victim of a "substantial" deprivation of those rights. For the Respondent, quoting the *Biwater* tribunal, "the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner" (Counter Memorial, paras. 1204-1207).

799. As regards the element of duration, the Respondent argues that while there is no clear test as to how long a deprivation must continue before it can amount to expropriation, it cannot be fleeting and it has even been held that the deprivation must be permanent (Counter Memorial, para. 1208).

800. Finally, regarding the element of the existence of a sovereign act, according to the Respondent, the Claimants must show that the deprivation was the result of a state

using its sovereign powers rather than acting in a private manner as a party to a contract. The breach of a contract, much less the exercise of legitimate termination rights under a contract, by a state actor, cannot amount to expropriation as a matter of international law. In other words, where a state exercises its contractual right to terminate a contract (whether the termination was rightful or wrongful), that act cannot constitute an expropriation in the absence of the state's exercise of its sovereign power. It must be the state's exercise of its sovereign power that led to the loss of the rights for which redress is sought; if the sovereign act is not the cause of the loss, there is no expropriation (Counter Memorial, paras. 1209-1219).

801. Applied to the facts of the present case, the Respondent argues that CIOC's claim for expropriation is groundless: (i) CIOC never had the production rights that it alleges were expropriated. At the time of the termination of the Contract, CIOC only had those rights granted to it under the exploration phase and a continuing possibility to fulfill the necessary requirements to move to the production phase. While CIOC did indeed lose those rights, it did so not as the result of a sovereign act, but as a result of its material breaches of the Contract and the Respondent's rightful exercise of its right to terminate the Contract in its capacity as a party to that Contract; (ii) even if CIOC had such rights, any loss of such rights was not caused by a sovereign act but rather by the Respondent's legitimate and lawful exercise of its termination rights under the Contract; (iii) even if the termination were found to be wrongful, in the absence of proof of an independent exercise of sovereign power by the Respondent, there can be no expropriation; and (iv) the alleged acts of harassment, even if considered as sovereign acts, were not the cause (or a cause) of the termination of the Contract. Rather, the termination was the result of CIOC's material breach of its contractual obligations (Counter Memorial, paras. 1220-1236).

802. The Respondent observes that the Claimants appear to have shifted their position at the Hearing in that they no longer appear to base their expropriation claims on the BIT standard, but rather on Article 7 of the FIL, although they still point to BIT cases in an attempt to support their FIL claim. The Respondent asserts that the Claimants' expropriation claim must fail, regardless of whether it is made under the BIT or the FIL, because there was no expropriation of their rights in this case (Respondent's First Post-Hearing Brief, paras. 384-387).

803. As regards the Claimants' **claim for compensation**, the Respondent submits that, because no expropriation occurred, the Claimants have no right to compensation and the Respondent did not breach any obligation in this respect. Thus, the

Claimants' claim must be dismissed (Counter Memorial, para. 1241; Respondent's First Post-Hearing Brief, para. 388).

804. Concerning the Claimants' claim with respect to an alleged breach of the Respondent's **fair and equitable treatment** obligations, it is the Respondent's position that neither customary international law nor the FIL contain a FET obligation and the Claimants have no right to claim breach of such an obligation. The FET standard set out in the BIT (on which the Claimants rely) is irrelevant to this case and the Claimants have no right to assert it. Nevertheless, for the sake of argument, the Respondent defines the proper standard of analysis before analyzing the FET principles asserted by the Claimants, that is: the obligation to provide legitimate expectations and the legitimate expectation to a stable legal framework; good faith and due process; and proportionality and transparency. In light of this analysis, the Respondent concludes that, even if one were to consider *arguendo* that the BIT standards, including the FET standard, were applicable, the Claimants have not stated a successful claim under the BIT's fair and equitable treatment provision, whether one were to follow the Claimants' broad interpretation thereof (which is unsupported by precedent or commentary), or the interpretation given by arbitral precedent.

805. The Respondent notes that during the Hearing, the Claimants attempted to argue that under Kazakh law they have the same protections as under the FET standard of international law. However, the Kazakh law provisions relied upon by the Claimants (including Articles 8(4) and 2(1) of the Civil Code and Article 27 of the Law on Private Entrepreneurship) do not amount to the FET standard and are indeed unrelated to an FET standard (Respondent's First Post-Hearing Brief, para. 389; Respondent's Reply Post-Hearing Brief, para. 127).

806. As regards the proper standard of analysis, the Respondent asserts that the Claimants must satisfy a high burden of proof in that the "measures taken by the host state should show 'a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith'". Furthermore, tribunals must assess and apply FET principles on a case-by-case basis, and they must not consider the state's conduct in the abstract, but rather evaluate such conduct in the light of the investor's own conduct. In particular, tribunals must assess whether the state's conduct is a justified reaction to the investor's conduct. Finally, the tribunal's evaluation "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate

matters within their own borders". It is clear, says the Respondent, that a state's legitimate exercise of its rights under a contract cannot violate a state's obligations under the FET standard (Counter Memorial, paras. 1245-1251).

807. With respect to **the obligation to provide legitimate expectations and the legitimate expectation to a stable legal framework**, the Respondent points out that the standard is an objective one and requires the determination of only those expectations that are legitimate in the circumstances and at the time an investment is made; it is not based on the investor's subjective intent or beliefs. Moreover, expectations are legitimate only if they arise from explicit commitments made by the state at the time of the investment and relied upon by the investor when deciding to invest. Finally, the terms of the contract must be taken into account, it being underlined that the expectations of contractual performance of a party are not necessarily expectations protected under an investment treaty (Counter Memorial, paras. 1253-1257). The Respondent further stresses that the breach of a contract alone does not imply a violation of legitimate expectations or the obligation to provide fair and equitable treatment (in that a breach of a contract is not properly a sovereign act) because "the existence of legitimate expectations and the existence of contractual rights are two separate issues" (Counter Memorial, paras. 1258-1261). Concerning in particular the issue of legal stability, the Respondent submits that this requirement does not prevent a state from making changes to its law or issuing decrees in good faith, directed towards a public interest, but rather to fulfill objective, legitimate and reasonable expectations as to stability, considered in light of the circumstances. The cases relied upon by the Claimants in support of their position on the issue do not contradict the premises set out by the Respondent (Counter Memorial, paras. 1262-1268).

808. With respect to the **principles of good faith and due process**, the Respondent submits that the burden of proof is very high. In response to the Claimants' reliance on the *Waste Management* award, the Respondent argues that the tribunal in that case clarified that in the context of an alleged fair and equitable treatment violation arising from a contractual relationship, contractual breaches could not amount to a violation of the fair and equitable treatment requirement, unless the state's conduct was wholly arbitrary or grossly unfair. Moreover, the tribunal found that if "some remedy" is available, the aggrieved investor cannot prevail on a FET claim. According to the Respondent, relying on the *Genin* case, the threshold is even higher when the state's action at issue was taken in response to the failures of the

investor. In any event, the principle of good faith is of negligible assistance in interpreting the FET standard, no tribunal having ever found a breach of the FET standard by relying solely on the principle of good faith or the vague obligation not to do harm or not to harass. Finally, bad faith cannot be presumed and the Claimants have not shown that the Respondent has engaged in bad faith behavior in this case (Counter Memorial, paras. 1269-1275).

809. Concerning the alleged **principles of proportionality and transparency**, it is the Respondent's position that such principles do not inform the FET standard; the Claimants thus misstate the scope and nature of the duty of fair and equitable treatment. The *Tecmed v Mexico* award relied upon by the Claimants has been strongly criticized by subsequent tribunals and commentators, as well as by UNCTAD, as advocating an FET standard that is too broad and nearly impossible to achieve. Pointing to the award in *Waste Management v Mexico*, the Respondent argues that several tribunals have specifically refrained from finding that customary international law imposes a general obligation to conduct government affairs in a transparent manner. UNCTAD also has voiced caution against defining transparency as an end in itself or an absolute obligation of host states. Furthermore, when a state conducts criminal and administrative investigations of an investor, if those investigations are well-founded and conducted within the legal framework, and, as here, do not lack proportionality, transparency and good faith, they do not violate the fair and equitable treatment standard and cannot be the basis of a treaty claim (Counter Memorial, paras. 1276-1283).

810. In the light of the Respondent's foregoing analysis of the FET standard, the Respondent argues that the Claimants' FET claims are meritless. The Respondent replies to the Claimants' arguments on the Recommendation of 7 September 2007 and the lawfulness of the termination of the Contract. Firstly, this Recommendation was neither a governmental directive (there having been no interference whatsoever by the President in the present case, unlike in the cases relied upon by the Claimants), nor the cause of the termination of the Contract (the Recommendation having been issued after the start of the termination process). The Recommendation "has nothing to do with the Hourani family and everything to do with the fact that CIOC was in a state of permanent material breach" (Counter Memorial, paras. 1285-1290). Secondly, the termination of the Contract was both substantively and procedurally lawful (Counter Memorial, paras. 1291-1301; Respondent's First Post-Hearing Brief, paras. 390-391).

811. As regards the Claimants' claim for breach of the Respondent's obligation to accord **full protection and security**, the Respondent points out that the Claimants have not presented an independent claim, but have subsumed this claim in their fair and equitable treatment claim, contending that the finding of a breach of fair and equitable treatment necessarily amounts to a breach of full protection and security. Under the Claimants' reasoning, and for the above reasons, the Claimants' claim must thus necessarily fail also. The Claimants have in any event failed to substantiate and prove their claim as regards full protection and security (Counter Memorial, paras. 1302-1304).

812. The Respondent submits that the Claimants have not presented an independent claim with respect to **arbitrary treatment and discrimination**, but have also subsumed it in their fair and equitable treatment claim, arguing that the finding of a breach of fair and equitable treatment necessarily amounts to arbitrary treatment and discrimination. Therefore, the Claimants' claim must necessarily fail for the above-mentioned reasons. Again, the Claimants have in any event failed to substantiate and prove their claim as regards arbitrary treatment and discrimination (Counter Memorial, paras. 1305-1307).

813. The Respondent rejects the Claimants' allegation concerning alleged breaches of the Respondent's obligation to comply with **specific commitments** allegedly contained in the Contract, stability provisions in the Contract and in various Kazakh laws. The Respondent did not breach its contractual commitments. Furthermore, the stability provisions of the Contract, the FIL, the 1999 Subsoil Law and the Kazakh Civil Code, which the Claimants invoke, are not specific commitments in favor of the Claimants (except for the commitments afforded to CIOC in the Contract), but rather general legislative instruments. The Claimants never had any rights under the FIL and, even if it were admitted *arguendo* that CIOC ever had rights under the FIL prior to the repeal, it lost such rights upon the transfer of the shares to Mr. Devincci Hourani. In any event, none of these provisions were breached and the use of the 2004 Subsoil Law was proper (Counter Memorial, paras. 1308-1310).

3. Analysis

814. The Tribunal will begin by examining CIOC's expropriation claim (**a.**) and claim for compensation (**b.**). The Tribunal understands that CIOC's other claims have been

raised on a subsidiary basis.[80] The Tribunal will therefore address them accordingly, to the extent required by the Tribunal's earlier conclusions on the issues of expropriation and compensation (**c.**).

a. CIOC's expropriation claim

815. As just seen, it is the Claimants' position that the Respondent wrongfully terminated the Contract in January 2008 and that this wrongful termination amounted to an expropriation in that it was motivated by political reasons and thus caused by state action.

816. By contrast, the Respondent submits that the termination of the Contract was lawful because CIOC was in material breach of the Contract during the entire lifetime of the Contract. Because the Respondent had the right under the Contract and the applicable law to terminate the Contract in case of material breach and because it did so in conformity with the Contract and the applicable law, the termination was lawful. In the absence of a sovereign act, it cannot, in any event, constitute an expropriation.

817. Therefore, the Tribunal will have to decide whether the present case gives rise to an expropriation or rather a simple termination of the Contract and whether, in either case, the Respondent acted lawfully or unlawfully and thus engaged its liability.

i. The applicable standard

818. Regarding the law governing CIOC's expropriation claim, the Tribunal makes a general reference to its analysis set forth in paragraphs 281 et seq. As stated in those paragraphs, the Tribunal considers that, in addition to the Contract itself, CIOC's claims arising under the Contract are governed by the guarantees and protections provided under the FIL (via Clause 28.4 of the Contract) and Kazakh law (via the choice-of-law clause in Clause 26.1 of the Contract). While the Parties' transaction remains governed by the domestic legal system chosen by the Parties, the Tribunal will check this choice by the application of customary international law, in particular mandatory international rules.

819. Article 7 of the FIL, entitled "Guarantees against Expropriation", undoubtedly constitutes one of the guarantees provided under the FIL. As a result, the Tribunal

[80] See *infra* para. 948.

finds that Article 7 of the FIL applies to CIOC's expropriation claim. This provision reads as follows (Exh. CLA-2):

> Article 7. Guarantees against Expropriation
>
> 1. Foreign investments may not be nationalized, expropriated or subjected to other measures having the same effects, such as nationalization and expropriation (hereinafter - expropriation), except where such expropriation is carried out in the public interest in accordance with due process of law and is executed without discrimination in the payment of immediate, adequate and effective compensation.
>
> 2. Compensation shall be equal to the fair market value of the expropriated investment at the time when investor was notified of the expropriation.
>
> 3. The compensation shall include a fee for using money, payable for the period from the date of expropriation until the date of compensation pay-off, at the rate determined by the National Bank of the Republic of Kazakhstan

820. The Tribunal recalls that it applies Article 7 of the FIL as supplementary contract law governing the contractual relations between CIOC and the Respondent via Clause 28.4 of the Contract. The Tribunal further recalls that CIOC and the Respondent agreed under Clause 27 of the Contract to treat the transactions contemplated under the Contract as an investment and CIOC as an entity under foreign control (see *supra*, paras. 599 et seq.). As discussed in further detail earlier in this Award, in these circumstances, the Tribunal does not deem it necessary to verify the scope of an independent application of the FIL, in particular the requirements as to the existence of an "investment" and "foreign investment" within the meaning of Article 1 of the FIL (see *supra*, paras. 651 et seq.).

821. The Tribunal cannot follow the Claimants' contention that the standard of protection as set forth in Article III of the BIT also governs CIOC's expropriation claim via the MFN clause in Article 4(1) and (2) of the FIL. Assuming *arguendo* that the FIL would be directly applicable (which question the Tribunal has left open), Article 4(2) of the FIL explicitly states that the FIL's MFN regime "does not apply […] to the benefits that the Republic of Kazakhstan provides to individuals or legal entities from other countries under the international treaties concluded with these countries or joint participation with these states in international conventions". The Tribunal is not persuaded by the Claimants' argument that Article 4(2) of the FIL is not applicable because CIOC is not seeking the "benefits" of the BIT, but rather its "protection". The Claimants' have provided no arguments, let alone evidence, in support of this allegation, but merely submitted that the Respondent bears the burden of proof with

respect to the interpretation of the FIL. However, the Tribunal has found in paragraphs 307 et seq. that the Claimants bear the burden of establishing their allegations and, in particular, the merits of their claims. In light of the rather unambiguous wording of Article 4(2) of the FIL, which does not seem to call for any interpretation and is dispositive of the Claimants' argument without need to add any other reason, the Tribunal considers that the Claimants have not satisfied their burden of proof. As a result, the Tribunal finds that CIOC cannot rely on Article III of the BIT in support of its expropriation claim. That said, the Tribunal recalls that it will in any event take into consideration the standards governing expropriation as provided by customary international law.

822. Under customary international law, an expropriation can be broadly defined as a taking or deprivation by the state of property for which compensation is required.[81] While a direct expropriation involves the transfer of the title to the property or its outright physical seizure, usually to the benefit of the state itself or a state-mandated third party, an indirect expropriation is characterized by the total or near-total deprivation of an investment, but without the formal transfer of the title or outright seizure.[82] It is undisputed between the Parties that contractual rights may be the subject of an expropriation. In particular, they may be considered as forming an integral part of an investment and the taking of these rights may amount to an expropriation (in whole or in part) of such investment.[83] Not disputing this general premise, the Respondent has however specified that "only rights that are vested at the time of the expropriatory act can be the object of an expropriation" (Counter Memorial, para. 1205). The Claimants have not taken issue with this statement.

823. While international law generally recognizes the state's sovereign right to take property through expropriation, in order for the expropriation to be lawful under international law, the taking must satisfy certain conditions. In particular, it must have been for a public purpose, on a non-discriminatory basis, in accordance with

[81] For the purposes of the present Award and for reasons of simplicity, the Tribunal may use the terms "taking" and "deprivation" interchangeably, being of course aware of the differences in their meaning.

[82] In support of this rather uncontroversial statement, the Tribunal relies on the UNCTAD Series on Issues of International Investment Agreements II, Expropriation, United Nations 2012 (Exh. CLA-103), pp. 6-7.

[83] See Campbell McLachlan, Laurence Shore and Matthew Weiniger, International Investment Arbitration; Substantive Principles, Oxford 2007, para. 8.116 (Exh. RL-124).

due process of law and accompanied by compensation.[84] The rule set forth in Article 7 of the FIL thus mirrors the international law standards.

824. Without going into detail, the Claimants contend that "Kazakhstan has violated its obligations by direct or alternatively creeping expropriation of Claimants' investments" (Memorial, para. 355).

825. According to the Respondent, in order for CIOC to prevail on either a direct or an indirect expropriation claim, it must establish the elements of expropriation, i.e. (i) an unreasonable substantial deprivation of existing rights; (ii) of a certain duration; and (iii) caused by a sovereign act of the host state (Counter Memorial, para. 1203).

826. Kazakh law, in particular the FIL, does not appear to define the elements of an expropriation and the Claimants have not taken issue with the Respondent's test, which appears in any circumstances correct. Therefore, the Tribunal will apply it to the present case.

ii. Application to the present case

(a) The unreasonable substantial deprivation of existing rights

827. It is the Claimants' position that, at the time of the termination of the Contract, CIOC had made a Commercial Discovery within the meaning of Clauses 1.3 and 10 of the Contract, had the exclusive right under the Contract to proceed to the commercial production phase, and was ready to do so. According to the Claimants, the wrongful termination of the Contract by the Respondent unlawfully expropriated CIOC of its investment and prevented it from moving to commercial production and developing its contractual and rightful activities (Claimants' First Post-Hearing Brief, paras. 385-395; Tr. Day 1, p. 15, line 23 to p. 19, line 4).

828. The Respondent admits that, at the time of the termination of the Contract, CIOC held rights, but only those granted to it under the Contract's exploration phase, as well as a continuing possibility to fulfill the requirements needed to move to the production phase. However, the Respondent disputes that CIOC ever had any vested production rights given that it did not fulfill the necessary requirements to

[84] In support of this rather uncontroversial statement, the Tribunal relies again on the UNCTAD Series on Issues of International Investment Agreements II, Expropriation, United Nations 2012 (Exh. CLA-103), p. 1.

obtain the right to proceed to the production phase, in particular a Commercial Discovery (Counter Memorial, paras. 1220-1224).

829. For the reasons set forth below, the Tribunal agrees that**, at the time of the termination of the Contract, CIOC had not made a Commercial Discovery within the meaning of the Contract** and, thus, had no vested right to proceed to the production stage of the Contract.

830. Clause 1.3 of the Contract defines the term "Commercial Discovery" as follows:

> **Commercial Discovery** – means a discovery within the Contract Area of one or several Deposits (Fields), economically suitable for Production as determined by the Contractor.

831. As was seen above in paragraph 21, Clause 10 of the Contract, entitled Commercial Discovery, further provides as follows:

> 10.1 In the event that the Contractor discovers a Hydrocarbon Deposit which in its sole opinion is economically and technically suitable for Production, it shall immediately inform the Competent Authority and shall within 120 days prepare a report for an estimation of its reserves for submission to the authorised State Agency for confirmation of the reserves of the Deposit.
>
> 10.2 The Exploration Stage can be extended as provided in Section 9.1 for the period the Contractor determines necessary to properly evaluate the Deposit.
>
> 10.3 The authorised State Agency shall, pursuant to the procedure established by the legislation on Subsoil Use, provide a State expert evaluation of the reserves of the Deposit.
>
> 10.4 After confirmation by the authorised State Agency as provided in Section 10.3 above, the Contractor shall within 120 days prepare a feasibility study of the efficiency of the development of the discovered Deposit ("Development Plan") within the framework of the Work Program and shall submit it to Competent Authority.
>
> 10.5 A Commercial Discovery gives the exclusive right to the Contractor to proceed to the Production stage.
>
> 10.6 Upon a Commercial Discovery the Contractor shall be entitled to reimbursement of its expenses in connection with Exploration and shall be reimbursed during Production of the Commercial Discovery in accordance with this Contract and the Legislation of the Republic of Kazakhstan.
>
> 10.7 If, as a result of Exploration, there is no Commercial Discovery, the Contractor shall have no right to reimbursement of its expenses incurred by the Contractor during Exploration. However, the Contractor shall have the right to deduct those expenses against any revenues or income received in connection with activities under this Contract.

832. One central point of contention between the Parties is whether a Commercial Discovery within the meaning of the Contract requires the discovery by CIOC of "new" oil deposits. While the Respondent asserts that this is the case, the Claimants describe this argument as "absurd", arguing that the purpose of the Contract was the exploration or appraisal of known deposits in order to prove the commercial viability of the discoveries made in Soviet times (see Mr. Tiefenthal's testimony at the Hearing in Tr. Day 9, p. 234, lines 8-16).

833. Having considered the Parties' respective arguments in light of the evidence on the record, the Tribunal agrees that a Commercial Discovery requires the discovery of "new oil". Starting with the wording, according to the usual language, which is confirmed in various English language dictionaries, the word "discovery" implies the finding of something for the first time that was not previously known to exist. For instance, according to the Cambridge Dictionary, the verb "to discover" means "to find information, a place, or an object, especially for the first time".[85] Merriam-Webster provides the following definition: "to obtain sight or knowledge of for the first time".[86] And the Oxford Learner's Dictionary states that "to discover" means "to be the first person to become aware that a particular place or thing exists".[87] The Respondent's expert, Dr. Thapar, confirmed that this literal meaning of the word "to discover" also corresponds to the word's meaning in the oil industry (Thapar, para. 75). The Claimants have not convincingly rebutted this allegation.

834. The Tribunal cannot follow the Claimants' argument that this literal interpretation of the word "to discover" would be inconsistent with the terms of the Contract, which defines a Commercial Discovery as "a discovery within the Contract Area of one or several Deposits (Fields), economically suitable for Production as determined by the Contractor". The Claimants emphasize the second part of this definition, arguing that the existence of a Commercial Discovery is determined by the Contractor. The Tribunal disagrees. Rather, the Tribunal agrees with the Respondent's interpretation of Clauses 1.3 and 10.1 of the Contract, according to which the making of a discovery constitutes an objective condition and a preliminary to the option to declare commerciality. By contrast, once such a discovery has been made, the assessment of that discovery's economic suitability for production is subjectively determined by the Contractor.

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[85] http://dictionary.cambridge.org/fr/dictionnaire/anglais/discover.

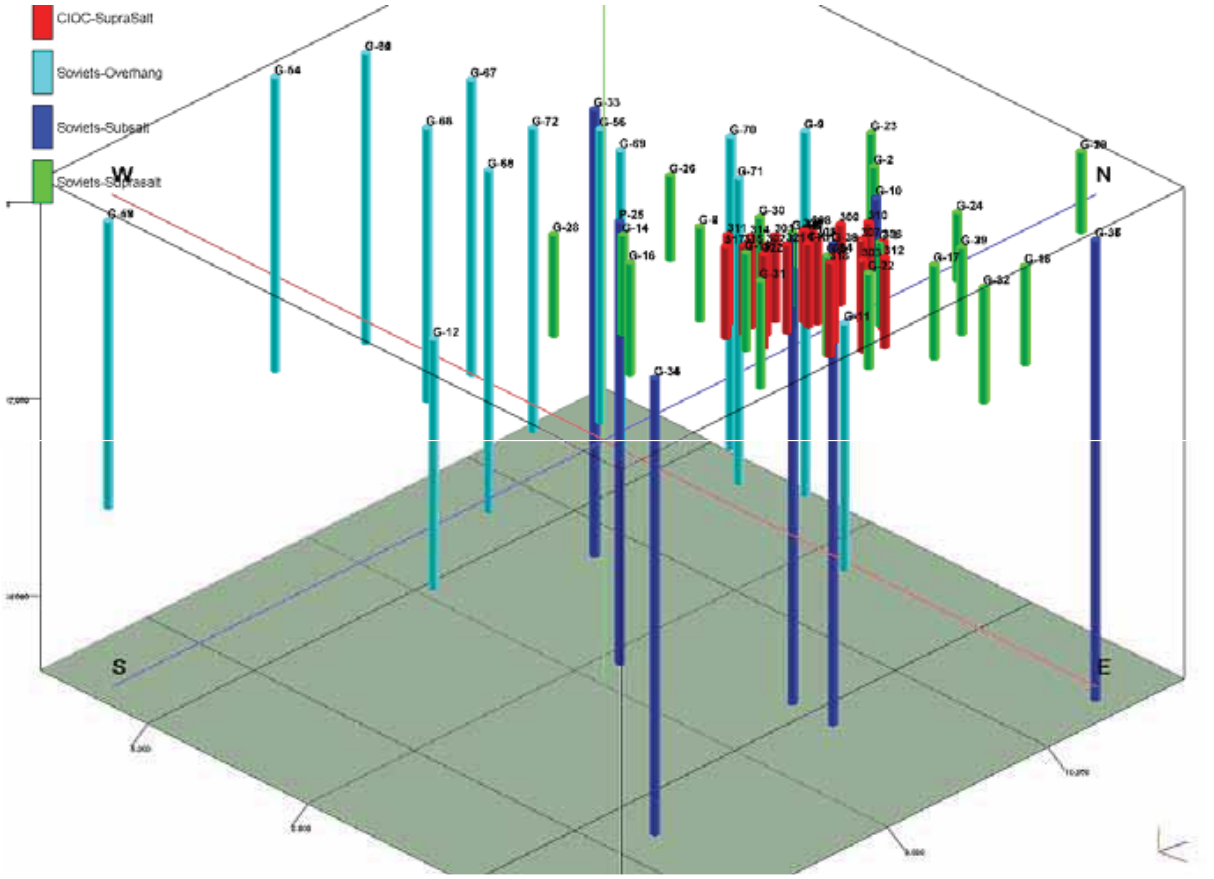
[86] https://www.merriam-webster.com/dictionary/discover.

[87] http://www.oxfordlearnersdictionaries.com/definition/english/discover?q=discover.

835. The Tribunal also is not persuaded by the Claimants' argument that CIOC had "fully explored the supra-salt Karatube Field within the Contract area", that the Caratube field was known to contain oil, and that it would not have been possible for CIOC to discover an unknown deposit in the Caratube field, thus rendering the requirement to discover "new oil" absurd. The Respondent, through its expert, Dr. Thapar, convincingly showed that CIOC did not fully explore the supra-salt Caratube field. In particular, CIOC did not drill any exploratory wells, i.e. a "well drilled to an unexplored depth or in unproven territory, either in search of a new pool of oil or gas or with the expectation of greatly extending the known limits of a field already partly developed" (Exh. MT-5). Moreover, CIOC drilled only within and to the depth of the known deposits, located in a limited portion of the Caratube field. In his expert report, Dr. Thapar pertinently states as follows (paras. 77-78):

> […] CIOC drilled wells in less than 2.28% of the Contract Area, and only into the already known deposits, which had been the most intensively drilled by the Soviets. Mr. Tiefenthal has not identified more reservoirs in the supra-salt than the number of reservoirs previously known from the Soviet times.
>
> A study of CIOC's drilling activity shows that CIOC drilled all its wells in a dense pattern, at about the same depth level, and within the small sub-area of the supra-salt. CIOC's drilling in the supra-salt section was production oriented and not exploration oriented. This limited activity was not designed for making a discovery, and CIOC did not make a discovery there. CIOC produced oil from the same supra-salt reservoirs which were discovered by the Soviets, and this is not called exploration in the oil industry.

836. To illustrate his statements, Dr. Thapar produced the following Figure 5, with the precision that "Figure 5 shows the suprasalt (green), overhang (cyan), and subsalt (blue) wells drilled by the Soviet Union; and suprasalt wells drilled by CIOC in red" (Figure 5 of Dr. Thapar's report, para. 78, p. 27):



837. The Claimants allege that under the MWP (Exh. C-16), CIOC did not have an obligation to drill in other parts of the Contract Area, outside the Caratube field. The Respondent disputes this allegation. Be that as it may, as correctly pointed out by the Respondent, CIOC could have, but did not, drill at another depth in the known deposits or elsewhere in the Caratube field, outside the known deposits. The Respondent observes that the "MWP did not impose any limitation on CIOC with regard to the territory and/or depth of the suprasalt wells it was required to drill within the Karatube field" (Respondent's Reply Post-Hearing Brief, para. 93). The Claimants have not convincingly rebutted the Respondent's arguments, which the Tribunal accepts, especially as it behooves the Claimants to prove that a condition precedent to the emergence of their rights (to declare commerciality) is satisfied.

838. In this regard, it is worth mentioning that TU Zapkaznedra had advised CIOC on several occasions, namely at the end of the years 2004, 2005 and again in 2006, to focus on its exploration obligations, instead of production (Exh. C-111. See also Exhs. C-92 and C-120):

> Analyzing company's work fulfillment under the work programs for previous years (2002-2005), it appeared that production prevails over

> exploration, despite the fact that during the period of pilot exploitation (2002-2006) the company should have focused on geological exploration to create a basis for final evaluation and estimation of field reserves.

839. Furthermore, for the Tribunal, the Claimants cannot argue that their main exploration obligations under the Contract were limited to the supra-salt zones, not to the deep zones, as is allegedly evidenced by the original tender and the first tender offer submitted by CCC. For the Tribunal, there can be no doubt that the subsequent negotiations and the provisions of the Contract agreed upon between the Parties must prevail over any previous tender offers. However, it is undisputed that CIOC had the obligation under the Contract, the MWP and the related AWPs to drill two deep wells, but did not do so. As observed by Dr. Thapar, CIOC did not drill any wells into the overhang and subsalt formations and, therefore, there could not be a discovery in the overhang or in the subsalt formations (Thapar, para. 76).

840. The Tribunal also cannot follow the Claimants' argument that, under the Contract, CIOC had the exclusive right to proceed to commercial production because it had complied with virtually all the steps set forth in Clause 10 of the Contract that are required to commence commercial production, and that the Respondent approved each of these steps. In particular, the Claimants assert that Clause 10.1 of the Contract does not contain a requirement for CIOC to make a formal declaration of a Commercial Discovery. Rather, the Claimants submit that, in conformity with Clause 10.1, CIOC hired a third-party expert, CER, to prepare an estimate of the reserves that CIOC had deemed to be commercially viable, i.e. the CER Reserves Report (Exh. C-159). Pursuant to Clause 10.3 of the Contract, on 29 February 2008, the CER Reserves Report was approved by the competent authority, i.e. the Geology Committee of the MEMR (Exh. C-27). The Claimants further argue that, in conformity with Clause 10.4 of the Contract, CIOC submitted a field development plan in relation to commercial production, i.e. the CER Field Development Plan (Exh. C-84). The Claimants emphasize that the approval of the CER Field Development Plan would have been a simple formality. According to the Claimants, holding in these circumstances that CIOC had not made a Commercial Discovery would amount to having form prevail over substance (Claimants' First Post-Hearing Brief, paras. 389-393).

841. The Tribunal recalls its finding that CIOC did not make a Commercial Discovery within the meaning of the Contract, given that it did not discover any new, previously unknown oil deposits. It is further undisputed that CIOC did not "immediately inform the Competent Authority" of any Commercial Discovery allegedly made (Clause 10.1

of the Contract). While CIOC did indeed submit the CER Reserves Report at an unspecified date in "early 2008", CIOC did not establish that such Report related to a Commercial Discovery. For the Tribunal, CIOC also did not convincingly establish that the Expert Opinion obtained on 29 February 2008 (Exh. C-27) constituted a confirmation and approval of a Commercial Discovery. It is pointed out that, on 29 February 2008, the Contract had already been terminated. The Claimants have submitted that "in March 2008" the CER Field Development Plan was completed and ready to be sent to the MEMR for approval (Memorial, para. 151). However, it is undisputed that the CER Field Development Plan was never submitted, let alone approved. In the circumstances, the question of whether such approval would have been a formality as suggested by the Claimants (but disputed by the Respondent), thus appears of minor importance.

842. In the light of the foregoing, the Tribunal cannot but conclude that, at the time of the termination of the Contract, CIOC had not complied with the requirements under Clause 10 of the Contract necessary to obtain the exclusive right to proceed to the Contract's production phase. In other words, at the time of the termination, CIOC did not have a vested right to proceed to the Contract's production stage. In support of this conclusion, it is worth mentioning that, at the Hearing, both Mr. Antar and Mr. Devincci Hourani stated the obvious that, at the time of the termination of the Contract, CIOC was still in the exploration phase of the Contract and had not moved to commercial production (Tr. Day 5, p. 135, lines 8-13; Tr. Day 4, p. 35, lines 6-9).

843. However, this conclusion does not mean that, at the time of the termination of the Contract, CIOC did not have any vested rights and that such rights were not expropriated by the Respondent. Indeed, the Respondent acknowledges that CIOC held those rights granted to it under the Contract's exploration phase, as well as a continuing possibility to fulfill the requirements needed to move to the production phase. For the reasons set forth below, the Tribunal finds that **the termination of the Contract by the Respondent was unlawful**. By thus terminating the Contract, the Respondent deprived CIOC of its existing rights under the Contract. For instance, at the time of the termination, subject to the MEMR's right to terminate the Contract under certain limited conditions, CIOC had the contractual right, *inter alia*:

> 7.1.1 to carry out Exploration and Production of Hydrocarbons within the Contract Area on an exclusive basis;
>
> […]

> 7.1.3 to have surface access and land use rights necessary for carrying out Exploration and Production operations, which rights shall be procured in accordance with the procedures established by the current legislation of the State;
>
> […]
>
> 7.1.7 to have a priority right to extend the Validity Term of this Contract in accordance with Section 3.4. of this Contract.

844. Under Clause 9.1 of the Contract, CIOC also had the "right to extend the period of Exploration twice with a duration of each period of up to two years in accordance with the Legislation on Subsoil Use". Article 43(1) of the 1999 Subsoil Law specifies that CIOC's right to extend the exploration period of the Contract is conditional upon "the Contractor carr[ying] out the obligations as defined in the Contract work program and annual work programs". This means that CIOC had the right to request an extension of the exploration period and it had the right to obtain such an extension, provided that it was in compliance with its obligations under the Contract and the work programs. Neither the Contract, nor the 1999 Subsoil Law thus affords the Respondent any discretion to grant the extension or not.

845. Accordingly, at the time of the termination, CIOC had the right to perform the Contract until May 2009 (subject to the conditions of termination and suspension set forth in Clause 29 of the Contract) and, if necessary, to request a second extension of the exploration period until May 2011, in order to make a Commercial Discovery and obtain the exclusive right to proceed to commercial production.

846. For the reasons set forth below, for a majority of the Tribunal, the deprivation of these rights constitutes an unlawful, unreasonable and substantial deprivation of CIOC's rights existing at the time of the termination.

847. First of all, the Tribunal rejects the Respondent's argument that CIOC obtained the first extension of the Contract based upon its **misrepresentation** that the 3D seismic study had been successfully completed and that it was in a position to begin its key exploration obligation of drilling four deep wells (Counter Memorial, paras. 409 et seq.).

848. The Tribunal is impressed by the fact that the Revised Work Program for the extension period 2007-2009 no longer lists works related to the 3D seismic study as a "major objective" for the extension period.[88] However, the Tribunal cannot follow

[88] See *supra* para. 57.

the Respondent's argument that the Revised Work Program is evidence of CIOC's alleged misrepresentation in April 2007 that the 3D seismic study was completed. Rather, the Revised Work Program states that the "[m]ain stage" of the 3D seismic study is completed.[89] It also mentions that "the following works should be still fulfilled: […] processing and interpretation of CDP-3D seismic survey".[90] Having considered the Parties' respective arguments in light of the evidence on the record, the Tribunal finds that the Respondent has not sufficiently and convincingly established its allegations that CIOC deliberately misrepresented the status of the 3D seismic study and "carefully concealed" this misrepresentation in order to unduly procure the extension of the Contract, that the Respondent relied on this misrepresentation when granting the extension, and that, "given the importance of the 3D study and CIOC's exploration obligations under the Contract, the MEMR would never have granted the extension" but for the alleged misrepresentation. To the contrary, the Respondent's allegations of misrepresentation appear to be inconsistent with the evidence and the facts on the record.

849. For instance, the Respondent argues that, on 1 November 2007, "i.e., eight months after the extension was approved and three months after it was finalized, the Republic finally learned that the 3D seismic study had not been completed prior to the finalization of the extension and was moreover seriously flawed and could not be used to determine the locations of the deep wells. TU Zapkaznedra, like CIOC and Mr. Vasiliev, heavily criticized the 3D study and realized that it failed to meet its objectives since the 3D study did not recommend any drilling locations for the deep wells. As a result, TU Zapkaznedra required that the 3D study be corrected" (Counter Memorial, para. 432). In these circumstances and in light of the alleged central importance of the 3D study and CIOC's exploration obligations under the Contract, it is not convincing to argue that the Respondent could not and should not have raised the issue of misrepresentation at the time.

850. It is worth underlining that the 3D seismic report was submitted to the Respondent by CIOC and included as attachments the comments and criticisms thereon expressed by CIOC's R&D board (dated 3 September 2007) and Mr. Vasiliev (dated 24 September 2007) (Exh. C-117). However, there is no allegation or evidence that the Respondent criticized CIOC for not having disclosed these criticisms earlier. More importantly, there is no allegation or evidence that the Respondent at the time

[89] Exh. C-26, p. 100.002.455 (see *supra* para. 57).

[90] Exh. C-26, p. 100.002.451.

raised any concerns or otherwise put into question the validity of the recently finalized extension of the Contract's exploration period, namely based on the fact that the 3D seismic study was allegedly "seriously flawed" and unfit for its purposes, contrary to what the Respondent had allegedly been made to believe. Rather, despite the alleged shortcomings, some of which, if perhaps not all, are referred to in the 1 November 2007 approval of the 3D seismic study, the MEMR decided to accept it, while at the same time stating that the study required corrections and reformatting (Exh. R-28).

851. For a majority of the Tribunal, the Respondent's argument according to which it never "approved" the 3D seismic study but only "accepted" it "for the purposes of submission to the archives" is unconvincing. The Minutes of 1 November 2007 regarding the meeting of the Scientific and Technical Council (STC) of the TU Zapkaznedra state that "[t]he 'Report on the Results of MOGT-3D Seismic Survey Performed in the Caratube Field Contract Area in 2006 – 2007' shall be accepted" (Exh. R-28). Apart from Mr. Ongarbaev's Witness Statement (para. 150), there is no indication that such acceptance could not be understood as an "approval" but was merely limited for the purposes of submitting the 3D seismic study to the archives. To the contrary, according to leading English language dictionaries, the word "to accept" may be understood as meaning "to give admittance or approval to"[91], "to agree to or approve of something"[92] or "to consider something or someone as satisfactory"[93]. The Respondent has failed to convincingly establish that a different meaning should be given to the word "accept" in the Minutes of 1 November 2007. The Tribunal also is not persuaded by the Respondent's argument that it terminated the Contract "*inter alia* precisely for CIOC's failure to carry out a usable 3D study" (Respondent's Reply Post-Hearing Brief, para. 68). Neither the Termination Ordinance dated 30 January 2008 (Exh. C-44), nor the Termination Notice dated 1 February 2008 (Exh. C-45) refer to CIOC's failure to submit a usable 3D seismic study as a ground for the termination of the Contract, nor do they identify any other specific breach of the Contract. Moreover, neither document raises the issue of misrepresentation or questions the validity of the extension of the Contract's exploration period.

[91] https://www.merriam-webster.com/dictionary/accept.

[92] http://www.oxfordlearnersdictionaries.com/definition/english/accept?q=accept.

[93] http://dictionary.cambridge.org/fr/dictionnaire/anglais/accept.

852. Finally, the Tribunal is not persuaded by the Respondent's explication that it could not have become aware of CIOC's misrepresentation when CIOC first submitted the 3D seismic report to the Respondent in November 2007. According to the Respondent, "TU Zapkaznedra only had access to the 3D Report for a short period of time" and CIOC's misrepresentation only became apparent "very late during the Caratube I Arbitration proceedings, at the time of its Rejoinder" when the Respondent managed to obtain a copy of the report directly from Saratov and was able to study it carefully along with its attachments (Respondent's Reply Post-Hearing Brief, para. 68; Tr. Day 3, p. 13, line 14 to p. 14, line 8). Even admitting that the Respondent briefly raised the misrepresentation issue in the *Caratube I* arbitration, it appears undisputed that it made a serious argument on this basis for the first time in the present proceedings.

853. In the opinion of the Tribunal, in the circumstances and in light of the evidence on the record, the Respondent's misrepresentation argument in this arbitration is belated in view of the facts as recalled in particular at paragraphs 851 and 852. More generally, the Tribunal also finds that the facts and the evidence on the record contradict the Respondent's misrepresentation argument and the Tribunal thus cannot but reject it, the Respondent having failed to meet its burden of proof in this regard.

854. Having reached the conclusion that the extension of the Contract was not unduly procured by CIOC through misrepresentation, there is thus no reason to question the extension's validity. As a result, the question of the lawfulness of the termination of the Contract in January 2008 is posed. As already indicated above, the Tribunal considers that this termination was unlawful.

855. Regarding **the law governing specifically the question of the lawfulness of the termination of the Contract**, in addition to the expropriation test outlined above at paragraphs 818 et seq., the Tribunal will refer to the relevant provisions of the Contract and Kazakh law, in conformity with Clause 26 of the Contract (see also *supra* paragraphs 281 et seq.).

856. In particular, regarding the termination of the Contract, Clause 29 of the Contract provides in relevant part as follows:

> 29.5 The Contract shall be terminated ahead of schedule only in the following cases:

- if the Contractor refuses to eliminate the reasons which caused the decision to suspend Exploration and Production, or if it does not eliminate such reasons within the time period sufficient for their elimination.

- if the Contractor fails to commence Petroleum Operations within the terms established by the Contract and does not provide a reasonable explanation;

- if it is impossible to eliminate the reasons which caused the suspension of Petroleum Operations, related to a threat to health and life of people.

-if the Contractor substantially violates the obligations established by the Contract or Work Program;

- if the Contractor is recognised as bankrupt according to the current legislation of the State except for the case when the right of Subsoil use is the subject of a pledge according to the current legislation of the State.

