SCC Arbitration V (116/2010)
1. Anatolie Stati
2. Gabriel Stati
3. Ascom Group S.A.
4. Terra Raf Trans Traiding Ltd.
versus
The Republic of Kazakhstan

AWARD

Date of Award: 19 December 2013

The Arbitral Tribunal:

David R. Haigh QC (Co-Arbitrator)
Prof. Sergei N. Lebedev (Co-Arbitrator)
Prof. Karl-Heinz Böckstiegel (Chairman)

Ms. Katherine Simpson (Secretary to the Tribunal)

Claimants:	Anatolie Stati Gabriel Stati Ascom Group S.A. Terra Raf Trans Traiding Ltd.
Claimants' counsel:	Reginald R. Smith Héloise Hervé Kenneth Fleuriet King & Spalding Bulboaca Asociatii
Respondent:	Republic of Kazakhstan
Respondent's counsel:	Dr. Patricia Nacimiento Matthew Buckle Norton Rose Fulbright LLP Joseph Tiredo Winston & Strawn London Professor I. Zenkin Moscow Regional Collegium of Advocates

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Abbreviations

¶ / ¶¶	Paragraph / Paragraphs
§ / §§	Section or Clause / Sections or Clauses
ARNM	Agency for Regulation of Natural Monopolies
Ascom	Ascom Group S.A.
Art.	Article / Articles
Bcm^3	Billion cubic meters
BIT	Bilateral Investment Treaty
BOE	Barrels of Oil Equivalent
C	Claimants' Exhibit
C-0	Claimants' Request for Arbitration
C-I	Claimants' Statement of Claim (18 May 2011)
C-II	Claimants' Reply Memorial on Jurisdiction and Liability (7 May 2012)
C-III	Claimants' Reply Memorial on Quantum (28 May 2012)
CAC Pipeline	Center Asia Center Pipeline
CAPEX	Capital Expenditure
CC RF	Criminal Code of the Russian Federation
CC RK	Civil Code of the Republic of Kazakhstan
CPC	Criminal Procedure Code of the Republic of Kazakhstan
CPHB 1	Claimants' First Post-Hearing Brief (8 April 2013)
CPHB 2	Claimants' Second Post-Hearing Brief (3 June 2013)
C Costs	Claimants' Request for Costs (1 July 2013)
C Costs Reply	Claimants' Reply on Costs (8 July 2013)
DCF	Discounted Cash Flow
ECOS	Economic Chance of Success
ECT	The Energy Charter Treaty
ECtHR	European Court of Human Rights
EPT	Excess Profits Tax
FDP	Field Development Plan
FET	Fair and Equitable Treatment
FMV	Fair Market Value
FTI	FTI Consulting
GCA	Gaffney, Cline, & Associates
GCOS	Geological Chance of Success
GPO	General Prosecutor's Office (Kazakhstan)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IPO	Initial Public Offering

JSC	Joint Stock Company
KMG	KazMunaiGas / KazMunaiGaz
KMG EP	KazMunaiGaz Exploration Production
KMG NC	KazMunaiGaz National Company
KMT	KazMunaiTeniz JSC
KNOC	Korea National Oil Company
KPM	Kazpolmunay LLP
Law on Oil	Law of the Republic of Kazakhstan of 28 June 1995, No. 2350 "*On Petroleum*" (as amended in 2003)
LLP	Limited Liability Partnership
LPG	Liquefied Petroleum Gas
ltr.	Letter
MBbls /MMBbl	Million barrels
MEMR	State of Kazakhstan Ministry of Energy and Mineral Resources
MES	Ministry of Emergency Situations
Mln	Million
MOG	Kazakh Ministry of Oil and Gas
NPV	Net Present Value
OJSC	Open Joint Stock Company
OTP	Oil Treatment Plant
p. / pp.	Page / Pages
PO	Procedural Order
R	Respondent's Exhibit
R-I	Respondent's Statement of Defence (21 November 2011)
R-II	Respondent's Rejoinder on Jurisdiction and Liability (13 August 2012)
R-III	Respondent's Rejoinder Memorial on Quantum (1 December 2012)
RPHB 1	Respondent's First Post-Hearing Brief (8 April 2013)
RPHB 2	Respondent's Second Post-Hearing Brief (3 June 2013)
R Costs	Respondent's Submission on Costs (1 July 2013)
R Costs Reply	Respondent's Comments on Claimants' Costs Submission (8 July 2013)
SCC	Stockholm Chamber of Commerce
SM Law	Law of the Republic of Kazakhstan of 5 March 1997 , No. 77-1 On the Securities Market
Subsoil Law	Law of the Republic of Kazakhstan "*On Subsoil and Subsurface Use*"
TNG	Tolkynneftegaz LLP
TOO	Limited Liability Partnership
USD	United States Dollar(s)
VCLT	1969 Vienna Convention on the Law of Treaties
WS	Witness Statement

