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.