29.6 If either Party to the Contract commits a material breach of the Contract, the other Party to the Contract shall have the right to demand that such breach be remedied within a reasonable specified period of time. If such breach is not remedied within such period of time, the complaining Party shall have the right to terminate this Contract by giving ninety (90) days written notice to the defaulting Party. However, if the defaulting Party contests such material breach of the Contract no termination shall occur unless an unremedied material breach shall have been judged by the final award of arbitration in accordance with Article 27 of this Contract.

29.7 The effect of this Contract may be terminated before the expiry of its Validity Term on the initiative of the Contractor at any time and on any ground, including ahead-of-schedule relinquishment of the whole Contract Area.

29.8 The Contract shall terminate for the reasons specified in Section 29.5. of the Contract, 60 days after the Contractor receives a written notice from the Competent Authority stating that the Contract is terminated ahead of time based on the decision of the Court.

29.9 The Parties shall not be exempt from performing current obligations which are already due upon termination of this Contract and which remain unfulfilled, upon termination of this Contract. Upon termination of this Contract for any reason, including at the initiative of the Contractor as described in Section 29.7, the Contractor shall not be liable for any obligation which is not yet due, including any unexpended portion of its Work Program.

29.10 The authorised State Agency on emergencies shall have the right to submit proposals to the Competent Authority to suspend the Contract in the event of repeated violations by the Contractor of norms and rules of safe conduct of work.

857. The Respondent, through its legal expert, Prof. Ilyasova, has argued that Article 45-2 of the Subsoil Law (both in its version of 1999, in force at the time of the execution of the Contract, and in its version of 2004, in force at the time of the termination of the Contract) is of mandatory nature and grants the Competent Authority, i.e. the

MEMR, a non-waivable right to terminate a contract, notwithstanding the existence of any contradictory contractual provisions (Counter Memorial, paras. 776-787).

858. Articles 45-2 and 46 of the 1999 Subsoil Law (Exh. CLA-43) provide in relevant part as follows:

> Article 45-2 Amendment and termination of the Contract
>
> 1. The Competent Authority (an Authorized State Body) shall have the right to unilaterally terminate the Contract if:
>
> […]
>
> 4) the Contractor substantially violates obligations set forth by the Contractor or work programs;
>
> […]
>
> 2. The Competent Authority (an Authorized State Body) shall be entitled, prior to making the decision on termination of the Contract, to require immediate termination of Subsoil Use Operations by giving a notice to a Contractor and the Contractor shall be obligated to honor such requirement.
>
> Article 46. Amendments to and Termination of Contracts
>
> […]
>
> 2. The parties may terminate the Contract only on the grounds and according to the procedure stipulated in the legislative acts and/or in the Contract.
>
> 3. The parties shall not be exempt from satisfaction of the current obligations, which are outstanding by the time of receiving a notice of termination of the Contract.

859. Furthermore, Article 70 of the 1999 Subsoil Law reads as follows:

> Article 70. Supervision of Compliance of Subsoil Users with the Terms of the Contract
>
> When a Subsoil User unreasonably violates the deadlines for beginning of Exploration or Production which are established in sub-paragraph 3 of paragraph 1 of Article 63 of this Decree, or carries out Production at a level which is inadequate to the geological potential of the Deposit, the Competent Authority (an Authorized State Body) in its written notice may indicate to the Subsoil User the necessity to begin to perform Exploration or Production or to adopt within a certain timeframe such remedies that would allow Production in the volumes based on Good Deposit Development Practice.
>
> In case of failure to comply with the requirements of the notice within the established period, the Competent Authority (an Authorized State Body) shall have the right to terminate the Contract pursuant to Article 45-2 of the present Decree.

860. These provisions, in their version of 2004, read as follows (Exh. CLA-44):

> Article 45-2 Amendment and termination of the Contract
>
> 1. The Competent Authority shall have the right to unilaterally terminate the Contract if:
>
> […]
>
> 4) the Contractor substantially violates obligations set forth by the Contract or work programs;
>
> […]
>
> 2. The Competent Authority shall be entitled, prior to making the decision on termination of the Contract, to require immediate termination of Subsoil Use Operations by giving a notice to a Contractor and the Contractor shall be obligated to honor such requirement.
>
> 3. The parties may terminate validity or amend contractual provisions only on the grounds and in accordance with the procedure provided for by the Republic of Kazakhstan legislation and the contract.
>
> 4. The Parties shall not be exempt from the implementation of current obligations that were left unperformed by the time of the contract validity termination or amendment of its provisions.
>
> 5. Termination of validity of a contract shall not release the subsoil user from the implementation of obligations associated with the restoration of the contractual territory to a condition which is safe for public health and lives and for the environment, in accordance with the liquidation project approved in accordance with the Republic of Kazakhstan legislation.
>
> [There is no Article 46 in the 2004 Subsoil Law]
>
> Article 70. Supervision of Compliance of Subsoil Users with the Terms of the Contract
>
> The Competent authority shall perform control of compliance with the contract provisions including the work program by the subsoil user. In case of violation of the contract provisions the Competent Authority shall have the right to notify in writing on the necessity to eliminate such violation.
>
> In case of failure to comply with the requirements of the notice within the established period, the Competent Authority shall have the right to terminate the Contract pursuant to Article 45-2 of the present Law.
>
> Article 70-1. The Control and Supervision of Activity of the Subsoil User by the State Authorities
>
> The control and supervision of activities of a subsoil user, except for the competent body and the authorised body in the sphere of use and protection of subsoil, shall also be carried out by other state bodies within the bounds of their authority as established by the laws of the Republic of Kazakhstan.

861. The Parties disagree as to which of the above-mentioned versions of the Subsoil Law is applicable. The Respondent relies on the 2004 Subsoil Law, arguing that both the 1999 and the 2004 Subsoil Law equally entitle the Respondent to terminate the Contract. The 2004 Subsoil Law did not deteriorate CIOC's position as compared to the 1999 Subsoil Law (Counter Memorial, paras. 789 seq. and paras. 854-865). By contrast, it is the Claimants' position that the 1999 Subsoil Law is applicable based on the stabilizing clause in Clause 28.2 of the Contract, given that Article 70 of the 2004 Subsoil Law deteriorated CIOC's position in that it granted the Respondent "a sweeping right to terminate subsoil contracts following any violation, upon failure to conform to notice", while Article 70 of the 1999 Subsoil Law allowed termination on very limited grounds only (Memorial, para. 294; Claimants' First Post-Hearing Brief, para. 302).

862. In the opinion of the Tribunal, based on its wording, Article 70 of the 2004 Subsoil Law does indeed appear to grant the Respondent broader rights to terminate the Contract than Article 70 of the 1999 Subsoil Law and, thus, it appears to deteriorate CIOC's position. The Respondent would have no reason to attempt relying on the 2004 version rather than the version of 1999 and thus must have some advantage, which in turn should be equipoise to saying that the Claimants' position would suffer some deterioration. The Tribunal would therefore be minded to agree with the Claimants that the 1999 Subsoil Law should apply, based on Clause 28.2 of the Contract. This said, for the Tribunal the question ultimately does not call for an answer as, in the opinion of a majority, the termination of the Contract by the Respondent did not comply with the Subsoil Law in either of its 1999 and 2004 versions.

863. The Parties agree that the reference in Article 45-2.1.4 of the 1999/2004 Subsoil Law to a substantial violation of the obligations under the contract and work programs refers to the notion of **"material breach"**. However, neither the Contract, nor the 1999/2004 Subsoil Law defines this term. The Parties therefore refer to Article 401(2) of the Kazakh Civil Code, which reads in relevant as follows (Exh. RL-43):

> A breach of the agreement by one of the parties shall be recognized as material if it entails for the other party such damage that it to a substantial degree loses something on which it had the right to count when concluding the agreement. […]

864. The Parties agree that this means that "a breach is deemed to be a material breach when it causes the non-breaching party to lose something to a substantial degree

that it had the right to expect to gain when it entered into the contract" (Counter Memorial, para. 797. See also Memorial, para. 342). Prof. Ilyasova further explains that "[e]ven if a breach caused a minor damage, such breach may be material, if the amount of such damage is considerable in correlation with what was expected by the other party when concluding the contract" and "[w]hen determining whether a material breach was committed by a contractor, it is necessary to consider what the State expected to gain and what interests it pursued when it concluded a specific contract" (Counter Memorial, para. 798). Finally, the Respondent submits that a breach of the MWP and of the AWPs also constitutes a breach of the Contract in conformity with Clause 1.5 of the Contract.

865. The Claimants do not appear to take issue with the Respondent's specifications regarding the term "material breach", although they dispute that CIOC committed a material breach or that the Respondent terminated the Contract due to the existence of a material breach.

866. Having considered the Parties' respective arguments and the evidence on the record, the Tribunal agrees that CIOC failed to comply with some of its contractual obligations under the Contract. For instance, the fact that the 3D seismic study submitted by CIOC contained several shortcomings does not appear to be disputed.[94]

867. However, the question is whether CIOC committed any "material breaches" of the Contract and whether, in the circumstances of the present case, the Respondent could rely on them to justify the termination of the Contract on 30 January 2008. If so, the question then is whether in terminating the Contract the Respondent complied with the applicable procedural requirements.

868. As was seen above in paragraphs 846 et seq., the Tribunal finds that the extension of the Contract was validly obtained by CIOC and that there is no reason to question its validity. For the Tribunal, it follows that, in principle, the Respondent could terminate the Contract based on events postdating that extension, in particular on material breaches only in so far as such material breaches were committed (i) after

[94] At the Hearing, the Claimants' expert, Mr. Tiefenthal, acknowledged the existence of shortcomings with respect to the 3D seismic study, as well as the fact that the study had been criticised by certain experts who had reviewed the study at the end of 2007. According to Mr. Tiefenthal, "[…] the worst grading came from this independent expert from Aral Petroleum, who called it a grade C" (Tr. Day 9, p. 185, lines 8-14). Indeed, the Tribunal has noted that, according to Aral Petroleum "[t]he report in general has been prepared per the 80's quality standards and can be only graded C" (Exh. C-117, p. 228).

the extension of the Contract, in violation of the extended deadlines set forth in the "post-extension" work programs and (ii) in case of "pre-extension" obligations under the MWP and the AWPs, provided that such obligations had not been extended. This general premise does not appear to be disputed by the Parties.

869. Concerning the first category of alleged **material breaches of "post-extension" obligations**, the Respondent argues that CIOC was in material breach of its obligations under the post-extension work programs, namely the 2007 Revised AWP (Exh. C-94), in particular its **financial obligations under the 2007 Revised AWP** (Respondent's First Post-Hearing Brief, paras. 182-183. See also Counter Memorial, paras. 504-509).

870. The Claimants dispute this allegation, arguing that "[p]ursuant to the Revised 2007 AWP, [CIOC] was to drill two wells before the end of 2007 in the supra-salt formations. As confirmed by the 2008 AWP, which was approved by the TU Zapkaznedra in December 2007, [CIOC] drilled these two shallow wells before the end of the year 2007 and had thus fulfilled the Revised 2007 AWP and the Revised MWP. [CIOC] had no other commitments for the time period between May 27 and December 31, 2007. Nor could it have breached the 2008 AWP as the Contract was terminated as early as February 2008. Therefore, [CIOC] did not breach any obligations, be it under the Revised MWP or the AWP between May 27, 2007 and the Notice of Termination of the Contract" (Claimants' First Post-Hearing Brief, para. 330). With respect to CIOC's financial obligations in particular, the Claimants further submit that "it simply does not make sense to allege that compliance with exploration obligations using a lower budget than anticipated constitutes a breach of Contract […]." (Claimants' Reply Post-Hearing Brief, para. 174).

871. Having considered the Parties' respective arguments in light of the evidence on the record, the Tribunal finds that, even admitting that CIOC had indeed breached its financial obligations under the 2007 Revised AWP, the Respondent has not established that such breach was "material" within the meaning provided by the Respondent and would thus have justified the termination of the Contract.

872. In particular, the Respondent has argued that CIOC "significantly breached" its financial obligations under the 2007 Revised AWP by performing only 65% of its financial obligations, 39% of its investment obligations, and only 13.8% of other works in geological prospecting. However, pursuant to the Respondent's definition, when assessing whether a breach is material, "it is necessary to consider what the

State expected to gain and what interests it pursued when it concluded a specific contract". As emphasized by the Claimants, CIOC performed its exploration obligation under the 2007 Revised AWP, namely to drill two shallow wells by the end of the year, and it did so using a lower budget than anticipated. The Respondent observes, however, that CIOC's costly obligation to drill two deep wells must be accounted for. But even so, the Respondent does not specify whether and to what extent this obligation would have to be performed, and hence accounted for, by the end of the year 2007.

873. More specifically, the Respondent does not establish that CIOC's compliance before the end of the year 2007 with its financial obligations under the 2007 Revised AWP was material in light of the Respondent's expectations and interests and could not have been usefully rolled over into the year 2008 via the 2008 AWP. This applies even more so in that the extension of the Contract had been finalized with the Respondent's approval only a few months earlier.

874. In the same vein, assuming that the CIOC's financial obligations under the 2007 Revised AWP were validly rolled over by TU Zapkaznedra by means of the 2008 AWP, the Respondent has not shown that the alleged breach by CIOC of its financial obligations under the 2007 Revised AWP constituted a violation of the Extended MWP, entitling the MEMR to rely on such violation of the Extended MWP in order to terminate the Contract.

875. In addition to the foregoing, a majority of the Tribunal finds that the Respondent, in any event, did not adequately notify CIOC of the alleged "material breach" of the latter's financial obligations under the 2007 Revised AWP. Under Article 70 of the 1999/2004 Subsoil Law, the MEMR must notify the contractor in writing of the existence of a certain material breach and set a time limit within which such breach must be remedied, failing which the contract may be terminated pursuant to Article 45-2 of the Subsoil Law. Clause 29.6 of the Contract specifies that the time limit for remedying the alleged material breach must be "reasonable". Accordingly, the MEMR's notice must not only allow the contractor to identify the relevant breach, but also provide a sufficient amount of time to remedy such breach, taking into consideration that a failure to do so may have serious consequences for the contractor, i.e. the termination of an oil exploration and production contract requiring substantial investments and risks on the part of the contractor. In the opinion of the Tribunal, the notice requirement thus cannot be interpreted lightly.

876. It is true that the MEMR, on 3 December 2007, sent a Notice of Breach to CIOC, advising that "according to the data presented in the Report of fulfilment of license/contract terms by subsoil users (form 2-LKU), you are in violation of your obligations under [the] Contract […]". The Notice further directed CIOC to remedy the breaches of Contract "[w]ithin one month of receipt of the present notice" and stated that "[i]n event of your failure to fulfil the requirements of the present notice within the allowed time, the Competent Authority will take the steps to terminate the Contract as provided for by the legislation of the Republic of Kazakhstan" (Exh. C-41). However, this Notice of Breach did not identify any particular breach.

877. According to the Respondent, there was no need to identify any particular breach, given that the Notice of Breach was based on the LKU Reports completed and submitted by CIOC, and CIOC thus was well aware of its breaches (see generally, Counter Memorial, paras. 463 et seq. and the Respondent's First Post-Hearing Brief, para. 188). However, insofar as this argument would even be persuasive as a general proposition given the seriousness of a notice of breach, especially if it is possibly the founding stone for a termination of contract, this does not appear adequate in the circumstances of the present case, given that the MEMR had only one week earlier, on 27 November 2007, authorized CIOC to resume operations under the Contract (Exh. C-148). While the Notice of Resumed Operations also listed some alleged breaches of the Contract, this list did not include an alleged material breach of CIOC's financial obligations under the 2007 Revised AWP.

878. A majority of the Tribunal cannot follow the Respondent's argument that the sending of seemingly contradictory notices on 27 November 2007 and 3 December 2007 had nothing "suspicious" given that the Notice of 3 December 2007 was a standard measure sent to all underperforming contractors (Respondent's First Post-Hearing Brief, para. 213). For a majority of the Tribunal, CIOC had good reasons to be "suspicious" in circumstances where, shortly after the finalization of the extension of the Contract by the MEMR, it received within weeks from the same authority a notice of termination, followed by a notice of resumed operations, followed by a notice of breach, without specifically identifying any alleged breach, let alone a "material breach".

879. In addition to the foregoing, it is also worth mentioning that, on 7 December 2007, TU Zapkaznedra drew CIOC's attention to alleged breaches of the latter's financial obligations for the year 2007 and indicated that the "Aktobe Regional Inspectorate For Geology And Subsoil Use reserves the right to take appropriate measures in

accordance with the legislation of the Republic of Kazakhstan" (Exh. R-49). However, shortly thereafter, on 29 December 2007, TU Zapkaznedra approved the 2008 AWP, rolling over CIOC's non-performed obligations to the year 2008 (Exh. C-43).

880. Neither the Ordinance of Termination dated 30 January 2008 (Exh. C-44), nor the Notice of Termination of the Contract dated 1 February 2008 (Exh. C-45) specified the particular material breach on the basis of which the Contract was terminated.

881. Based on the above, a majority of the Tribunal thus finds that the Respondent has not established that CIOC's alleged breach of its post-extension financial obligations under the 2007 Revised AWP constituted a "material breach" justifying the termination of the Contract. One could attempt to conjecture and make inferences about the reasons which led the Respondent not to point to any specific material breach; it is unnecessary and, in any event, the Respondent has not established that it sufficiently and adequately notified CIOC of this alleged breach before terminating the Contract.

882. Within the second category of **pre-extension obligations under the MWP and the AWPs**, which allegedly had not been extended, the Respondent lists the obligation to complete a 3D seismic study and CIOC's trial production obligations.

883. Regarding the alleged breach by CIOC of its **trial production obligations**, the Respondent submits that CIOC had to complete such obligations by 31 December 2007 and that its failure to do so constituted a material breach and led to the termination of the Contract (Counter Memorial, paras. 223 et seq. and para. 764; Respondent's First Post-Hearing Brief, para. 177).

884. By contrast, the Claimants contest that CIOC was in breach of its trial production obligations, arguing that by the end of the year 2007 it "had completed its pilot production program, achieving all necessary technical targets, as confirmed by the audit conducted by Gorniy Economic Consulting, submitted to the MEMR and successfully defended, and CER used this data to prepare its Reserves Report". The Claimants further observe that "while [CIOC]'s 2008 AWP did include a forecast of oil production for 2008, TU Zapkaznedra actually excluded this parameter from the Work Program […]. In other words, the forecast simply showed that [CIOC] did not wish to suspend activity on the wells while waiting to start production on a commercial scale, which is common practice in the oil industry" (Claimants' Reply Post-Hearing Brief, para. 168).

885. Having considered the Parties' respective arguments and the evidence on the record, a majority of the Tribunal finds that, even admitting the Respondent's allegation that CIOC was in breach of its obligations with respect to trial production, the Respondent has not sufficiently and convincingly established that such alleged breach constituted a material breach, justifying the termination of the Contract. Furthermore, for a majority of the Tribunal, the Respondent, in any event, has not established that it adequately notified CIOC of this alleged material breach before terminating the Contract.

886. On the facts and according to the record, on 20 October 2006, the CDC extended the trial production program until 31 December 2007 (see Exh. C-120). At this time, the issue of the extension of the Contract's exploration period had not yet arisen, given that Mr. Devincci Hourani requested the extension only one month later by letter dated 27 November 2006 (Exh. C-21). There is no dispute that the request for the extension of the exploration period was granted and that the corresponding Amendment No. 3 to the Contract was adopted on 27 July 2007. While it is true that the Extended MWP continued to provide a deadline until 31 December 2007 for the trial production program (Exh. C-26), one may question whether, at the time when the Extended MWP was adopted, i.e. on 23 April 2007, the question of an extension of the trial production program beyond 31 December 2007 was posed.

887. Be that as it may, one may simply note that Amendment No. 3 to the Contract extended the Contract's exploration period until 27 May 2009, pursuant to Clause 9 of the Contract. The trial production program was part of the Contract's exploration period. For a majority of the Tribunal, there appears to be no indication that the trial production program would not have been covered by the extension of the exploration period. Therefore, on 31 December 2007, CIOC was still within the exploration period's overall timeframe.

888. Moreover, in the opinion of a majority of the Tribunal, the Claimants have sufficiently established that the AWPs could modify the obligations set forth in the MWP in order to adjust and align the Contractor's obligations with the reality on the ground. Regarding in particular CIOC's obligations with respect to trial production, this appears to have been done before: while the initial MWP provided for trial production during the first year, the term for the trial production program was extended twice, until 2006 and, thereafter, until 31 December 2007. The extensions and amendments of CIOC's obligations in matters of trial production were set forth in AWPs (see, e.g., Exhs. C-20 and C-93). It is recalled in this regard that, at the

time when the trial production program was extended until the end of 2007, the extension of the initial 5-year term of the Contract had not yet been granted, and the AWP thus went beyond the MWP. By contrast, when the 2008 AWP was approved on 29 December 2007, the Contract's exploration period had already been extended until 27 May 2009.

889. For a majority of the Tribunal, it follows from the foregoing that the fact that CIOC had included a forecast of oil production for 2008 in the 2008 AWP does not show that CIOC was in material breach of its trial production obligations under the Contract. No such allegation of breach or criticism emerges from the Minutes of the meeting of TU Zapkaznedra dated 29 December 2007. To the contrary, these Minutes state that "[t]he volumes of production and sales of oil shall be specified after approval of the "Field development process flow chart" (Exh. C-43, p. 100.001.755). The fact that, prior to the extension of the Contract, in October 2006, CIOC was fined by the Ministry of Environmental Protection and ordered to suspend trial production for alleged deviations from and violations of environmental regulations and environmental protection legislation (see Exhs. R-39 to R-42) cannot establish (in particular given that the fine - not to mention the breach causing it - precedes the termination by over one year) a material breach of CIOC's trial production obligations justifying the termination of the Contract on 30 January 2008.

890. In any event, a majority of the Tribunal finds that the Respondent did not adequately notify CIOC of the alleged material breach of its trial production obligations before terminating the Contract. Contrary to the Respondent's allegation, the Tribunal does not find that the CDC "strongly criticized CIOC's performance in matters of trial production" in the Minutes of its meeting of 20 October 2006. Noting a "significant backlog" with respect to test production, the CDC then moved to extend the trial production program until 31 December 2007 (Exh. C-113).

891. In the Notice of Breach of Obligations dated 25 March 2007 (Exh. C-37; R-48), the MEMR notified CIOC of several breaches of the Contract and requested the latter to remedy such breaches within one month, failing which "the Competent Authority may unilaterally dissolve the Contract […]". The Tribunal recalls that it is highly disputed between the Parties whether this Notice of Breach was sent and received by CIOC at the time, a fact which the Claimants deny.

892. The Respondent has submitted evidence, for instance a page of the logbook of the MEMR of 25 March 2007 and CIOC's signed acknowledgment of receipt of 28

March 2007, in support of its position that the 25 March 2007 Notice was indeed sent and received by CIOC (Exhs. R-186; R-57. See also Counter Memorial, paras. 895 et seq; Respondent's First Post-Hearing Brief, para. 189). However, in the MEMR's letter to the Aktobe Prosecutor's Office dated 22 November 2007, it was acknowledged that there was no precise information as to who had taken receipt of the Notice, which is why the MEMR decided to re-send a copy of the Notice of Breach to CIOC on 24 September 2007 (Exh. C-36).

893. The Tribunal finds that the Claimants have not sufficiently and convincingly established their allegation that the 25 March 2007 Notice was "a *post facto* concoction, manufactured upon receipt of the Prosecutor's instruction to terminate [CIOC] and in an attempt to discover a justification for the termination of [CIOC's] Contract" (Claimants' First Post-Hearing Brief, para. 248). At the same time, the Tribunal must wonder why neither the Respondent, nor CIOC ever made any reference to this Notice in their correspondence between 25 March 2007 and 24 September 2007. CIOC did not respond to the 25 March 2007 Notice before 3 October 2007, and the Respondent did not react to CIOC's failure to respond. This silence regarding the 25 March 2007 Notice is even more striking in light of the fact that the Parties discussed and agreed on the extension of the Contract in the months from November 2006 until July 2007. The Tribunal is not persuaded by either Party's explanation, be it the Claimants' argument regarding a *post facto* concoction, or the Respondent's explanation of CIOC not wanting to "rock the boat" during the extension process and the Respondent not having an alarm system in place to follow-up unanswered notices.

894. For a majority of the Tribunal, the question of whether the 25 March 2007 Notice constituted an adequate notice of the alleged material breaches and whether or not it was properly sent and received as alleged by the Respondent can ultimately be left open. Even admitting that the 25 March 2007 Notice had been sent as alleged by the Respondent, even admitting further that CIOC did receive it, which is more uncertain and that the Respondent should establish, the extension of the Contract was repeatedly approved at various stages during a lengthy approval process, namely on 23 April 2007 (Exh. C-23), 6 June 2007 (Exh. C-24), on 29 June 2007 (Exh. C-232), and ultimately confirmed in Amendment No. 3 to the Contract dated 27 July 2007. A new working program was thus adopted, detailing CIOC's obligations under the Contract's extended exploration period. In these circumstances, a majority of the Tribunal finds that the Respondent is estopped from

relying on and/or waived its allegations of breach contained in the 25 March 2007 Notice with respect to CIOC's obligations that were extended by means of the extension of the Contract's exploration period. As was seen above in paragraph 887, a majority of the Tribunal finds that the trial production program was indeed covered by the extension of the exploration period. And even if the Extended MWP provided a deadline until 31 December 2007 for the trial production program, the subsequent AWP (namely the 2008 AWP) could modify this obligation in order to adjust and align CIOC's obligations with the reality on the ground.

895. As stated above in paragraph 892, on 24 September 2007 the MEMR re-sent the 25 March 2007 Notice to CIOC, giving the latter one month to remedy the alleged breaches. By letter dated 3 October 2007, CIOC responded to the allegations of breach, stating *inter alia* that it had not previously received the 25 March 2007 Notice and expressing its surprise at receiving this Notice in September 2007, despite the earlier extension of the Contract and the adoption of the Extended MWP (Exh. C-39. See also Exh. C-146). Concerning in particular "your question on volume production according to the plan at the trial exploration stage", CIOC explained that the trial production obligations in the initial work programs "did not correspond to the actual situation". CIOC further stated that "the annual recommendations (included in the Minutes of the Territorial Directorate ZapKazNedra) pointed at the inadmissibility of increasing volumes of oil output in the trial exploitation stage, which we have been observing". In this regard, the Tribunal recalls that the Respondent had also on several previous occasions directed CIOC to not focus on the production of oil, but on exploration (see *supra*, para. 838). For a majority of the Tribunal, the Respondent's argument that CIOC committed a material breach of its trial production obligations under the Contract by not having produced more oil thus appears contradictory.[95]

896. With reference to CIOC's explanations of 3 October 2007, the MEMR – which had in the meantime sent a Notice of immediate termination of operations to CIOC on 1 October 2007 (Exh. C-38) – notified to CIOC its Notice of Resumed Operations dated 27 November 2007 (Exh. C-148). While the Notice of Resumed Operations listed a number of breaches, including with respect to the "[t]erms of the Work Program", and requested CIOC to remedy such breaches within one month from the date of the receipt of the Notice, it did not identify any individual breaches. Moreover, there is no reaction or criticism with respect to the explanations given by

[95] The Tribunal is aware that trial production was part of the Contract's exploration period.

CIOC in its letter of 3 October 2007, or some other indication that some or all of these explanations had been found to be insufficient. The MEMR's Notice of non-performance of obligations dated 3 December 2007 (Exh. C-41) also did not further identify any individual breaches, including with respect to CIOC's trial production obligations.

897. Finally, neither the MEMR's Order of termination of the Contract nor its Notice of termination of the Contract to CIOC, dated 30 January 2008 (Exh. C-44) and 1 February 2008 (Exh. C-45) respectively, identify the breaches underlying the termination of the Contract.

898. Based on the foregoing, a majority of the Tribunal concludes that the Respondent has not established that CIOC was in material breach of its trial production obligations under the Contract. Even if such a breach were admitted, a majority of the Tribunal finds that the Respondent did not adequately notify CIOC of such breach before unilaterally terminating the Contract on 30 January 2008.

899. Regarding the alleged breach by CIOC of its obligations with respect to the **3D seismic study**, for the reasons already set forth above in paragraph 850, a majority of the Tribunal finds that the Respondent has not established its allegation that the Contract was rightfully terminated based on CIOC's material breach of this obligation. As stated above, on 1 November 2007, the Respondent learned of the shortcomings affecting the 3D seismic study, but nevertheless accepted it subject to certain corrections and reformatting (Exh. R-28). Moreover, as was just seen, the Notice of Resumed Operations dated 27 November 2007 did not identify any individual breaches or express criticism with respect to the explanations previously given by CIOC with respect to the MEMR's Notice of Breach dated 25 March 2007. Neither did the MEMR's Notice of non-performance of obligations dated 3 December 2007 identify any individual breaches, including with respect to CIOC's obligations in matters of the 3D seismic study. The MEMR's Termination Order and Termination Notice also did not specifically refer to CIOC's failure to submit a usable 3D seismic study as a ground for the termination of the Contract.

900. Therefore, a majority of the Tribunal finds that the Respondent has not established the existence of a material breach by CIOC of its obligation regarding the 3D seismic study and it cannot validly rely on the shortcomings affecting the 3D seismic study to argue that there was such a material breach within the meaning of the Contract and the Subsoil Law and to thus justify the termination of the Contract. To

be sure, a majority of the Tribunal does not mean to pronounce itself here on the quality of the 3D seismic study. In fact, as will be seen later in this Award, the Claimant has not established to the satisfaction of the Tribunal that the 3D study was sufficient and appropriate to reliably and with sufficient certainty assert the existence and magnitude of the oil reserves in the Contract Area. The issue at stake here is different. The issue is less whether or not the 3D study was satisfactory, but rather whether the Respondent can validly rely on the alleged flaws in the 3D study as a ground for the unilateral termination of the Contract based on material breach. As just seen, a majority of the Tribunal finds that it cannot do so, because the Respondent accepted the 3D study after becoming aware of its shortcomings. That said, as with respect to the other alleged material breaches examined above, a majority of the Tribunal finds that the Respondent, in any event, did not adequately notify CIOC of an alleged material breach with respect to the 3D seismic study before unilaterally terminating the Contract on 30 January 2008.

901. Having reached the conclusion that (i) the Respondent has not established that CIOC committed a material breach of its post-extension obligations or its pre-extension obligations that allegedly were not specifically extended and that (ii) the Respondent, in any event, did not adequately notify CIOC of such alleged "material breaches", the majority of the Tribunal can dispense with examining whether the Respondent respected any further procedural requirements under Clause 29 of the Contract or the 1999/2004 Subsoil Law.

902. However, the Tribunal must address the Respondent's argument that CIOC also was in anticipatory breach of the Extended MWP in that it was "clearly not in a position to comply with the obligations that it undertook under the Extended MWP related to the drilling of the deep wells and would thus necessarily be in breach of the Extended MWP" (Respondent's First Post-Hearing Brief, para. 184 and paras. 308-332).[96] The Respondent argues that CIOC would have been in breach of the 2008 AWP and the Extended MWP and that it thus would have been exposed to contract termination for material breach. Even if the Contract would not have been terminated for material breach, CIOC most likely would not have obtained a second extension of the Contract until 27 May 2011. Therefore, the Respondent does not argue that any alleged anticipatory breach by CIOC of the Extended MWP would

[96] It is observed that the Claimants dispute the Respondent's reference to the concept of "anticipatory breach". According to the Claimants, "[t]his is a pure misstatement of the legal concept of anticipatory breach, which arises when a party informs the other that it does not intend to perform its obligations. This is not the case here" (Claimants' Reply Post-Hearing Brief, para. 176).

have justified the termination of the Contract on 30 January 2008, but rather that such anticipatory breach could have justified the termination of the Contract in May 2009. The Respondent's argument is thus irrelevant for the present question regarding the lawfulness of the termination of the Contract in January 2008, but rather relates to the issue of the quantification of damages.

903. For an expropriation to exist, the State measure must not only be unreasonable, but also substantially deprive the investor of the economic value of its investment. As has been observed by the Respondent, "[i]n determining whether an interference amounts to an expropriation, 'the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner.'" The Respondent also quoted the following passage from the award in *Biwater* (Counter Memorial, para. 1207):

> level of interference with rights has been variously described as "unreasonable"; "an interference that renders rights so useless that they must be deemed to have been expropriated"; "an interference that deprives the investor of fundamental rights of ownership"; "an interference that makes rights practically useless"; "an interference sufficiently restrictive to warrant a conclusion that the property has been 'taken'"; "an interference that makes any form of exploitation of the property disappear"; [and] "an interference such that the property can no longer be put to reasonable use."

904. For the Tribunal, in the absence of the Contract, which was CIOC's sole *raison d'être*, CIOC's investment in the Caratube project was virtually worthless. The Respondent has described CIOC as an "investment vehicle" (see, e.g., Counter Memorial, para. 241), created for the sole purpose of performing the Contract. The Respondent has further submitted that "CIOC's only business activity was the exploration of the Caratube field in Kazakhstan. It was created specifically for that purpose. CIOC has presented no evidence that it ever attempted to make any other business deals whether before or after the termination of its Contract" (Counter Memorial, para. 1646). While the Tribunal did not find that CIOC, at the time of the termination, already had a vested right to move to commercial production, the Respondent deprived CIOC of its right to continue performing the Contract in order to make a Commercial Discovery and meet the requirements necessary to obtain the exclusive right to move to commercial production. The Respondent thus substantially deprived CIOC of the value of its investment.

905. Based on the foregoing, a majority of the Tribunal concludes that the Respondent unlawfully terminated the Contract. Due to this unlawful termination of the Contract,

CIOC, at the time of the termination, was unreasonably and substantially deprived of its existing rights under the Contract.[97]

(b) Duration

906. The Respondent submits that for an expropriation claim to be successful, the deprivation must not only be substantial and relate to an existing right, it must also be lasting (Counter Memorial, para. 1208).

907. The Parties have not further debated this element of expropriation. However, for a majority of the Tribunal, there can be no dispute that the deprivation by the Respondent of CIOC's existing rights under the Contract was lasting and even permanent.

(c) Sovereign act

908. In order to establish the existence of an expropriation, it is not enough to find that the Respondent unlawfully terminated the Contract, as a mere contractual breach by a state generally does not amount to an expropriation. Rather, in order for the contractual breach to be considered an expropriation, a sovereign act, i.e. the interference by the state in the Contract in the exercise of its sovereign powers (as opposed to the state acting in the capacity of a contracting party), is required (Counter Memorial, para. 1209).

909. As it was seen in the summary of the facts set forth above in Chapter II (see *supra* paras. 14 et seq.) and the procedural history in Chapter III (see *supra*, paras. 94 et seq.), the facts in the record of the present Arbitration are troubling and the Claimants' allegations of harassment have occupied (and preoccupied) this Tribunal from the beginning and throughout the present proceedings. For instance, in its Decision on Provisional Measures dated 4 December 2014, the Tribunal examined a number of allegations of harassment, including the alleged involvement of the Respondent in certain websites and protests in London, as well as the criminal proceedings in the Novikova case before the Lebanese courts.

910. In this Decision on Provisional Measures, the Tribunal took note of the Respondent's representations and denials of any involvement in any acts of

[97] The Tribunal has taken note of the Claimants' allegation that "Claimants have lost more than merely vested rights under a contract – they have lost the Contract itself as well as the investments they had made in obtaining and fulfilling it" (Claimants' Reply Post-Hearing Brief, para. 243). For the Tribunal, the Claimants have not established the materiality of this distinction and the Tribunal will thus proceed in its discussion of the Claimants' expropriation claim without making this same distinction.

harassment against the Claimants, noting however that "the Tribunal is of course aware that such kind of denials and representations are not unusual and that even the most unethical parties will not concede their sins but rather deny them and represent that they would profess to have conducted themselves as they should and intend to continue doing so. Moreover, while the honorability of Counsel is of course undeniable, it bears mentioning that the arbitral tribunal in the first *Caratube I* arbitration noted that Kazakhstan may not always have been totally transparent towards its own Counsel" (Decision on Provisional Measures, para. 113).

911. While the Tribunal ultimately rejected the Claimants' requests for provisional measures on the ground that the Claimants had not satisfied their burden of proof with respect to the Respondent's alleged involvement in any acts of harassment against the Claimants, the Tribunal clarified, however, that doubts remained and that it was not convinced "one way or the other". In particular, the Tribunal was troubled by "the conspicuous timing" of some of the alleged acts of harassment which coincided with the developments in this Arbitration. In this respect, the Tribunal felt the need to stress that there were "troubling circumstances or coincidences […], in particular when one puts various events into perspective and looks at the timeline as a whole rather than individual event by individual event" (Decision on Provisional Measures, para. 141). In addition, while the Tribunal made clear that the Respondent's alleged past conduct in other arbitrations was not relevant for the Tribunal's assessment of the allegations in the present Arbitration, the Tribunal nevertheless found it "rather conspicuous that the tribunals in the *Caratube I* and *Ruby Roz* arbitrations felt the need to point out troubling circumstances and coincidences, as does this Tribunal" (Decision on Provisional Measures, para. 142). Therefore, in the circumstances, while the Tribunal was prepared to give credence to the Claimants' allegations of harassment, it could not but ultimately dismiss the Claimants' requests for lack of having sufficiently proven their allegations.

912. As it emerges from the procedural history, following the Tribunal's Decision on Provisional Measures, the Claimants have informed the Tribunal of several further alleged acts of harassment by the Respondent against the Claimants. The Tribunal has dealt with these additional allegations of harassment in substantially the same way as in its Decision on Provisional Measures.

913. Having considered the Parties' respective arguments in light of the evidence on the record, including the evidence presented at the Hearing, the Tribunal finds that its position as set forth in the Decision on Provisional Measures generally is still

warranted in the present Award. In particular, with respect to the so-called "Sabsabi/Ruby Roz saga", the allegations made by both sides against each other are serious. As mentioned before, for the Tribunal doubts remain and it is not convinced one way or the other. At the same time, the Tribunal once again is troubled by the conspicuous timing and circumstances of the alleged events when put into perspective and viewed against the timeline as a whole. However, the Tribunal must again conclude that the Claimants have not sufficiently established their allegation that the Sabsabi/Ruby Roz saga "marked the start of Kazakhstan's campaign against the Hourani family and their companies that ultimately led to the expropriation of Claimants" (Claimants' First Post-Hearing Brief, para. 305).

914. However, having said this, for the reasons set forth below, a majority of the Tribunal finds that the Claimants have sufficiently established that the unreasonable and substantial deprivation of their existing rights under the Contract was caused by a sovereign act, i.e. by the Respondent using its sovereign powers rather than acting in a private manner as a party to the Contract. For a majority of the Tribunal, of particular relevance in this regard is the intervention in the Contract by the Acting Prosecutor of the Aktobe Oblast – acting "[a]s per the request of the General Prosecutor's Office of the Republic of Kazakhstan" – by means of his "Recommendation on elimination of disregard of the rule of law" dated 7 September 2007 and addressed to the Minister of Energy and Mineral Resources (Exh. C-35). The Recommendation was further forwarded directly to the MEMR by the General Prosecutor of the Republic of Kazakhstan under a separate cover letter dated 13 September 2007 (Exh. R-176).

915. Having considered the Parties' respective arguments and the evidence on the record, a majority of the Tribunal is persuaded that the "Recommendation" was received and acted on as an instruction to the MEMR to terminate CIOC's Contract. Following a summary of the facts, the "Recommendation" states that CIOC had over several years been in "material breach" of its obligations under the work programs. The "Recommendation" observes that despite these material breaches, TU Zapkaznedra had year after year rolled over CIOC's non-performed obligations into the next year and approved the work programs for that year. Furthermore, the "Recommendation" refers to Articles 45-2 and 70 of the Subsoil Law, namely the MEMR's duty to supervise the Contractor and the conditions for a unilateral termination of the Contract. The "Recommendation" then criticizes the MEMR for its "lack of appropriate monitoring of the activities of the subsoil user and failure to take

measures to rectify noncompliance with the terms of the Contract". Immediately following this criticism of the MEMR, the "Recommendation" then "invites" the MEMR to "review this recommendation […] in order to 1. take measures to notify [CIOC] of the necessity to address the abovementioned breaches for the elimination of the discovered legal breaches and for prevention in the future. 2. Settle an issue of unilateral termination of the Contract in connection with the existing breaches of obligations provided in the work programs". The "Recommendation" concludes with a request for the MEMR to notify the Prosecutor's Office of the Aktobe Oblast of the MEMR's results of the review of the "Recommendation". Likewise, the General Prosecutor's letter dated 13 September 2007 also requested the MEMR to inform both the Aktobe Prosecutor's Office and the General Prosecutor's Office of the results of the review of the "Recommendation" and any adopted measures.

916. In the opinion of a majority of the Tribunal, the ensuing facts and events of the case show that the Aktobe Prosecutor's "Recommendation" was received by the MEMR as an order to terminate the Contract and marked the beginning of the termination process. Despite the fact that Amendment No. 3 to the Contract, providing for the Contract's extension, had been adopted by the MEMR only two months earlier on 27 July 2007, on 24 September 2007 the MEMR re-sent the Notice of Breach dated 25 March 2007 to CIOC, requesting the latter to remedy the breaches within one month and advising of the possibility to unilaterally terminate the Contract in case of a failure to do so (Exh. C-36).

917. Only one week later, on 1 October 2007, the MEMR sent CIOC a Notice of Termination of the Contract, observing that the latter had not responded to the 25 March 2007 Notice and requesting CIOC to immediately terminate operations under the Contract, pending a decision on unilateral termination (Exh. C-38). By letter dated 3 October 2007, the MEMR did not fail to promptly inform the General Prosecutor's Office of this latest development (Exh. R-177).

918. Following CIOC's explanations in its letter of 3 October 2007 in response to the MEMR's Notice of Breach (Exh. C-39), on 27 November 2007 the MEMR wrote to the Aktobe Prosecutor's Office, informing the latter of CIOC's request for reconsideration of the decision to immediately terminate operations under the Contract. The MEMR also advised the Aktobe Prosecutor's Office of its decision to re-send the 25 March 2007 Notice and to allow the resuming of operations of the Contract, "[g]iven that the delivery of the registered letter, by which the notice of violation of contractual obligations was sent to the Contractor, has no precise

information as to on whom it was served and in order to comply with the procedures prescribed by Section 29 of the Contract [regarding the 'conditions of termination and suspension of Contract validity']" (Exh. R-178).

919. On the same day, i.e. on 27 November 2007, the MEMR sent CIOC the Notice of Resumed Operations, but at the same time also notified CIOC of further breaches of the Contract and the need to remedy such breaches within one month (Exh. C-148).

920. Shortly thereafter, on 3 December 2007, the MEMR sent CIOC a further Notice of Breach, by which the MEMR requested CIOC to remedy its breaches under the Contract within one month, failing which the Contract would be terminated (Exh. C-41).