A. The Parties and their Counsel

The Claimants	Anatolie Stati Gabriel Stati Ascom Group S.A. Terra Raf Trans Traiding Ltd.
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B. The Arbitral Tribunal

Appointed as Chairman by SCC Letter dated 28 September 2010:

Professor Dr. Karl-Heinz Böckstiegel, Chairman
Parkstrasse 38
D-51427 Bergisch-Gladbach
GERMANY

Nominated by Claimants in their Request for Arbitration filed on 26 July 2010:

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CANADA

Appointed by the SCC on behalf of Respondent by letter dated 23 September 2010 and confirmed on 15 December 2010:

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RUSSIA

C. Short Identification of the Case

1. The short identification below is without prejudice to the Parties' full presentation of the factual and legal details of this case, and the Tribunal's considerations and conclusions.

C.I. The Claimants' Perspective

2. Claimants summarize the main aspects of the dispute at C-I ¶¶ 2 – 24 and C-II ¶¶ 1 - 31, partially quoted and summarized below; CPHB 1 ¶¶ 2 – 42, CPHB 2 ¶¶ 1 – 8:

> *2. [...] In reliance on Kazakhstan's solemn commitments under international law, Claimants invested more than US$ 1 billion breathing new life into previously-neglected oil and gas fields, and constructing a state-of-the art LPG Plant that Kazakhstan itself described as having "great regional and industrial importance for development of the region." But just as those investments matured and began to generate returns, Kazakhstan launched a targeted campaign of intimidation and harassment designed to pressure Claimants into selling their investments to the state-owned oil company at a firesale price. Kazakhstan went so far as to imprison a senior KPM employee on patently bogus criminal charges, and to threaten other employees with the same fate, in furtherance of its strong arm tactics. When its plan failed — because Claimants defiantly refused to give in to Kazakhstan's pressure — the government simply seized the investments, deciding to take its chances in arbitration.*
>
> *3. Perhaps most shocking, this plan originated from the highest level of the Kazakhstan government, namely, President Nazarbayev himself. That fact would sound far-fetched if it were not admitted, but Kazakhstan concedes that President Nazarbayev personally issued the order that led to the expropriation of Claimants' investments.*
>
> *4. [...] Kazakhstan attempts to shroud its violations of international law in a cloak of legitimacy by focusing on each minute detail in isolation rather than the totality of its conduct as a whole. It argues that its extraordinary campaign of inspections was perfectly normal, and that its subsequent actions were appropriate responses to the information it discovered under arcane, Delphic, and often-misstated provisions of its own domestic law. These arguments, however, crumble under the weight of the evidence. Kazakhstan did not discover any wrongdoing by Claimants' companies, much less violations that would justify the extraordinary actions that followed. Viewing Kazakhstan's conduct in its entirety, it is evident that Kazakhstan's objective from the start was to devalue Claimants' investments by making it virtually impossible for Claimants to operate or sell the businesses, so that Claimants would sell to Kazakhstan at a firesale price. Moreover, Kazakhstan also anticipated this arbitration from the beginning, and cloaked its actions under mystifying interpretations of domestic laws and regulations in order to create an appearance of normalcy and legitimacy.*

5. Furthermore, Kazakhstan has continued its blatant disregard for its obligations under international law in its conduct of this arbitration. Kazakhstan consistently attempts to obstruct this Tribunal's consideration of Claimants' claims by raising utterly baseless arguments, flatly misstating facts and law, and engaging in procedural misconduct of the worst kind. [Kazakhstan hopes that through the sophistry of focusing on each small fact individually, the Tribunal will lose sight of the fact that Kazakhstan launched the investigations for the precise purpose of acquiring Claimants' investments for less than fair value.] (C-II ¶¶ 2 – 5, 7). [...]