921. On 7 December 2007, TU Zapkaznedra also sent a Notice of Breach to CIOC with respect to the latter's alleged violations of its financial obligations (Exh. R-49).

922. As was already seen, on 30 January 2008, the MEMR then issued its Order to terminate the Contract "due to failure of completion of notice requirements within the specified period" (Exh. C-44). On 1 February 2008, the MEMR sent CIOC the Notice of Termination, informing the latter of the termination of the Contract (Exh. C-45).

923. It is true that over the course of the performance of the Contract and prior to the "Recommendation" of 7 September 2007, the Respondent had on several occasions drawn CIOC's attention to its failures in performing its obligations under the Contract (see, e.g., Counter Memorial, paras. 658 et seq.).[98] However, on such occasions, the Respondent's notices generally remained matter-of-fact and did not threaten any consequences. As an exception to the foregoing, on 17 January 2005, the MEMR sent CIOC a Notice of Breach and requested CIOC to eliminate the breaches, failing which the Contract could be suspended (Exh. C-121). However, following receipt of CIOC's explanations by letter of 9 March 2005 (Exh. C-115), the MEMR decided to take no further actions in this matter. Furthermore, on 28 February 2006, TU Zapkaznedra drew CIOC's attention to the non-performance of certain obligations and indicated that it would take "appropriate actions according to the legislation of RK" should CIOC fail to eliminate such non-performance (Exh. C-228). However, no such actions appear to have been taken by TU Zapkaznedra. As was seen above in

[98] Without claiming to be exhaustive, the Tribunal has counted in the factual part of this Award 12 occasions (including meetings, notices and orders) on which the Respondent drew CIOC's attention to its failures in performing its obligations under the Contract between December 2003 and 7 September 2007, i.e. a period ranging over almost 4 years. By contrast, the Tribunal has counted 8 such occasions during the 6-month period between 7 September 2007 and February 2008.

paragraphs 891 et seq., on 25 March 2007, the MEMR allegedly sent CIOC a Notice of Breach informing the latter that the Contract may be terminated should CIOC not remedy the alleged breaches of its obligations, it being recalled once again that the Claimants dispute that such Notice was ever actually sent to (or, at the very least, received by) CIOC at that time (Exh. C-37). As was further seen, even admitting that the 25 March 2007 Notice was sent and received by CIOC, no adverse consequences followed. To the contrary, the 2-year extension of the Contract was approved and then confirmed in Amendment no. 3 to the Contract.

924. In the opinion of a majority of the Tribunal, the chronology of the facts is striking, especially when viewed against the timeline as a whole and in light of the family and political context of this case, which – as the Claimants have convincingly shown – took a turn for the worse in the spring of 2007 (see *supra*, paras. 80. See also the Claimants' Demonstrative Exhibit No. 1).[99]

925. Equally striking is the drastic change of the MEMR's attitude towards CIOC following receipt of the "Recommendation" dated 7 September 2007. In particular, for a majority of the Tribunal, the evidence on the record shows that, following the "Recommendation", the MEMR was set to terminate the Contract, notwithstanding the fact that the MEMR had adopted Amendment No. 3 regarding the extension of the Contract only shortly before. The MEMR's communications to CIOC following the "Recommendation" make no further reference to the fact that the Contract had just been extended. In this regard, it is recalled that the Tribunal does not accept the Respondent's allegation that the MEMR extended CIOC's Contract based on the latter's misrepresentation regarding the completion of the 3D seismic study. A majority of the Tribunal also cannot follow the Respondent's argument according to which the extension and termination processes were running in parallel and independently from one another (Respondent's First Post-Hearing Brief, paras. 205-224). This does not explain the lack of reference to the alleged existence of material breaches and the Notice of Breach dated 25 March 2007 during the extension process.

926. Furthermore, a majority of the Tribunal cannot follow the Respondent's argument that "the Aktobe Prosecutor was simply acting in accordance with its duty to ensure the enforcement of the law and of the contract terms with regard to subsoil users and also within the express purview of the Contract" (Counter Memorial, para.

[99] See also *supra* fn 98.

1232). The "Recommendation" of 7 September 2007 refers to Article 83 of the Constitution of the Republic of Kazkahstan and to Article 25 of the Law of the Republic of Kazkahstan "On the Prosecutor's Office". While neither Party has offered an analysis of these provisions, a majority of the Tribunal notes that such provisions appear to refer to the Prosecutor's Office's general duty to ensure the enforcement of the law; the Tribunal accepts that this general duty does exist as a general matter. However, for a majority of the Tribunal, the Respondent has not shown whether and to what extent these provisions authorize the Prosecutor's Office to supervise a contractor's performance under a given contract and to instruct the Competent Authority, i.e. the MEMR, to terminate the contract in case of non-compliance with contractual terms. Neither has the Respondent shown whether and to what extent Article 83 of the Kazakh Constitution and Article 25 of the Kazakh Law "On the Prosecutor's Office" authorize the Prosecutor's Office to ensure the MEMR's compliance with the latter's duty under Article 8 of the Subsoil Law to monitor and control the contractors' compliance with the terms of the contract.

927. In support of its argument that the Aktobe Prosecutor was acting within the express purview of the Contract, the Respondent refers to the decision in the *Bayindir* case, namely to the *Bayindir* tribunal's finding that "not every contract breach deprives an investor of the substance of its investment" and that "even where it does and the breach stems from a governmental directive, it would not necessarily follow that the contractual breach is the result of a sovereign act, as a directive of the State may be given in the framework of the contract". In holding so, the *Bayindir* tribunal responded to the Claimant's suggestion that "a breach of the Contract as a result of governmental directives would suffice for a finding of expropriation" (Exh. RL-122, para. 445). Again, a majority of the Tribunal finds that the Respondent has not sufficiently established that the Prosecutor's Office in the present case was simply acting in accordance with its authority under Kazakh law and "within the express purview of the Contract" when it determined that CIOC was in material breach of its obligations under the Work Programs and "recommended" the MEMR to terminate the Contract on this basis. Especially in view of the evidence to which the majority of the Tribunal now turns.

928. A majority of the Tribunal finds its conclusion corroborated by the evidence presented at the Hearing, which has shown that the intervention in the Contract by the Aktobe Prosececutor's Office and the General Prosecutor's Office did not reflect the Prosecutor's Offices' habitual, regular practice. While Mr. Kravchenko, the

Deputy General Prosecutor, first stated that recommendations such as the "Recommendation" dated 7 September 2007 were "absolutely routine procedure" (see Tr. Day 7, p. 115, lines 1-8), he then stated more cautiously that recommendations by the Prosecutor to the MEMR to terminate contracts the MEMR had entered into with a private contractor "doesn't happen very often", but "happen from time to time, and there's nothing extraordinary. Nothing extraordinary was taking place here" (Tr. Day 7, p. 116, lines 5-11).

929. Mr. Ongarbayev of the MEMR testified that recommendations by the Prosecutor's Office requesting the MEMR to terminate a contract were not possible. However, he further stated that recommendations similar to the "Recommendation" of 7 September 2007 had been received before from the Prosecutor's Office. But he could not recall any particular incidence in 2007 when this had occurred, other than on 7 September 2007 with respect to CIOC's Contract (Tr. Day 8, p. 157, lines 2-6 and p. 158, line 14 to p. 162, line 10).

930. Neither could Mr. Akchulakov, the former Vice-Minister of the MEMR, or Mr. Batalov, the former Executive Secretary of the MEMR, recall any such incidences, despite the allegations that there were hundred contracts terminated by the MEMR at the end of 2007 and that CIOC was not treated any differently from other contractors (Tr. Day 5, p. 165, lines 1-14; Tr. Day 6, p. 64, lines 1-11 and p. 101, line 14 to p. 102, line 22).

931. These testimonies are confirmed by the fact that, in response to the Claimants' document production request, asking for the production of all recommendations issued in 2007 similar to the "Recommendation" dated 7 September 2007, the Respondent replied that after a diligent search it was unable to find any documents responsive to the request.

932. In the same vein, it is worth mentioning that Mr. Batalov testified at the Hearing that there has never been a recommendation received from the Prosecutor's Office and requesting to take a certain measure that he did not follow (Tr. Day 5, p. 162, lines 5-7).

933. Finally, in addition to the foregoing, it is worth recalling that, as of mid-April 2009, the KNB has taken *de facto* control of the Caratube field (Memorial, para. 296). This fact is not disputed by the Respondent, who argues however that the KNB is merely protecting the oil field from looting because CIOC left the oil field unattended (Counter Memorial, para. 1107).

934. Based on the foregoing, a majority of the Tribunal finds that the unreasonable and substantial deprivation of CIOC's existing rights under the Contract was caused by a sovereign act, in particular the Respondent's intervention in the private Contract between CIOC and the MEMR through the Aktobe Prosececutor's Office and the General Prosecutor's Office. As just seen, for a majority of the Tribunal, the Claimants have convincingly established that this intervention by both the regional and General Prosecutors in the Contract concluded between CIOC and the MEMR, did not correspond to normal, regular practice. The Respondent also has not rebutted the showing by the Claimants that the Prosecutor's Offices were not authorized under the law to intervene in the Contract in the way that they did, it being specified that it is not disputed that, under both the Contract and the 1999/2004 Subsoil Law, the MEMR was the "Competent Authority" with respect to all issues essential to the Contract. In particular, the MEMR was the only authority authorized to conclude, perform and, as the case may be, terminate the Contract on behalf of the Republic of Kazakhstan, which latter right has been described by the Respondent as a mandatory, non-waivable right (see, e.g., Counter Memorial, paras. 461, 755, 776 and 784).

935. For a majority of the Tribunal, the MEMR thus did not merely breach its contractual obligations under the Contract by not respecting the substantive and procedural requirements under the Contract and the Subsoil Law for the termination of the Contract. Acting through the regional and General Prosecutor's Offices, i.e. organs of the Respondent other than the Competent Authority, the Respondent did not act like a mere private party to the Contract, but rather in its sovereign capacity. For a majority of the Tribunal, the Claimants have convincingly established that it was this intervention by the Prosecutor's Offices that, in concrete terms, ignited the process that was intended to and actually resulted in the termination of the Contract. For a majority of the Tribunal, the Claimants thus have established that the Respondent terminated the Contract using its sovereign powers rather than acting in a private manner as a party to the Contract.

936. Moreover, in the majority view, it was the Respondent's sovereign act that caused CIOC's loss of its existing rights under the Contract, rather than the latter's alleged breaches of the Contract. In particular, considering the troubling facts (especially the chronology of the facts taken as a whole) underlying this case and the evidence on the record, a majority of the Tribunal considers that the Claimants have convincingly established that the real motivation behind the termination of the Contract was not

CIOC's allegedly deficient performance of the Contract, but rather lies in the family and political context underlying the case. While CIOC's deficient performance of its contractual obligations might not have been approved by the Respondent, it was tolerated without any material consequences attached thereto until the year 2007, thus coinciding with the Hourani family's falling out of favor with the Respondent.

937. A majority of the Tribunal has noted the Respondent's explanation regarding the Respondent's practice to be more lenient with under-performing contractors during the first contract years and also of the fact that "2007 was a special year" in that the first contracts in the oil business were coming to an end and that it thus "was time to make contractors either work efficiently or be substituted by those which were motivated and capable of complying with the requirements of the contract" (Respondent's First Post-Hearing Brief, para. 207). For a majority of the Tribunal, this does not, however, explain the striking U-turn taken by the Respondent in September 2007, following the Prosecutor's Office's "Recommendation", shortly after the extension of the Contract had been finalized through the adoption of Amendment No. 3 to the Contract. The Respondent's explanation fails to convince in light of the conspicuous timing of the commencement of the termination process, coincidences with developments within the family and political context and, more generally, the chronology of the facts when viewed as a whole.

938. For a majority of the Tribunal, the above is corroborated by its prior conclusion that the Respondent has not sufficiently demonstrated that any of CIOC's breaches under the Contract were material so as to justify the termination of the Contract. Furthermore, as was seen, a majority of the Tribunal has found that the Respondent did not adequately notify CIOC of the existence and specific identity of any alleged material breaches prior to terminating the Contract (see *supra* paras. 855 et seq.). In particular, in the majority view, notices of breach and of termination of the Contract mostly started shortly after the "Recommendation" of 7 September 2007, it being recalled, yet again, that there are doubts regarding the sending by the MEMR and the receipt by CIOC of the Notice of Breach dated 25 March 2007, which Notice can in any event not be considered as adequate, in the majority view, in light of the subsequent extension of the Contract. It is further recalled that there was no reference to the alleged existence of material breaches and the Notice of Breach dated 25 March 2007 during the extension process or any reference to the extension of the Contract during the termination process.

939. In conclusion, a majority of the Tribunal finds that, with all three elements of an expropriation being present, CIOC has been expropriated of its existing rights under the Contract, which granted CIOC access to the Caratube field and its exploitation. Rather than being in the presence of a mere breach of Contract by the Respondent, in the majority view, an expropriation took place through the unlawful termination of the Contract by the Respondent acting in its sovereign capacity.

(d) The lawfulness of the expropriation

940. Having concluded that an expropriation of CIOC's rights under the Contract has taken place, the majority of the Tribunal must now answer the question of whether such expropriation was lawful.

941. As was seen above in paragraph 819, under Article 7 of the FIL, an expropriation shall be "carried out in the public interest in accordance with due process of law and is executed without discrimination in the payment of immediate, adequate and effective compensation". Moreover, as was seen in paragraph 823, international law provides for substantially the same requirements.

942. The taking of CIOC's existing rights under the Contract was not motivated by a public interest and has not been realized via the payment of immediate, adequate and effective compensation. While the Claimants have argued that "this is a clear case of unlawful expropriation" (Memorial, para. 357), the Respondent has only disputed that the termination of the Contract constituted an expropriation, without however arguing in the alternative that such expropriation, if admitted by the Tribunal, would have to be considered as lawful.

943. Accordingly, a majority of the Tribunal finds that the expropriation of CIOC's investment by the Respondent was unlawful, engaging the Respondent's liability.

b. CIOC's claim for compensation

944. In light of a majority's conclusion that the Respondent has unlawfully expropriated CIOC of its rights under the Contract, the issue of compensation (or "reparation") arises. The Respondent does not appear to dispute this general premise, having argued only that no compensation should be due in the absence of an expropriation (Counter Memorial, para. 1241).

945. The Claimants submit that they are entitled to compensation calculated based on the fair market value of CIOC at the time of the expropriation, namely 31 January 2008, using the DCF method (Memorial, paras. 436 et seq; Claimant's First Post-Hearing Brief, paras. 383 et seq.).

946. By contrast, the Respondent disputes that fair market value is the appropriate standard in the present case. A subjective and concrete approach to damages, focusing on the actual damage suffered by CIOC and taking into account the financial situation and the specific plans and competences of CIOC, rather than an abstract and objective approach, focusing on a hypothetical third party buyer, should apply (Counter Memorial, paras. 1359 et seq.).

947. The Parties have addressed the issue of compensation/reparation in the sections of their written submissions pertaining to "Damages". Accordingly, the Tribunal will analyze this issue below in this Award's Chapter D. on "Damages".

c. CIOC's other claims regarding the Respondent's alleged breaches of its obligations

948. In light of a majority's conclusion that the Respondent's unlawful termination of the Contract amounts to an unlawful expropriation for which compensation is due, the Tribunal does not deem necessary to analyze and decide upon CIOC's further claims with respect to the Respondent's alleged other breaches of its obligations, such as CIOC's claims regarding fair and equitable treatment, among others. The Claimants agree, having stated at the Hearing that they "don't need" these further claims, addressing them only "out of an abundance of caution and exhaustiveness" (Tr. Day 1, p. 166, line 13-16).

D. DAMAGES

1. The Claimants' position

a. Compensatory damages

949. In their Reply Post-Hearing Brief, the Claimants make some preliminary clarifications regarding issues on which the Respondent claims the Parties have agreed. The Claimants state that the Parties in fact disagree (Claimants' Reply Post-Hearing Brief, paras. 242-249):

950. First, the Claimants insist that the subject matter of the valuation is the unlawfully expropriated investment, and the Claimants are entitled to recover the fair market value of this investment at the time of the termination. Contrary to the Respondent's allegation, the Claimants deny that the subject matter of the valuation is limited to CIOC's rights under the Contract, excluding the Caratube oil reserves themselves.

951. Second, the Claimants deny the Respondent's allegation that the Parties agree on the application of Kazakh law to material and moral damages. Compensation must be determined in accordance with the general principles of international law, not Kazakh law.

952. Third, the Claimants maintain their position that under the applicable international law, the threshold of sufficient certainty applies to the existence of the damage, but less certainty is required for the amount of the loss.

953. Fourth, the Claimants deny the Respondent's contention that the applicable valuation standard is of little relevance and that the Parties agree that both the fair market value and the full reparation value would be acceptable valuation standards. The Claimants insist that the applicable valuation standard is the fair market value of their investment as this standard would correctly place the Claimants in the position in which they would have been, but for the breach.

954. Finally, the Claimants submit that the Parties agree only that the Claimants bear the burden of proof with respect to their claims on damages. The Claimants have satisfied this burden of proof.

955. It is the Claimants' position that by the time the alleged expropriation took place, CIOC had fully explored the supra-salt Caratube field within the Contract Area and managed to confirm the reserves in this respect. In particular, on 1 February 2007, the Claimants retained CER to prepare an estimate of the Caratube field reserves. The CER Reserves Report assessed the supra-salt reserves in the Contract Area at 4,248,000 tons of C1 reserves and 5,647,000 tons of C2 reserves.[100] The CER Reserves Report was approved by CIOC on 27 November 2007 and finalized on 1 December 2007. In early 2008, it was then submitted to the MEMR who approved it at the end of meetings which took place on 27-28 February 2008. On 29 February

[100] The categories C1 and C2 are part of the Former Soviet Union ("**FSU**") system for the classification of natural reserves. Category C1 refers to "reserves for fields that are fully explored and sufficiently well understood to seek approval for a development plan". Category C2 stands for "reserves for fields that have been discovered, but not yet fully explored". For more details, see Memorial, paras. 407 et seq.

2008, the MEMR sent CIOC a written confirmation of the estimated reserves of the Contract Area as calculated on the basis of the CER Reserves Report (Memorial, paras. 407-415; Claimants' First Post-Hearing Brief, paras. 385-386).

956. The Claimants stress, *inter alia*, that the assessments in the CER Reserves Report were approved officially and upon scrutiny by a specialized organ of the Republic of Kazakhstan, as well as confirmed by the expert instructed by the Claimants in this Arbitration, Mr. Sven Tiefenthal (Memorial, paras. 416-421). In addition, Mr. Tiefenthal has prepared another independent assessment (using both the FSU and the SPE-PRMS systems) of the Contract Area's estimated reserves in the form of a separate Reserves Report, submitted with the Claimants' Memorial.

957. In a nutshell, Mr. Tiefenthal estimated (i) Reserves to amount to 4,160 thousand tons (the CER Reserves Report estimated C1 Reserves to amount to 4,248 thousand tons); (ii) Contingent Resources to amount to 17,164 thousand tons (the CER Reserves Report estimated C2 Reserves to amount to 5,648 thousand tons); and (iii) Prospective Resources to amount to 10,585 thousand tons (the CER Reserves Report did not include C3 Reserves). Mr. Tiefenthal did not apply a risk factor to the Reserves for the purpose of calculating risked volumes (C1 Reserves) as they are confirmed with a reasonable degree of certainty. He did however apply a risk factor to account for the uncertainty of the Contingent Resources (C2 Reserves) and the Prospective Resources (C3 Reserves) (see Memorial, paras. 422-435).

958. The Claimants also affirm that, by the time of the alleged expropriation, CIOC had made a Commercial Discovery within the meaning of the Contract, which gave it the exclusive right to proceed to the production stage. The Claimants reject the Respondent's argument that the existence of a Commercial Discovery requires the discovery of "new oil". This requirement is contrary to the terms of the Contract, which provides for no such requirement. Moreover, if one were to adopt the Respondent's interpretation of Commercial Discovery, this would have the absurd result that it would be impossible for CIOC to make such a Commercial Discovery. This is so because CIOC's exploration obligations in the supra-salt as set forth in the MWP were limited to the Caratube field. However, the Caratube field was known to contain oil and it would thus have been impossible for CIOC to discover new, unknown oil deposits. The Respondent's allegation, according to which the main exploration obligations related to the deep wells, disregarding the supra-salt, is equally absurd (Claimants' First Post-Hearing Brief, paras. 386-388).

959. Furthermore, the Claimants assert that there is no contractual requirement that there be a formal declaration of Commercial Discovery by the Contractor. The Respondent's argument to the contrary elevates form over substance, as CIOC fulfilled all of the steps required under Clause 10 of the Contract to commence commercial production, and the Respondent approved each of these steps. Moving on to commercial production would have led to significantly increased production and access to international oil prices, and CIOC was on the verge of doing so but for the Respondent's breach (Claimants' First Post-Hearing Brief, paras. 389-395).

960. The Claimants submit that "[n]either customary international law, the FIL, the applicable BIT or Kazakh law set forth any limitations or methodology for assessing compensation as a result of an unlawful expropriation" (Memorial, para. 436). Therefore, compensation must be determined in accordance with general principles of international law, namely full reparation and fair market value, as set forth in the ILC Articles on State Responsibility ("**ILC Articles**"). In particular, Article 31 of the ILC Articles provides for the principle of full reparation for injuries caused by a state's internationally wrongful act, and this principle was confirmed by the decision of the International Court of Justice ("**ICJ**") in *Chorzow Factory*, where the ICJ held that "[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (Exh. CLA-102, p. 47). According to the Claimants, the "fair market value" is the standard of compensation commonly applied by international arbitral tribunals for the assessment of damages in cases of unlawful expropriation (Memorial, para. 441; Claimants' First Post-Hearing Brief, paras. 396 et seq.).

961. For the Claimants, the above is in line with the principles of compensation under Kazakh law (Memorial, para. 443). Under Kazakh law a party can opt to claim for damages only (without also requesting the restoration of the terminated Contract), thereby accepting as a matter of fact the termination of the Contract, without however accepting that termination as lawful (Memorial, para. 444). Moreover, damages under Kazakh law include all real damages (i.e. the value of the lost or damaged assets, expenditures incurred or to be incurred by the wronged party as a result of the unlawful contract termination) and consequential damages (i.e. the net value of the anticipated lost profits which the wronged party would have received under normal operating conditions had the contract not been unlawfully terminated)

incurred as a result of the unlawful termination of the Contract (Memorial, para. 445).

962. The Claimants argue that, under Kazakh law, the compensation of damages also aims at putting the wronged party in the same position it would have been in had the contract been properly performed by the other party. When determining the amount of damages suffered as a result of the breach of contract, one should generally take into account the prices existing at the place where the contract had to be performed and where the party at fault did not voluntarily satisfy the wronged party's claim at the time of the filing of the lawsuit by the wronged party. However, the time of the date of the award or of the actual compensation may be also used, depending on the circumstances (Memorial, para. 446).

963. The Claimants put forward that neither the BIT, the FIL, the Contract, nor Kazakh law, provide for a date at which the investment must be valued to assess a damages claim in the event of an unlawful expropriation. The Claimants submit that in cases of creeping expropriation, arbitral tribunals may dispose of some discretion when determining the relevant moment of expropriation. However, the moment of expropriation (which pertains to the question of liability) must be distinguished from the moment of valuation (which pertains to the question of damages). This moment of valuation "should be the date on which assessing the fair market value of a foreign investment for purposes of calculating compensation will enable a tribunal to give full effect to the principle of full reparation" (Memorial, para. 448).

964. The Claimants submit that it is in conformity with these principles that their damages expert, GT, has assessed the Claimants' damages based on the fair market value of the Caratube project as at 31 January 2008, i.e. the day following the order terminating the Contract, and immediately preceding the date of the termination notice, so as to put the Claimants in the position they would have been in had the Respondent not breached the Contract (Memorial, para. 449; Claimants' First Post-Hearing Brief, para. 413).

965. In response to Respondent's position that the Claimants' damages should be assessed based on a "subjective standard", the Claimants argue that this position was never raised in the *Caratube I* arbitration and is entirely unsupported and incorrect. Under the provisions of the FIL, which also apply under the Contract, fair market value is the measure of compensation for a lawful expropriation. This standard is also in line with the Kazakh Law "On valuation activity in the Republic of

Kazakhstan" No. 243 of 29 June 2011. *A fortiori*, the fair market value should be the measure for unlawful expropriations (Claimants' First Post-Hearing Brief, paras. 397-402).

966. With respect to their claim for lost profits, the Claimants argue that under Article 36(2) of the ILC Articles, the claimed lost profits must not be speculative but established with "reasonable probability". However, once the existence of a loss and causation have been established, less certainty is required for the proof of the actual amount of damages. The Claimants only need to provide a basis on which the tribunal can, with reasonable confidence, estimate the extent of the loss (Memorial, para. 450). Relying on the case in *Micula v Romania*, the Claimants argue that the circumstances of the case will determine the degree of certainty in the amount of the loss required (Claimants' First Post-Hearing Brief, para. 412).

967. The Claimants' damages expert, GT, has used the discounted cash flow ("**DCF**") method to value the Claimants' loss of profits, which the Claimants argue to be the correct approach in the present case. The Claimants point out that a number of arbitral tribunals have used the DCF method even when a project has not started operations and thus in the absence of a record of profitability, when the data used for projections of future incomes can be established (on a case-by-case basis) with sufficient certainty, on the basis of additional elements, for instance proof of the claimant benefitting of a long-term contract or concession that guarantees a certain level of profits, or a track record of similar sales. This holds true especially in the oil and gas industry, where companies derive their primary value on the existence of reserves, rather than on the ability to develop and extract such reserves and later market them. In particular, the Claimants submit that "DCF is in fact considered as the common method in principle for valuation of exploration companies that have reasonable prospects [especially] when reserves have been confirmed, and this […] irrespective of any track record and if the company is junior or senior" (Memorial, paras. 452-464; Claimants' First Post-Hearing Brief, paras. 403 et seq.).

968. For the Claimants, loss of profits and the application of the DCF method is warranted in the present case, in particular because (i) the industry and commodity concerned is oil; (ii) prior to this arbitration, the industry experts CER have made an assessment confirming oil reserves, based on contemporaneous facts, and the CER Reserves Report was officially approved by the specialized organ of the Respondent; and (iii) the reserves have again been confirmed for the purposes of this Arbitration by the independent expert Mr. Thiefenthal, both under the SPE-

PRMS and the FSU systems. CIOC was a business close to production, whose cash flows could be projected, and CIOC was a going concern and its profitability was confirmed by the payment of corporation taxes in the LKU reports (Claimants' First Post-Hearing Brief, para. 403; Claimants' Reply Post-Hearing Brief, paras. 261-264).

969. The Claimants submit that these elements meet, and even go beyond, the applicable threshold of reasonable certainty and probability for the facts of the loss. There is no doubt that their venture would have been profitable but for the Respondent's breaches. The Claimants therefore suffered a loss, which can be quantified based on the CER Reserves Report, the price of nearby oil fields sold for equivalent values and KTG's contemporaneous offer to purchase CIOC (Memorial, paras. 465-466; Claimants' First Post-Hearing Brief, para. 406). Moreover, the Respondent must not be allowed to raise the standard of proof for the amount of the losses, and its position is in any event neither appropriate nor grounded in law or policy, but would lead to unjust results (Claimants' First Post-Hearing Brief, para. 407).

970. Furthermore, it is the Claimants' position that "any compensation other than full compensation by way of an award of loss of profits would contradict the intention of the Parties and Claimants' legitimate expectations as full reward in exchange for the exploration and confirmation of the reserves was bargained for since the outset" (Memorial, para. 467).

971. The Claimants state that, based on Mr. Tiefenthal's estimations, GT conservatively assessed the damages arising from the portion of the Caratube field comprising **confirmed reserves** at an amount of **USD 647.57 million**, as at 31 January 2008 (Memorial, para. 469; Claimants' First Post-Hearing Brief, para. 414). With respect to the **contingent and prospective resources**, based on Mr. Tiefenthal's estimations of risked volumes, GT assessed the amount of damages at **USD 298.72 million**, as at 31 January 2008.

972. On the basis of the DCF method and under the assumption that CIOC had "the rights to exploit hydrocarbon resources as set out in the Contract, and that the total and economically extractable reserves in the Contract Area corresponded to those set out in the Reserves Report", GT estimated the **Claimants' investment's fair market value** at **USD 941.05 million**, as at 31 January 2008, without interest

(Memorial, paras. 469-475; Claimants' First Post-Hearing Brief, paras. 384 and 414).

973. For the Claimants, the assessment is confirmed by (i) the quantum reports prepared by CRA International and submitted by the Claimants in the *Caratube I* arbitration in that CRA International quantified the Claimants' damage at USD 1,149 billion excluding interest, based on the same data as in the present Arbitration. GT's quantification is more conservative as it applied a country risk premium, a small stock premium and various assumptions; (ii) the proof of the existence of sales in 2007 and 2008 of oil fields such as Caratube in areas near the Claimants' investment for values equivalent to the Claimants' valuations; and, more importantly (iii) the proof of the existence of an offer made in 2008 (i.e. at the time of termination) for the purchase of CIOC within the range of USD 450,000,000 – 500,000,000 onwards (Memorial, paras. 476-477; Claimants' First Post-Hearing Brief, paras. 411 et seq.).

974. In particular, with respect to the offer for the purchase of CIOC, the Claimants point to the KTG arms-length offer made in a letter dated 11 February 2008, i.e. contemporaneous with the confirmation of the reserves by the CER Reserves Report. Relying on the World Bank Guidelines, the Claimants submit that this offer is "squarely a valuation method for the fair market value of the project". International law makes clear that offers that have not been accepted can serve as a basis for the assessment of damages (Claimants' First Post-Hearing Brief, para. 448).

975. The Claimants point out that while the Respondent contests that the meeting with KTG of March 2008 ever took place, it does not take issue with the authenticity of the 11 February 2008 letter, signature, date, and content. It is the Claimants' position that, at the Hearing, it became clear that the meeting of March 2008 took place and the precise date of that meeting was confirmed. In any event, even if the March 2008 meeting did not take place, the letter of 11 February 2008 is still enough proof of the KTG offer to purchase CIOC, as it clearly defines the property to be purchased and the sale price. The KTG offer was made and must be taken into consideration in assessing the value of CIOC.

976. The Claimants further underline that, in light of the adverse circumstances in which the Respondent had illegally placed the Claimants at the time of the offer, the amount of the offer must be considered as the very base floor in terms of valuating CIOC, which should be used as checks and balances to give comfort that the fair

market value was significantly higher. The Claimants further argue that the GT calculation would be used by an industry buyer. The Claimants reiterate in this respect that the fair market value calculated using the DCF method as computed by GT is the correct value for CIOC. That the USD 500 million price offered by KTG is lower than the USD 941 million estimate made by GT should not be held against the Claimants (Claimants' First Post-Hearing Brief, paras. 447-465; Claimants' Reply Post-Hearing Brief, paras. 280-293).

977. The Claimants reject the Respondent's allegation that the Claimants' damages claims are disconnected from the facts of the present case. In particular, the Respondent confuses the *consideration* that the Claimants gave in acquiring the Contract, namely USD 46 million (including the cash price of USD 9.4 million and the undertaking to pay future costs in the amount of USD 36.6 million), and the fair market value of the Claimants' investment at the time of the termination. What is relevant for purposes of quantification is the total consideration paid by the Claimants to acquire the Contract. Moreover, whether or not CIOC's performance of the Contract was satisfactory has no bearing on the economic value of the Caratube field. Rather, this value is confirmed by the estimate of the reserves reviewed and approved by the Respondent, and the fact that CIOC could have sold its rights in the field once those reserves were confirmed for the full value of the reserves (Claimants' Reply Post-Hearing Brief, paras. 250-257).

978. In response to **Question No. 10** in the Tribunal's Post-Hearing Order,[101] the Claimants submit that the production profile prepared by Mr. Tiefenthal in Figure No. 27 of his Reserves Report is conservative. The curve presented by Mr. Tiefenthal (and the Development Plan) is based on assumptions shared by the CER and the MEMR. The Claimants explain, *inter alia*, that during the time period in which the Contract was performed, CIOC had put in place a pilot production program until early 2008 with the aim to gather data, not exploit the wells to their fullest. During this time, the produced oil was sold on the internal market, for a fraction of export prices, and the revenue generated was reinvested into CIOC. The unrealistically high targets initially set in the pilot production program were adjusted downwards in the AWPs. Furthermore, the Claimants recall several of CIOC's exploration activities

[101] See *supra* para. 237 ("**Question 10**: Explain and comment on the curve presented by Mr. Tiefenthal with respect to the expected oil production starting from the production phase (see Mr. Tiefenthal's Reserves Report, Figure No. 27): what would have happened during the period between the beginning of 2008 and the commencement of production to justify the ascent of that curve, compared to the results achieved by CIOC at the time of the termination of the Contract?").

that took place between 2003 and 2007, such as (*inter alia*) the drilling of 24 new supra-salt wells and the re-entering of 10 existing supra-salt wells, the completion of geological-technological research works in exploration wells, and the drilling of 16 water wells as opposed to the 14 provided for in the MWP. The Claimants insist that CIOC's relevant activities between 2003 and 2007 were exploration activities[102] and oil production was very constrained by the objectives of the trial production scheme. At the conclusion of the pilot production program, it was confirmed that all necessary technical targets had been achieved, and CIOC was thus ready to start commercial production. CIOC was entitled to move to commercial production, having made a Commercial Discovery within the meaning of the Contract, and was on the verge of starting production. Hence, all constraints relating to the pilot production would have been removed, significantly increasing oil production (Claimants' First Post-Hearing Brief, paras. 415-430; Claimants' Reply Post-Hearing Brief, paras. 272-279).

979. In response to **Question No. 9** in the Tribunal's Post-Hearing Order,[103] the Claimants submit that, apart from the drilling and testing of deep wells (which obligations had been rolled over to the Extended MWP by mutual agreement), at the time of the termination of the Contract, CIOC had fully and successfully explored the supra-salt formations in the Caratube field in accordance with its obligations under the Contract and was ready to move to production, having managed to confirm the reserves. CIOC drilled one exploratory well in the Caratube field in conformity with its undertakings in the Contract. The Claimant also re-affirms having made a Commercial Discovery within the meaning of the Contract, which gave it the right to proceed to the production stage. The Respondent itself confirmed that CIOC had made a Commercial Discovery, namely by approving the CER Reserves Report, which in turn gave CIOC the right to prepare and submit a Field Development Plan, the approval of which was a simple formality. Therefore, at the time of termination, CIOC was entitled to move to the commercial production of the supra-salt reserves

[102] With respect to the first part of the Tribunal's Question No. 9 (*supra*, para. 237), namely the issue of the characterization of CIOC's activities as pertaining to exploration, development and/or production, it is the Claimants' position that the activities referred to in para. 419 of their First Post-Hearing Brief were all exploration activities and CIOC performed them in conformity with the Contract (Claimants' First Post-Hearing Brief, paras. 420 et seq.; Claimants' Reply Post-Hearing Brief, paras. 211-227).

[103] See *supra* para. 237 ("**Question 9**: Based on the facts of this case, with respect to the activities carried out by the Claimants during the time the Contract was performed, were such activities in conformity with the Contract and do they qualify as activities of exploration, development and/or production? If it were admitted arguendo that the performance of the Contract by the Claimants was unsatisfactory during the period from 27 May 2002 until 27 May 2007, what is the position of each Party as to how the Claimants' performance of the Contract has or would have evolved during the extended period until 27 May 2009, as well as a possible further two-year extension of the Contract until 27 May 2011? What legal consequences do the Parties draw from the foregoing?").

and it was only a formality away from doing so (Claimants' Reply Post-Hearing Brief, paras. 211-227).

980. The Claimants recall that whether or not CIOC's performance during the exploration phase was satisfactory between 27 May 2002 and 27 May 2007 is irrelevant with respect to the economic value of the Caratube field. With respect to the supra-salt formations, the Claimants were "in the possession of a billion dollar field, and had every incentive to produce the confirmed reserves as efficiently as possible [and they] had the financial means of doing so" (Claimants' First Post-Hearing Brief, para. 431). Similarly, with respect to the sub-salt, CIOC "was willing, ready and capable of drilling the two deep wells within the extended period", it being however pointed out that CIOC's performance would have been irrelevant for present purposes as CIOC had issued a tender for a sub-contractor to drill the deep wells and there is no reason to believe that CIOC would have chosen a sub-contractor incompetent to complete the work (Claimants' First Post-Hearing Brief, para. 433; Claimants' Reply Post-Hearing Brief, paras. 228-237).

981. The Claimants reiterate that GT calculated the final value of CIOC based on Mr. Thiefenthal's production profile, applying conservative discounts. By contrast, the Claimants raise various arguments why the criticisms of the Respondent's quantum expert, Mr. Brailovsky, expressed against GT's report should not be considered by the Tribunal. Rather, the Claimants submit that the results reached by Mr. Brailovsky are absurd. The Tribunal should rely on and work with the Claimants' valuation, especially since their valuation is consistent with the reserves confirmed at the time by an independent firm and approved by the Respondent (Claimants' First Post-Hearing Brief, paras. 434-443).

982. Finally, the Claimants reject the Respondent's *post-facto* defenses, allegedly raised in relation to the Respondent's defense on damages as opposed to the merits in order to avoid compensating the Claimants for the value of their investment. In particular, the Claimants argue that (i) the allegedly gross disparity between CIOC's purchase price in 2002 and the Claimants' damages is expected in the oil and gas industry; (ii) the amount of the investment yet to be made is neither relevant nor an impediment to awarding lost profits, it being noted that the Respondent is wrong to allege that 95% of CIOC's investments were yet to be made; the only outstanding investments for returns to be recovered consisted in the costs incurred with respect to production, which have been accounted for in the calculation of the damages; (iii) the Respondent's attempt at putting the Claimants' compliance into doubt is to no

avail, it being underlined that the Respondent should not be allowed to speculate on a potential non-compliance by the Claimants since the Respondent itself prevented them from ultimately meeting or knowing whether they would meet certain conditions. Even if the Respondent could make any such speculations, none of the Respondent's arguments stand as a matter of fact and law. For instance, the Respondent's speculation that CIOC or a reasonable buyer may not have been entitled to a 25-year commercial production license is wrong. Furthermore, the Respondent's speculation that the Field Development Plan might not have been approved is unsupported, it being underlined that the Respondent should in any event be estopped from raising this argument. Likewise, the Respondent's argument that CIOC or a reasonable buyer might not have complied with the 2008 AWP or the Extended MWP is also unsupported and irrelevant. Again, the Respondent should in any event be estopped from raising this argument. The Respondent also has the burden of proving (but failed to do so) that CIOC or a reasonable buyer would not have complied with their drilling obligations and that such failure would have constituted a material breach; and (iv) the Respondent's attempt at putting the Claimants' financial capacity in question is to no avail. CIOC had successfully moved from the riskiest time of not knowing whether it would find oil suitable for production to the reserves being confirmed and commercial production being imminent. Therefore, while, in any event, there were sufficient financial means to finance the investment, there was no risk that no returns would be recovered (Claimants' First Post-Hearing Brief, paras. 466-496; Claimants' Reply Post-Hearing Brief, paras. 264-279).

983. With respect to point (iii) in paragraph 982, and in response to **Question No. 8** in the Tribunal's Post-Hearing Order,[104] the Claimants affirm that, at the time of the termination of the Contract, CIOC was ready, capable and willing to drill deep wells. In particular, in conformity with the Contract, the Parties had agreed to transfer the drilling of the deep wells to the Extended MWP. The Claimants had the financial means of drilling these wells in that they had entered, already in November 2004, into a loan agreement with JOR for the amount of USD 25 million, which had been approved by the Respondent. Mr. Devincci Hourani himself also had the necessary financial means. With respect to the technical means, the Claimants' drilling engineer, Mr. Omar Antar, had the necessary qualifications, which has not been seriously disputed.

[104] See *supra* para. 237 ("**Question 8**: What did the testimonies bring forth with respect to CIOC's readiness, capacity and willingness to drill deep wells (location, financing, etc.)?").

984. Furthermore, the Claimants assert that they had the intention and willingness to proceed with the drilling of the deep wells, as is demonstrated, *inter alia*, by the fact that they had (i) commissioned CER to prepare a well design for the deep wells, which was finalized in March 2008. TU Zapkaznedra never had the chance to approve the Well Development Plan issued by CER in March 2008 due to the fact that the Contract was terminated in February 2008; (ii) identified the location of the deep wells; (iii) on 6 December 2007, announced in the local newspaper an open tender for the construction of a 5,200-meters deep well.

985. The Claimants further explain that CIOC was ready to drill the deep wells in the summer of 2008 and would have commenced commercial production from the sub-salt in 2012. Even if the 3D seismic study would not have allowed to properly locate the deep wells, or even worse, would have had to be re-done in its entirety, CIOC would still have been able to drill the deep wells within the second contractual extension of the exploration period, i.e. from 2009 to 2011. The Claimants recall that Mr. Tiefenthal explained at the Hearing that a 3D study is not a condition *sine qua non* for the drilling of deep wells, contrary to what is asserted by the Respondent. In any event, the Claimants' 3D study was usable and needed not to be re-done. The 3D study was indeed used, namely by CER to identify four bona fide locations for drilling deep wells (in addition to the two preliminary or surface locations, i.e. GD-1 and GD-2). These bona fide locations were final surface locations. The locations for the deep wells were chosen on the basis of the 3D study, it being pointed out that "the locations for the deep wells can only be based on the 3D seismic as there was no other source of information" (Claimants' First Post-Hearing Brief, paras. 483-489; Claimants' Reply Post-Hearing Brief, paras. 195-210).

986. Alternatively, should the Tribunal reject the Claimants' claim for compensation, including lost profits, on the basis that such claim was not established with the required degree of certainty, the Claimants argue that they would be entitled to compensation on the basis of the **loss of opportunity** to obtain profits from the production of the volumes of oil contained in the Caratube field or from the sale of the company with its confirmed reserves. This possibility is given in particular where the wronged party was prevented from establishing the loss of profits with a reasonable degree of certainty by the acts and omissions of the respondent. According to the Claimants, it is sufficient for this Tribunal "to admit with sufficient probability the existence and extent of the damage on the grounds that the wronged party lost the opportunity to generate future incomes as a result of the wrongdoer's

acts or omissions". The burden of proof in this respect lies on the Respondent as the author of the damage, to show that there was no chance that the Claimants could have produced the oil deposits as anticipated (Memorial, para. 479).

987. The Claimants further submit that this Tribunal has full discretion in determining the quantification of the loss of opportunity. The amount of damages for this lost opportunity should be calculated on the basis of the maximum hypothetical loss, multiplied by the possibility of this chance coming to fruition. On this basis, the Claimants conclude that "the Tribunal is therefore requested, if it deems that Claimants are not entitled to compensation on the basis of lost profits, to apply a risk factor that the Tribunal deems appropriate to the quantified lost profits, corresponding to the chances the Tribunal deems Claimants had of producing the estimated quantities of oil or selling the company with its confirmed reserves pursuant to the DCF method". These chances should be 99% given the commodity at hand and the confirmation of the reserves by industry experts (Memorial, paras. 478-484).

988. In response to the Respondent's allegation that compensation for loss of opportunity is not available under Kazakh law, the Claimants argue that the Respondent has not provided any support for this contention. In any event, loss of opportunity is recognized in international law. Case law demonstrates that amounts awarded under loss of opportunity are likely to reflect a tribunal's views of an equitable and reasonable outcome rather than being the result of a mathematical calculation. Therefore, the Respondent's argument that loss of opportunity is not quantified with enough certainty is no barrier to it being awarded by this Tribunal. Rather, in order to succeed in their claim for loss of opportunity, the Claimants solely have to make a showing that it is sufficiently probable that they would have had opportunities as a result of the proven reserves. The probability of the opportunity coming to fruition will subsequently be taken into account in the calculation of the compensation for loss of opportunity (Claimants' First Post-Hearing Brief, paras. 497-504; Claimants' Reply Post-Hearing Brief, paras. 294-301).

989. The Claimants submit that an award of **sunk costs** would not be appropriate. Such an award of sunk costs would not only be contrary to the principle of full reparation, but also to any business rationale in the oil industry where the field had been de-risked and reserves confirmed. Moreover, it would lead to the unfair situation where states were encouraged to transfer the risk of exploration and development to investors, only to reclaim the project and reap the rewards once the reserves are

confirmed. The Claimants' position is confirmed by ICSID case law where tribunals have made good faith efforts to value investments using available facts and tools to put the claimants in the position they would have been in but for the breach, instead of giving up all too easily by an award on sunk costs. By contrast, the cases relied upon by the Respondent (namely *Ascom* and *Exxon Mobile*) are inapposite. In any event, even if the Tribunal were to deem that the Claimants are entitled to sunk costs, these costs are scientific and amount to an undisputed amount of USD 39 million (Claimants' Reply Post-Hearing Brief, paras. 302-306).

990. The Claimants also argue that the Respondent's DCF calculation is not a bona fide attempt at valuing CIOC. In particular, the Respondent applies a number of discounts, for example the cessation risk premium, which the Claimants have shown to be inapplicable. The Claimants point out that while the Respondent's quantum expert had made no mention of the cessation risk premium in his 2009 report, it becomes a central figure in his 2015 report. Moreover, the discount for lack of marketability, which the Claimants describe as "obscure", is not accepted in the field and leads to double-counting the discount already applied through the small cap premium (Claimants' Reply Post-Hearing Brief, paras. 307-310).

991. The Claimants further insist that there is no **contributory fault** that would justify reducing any award made to the Claimants. In particular, the Respondent misunderstands the theory and application of the concept of contributory fault. Relying on the *Occidental Petroleum* case, the Claimants submit that only a material and significant contributory fault may be taken into account under international law. Moreover, under Article 39 of the ILC Articles (in particular as read in the light of Comment 5 to this Article), a contributory fault is relevant only if the Claimants' conduct involved a lack of due care for their own property or rights. As a further requirement, the contributory fault of the investor must decrease the value of the latter's investment. The Respondent has not shown that any of these requirements are met, it being pointed out that the correct test is whether the claimant's acts decreased the value of its investment, not whether they justify the acts of the breaching party. In any event, the Respondent has not explained why the Claimants' damages should be reduced by "at least 50%", it being specified that the reduction of an award for contributory fault is at the discretion of the Tribunal (Claimants' Reply Post-Hearing Brief, paras. 310-321).

b. Moral damages

992. The Claimants request compensation for the moral damages caused by "(i) the pain, stress, shock, anguish, humiliation and shame that Mr. Devincci Hourani has suffered as a result of Kazakhstan's acts and omissions in relation to his investments, which forced him to leave the country for his own safety and the subsequent harassment and threats to Mr. Devincci Hourani and his family; (ii) the harm to Mr. Devincci Hourani and CIOC's reputation; and/or (iii) the harassment of [CIOC]'s employees" (Memorial, para. 485; see also Claimants' Reply Post-Hearing Brief, paras. 336-339).

993. The Claimants argue that moral damages, the notion of which covers a broad range of elements, can be claimed in international law on the basis of the well-established principle that quantifiable damage includes compensation for moral damage. This is confirmed by Article 31 of the ILC Articles. According to the Claimants, the same applies under Kazakh law if the latter were deemed to be applicable. A number of arbitral tribunals, including ICSID tribunals, have awarded moral damages, to either a legal or a natural person, sometimes without providing reasoning for the amount of moral damages thus awarded. With respect to legal persons, moral damages have been held to be available in cases of loss of reputation, including based on an injury to a corporation's credit. It is further accepted that injury or damage to the executives or shareholders of a legal entity may be considered as damage to the legal entity itself (Memorial, para. 486; Claimants' First Post-Hearing Brief, para. 505).

994. The Claimants describe various serious acts of harassment and omissions that they attribute to the Respondent (Memorial, paras. 497 et seq.), arguing that such acts and omissions "have caused pathological harm, including mental stress, pain, anguish, anxiety, suffering, threat or shock" (Memorial, para. 510). According to the Claimants, the Respondent's acts and omissions "have also caused emotional harm, including indignity, humiliation, shame, defamation, injury to reputation and feelings, and loss of credit" (Memorial, para. 511; Claimants' First Post-Hearing Brief, para. 506). These are all consequences of the Respondent's acts and omissions, warranting (taken individually, let alone collectively) an award of moral damages; the existence of causation is obvious, say the Claimants (Memorial, paras. 510-514).

995. Concerning the amount of moral damages, the Claimants argue that "they have to take into account the intensity, the diversity, the duration of these acts and consequences as well as the value of the investment and the profile of both the Claimants, influential and wealthy in Kazakhstan, and Kazakhstan, one of the richest countries in the world" (Memorial, para. 515). On this basis, the Claimants quantify the moral damages at the amount of **USD 50,000,000** (Memorial, para. 516).

996. In response to **Question No. 11** in the Tribunal's Post-Hearing Order,[105] the Claimants' first argument is that moral damages are available within the framework of Article 25 of the ICSID Convention. While the ICSID Convention does not specifically provide for the award of moral damages, this does not prevent the Tribunal from granting such an award, as moral damages are awarded at the Tribunal's discretion and in accordance with principles of compensation in national and international law. Moreover, the arbitration clause in the present case is not abnormally restrictive to exclude an award of moral damages. Rather, the FIL and the arbitration clause in the Contract are broadly worded. The Claimants point to the *DLP v Yemen* and *Lemire v Ukraine,* cases where an ICSID tribunal awarded moral damages. It is the Claimants' position that the relevant test is not whether the institution or procedural rules through and pursuant to which the arbitration is brought allows for moral damages, but rather whether the applicable substantive norms allow the same and, if so, the nature and intensity of the intangible harm inflicted by the state on the investor.

997. Moreover, the Claimants submit that even in ICSID cases where moral damages were not awarded, the tribunals did not question the availability of these damages under Article 25 of the ICSID Convention. The Respondent's argument, according to which its offer to arbitrate in the FIL or in the arbitration agreement in the Contract did not cover moral damages, is inapposite. Rather, the FIL calls for the application of international customary law, which includes moral damages as part of the principle of full reparation, which must, as far as possible, wipe out all the consequences of the illegal act. Kazakh law allows compensation for moral damages by virtue of Article 951 of the Kazakh Civil Code. In response to the Respondent's reliance on the stabilization clause in Clause 28.2 of the Contract (which allegedly should not apply to moral damages claims), the Claimants

[105] See *supra* para. 237 ("**Question 11**: Is it possible to request the reparation of moral damages with respect to the loss of an investment within the framework of Article 25 of the ICSID Convention? If not, before which court or tribunal should this reparation be requested, assuming that the existence of moral damages is established?").

underline that there is no need for moral damages to be explicitly included in the Contract for them to be awarded by this Tribunal (Claimants' First Post-Hearing Brief, paras. 508-518; Claimants' Reply Post-Hearing Brief, paras. 322-339).

998. The Claimants reject the Respondent's contention that this Tribunal does not have jurisdiction over the moral damages claim on the ground that the claim is not arbitrable under Kazakh law. The Respondent is confusing personal injury, on the one hand (which the Claimants are not claiming), and moral damages arising out of the investment, on the other hand. The Claimants' request for moral damages is arbitrable because it is made in a dispute arising out of property rights and relating to a property, namely CIOC. The question of whether a legal entity can claim moral damages is not governed by Kazakh law, but by international law, which recognizes that legal entities can recover such damages (Claimants' First Post-Hearing Brief, paras. 519-524; Claimants' Reply Post-Hearing Brief, para. 330).

999. The Claimants' second argument in response to the Tribunal's Question No. 11 is that moral damages can be awarded for loss of an investment, as is confirmed by the award in *Benvenuti & Bonfant v Congo*. The Claimants' request for moral damages arises directly out of the loss of their investment, which is made clear by the fact that the Respondent exerted severe and undue pressure to force the Claimants' hand at relinquishing the investment by running away. They now claim monetary compensation for the non-material losses that they have incurred to their reputation, social standing, mental health, safety, and peace of mind (Claimants' First Post-Hearing Brief, paras. 525-529; Claimants' Reply Post-Hearing Brief, para. 332).

1000. Third, the Claimants argue that this Arbitration is the only forum to fully compensate the Claimants for moral damages, given that only this Tribunal has the full picture of the vast scope of grievous acts over the years that are associated with the investment in dispute. Moreover, it would not be efficient, but unduly burdensome, to require the Claimants to seek compensation for moral damages in a different forum. Furthermore, it is the Claimants' right to have this matter, which arises in relation to their investment, settled before the agreed forum, i.e. an ICSID Tribunal. In any event, this Tribunal's jurisdiction to rule on the Claimants' moral damages claim is not conditional on the availability (or lack thereof) of an alternative forum to rule on the same (Claimants' First Post-Hearing Brief, paras. 530-534; Claimants' Reply Post-Hearing Brief, para. 334).

1001. The Claimants' fourth argument is that they have met their burden of proof for an award of moral damages. The test set out by the *Lemire* tribunal for awarding moral damages should guide this Tribunal in their assessment of moral damages. This means that moral damages should be granted provided that (i) the state's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; (ii) the state's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and (iii) both cause and effect are grave or substantial. It is the Claimants' position that this test is largely satisfied in the present case (Claimants' First Post-Hearing Brief, paras. 535-563).

2. The Respondent's position

1002. For the Respondent, the Claimants' claim for damages, which is primarily comprised of their claim for CIOC's lost profits, is baseless and greatly exaggerated (Counter Memorial, paras. 1313-1315). The Respondent makes **several preliminary observations** with respect to alleged flaws in the Claimants' damages claims: first, the Respondent argues that the amount of damages claimed by the Claimants, i.e. USD 941.05 million, is disconnected from reality and greatly exaggerated.[106] In the words of the Respondent: "[t]he amount of damages requested by Claimants, if awarded, would be 103 times greater than the FMV of USD 9.1 million paid by CCC to acquire the Contract in 2002, 100 times greater than the FMV of USD 9.4 million owed by CIOC to CCC to acquire the Contract in 2002, 52 times greater than the USD 18 million that Devincci Hourani said was the FMV of CIOC's assets in May 2004 and April 2005, and 144,769 times greater than the USD 6,500 that Devincci Hourani said was the FMV of 92% of CIOC's shares in May 2004 and April 2005" (Counter Memorial, para. 1320). It is the Respondent's position that nothing happened (except an increase in oil prices) between April 2005 and January 2008 that increased the FMV of CIOC's assets by more than 52 times and of CIOC's shares (excluding liabilities) by 144,769" (Counter Memorial, paras. 1317-1321. See also Counter Memorial, paras. 1331-1357; Respondent's First Post-Hearing Brief, paras. 404-408; Respondent's Reply Post-Hearing Brief, paras. 137-140).

[106] The Respondent points out that the amount of USD 941.05 million is an already reduced amount. In their Request for Arbitration (para. 135), the Claimants initially requested USD 1.130 billion. In their Request for Arbitration in the *Caratube I* arbitration, CIOC requested USD 2 billion (Exh. C-280, para. 85). For the Respondent, these reductions confirm the unreliability of the Claimants' damages claims (Counter Memorial, para. 1321).

1003. Second, the Respondent points out that the Claimants' material damages claim is rooted exclusively in the Contract in that they request payment of lost profits incurred as a result of the alleged wrongful termination of the Contract and the resulting deprivation of CIOC of its rights to produce oil for over 37 years. However, the Claimants had no vested rights under the Contract to produce oil at the time of the termination of the Contract. There is no certainty (or sufficient certainty) that CIOC, or a third party buyer, would have been able to obtain such rights prior to the end of the Contract extension period in May 2009 and would have been able by then to comply with their exploration obligations, that is the drilling of two overhang wells and two deep wells. Like in the *Caratube I* arbitration (but with a different quantum expert), for the purposes of their damages valuation, the Claimants apply the DCF method erroneously assuming vested contractual rights to commercial production that CIOC did not have when the Contract was terminated and would not have had prior to 27 May 2009. Therefore, the Claimants' damages valuation is inherently flawed and must be completely disregarded (Counter Memorial, paras. 1322-1324).

1004. Third, the Respondent points to various circumstances that render the Claimants' lost profit claim using the DCF method highly speculative and uncertain. This uncertainty is not made up for by Mr. Tiefenthal's reserves estimate, which in itself is highly speculative and uncertain. For this reason also, the Claimants' damages claim for lost profits should be completely disregarded (Counter Memorial, paras. 1325-1326).

1005. Fourth, the Respondent submits that the Claimants' damages claims are based on the FMV standard and the incorrect assumption that there would be an arms-length third party buyer interested in purchasing CIOC or its Contract at the time of the termination on 31 January 2008. According to the Respondent, no reasonable third party buyer would have acquired CIOC or its Contract prior to 27 May 2009 (Counter Memorial, paras. 1327-1329).

1006. Following the Hearing, the Respondent made five further preliminary observations: first, the Respondent claims that the parties now agree that the subject matter of the valuation is CIOC's rights under the Contract, not the Caratube oil reserves themselves. Therefore, the Claimants' valuation is inherently flawed because it incorrectly assumes that at the moment of termination CIOC had long-term vested contractual rights to the production of the reserves in the Contract Area (Respondent's First Post-Hearing Brief, para. 398).

1007. Second, the Respondent submits that the Parties agree that Kazakh law is the applicable law, including to the issue of material and moral damages (Respondent's First Post-Hearing Brief, para. 399).

1008. Third, according to the Respondent, the Parties generally agree that the Claimants have the burden of proof of their damages claims (Respondent's First Post-Hearing Brief, para. 400).

1009. Fourth, the Respondent states that the Parties agree that under Kazakh law and international law, damages, including for lost profits, must be sufficiently certain and not speculative. However, contrary to the Claimants' allegation, under Kazakh law the threshold of sufficient certainty applies to both the existence and the amount of the damage. The Claimants' claims for damages meet neither the threshold of Kazakh law nor the Claimants' lower threshold of reasonable confidence (Respondent's First Post-Hearing Brief, para. 401).

1010. Fifth, the Respondent argues that the Parties agree that the valuation date is 31 January 2008. While they disagree on the applicable valuation standard, they now agree that this issue is of little relevance in this case. Nevertheless, the Claimants are incorrect to state that, if the FMV standard were to apply only to a lawful expropriation and not to an unlawful expropriation, they would be in a less favorable position in the event of an unlawful expropriation than in a lawful one. The Respondent notes that the price that a reasonable buyer would agree to pay for the Contract on the valuation date under the FMV standard would necessarily take into account CIOC's rights and obligations under the Contract on such date and, thus, the risk of termination. Therefore, the uncertainties relating to the Contract, including the risk of termination, must be taken into account for assessing damages under either the Full Reparation or the FMV standards (Respondent's First Post-Hearing Brief, para. 402).

a. Compensatory damages

1011. After recalling the most relevant facts surrounding the Claimants' damages claims and further substantiating its position that the Claimants' claims are over-stated, unrealistic and flawed (Counter Memorial, paras. 1331-1357), the Respondent sets forth **the applicable valuation standards and valuation date in this case**. While the Respondent agrees that 31 January 2008 is the appropriate valuation date, it disagrees that FMV is the appropriate standard. Rather, a subjective and concrete

approach to damages, focusing on the actual damage suffered by the Claimants and taking into account the financial situation and the specific plans and competences of the Claimants should apply, instead of an abstract and objective approach, focusing on a hypothetical third party buyer, such as FMV (Counter Memorial, paras. 1358-1360).

1012. In particular, it is the Respondent's position that, under Kazakh law, damages for the unlawful termination of a contract in breach of the law or the contract follow the principle of full compensation (*restitutio in integrum*), which aims at putting the aggrieved party in the same position it would have been in had the breach not occurred. The aggrieved party is entitled to real damages, i.e. the expenditures incurred or to be incurred due to the violation of that party's rights, and the lost profits the aggrieved party would have received under normal operating conditions. Kazakh law follows a subjective and concrete approach to damages, focusing on the actual damage suffered. While the Claimants seemingly agree with the Respondent's position as regards the applicable standard, they nevertheless rely on the FMV standard. For the Respondent, the Claimants' FMV valuation should therefore be disregarded (Counter Memorial, paras. 1362-1364).

1013. Furthermore, according to the Respondent, full reparation without FMV is also the applicable standard for breach of customary international law, should the Tribunal find that the Claimants have rights thereunder and that the alleged wrongful termination of the Contract violated customary international law. Moreover, the same standard would also apply to a breach of the BIT standards allegedly triggered by the FIL's MFN clause, if the Tribunal were to find that such breach is not compensated using the valuation standard of Kazakh law, but the international standard. Indeed, the full reparation standard is set forth in Article 31 of the ILC Articles. The content of this obligation of reparation has also been specified by the PCIJ in the *Chorzów Factory* case. Article 36 of the ILC Articles states that reparation in the form of compensation must cover "any financially assessable damage including loss of profits insofar as it is established". The Respondent asserts that this means that the damage must be measured from the perspective of the affected individual and not from the perspective of a third person, such as the hypothetical willing buyer. This damage is thus often measured by reference to the aggrieved party's investment costs, lost profits, or a combination of the two, and must not exceed the damage actually incurred by the aggrieved party.

1014. According to the Respondent, this approach was followed by the *Amco II* tribunal and the tribunal in *PSEG v Turkey* who expressly rejected the application of the FMV standard. These cases confirm that the FMV standard is not appropriate in the case of breach of customary international law. The damage allegedly suffered by CIOC is rooted in the Contract and CIOC should thus be placed in the position it would have been in had the Contract remained in effect in the hands of CIOC. Moreover, the Caratube project was in its infancy and CIOC had no vested rights to production. There also was no market for valuation purposes given the state of affairs in which CIOC had left the Caratube concession in January 2008 (Counter Memorial, paras. 1365-1373).

1015. The Respondent concedes that the FMV approach could arguably apply if the Tribunal were to find that the Claimants have rights under the FIL and customary international law (which the Respondent denies) and that the alleged wrongful termination of the Contract amounted to a lawful expropriation (which the Respondent also denies and which the Claimants did not allege). Under the FMV standard, which calls for an abstract approach to valuation, it is necessary to determine the hypothetical purchase price that a hypothetical buyer (that is the reasonable buyer) would have paid for CIOC on 31 January 2008. Contrary to the Claimants' allegation that the FMV is measured by both the price paid and later investments to be made pursuant to the Contract, FMV is measured exclusively by reference to the price of an asset that is paid to the seller. This is because the purchase price of a contract will necessarily depend upon and take into account the rights and obligations to be acquired under such contract, including later investments to be made pursuant thereto. Concerning the notion of the third party reasonable buyer, the Respondent submits that this is a willing, reasonable businessman of the same size as CIOC, who has good information, desires to maximize his financial gain and is not under duress. The Respondent argues that under Kazakh law, there are no specific criteria that would warrant the use in certain circumstances of one method over another. Rather, it is for the parties to show that a method is more appropriate than another under the specific circumstance to determine FMV (Counter Memorial, paras. 1374-1379; Respondent's First Post-Hearing Brief, paras. 404-406).

1016. It is the Respondent's position that, should the FMV standard apply (which the Respondent denies), the Claimants are not entitled to compensation based on lost profits or lost opportunity because any such profits are too uncertain and

speculative. CIOC should at most be entitled to compensation for its sunk investment costs in the amount of USD 4.2 million. In the alternative, assuming *arguendo* that CIOC is entitled to lost profits, the DCF valuation proposed by the Claimants is flawed and unreliable and that damages awarded to CIOC should be reduced by 50% to account for CIOC's contribution to its own losses.

1017. As regards in particular **the applicable requirements for awarding lost profits**, the Respondent observes that, under the applicable Kazakh law (as well as under customary international law), only damages (including lost profits) that are direct, certain and not speculative are recoverable, and this general premise applies both with respect to the existence and the amount of lost profits. Thus, the Claimants must prove that both the existence and the amount of the claimed damages are sufficiently certain, direct and not speculative. According to the Respondent, while the Claimants do not dispute this applicable high threshold, they do however (wrongly) allege that the requirement of sufficient certainty applies only to the existence of the damage or lost profit, but not to the claimed amount. Indeed, a failure to quantify the claimed lost profits indicates that the existence of the lost profits is not sufficiently certain (Counter Memorial, paras. 1381-1387).

1018. Furthermore, regarding the Respondent's position that **CIOC is not entitled to compensation based on lost profits using DCF or lost opportunity to generate profits because any such profits are speculative and uncertain**, the Respondent further argues that the DCF method is inherently uncertain (a view that is supported by various well-known economists). Moreover, arbitrators cannot rely solely on economics to determine the appropriateness of a valuation method, such as the DCF, or on the amount of compensation to be awarded, because the use of this method presupposes that the existence and amount of lost profits can be established with a sufficient degree of certainty. Arbitrators, unlike businessmen, cannot reason as risk-taking investors and include speculative and uncertain profits in their awards (Counter Memorial, paras. 1388-1394).

1019. The Respondent clarifies that the DCF method may be appropriate to value oil projects where there exist vested contractual rights to reserves, reliable data, including reliable reserves estimates, and where the claimant is a serious oil & gas operator and has a solid track record in the oil industry. However, this is not the case here because of several independent reasons which all show that the existence of CIOC's lost profits is too uncertain and speculative.

1020. First, for the Respondent, there is no certainty, let alone sufficient certainty, that CIOC or a reliable third party buyer would have ever been entitled to a 25-year commercial production license, in particular whether they would ever have had the vested right under the Contract to enter the production phase, without which there would be no future profits. Indeed, it is wholly speculative to assume that, had the Contract not been terminated, either CIOC or a reasonable buyer would have made a commercial discovery, obtained the approval of a Field Development Plan by the CDC, obtained the approval to move to production from the MEMR's Expert Committee and complied with the Extended MWP and the 2008 AWP in a period of 16 months. Contrary to the Claimants' allegations, CIOC did not make a Commercial Discovery within the meaning of the Contract; it had no vested rights to production at the moment of termination. Even if such right had been acquired, it would not extend to all of the deposits identified by Mr. Tiefenthal in his Reserves Report, but only to the deposits for which a Commercial Discovery would have been declared (Counter Memorial, paras. 1399-1418; Respondent's First Post-Hearing Brief, paras. 418-423; Respondent's Reply Post-Hearing Brief, paras. 145-146).

1021. Second, the Respondent submits that CIOC was not a going concern with a record of profits. Rather, at the time of termination, CIOC had been in existence for little more than five years and CIOC's project was still in its infancy. CIOC had no history of profitable operation under commercial production and its history of trial production in known deposits during the exploration phase was disappointing and well below the forecasts in the work programs. CIOC generated no surplus cash flow or profits whatsoever, but rather a negative cash flow. CIOC also had a record of accounting losses every year between 2002 and 2007. Furthermore, the Respondent rejects the Claimants' argument that the requirement of a going concern can be dispensed with for oil projects as it is directly contradicted by the case law of several tribunals requested to value oil projects. Even under the cases relied upon by the Claimants, the latter are not entitled to lost profits (Counter Memorial, paras. 1419-1431; Respondent's First Post-Hearing Brief, paras. 411-417; Respondent's Reply Post-Hearing Brief, para. 144).

1022. Third, according to the Respondent, the overwhelming majority of CIOC's investment was yet to be made and CIOC's alleged lost profits were dependent on such investments. In particular, by the Claimants' expert's own admission, at the time of the termination on 31 January 2008, more than 95% of CIOC's investment was yet to be made, including 100% of the commercial production stage investment.

In this situation, a cash flow projection is unreliable and leads to damages that are too uncertain and speculative. This position is confirmed by the findings of several international tribunals, says the Respondent (Counter Memorial, paras. 1436-1438; Respondent's First Post-Hearing Brief, paras. 424-428; Respondent's Reply Post-Hearing Brief, para. 147).

1023. Fourth, the Respondent submits that CIOC did not have the required expertise and financial resources necessary to succeed and be profitable under the circumstances. The Respondent underlines that a project cannot generate cash flows in the vacuum and the inner features of the project must be considered, such as its state of affairs, the quantity and condition of its assets, the quality of its organization, and the competence, skills and experience of its management and staff. Otherwise, an aggrieved enterprise could be unduly and unfairly rewarded for something that it did not do. In particular, CIOC would be rewarded with an unjust windfall even though it would never have been able to gain itself the compensation it now requests by either performing the Contract, given CIOC's demonstrated lack of expertise, management skills and financial means, or by selling its interests in the Contract to a reasonably competent third party buyer, given the illiquidity of the Contract and of CIOC's shares in January 2008. Mr. Devincci Hourani never invested any money in the project other than the nominal price of USD 6,500 that he allegedly paid for his shares. And CIOC could not have relied on loans because banks lend on a cash flow basis; JOR cannot be regarded as a reliable source for obtaining hundreds of millions of dollars necessary to develop the Caratube project. CIOC could not have obtained the necessary financing through its "meager and declining production from the suprasalt reservoirs" (Counter Memorial, paras. 1439-1454; Respondent's First Post-Hearing Brief, paras. 429-432).

1024. Fifth, according to the Respondent, CIOC is not entitled to lost profits because, contrary to the Claimants' allegation, there is no reliable data to project future cash flows over 37 years. In particular, in the absence of a usable 3D study and exploratory wells outside the known deposits, there is no reliable reserve estimate or development plan. Indeed, Mr. Tiefenthal's reserve estimate, development plan and production profile are flawed and unreliable and irreconcilable with CIOC's record of performance or capabilities. Likewise, CER's reserve estimate and development plan are flawed and unreliable. The Respondent points out that whether or not the CER reserve estimate was confirmed by the Respondent is irrelevant. What is relevant is whether these estimated reserves are sufficiently certain to project lost

profits over 37 years. According to the Respondent, this is not the case. Furthermore, given the fact that oil prices are undeniably unstable and volatile, there is no reliable oil price estimate over the 37-year period claim. Moreover, the alleged KTG "offer" cannot be considered as a genuine arms-length offer and must be disregarded entirely. There are reasons to believe that the March 2008 meeting in London concerned the sale of gas rather than the sale of CIOC, which would reconcile many inconsistencies in the Claimants' and their witnesses' story and explain why the meeting took place in London with Mr. Issam Hourani, the presence of Mr. Harvey Jackson at the meeting who knew nothing of CIOC but was in charge of Mr. Issam Hourani's portfolio, the lack of communication between Messrs. Devincci Hourani and Kassem Omar and KTG, Mr. Devincci Hourani's absence from the meeting, and the lack of any due diligence regarding CIOC (Respondent's First Post-Hearing Brief, paras. 433-484; Respondent's Reply Post-Hearing Brief, paras. 131-132 and paras. 149-165).

1025. In response to the Tribunal's **Question No. 10** in the Post-Hearing Order,[107] the Respondent submits that the Tiefenthal Full Field Production Profile (Figure No. 27 and Table 36 of his Reserves Report) is based on the two main assumptions that CIOC would have acquired between 2008 and 2012 a commercial production license for all three formations of the Contract Area and that during production, CIOC would have successfully carried out the Tiefenthal Development Plan and produced over 79.9 million barrels of oil. For the Respondent, these assumptions are incorrect and unrealistic, and the Tiefenthal Full Field Production Profile is flawed, completely disconnected from CIOC's past performance and the product of Mr. Tiefenthal's imagination. Nothing could have happened between 2008 and the commencement of production to justify the ascent of Mr. Tiefenthal's curve, compared to the results achieved by CIOC at the time of termination. The Respondent rejects the Claimants' rebuttal arguments and argues that some of them actually confirm the Respondent's position. In particular, the Respondent argues, *inter alia*, that the Claimants' rebuttal arguments confirm that (i) they would have used much more time to drill the two deep wells than contemplated by Mr. Tiefenthal's production profile and under the Extended MWP; (ii) CIOC would not have acquired vested rights to production from the overhang reservoirs by the end

[107] See *supra* para. 237 ("**Question 10**: Explain and comment on the curve presented by Mr. Tiefenthal with respect to the expected oil production starting from the production phase (see Mr. Tiefenthal's Reserves Report, Figure No. 27): what would have happened during the period between the beginning of 2008 and the commencement of production to justify the ascent of that curve, compared to the results achieved by CIOC at the time of the termination of the Contract?").

of the exploration phase; (iii) the Claimants sought to maximize production during trial production, it being pointed out however that the level of production was still 65% below CIOC's own projections and productivity of the known deposits was declining despite CIOC's efforts to maximize production therein. There is no reason to believe that the wells would suddenly start to produce much more if the field went into production (Respondent's First Post-Hearing Brief, paras. 437-464; Respondent's Reply Post-Hearing Brief, paras. 149-156).

1026. The Respondent rejects the Claimants' argument that tribunals have accepted the application of the DCF method even when a project has not started operations or does not have a track-record of profitability, namely when there was sufficiently established data to award lost profits using DCF. It is the Respondent's position that there are no sufficiently established data on the basis of which lost profits could be awarded. In particular, there are great uncertainties concerning the existence, amount, commerciality and productivity of the Caratube reserves due to CIOC's failure to acquire proper 3D seismic data and drill exploratory wells (Counter Memorial, paras. 1458-1461).

1027. Furthermore, the Respondent submits that both the Tiefenthal Reserves Recalculation and the CIOC/CER 2008 Reserves Estimates are utterly flawed and must be disregarded. With respect to the Tiefenthal Reserves Recalculation, first, it follows a probabilistic approach which is susceptible to bias, is contrary to industry practice in several regards, and lacks in transparency, meticulousness and rigor. Second, the Tiefenthal Reserves Recalculation is flawed in that it relies on CIOC's flawed 3D data and flawed maps, which were created based on the 3D data. As a result, there is no certainty that the estimated reserves and resources exist. Third, the Tiefenthal Reserves Recalculation includes 46% of highly speculative contingent and prospective resources (which are the most uncertain categories of resources, as they are undiscovered and undeveloped accumulations). The vast majority of these resources come from the unexplored overhang and subsalt sections (it being specified that the CIOC/CER 2008 Reserves Estimate correctly and in accordance with industry practice did not include any speculative and prospective resources). Approximately USD 300 million claimed by CIOC in damages for these contingent and prospective resources should thus be rejected, which alone would reduce CIOC's damages claim by approximately 32%. Fourth, the Tiefenthal Reserves Recalculation wrongfully uses "P50" (which have only a 50% probability of occurrence, meaning a 50% chance that the volumes are higher or lower than

estimated) or "2P" (which are equivalent to the "P50" reserves estimates) values for reserves. Valuations based on such reserves are highly uncertain and speculative and must be disregarded. Fifth, the Tiefenthal Reserves Recalculation accounts for 100% of the value of these P50/2P reserves and fails to appropriately risk-adjust its probable reserves and the vast majority of its proved undeveloped reserves to account for the fact that these estimated reserves may not turn out to be commercially extractable.

1028. As regards the CIOC/CER 2008 Reserves Estimate, the Respondent submits that it must also be disregarded because it is flawed for various reasons similar to those mentioned with respect to the Tiefenthal Reserves Recalculation (Counter Memorial, paras. 1462-1484).

1029. The Respondent further argues that the Tiefenthal Development Plan, the Tiefenthal Full Field Production Profile and the CIOC/CER Development Plan are all unreliable, unrealistic and cannot serve as a reliable basis for DCF. The Respondent points to several allegedly wrong assumptions underlying these documents, the aim of which, says the Respondent, is to artificially accelerate oil production, increase production volumes, and sustain a higher production level for a longer period of time resulting in higher revenues (Counter Memorial, paras. 1485-1495).

1030. The Respondent submits that oil prices are unstable and highly volatile, and oil price forecasting is notoriously imprecise. This is even more problematic with respect to a cash-flow projection over a period of 37 years, which is why tribunals have refused to apply DCF for projections twice as short, because they would have resulted in a speculative and uncertain compensation (Counter Memorial, paras. 1496-1497; see also Respondent's Reply Post-Hearing Brief, para. 156).

1031. It is the Respondent's position that **CIOC is not entitled to damages for lost opportunity**. The Respondent argues, first, that there is no legal basis, in particular under Kazakh law, for awarding damages for lost opportunity in this case. Under Kazakh law, any damages based on a loss of opportunity or loss of a chance are not recoverable because deemed too uncertain. Likewise, international law also does not recognize a general principle of lost opportunity to generate a profit as such claims for lost opportunity necessarily provide for amounts of damages that are too uncertain and speculative (Counter Memorial, paras. 1501-1503; Respondent's First Post-Hearing Brief, paras. 485-487; Respondent's Reply Post-Hearing Brief, para. 166).

1032. In any event, for the Respondent, there is no factual basis for awarding damages for lost opportunity in this case, because such damages are too speculative and not sufficiently probable. The Respondent points out that only few tribunals have considered claims for lost opportunity, and even fewer tribunals have awarded such claims, namely in exceptional circumstances where lost profits were not sufficiently certain but were sufficiently probable such that, but for the alleged breach, profits were sufficiently likely to have been generated. In these cases, the tribunals generally awarded conservative and often discretionary lump sums far lower than the amounts claimed, without applying the DCF method, in view of an equitable, reasonable and balanced outcome, rather than based on mathematical calculations. The Respondent stresses that a high threshold of sufficient probability must be applied to a claim for lost opportunity, and that, contrary to the Claimants' allegations, it is for the Claimants, not the Respondent, to prove that its lost opportunity claim meets such high threshold. This is in line with the international legal principle of *actori incumbit onus probandi* and with the rulings of international tribunals. Furthermore, tribunals (e.g. in *Wena* and *Ascom*) have refused to award damages for lost opportunity where the alleged profits were too speculative or insufficiently probable (Counter Memorial, paras. 1505-1510).

1033. In light of the forgoing, the Respondent submits that CIOC is not entitled to damages for lost opportunity to generate profits because such profits are speculative and not sufficiently probable. In particular, the Claimants have not met their burden of proving that the high threshold of sufficient probability is met, *inter alia*, in the light of the various flaws in the Tiefenthal Reserves Recalculation and the CIOC/CER 2008 Reserves Estimates, the volatility of the oil prices, etc. The Claimants' lost opportunity claim is speculative for the same reasons as those outlined with regard to their lost profits claim. For the Respondent, the Claimants' claim for lost opportunity is a disguised claim for lost profits, which is evidenced by the Claimants' argument that they would have had a 99% chance of generating profits in the amount of USD 931.64 million. Thus, the lost opportunity claim must be rejected for the same reasons as the lost profit claim (Counter Memorial, paras. 1511-1515).

1034. It is the Respondent's position that **KTG's alleged USD 500 million arms-length offer in 2008 to acquire CIOC is more than highly suspicious and must be entirely disregarded for valuation purposes**. The Respondent names various reasons in support of its position. First, the KTG offer cannot be a genuine third party arms-length offer. It does not make any business sense in light of CIOC's

reality at the time, for instance the fact that the Contract had been terminated on 30 January 2008, i.e. at least one month before the alleged meeting in March 2008 during which the USD 500 million offer was allegedly made (Counter Memorial, paras. 1518-1519). Second, the suspicious nature of KTG's letter to Mr. Issam Hourani dated 11 February 2008 (e.g. shortly after the termination of the Contract on 30 January 2008), in which KTG allegedly offered to purchase CIOC for USD 450 million (Exh. C-160) (Counter Memorial, paras. 1520-1523). Third, the contradictory and inconsistent statements made by the Claimants and their witnesses (e.g. Mr. Issam Hourani, to whom the letter of 11 February 2008 was addressed) with respect to the KTG offer and the meeting of March 2008 (Counter Memorial, paras. 1524-1529). Fourth, the various doubts about the genuineness of the alleged KTG offer are further reinforced by the appearance, disappearance and reappearance of Mr. Harvey Jackson's Statement in the *Caratube I* arbitration. The submission, withdrawal and resubmission of Mr. Jackson's statement was timed by the Claimants with the aim of minimizing the Respondent's ability to properly reply to their unfounded allegations. In turn, this behavior also calls into question Mr. Jackson's own behavior and motives (Counter Memorial, paras. 1530-1531). Hence, the KTG offer should be disregarded for valuation purposes. Even if genuine, it would confirm the strong ties between Mr. Issam Hourani and CCC, that Mr. Issam Hourani was acting as CIOC's *de facto* owner, and that Messrs. Devincci Hourani and Kassem Omar were mere straw men (Counter Memorial, paras. 1532-1536; Respondent's First Post-Hearing Brief, paras. 474-479; Respondent's Reply Post-Hearing Brief, para. 164).

1035. In the light of the foregoing, the Respondent reiterates that **CIOC is at most entitled to sunk investment costs** under the full reparation standard or under both the full reparation standard and the FMV standard (which are the applicable standards according to the Claimants).

1036. With reference to its expert, Mr. Brailovsky, the Respondent defines sunk investment costs as "the net amount of money that the investors have put into the company or that the company has put into the project" (Counter Memorial, para. 1537). The suggested approach has been followed by many tribunals, including in cases related to oil projects, when they found that the alleged lost profits or opportunity were too uncertain and speculative. They considered the approach to constitute "the best way of achieving full reparation based on the notion of *restitution in integrum*".

1037. With reference to Mr. Brailovsky's Valuation Report, the Respondent submits that CIOC's sunk investment costs amount to USD 20.8 million and must be reduced to take into account the cessation risk, resulting in an amount of damages of USD 4.2 million. An award of sunk investment costs or an award based on an asset-based method would exclude the expected cash flows to be generated from the Caratube field during production. Contrary to the Claimants' position, this is appropriate because such cash flows and their amount are simply too speculative and uncertain (Counter Memorial, paras. 1537-1546; Respondent's First Post-Hearing Brief, paras. 488-495).

1038. Alternatively, were this Tribunal to apply the FMV standard alone (without the full reparation standard) and to consider that CIOC is not entitled to its sunk investment costs under this standard, the Respondent argues that CIOC is at most entitled to damages using a **backward-looking valuation method**, because CIOC is not entitled to lost profits or lost opportunity using a forward-looking method. According to the Respondent, it would be appropriate to apply the backward-looking valuation method based on CIOC's historical capital investments updated to take into consideration the factors of inflation and depreciation. Using this method, the FMV of CIOC's capital investment as of 31 January 2008 is USD 30.8 million and must be reduced to take into account the cessation risk and CIOC's lack of marketability, resulting in an amount of damages of USD 5 million. The figure of USD 30.8 million is consistent with (i) the actual prices paid in real-life transactions for the acquisition of the Contract in 2002 and of CIOC's shares in 2004-2005; (ii) the state of affairs of the project in 2008; and (iii) the evolution of oil prices between 2002 and 2008. The Respondent points out that the increase in the FMV coincides with the increase of oil prices and that nothing else happened with CIOC between 2002 and 2008 to justify even a moderate increase in value (Counter Memorial, paras. 1547-1553).

1039. The Respondent submits that the Claimants cannot dispute the application of the cessation risk premium ("**CRP**") and discount for lack of marketability ("**DLOM**"). According to the Respondent, GT admitted at the Hearing that if the Tribunal considered as a factual matter that there was a 75% chance that the Contract would be terminated, such risk should be taken into account. Contrary to the Claimants' position, the application of a CRP to sunk investment costs or a backward-looking value is entirely appropriate in the present case because CIOC or a reasonable buyer would not have been entitled under the Contract or the law to the reimbursement of their expenditures if they did not declare a Commercial Discovery.

It is thus necessary to account for this high risk by applying a CRP irrespective of the valuation standard. The use of a DLOM is also entirely justified to take into account "the fiscal reality" of CIOC and the fact a potential buyer might not be anxious to buy (Respondent's First Post-Hearing Brief, paras. 491-495).

1040. The Respondent argues that, **assuming *arguendo* that DCF is the appropriate valuation method, CIOC is at most entitled to damages based on the base decline production profile**, that is a DCF analysis based on a liquidation profile assuming no additional capital investment and on the only sufficiently certain reserves in this case, i.e. the proved producing reserves. It is the Respondent's position that such a DCF analysis would yield a net present value ("**NPV**") of USD 4.4 million under the full reparation standard and of USD 3 million under the FMV standard. Contrary to the Claimants' DCF analysis, the Respondent's own DCF analysis is based on (i) proved producing reserves and a more realistic base decline production profile; (ii) drilling costs that take into account the costs of dry holes; (iii) more realistic oil price projections; (iv) a more realistic discount rate of 24.3% p.a.; and (v) appropriately adds a CRP of 80% and a DLOM of 19.3% (Counter Memorial, paras. 1554 et seq.; Respondent's First Post-Hearing Brief, paras. 496-501; Respondent's Reply Post-Hearing Brief, para. 158).

1041. The Respondent specifies that its DCF analyses does not include any additional capital expenditures, ignores all of the exploration and investment obligations included in the Extended MWP, including the drilling of the two deep overhang wells and the two deep wells, and are short lived. While they are unsustainable, they are based on the only sufficiently certain reserves in this case. The Respondent further notes that if additional investments were assumed, these DCF analyses (like the DCF analysis based on the Tiefenthal Reserves Recalculation and the Tiefenthal Full Field Production Profile, or on the CIOC/CER 2008 Reserves Estimate and the CIOC/CER Development Plan) would yield a negative NPV (thus entitling CIOC to no damages at all) (Counter Memorial, paras. 1558-1559).