15. Moreover, while Kazakhstan publicly maintained that it would honor its earlier contracts, its practice has been quite to the contrary. [...] Kazakhstan has become adept at pressuring foreign investors to sell equity stakes to KazMunaiGaz through a combination of Financial Police investigations, baseless criminal allegations, fines, and tax threats. Kazakhstan makes it essentially impossible to continue normal operations, and then makes it known that the sale of a substantial equity stake to KazMunaiGaz would resolve the company's various legal difficulties. Kazakhstan has run this "playbook" on foreign investors — and especially, investors in 100% foreign-owned projects — time and again. [That is precisely what happened here. And when Claimants' refused Kazakhstan's below-average bid for Claimants' investments, Kazakhstan turned up the pressure. After six months of government harassment, they offered USD 150 million less. This is the Kazakhstan playbook to the letter.] (C-II ¶¶ 15 - 16). [...]

17. Moreover, when Claimants rejected KazMunaiGaz's lowball offer in June 2009, Kazakhstan simply turned up the pressure. It interfered in the trial of Mr. Cornegruta to ensure a guilty verdict, then sentenced him to four years in Kazakhstan's notoriously dangerous prison system as punishment. It continued to threaten the same fate for KPM and TNG's other directors. It engineered a massive fine against KPM (which was not even a party to the criminal trial) that was large enough to bankrupt the company and provide a ground for seizing its assets. And it continued to interfere with the day-to-day operations of the businesses, including more inspections and audits, asset seizures, and apparent interference with TNG's access to gas markets that choked the company's cash flows. Then, in November 2009, KazMunaiGaz made another bid to buy the companies, this time attempting to circumvent the Claimants by negotiating with the companies' note-holders, and then offering even less to the Claimants than it had offered in June 2009.

18. Despite all this, Claimants continued to resist Kazakhstan's coercion, and ultimately found a Kazakhstan-based buyer for the companies. In February 2010, Claimants signed an agreement to sell their Kazakhstan investments to the Cliffson company for more than US$ 920 million — which was nearly 70% higher than KazMunaiGaz's lowball offer in June 2009. And that presented a dilemma for Kazakhstan. Cliffson was owned by the wealthy and politically connected Assaubayev family. In the course of those negotiations, it became clear to all involved (and no doubt to

Kazakhstan as well) that Claimants intended to bring arbitration claims against Kazakhstan once the sale closed for the diminution in the sale price caused by Kazakhstan's harassment campaign. Thus, Kazakhstan faced the prospect of either allowing the companies to slip out of its hands or exercising its pre-emptive rights (which would have required it to match Cliffson's offer), while still facing arbitration claims for the diminution in value. Kazakhstan delayed approval of the transaction for several months with requests for additional details and documentation, but Claimants submitted everything the Government requested in June 2010. Within a week, on June 29, 2010, Kazakhstan launched the final inspection blitz that led to the outright seizure of the companies on July 21, 2010. Kazakhstan apparently concluded that if it was going to face arbitration claims anyway, it might as well take the assets for free and posture a termination basis for the coming arbitration fight. (C-II ¶ 18).

19. This tale of conspiracy coordinated at the highest levels of government might seem contrived if it were not both a familiar pattern of behavior in Kazakhstan and admitted in this case that President Nazarbayev was personally involved. But viewed in the context of all the facts, this is a far more plausible explanation than Kazakhstan's suggestion that this was just the normal operation of law in Kazakhstan. Only Kazakhstan knows precisely why it chose this path: a favor to a regional ally, punishment for a 100% foreign-owned company that had refused purchase overtures in the past, an old-fashioned money grab, or some combination of all three. But it is beyond serious dispute that it occurred. [And, Kazakhstan's own documents and admissions in this proceeding confirm that it did. (C-II ¶¶ 19 – 20)]. [...]

30. [In these proceedings, Kazakhstan's] conduct goes beyond zealous advocacy in a contentious arbitration. [Kazakhstan has delayed proceedings, unfairly and obstructionistically submitted evidence, and has made meritless jurisdictional objections.] Kazakhstan seeks to obscure the truth from this Tribunal and make it as costly, time-consuming, and difficult as possible for Claimants to obtain justice, in furtherance of its strategy of harassment and intimidation. Indeed, if Kazakhstan can bully or mislead this Tribunal into an award favoring Kazakhstan — or even an award for Claimants that undervalues damages — then Kazakhstan will have accomplished its objective of seizing Claimants investments for less than fair value, and also can discourage other foreign investors from resisting its coercion in the future based on hope of obtaining redress in arbitration. (C-II ¶¶ 22 – 30).

3. Prior to the Hearing on Quantum, Claimants summarized the main aspects of the dispute at C-III ¶¶ 1-7, partially quoted and summarized below:

1. [...] Kazakhstan's harassment campaign had as its principal objective a devaluation of Claimants' investments in an effort to acquire them for far less than their fair market value. Kazakhstan saddled KPM and TNG with unfounded liabilities, interfered with the companies' cash flows, and obstructed the sale of the companies, all as part of its strategy to force Claimants to sell to KazMunaiGas at a firesale price. When that strategy

failed, Kazakhstan seized the investments, deciding to take its chances in arbitration.