1042. With respect to this line of argument, the Respondent specifies that GT's DCF analysis of CIOC's FMV is erroneous and yields a negative NPV when corrected. In particular, GT's DCF analysis is based (i) on the flawed information provided in the Tiefenthal Reserves Report; (ii) on unrealistic capital and operating expenditures estimates provided by the IHS Report, which, among other flaws, includes drilling costs only for wells that are successful. Drilling costs for unsuccessful wells should have been taken into account in GT's DCF analysis to avoid an undue

undervaluation of drilling costs (which the Respondent estimates at no less than USD 550 million), it being specified that there was a high possibility of dry holes; (iii) on exaggerated oil prices, namely nominal short-term futures market oil prices, which GT failed to adjust for the effect of expected inflation. This led to an overestimation of cash flow; and (iv) on a discount rate of 11.5% per annum, which is too low. GT's DCF analysis further fails to account for the cessation risk and to include a discount for lack of marketability due to CIOC's illiquidity. As a result, GT's DCF analysis grossly overestimates CIOC's FMV (Counter Memorial, paras. 1560-1570).

1043. The Respondent concludes that GT's assumptions are utterly unrealistic, completely disconnected from the Caratube reality and from the Contract's FMV in 2002 of USD 9.1 million, CIOC's FMV in 2004-2005 of USD 18 million and the USD 6,500 allegedly paid by Mr. Devincci Hourani to acquire his 92% share in CIOC. Should CIOC be awarded the claimed USD 941 million, the profitability for CIOC would be an exorbitant internal rate of return ("**IRR**") of 123% per annum (i.e. an IRR 6.5 times higher than the median IRR of the 170 largest oil projects in 2007 of 18.7% per annum).

1044. Finally, the Respondent asks this Tribunal to apply two reality checks (or "glass slippers"): "[f]irst, one must determine a consistent rate of return which the claimant has or would earn on the project based on the projected performance after the taking". This rate of return is then compared with the expected discount rate or reasonable rate of return which a prospective buyer would expect on that project. Second, "one must compare the 'income before and after the taking'". It is the Respondent's position that CIOC failed both reality checks (Counter Memorial, paras. 1571-1577).

1045. The Respondent argues that once GT's incorrect assumptions are corrected (as was done by Mr. Brailovsky in his Valuation Report), CIOC's NPV was negative on 31 January 2008, namely a negative figure of USD 8 million. Based on Mr. Brailovsky's analysis, the Respondent concludes that CIOC is not entitled to any damages if this Tribunal were to apply the FMV standard, the DCF method and rely on the flawed Tiefenthal Reserves Report and GT Quantum Report (Counter Memorial, paras. 1578-1580).

1046. According to the Respondent, contrary to the Claimants' allegations, GT's valuation is not confirmed by the KTG offer and the sales of nearby fields, namely the sale of

First Calgary Petroleum ("**FCP**") to ENI. In particular, the Claimants have not provided any information on the circumstances and context of these sales. In any event, no parallels may be drawn from these transactions, in particular the FCP sale, for the purposes of valuation in the present case. Rather, this transaction clearly confirms that GT and the Claimants have immensely over-valuated CIOC (Respondent's Reply Post-Hearing Brief, paras. 160-164).

1047. Concerning **the DCF analyses based on the flawed CIOC/CER 2008 Reserves Report and Development Plan** (one to determine the full reparation value ("**FRV**") of CIOC on 31 January 2008, assuming that CIOC would have carried out the operations (concrete approach), and another one to determine CIOC's FMV on 31 January 2008, assuming the price that a reasonable buyer would pay for CIOC (abstract approach)), the Respondent maintains that they are flawed and cannot be used for DCF purposes. They also yield negative NPVs, i.e. a negative NPV of USD 9.2 million for the concrete approach, and a negative NPV of USD 8.1 million for the abstract approach. The Respondent again concludes that CIOC is not entitled to any damages if this Tribunal were to apply either the full reparation or FMV standards, the DCF method and rely on the flawed CIOC/CER 2008 Reserves Report and the CIOC/CER Development Plan (Counter Memorial, paras. 1581-1587).

1048. In the light of the foregoing (and as mentioned above in paragraph 1040), the Respondent maintains that, if the Tribunal decides to apply the DCF method (which the Respondent denies), the only production profile left is **the Base Decline Production Profile** developed by IFM. The Respondent further maintains that CIOC is at most entitled to USD 4.4 million under the full reparation standard and USD 3 million under the FMV standard if the Tribunal were to apply the DCF method and rely on the Base Decline Production Profile (Counter Memorial, paras. 1588-1590).

1049. It is the Respondent's position that **any damages awarded to CIOC should be reduced by 50% to account for CIOC's own contribution to its alleged losses**. In particular, under Kazakh law, damages can be reduced if the aggrieved party willfully or negligently provoked or contributed to the other party's wrongdoing. Article 39 of the ILC Articles contains a similar rule. Moreover, several tribunals (e.g. in *MTD v Chile*, *Occidental v Ecuador* and *Yukos v Russia*) have relied on the contributory fault doctrine to lower the amount of damages awarded to claimants. It is the Respondent's position that CIOC in this case has contributed to its loss as it was in material breach of its contractual obligations, has been put on notice of such breaches since 2003, but chose to disregard these notices. CIOC further violated a

myriad of Kazakh laws and regulations prior to the termination of the Contract, for instance tax laws, the law on subsoil and subsoil use, environmental laws, the unified rules for developing oil and gas fields, the rules on well conservation and liquidation, the law on state environmental expertise, the land use law, and the code on water use. Moreover, the Respondent alleges – in the terms of the tribunal in *MTD v Chile* – that CIOC's Caratube project was doomed to fail and that it therefore cannot be considered as a wise investor and its losses would have occurred irrespective of any alleged breaches by the Respondent. Relying further on the *MTD* and *Occidental* cases, the Respondent argues that when the contributory fault of a claimant is established, damages have been reduced by half, on the sole ground that the claimant had acted imprudently from a business point of view (and even more so when the claimant had acted illegally) (Counter Memorial, paras. 1591-1598; Respondent's First Post-Hearing Brief, para. 502).

1050. Finally, the Respondent submits that the claim that any amounts due to CIOC must be paid to Mr. Devincci Hourani outside of Kazakhstan without any right of set-off must be rejected. There is no basis for paying to one Claimant damages awarded to another Claimant. Moreover, the Respondent argues that any amount due to Mr. Devincci Hourani, as CIOC's 92% shareholder, should be reduced to account for CIOC's liabilities provisionally estimated at USD 35,320,951, as finding otherwise would allow Mr. Devincci Hourani to bypass CIOC's corporate structure and put himself in a better position than CIOC's creditors, which include the Respondent, to overlook bankruptcy issues faced by CIOC and allow CIOC not to pay the USD 3.2 million that it owes and has failed to pay under the binding *Caratube I* award (Counter Memorial, para. 1611; Respondent's First Post-Hearing Brief, para. 508).

b. Moral damages

1051. It is the Respondent's position that the Claimants are not entitled to moral damages because this claim falls outside the jurisdiction of this Tribunal and, in any event, the Claimants are not entitled to this relief as a matter of law and fact.

1052. Regarding the Respondent's first argument that **this Tribunal lacks jurisdiction over the Claimants' moral damages claims**, the Respondent specifies that such claims are not arbitrable under Kazakh law in that they concern the investor and the investor's personal rights, as opposed to its property rights. The Respondent relies on Article 6.8 of the Kazakh law on international arbitration dated 28 December 2004 and on Article 7.6 of the law on domestic arbitration dated 28 December 2004.

The Respondent also submits that the FIL, assuming *arguendo* that it was applicable, only protects property rights of the investor, but not the investor itself. Article 9 of the FIL clearly provides that only material damages caused to an investor's investment may be subject to compensation. Hence, in an investment dispute, the investor can only seek the protection of rights associated with the invested property. By contrast, it is not possible to claim moral damages in relation to the violation of a property right. The same applies under Article 951(4) of the Kazakh Civil Code: it is not possible for a claimant to request moral damages in relation to the violation of a property right.

1053. The Respondent submits that the Claimants' moral damages claim also falls outside the scope of Article 27.7 of the Contract as it has nothing to do with either party's rights under the Contract.

1054. In response to the Claimants' argument that their claim is for "moral damages arising out of an investment" and not a "personal injury claim", the Respondent submits that under Kazakh law, moral damages are sought in relation to a violation of a personal non-property right and are thus "personal injury claims" (Counter Memorial, paras. 1612-1622; Respondent's First Post-Hearing Brief, paras. 510-515). This position is consistent with international law, where the object of substantive protection is usually the property rights comprising an investment, not the personal rights of the investor. A distinction must therefore be drawn between measures affecting the individual's investment and measures affecting the individual (Counter Memorial, paras. 1623-1624).

1055. In response to the Tribunal's **Question No. 11** in the Post-Hearing Order,[108] the Respondent argues that, under Article 25(1) of the ICSID Convention, if a claim for moral damages does not arise directly out of an investment, the Tribunal does not have jurisdiction to entertain such claim. The Claimants' moral damages claim does not arise directly out of an investment because (i) CIOC and Mr. Devincci Hourani did not make an investment; (ii) the Claimants' moral damages claim is based on *post facto* allegations that have nothing to do with their alleged investment or loss thereof, it being underlined that the object of the substantive protection of an investment treaty is usually the property rights of the investor, not the investor

[108] See *supra* para. 237 ("**Question 11**: Is it possible to request the reparation of moral damages with respect to the loss of an investment within the framework of Article 25 of the ICSID Convention? If not, before which court or tribunal should this reparation be requested, assuming that the existence of moral damages is established?").

himself. The Claimants' moral damages claims do not affect their property right but are personal injury claims (Respondent's First Post-Hearing Brief, paras. 516-517; Respondent's Reply Post-Hearing Brief, paras. 168).

1056. The Respondent points out that this Tribunal does not have jurisdiction to rule on the legitimacy of international criminal investigations carried out by foreign countries that have nothing to do with the termination of the Contract. Moreover, in response to the Claimants' arguments, the Respondent submits that it does not need to indicate the proper forum for the Claimants' moral damages claims. Rather, it is for the Claimants to present their claims before the appropriate forum. The Respondent notes that Mr. Devincci Hourani has filed a complaint in the US against parties other than the Respondent in relation to the Novikova website and demonstrations in the UK and in the US. Mr. Devincci Hourani is requesting over USD 100,000,000 in damages, including moral damages (Respondent's Reply Post-Hearing Brief, para. 170).

1057. The Respondent further argues that, in any event, **the Claimants, who have the burden of proof, have not established that moral damages are justified in this case**. Moral damages are an exceptional remedy and the Claimants must satisfy a high threshold under both Kazakh and international law. Under Kazakh law, only individuals may claim moral damages. Legal entitles are not entitled to moral damages, including for loss of reputation, even if suffered by third parties (such as employees, executives or shareholders as individuals) (Counter Memorial, paras. 1627-1628; Respondent's Reply Post-Hearing Brief, paras. 171-172).

1058. As regards international law, the Respondent concedes that individuals and companies may claim moral damages. However, in order to bring a successful moral damages claim, (i) a party must establish that is has standing under the applicable investment treaty or investment law. Contrary to the Claimants' allegations, it is not accepted that injury or damages to the executives or shareholders of a legal entity constitutes damages to the legal entity itself; (ii) the party seeking moral damages bears the burden of proof and must meet a very high threshold to show liability for moral damages. Under Article 31 of the ILC Articles, compensation for any type of harm, whether material or moral, requires both the proof of the harm (which the Respondent interprets as "damages actually incurred") and causation. The Commentary on Article 36 of the ILC Articles specifies that moral damages may be compensated as long as they are assessable; they cannot be awarded as a proxy for the inability to prove actual economic damage; (iii) a

claimant must meet the extraordinary tests required for the recognition of separate and additional moral damages. The Respondent invokes the "*Lemire* test" according to which a claimant must show that exceptional circumstances are met, namely (a) there was a wrongful act of the state that is grave or substantial (that is "egregious" or "malicious"). The mere breach of an obligation by the state is not sufficient (to avoid double counting, considering the fact that moral aspects of the claimants' injuries have already been compensated by the award of economic compensation); (b) the claimant suffered an actual moral harm that is grave or substantial (it being specified that tribunals have applied this criteria strictly); (c) there is a causal link between the state's measure and the alleged moral harm; and (iv) a claimant has not itself engaged in actions lacking good faith (Counter Memorial, paras. 1629-1640).

1059. In application of the test(s) outlined above, the Respondent contends that CIOC is not entitled to moral damages in relation to CIOC's alleged loss of reputation and moral harm to employees. Concerning the moral damages claim for alleged loss of reputation, the Claimants have not provided any factual or legal bases in support of this claim and it must be rejected for any one of four independent reasons. First, legal entities are not entitled to claim moral damages under Kazakh law. Second, the Claimants have not identified any wrongful act of the Respondent that could be the source of CIOC's alleged harm. Third and fourth, the Claimants have neither proven the materiality of the alleged moral harms, nor have they demonstrated any causal link between an alleged illegal act and the alleged moral harm. Concretely, they have not pointed to any actual loss of reputation suffered by CIOC, let alone to a causal link between such loss of reputation and the Respondent's acts. Finally, the award of damages for CIOC's alleged reputational harm would create a serious risk of double counting with the Claimants' material damages claim. In any event, the Claimants have never formulated such a claim (Counter Memorial, paras. 1642-1648; Respondent's First Post-Hearing Brief, para. 518).

1060. Concerning the moral damages claim for the alleged harassment of CIOC's employees, the Respondent submits that this claim must also be rejected for four independent reasons. First, under Kazakh law and international law, a natural or a legal person cannot claim compensation for the alleged moral damages suffered by third parties, such as CIOC's employees and executives. Second, the Respondent did not harass CIOC or its employees. Third, the Claimants have not presented any evidence to show that the alleged harm or moral suffering of CIOC's employees was

grave or substantial. Finally, the Claimants' reliance on the *DLP* case is inapposite; the exceptional circumstances of that case clearly distinguish it from the present case (Counter Memorial, paras. 1649-1654).

1061. The Respondent argues that, in any event, CIOC's own conduct would render the award of moral damages inappropriate. In particular, CIOC was a poor performing contractor who depleted natural reserves and left the field in very bad condition, causing environmental damages and consistently violated Kazakh regulations (Counter Memorial, paras. 1655-1656).

1062. Finally, the Respondent submits that **the quantum of the Claimants' moral damages claim is disproportionate**, particularly when considering that the Claimants did not show any wrongful conduct of the Respondent or harm suffered. First, the Respondent takes issue with the Claimants presenting a lump sum amount of USD 50 million for all the alleged harms suffered by both Claimants. Moral damages are a remedy for the breach of a personal non-property right and each Claimant is only entitled to claim the damages personally caused to it by specific conduct. The Claimants' failure to demonstrate the quantum of moral damages caused by each of the alleged harm suffered by each Claimant suffices to reject the Claimants' moral damages claim (Counter Memorial, paras. 1672-1674).

1063. Second, the requested lump sum is unsubstantiated and entirely disconnected from the reality of this case and the amount of moral damages awarded by past tribunals. The Claimants cannot justify the excessive amount claimed by considerations of the alleged value of the investment and the profile of the Claimants and the Respondent. The quantum must correspond to the alleged harm and has nothing to do with the abstract value of the investment, the Claimants' alleged profile or the wealth of the Respondent. The amount of USD 50 million claimed by the Claimants is particularly exorbitant when compared with the amounts awarded by international human rights tribunals in cases of extreme violation of human rights. The Respondent points to the USD 1 million award in the *DLP* case, a sum which has been criticized as being disproportionate in the light of the much smaller sums awarded with respect to grave violations of international human rights (Counter Memorial, paras. 1672-1681).

3. Analysis

1064. The Tribunal will first address CIOC's claim for compensatory damages (**a.**), before turning to its request for moral damages (**b.**).

a. Compensatory damages

i. The applicable standard

1065. As was seen above in paragraphs 281 et seq., in accordance with Clause 26.1 of the Contract, the Tribunal will apply the law chosen by the Parties, i.e. Kazakh law, to decide the merits of disputes arising under the Contract. Here, the unlawful termination of the Contract by the Respondent and the violation of the guarantee against expropriation set forth in Article 7 of the FIL, which is applicable via Clause 28.4 of the Contract, gave rise to a dispute in connection with the Contract to which Kazakh law thus applies. This said, as was further seen in paragraphs 281 et seq., the Tribunal will not disregard, but will take into account customary international law, in particular mandatory rules of international law, when deciding the present dispute. The prohibition against expropriations, except where such expropriations respect certain international minimum standards, forms part of the customary international law rules that the Tribunal must take into account when deciding CIOC's damages claim based on the unlawful expropriation of its investment.

1066. The Tribunal recalls that, according to Professor Schreuer, "ICSID tribunals have frequently applied rules of customary international law either under the first or second sentence of Art. 42(1) [of the ICSID Convention]. This practice may be illustrated by the following examples: principles of State responsibility; the principle of respect for acquired rights; […] expropriation requires compensation; the *Chorzów Factory* standard providing the appropriate measure of compensation for wrongful expropriation; […] not only tangible property rights but also contractual rights may be indirectly expropriated; […]".[109]

1067. Regarding Kazakh law, as was seen above in paragraph 819, in case of a lawful expropriation, Article 7(1) of the FIL provides for the "payment of immediate, adequate and effective compensation". Article 7(2) and (3) of the FIL further provides as follows:

[109] Christoph Schereuer, The ICSID Convention: A Commentary, 2nd ed., 2009, ad Article 42 of the ICSID Convention, para. 177, with references (Exh. CLA-53).

> 2. Compensation shall be equal to the fair market value of the expropriated investment at the time when investor was notified of the expropriation.
>
> 3. The compensation shall include a fee for using money, payable for the period from the date of expropriation until the date of compensation pay-off, at the rate determined by the National Bank of the Republic of Kazakhstan.

1068. Article 7 of the FIL contains no rule regarding reparation in case of an unlawful expropriation.

1069. Both Parties have relied on the Kazakh law standard in case of an unlawful termination of the Contract. In particular, the Respondent submits that, in case of an unlawful termination of a contract, Kazakh law provides for the application of the principle of full compensation (*restitutio in integrum*) according to which the aggrieved party must be put in the same position as it would have been in prior to the breach of the contract. The Respondent further submits that the principle of full compensation under Kazakh law comprises "both real damages, i.e., the expenditures incurred or to be incurred by the aggrieved party due to the violation of its rights, and the lost profits which the aggrieved party would have received under normal operating conditions". The Respondent underlines that Kazakh law thus follows a subjective and concrete approach to damages, focusing on the actual damage suffered by the aggrieved party (Counter Memorial, para. 1363).

1070. The Claimants agree in substance with the Respondent's representation of Kazakh law, stating that "[d]amages, under Kazakh law, include all real damages and consequential damages incurred as a result of the unlawful termination of a contract. Real damages consist of the value of the lost or damaged assets, as well as expenditures which are incurred or must be incurred by a wronged party as a result of the unlawful termination of a contract. Consequential damages include the net value of the anticipated lost profits which a wronged party would have received under normal operating conditions should a contract not have been unlawfully terminated". The Claimants note that "[t]he compensation of damages, under Kazakh law, also aims at putting the wronged party in the same position it would have been had the contract been properly performed by the other party" (Memorial, paras. 445-446).

1071. Kazakh law thus does not appear to provide for any specific provisions for assessing damages as a result of an unlawful expropriation. In these circumstances, the Claimants point to the ILC Articles and the *Chorzów Factory* standard, which –

according to the Claimants – "are in fact the very same as those of the BIT for unlawful expropriation and Kazakh law" (Memorial, para. 438). The Respondent also points to the ILC Articles and the *Chorzów Factory* standard for the situation where the Tribunal would find that the wrongful termination of the Contract amounts to a breach of customary international law (Counter Memorial, para. 1367).

1072. Under the title "Reparation", Article 31 of the ILC Articles expresses the state's general obligation of reparation in the following terms:

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

1073. The Commentary to Article 31 of the ILC Articles refers to the PCIJ's *Chorzów Factory* case, which specified in more detail the content of the obligation of reparation, stating in relevant part – and as most frequently referred to in investment awards – as follows (Exh. CLA-102):

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

1074. The Claimants and the Respondent have also relied on the standard expressed in this particular quotation from the *Chorzów Factory* case (Memorial, para. 440; Counter Memorial, para. 1367).

1075. The PCIJ explicitly linked the amount of the reparation and the concept of restitution in kind: where restitution in kind is not possible, the principle of full reparation requires the payment of damages equivalent to restitution in kind. According to the PCIJ (Exh. CLA-102):

> The dispossession of an industrial undertaking – the expropriation of which is prohibited by the Geneva Convention – then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.

1076. The PCIJ also stated that monetary damages equivalent to restitution are "not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment", specifying that reparation for an unlawful expropriation cannot be lower than compensation for a lawful one.

1077. Articles 34 and 36 of the ILC Articles, which have also been relied upon by both Parties, read as follows:

> Article 34. Forms of reparation
>
> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.
>
> Article 36. Compensation
>
> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

1078. The Parties apparently agree that the above-mentioned ILC Articles and the *Chorzów Factory* standard provide for the application of the full reparation standard. However, they disagree on the applicable valuation method to determine the amount of this reparation. The Claimants propose a valuation method based on the fair market value ("**FMV**") of the Caratube project at the time of the expropriation, i.e. the price which a hypothetical buyer would be willing to pay for CIOC as at 31 January 2008. They claim that the FMV is the commonly applied standard for the assessment of damages in case of expropriation (Memorial, paras. 441 and 448).

1079. The Claimants further submit that under Article 36(2) of the ILC Articles, full reparation includes loss of profits, to the extent that such lost profits are not speculative but established with reasonable probability. According to the Claimants, the DCF method is the correct approach to estimate CIOC's loss of profits (Memorial, paras. 450 et seq.).

1080. The Respondent disagrees, arguing that the applicable standard to assess CIOC's damages in case of breach of customary international law is full reparation without FMV. While the Respondent agrees that CIOC must be placed in the position it would have been in had the Contract remained in effect in the hands of CIOC, the FMV is not the appropriate method of valuation. Rather, the full compensation standard of Kazakh law and the full reparation standard of customary international

law call for a subjective and concrete approach to damages, focusing on the actual damage suffered by CIOC, rather than an objective and abstract approach such as the FMV.

1081. While the Respondent does not dispute that the full reparation standard may include lost profits, it argues that CIOC is not entitled to damages based on lost profits using the DCF method (or based on lost opportunity) because any such profits are too uncertain and speculative. For the Respondent, CIOC would be entitled at most to its sunk investment costs (Counter Memorial, paras. 1380 et seq.).

1082. The Tribunal finds that a distinction is to be drawn between compensation for a lawful expropriation, on the one hand, and reparation for the damage incurred through an unlawful expropriation, on the other hand, the applicable standards of compensation or reparation being different, at least in international law practice. The distinction and the difference in the financial consequences between lawful and unlawful expropriation is increasingly recognized in international practice.[110]

1083. The Tribunal further agrees that, in case of an unlawful expropriation, the ILC Articles provide for the full reparation standard, meaning that this Tribunal must determine an amount of damages that will, "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".

1084. The Tribunal recognizes that international tribunals have sometimes applied the FMV standard in case of unlawful expropriations, e.g. by way of analogy with lawful expropriations or on the ground that an unlawful expropriation cannot entail lower compensation than a lawful expropriation, which is also an argument relied upon by the Claimants (Claimants' First Post-Hearing Brief, para. 401). However, when determining the amount of money that will provide full reparation to the injured party, this Tribunal does not consider itself limited to the FMV standard, but may apply other methods to determine the amount that, in the Tribunal's opinion, best reflects the damages incurred by CIOC.

1085. Having considered the Parties' respective arguments, a majority of the Tribunal finds that, in the circumstances of the present case, the damages incurred by CIOC as a

[110] Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law, Oxford 2009 (Exh. RL-164), paras. 3.96 et seq., with references to case law. The Tribunal also refers to Ms. Marboe's more recent and updated contribution on the same subject, which confirms her prior statements: Irmgard Marboe, Valuation in Cases of Expropriation, International Investment Law, Baden-Baden 2015, paras. 8-16, with references with references to case law.

result of the Respondent's unlawful expropriation of the Contract (as determined by a majority of the Tribunal) are appropriately assessed using a subjective and concrete valuation approach providing full reparation for the damages actually incurred by CIOC, without FMV. This means that, while the applicable standard for calculation thus is the damage incurred as a result of the unlawful act, the amount of damages must not exceed the damage actually incurred to avoid over-compensation.

1086. In the present case, an application of a subjective and concrete valuation approach providing full reparation appears appropriate also in light of the fact that the Respondent's unlawful expropriation of CIOC's Contract (as determined by a majority of the Tribunal) was accomplished through the unlawful termination and breach of the Contract. As was seen above in paragraphs 1069 and 1070, contract damages under Kazakh law are based on the principle of "full reparation" and a valuation based on the actual damage incurred. According to Marboe (Exh. RL-16), in cases of a simultaneous violation of international and contractual obligations, international (including investment) tribunals have frequently preferred the criteria applicable to the valuation of contract damages, following a subjective and concrete approach.[111]

1087. This said, a majority of the Tribunal agrees that, in the present case, the issue of whether CIOC's damages should be assessed using the FMV standard or a full reparation standard without FMV is in any event of little practical relevance, given that CIOC's claim for compensatory damages is exclusively for lost profits or, alternatively, lost opportunity. A majority of the Tribunal considers that the Claimants have not sufficiently and convincingly established either of these claims. In other words, for the reasons set forth below, a majority of the Tribunal finds that the valuation methods proposed by the Claimants to determine CIOC's FMV, in any event, do not provide a basis for damages that are sufficiently certain. Therefore, for a majority of the Tribunal, in these circumstances CIOC's sunk investment costs best express in monetary terms the damages incurred by CIOC as a result of the unlawful expropriation.

1088. A minority arbitrator disagrees with the majority's decision regarding the applicable valuation method. Damages arising out of an unlawful expropriation or an unlawful termination of a contract, which is the basis of a business, for instance a concession

[111] Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law, Oxford 2009 (Exh. RL-164), paras. 3.226 et seq., with references to case law.

or a contract with CIOC in the present case, fundamentally consist in the loss of an asset. For a minority arbitrator it follows that compensation, when it consists in a sum of money, should be equal to the value of the asset at the time of the expropriation.

1089. A minority arbitrator further opines that in the oil and gas industry, it is well known that the valuation of a concession or a contract for the exploitation of an oil field is calculated by reference to the reserves (and not to the actual profit). When the majority decides to reimburse only the investments made (sunk costs), it implies that the contract or the business had no value at all at the time of the expropriation. However, in the minority view, that is something that even the Respondent has not contended. Furthermore, according to a minority arbitrator, there is no logic to order the reimbursement of the sunk costs: if the contract had not been wrongfully terminated, the victim would never be entitled to the reimbursement of its sunk costs. Therefore, given that it would be absurd to decide that the unlawfully expropriated asset had no value at all, the Tribunal's duty is to determine this value.

1090. Finally, the Tribunal observes that the Parties agree that the valuation date should be 31 January 2008, i.e. "the day following the order terminating the Contract, and immediately preceding the date of the notice of termination, so as to put Claimants where they would have been had Kazakhstan not breached its obligations" (Memorial, para. 449; Counter Memorial, para. 1359).[112]

1091. Based on the foregoing, the Tribunal concludes that it will assess CIOC's claim for compensatory damages in application of the full reparation standard set forth in Kazakh law and checked against the full reparation standard set forth in customary international law, without using the FMV standard.

ii. Categories of compensable losses

(a) Lost profits

1092. The Parties agree that under the full reparation standard, CIOC may claim damages based on lost profits. The Parties further appear to agree that, under both Kazakh law and international law, lost profits, to be awarded, must be sufficiently certain and

[112] The Tribunal notes that, in order to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed", it may take into account an increase in value between the time of the unlawful expropriation and the date of the Award. However, in the present case, no such increase in value has been established, to the extent that it was even alleged.

not speculative. However, the Claimants maintain that "compensation must be determined in accordance with the general principles of international law", not Kazakh law,[113] and that the threshold of sufficient certainty only applies to the existence of the damage, with less certainty being required for the amount of the loss (Claimants' Reply Post-Hearing Brief, paras. 244-246).

1093. That said, for the reasons set forth below, even applying "the general principles of international law" as proposed by the Claimants, the Tribunal rejects CIOC's claim for lost profits, the Claimants having failed to establish such lost profits with the required degree of certainty.

1094. The Tribunal recognizes that the DCF method is widely accepted as an appropriate method to assess the lost profits of going concerns with a proven record of profitability. In this regard, it is worth mentioning the World Bank Guidelines, cited by both Parties, which suggest that the market value of an expropriated investment may be determined "for a going concern with a proven record of profitability, on the basis of the discounted cash flow value".

1095. However, in the opinion of the Tribunal, the Claimants have not convincingly established that CIOC ever was **a going concern with a proven record of profitability**. This appears to have been alleged appropriately, if at all, for the first time at the Hearing by the Claimants' expert, GT (see Tr. Day 10, p. 193, lines 2-5: "If the formal requirement should apply, it was a going concern and was apparently profitable, as shown by payment of corporation tax in the LKU reports". See also the Claimants' First Post-Hearing Brief, para. 403 and the Claimants' Reply Post-Hearing Brief, para. 261).[114] Indeed, prior to the Hearing, the Claimants focused their argument on the allegation that "[i]n the oil and gas industry, once the existence of reserves is confirmed, the DCF method should be applied and loss of profits awarded regardless of profitability or a company being a going concern or not, given that oil and gas companies derive their primary value from the existence of reserves and far less on the ability of that particular company to develop, extract, and sell the reserves" (Claimants' First Post-Hearing Brief, para. 405).

[113] The Tribunal recalls that, according to the Claimants, the relevant provisions governing compensatory damages contained in Kazakh law are essentially the same as those set forth in international law.

[114] See also Memorial, para. 152 ("Even selling at a reduced price, Caratube was profitable each year, paying tax on profits each year").

1096. Be that as it may, in the opinion of the Tribunal, the Respondent has convincingly rebutted the Claimants' allegation of CIOC ever having been a going concern, which term has been defined by the World Bank Guidelines as follows (Exh. RL-170):

> [A]n enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State […].

1097. It is not disputed that, at the time of the termination of the Contract, CIOC had been in existence and performed the Contract for just over five years. It also appears undisputed that, while CIOC had realized (and reinvested) a certain amount of revenues from oil sales produced during the Contract's trial production program, CIOC had not realized profits, but had a record of negative cash flows and a record of accounting losses during the performance of the Contract. And while the Claimants have alleged that CIOC's profitability is established by the payment of corporation taxes in the LKU reports, the Respondent has pointed out that, in addition to CIOC's net profits having been negative throughout Contract performance, the amount of corporation taxes paid by CIOC between 2002 and 2008 was very low, and CIOC had not reported any pre-tax income on its activities in its LKU Reports.

1098. Therefore, for the Tribunal, the Claimants have not convincingly established that CIOC was a going concern with a proven record of profitability.[115] For the reasons set forth below, the Tribunal finds that the Claimants also have not sufficiently established that CIOC would have become a going concern but for the termination of the Contract.

1099. The Tribunal cannot follow the Claimants' argument that, in the circumstances of the present case, it can apply the DCF method to assess CIOC's alleged lost profits even in the absence of a going concern. In support of their position, the Claimants

[115] Subsidiarily, the Tribunal considers that if it were minded to accept at all the existence of a going concern with respect to CIOC, such acceptance would need to be limited to CIOC's operations as performed solely in the supra salt section of the Contract Area and only within the limited framework of trial production. This means that, at best, the existence of a going concern could be accepted as established only for that limited kind of operation. However, for the Tribunal, this would not constitute a going concern as understood by the Tribunal. And it is recalled that the Claimants have not established the existence of a proven record of profitability for this kind of operation. Moreover, the Tribunal finds that the Respondent has convincingly shown that the DCF method based on such cash-flows would not result in a valuation superior to what the sunk costs would bring forth.

have relied, *inter alia*, on the *Micula* case, where the tribunal held in relevant part as follows (Exh. CLA-108, paras. 1008-1010):

> 1008. The Tribunal understands that any future damage is difficult to prove and is willing to take that into account. There remains nevertheless a requirement to show sufficient certainty as speculation is not the same as prediction. Indeed, the cases cited by the Claimants call for leniency in the assessment of the amount of damage, not of its existence. The Tribunal agrees with the tribunal in Lemire v. Ukraine when it states that "[o]nce causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."
>
> 1009. The Tribunal also notes that the commentary to the ILC Articles limits compensation to "damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or too remote" (Comment 5 to Article 34 of the ILC Articles). In the case of lost profits, this can only mean that the claimant must have been deprived of profits that would have actually been earned but for the internationally wrongful act. Accordingly, before they are entitled to request a more lenient application of the standard of proof, the Claimants must first prove that they would have actually suffered lost profits, i.e., that they have been deprived of profits that would have actually been earned. In the Tribunal's view, this requires proving (i) that the Claimants were engaged in a profit-making activity (or, at the very least, that there is sufficient certainty that they had engaged or would have engaged in a profitmaking activity but for the revocation of the incentives), and (ii) that that activity would have indeed been profitable (at the very least, that such profitability was probable).
>
> 1010. In the Tribunal's view, the sufficient certainty standard is usually quite difficult to meet in the absence of a going concern and a proven record of profitability. But it places the emphasis on the word "usually." Depending on the circumstances of the case, there may be instances where a claimant can prove with sufficient certainty that it would have made future profits but for the international wrong. This might be the case, for example, where the claimant benefitted from a long-term contract or concession that guaranteed a certain level of profits or where, as here, there is a track record of similar sales. This must be assessed on a case by case basis, in light of all the factual circumstances of the case. That is what the Tribunal will now do with respect to the Claimants' specific claims for lost profits.

1100. Accordingly, the *Micula* tribunal found that, to award lost profits, a claimant must prove (i) at the very least, that there is sufficient certainty that they had engaged or would have engaged in a profitmaking activity but for the revocation of the incentives, and (ii) that that activity would have indeed been profitable (at the very least, that such profitability was probable). In the absence of a going concern, the tribunal indicated that it might accept as evidence, to be assessed in light of all the factual circumstances of the case, the existence of a long-term contract or concession that guaranteed a certain level of profits or a track record of similar sales.

1101. The Tribunal opines that, even under the standard set forth in the *Micula* case, CIOC has failed to establish its lost profit claim with a sufficient degree of certainty.

1102. Concerning **the required degree of certainty** for recovering lost profits, the Tribunal recalls again that lost profits have to be sufficiently certain in order to be recovered. The controversies in scholarship and case law regarding the award of lost profits show that the standard of certainty is rather high to be considered sufficient and reaching that level of certainty is difficult, if not necessarily impossible, in the absence of a going concern with a proven record of profitability. For the Tribunal, this results first from the general premise that a claimant has the burden of proving its damage. It is further corroborated by the applicable, subjective and concrete approach to the full reparation standard as detailed above in paragraphs 1065 et seq. As was seen, while the full reparation standard seeks to provide "full" reparation for damages actually incurred as a result of the unlawful act (including lost profits), it also sets a limitation in that the amount of damages must not exceed the damage actually incurred, and the injured party must not be placed in a better position as a result of the unlawful act or breach. This general premise applies to lost profits. In order to avoid an undue windfall in favor of the injured party, lost profits must be awarded only if they have been established with sufficient certainty.

1103. Another question is **whether the degree of certainty applies only to the existence of the loss or also to its amount**. In this respect, the Tribunal notes that the Parties generally agree that certainty relates to both, athough the Claimants argue that - under general principles of international law - "less certainty" is required for the amount of the loss and furthermore the circumstances of the case will determine the degree of certainty required in determining the amount of the loss. In any event, the Claimants aver that no source cited by the Repondent provides support for the conclusion that the amount of damages must be certain under Kazakh law or else they will not be awarded. For the Claimants, the Respondent also has not shown that, under Kazakh law, the burden of proving lost profits extends to the same degree not only to their existence but also to their amount (Claimants' Reply Post-Hearing Brief, paras. 245-246).

1104. For the Tribunal, a party must prove both the principle of the loss and its extent and there should be no controversy in that regard. As just mentioned, this appears indeed to be undisputed. This said, once the existence of the loss is established with sufficient certainty, the Tribunal enjoys some discretion in determining the quantum. As observed by the Respondent, the Tribunal may consider that, in the exercise of

its discretion and the circumstances of the case, a party who has failed to quantify its lost profits claim also failed to establish the existence of the lost profits with the required degree of certainty. In any case, this is a relaxation of and thus an exception to the general principle that a claimant must (sufficiently) prove the certainty of its damage: its operation should thus be restrictive and, in light of the controversies in scholarship and case law and the seemingly restrictive position under Kazakh law as seen above in paragraph 1102, the Tribunal will be slow in exercising its discretion in favor of awarding lost profits in case of a failure to quantify lost profits.

1105. Be that as it may, as just mentioned, the Tribunal finds that, even under the standard set forth in the *Micula* case, which followed the approach to lost profits advanced by the Claimants, CIOC has not established its lost profit claim with a sufficient degree of certainty. As was seen above in paragraphs 829 et seq., the Tribunal has found that, at the time of the termination of the Contract, CIOC had not yet made a Commercial Discovery within the meaning of the Contract and, thus, had no vested right to proceed to the production stage of the Contract. Rather than being ready to commence commercial production, CIOC had obtained the confirmation of the extension of the Contract's exploration phase only a few months prior to the termination. At the time of the termination, CIOC thus was still in the exploration phase of the Contract and did not dispose of a long-term contract that guaranteed a certain level of profits. In particular, it did not dispose of "the exclusive right of Production in the Contract Area for 25 consecutive years, plus any extension", pursuant to Clauses 10.5 and 11.1 of the Contract.

1106. The Tribunal recalls the Respondent's allegation that, at the time of the termination, the majority of CIOC's investment was yet to be made. The Claimants argue that there is no such requirement for the award of lost profits and that the Respondent's allegation is thus irrelevant. For the Tribunal, while this may be true as a matter of law, this question does not require an answer as the issue at stake here is different. Indeed, the issue is not whether for an award of lost profits it is necessary to have the majority of the investment made, but rather, as a matter of fact and evidence, what indication of the value of the damage results from the percentage of the investment already spent. As was just seen in the above quoted *Micula* decision, in the absence of a going concern, the Tribunal must assess the certainty of future profits on a case-by-case basis in the light of all the factual circumstances of the case. For the Tribunal, such circumstances include, *inter alia*, the fact that, at the

time of the termination, the Contract was still in its exploration phase with no Commercial Discovery having yet been made, that CIOC had limited its exploration and drilling activities to the known deposits in a limited area of the Caratube field, that the 3D seismic study contained several shortcomings, and that no exploratory wells had been drilled, in particular in the overhang and subsalt sections of the Contract Area, which sections had remained entirely unexplored. In these circumstances, the Tribunal cannot but find relevant the fact that, at the time of the termination, CIOC had only invested approximately USD 39.24 million and that by the Claimants' experts' own admission 94.3% of the total capital investment in the project remained to be made (i.e. an additional USD 486.5 million between 2008 and 2032).

1107. Having considered all the relevant factual circumstances and the evidence on the record, the Tribunal is not persuaded by the Claimants' allegation that, at the time of the termination of the Contract, by means of the Claimants' investment, the Contract Area had been "de-risked" and transformed from what was previously an oil-rich but barren and under-explored area into an active field with proven and commercially-viable reserves ready to produce oil on a commercial scale. Neither is the Tribunal persuaded by the Claimants' allegation that, at the time of the termination, CIOC had successfully moved from the riskiest time of not knowing whether and where it would find oil suitable for commercial production and that there was no risk that no returns would be recovered (see, e.g., Claimants' First Post-Hearing Brief, para. 385; Claimants' Reply Post-Hearing Brief, para. 270). Therefore, the Tribunal agrees that the existence of CIOC's lost profits depended on important investments yet to be made and was thus uncertain.

1108. In support of their position that CIOC was ready to produce oil on a commercial scale and that there was no risk that no returns would be recovered, the Claimants rely heavily on the allegation that, at the time of the termination, the oil reserves were proven and confirmed. However, the Tribunal agrees in this regard with the Respondent that the question is less whether the Claimants' reserves estimate was confirmed in 2008 by the Central Reserves Committee of the MEMR, but rather whether, in view of all the circumstances, the Claimants' reserves estimates constitute sufficient proof of CIOC's lost profit claim. For the reasons set forth below, the Tribunal does not consider this to be the case.

1109. It is recalled that the CER Reserves Report was approved by CIOC on 27 November 2007 and finalized on 1 December 2007 (Memorial, para. 260). It was

discussed during meetings held on 27-28 February 2008 before the Central Reserves Committee of the MEMR, which approved the CER Reserves Report at the closure of these meetings. On 29 February 2008, the MEMR's Geology Committee sent CIOC a written confirmation of the estimated supra-salt reserves of the Contract Area as calculated on the basis of the CER Reserves Report, namely 4,248 thousand tons of C1 reserves and 5,647 thousand tons of C2 reserves (Memorial, para. 266).

1110. With respect to the CER Reserves Report, it is noted that the Claimants do not rely on this Reserves Report as the basis of their lost profits claim, but rather on Mr. Tiefenthal's Reserves Report (see paras. 41 and 335 of the Tiefenthal Reserves Report). It is further noted that the CER Reserves Report was prepared throughout the year 2007, i.e. in parallel to the 3D seismic study. Indeed, according to the Claimants, "[t]he 3D data was made available to Caratube in early 2007. The 3D seismic study was approved by Saratov's board in August 2007, then by Mr. Hussam Hourani as Director of Caratube, and then was submitted to an expert panel and approved by Caratube in September 2007, although with some criticism noted. An independent review performed by Aral Petroleum Capital (which reported to TU Zapkaznedra) deemed the report to be satisfactory, albeit with some criticism. On November 1, 2007, following the presentations of Saratov and Aral Petroleum Capital, TU Zapkaznedra's expert panel decided to approve the Report" (Memorial, para. 147).

1111. It is thus unclear to what extent 3D seismic data was available to and used by the CER in preparation of their Reserves Report (see also Tr. Day 9, p. 256, line 6 et seq.). In any event, to the extent that the 3D data was available to and used by the CER, it is undisputed that such data was affected – to a certain extent at least – by several shortcomings and criticisms. In this regard, it is observed that Mr. Tiefenthal may not have used the same 3D seismic data as the CER in support of his Reserves Report (see Tr. Day 9, p. 225, lines 6-12).

1112. Moreover, the Claimants' expert, Mr. Tiefenthal, criticized and departed from the CER Reserves Report in several respects. For instance, at the Hearing Mr. Tiefenthal stated that "the CER had not done such a good job at mapping the overhangs" (Tr. Day 9, p. 189, lines 20-21). He then clarified that the "CER had actually not used the seismic in a constructive way for the overhang reservoirs, and also CER had not used it for the subsalt reservoirs. The CER reserves report, which only has C2 reserves for the subsalt, does not rely on the 3D seismic for the subsalt;

it relies on well data" (Tr. Day 9, p. 192, lines 2-7). Furthermore, Mr. Tiefenthal disagreed with and departed from the CER's use of the C1 and C2 reserves classification system, i.e. the system used in the former Soviet Union, preferring the SPE-PRMS classification system (see Tr. Day 10, p. 120, lines 9-24).[116]

1113. Having considered the Parties' respective arguments and the evidence on the record, the Tribunal is persuaded of the necessity of an appropriate 3D seismic study in order to estimate with a sufficient degree of certainty the existence, magnitude and location of oil reserves. At the Hearing, while the Claimants' expert, Mr. Tiefenthal, suggested that a 3D seismic study is not a condition *sine qua non* for the drilling of deep wells, he also acknowledged that, from an economic and technical standpoint, it is prudent and good practice to wait for the 3D study before drilling the wells (Tr. Day 9, p. 231, line 21, p. 232, lines 4-10, p. 243, lines 5-7). Given the stakes in drilling wells, in particular but not limited to the cost of drilling especially deep wells, Mr. Tiefenthal's view is not surprising.

1114. In the opinion of the Tribunal, the Claimants have not established that the 3D seismic study in the present case was sufficient and appropriate to reliably and with sufficient certainty assert the existence and magnitude of the oil reserves in the Contract Area. Therefore, for the Tribunal, even if the CER Reserves Report was confirmed by the MEMR on 29 February 2008, the Claimants have not sufficiently and convincingly established that the CER Reserves Report confirms the oil reserves with the required degree of certainty. As a result, the Tribunal cannot follow the Claimants' allegation that the CER Reserves Report sufficiently confirms the oil reserves in the Contract Area for the purposes of CIOC's lost profits claim, thus dispensing with the requirement that there be a going concern.

1115. Regarding Mr. Tiefenthal's Reserves Report, as with the CER Reserves Report, the Tribunal finds that, based on the Parties' respective arguments and the evidence on the record, the Tiefenthal Reserves Report also cannot be confidently relied upon by the Claimants to establish CIOC's lost profits claim. This is so, in particular, to the extent that the Tiefenthal Reserves Report is also based on CIOC's 3D data, which the Tribunal has found to be inappropriate to confirm with a sufficient degree of

[116] See also Tr. 10, p. 123, lines 10-18 ("There is something odd there. You can see this sliver of yellow moving across into what is certainly the South Caratube field. And in the South Caratube field, we know that we have 5.5 million tonnes of reserves in exactly these reservoirs. So there is something wrong with this map. We know we have 60-ish meters of reservoir where CER thinks we have nothing. So there's an inconsistency at that level in the CER report. We have tried to address that"). See also the Tiefenthal Reserves Report, para. 52.

certainty the alleged oil reserves in the supra-salt, overhang and subsalt sections of the Contract Area. For the Tribunal, this applies even more so in the absence of the drilling of exploratory wells, especially in the overhang and subsalt sections of the Contract Area, to confirm and corroborate the 3D data.

1116. Moreover, for the Tribunal, the Claimants have not established the appropriateness of the inclusion by Mr. Tiefenthal in his Reserves Report of important amounts of contingent and prospective resources. The Respondent has pointed out that 46% of the volumes incorporated by Mr. Tiefenthal in his production profile are made up of contingent and prospective resources, the majority of which come from the overhang and subsalt sections. However, it is undisputed that these sections have not been explored by CIOC during the performance of the Contract. In this regard, the Respondent has also noted that the CER Reserves Report did not include such resources (Counter Memorial, para. 1473). For the Tribunal, the Claimants have not convincingly established that such contingent and prospective resources have been properly included by Mr. Tiefenthal in his reserves estimations because they are sufficiently certain and that they thus should be taken into consideration by this Tribunal for the purposes of CIOC's lost profit claim. To the contrary, in the opinion of the Tribunal, the Respondent has convincingly rebutted this allegation.

1117. Based on the foregoing, the Tribunal cannot but reach the conclusion that the Claimants have not established with a sufficient degree of certainty the oil reserves as allegedly confirmed in the CER Reserves Report and the Tiefenthal Reserves Report, for the purpose of CIOC's lost profits claim.

1118. Against this conclusion, the question of whether the Claimants have sufficiently established their allegation regarding the commercial exploitation by CIOC of the oil reserves in the Contract Area in the absence of the unlawful taking of their investment is of lesser relevance. Nevertheless, for the reasons set forth below, the Tribunal finds that the Claimants, in any event, have not established with the required degree of certainty that CIOC would have successfully carried out the Tiefenthal Development Plan and produced over 79.9 million barrels of oil, even admitting that it would have reached the production phase of the Contract and obtained a production license to commercially exploit the oil reserves of the Contract Area within the time periods assumed by Mr. Tiefenthal.[117]

[117] The Tribunal notes that the latter assumption regarding the acquisition by CIOC of a commercial production license for the Contract Area is highly disputed by the Respondent (see, e.g., the Respondent's First Post-Hearing Brief, paras. 437 et seq.).

1119. First, the Tribunal finds it appropriate to resort to CIOC's past performance record as one relevant criterion to assess the certainty of CIOC's lost profits claim. The Claimants have asserted that whether or not CIOC's past performance during the exploration phase was satisfactory has no bearing on the economic value of the field, i.e. approximately USD 1 billion (Claimants' First Post-Hearing Brief, para. 431). However, the Claimants have also submitted that "[i]n practice, arbitral tribunals rely on companies' historical performance in order to assess the reliability and the certainty of the data used for projections of future" (Memorial, para. 454). The Tribunal agrees with this latter statement and finds that CIOC's past performance during the exploration phase may be an indicator as to its future performance had the Contract not been terminated, in particular as to the reasonableness of certain assumptions underlying Mr. Tiefenthal's Development Plan and production profiles and the certainty with which CIOC would have been able to carry out this Development Plan and achieve the production profiles.

1120. While a majority of the Tribunal found that the Respondent has not established its allegation that CIOC was in material breach of the Contract and that the Contract was validly terminated in January 2008 on this basis, it appears however undisputable to the Tribunal that, from the early stages of Contract performance, CIOC was unable to perform several of its contractual obligations according to the standards and specifications in the work programs. Prior to the year 2007, such under-performance generally did not entail consequences for CIOC as its obligations were rolled-over to the next Contract year by the TU Zapkaznedra. However, the Tribunal cannot follow the Claimants' allegation that "[d]uring the entire period of exploration, i.e. almost five years, the record of performance of Caratube and its relationship with Respondent showed no sign of difficulty". It is observed that the Claimants concede the obvious, i.e. that CIOC received "a few letters from TU Zapkaznedra raising concerns […]" and "[alleging] various minor breaches" (Memorial, paras. 157 et seq.). For the Tribunal, the Respondent has convincingly shown that "CIOC's contractual performance was sub-standard" from the early stages of Contract performance (Counter Memorial, paras. 644 et seq.), even though a majority of the Tribunal – for the reasons set forth earlier in this Award - cannot follow the Respondent with respect to the legal implications of such "sub-standard" performance.

1121. In the opinion of the Tribunal, CIOC's past performance record suggests that it would not have been able to carry out Mr. Tiefenthal's Development Plan during the

Contract's production phase. In other words, for the Tribunal, the Claimants have not convincingly and sufficiently established that, despite its past performance, CIOC's ability to perform the Contract would have sufficiently improved in the future in order to successfully carry out the Tiefenthal Development Plan.

1122. Also in connection with CIOC's past performance, the Tribunal recalls its conclusion regarding the necessity of an appropriate 3D seismic study, which has been confirmed by the Claimants' expert, Mr. Tiefenthal, at least with respect to the locating and drilling of deep wells. The Tribunal further recalls that, in its opinion, the Claimants have not established that their 3D seismic study would have allowed them to confirm the oil reserves in the Contract Area with reliability and with a sufficient degree of certainty.

1123. For the Tribunal, the Claimants also have not convincingly established their selection of the deep well drilling locations, based on the 3D study or otherwise. It is noted that these drilling locations were referred to at the Hearing as "preliminary" locations by Mr. Antar (Tr. Day 5, p. 64, lines 6-18 and p. 65, lines 18-23), and Mr. Tiefenthal confirmed that such locations would have changed (Tr. Day 9, p. 257, line 14 to p. 258, line 13). Moreover, based on the evidence on the record, the Tribunal is not persuaded that CIOC would have been able, based on its 3D study or otherwise, to efficiently and expeditiously locate and drill wells in the as yet unexplored overhang and subsalt sections of the Contract Area in order to successfully and efficiently exploit the oil reserves allegedly located in these sections and avoid the risk of dry holes (see, e.g., Tr. 9, p. 246, line 24 to p. 247, line 4 and Tr. Day 10, p. 178, lines 14-21).

1124. Concerning more specifically the drilling of wells, independently of the question of preparing and obtaining the approval of well designs, the Tribunal finds that the Claimants have not convincingly established their allegations regarding drilling times, i.e. the time it would realistically take CIOC to drill wells. This is relevant in that the certainty of CIOC being able to carry out Mr. Tiefenthal's Development Plan and achieve oil production as set forth in Mr. Tiefenthal's production profiles (Figure No. 27 and Table 36 of the Tiefenthal Reserves Report) depends on CIOC being able to drill the individual wells within the drilling times assumed by Mr. Tiefenthal.

1125. However, the Tribunal finds that the Respondent and its expert, Mr. Chug, convincingly rebutted the Claimants' allegations regarding drilling times, showing that CIOC in all likelihood would have required substantially more time than the

drilling times assumed in Mr. Tiefenthal's Development Plan (see Tr. Day 10, pp. 41, lines 4 et seq. See also IFM Reserves Report, para. 59; Respondent's First Post-Hearing Brief, paras. 445-446).

1126. For the Tribunal, the question of the reasonableness of the assumption underlying Mr. Tiefenthal's Development Plan that all of the 124 wells drilled by CIOC would successfully produce oil is also posed, as is the question of the reasonableness of risking the reserves in order to account for all risks associated with producing the reserves.

1127. In addition to the foregoing, in the opinion of the Tribunal, the Claimants have not established with the required degree of certainty that CIOC would have significantly increased its oil production as alleged and thus produced 79.9 million barrels. Having considered the Parties' respective arguments and the evidence on the record, the Tribunal is not convinced by the Claimants' arguments to justify the alleged important increase in oil production as compared to CIOC's past performance, e.g. that CIOC, during the exploration phase's trial production, sold the produced oil on the internal market for a fraction of export prices, or that CIOC's oil production would have considerably increased by means of additional pumps and water injections, which injections – according to the Claimants' expert, Mr. Tiefenthal – "would instantly double the production from the existing wells" (Tr. Day 10, p. 13, line 14 to p. 14, line 19). In fact, while this is not dispositive of that question, it appears undisputed that, despite CIOC having already installed several pumps in several wells, oil production was in decline. Moreover, it is also undisputed that CIOC never tested water injections during trial production. For the Tribunal, the Claimants have not shown that water injections would, with sufficient certainty, have increased CIOC's oil production rates as alleged, and the Respondent's expert, Mr. Chug, has provided persuasive arguments in rebuttal to the Claimants' allegations in this respect (Tr. Day 10, p. 146, lines 4-25).

1128. More generally, for the Tribunal, the Claimants thus have not established their allegation that "[w]ith the onset of commercial production, all of the constraints relating to pilot production would be removed", thus leading to a significant increase in production during commercial operation (Claimants' First Post-Hearing Brief, paras. 421 et seq.). As mentioned earlier in this Award, the Tribunal finds that the Claimants have not established that CIOC was at "the onset of commercial production". But even if it were accepted *arguendo* that commercial production would have been imminent, the Claimants have not convincingly established that the

removal of any of the alleged constraints relating to pilot production would, with sufficient certainty, have resulted in a significant increase in oil production.

1129. Based on the foregoing, the Tribunal reiterates that the Claimants have not established with the required degree of certainty that CIOC would have successfully carried out the Tiefenthal Development Plan and produced over 79.9 million barrels of oil but for the Respondent's unlawful termination of the Contract and the resulting unlawful expropriation of CIOC's rights thereunder.

1130. In addition, the Tribunal cannot follow the Claimants' allegation that "[t]he industry and commodity at hand is oil, in demand and tradable worldwide with scientific spot prices available from the date of expropriation until this very date (and until the date of the award) and reliable forecasts for the future" (Memorial, para. 465). Rather, the Tribunal agrees that an additional element of uncertainty with respect to CIOC's lost profits claim is a lack of reliable oil price estimates for a cash-flow projection over a period of 37 years. There can be no dispute that "[o]il prices are notoriously hard to forecast" (GT Quantum Report, para. 5.55) and the Claimants themselves have argued that CIOC's investments "were by essence risky, due to the fluctuating oil prices" (Memorial, para. 581). For the Tribunal, the Respondent has convincingly rebutted the Claimants' allegation regarding the existence of reliable oil price estimates over the 37-year period claimed (Respondent's Post-Hearing Brief, para. 473).

1131. Based on the foregoing and having considered the Parties' respective arguments and evidence on the record, the Tribunal concludes that the Claimants have not established with the degree of certainty required that CIOC had engaged or would have engaged in a profitmaking activity but for the termination of the Contract, and that that activity would have indeed been profitable (at the very least, that such profitability was probable). For the Tribunal, the Claimants have not established CIOC's lost profit claim with a sufficient degree of certainty.

1132. The Tribunal finds that its conclusion is, in any event, not altered by the Claimants' reliance on the alleged values of oil fields that sold at around the same period of time as the unlawful expropriation in the vicinity of CIOC's investment or on the alleged existence of the KTG arms-length offer to purchase CIOC in order to cross-check the Claimants' valuation of CIOC's FMV. In this regard, the Tribunal recalls its prior conclusion to assess CIOC's compensatory damages claim using a subjective and concrete valuation approach providing for full reparation, without FMV. Be that

as it may, the Tribunal finds that, in any event, the Claimants' valuation is not confirmed by the alleged sales of nearby oil fields or the alleged KTG offer.

1133. Regarding **the alleged sale of nearby oil fields**, the Respondent has convincingly rebutted the Claimants' allegation that such sales can be usefully relied upon in order to confirm the Claimants' damages valuation. In particular, as pointed out by the Respondent, the Claimants have not provided any details regarding the circumstances and context of the relied upon transactions and have not shown that such transactions provide meaningful comparisons and can thus be used as proxies to the valuation of CIOC's FMV. The Tribunal has taken note of the Respondent's allegations that the sale of the East Akzar field to Kazakhmys for USD 450 million in 2007 is inapposite, given in particular that the relevant contract area is 12 times larger than CIOC's Contract Area. The Tribunal also notes the allegation that Kazakhmys' exploration campaign was a "complete failure" (Respondent's Reply Post-Hearing Brief, para. 161). Moreover, the Tribunal has taken note of the Respondent's allegation that the sale of FCP for USD 933 million in 2008 was also inapposite, submitting *inter alia* that FCP's assets were reserves (not resources) and they were not located in Kazakhstan but in Algeria, that the contract area in that case was 22 times larger than CIOC's Contract Area, that FCP had a highly advanced and state of the art 3D study over 250 square kilometers, that FCP had invested almost USD 1 billion, and that FCP had drilled 25 4,000-5,000 meters deep exploration, appraisal and development wells and performed 90 well tests for confirmation of the production rates and the reserves (Respondent's Reply Post-Hearing Brief, para. 162).

1134. Concerning **the alleged KTG offer**, having considered the Parties' respective positions and the evidence on the record, the Tribunal finds that the Claimants have not met their burden of proving that the KTG offer constitutes an arms-length offer that must be taken into consideration by the Tribunal in assessing CIOC's FMV.

1135. Regarding more specifically KTG's letter dated 11 February 2008 in which an offer to purchase "Caratube International Corporation" for USD 450 million was expressed (Exh. C-160), the Tribunal cannot follow the Claimants' allegation that this "letter is genuine and of the utmost seriousness from all perspectives" (Claimants' First Post-Hearing Brief, para. 451). While it may be true that the Respondent has not challenged the authenticity of the letter, signature, date, and content, the Respondent has however come close in describing the KTG offer as "not a genuine offer" and "nothing more than a poorly tailored tale concocted for the

purpose of *Caratube I* and this Arbitration" (Counter Memorial, para. 1532). Besides its comments regarding the timing and lack of business sense of the KTG offer (see Counter Memorial, paras. 1518-1519), considering the circumstances of the case, the Respondent has raised a number of legitimate questions regarding the letter of 11 February 2008. For instance, the Respondent questions why the letter was sent to Mr. Issam Hourani, namely his CCC email address, who had never held any official position in CIOC. Why was the letter neither addressed nor sent to either Mr. Devincci Hourani or Mr. Kassem Omar, i.e. CIOC's shareholders? Why does the letter refer to "Consolidated Contractors International (UK) Limited", i.e. CCC? The Respondent further questions the basis underlying the transaction as well as the basis on which the offered amount of USD 450 million was determined. Moreover, the Respondent raises several questions regarding any due diligence carried out by KTG (Counter Memorial, paras. 1520-1523).

1136. While the Claimants and their witnesses have sought to provide answers to the questions raised by the Respondent, the Tribunal remains unpersuaded. In particular, the Tribunal notes that several basic "details" remain missing, such as specifications as to a closing date, conditions precedent, such as government approvals, or payment modalities. No further indications about such "details" were provided in the letter dated 11 February 2008, nor apparently during the meeting held in March 2008, even though the purpose of this meeting allegedly was to "further negotiate and finalize the terms of the purchase" (Claimants' First Post-Hearing Brief, para. 455). The Tribunal has further taken note of Mr. Devincci Hourani's testimony at the Hearing that a due diligence had been conducted by a representative of Mr. Kulibayev (i.e. an oil tycoon and son-in-law of President Nazarbayev) at CIOC's office. However, Mr. Devincci Hourani confirmed at the Hearing that such due diligence lasted only one or two days, was limited to certain specific issues and did not involve any lawyers (Tr. Day 4, p. 104, line 13 – p. 105, line 10).

1137. For the Tribunal, contradictions and inconsistencies among the statements made by the Claimants' witnesses remain. For instance, it is not certain whether KTG was unaware at the time of its letter dated 11 February 2008 of the termination of CIOC's Contract, as submitted by the Claimants prior to the Hearing (Claimants' Skeleton, p. 25), was fully "aware of everything" as affirmed by Mr. Devincci Hourani at the Hearing (Tr. Day 4, p. 103, lines 14-24 and p. 106, lines 22-25), or whether they knew "the small details" as alleged by Mr. Issam Hourani (Tr. Day 4, p. 203, line 14).

1138. In the event that KTG was aware of the termination of CIOC's Contract, the question arises as to why and on what basis KTG would offer to pay USD 450-500 million for a Contract that had just been terminated or why CIOC would refuse such an offer. The Tribunal has taken note of the Claimants' explanation that "Kazakh tycoons or oligarchs with a close association to Mr. Kulibayev […] an oil tycoon and the son-in-law (in very good standing) of the President", were behind the KTG offer (Claimants' First Post-Hearing Brief, para. 456). At the Hearing, Mr. Issam Hourani asserted that "[o]ne call to Batalov" by Mr. Kulibayev would have sufficed to resolve any issues and to reinstate the Contract (Tr. Day 4, p. 202, lines 11-18). However, if matters were "so simple", as claimed by Mr. Issam Hourani, this in turn raises the question why KTG would have deemed it at all necessary and useful to enter into direct negotiations with the Houranis and offer to pay Messrs. Devincci Hourani and Kassem Omar USD 450-500 million to purchase CIOC, especially in light of the Claimants' allegations regarding the Houranis and their extended family being considered as *personae non gratae* by the President of Kazakhstan. To this, the Claimants respond that, at the time, "no one, including the President's own daughter, expected the situation to end up this badly".[118] Moreover, "Caratube would have become by then a litigious property […] [and] a consensual purchase at discounted price based on the confirmed reserves could have enabled the KTG representatives to proceed, reinstate the Contract and promptly pocket a huge risk-free profit without causing any scandal" (Claimants' First Post-Hearing Brief, para. 460). However, the Tribunal remains unconvinced and the question is posed whether a transaction based on one powerful party being able to reinstate the terminated Contract by means of a phone call can be considered as an arms-length transaction.

1139. Furthermore, the Tribunal has taken note of the Claimants' criticism that the Respondent could have, but did not verify whether the KTG representatives who allegedly participated in the March 2008 meeting in London flew out of Kazakhstan's airports at the relevant time. Moreover, the Claimants note that the Respondent chose not to bring these KTG representatives as witnesses in the present

[118] In support of this argument, the Claimants rely on Mr. Devincci Hourani's testimony at the Hearing where the latter submitted that one of the reasons for rejecting the KTG offer was the insurance given by Ms. Dariga Nazarbayeva, the daughter of the President of the Republic of Kazkahstan, during conversations held until 2008 that "everything will go [back] to normal" (Tr. Day 4, pp. 112, lines 22 et seq.). However, the Tribunal has also taken note of Mr. Devincci Hourani's Witness Statement according to which Mr. Devincci Hourani had met with Ms. Nazarbayeva in June and July 2007 and that, during these meetings, Ms. Nazabayeva had stated her belief that "[nothing] could be done to save anyone", that "her father would not listen anymore to her" and that "there was no way out" (Witness Statement of Mr. Devincci Hourani, paras. 34 and 42).

Arbitration, which choice the Claimants explain by the fact that they would have confirmed the letter of 11 February 2008 and the March 2008 meeting. Without wishing to afford disproportionate importance to this line of argument, the Tribunal observes that the Claimants also chose not to present the KTG representatives as witnesses to confirm the Claimants' allegations. Neither did the Claimants provide any explanation as to whether they attempted to do so, albeit unsuccessfully, or why they would have been unable otherwise to request their testimony.

1140. Regarding the meeting that allegedly took place with KTG representatives in London in March 2008, the Tribunal is prepared to accept that such meeting took place. It bears mentioning however that the Tribunal was not impressed by the testimonies of Messrs. Issam Hourani and Harvey Jackson regarding the content of such meeting. While the Tribunal remains unconvinced one way or the other, the Tribunal is prepared to give credence to the Respondent's allegation that the London meeting of March 2008 may not have concerned the sale of CIOC, but rather the sale of gas (see Respondent's First Post-Hearing Brief, para. 478).

1141. Based on the foregoing, in general, given the surrounding circumstances and its amount, the KTG offer is insufficient to persuade. The Tribunal reiterates that the Claimants have not met their burden of proving that the KTG offer constitutes an arms-length offer to purchase CIOC for over USD 500 million that must be taken into consideration by the Tribunal in assessing CIOC's FMV. In this regard, the Tribunal might add that Mr. Devincci Hourani also does not appear to consider the KTG offer to be a reflection of CIOC's FMV, given that he rejected that offer, allegedly estimating CIOC at USD 2-3 billion (Claimants' First Post-Hearing Brief, para. 453, footnote 618).[119]

[119] The Tribunal has taken note of the Claimants' reference to the case in *James M Saghi v Iran* (Exh. CLA-305) where the tribunal considered the offer made by KCC to purchase a 45% equity stake in N.P.I. as "potentially important evidence" despite the fact that the offer was rejected. However, for the Tribunal, the case in *James M Saghi v Iran* is not sufficiently comparable to the present case. In *James M Saghi v Iran*, KCC had been in a long-standing contractual relationship with N.P.I. and was thus well-informed about N.P.I.. Negotiations to purchase an equity stake in N.P.I. had been ongoing for several months before the offer was rejected. The tribunal in *James M Saghi v Iran* also noted that the text of the offer showed that KCC was well aware of the risk of new government legislation being enacted and potentially applied to N.P.I. and had taken the necessary measures to protect its interests in this regard. No such information and details are available in the present case with respect to the KTG offer.

(b) Lost opportunity

1142. Having concluded that the Claimants have not established CIOC's claim for lost profits with the required degree of certainty, the question is posed whether CIOC is entitled, alternatively, to obtain reparation for its loss of opportunity.

1143. As was seen earlier in this Award, the Claimants have argued that, under international law, in the event that the Tribunal would find that CIOC's lost profits claim is not established with the required degree of certainty, CIOC would still be entitled to compensation for loss of opportunity to obtain profits. According to the Claimants, where a claimant's inability to prove its loss of opportunity is due to the wrongs of the respondent, that respondent would have to show that the alleged opportunities did not exist. This means that the Respondent partially bears the burden of proof, namely to demonstrate that CIOC did not suffer any loss of opportunity. The Claimants submit that they only have to establish that it is sufficiently probable that CIOC would have had opportunities as a result of the proven reserves. The probability of these opportunities coming to fruition is to be considered to calculate the amount of the compensation due. In other words, reparation for loss of opportunity is to be awarded in proportion to the probability of its occurrence. The Claimants also point out that, in practice, international tribunals have awarded compensation for loss of opportunity in view of reaching equitable and reasonable outcomes, rather than on the basis of mathematical calculations.

1144. The Respondent argues that there is no legal basis in Kazakh law for an award of compensation for loss of opportunity. Moreover, according to the Respondent, CIOC's claim for lost opportunity must fail on the merits, even under international law, because CIOC's alleged damages for loss of opportunity to generate profits are speculative and not sufficiently probable.

1145. According to Prof. Ilyasova, Kazakh law does not recognize the concepts of loss of opportunity (Ilyasova, para. 255):

> The legislation of the Republic of Kazakhstan does not recognize such concepts as "loss of opportunity" or "loss of a chance" to make profits. […] [P]ursuant to paragraph 4 of Article 9 of the Civil Code, the damages that can be claimed in the event of a breach of contract or breach of the Kazakh law extend only to real damage and lost profits, not to loss of opportunity. Moreover, there must be reasonable certainty as to the occurrence and amount of damages. Under Kazakh law, any damages based on a loss of opportunity or loss of a chance would be considered as too remote and uncertain. I understand that Claimants are seeking to claim loss of opportunity in this case. This is contrary to Kazakh law.

1146. Against this allegation, the Claimants argue that neither Prof. Ilyasova, nor the Respondent have provided any evidence in support of this statement, it being however recalled that the Claimants' general position in this Arbitration is that the question of "compensation must be determined in accordance with the general principles of international law," and not Kazakh law.

1147. In light of the Claimants' limited line of argument, the Tribunal would be minded to agree that the Claimants have not established a legal basis for this Tribunal to award damages for lost opportunity, considering that the Tribunal has held above in paragraphs 1065 et seq. that it will assess CIOC's claim for compensatory damages in application of the full reparation standard set forth in Kazakh law, informed against the full reparation standard set forth in customary international law.

1148. Be that as it may, for the reasons set forth below, the Tribunal also agrees that, even in application of international law, CIOC's claim for lost opportunity must fail on the merits.

1149. It is true that some international tribunals have awarded damages for lost opportunity, but such practice is not widely accepted. The Claimants have relied on the cases in *Sapphire v NIOC* (Exh. CLA-110), *Gemplus v Mexico* (Exh. CLA-115), *SPP v Egypt* (Exh. CLA-117), *SOABI v Sénégal* (Exh. CLA-116), and *Lemire v Ukraine* (Exh. CLA-106).

1150. Concerning **the required degree of probability** for recovering damages for lost opportunity, the Claimants submit that they only "have to make a showing that it is sufficiently probable that they would have had opportunities as a result of the proven reserves", pointing out that in the *Gemplus* case a "reasonable opportunity" to make profits was deemed sufficient to award loss of opportunity (Claimants' First Post-Hearing Brief, para. 503). By contrast, the Respondent, relying on the *Ascom* case, argues that "a high threshold of sufficient probability must be applied to a claim for Lost Opportunity" (Counter Memorial, para. 1505).

1151. Having considered the Parties' respective positions, the Tribunal maintains that any damage, including damages for lost opportunity, must be sufficiently certain in order to be recovered. This general premise rightly does not appear to be disputed between the Parties. The Claimants, who bear the burden of proof with respect to their damages, must thus show that it is more probable than not, by a preponderance of evidence, that the facts they allege are true. It follows that, for the Tribunal, the relevant question is not whether it should apply a high or low threshold

of sufficient probability to the Claimants' claim for damages for lost opportunity. Rather, the relevant question is whether the Tribunal may, in its assessment of whether the Claimants have met their burden of proving their damages, take into consideration the specifics of that which must be proven, namely the inherent difficulty in proving the sufficient probability of lost opportunities, including the lack of a method to do so with absolute certainty (be that the DCF method or other). For the Tribunal, there should be no controversy that this should indeed be the case. This means, in other words, that the Tribunal must assess whether the Claimants have proven their claims for damages for lost opportunity with sufficient probability, i.e. whether their claim is more probable than not, by a preponderance of evidence. Taking into account the inherent difficulty in meeting this burden of proof, the Tribunal will thus have to determine whether the evidence in the record is sufficient to prove the facts alleged by the Claimants and thus whether such facts can be held to be true.

1152. As with lost profits, the Tribunal enjoys some discretion in determining the quantum of CIOC's claim for damages for lost opportunity. However, the party claiming damages for lost opportunity must provide sufficient elements to enable the Tribunal to exercise this discretion in a way that has meaning and purpose. Where a party fails to provide elements to allow the Tribunal to determine the quantum, that party may then be found to have failed to sufficiently establish the existence of the alleged lost opportunity. Still as with lost profits, for the Tribunal, this discretionary power should be regarded as a relaxation of and thus an exception to the general principle that a claimant must (sufficiently) prove its damage. The Tribunal will thus be slow in exercising its discretion in favor of awarding damages for lost opportunity in case of a failure to provide sufficient elements for the quantification of this claim for damages.

1153. Concerning further **the burden of proof**, in particular whether and to what extent such burden should be carried by the Respondent rather than the Claimants, the Tribunal recalls that the Parties generally agree that the Claimants have the burden of proof with respect to the merits of their claims, including the alleged damages (see *supra* para. 307). The Tribunal finds that the Claimants have provided no persuasive reason that would justify shifting (wholly or partially) to the Respondent the burden of proof with respect to CIOC's damages claim for lost opportunity.

1154. In *Gemplus v Mexico*, regarding the issue of burden of proof, the tribunal set forth the following general premise (Exh. CLA-115, para. 12-56):

> Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.

1155. It is true that on the particular issue of compensation for lost opportunity, the tribunal in *Gemplus* found that the burden of proof did not lie exclusively on the claimants, but also on the respondent (Exh. CLA-115, para. 13-99):

> As already decided by the Tribunal above, it would be wrong in principle to deprive or diminish the Claimants of the monetary value of that lost opportunity on lack of evidential grounds when that lack of evidence is directly attributable to the Respondent's own wrongs. This is not therefore a case where the burden of proof lay exclusively on the Claimants: and, in the Tribunal's view, it was also for the Respondent to prove the contrary. It did not do so.

1156. For the Tribunal, the Claimants have not shown that this possible exception to the general rule must apply in the present case, in particular that their purported inability to prove their lost opportunity claim would be directly attributable to the Respondent's own wrongs. The Tribunal will thus apply the general rule that the Claimants have the burden of proving the merits of their claims, including the alleged damages, in accordance with the general principle of *actori incumbit onus probandi*. That said, as was seen earlier in this Award (see *supra* paras. 307 et seq.), the Parties generally seem to agree that the burden of producing evidence, defined by the Respondent as the "obligation of each party to produce evidence in support of its arguments as a case progresses" (Counter Memorial, para. 28), may shift between the parties depending on the nature and strength of the evidence presented by each party in support of their respective arguments.

1157. According to the Claimants, CIOC's chances of producing the estimated quantities of oil or selling the company with its confirmed reserves were "very high, namely 99% (or again any figure the Tribunal deems appropriate) given the commodity at hand, the confirmation of the reserves by industry experts both at the time of the project and during this arbitration as well as by Kazakhstan itself" (Memorial, para. 484).

1158. By contrast, it is the Respondent's position that there was "virtually no chance" that, had the Contract not been terminated in January 2008, CIOC would have made a Commercial Discovery within the meaning of the Contract before the end of the extended exploration phase in May 2009 or even in May 2011, and thus obtained the exclusive right to proceed to production. Even if CIOC had acquired such right,

there was “virtually no chance” that CIOC’s field development plan would have been approved by the CDC and that CIOC would thus have received the approval to start production and obtained a production license. In any event, for the Respondent, CIOC, or any company for that matter, would have necessarily been in breach of the 2008 AWP and the Extended MWP with the result that “the Contract in any event would no doubt have been terminated for material breach in May 2009” (see Respondent’s First Post-Hearing Brief, paras. 315 and 421; Respondent’s Reply Post-Hearing Brief, para. 146).

1159. Having considered the Parties’ respective arguments and the evidence on the record, the Tribunal finds that – for essentially the same reasons as those expressed above in paragraphs 1092 et seq. with respect to CIOC’s lost profits claim – the Claimants have not established CIOC’s lost opportunity claim with sufficient probability. For the Tribunal, it is clear that CIOC’s lost opportunity was not 99%. In light of the numerous uncertainties surrounding the quantification of CIOC’s compensatory damages claims, including *inter alia* the uncertainties relating to the oil reserves in the Contract Area, CIOC’s ability to successfully perform the Contract and its work programs, and its ability to produce oil in accordance with the specifications set forth in its Development Plan and production profile, the Tribunal is unable to make a serious assessment of the probability of CIOC’s lost opportunity.

1160. Furthermore, in light of its findings in paragraph 1151 above regarding the Claimants’ burden of proving their damages claim with sufficient certainty, the Tribunal does not deem it appropriate to speculate and choose a figure “likely to reflect [the Tribunal’s] views of an equitable and reasonable outcome”. In this regard, it is worth recalling that the Claimants also seem to have been unable or unwilling to do that exercise, submitting that their lost opportunity amounted to 99% of the alleged damage.

1161. Based on the foregoing, the Tribunal thus cannot but conclude that the Claimants have not sufficiently established their claim for damages for lost opportunity. Furthermore, the Claimants have also failed to provide the Tribunal with sufficient (if any) elements in order to enable the Tribunal to exercise its discretion in determining the probability of their claim. As a result, the Tribunal cannot but reject CIOC’s claim for lost opportunity.

(c) Sunk investment costs

1162. As was seen earlier in this Award, it is the Respondent's position that CIOC is at most entitled to its sunk investment costs, given that its claims for lost profits and lost opportunity are uncertain and speculative. The Respondent defines such "sunk investment costs" as the "net amount of money that the investors have put into the company or that the company has put into the project". Moreover, the Respondent argues that the net amount of CIOC's sunk investment costs must further be reduced proportionally to take into account the alleged cessation risk, i.e. the risk that "CIOC would never have obtained a Production license or would not have been able to comply with the Extended MWP and 2008 AWP by May 27, 2009". The Respondent argues that "[t]he application of a CRP to sunk investment costs or a backward-looking value is entirely appropriate in this case because CIOC or a Reasonable Buyer would not have been entitled under the Contract or the law to the reimbursement of their exploration expenditures if they did not declare a Commercial Discovery" (Respondent's First Post-Hearing Brief, para. 493). Ultimately, the Respondent quantifies CIOC's sunk investment costs at USD 4.2 million.

1163. As was seen, the Claimants argue that an award of sunk costs would not be appropriate as it would run contrary to the principle of full reparation, as well as to any business rationale in the oil industry where the field has been de-risked and the reserves confirmed. An award of sunk costs would also create an incentive for states to transfer all risks of the exploration stage to the investor. Moreover, the Claimants argue that the cases relied upon by the Respondent in support for its position on sunk costs are inapposite, namely in the presence of a Commercial Discovery, a de-risked Contract Area and proven and commercially viable oil reserves ready for commercial production. The Claimants also insist that the damages claimed by CIOC are not speculative and uncertain and are further confirmed by other methods, including information regarding the sale of nearly oil fields for equivalent values and the KTG offer. In any event, the Claimants underline that CIOC's sunk investment costs undisputedly amount to USD 39 million.[120]

1164. Having considered the Parties' respective positions and the evidence on the record, a majority of the Tribunal finds that, in the circumstances of the present case and for

[120] It is worth mentioning that the Claimants have observed that, in the *Caratube I* arbitration, the Respondent had quantified CIOC's sunk costs at USD 31.8 million (Claimants' Reply Post-Hearing Brief, para. 302).

the reasons set forth below, CIOC's compensatory damages claim is most appropriately addressed by an award of sunk investment costs.

1165. For the reasons stated earlier in this Award, the Tribunal has found that it cannot follow the Claimants' position that CIOC's claims for lost profits or lost opportunity have been established with sufficient certainty or probability respectively. In particular, the Tribunal has not accepted the Claimants' allegation that, at the time of the termination of the Contract, CIOC had made a Commercial Discovery and had "[transformed] what was previously an oil-rich but barren and under-explored area into an active field with proven and commercially-viable reserves ready to produce oil on a commercial scale" (Claimants' Reply Post-Hearing Brief, para. 305). The Tribunal also found that it could not usefully rely on CER's or Mr. Tiefenthal's Reserves Reports, nor on Mr. Tiefenthal's Development Plan, as a basis for awarding the damages for lost profits or lost opportunity claimed by CIOC. Furthermore, the Tribunal concluded that it could not use the Claimants' other methods, namely references to the sale of nearby oil fields or the KTG offer, in order to quantify CIOC's damages for lost profits or lost opportunity.

1166. A majority of the Tribunal thus finds that the valuation methods proposed by the Claimants do not provide a basis for damages that are sufficiently certain. In these circumstances, a majority finds that an award of sunk investment costs is appropriate and it will thus apply this method. As observed by Marboe, "[i]n a number of cases, the award of the amount of investments actually undertaken was regarded as the best way of achieving full reparation based on the notion of *restitution in integrum*" (Exh. RL-164, para. 3.134, with references to case law). The same author also pertinently stated in relevant part as follows (Exh. RL-167, p. 745, with references to case law):

> The valuation of damages on the basis of past costs and expenses comes very close to restitution. This seems to be a "solid" valuation approach that has been applied in numerous cases where other items of damages were considered to be too speculative or were not supported by sufficient evidence.

1167. Importantly, the purpose remains the same regardless of the method applied to establish the damage suffered by CIOC. Indeed, the purpose is to apply restitution to the measure of damages required to restore the claimant to the position it held prior to the commission of the breach (to place it again in the position as if the breach had not occurred, rather than in the position it would have been in had the contrat never been concluded). It is the breach that deprived the sunk costs of

purpose for the claimant. Up until the breach, the sunk costs had been spent with a view to some possible benefit. The breach deprived the claimant of the possibility to obtain such benefit. In the present case, CIOC was unable to prove the latter, either as lost profits or loss of an opportunity. However, because the breach deprived these costs of their justification, that deprivation should be repaired.

1168. As was seen, the Respondent's quantum expert, Mr. Brailovsky, has defined "sunk investment costs" as "the *net* amount of money that the investors have put into the company or that the company has put into the project", i.e. "the difference between total revenues and expenditures" (Brailovsky Valuation Report, paras. 10 and 58). A majority of the Tribunal notes that neither Mr. Brailovsky nor the Respondent has provided evidence in support of this definition. However, while the Claimants have not taken issue with this definition as such, they have argued that CIOC's sunk investment costs "amount to an undisputed USD 39 million" (Claimants' Reply Post-Hearing Brief, para. 306).

1169. According to Mr. Brailovsky, CIOC's sunk investment costs amount to USD 20.8 million, i.e. the difference between CIOC's total expenditures (USD 39.2 million) and the revenues generated by CIOC between 2002 and 2007 (USD 18.4 million).

1170. For a majority of the Tribunal, however, even accepting Mr. Brailovsky's definition of sunk investment costs, the Respondent has in any event not shown that CIOC's sunk investment costs amount to USD 20.8 million, rather than USD 39.2 million. An award of sunk investment costs aims to repay - or "restitute" - all the amounts of investments undertaken and expenses incurred (Marboe (Exh. RL-164), para. 5.315). It is undisputed that CIOC reinvested into the Caratube project all of the revenues generated from trial production, and such reinvestment also is part of CIOC's investment. In particular, it is undisputed that Mr. Devincci Hourani did not take any dividends (assuming *arguendo* that that he could have done so, which the Claimants have failed to establish), nor did he take out any of the oil sale revenues, but reinvested such revenues in their entirety (Tr. Day 1, p. 72, line1; Respondents' First Post-Hearing Brief, para. 451). For a majority of the Tribunal, what matters is not the source of the reinvestment, i.e. revenues generated from trial production which the Respondent has not established could not have been used in that way by the Claimants, but whether there was a reinvestment. The record shows that USD 39.2 million have been reinvested and does not show that CIOC did not reinvest the revenues in question into the Caratube project such that these revenues are not part of the investment that was expropriated (as found by a majority of the Tribunal)

through the unlawful termination of the Contract. Accordingly, a majority of the Tribunal finds that the Respondent has not shown that the revenues generated by CIOC must be deducted from the amount of CIOC's total investment.

1171. For a minority arbitrator, deducting oil sales revenues from CIOC's total expenditures is necessary so that the compensation awarded does not exceed the damage CIOC actually incurred (Counter Memorial, para. 1368). A minority arbitrator believes this to be the case whether the purpose of an award of sunk investment costs is to "put the investor back into a position as if he had never made the investment" (Counter Memorial para. 1541, note 2160, Exhibit RL-178: Mark Kantor, "Valuation for Arbitration," p. 50), or whether the purpose is to "reestablish the situation which would, in all probability, have existed if that act had not been committed" (Claimants' Memorial para. 440, note 725, Exhibit CLA-102: Chorzow Factory at p. 47). In this case, the situation that existed before the termination of the Contract, i.e. at the close of 2007, was one in which CIOC had a negative net cash flow of between USD 23.5 million (using Grant Thornton's figures, para. 3.31, excluding external financing) and USD 20.8 million (using Mr. Brailovsky's figures, para. 56). According to Mr. Brailovsky, "[t]he company was not able to derive a positive net cash flow during the period as the expenditures of around US$39.2 million were larger than revenues, which amounted to only about US$18.5 million, i.e. for each dollar of inflow, there were 2.1 dollars of outlay." (Brailovsky Report, para. 59). In that financial situation, two economic realities emerge: (i) oil sales revenues were not profits and, therefore, Devincci Hourani could not have taken dividends or reinvested profits that never existed (Respondents Post Hearing Brief, para. 415); and (ii) oil sales revenues did not represent cash available to CIOC due to the company's negative net cash flow position. Consequently, at the close of 2007, neither Devincci Hourani nor CIOC would have been capable of disposing of an amount of USD 18.4 million corresponding to oil sales revenues, as those revenues did not translate into either profits or cash. By contrast, because of the termination of the Contract and the majority decision to grant CIOC compensation of USD 39.2 million, CIOC will be able to fully cover its out of pocket expenses of USD 20.8 million and dispose of an additional amount in cash of USD 18.4 million. Consequently, CIOC is better off due to the termination of the Contract and the majority award of compensation than it would have been if the Parties had continued to perform the Contract. For the above reasons, in the minority view, CIOC's damages actually incurred are its out of pocket expenses of USD 20.8 million (i.e. total expenditures minus oil sales revenues) and the majority decision to award

compensation equivalent to CIOC's total expenditures of USD 39.2 million is thus outside the limits of the full reparation standard adopted by the Tribunal (see *supra*, paras. 1082 et seq.).