2. Respondent has continued that strategy in this arbitration, making a series of disingenuous arguments about the value of Claimants' investments in an effort to enlist the Tribunal in accomplishing the objective Respondent could not accomplish in negotiations with Claimants — namely, acquiring Claimants' investments for far less than their actual worth. In summary, Kazakhstan argues that the value of Claimants' investments as of October 14, 2008 (the valuation date used by Claimants) was significantly less than Claimants calculate; that Claimants' investments were of de minimis value by the time of their final seizure in July 2010; and that, between October 2008 and July 2010, "there are other possible causes of a reduction in the value of the Claimants' investments that cannot possibly be attributable to the Republic and may even be attributable to the Claimants."

4. Respondent purportedly arrives at a range for the total market value of Claimants' investments, as of its chosen July 21, 2010 valuation date, of US $161 to US $237 million on an enterprise value basis (i.e., without considering debt). To arrive at this exceedingly low value, Respondent fabricates capital costs, overstates operating costs, ignores existing reserves, fabricates artificially low gas prices, attributes no value at all to five of the six resource areas at issue in the Contract 302 Properties, relegates the LPG Plant to scrap value, and ignores entirely any attributes of the investments that would be of uniquely enhanced value to the State itself.

C.II. The Respondent's Perspective

4. Respondent summarizes the main aspects of the dispute at R-I ¶¶ 2 *et seq.*, and R-II ¶¶ 1 – 9, RPHB 2 ¶¶ 1 – 3, 59 partially quoted and summarized below:

1. […] A claimant raising claims must state and prove his case. Stating one's case means that the claimant must present to a tribunal a complete, plausible and logical factual story without contradictions. Proving one's case means that the investor must prove that the tribunal has jurisdiction to hear the case and that the applicable treaty was breached by the state. The claiming investor must further prove causation, […][i.e.] that he incurred damages as a result of such breach. And finally the claiming investor must prove and specify the precise amount of the damages he requests the tribunal to award based on a certain valuation date which also needs to be correctly determined by the claiming investor. […]

3 […] [The]need for the claimant to fulfil its procedural duties cannot be replaced by mere reference to an alleged discretion of a tribunal. A claimant may not simply anchor the highest possible value and the earliest valuation date he could think of and leave it to the tribunal to award a portion of this maximum threshold established by a claimant. Rather, any claimant must submit a specified request for damages based on specific and proven facts. A claimant must further establish a causal link between the alleged breach by a respondent and the requested damages. And this

must be linked to a specific date for the valuation of the damages requested. Once the claimant has done so, he is bound by the choices he made as to facts, causation, amount requested and valuation date. Equally, the tribunal is bound by those choices and bound to verify whether the claimant has discharged its various procedural duties. Where this is not the case, the tribunal cannot put its own discretion to cover up for claimant's failure. Rather, if a claimant fails in any of the mandatory steps required of a claiming party, his claim must also fail. […]

59. Claimants have in many instances failed to coherently state their case. Where they did present a coherent set of factual allegations, they generally failed to provide proof of their contentions: Their witnesses are non-credible, many of their documents are tainted with procedural misconduct, and their experts lack independence as well as the competence necessary to provide useful opinions on valuation issues. The latter is evidenced not least by Claimants' ever changing prayers for relief. Ultimately, all of this does not matter, as Claimants have not presented a valuation corresponding to the facts of this case and the timing of the alleged breaches of the law. In summary, Claimants' claims must be dismissed (RPHB 2 ¶¶ 1 -3, 59).

1 Anatolie Stati is a Moldovan businessman [who] [...] claims to have acquired two relativley minor oil and gas companies in Kazakhstan, KPM and TNG. The mechanism of the supposed acquisition and holding of these companies is opaque, involving multiple intermediate entities outside Kazakhstan, some disclosed others not.

2 The rationale for this complex holding structure is unknown, but liabilities seemed to gravitate to KPM and TNG from their owners and their owner's afiliates, whilst cash flowed out to a number of afiliated companies outside Kazakhstan.

3 Tristan Oil, a BVI registered entity has no disclosed stake in KPM or TNG, but since the end of 2006, it has issued over half a billion dollars in debt, ostensibly for the purpose of funding KPM and TNG. Whilst KPM and TNG are apprently guarantors of this debt, it is by no means clear that they benefited from all of the funds this brought into Tristan Oil. As a BVI registered entity Tristan Oil does not benefit from the protection of the ECT.