1172. The Tribunal cannot follow the Respondent in reducing CIOC's sunk investment costs by means of an application of a **CRP** of 80% to CIOC's sunk investment costs. As just seen, according to the Respondent, the application of a CRP to sunk investment costs (or a backward-looking value) is justified in the present case because CIOC or a Reasonable Buyer would not have been entitled under the Contract or the law to the reimbursement of their exploration expenditures if they did not declare a Commercial Discovery. The Respondent's expert, Mr. Brailovsky, further explained the application of the CRP as follows (Brailovsky Valuation Report, para. 20):

> There is a prima facie case that the fulfilment of the MWP would not occur by May 2009, at the end of the first extension of exploration period. This possibility emerges clearly from the discussion in the IFM Compliance Report, the Thapar Report and the Ongarbaev Statement. It is a virtual certainty that CIOC would not have been able to comply, given the deficiencies of the seismic study and the need to repeat it in its entirety, making it impossible in the time available to find sensible locations for the deep exploration wells required by the MWP, let alone drilling them and making a commercial discovery as required by the contract. This occurrence will imply a breach of contract and its consequent termination.

1173. For the Tribunal, the relevant question is not whether and to what extent CIOC would have complied with (or breached) its obligations under the Contract and the work programs by 27 May 2009, justifying or not a termination at that point in time. The wording of Clauses 10.6 and 10.7 of the Contract makes clear that the relevant question is whether or not CIOC would have been able to make a Commercial Discovery within the meaning of the Contract:

> 10.6 Upon a Commercial Discovery the Contractor shall be entitled to reimbursement of its expenses in connection with Exploration and shall be reimbursed during Production of the Commercial Discovery in accordance with this Contract and the Legislation of the Republic of Kazakhstan.
>
> 10.7 If, as a result of Exploration, there is no Commercial Discovery, the Contractor shall have no right to reimbursement of its expenses incurred by the Contractor during Exploration. However, the Contractor shall have the right to deduct those expenses against any revenues or income received in connection with activities under this Contract.

1174. As was seen above in paragraphs 833 et seq., the Tribunal agreed with the Respondent that a Commercial Discovery requires the discovery of "new oil". The Tribunal further agreed with the Respondent's interpretation of Clauses 1.3 and 10.1

of the Contract, according to which the making of a discovery constitutes an objective condition. By contrast, once such a discovery has been made, the assessment of that discovery's economic suitability for production is determined by the Contractor, applying its own criteria to make its determination, i.e. "subjectively".

1175. It is recalled that under Clause 1.3 of the Contract, a Commercial Discovery is defined as "a discovery within the Contract Area of one or serval Deposits (Fields), economically suitable for Production as determined by the Contractor". And Clause 10.1 of the Contract specifies that the question of whether the discovered deposit is economically and technically suitable for production depends on the "sole opinion" of the Contractor.

1176. In light of this definition and interpretation of the notion of "Commercial Discovery" under the Contract, the Tribunal cannot accept that it is a "virtual certainty" that CIOC would not have made a Commercial Discovery by May 2009.

1177. To be sure, the Tribunal does not consider as established that CIOC, even if it had declared a Commercial Discovery before May 2009, would have complied with (or breached) its obligations under the Contract and the work programs by 27 May 2009, justifying or not a termination at that point in time. For the Tribunal, it has also not been established that CIOC would have obtained the approval to start production and obtained a production license.

1178. Moreover, as was seen, for the Tribunal, CIOC has not sufficiently established that it would have been able to efficiently and profitably produce oil. In particular, the Tribunal has found that the Reserves Reports and Development Plans relied upon by the Claimants in this Arbitration do not establish with sufficient certainty or probability CIOC's claims for lost profits or lost opportunity.

1179. However, the requirements necessary for CIOC to establish its claims for lost profits or lost opportunity are different from the requirements under the Clauses 1 and 10 of the Contract regarding the existence of a Commercial Discovery.

1180. The Tribunal has rejected the Claimants' contention that a contractual obligation to discover "new oil" would be absurd, but accepted the Respondent's position that CIOC had not fully explored the Contract Area, including as yet unexplored areas and depths of the Caratube field. Therefore, the Tribunal agreed that it would have been in principle possible for CIOC to discover "new oil" and thus make a Commercial Discovery. Moreover, for the Tribunal, it is not conceivable that the

Parties, especially the Respondent, who had extensive experience and already was in possession of information and documentation regarding the existence of oil deposits in the Contract Area following the exploration by the Soviets, would enter into an exploration and production contract with CIOC, requiring important investments, if there was no new oil to be discovered in the Contract Area, especially when the Contract's production phase was made subject to the making of such a discovery. For the Tribunal, this is further corroborated by the fact that the Respondent, after five years of Contract performance, granted CIOC a 2-year extension of the exploration period under the Contract.

1181. In these circumstances, the Tribunal concludes that the Respondent has not established its allegation that it is a "virtual certainty" that CIOC would not have made a Commercial Discovery, it being reiterated that the question of the magnitude and objective commercial viability of such discovery is not the right question under Clause 10 of the Contract given that, under the Contract, the assessment of a Commercial Discovery's economic suitability for production is subjectively determined by the Contractor, i.e. CIOC, at its sole discretion. Hence, the Respondent has also not shown that CIOC would not have been able to trigger Clause 10.6 of the Contract and that it thus would not have been entitled to reimbursement of its expenses.[121]

1182. Therefore, the Tribunal finds that an application to CIOC's sunk investment costs of a cessation risk premium, let alone a CRP of 80%, is not justified.

1183. The Tribunal notes that the Respondent's argument regarding an application of a **discount for lack of marketability (DLOM)** only concerns the hypothesis of the Tribunal's application of the FMV standard, not the full reparation standard. The question of the applicability of the DLOM to CIOC's sunk investment costs thus is not posed here.

1184. Finally, the Tribunal also finds that the damages to be awarded to CIOC in the amount of its sunk investment costs must not be reduced to account for CIOC's alleged **contributory fault**.

[121] The Tribunal has taken note of the Respondent's argument that CIOC would have needed to make a Commercial Discovery in each of the three formations of the Contract Area, i.e. the supra-salt, overhang and subsalt formations, in order to obtain production licenses for each respective formation. However, the Respondent has not argued that CIOC's right to reimbursement of its expenses related to exploration would also be limited in a similar way and that argument would in any case not be persuasive.

1185. It is recalled that the Respondent has argued that any damages awarded to CIOC should be reduced by 50% to account for the latter's own contribution to its alleged losses. The Respondent relies in this regard on Kazakh law, in particular on Article 364(1) of the Kazakh Civil Code, which reads as follows (Exh. RL-43):

> When a failure to execute or improper execution of an obligation took place because of the fault of both parties, the court shall accordingly reduce the amount of the liability of the debtor. The court shall also reduce the amount of the liability of the debtor if the creditor deliberately or through negligence assisted in the increase of the amount of losses inflicted by the failure to execute or by improper execution, or did not adopt any reasonable measures to reduce them.

1186. Notwithstanding the use of the word "shall" in Article 364(1) of the Kazakh Civil Code, the Respondent and its expert, Ms. Ilyasova, submit that, under this provision, the Kazakh court "can" reduce the amount of damages to be awarded in case of contributory fault (Ilyasova Report, para. 257; Counter Memorial, para. 1592).

1187. In support of its position, the Respondent has also referred to Article 39 of the ILC Articles, which reads as follows:

> Article 39. Contribution to the injury
>
> In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

1188. The Commentary to Article 39 specifies that this Article deals with situations where the injured party "has materially contributed to the damage by some willful or negligent act or omission". It further clarifies as follows (Exh. CLA-32):

> Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as willful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or right. While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.

1189. Moreover, the Respondent relies on international case law, in particular the decisions in *MTD v Chile* (Exh. CLA-82), *Occidental v Ecuador* (Exh. CLA-55) and *Yukos v Russia* (Exh. RL-187).

1190. In response to the Respondent's line of argument, the Claimants submit that the Respondent misunderstands the theory and application of the concept of

contributory fault. The Claimants further submit that, in order to prevail, the Respondent must show – but failed to do so – that (i) the Claimants have materially and significantly contributed to their damages and (ii) the Claimants' conduct involved a lack of due care for their own property or rights. The Claimants also underline that the relevant question is not whether the alleged contributory fault justified the breaching party's wrongful act, but rather whether such contributory fault decreased the value of the injured party's own investment. However, the Claimants argue that the Respondent has not shown how the Claimants' alleged contributory fault decreased the value of their investment. In sum, it is the Claimants' position that the Respondent has not met its burden of proof with respect to the defense of contributory fault.

1191. Given that both Parties have primarily relied on principles of international law, the Tribunal will analyze the Respondent's defense of contributory fault under international law.

1192. The Tribunal finds that, while it may take into account a contributory fault by CIOC in the determination of the amount of reparation to be awarded, it is entitled to wide discretionary powers in making this determination. The Tribunal further finds that it must adopt a restrictive approach in that a mere contribution to causation is not enough, in the absence of willful or negligent, reproachable behavior by CIOC, thereby materially contributing to its damage.

1193. In the circumstances of the present case, the Tribunal finds that the Respondent has not sufficiently and convincingly established its position that any damages to be awarded to CIOC should be reduced by 50% to account for CIOC's contributory fault. It is true that the Tribunal agreed with the Respondent that CIOC's contractual performance under the Contract was "sub-standard". However, at the same time, a majority of the Tribunal found that the Respondent had not established that CIOC was in material breach of the Contract and that the Respondent had terminated the Contract on this basis. In this regard, the opinion of a majority of the Tribunal is recalled, which expressed its puzzlement regarding the striking U-turn taken by the Respondent in September 2007, following the "Recommendation" of the Prosecutor's Office as to the termination of the Contract, shortly after the extension of the Contract had been finalized through the adoption on 27 July 2007 of Amendment No. 3 to the Contract. A majority of the Tribunal noted the conspicuous timing of the commencement of the termination process, coincidences with

developments within the family and political context and, more generally, the chronology of the facts when viewed as a whole.

1194. For the Tribunal, the Respondent – who, in the majority view, engaged in inconsistent behavior by tolerating CIOC's sub-standard performance to the extent of granting an extension of the Contract and accepting (albeit with certain corrections and reformatting) the 3D seismic study, shortly before unilaterally terminating that same Contract for alleged non-compliance with unspecified contractual obligations – cannot now invoke a contributory fault by CIOC to claim a reduction of the amount of damages to be awarded. In particular, in light of the fact that CIOC had only recently obtained an extension of the Contract, the Tribunal cannot agree that CIOC's sub-standard performance prior to the extension of the Contract constituted willful, negligent, reproachable behavior by CIOC, by which the latter materially contributed to its damage.

1195. Based on the foregoing, and in the exercise of its discretion, the Tribunal concludes that the damages to be awarded to CIOC in the amount of its sunk investment costs must not be reduced on the basis of contributory fault.

1196. As a result, a majority of the Tribunal finds that at the relevant (and undisputed) date of valuation, i.e. 31 January 2008, CIOC's sunk investment costs amounted to the entire **USD 39.2 million**, there being no reasons to reduce this amount as argued by the Respondent.

1197. The Tribunal has taken note of the Claimants' request for the Tribunal to "[o]rder [the] Respondent to pay the above amounts outside of the Republic of Kazakhstan without any right of set-off to Mr. Devincci Hourani, as Claimant and/or majority shareholder" (Memorial, para. 584.7). The Claimants have not further substantiated this request.

1198. As was seen, the Respondent objected to this request, mainly for the reason that the Claimants have not shown any basis on which damages awarded to one claimant can be paid to another claimant. In other words, damages awarded to CIOC are due to CIOC only and amounts due to Mr. Devincci Hourani, as CIOC's 92% shareholder, should be reduced to account for CIOC's liabilities, which the Respondent provisionally estimated at USD 35,320,951. In particular, according to the Respondent, finding otherwise would allow Mr. Devincci Hourani to bypass CIOC's corporate structure and put himself in a better position than CIOC's creditors, which include the Respondent, to overlook bankruptcy issues faced by

CIOC and allow CIOC not to pay the USD 3.2 million that it owes and has failed to pay under the binding *Caratube I* award (Counter Memorial, para. 1611 citing, in particular, Ex. C-6, *Caratube I* Award, para. 495; Respondent's First Post-Hearing Brief, para. 508).

1199. The Tribunal finds that the Claimants have not established their request for any amounts awarded to CIOC to be paid outside of the Republic of Kazakhstan without any right of set-off to Mr. Devincci Hourani. In particular, the Claimants have not rebutted the Respondent's objections to this request and established a basis on which this request may be granted. More importantly, and in any event, this request has become moot given that the Tribunal has found that it has no jurisdiction over Mr. Devincci Hourani. There is thus nothing in the record to justify a payment made to him rather than to CIOC. Therefore, the Tribunal cannot but deny this request.

b. Moral damages

1200. The Tribunal has taken note of the debate between the Parties regarding the various issues surrounding CIOC's moral damages claim, including the question of whether this Tribunal has jurisdiction over this claim. The Tribunal finds that it can dispense with analyzing these issues, including its jurisdiction over CIOC's moral damages claim. This is because the question of an award of moral damages in favor of CIOC, in any event, is not posed, namely as a result of the Tribunal's earlier finding that the Claimants have not sufficiently established their allegations of harassment. The Tribunal generally refers to its prior developments and findings on this matter in paragraphs 909 et seq.

1201. CIOC's claim for moral damages is based entirely on the alleged continuous and multi-fronted acts of harassment, threats, intimidation and public bashing by the Respondent against the Hourani family and their relatives, in Kazakhstan and abroad and worldwide via the internet, thus causing fear, anguish, anxiety, humiliation, shame, stress, as well as reputational harm and social seclusion.

1202. As was seen earlier in this Award, the Tribunal empathizes with the Claimants in that it does not doubt that the Claimants and their relatives have indeed been the subjects of harassment. And the Tribunal reiterates, once again, that the facts underlying the present Arbitration are troubling, and it is prepared in the circumstances to give credence to the Claimants' allegations of harassment.

1203. However, the Tribunal cannot but repeat its prior conclusion that the Claimants have not satisfied their burden of proof with respect to the Respondent's alleged involvement in any acts of harassment against the Claimants. As a result, the Tribunal cannot but reject CIOC's claim for moral damages.

E. INTEREST

1. The Claimants' position

1204. The Claimants request an award of interest on all the amounts claimed, running from the date of the termination of the Contract, i.e. from 31 January 2008, until the date of full payment of the Award (Memorial, para. 517; Claimants' First Post-Hearing Brief, paras. 575-577; Claimants' Reply Post-Hearing Brief, paras. 340-345). The Claimants reject the Respondent's argument that interest should only accrue until the date of the *Caratube I* award, insisting that they have not engaged in improper claim-splitting or serial proceedings. The Claimants point out that the concept of improper claim-splitting and serial proceedings does not apply in investment arbitration, and the *Caratube I* tribunal did not reach the merits of the case; the Claimants should not be held responsible for the *Caratube I* tribunal's decision to dismiss their case for want of jurisdiction. Finally, the Respondent has not provided any case law justifying cutting off the accrual of interest at the date of an earlier decision, the reason being that there is no such case law. It is the Claimants' position that an award of interest for the entire period from the date of the breach until the date of the payment of the final Award on the merits in the present Arbitration would place the Claimants in the position they would have been in but for the breach (Claimants' First Post-Hearing Brief, paras. 575-577).

1205. The Claimants submit that the appropriate interest rate – which would also be the "commercially reasonable rate" of interest for a company such as CIOC – should reflect the average rate CIOC would have avoided or earned on the amounts awarded to it, had they been utilized to pay off debt (if any) or placed into a bank account. The Claimants' quantum expert, GT, has estimated the interest on the damages or compensation owing to CIOC since 31 January 2008 at 7% per annum, on the basis of the cost of debt of the Caratube project. However, the Claimants only request an interest at a rate of LIBOR +2% compounded semi-annually, as per ICSID standard practice (Memorial, paras. 518-519; Claimants' First Post-Hearing Brief, paras. 566-569; Claimants' Reply Post-Hearing Brief, para. 340).

1206. The Claimants insist that it would be inappropriate to rely only on the interest rates of the prior loans with JOR, because JOR is not the only institution from which CIOC is likely to borrow, nor is there any notion that JOR would continue to extend loans to Mr. Devincci Hourani or CIOC at their every whim. Moreover, it is not true that the loans with JOR did not provide for interest. According to the Claimants, the interest on the loan is in any event irrelevant with regard to the interest on the damages awarded by the Tribunal, because the interest on the loan was made for the purposes of the investment, not for the unlawful expropriation of CIOC. Therefore, the average of borrowing should be taken into consideration by the Tribunal. Furthermore, the three-month US Treasury Bond rate proposed by the Respondent would be inappropriate, because there is no indication that the funds would have been invested in the US (Claimants' First Post-Hearing Brief, paras. 567-569; Claimants' Reply Post-Hearing Brief, para. 342).

1207. Moreover, the Claimants submit that it is standard in international arbitration to award compound interest, rather than simple interest, because the goal of prejudgment interest is to place the parties in the position they would have been in had the award been made immediately after the cause of action arose; simple interest thus fails to fully compensate the claimant. The Respondent cannot rely on *CME v Czech Republic* in support of their contention that compound interest is not appropriate. In that case simple interest was awarded based on statutory grounds, as the tribunal noted that the Czech Republic only provides for simple interest by specifying the rate to be applied by statute. The *CME* case does not support the Respondent's allegation that compound interest can only be awarded when the claimant can show that it borrowed money from banks and paid compound interest (Claimants' First Post-Hearing Brief, paras. 570-574).

1208. Finally, in response to the Tribunal's question put to Counsel for the Respondent whether it would make mathematical sense to suspend the accrual of interest from the date of the breach until the end of the *Caratube I* arbitration, rather than from the time the *Caratube I* arbitration was initiated until the award in that case (as advanced by the Respondent), the Claimants submit that no suspension, however calculated, would be warranted. Any suspension of the period of accrual of interest would directly contravene the purpose of awarding interest in the first place, namely to put the injured party in the position it would have been in absent the unlawful act given the passage of time (Claimants' Reply Post-Hearing Brief, para. 345).

2. The Respondent's position

1209. With respect to the issue of pre-award interest, the Respondent submits that, in the event that any damages are awarded to the Claimants, (i) the appropriate commercially reasonable interest rate that should be applied is the 3-month US Treasury Bond yield plus 1.8%; (ii) simple interest should be applied; and (iii) no interest should be due from the date of the *Caratube I* award, that is 5 June 2012, onwards.

1210. With respect to the first point (i), the Respondent submits that the short term 3-month US Treasury Bond yield plus 1.8% is appropriate because the date of the Tribunal's Award is not yet known and, therefore, one must assume that the loan resulting from the delay in payment is renewed constantly. If a premium is added, the Claimants' risk should be used as this compensates the Claimants for any interest on commercial loans that the Claimants may have been required to take on during the arbitration proceedings. This is equivalent to the 3-month US Treasury Bond yield plus 1.8%. For the Respondent, the Claimants' suggested rate of LIBOR+2% compounded semi-annually is inappropriate because (i) the integrity of LIBOR is in question; (ii) the appropriateness of this rate has not been explained by the Claimants but rather appears to have been chosen in an arbitrary manner based on inapplicable rates used by other arbitral tribunals in the past. The Respondent also rejects the other rate mentioned by the Claimants, i.e. a simple 7% interest. The Claimants rightfully chose to disregard this very high rate (that was proposed by their expert, GT). This interest rate is indeed inappropriate as it is a long-term rate based on 20-year bond yields. However, for pre-award interest, the maturity should be short because the date of the Award is not known. Moreover, it includes a measure of corporate risk and country risk and therefore unjustly compensates the Claimants for risks they never faced (Counter Memorial, paras. 1682-1685; Respondent's Reply Post-Hearing Brief, para. 175).

1211. With respect to point (ii), the Respondent notes that there is no uniform practice on awarding simple or compound interest in international investment law. However, arbitral tribunals and commentators have found that simple, not compound, interest provided appropriate compensation, as for example Professor Crawford in the commentary to the ILC Articles or the tribunal in *CME v Czech Republic*. Like in the *CME* case, there are no special circumstances present here to justify the award of compound interest. Should this Tribunal nevertheless decide to award compound

interest, such interest should be compounded quarterly (Counter Memorial, paras. 1681-1687).

1212. With respect to point (iii), the Respondent agrees with the Claimants that interest should start running on 31 January 2008. However, no pre-award interest should be applied from 5 June 2012, the date of the *Caratube I* award, onwards, because the Claimants have engaged in improper claim-splitting, bringing repetitive claims where all claims could have been brought in one proceeding. In any event, even if this Tribunal were to find that the Claimants did not engage in improper claim splitting, they undeniably could and should have brought all their claims at once but failed to do so, thereby causing their loss of use of funds (Counter Memorial, para. 1688; Respondent's Reply Post-Hearing Brief, para. 176).

1213. Finally, in response to the Tribunal's alternative analysis, raised at the Hearing, that the Claimants' interest should run only for the duration of this Arbitration, and the *Caratube I* arbitration should be eliminated, the Respondent states that this would mean that interest should run from the date the Claimants filed their Request for Arbitration, i.e. 5 June 2013. For the Respondent, this issue is a matter of appreciation left to the Tribunal. In such case, the commercially reasonable interest rate would be the three-month US treasury bond yield, plus a spread of 1.8%, not compounded (Respondent's First Post-Hearing Brief, para. 521).

3. Analysis

1214. As was seen above in paragraphs 1162 et seq., a majority of the Tribunal decided to award CIOC the entirety of its sunk investment costs in the amount of USD 39.2 million. There is no dispute between the Parties with respect to the general principle that an award of interest on this amount is justified. Because the Tribunal denied CIOC's request for an award of moral damages, the question of whether and to what extent an award of interest should also apply to moral damages has become moot.

1215. The Parties disagree on the time period over which the Tribunal's award of interest should run. According to the Claimants, interest should run over the entire (uninterrupted) period from 31 January 2008 until the date of full payment of the present Award. The Respondent agrees that interest should start running from 31 January 2008. However, the Respondent argues that no interest should run from the date of the *Caratube I* award onwards, i.e. from 5 June 2012. The Parties appear to agree that the Tribunal has broad discretion with respect to questions of interest

(Claimants' First Post-Hearing Brief, para. 564, Respondent's First Post-Hearing Brief, para. 521).

1216. Regarding specifically the question of **the time period over which the award of interest should run**, the Tribunal agrees that its award of interest should cover the entire period from 31 January 2008 until the date of full payment of the present Award, without any interruptions being justified as a result of the initiation by CIOC of the *Caratube I* arbitration. The Tribunal founds this decision on the following two principal reasons.

1217. First, a primary function of the award of interest is to provide full reparation for the damage incurred by CIOC. As was seen, full reparation should seek to wipe out, as far as possible, all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. An award of interest compensates the claimant for the loss of the use of its money as a result of the respondent's wrong. Thus, limiting the reparation for the deprivation of the use of money to a period shorter than the actual time during which the deprivation lasted can only be an exception.

1218. This general premise is confirmed by Article 39 of the ILC Articles which reads as follows:

> Article 38. Interest
>
> 1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
>
> 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

1219. Second, for the reasons set forth above in paragraphs 371 et seq., the Tribunal rejected the Respondent's preliminary jurisdictional objection based on abuse of process. The Tribunal recalls its earlier decision to follow a cautious approach with respect to the abuse of process doctrine, *inter alia*, in recognition of the importance of party autonomy in international arbitration and the resulting wide discretion enjoyed by parties and their counsel in determining their strategies, without patronizing principles being erected to appraise what parties and their counsel ought to have done in managing their case. The Tribunal further recalls its earlier findings to require a high threshold to prove an abuse of process and that the fact of bringing multiple proceedings as such does not constitute an abuse of process. The Tribunal thus decided not to focus on the fact of multiple proceedings or on whether a

particular claim or issue could have been raised in earlier proceedings, but rather on whether the assertion of such particular claim or issue in further proceedings constitutes an abuse.

1220. For the reasons seen earlier in this Award, the Tribunal found that, while the Claimants could have raised their FIL and Contract claims already in the *Caratube I* arbitration, they did not have an obligation to do so, and the fact of having asserted such claims only in this Arbitration did not constitute an abuse of right or of process.

1221. In these circumstances, the Tribunal does not deem it appropriate to penalize the Claimants for their choices and conduct through an award on interest, namely by limiting the time period over which the award of interest should run, in review over how – in the opinion of the Respondent – the Claimants and their Counsel ought to have managed and conducted their case before the *Caratube I* tribunal, as well as the present one. For the Tribunal, there is thus no reason to depart from the general principles set forth in Article 38 of the ILC Articles (see *supra* paragraph 1218). The Tribunal therefore agrees that an award of interest running from 31 January 2008 until the date of full payment of the present Award is called for by the full reparation standard that the Tribunal has held to be applicable in the present case.

1222. Regarding the question of **the appropriate interest rate**, the Tribunal deems appropriate to apply an interest rate of LIBOR+2%, as suggested by the Claimants. The Tribunal has taken note of the Respondent's and its expert's criticisms expressed against this interest rate. At the same time, the Respondent and its expert, Mr. Brailovsky, recognized that the LIBOR rate has "often [been] used in the past as the basis for pre-award interest". Mr. Brailovsky opined that the LIBOR rate is not suitable, *inter alia*, because the integrity of LIBOR has recently been challenged. However, the evidence submitted by Mr. Brailovsky in support of this statement insists that the British Bankers' Association "has worked hard […] to restore confidence in LIBOR as a benchmark" and that "[r]estoring confidence in LIBOR has been an absolute priority for the [British Bankers' Association]" (Exh. App. VB-054). According to this same evidence, the transfer of the administration of LIBOR to NYSE Euronext Rates Administration Limited was to be completed in early 2014.

1223. For the Tribunal, the Claimants have shown that the LIBOR interest rate has frequently been used by ICSID tribunals, an assertion which the Respondent has not disputed. Moreover, the Respondent has not convincingly rebutted the

Claimants' allegation as to the suitability of applying the LIBOR interest rate in the present case, namely by alleging that, in the circumstances, "it may not be appropriate in this case" to use the LIBOR interest rate as a reference to establish pre-award interest.

1224. Regarding the spread of two percentage points, the Respondent's expert, Mr. Brailovsky, acknowledged that "the spread of two percentage points may have been used by ICSID tribunals in the past". However, according to Mr. Brailovsky, this would "now seem high in comparison with the six-month U.S. dollar denominated LIBOR rate, which is currently less than 0.4 percentage points".

1225. Having considered the Parties' respective arguments, the Tribunal finds that an interest rate of LIBOR+2% is appropriate in the present case to fully compensate CIOC for its loss. The Tribunal is satisfied – and the Respondent has not convincingly rebutted the Claimants' allegation – that this is also in line with ICSID standard practice.

1226. Finally, concerning the question of **simple or compound interest**, the Tribunal is also satisfied that, while this may not always have been the case, today compound interest is readily awarded by international investment tribunals in an effort to provide full compensation to the claimant and place the latter in the position it would have been in had the wrongful act not taken place.[122] While the Tribunal agrees that there is no uniform practice among international investment tribunals regarding the appropriate compounding period, it is however satisfied that the use of a semi-annual compounding period is frequently applied by international investment tribunals and appropriate in the circumstances of the present case to provide full reparation to CIOC.[123]

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[122] See, e.g., *Micula v Romania* (Exh. CLA-108); *Azurix v Argentina* (Exh. CLA-86); *Gold Reserve v Venezuela* (Exh. CLA-307) and *Rumeli v Kazakhstan* (Exh. CLA-16). See also *Vivendi v Argentina*, where the tribunal held that "[t]o the extent there has been a tendency of international tribunals to award only simple interest, this is changing, and the award of compound interest is no longer the exception to the rule. This development is not surprising once it is recognised that compound interest is not punitive in nature. […] Reflecting this rationale, a number of international tribunals have recently expressed the view that compound interest should be available as a matter of course if economic reality requires such an award to place the claimant in the position it would have been in had it never been injured (ie had the wrongful act not taken place)." (Exh. CLA-36, para. 9.2.4-9.2.6). In addition to the evidence relied upon by the Claimants, the Tribunal also refers to John Y. Gotanda, Interest, International Investment Law, Bungenberg/Griebel/Hobe/Reinisch, Baden-Baden 2015, para. 29, with references ("In fact, the presumption of simple interest has become so eroded that compound interest has come to be treated as the default position for international investment tribunals").

[123] See, e.g., *PSEG v Turkey* (Exh. CLA-126), para. 348; *Rumeli v Kazakhstan* (Exh. CLA-16), para. 769 ("Interest should be compounded semi-annually as reflected by the recent practice of ICSID tribunals"); *Lemire v Ukraine* (Exh. CLA-106), paras. 360-361 ("The Tribunal sides with the more

1227. Based on the foregoing, the Tribunal therefore awards interest on the amount of damages awarded to CIOC at a rate of LIBOR+2% compounded semi-annually. This interest shall run from 31 January 2008 until the date of full payment of the present Award.

F. COSTS

1. The Claimants' position

1228. According to the Claimants, the total arbitration costs directly incurred by them in these arbitration proceedings amount to **USD 4,972,516.24**, **EUR 390,091.00** and **GBP 506.50**. The Claimants have broken down these costs in the following table:

	COST INCURRED	AMOUNT
1.	ICSID [*sic*] fees	USD 2,975,000.00
	Legal fees of Counsel for Claimants	USD 1,500,000.00
3.	Legal fees for Mr. Fawaz Fakhry (advice on questions of Lebanese law)	USD 280,000.00
4.	Disbursements of Counsel for Claimants	USD 54,492.78 EUR 10,000.00
5.	Fees, costs and expenses of expert advisors that were not covered as disbursements by Claimants' legal counsel • Grant Thornton • Mr. Sven Tiefenthal	 EUR 371,394.00 USD 145,000.00
6.	Experts and fact witnesses' travel and related expenses for the hearing	USD 18,023.46 EUR 8,697.00 GBP 506.50

modern decisions. Loan agreements in which interest is calculated on the basis of LIBOR plus a margin usually include a provision that unpaid interest must be capitalised at the end of the interest period, and will thereafter be considered as capital and accrue interest. The financial reason for this provision is that an unpaid lender has to resort to the LIBOR market, in order to fund the amounts due but defaulted, and the lender's additional funding costs have to be covered by the defaulting borrower. This principle implies in our case that, if Claimant were to take out a LIBOR loan to anticipate the amounts to which he is entitled under the Award, the bank would insist that unpaid interest be capitalised at the end of each interest period. Consequently, if Claimant is to be kept fully indemnified for the harm suffered, interest owed under the Award should be capitalised at the end of each six month interest period. The Tribunal, thus, decides that due and unpaid interest shall be capitalized semi-annually, from the dies a quo.").

	TOTAL	USD 4,972,516.24 EUR 390,091.00 GBP 506.50

1229. In their letter of 13 July 2016, the Claimants specified that their Counsel, Derains & Gharavi, "worked on a lump sum basis of USD 1,500,000 together with a success fee, consisting in 1% [on] all amounts awarded, including interest and costs, up to USD 500,000,000, and 1.5% on all amounts awarded above USD 500,000,000". It is the Claimants' position that success fees have been awarded by international investment tribunals, e.g. in *Siag v Egypt* and in *Lahoud v DRC*.

1230. The Claimants submit that their costs are reasonable and should be borne by the Respondent in their entirety as per the discretionary power of the Tribunal under Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules. The Claimants further clarify that their costs are roughly split as follows: 5% for the proceedings relating to provisional measures, 5% to procedural issues such as admission of Leaked Documents, 20% to jurisdictional issues, 50% to the merits issues, and 20% to the quantum issues.

1231. In response to the Respondent's comments of 25 July 2016, the Claimants clarify that, had their Counsel billed this case on hourly rates, they would have billed at least the same amount as billed by the Respondent's Counsel, keeping in mind that the Respondent's Counsel was the same as for the *Caratube I* arbitration.

1232. The Claimants further insist that the success fee component of the legal fees of the Claimants' Counsel is reasonable and an essential component of the fee arrangement, which is why the Tribunal should order the Respondent to reimburse these amounts in full. The Respondent admitted that legal fees in excess of USD 21 million are not "inherently unreasonable" in a case such as the present one. According to the Claimants, "[t]hese costs should thus be awarded, or at the very least, the success fee should be capped at the amounts claimed by Respondent's Counsel in these proceedings" (Claimants' letter of 15 August 2016).

1233. Concerning the Respondent's argument that 10% of the lump sum should not be awarded in that this amount relates to work undertaken in relation to the Leaked Documents and the provisional measures, the Claimants argue that the lump sum agreement was entered into at the outset of the proceedings, at a time where the

provisional measures application and the Leaked Documents requests were not anticipated, and irrespective of the claim.

1234. Finally, concerning the legal fees incurred by Mr. Fakhry, the Claimants assert that they were not incurred in relation to the provisional measures application, but rather with respect to jurisdictional issues raised by Professor Slim. The fact that Mr. Fakhry did not apply or file documents in this Arbitration is irrelevant.

2. The Respondent's position

1235. As a preliminary matter, the Respondent observes that, under Article 61(2) of the ICSID Convention, the Tribunal enjoys discretionary authority to assess the expenses incurred by the Parties and render a decision on the allocation between the Parties of such expenses. The Respondent further draws the Tribunal's attention to the Parties' agreement in Clause 27.6 of the Contract, which reads in relevant part as follows:

> Costs. The costs of the arbitration, including legal costs, shall be borne by the unsuccessful Party or, if neither Party is wholly successful, shall be borne by the Parties in such proportions as may be specified in the arbitral award or, if no such specification is made, shall be borne by the Parties in equal shares. […]

1236. The Respondent affirms that the Tribunal thus has the authority, except if one of the Parties is "wholly successful", to apportion all or part of the costs incurred by the Parties. The Tribunal also has the authority to order that any amount of costs awarded to one Party shall bear interest and, if there are several unsuccessful parties, that the unsuccessful parties be jointly and severally liable for the payment of such costs. It is thus the Respondent's position that the Tribunal should order the Claimants, using its discretionary power, to jointly and severally pay the expenses incurred by the Respondent in connection with the present Arbitration, plus interest on the amount awarded at a reasonable commercial rate as from the date of the Award.

1237. Against these preliminary comments, the Respondent submits that its costs incurred and borne in this case total **USD 17,389,921**, of which **USD 1,381,636** is outstanding. The Respondent has broken down these costs in the following table:

CATEGORY	AMOUNT (USD)
(i) Legal fees and expenses	USD 14,137,314.25
(ii) Costs incurred for expert advice	
Vladimir Brailovsky's fees and expenses	USD 324,800
Prof. Hadi Slim's fees and expenses	USD 58,250
Antonio El Hachem's fees and expenses	USD 6,000
Carl Shusterman's fees and expenses	USD 3,000
Dr. Mangat R. Thapar's fees and expenses	USD 688,720
Prof. Martha Olcott's fees and expenses	USD 177,100
IFM Resources Inc.'s fees and expenses	USD 1,560,832.50
Prof. Kulyash Ilasova's fees and expenses	USD 168,780
Sub-total for experts	**USD 2,987,482.50**
(iii) Expert and witnesses expenses	USD 115,124.62
(iv) ICSID Advance on Costs	USD 150,000
TOTAL **Of which outstanding**	**USD 17,389,921.37** **USD 1,381,636.25**

1238. The Respondent clarifies that "[i]n accordance with the Tribunal's prior decisions in the case, these costs do not include any fees or expenses incurred by the Republic's Counsel, its experts and witnesses in connection with Claimants' requests for provisional measures of July 2014 and September 2015 or the correspondence relating to the leaked documents".

1239. The Respondent further clarifies that it incurred Counsel and experts' fees and expenses, and witnesses' expenses totaling **USD 17,239,921**, corresponding to the total amount of fees and expenses, minus the ICSID advance on costs (17,389,921.37 – 150,000). The Respondent asserts that this amount is reasonable in the circumstances of the present case, considering *inter alia* the amount of damages claimed by the Claimants, the multiplicity and complexity of the legal, factual, technical and economic issues of this case (which differed to a large extent from the issues in the *Caratube I* arbitration), the Claimants' improper conduct in these proceedings and the length of the present proceedings.

1240. It is the Respondent's position that it should be awarded its entire costs because the Claimants could have brought their claims under the Contract and/or the FIL in the *Caratube I* arbitration. The Claimants' choice not to do so caused the Respondent to incur significant additional costs. This holds true independently of the Tribunal's findings on the Respondent's preliminary jurisdictional objections.

1241. Based on the foregoing, the Respondent reiterates its position that the Tribunal should order the Claimants, using its discretionary power, to jointly and severally pay the expenses incurred by the Respondent in connection with the present Arbitration, plus interest on the amount awarded at a reasonable commercial rate as from the date of the Award.

1242. In response to the Claimants' Statement of Costs, the Respondent asserts that, even if the Claimants were to be successful in part or even with respect to all of their claims, it should not be ordered to pay the Claimants' costs. This is so, in particular, because the Claimants could and should have brought their claims under the Contract and the FIL in the *Caratube I* arbitration. Regardless of the Tribunal's rulings on jurisdiction, it would be unfair to impose the additional financial burden of the Claimants' arbitration costs in the present proceedings on the Respondent.

1243. Furthermore, in the event that the Tribunal finds that the Claimants are entitled to reimbursement of part or all their costs, the Respondent argues that the Claimant should not be entitled to the reimbursement of the success fees they claim. Considering the amount of damages sought by the Claimants, the success fee alone could reach over USD 19.5 million. While the Respondent does not argue that an amount of legal fees over USD 21 million in a case of this scope would be inherently unreasonable, it bears stressing that there is no indication that such amount would correspond to the time actually spent by the Claimants' Counsel on this case. Therefore, such costs cannot be considered as having been reasonably incurred by the Claimants for the purposes of this Arbitration.

1244. The Respondent also underlines that it is not a generally accepted practice among tribunals to award costs incurred on a success fee basis. To the contrary, tribunals have refused to do so. Moreover, even in the only two cases in which success fees have been granted, the tribunal required that such fees meet the general standard of reasonableness, applicable to the reimbursement of other arbitration costs. This means that the reasonableness should be measured against the value of the time actually spent by the counsel on the case at normal billing rates. It would be unjust

to allow a claimant to enter into agreements protecting itself against the financial risk in the event it loses the case, while requiring the respondent to bear the financial risk of counsel for claimant's increased legal fees in case the claimant is successful. It is the Respondent's position that this is what the Claimants are seeking here.

1245. The Respondent submits that the maximum amount to which the Claimants could possibly be entitled is the lesser of (i) the amount of legal fees that the Claimants would have incurred, had their entire fee arrangement been based on the value of the actual time spent by the Claimants' Counsel on the case at its normal hourly rates, and (ii) the total legal fees paid by the Claimants to their Counsel, including pursuant to the success fee arrangement. However, the Claimants have failed to provide any precise estimate of the actual amount of their fees based upon the time spent and hourly rates. Given that they have thus failed to provide the Tribunal with the necessary information to apply the applicable test set forth in the cases relied upon by the Claimants themselves, the Tribunal must reject the Claimants' request for reimbursement of a success fee. Should the Tribunal nevertheless find otherwise, the amount of any success fee that could be awarded cannot exceed the amount of damages awarded by the Tribunal times the respective percentages of 1% and 1.5% as set forth in the Claimants' Statement of Costs.

1246. The Respondent insists that the Claimants have improperly included the costs incurred in relation to the requests for provisional measures and the Leaked Documents, considering that the Tribunal already held that each Party should bear its own costs with respect to these decisions. Accordingly, the Claimants' total costs should in any event be reduced by 10%.

1247. Finally, regarding the Claimants' alleged legal fees of Mr. Fawaz Fakhry, the Respondent submits that there is no evidence that his legal fees were necessary for this Arbitration, given that Mr. Fakhry has not appeared and has filed no document in the present proceedings. The Claimants therefore should not be entitled to these legal fees, especially if such fees were incurred in relation with the requests for provisional measures. That said, in any event, the Claimants have not provided any indication regarding the specific issues addressed by Mr. Fakhry, the scope of his work, his conclusions under Lebanese law or why they did not submit a report for him.

3. Analysis

1248. The Tribunal's decision on costs is governed by Article 61(2) of the ICSID Convention, which reads as follows:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

1249. Moreover, Article 28 of the ICSID Arbitration Rules provide as follows:

> (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
>
> (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
>
> (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
>
> (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

1250. It is undisputed that Article 61(2) of the ICSID Convention and Article 28 of the ICSID Arbitration Rules give the Tribunal broad discretion in deciding the matter of the costs of the arbitration, including legal fees and expenses.

1251. As was seen, Clause 27.6 of the Contract contains an agreement between the Parties regarding the matter of costs. It is recalled that this agreement reads as follows:

> Costs. The costs of the arbitration, including legal costs, shall be borne by the unsuccessful Party or, if neither Party is wholly successful, shall be borne by the Parties in such proportions as may be specified in the arbitral award or, if no such specification is made, shall be borne by the Parties in equal shares. […]

1252. It is undisputed that the Tribunal's broad discretion in deciding the matter of the costs of the Arbitration, including legal fees and expenses, is not affected by the Parties' agreement in Clause 27.6 of the Contract, except for the situation where

one Party is wholly successful, in which case the unsuccessful Party shall bear the costs of the Arbitration.

1253. Two main approaches may be distinguished in awarding costs in investment arbitrations. Some tribunals apportion ICSID costs equally where they were incurred and rule that each party should bear its own costs. Others apply the principle “costs follow the event”, making the losing party bear all or part of the costs of the proceedings, including those of the prevailing party. Furthermore, another criterion commonly adopted is the general conduct of a party and the more or less serious nature of the case it has defended.

1254. As evidenced by the foregoing sections of this Award, there were numerous procedural issues and difficult substantive legal questions involved at the various phases of the Arbitration. Many of these issues were far from clear-cut and involved meritorious arguments by both Parties.

1255. The Tribunal finds that Counsel on both sides generally conducted this Arbitration fairly and with high professional standards. None of the facts that would clearly justify cost allocation (such as bad faith, abusive or unreasonable argument, or obstructions tactics) was present in this Arbitration. Each side presented valid arguments in support of its respective case. In particular, the extensive and well-reasoned pleadings of both Parties assisted the Tribunal in its task. To the extent that there were new arguments and changes in the Parties' positions, this occurred to a greater or lesser extent on either side. Such changes were raised in good faith and generally in a timely manner. Moreover, the applications made by the Parties during the course of the Arbitration were not spurious and the corresponding procedural orders and decisions generally were regularly complied with.

1256. In particular, concerning the Claimants’ Proposal for Disqualification of the initial arbitrator nominated by the Respondent, the Tribunal found that this proposal was justified.

1257. The Claimants’ application for provisional measures of 14 July 2014 gave rise to a hearing on provisional measures and the Tribunal’s Decision on Provisional Measures dated 4 December 2014. While the Tribunal rejected the Claimants’ application for provisional measures, it empathized with the Claimants’ concerns, stating that it was prepared to give credence to the Claimants’ allegations of harassment in light of the troubling circumstances of the present case. The Tribunal also observed that, while the Claimants had not been able to concretely and

specifically prove the Respondent's involvement in the alleged acts of harassment, the Claimants nevertheless "have shown a certain need for protection in this Arbitration and that it was not unreasonable under the circumstances to have submitted its Request for Provisional Measures" (Decision on Provisional Measures, para. 155). Therefore, the filing by the Claimants of their application for provisional measures was justified at least in principle.

1258. The Tribunal generally followed the same approach with respect to the Claimants' further applications for provisional measures, such as formulated in their correspondence of 3 February 2015, 20 March 2015, 2 April 2015 and 8 September 2015.

1259. Furthermore, concerning the document production procedure which gave rise, *inter alia,* to PO2, PO3 and PO4, while it is undisputed that both Parties failed to produce certain documents notwithstanding the Tribunal's orders, it has not been shown that either Party provoked unjustified costs by unduly withholding relevant information or documents in this Arbitration. More specifically, while it is also undisputed that the Respondent refused to produce certain documents it was ordered to disclose under PO2 as well as a privilege log, this was motivated by concerns regarding the protection of privileged documents and information. In its decision on the admissibility of the Client-Attorney Email/the Non-Privileged Email dated 26 August 2015, the Tribunal reconfirmed its decision to afford privileged documents the utmost protection. The Tribunal further recalls that on 30 October 2015, Mr. Langlois issued his Report on the Application of Legal Privilege to the "Requested Email", concluding that the two documents attached to the "Cover Email" (the "Attached Documents") were indeed protected by the attorney-client privilege and under the work product doctrine.

1260. Further, concerning specifically the Respondent's refusal to produce a privilege log in disregard of the Tribunal's orders, it has not been shown by the Claimants that the Respondent's conduct provoked unjustified costs in this Arbitration.

1261. The Tribunal also considers worth mentioning the Claimants' request for leave to produce certain "Leaked Documents", which gave rise to the Tribunal's Decision on "Leaked Documents" dated 27 July 2015. The Tribunal admitted the Claimants' request in part (namely with respect to certain "Leaked Documents") and rejected it in other parts (namely with respect to the "Privileged Leaked Documents"). Therefore, the Claimants' request was at least partially justified.

1262. In determining the appropriate award of costs, the Tribunal must also consider the success of the Parties' respective cases. The Respondent has prevailed in general on the issues of the applicability of Kazakh law, the burden of proof, the lack of jurisdiction over Mr. Devincci Hourani's claims, on several issues concerning quantum, and on the issue of moral damages.

1263. By contrast, the Claimants have prevailed on the issue of the relevance of customary international law, the preliminary jurisdictional objections and the Tribunal's jurisdiction over CIOC's claims, the principle of liability, on parts of CIOC's damages claim, and on interest. It is specified in this regard that, while the Claimant has prevailed on jurisdiction, except with respect to Mr. Devincci Hourani's claims, the Respondent's defenses, while ultimately rejected by the Tribunal, were not frivolous, but quite to the contrary serious.

1264. Based on the foregoing, there can be no doubt that CIOC – but not Mr. Devincci Hourani – was justified in starting this Arbitration to recover monies that were due to it and that it would not have recovered otherwise. This said, CIOC prevailed only on part of its claim, i.e. USD 39.2 million out of the claimed USD 941.05 million.

1265. On the basis of the foregoing reasons and in the exercise of its discretion in matters of costs, the Tribunal comes to the conclusion that it is fair for each Party to bear its own legal fees, costs and expenses in this Arbitration, including fees, costs and expenses related to expert and fact witnesses.

1266. As a result, the Tribunal can dispense with deciding issues relating to the Claimants' success fee arrangement with its Counsel, as well as the question of the Claimants' entitlement to claim reimbursement for the costs incurred in relation to the requests for provisional measures and the Leaked Documents, and legal fees of Mr. Fawaz Fakhry.

1267. The Tribunal further concludes in its discretion that it is fair for the Parties to equally share the costs of the Arbitration, including the fees and expenses of the Tribunal and Tribunal's Assistant, ICSID's administrative fees and the direct expenses of the proceedings. Therefore, the Respondent shall reimburse the Claimants for the advance payments to ICSID that the Claimants paid on behalf of the Respondent to meet such costs in accordance with the Parties' agreement to this effect embodied in Section 9.2 of PO1 for a total of USD 1,207,757.44. In this respect, it is noted that

the ICSID Secretariat will provide the Parties with a statement of the case account in due course.[124]

G. DECISION

1268. For the reasons stated in this Award, the Tribunal makes the following decision:

a. The Tribunal has jurisdiction over CIOC's claims under the Contract;

b. The Tribunal denies jurisdiction over Mr. Devincci Hourani's claims;

c. The Respondent breached its obligations towards CIOC under the Contract, Kazakh law, the FIL and/or international law;

d. The Respondent shall pay CIOC the amount of USD 39.2 million;

e. The Respondent shall pay interest on the amount specified in subparagraph (d.) above at the rate of LIBOR + 2% compounded semi-annually, calculated from 31 January 2008 until payment in full;

f. The Parties shall equally share the costs of the Arbitration as reflected in ICSID's final financial statement of the proceedings. The Respondent shall pay the Claimants for the advance payments to ICSID that the Claimants paid on behalf of the Respondent to meet such costs, for a total of USD 1,207,757.44;

g. Each Party shall bear the fees, costs and expenses it incurred for the preparation and presentation of its case;

h. All other claims or prayers for relief are dismissed.

[124] The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account once all invoices are received and the account is final. The remaining balance will be reimbursed in proportion of the payments that they advanced to ICSID.

[Signed]

Prof. Laurent Aynès, Arbitrator
Date:

[Signed]

Dr. Jacques Salès, Arbitrator
Date:
Subject to the attached dissenting and concurring opinion with respect to paragraphs 815-943

[Signed]

Dr. Laurent Lévy, President
Date:

CONCURRING AND DISSENTING OPINION OF JACQUES SALÈS PURSUANT TO ARTICLE 48(4) OF THE ICSID CONVENTION

I. INTRODUCTION

1. Pursuant to Article 48(4) of the ICSID Convention, I submit for attachment to the Award my concurring and dissenting opinion relating to certain aspects of the Tribunal's analysis of CIOC's expropriation claim.[1]

2. The Tribunal adopts the standard proposed by the Respondent[2] and undisputed by the Claimants according to which CIOC must establish, in order to prevail on its claim for expropriation, "[...] (i) an unreasonable substantial deprivation of existing rights; (ii) of a certain duration; and (iii) caused by a sovereign act of the host State [...]."[3]

3. Concerning the scope of CIOC's existing rights, the Tribunal decides, "[...] at the time of the termination, CIOC did not have a vested right to proceed to the Contract's production stage."[4] Consequently, CIOC remained in the Exploration Phase under the Contract at the time of the termination.

4. The Tribunal characterizes the rights of CIOC under the Exploration Phase of the Contract as being those conferred on it by Articles 7 (General rights and obligations) and 9 (Exploration period) of the Contract. The Tribunal concludes, "[...] at the time of the termination, CIOC had the right to perform the Contract until May 2009 (subject to the conditions of termination and suspension set forth in Clause 29 of the Contract) and, if necessary, to request a second extension of the exploration period until May 2011, in order to make a Commercial Discovery and obtain the exclusive right to proceed to commercial production."[5]

5. While I join my fellow arbitrators in rendering notably the decisions mentioned above, I dissent from the majority decision that, "[...] with all three elements of an expropriation being present, CIOC has been expropriated of its existing rights under the Contract, which granted CIOC access to the Caratube field and its exploitation. Rather than being in the presence of a mere breach of Contract by the Respondent, in the majority view, an expropriation took place through the unlawful termination of the Contract by the Respondent acting in its sovereign capacity."[6]

6. In the following paragraphs, I give my opinion on two of the requirements that the majority finds satisfied in this case, namely: (i) that the Respondent unreasonably and substantially deprived CIOC of its rights existing at the time of termination of the Contract and (ii) that a sovereign act by the Respondent caused the said deprivation.[7]

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[1] Award, paras. 815-943.
[2] Counter Memorial, para. 1203.
[3] Award, para. 825.
[4] Award, para. 842.
[5] Award, para. 845.
[6] Award, para. 939.
[7] Since I express my opinion that these two requirements are not satisfied and that this case thus constitutes a breach of contract case as opposed to an expropriation case, I omit from my opinion the second element of the expropriation standard set out in paragraph 2 above pertaining to the duration of the deprivation of existing rights (Award, paras. 906-907).

II. "AN UNREASONABLE SUBSTANTIAL DEPRIVATION OF EXISTING RIGHTS"

A. CIOC's obligation to complete a 3D seismic study

7. Concerning CIOC's obligation to complete a 3D seismic study, the Award states, "[...] the Respondent has not established its allegation that the Contract was rightfully terminated based on CIOC's material breach of this obligation."[8] The majority bases the above decision notably on its findings that "[...] the Respondent learned of the shortcomings affecting the 3D seismic study, but nevertheless accepted it subject to certain corrections and reformatting (Exh. R-28)"[9] and that "[...] there is no indication that such acceptance could not be understood as an approval [...]."[10] I do not agree with the majority's findings and therefore dissent from the above decision for the following reasons.

8. As recorded in the Respondent's English-language translation of the Russian-language minutes of the 1 November 2007 meeting of the Scientific and Technical Council of TU Zapkaznedra ("STC"), the STC resolved, "[...] [t]he Report on the Results of MOGT-3D Seismic Survey Performed in the Caratube Field Contract Area in 2006-2007 shall be accepted."[11] According to the Respondents, the Russian-language minutes support a finding that the STC "accepted" the 3D seismic study "for what it was," subject to the reservations that the STC expressed in the minutes,[12] meaning that the STC had not "approved" the study.[13] The Claimants, on the other hand, submitted an English-language translation of the Russian-language minutes of the STC's 1 November 2007 meeting, which states, "[...] [t]he Report on the Results of MOGT-ZD Seismic Survey Performed in Caratube Field Contract Area in 2007-2007 has been approved."[14] According to the Claimants, the STC thus "approved" the study.[15] My fellow arbitrators find that citations to English-language dictionaries disprove the Respondent's claim because "[...] the word 'to accept' may be understood as meaning 'to give admittance or approval to,' 'to agree to or approve of something' or 'to consider something or someone as satisfactory."[16]

9. Later in the Award, the Tribunal unanimously decides, "[...] the Claimants have not established that the 3D seismic study in the present case was sufficient and appropriate to reliably and with sufficient certainty assert the existence and magnitude of the oil

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[8] Award, para. 899.

[9] Id.; See also, Award, paras. 849-850.

[10] Award, para. 851.

[11] Exh. R-28: Minutes No. 246/2007 of the meeting of the Scientific and Technical Council of TU Zapkaznedra of 1 November 2007, first resolution, emphasis added. In its second resolution, the STC resolved, "[t]he report shall be formatted in compliance with 'Instruction on the formatting of reports on geological surveys of the subsoil in RoK' No. 69-P dated April 21, 2004 and shall be submitted for permanent storage to both the RGIC 'Kazgeoinform' geological repository and the TGF of the Zapkaznedra Territorial Department in hardcopy and on magnetic media. The initial materials shall be submitted to the archives of the 'Zapkaznedra' Territorial Department for permanent storage."

[12] The STC stated, "[t]he shortcomings of works include insufficient analysis and, accordingly, a lack of conclusions and recommendations as to mapping and evaluation of overhang and sub-salt deposits within the Caratube contract area. The report requires correction and follow-up formatting."

[13] Counter Memorial, paras. 533-537.

[14] Exh. C-18: Minutes No. 246/2007 of the meeting of the Scientific and Technical Council of TU Zapkaznedra of 1 November 2007, first resolution, emphasis added.

[15] Claimants' Memorial, para. 147; Claimants' First Post-Hearing Brief, paras. 261, 370, 375 and 378.

[16] Award, para. 851, footnotes omitted.

reserves in the Contract Area."[17] The Tribunal thus finds that the 3D seismic study that CIOC completed and submitted to the STC on 1 November 2007 did not fulfill its fundamental purpose.

10. Given the Tribunal's decision above, I believe my fellow arbitrators do not give sufficient weight to the Respondent's interpretation of the word "accepted" in the Russian original of the minutes of the STC's 1 November 2007 meeting. In my opinion, in light of the fact that the study did not fulfill its fundamental purpose, the Respondent's limited interpretation of the word "accepted" as meaning mere administrative acceptance of the study for storage purposes is more credible than the majority's broader interpretation of "acceptance" as meaning "approval." The result of the majority decision is that STC approved CIOC's unusable 3D seismic study and thus excused what otherwise would have constituted a material breach of the Contract by CIOC. I do not join my fellow arbitrators in admitting this unlikely outcome based on citations to English-language dictionaries. Consequently, in my opinion, CIOC's unusable 3D seismic study constituted a material breach of the Contract, which the STC did not excuse.

B. Termination for breach of CIOC's 3D seismic study obligation

11. The majority finds that the Respondent did not refer to CIOC's failure to submit a usable 3D seismic study in the Notification for resumed operations dated 27 November 2007,[18] the Notice of non-performance of obligations dated 3 December 2007,[19] the Termination Ordinance dated 30 January 2008[20] and the Termination Notice dated 1 February 2008.[21] The majority concludes that the Respondent thus could not terminate the Contract validly on that ground and that, in any event, the Respondent did not give CIOC adequate notice of such a breach.[22] I dissent from the above decision for the following reasons.

12. I do not differ from my fellow arbitrators who find that the notices and Ordinance cited above do not mention the 3D seismic study expressly. However, I believe the Notification for resumed operations encompassed CIOC's breach of its 3D seismic study obligation with CIOC's other breaches of the 2007 AWP within the following language of the general notification: "[t]erms of the Work Program are not competed [sic] either in physical or in financial expression (Clause 8.1 of the Contract)." In reaction to this general notification, CIOC manifested its awareness that the MEMR questioned particularly CIOC's performance of its 3D seismic study obligation. First, in its letter to the MEMR dated 13 December 2007,[23] CIOC stated, "Caratube [...] is offering clarifications in regards of the letters of the Ministry and Energy and Mineral Resources No. 14-05-10682 of November 27, 2007[24] and No. 14-05-10942 of December 03, 2007."[25] Then, in defense of its performance of its 3D seismic study obligation, CIOC stated, "[...] [w]e have completed

[17] Award, para. 1114.

[18] Exh. C-148: Notification for resumed operations under Contract No. 954 of May 27, 2002 and on the failure to exercise provisions under Contract No. 954 of 27 May 2002 (hereafter cited as the "Notification for resumed operations").

[19] Exh. C-41: Notice of non-performance of obligations under Contract No. 954 of May 27, 2002.

[20] Exh. C-44: Termination Ordinance dated 30 January 2008.

[21] Exh. C-45: Notice of termination of Contract No. 954 dated May 27, 2002.

[22] Award, paras. 851, 899-900.

[23] Exh. C-42: CIOC's letter to the MEMR dated 13 December 2007.

[24] "Letter No. 14-05-10682 of November 27, 2007" is a direct reference to the MEMR's Notification for resumed operations, Exh. C-148.

[25] "Letter No. 14-05-10942 of December 03, 2007" is a direct reference to the MEMR's Notice of non-performance, Exh. C-41.

the interpretation of materials of the seismic prospecting MOGT-ZD, validated the complete report of field work of processing and interpretation with the Territorial Department ZapKazNedra (Minutes No. 246/2007)." Consequently, in my opinion, the MEMR did give CIOC adequate notice of its breach of its 3D seismic study obligation.

13. The majority declines to examine whether the MEMR's notice complied with the procedural requirements under Clause 29 of the Contract or the 1999/2004 Subsoil Law.[26] In my opinion, even if the Respondent did not satisfy contractual or legal procedural requirements for terminating the Contract, CIOC could only use the Respondent's failure in this respect as a ground for seeking compensation from the Respondent for breach of the Contract and not for expropriation.[27]

C. A substantial deprivation of CIOC's rights

14. The majority examines whether CIOC suffered a substantial deprivation of the value of its investment and finds that without the Contract, "[...] CIOC's sole *raison d'être*, CIOC's investment in the Caratube project was virtually worthless," since CIOC notably was an investment vehicle for the performance of the Contract and CIOC's only business was the exploration of the Caratube field.[28] In particular, the majority finds that "[...] the Respondent deprived CIOC of its right to continue performing the Contract in order to make a Commercial Discovery and meet the requirements necessary to obtain the exclusive right to move to commercial production," and that the Respondent "[...] thus substantially deprived CIOC of the value of its investment."[29] A majority concludes, "[...] Respondent unlawfully terminated the Contract," and "[d]ue to this unlawful termination of the Contract, CIOC, at the time of the termination, was unreasonably and substantially deprived of its existing rights under the Contract."[30]

15. I dissent from the above decision for the reasons set out in paragraphs 7 to 13 above. In my opinion, CIOC committed a material breach of the Contract (at least of its 3D seismic study obligation) and the Respondent therefore had the right to terminate the Contract in accordance with Article 29 of the Contract.

16. In my opinion, even if the Respondent did not satisfy contractual or legal procedural requirements for terminating the Contract, thus characterizing the termination as unlawful, this does not mean the Respondent expropriated CIOC's existing rights under the Contract.[31] In order to find an expropriation, the Tribunal must determine that a sovereign act of the host state caused the unreasonable substantial deprivation of existing rights in question. However, for the reasons set out below, I believe there was no "sovereign act" in this case.

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[26] Award, para. 901.
[27] See Section III below.
[28] Award, para. 904.
[29] Award, para. 904.
[30] Award, para. 905.
[31] In my opinion, in such a case, as stated in paragraph 13 above, CIOC could only seek compensation from the Respondent for breach of the Contract.

III. "CAUSED BY A SOVEREIGN ACT OF THE HOST STATE"

A. Preliminary considerations

17. I agree with my fellow arbitrators that a mere contractual breach is not enough to establish an expropriation. As stated in the Award, in order for a contractual breach to amount to an expropriation, a "sovereign act" is required, which means interference in the contract by a state, "[...] in the exercise of its sovereign powers (as opposed to the state acting in the capacity of a contracting party) [...]."[32]

18. The Award then announces, "[...] the facts in the record of the present Arbitration are troubling and the Claimants' allegations of harassment have occupied (and preoccupied) this Tribunal from the beginning and throughout the present proceedings."[33] After this statement, the Award summarizes the Tribunal's Decision on Provisional Measures dated 4 December 2014 and the Claimants' further allegations of acts of harassment by the Respondent against the Claimants.[34] The Award thereafter confirms the Tribunal's previous conclusion in the following terms: "[...] Claimants have not sufficiently established their allegation that the Sabsabi/Ruby Roz saga 'marked the start of Kazakhstan's campaign against the Hourani family and their companies that ultimately led to the expropriation of Claimants'[...]."[35]

19. I have no major objection to the summary of the Tribunal's Decision on Provisional Measures in the above-mentioned paragraphs of the Award nor do I differ from my fellow arbitrators who confirm that the Claimants fail to establish their case that harassment by the Respondent led to the expropriation of the Claimants' rights.

20. However, I do not think the Tribunal's Decision on Provisional Measures lends weight to the majority's decision on sovereign action in the following paragraphs of the Award. In particular, echoing a statement in the Tribunal's Decision on Provisional Measures, the Award announces, "[...] the Tribunal once again is troubled by the conspicuous timing and circumstances of the alleged events when put into perspective and viewed against the timeline as a whole."[36] I agreed to an *obiter dictum* along those lines in the Tribunal's Decision on Provisional Measures.[37] I do not agree to its use in the Award as supplementary evidence for the majority's finding that "[...] the Claimants have sufficiently established that the unreasonable and substantial deprivation of their existing rights under the Contract was caused by a sovereign act, i.e. by the Respondent using its sovereign powers rather than acting in a private manner as a party to the Contract."[38] In my opinion, the *obiter dictum* cited can only be void of probative value where the Claimants fail to establish their case for harassment. I therefore do not join my fellow

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[32] Award, para. 908.
[33] Award, para. 909.
[34] Award, paras. 910-911.
[35] Award, para. 913.
[36] Award, para. 913.
[37] I accepted the *obiter dictum* cited as serving a limited purpose for the administration of the arbitration. In paragraph 143 of the Decision on Provisional Measures, the Tribunal reminded the parties of the "[...] general duty, arising from the principle of good faith, not to take any action that may aggravate the present dispute, affect the integrity of the arbitration and the equality of the Parties, or that could contravene the fundamental principles of the presumption of innocence of the Claimants and of the prohibition of unlawful attacks on one's honour and reputation."
[38] Award, para. 914.

arbitrators in making this decision, which relies on this *obiter dictum* as corroborating evidence for a finding of sovereign action.[39]

21. The primary evidence upon which my fellow arbitrators base their decision on sovereign action is the "Recommendation on elimination of disregard of the rule of law" dated 7 September 2007 from the General Prosecutor's Office of the Republic of Kazakhstan to the Minister of Energy and Mineral Resources.[40] The Award states, "[...] the 'Recommendation' was received and acted on as an instruction to the MEMR to terminate CIOC's Contract."[41] I do not agree with this decision nor do I entirely subscribe to the underlying analysis of my fellow arbitrators in the following paragraphs of the Award.[42] I do not wish to comment on all of the points on which I agree or disagree and, therefore, focus on the issues that are essential to my concurring and dissenting opinion on the subject of sovereign action. This requires my starting from the 25 March 2007 Notice of Breach.[43]

B. <u>The 25 March 2007 Notice of Breach</u>

22. I concur with the decision that "[...] the Claimants have not sufficiently and convincingly established their allegation that the 25 March 2007 Notice was 'a *post facto* concoction, manufactured upon receipt of the Prosecutor's instruction to terminate [CIOC] and in an attempt to discover a justification for the termination of [CIOC's] Contract' [...]."[44]

23. In my opinion, the 2007 correspondence establishes that, in 2007, CIOC never claimed that the MEMR had not sent the 25 March 2007 Notice. In its 2007 correspondence, CIOC claimed it never received the said notice.[45] Similarly, the 2007 correspondence establishes that, in 2007, the Respondent never claimed that CIOC was untruthful when CIOC stated that it did not receive the 25 March 2007 Notice. The Respondent gave CIOC the benefit of the doubt, notably by issuing the 27 November 2007 "Notification for resumed operations under Contract No. 954 of May 27, 2002 and on the failure to exercise provisions under Contract No. 954 of May 27, 2002."[46] This is how the parties represented the facts in 2007. I see no reason why the Tribunal should treat the facts any differently than the parties treated them in 2007.

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[39] Award, paras. 913, 924 and 936.

[40] Exh. C-35: Recommendation on elimination of disregard of the rule of law dated 7 September 2007 (hereafter cited as the "Recommendation").

[41] Award, para. 915.

[42] Award, paras. 916-935.

[43] Exh. R-48/C-37: Notice of Breach No. 14-02-2498 dated 25 March 2007 (hereafter cited as the "25 March 2007 Notice.")

[44] Award, para. 893.

[45] Exh. C-39: CIOC's letter to the MEMR dated 3 October 2007; Exh. C-146: CIOC's letter to TU Zapkaznedra dated 18 October 2007.

[46] Exh. C-148: Notification for resumed operations under Contract No. 954 of May 27, 2002 and on the failure to exercise provisions under Contract No. 954 of 27 May 2002 (hereafter cited as the "Notification for resumed operations"). See also, Exh. C-38: Notice of termination of operations under Contract No. 954 of May 27, 2002 dated 1 October 2007 (mistakenly dated 10 October 2007 in English translation). Pursuant to the Notice of termination, the MEMR, citing CIOC's failure to respond to the 25 March 2007 Notice, suspended operations under the Contract pending a decision on unilateral termination of the Contract. In reaction to the Notice of termination, CIOC issued its letter of 3 October 2007, in which it stated: "[the Notice of termination] declares the [25 March 2007 Notice] to be received by us on March 28, 2007. In fact, we never received such a notice." After having reviewed CIOC's 3 October 2007 letter, the MEMR issued the Notification for resumed operations.

24. The other evidence is consistent with the parties' representation of the facts in 2007. The page from the MEMR's logbook[47] and the acknowledgement of receipt dated 28 March 2007[48] are consistent with the MEMR's claim that it sent the 25 March 2007 Notice on the date of the said notice. The acknowledgement of receipt dated 28 March 2007 also is consistent with CIOC's claim that it never received the said notice because, as the MEMR admitted in its letter to the Prosecutor's Office of the Aktobe Oblast, the acknowledgement of receipt contained "[...] no precise information as to on whom it was served [...]."[49]

25. On the one hand, the evidence in this case enables the Tribunal to find that the Respondent sent the 25 March 2007 Notice, even if CIOC did not receive it until after TU Zapkaznedra resent it by fax on 24 September 2007.[50] On the other hand, the Tribunal has a duty to settle that controversy since the parties asked us to do so. Consequently, I do not join my fellow arbitrators in their decision to leave open the question whether the Respondent sent the 25 March 2007 Notice.[51] In my opinion, my fellow arbitrators do not give the evidence the weight it deserves and leave the parties without an answer to a key issue they extensively argued in their respective cases.

26. The absence of a decision puts in an unfavorable position the Respondent, the losing party on the issue of sovereign action. In my opinion, a decision on the sending of the 25 March 2007 Notice is essential to establish the Respondent's determination, in compliance with the Contract's provisions, to cease to tolerate CIOC's faulty performance of the Contract, several months before the Respondent received the 7 September 2007 Recommendation.

27. The extension of the Contract, formalized in the intervening period and particularly by Appendix No. 3 dated 27 July 2007,[52] does not change my perspective for the following reasons. The MEMR sent to CIOC a Notice of Breach on 17 January 2005,[53] at a time when Mr. Rakhat Aliyev remained in good graces with the President of the Republic of Kazakhstan, Nursultan Nazarbayev. At that time, nobody considered the sending of this Notice of Breach to be an exceptional event. The MEMR issued the 17 January 2005 Notice of Breach within weeks following the TU Zapkaznedra meeting of 21 December 2004 during which TU Zapkaznedra decided to carry forward to 2005 all of

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[47] Exh. R-186: a page of the MEMR's logbook of 25 March 2007 in support of the Respondent's position that it indeed sent the 25 March 2007 Notice.

[48] Exh. R-57: CIOC's signed acknowledgment of receipt of 28 March 2007, from which it is impossible to determine who received the letter. The 28 March 2007 date of receipt mentioned in the acknowledgment of receipt coincides with the delivery date mentioned in the MEMR's Notice of termination of operations to CIOC of 1 October 2007 (mistakenly dated 10 October 2007 in the English translation).

[49] Exh. R-178: the MEMR's letter to the Prosecutor's Office of the Aktobe Oblast dated 27 November 2007, in which the MEMR explained that it issued the Notification for resumed operations because, "the delivery receipt of the registered letter, by which the notice of violation of contractual violations was sent to the Contractor, has no precise information as to on whom it was served [...]".

[50] Exh. C-36 attaching Exh. C-37. See also Exh. C-39: CIOC's letter to the MEMR dated 3 October 2007 in which CIOC acknowledged receipt of the 25 March 2007 Notice on 24 September 2007.

[51] Award, para. 894: "For a majority of the Tribunal, the question whether the 25 March 2007 Notice constituted an adequate notice of the alleged material breaches and whether or not it was properly sent and received as alleged by the Respondent can ultimately be left open." See also, Award para 923: "[...] on 25 March 2007, the MEMR allegedly sent CIOC a Notice of Breach informing the latter that the Contract may be terminated should CIOC not remedy the alleged breaches of its obligations, it being recalled once again that the Claimants dispute that such Notice was ever actually sent to (or, at the very least, received by) CIOC at that time (Exh. C-37) [...]."

[52] Exh. C-1: Appendix No. 3 to Contract No. 954 of May 27, 2002 dated 27 July 2007.

[53] Exh. C-121: Notice of Breach of Contract No. 954 of 27 May 2002.

CIOC's outstanding obligations.[54] CIOC did not claim at that time that the MEMR could not issue a notice of breach with respect to outstanding obligations that TU Zapkaznedra had carried over. To the contrary, CIOC promised to cure the breaches.[55] In my opinion, the situation in 2005 is analogous to the one in 2007: neither the Revised Work Program of 23 April 2007[56] nor Appendix No. 3 could have had any effect on the Respondent's allegations of breach in the 25 March 2007 Notice, which TU Zapkaznedra resent to CIOC on 24 September 2007.[57] I therefore dissent from the majority decision that "[...] the Respondent is estopped from relying on and/or waived its allegations of breach contained in the 25 March 2007 Notice with respect to CIOC's obligations that were extended by means of the extension of the Contract's exploration period."[58]

C. The Recommendation on the elimination of disregard of the rule of law

28. For the reasons developed in the preceding paragraphs, I believe the Respondent first manifested its intent to terminate the Contract in the 25 March 2007 Notice and thus before the issuance of the 7 September 2007 Recommendation. Consequently, I dissent from the majority decision that "[...] the Aktobe Prosecutor's 'Recommendation' was received by the MEMR as an order to terminate the Contract and marked the beginning of the termination process."[59]

29. My fellow arbitrators find that the Recommendation caused the MEMR to adopt a "drastic change" in attitude and that the Recommendation set the MEMR on a course to terminate the Contract.[60] However, I believe the evidence in addition to the 25 March 2007 Notice contradicts that majority finding. For example, the Recommendation did not prevent the MEMR from giving CIOC the benefit of the doubt when CIOC stated in its 3 October 2007 letter that it had not received the 25 March 2007 Notice. To the contrary, the MEMR reported to the Prosecutor's Office of the Aktobe Oblast that in order to comply with Section 29 of the Contract,[61] the MEMR had granted CIOC's request to allow CIOC to resume operations.[62] In the 27 November 2007 Notification for Resumed Operations, the MEMR, in addition to allowing CIOC to resume operations, also revised its previous notice of breach and accorded CIOC one more month to cure its breaches of the Contract.[63] In my opinion, the MEMR's action after the Recommendation was the continuation of its action prior to the Recommendation and manifested the same determination, in compliance with the Contract's provisions, to cease to tolerate CIOC's faulty performance of the Contract, which the MEMR first manifested in the 25 March 2007 Notice.

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[54] Exh. C-92: Minutes of the TU Zapkaznedra Technical Committee No. 105/2005 dated 21 December 2004.

[55] Exh. C-115: CIOC's letter to the MEMR dated 9 March 2005. CIOC stated, in particular, "[...] we are conducting an expedited implementation of the 2005 Work Program approved by TU "Zapkaznedra", which provides for the correction of deficiencies with regards to the obligations" (emphasis added).

[56] Exh. C-26: Work program for geologic exploration works in the Caratube oil field during the extension exploration period 2007 (27.05) – 2009 (27.05).

[57] Respondents Post-Hearing Brief para. 209. Messrs. Batalov and Ongarbaev testimony at the hearing confirmed this point.

[58] Award, para. 894.

[59] Award, para. 916.

[60] Award, para. 925.

[61] Section 29 sets forth the conditions of termination and suspension of the Contract.

[62] Exh. R-178: the MEMR's letter to the Prosecutor's Office of the Aktobe Oblast dated 27 November 2007.

[63] Exh. C-148: Notification for resumed operations under Contract No. 954 of May 27, 2002 and on the failure to exercise provisions under Contract No. 954 of 27 May 2002 (hereafter cited as the "Notification for resumed operations").

30. I differ from my fellow arbitrators who observe that the MEMR's correspondence after the Recommendation did not mention Appendix No. 3 and find that this fact supports their conclusion that the prosecutor sent the MEMR on a course to terminate the Contract.[64] The majority finding ignores that Appendix No. 3, which extended the Exploration Period until 27 May 2009, did not extend the deadlines for all of CIOC's obligations and thus was not relevant to the MEMR's post-recommendation correspondence. I believe that TU Zapkaznedra's 30 September 2007 Prescriptive Order clarifies this point because it mentions Appendix No. 3 and nevertheless specifies deadlines falling in the fourth quarter of 2007 for some of CIOC's obligations under the 2007 Revised AWP.[65]

31. The Award states, "[t]he Respondent also has not rebutted the showing by the Claimants that the Prosecutor's Offices were not authorized under the law to intervene in the Contract in the way that they did, it being specified that it is not disputed that, under both the Contract and the 1999/2004 Subsoil Law, the MEMR was the "Competent Authority" with respect to all issues essential to the Contract."[66] I dissent from the above decision for the following reasons.

32. First, neither the Aktobe Prosecutor's Office nor the General Prosecutor's Office intervened in the Contract in the place of the MEMR as Competent Authority: their interaction was limited strictly to correspondence with the MEMR in the latter's express capacity as the Competent Authority. There is no evidence in this arbitration that either prosecutor took any action in the place of the MEMR or otherwise interacted with the Contractor in relation to the Contract.

33. Second, the Respondent claimed that the Prosecutor, who sent his Recommendation to the MEMR, acted in accordance with his duty to ensure the enforcement of the law and of the Contract terms with regard to subsoil users.[67] I believe the Respondent satisfied its burden of proof with respect to the above claim to the extent that the Tribunal accepts that the Prosecutor has a general duty to ensure the enforcement of the law.[68] In my opinion, Claimants, who have the burden of proof on their expropriation claim, thus fail to rebut Respondent's claim that the Prosecutor, when issuing the Recommendation, did so within his authority and in fulfillment of his duties. Such a rebuttal could have entailed an examination of the authority cited in the Recommendation, namely Article 83 of the Constitution of the Republic of Kazakhstan and Article 25 of the Law of the Republic of Kazakhstan "On the Prosecutor's Office." Unlike my fellow arbitrators, I do not believe the Respondent had the burden to examine these provisions. I therefore dissent from the majority decision that the Respondent had the burden to show "[...] whether and to what extent these provisions authorize the Prosecutor's Office to supervise a contractor's performance under a given contract and to instruct the Competent Authority, i.e. the MEMR, to terminate the contract in case of non-compliance with contractual terms."[69]

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[64] Award, para. 925.

[65] C-129: Prescriptive Order based on the results of the scheduled verification of the integrated and rational use of the subsurface resources and of the fulfillment of licensing and contractual terms by TOO Karatube International Oil Company LLP dated 30 September 2007, issued by TU Zapkaznedra to CIOC.

[66] Award para. 934.

[67] Counter Memorial, para. 1232.

[68] Award, para. 926.

[69] Award, para. 926. I therefore similarly dissent from the majority decision, in paragraph 926 of the Award, that the Respondent had the burden to show "[...] whether and to what extent Article 83 of the Kazakh Constitution and Article 25 of the Kazakh Law 'On the Prosecutor's Office' authorize the Prosecutor's Office to ensure the

34. I also dissent from the majority decision rejecting the Respondent's argument that the Prosecutor was acting within the express purview of the Contract.[70] In my opinion, the legal authority cited by the Respondent supports the conclusion that where a deprivation at issue "[...] stems from a governmental directive, it would not necessarily follow that the contractual breach is the result of a sovereign act, as a directive of the State may be given in the framework of the contract."[71] The Respondent claimed that the Prosecutor issued its Recommendation in the framework of the Contract and I believe that the text of the Recommendation bears this out. The Recommendation is strictly limited to notably: (i) detailing CIOC's past non-performance under the 2004, 2005 and 2006 work programs and the rolling over of those non-performed obligations into the AWPs of the following years; (ii) observing CIOC's existing breaches under the 2007 Revised Work Program based on the LKU reports submitted by CIOC; (iii) reminding the MEMR of the Contractor's duties under Clause 7.2.4 of the Contract and of the Competent Authority's rights and duties under Clauses 1 and 2 of Article 45-2 of the Subsoil Law; (iv) pointing out to the MEMR that it is lacking in its monitoring of the subsoil user (i.e. CIOC) because, despite CIOC's continued nonperformance, "TUZ annually approves work programs and, moreover, carries over part of the unfulfilled obligations of the current year to the following year." In my opinion, those reasons related to the Contract underlie the Prosecutor's invitation to the MEMR to (i) take measures to notify CIOC of the necessity to perform and (ii) "[s]ettle an issue of unilateral termination of the Contract in connection with the existing breaches of obligations provided in the work programs." Furthermore, based on the above, I do not agree with the majority's characterization of the Recommendation as an instruction by the Prosecutor's Office to the MEMR to terminate the Contract.[72]

35. For the above reasons, I conclude the Respondent acted as a private party to the Contract and not in a sovereign capacity. I therefore dissent from the majority decision that "[...] the Respondent terminated the Contract using its sovereign powers rather than acting in a private manner as a party to the Contract."[73]

D. <u>The motivation behind the termination of the Contract</u>

36. The Award states, "[...] the real motivation behind the termination of the Contract was not CIOC's allegedly deficient performance of the Contract, but rather lies in the family and political context underlying the case. While CIOC's deficient performance of its contractual obligations might not have been approved by the Respondent, it was tolerated without any material consequences attached thereto until the year 2007, thus coinciding with the Hourani family's falling out of favor with the Respondent."[74]

37. My fellow arbitrators do not cite any specific evidence of the Claimants in support of the above conclusion. The majority refers to "[...] troubling facts (in particular the chronology of the facts taken as a whole)"[75] and to "[...] conspicuous timing of the commencement of

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MEMR's compliance with the latter's duty under Article 8 of the Subsoil Law to monitor and control the contractors' compliance with the terms of the contract."

[70] Award, para. 927.

[71] Counter Memorial, para. 1232, footnote 1677, citing *Bayindir* Award, Ex. RL-122.

[72] Award, para. 926.

[73] Award, para. 935.

[74] Award, para. 936.

[75] Award, para. 936.

the termination process, coincidences with developments within the family and political context and, more generally, the chronology of the facts when viewed as a whole."[76]

38. In my opinion, the Tribunal should draw no conclusions from the coincidence of the timing of the termination of the Contract and the Hourani family's troubles because only speculation permits affirming a causal link between those events. In addition, the majority's finding of a causal link appears in contradiction to the fact, mentioned in paragraph 27 above, that the MEMR sent to CIOC a notice of Breach on 17 January 2005, at a time when Mr. Rakhat Aliyev remained in good graces with the President of the Republic of Kazakhstan, Nursultan Nazarbayev. While I sympathize with the Houranis for certain things they may have endured during the period in question, the evidence in this arbitration is not sufficient to support the allegations the Claimants advance to render Respondent responsible for the Hourani family's troubles. If they had produced support for those allegations, the Claimants would have prevailed on their claim of harassment.

39. By contrast, the Respondent furnished reasons and evidence to support its claim that the termination of the Contract in 2007 occurred at a time when a number of policy developments notably "[...] led to a tightening of control over all subsoil users through the increased monitoring of the performance of contracts by the MEMR [...]."[77] In my opinion, my fellow arbitrators do not give the Respondent's evidence the weight it deserves.

40. The Award further states that the real motivation behind the termination of the Contract "[...] is corroborated by [the majority's] prior conclusion that the Respondent has not sufficiently demonstrated that any of CIOC's breaches under the Contract were material so as to justify the termination of the Contract."[78]

41. Having concluded above that the Respondent acted as a private party to the Contract and not in a sovereign capacity, I believe that the majority decision that CIOC committed no material breach of the Contract does not enable the Claimants to establish an expropriation.[79] The case can only be one for breach of the Contract.

IV. CONCLUSION

42. CIOC's unusable 3D seismic study constituted a material breach of the Contract, which the STC did not excuse. The Respondent therefore had the right to terminate the Contract in accordance with Article 29 of the Contract. Even if the Respondent did not satisfy contractual or legal procedural requirements for terminating the Contract, thus characterizing the termination as unlawful, this does not mean the Respondent expropriated CIOC's existing rights under the Contract. In order to find an expropriation, the Tribunal must determine that a sovereign act of the host state caused the unreasonable substantial deprivation of existing rights in question. However, for the reasons set out below, there was no "sovereign act" in this case.

43. The evidence in this case enables the Tribunal to find that the Respondent sent the 25 March 2007 Notice, even if CIOC did not receive it until after TU Zapkaznedra resent it

[76] Award, para. 937.
[77] Respondent's First Post-Hearing Brief, para. 207.
[78] Award, para. 938.
[79] I also believe that CIOC committed a material breach of the Contract for the reasons set out in paragraphs 7-10 above.

by fax on 24 September 2007. Neither the Revised Work Program of 23 April 2007 nor Appendix No. 3 could have had any effect on the Respondent's allegations of breach in the 25 March 2007 Notice, which TU Zapkaznedra resent to CIOC on 24 September 2007. The Respondent first manifested its intent to terminate the Contract in the 25 March 2007 Notice and thus before the issuance of the 7 September 2007 Recommendation. The MEMR's action after the Recommendation was the continuation of its action prior to the Recommendation and manifested the same determination, in compliance with the Contract's provisions, to cease to tolerate CIOC's faulty performance of the Contract, which the MEMR first manifested in the 25 March 2007 Notice. The Prosecutor, who sent his Recommendation to the MEMR, acted in accordance with his duty to ensure the enforcement of the law and of the Contract terms with regard to subsoil users. Moreover, the Prosecutor issued his Recommendation in the framework of the Contract and the text of the Recommendation bears this out. Consequently, the Respondent acted as a private party to the Contract and not in a sovereign capacity. The Tribunal should draw no conclusions from the coincidence of the timing of the termination of the Contract and the Hourani family's troubles because only speculation permits affirming a causal link between those events. In addition, the majority's finding of a causal link appears in contradiction to the fact that the MEMR sent to CIOC a notice of Breach on 17 January 2005, at a time when Mr. Rakhat Aliyev remained in good graces with the President of the Republic of Kazakhstan, Nursultan Nazarbayev. Moreover, the Respondent furnished reasons and evidence to support its claim that the termination of the Contract in 2007 occurred at a time when a number of policy developments notably "[...] led to a tightening of control over all subsoil users through the increased monitoring of the performance of contracts by the MEMR [...]."

44. For all of the above reason, I dissent from the majority decision that "[...] with all three elements of an expropriation being present, CIOC has been expropriated of its existing rights under the Contract, which granted CIOC access to the Caratube field and its exploitation. Rather than being in the presence of a mere breach of Contract by the Respondent, in the majority view, an expropriation took place through the unlawful termination of the Contract by the Respondent acting in its sovereign capacity."[80]

[Signed]

Jacques Salès
Arbitrator
Date 15 September 2017

[80] Award, para. 939.