4 In late 2008, when at a domestic level the Republic began to become aware of problems with KPM and TNG, it seems that KPM and TNG's precarious debt laden ownership structure was pushed to the brink by the financial crisis, resulting in yet more funds being stripped from the companies.

5 In late 2008 little of the above was known to the agencies of the Republic that regulated the performance of KPM and TNG. At that time their principal concern was a littany of breaches by KPM and TNG of their contractual and other legal obligations. There were also wider social consequences for the area in which the companies operated, caused by what, at the time, seemed an inexplicable decline in the companies' performance and indiference of their management.

6 *The Republic was ultimately driven to terminate KPM and TNG's contract contracts and place their subsoil use assets into trust management to preserve them from decay. That was not the outcome that anyone wanted, least of all the Republic, which generates much of its income from active subsoil users. However, KPM and TNG's apparent disinterest in remedying their desructive poor performance made it unavoidable.*

7 *Since this Arbitration was commenced, the Republic has learned rather more about KPM and TNG and Mr Stati, though perhaps not enough fully to explain the decline of KPM and TNG. However, what it has learned has re-inforced its view that fundamentally the Claimants are seeking to use international arbitration to shield them from the consequences of their wrongdoing in Kazakhstan and perhaps from matters outside Kazakhstan as well.*

8 *In the Republic's respectful submission, the Tribunal should not allow its power to be abused either to protect the Claimants from the Republic's legitimate reaction to KPM and TNG's illegal conduct or from the apparent wider troubles of Mr Stati's buiness empire in which the Republic plays no part.*

9 *In dealing with this case, the Tribunal should keep four basic points in mind:*

(a) *First, the Claimants' illegal and bad faith conduct already excludes any protection under the ECT and any jurisdiction of the Tribunal. A foreigner breaching the laws of a state cannot expect protection under international law. Conversely, a state making promises in the expectation of (i) lawful investor conduct, (ii) mutual cooperation and (iii) mutual profiting of both the state and the investor from the investment cannot be held to such promises when the investor acts illegally and contrary to the purposes of admission of foreign investment.*

(b) *Second, Claimants claims are in any event completely without merit. Claimants suggest that they fell victim to a "harassment campaign" initiated by the President of the Republic for the purpose of expropriating the Claimants' assets and that this "harassment campaign" was based on a "Kazakhstan playbook". These are mere pretty words with which Claimants try to turn the case on its head. Claimants, as foreign subsoil use contractors in Kazakhstan, were not respecting the laws that Kazakhstan had enacted in order to safeguard its interests and ensure its subsoil use policies. The Republic's audits, inspections and investigations were the lawful reaction to Claimants' illegal conduct. This is not harassment but the legitimate measures any state in the position of the Republic would have taken.*

(c) *Third, Claimants are trying to blame the Republic for the demise of their companies, when it was in fact the Claimants' own conduct,*

as well as external circumstances, which made the Claimants' project companies KPM and TNG fail in the end. Claimants overburdened KPM and TNG with debt. This approach backfired when the global financial crisis hit the markets in 2008, energy prices took a dive and important local customers of KPM and TNG could no longer fulfil their contracts with Claimants. Yet, in this severe situation, instead of supporting the companies, Claimants decided to strip them of cash even more. The ultimate failure of the companies can come as no surprise against this background.

(d) Fourth, Claimants also largely overstate the importance of their alleged investment within the Republic. Claimants' activities were of a rather minor scale compared to many other exploration and production projects in the Republic. This has two consequences: For one, this further undermines Claimants' spurious allegation of a "harassment campaign" initiated by the President of the Republic. Apart from all other reasons excluding this argument, Claimants' assets were simply not valuable enough to merit such action in the first place. Moreover, this also shows that Claimants' claim for compensation is artificially inflated. In fact, Claimants claim for compensation runs into billions, a sum which no interested third party ever offered to pay for KPM and TNG.

5. Prior to the Hearing on Quantum, Respondent summarized the main aspects of the dispute at R-III ¶¶ 1 – 12, partially quoted and summarized below (citations omitted):

3 [T]he billions of USD claimed by Claimants in this arbitration, are reached by a blatant breach of universally accepted valuation standards. Moreover, they are reached by simply disregarding a whole range of inconvenient facts and substituting reality by wishful thinking. [...]

5 The largest part of Claimants' damages claim is taken up by the claim relating to Contract No. 302. Claimants demand a whopping USD 1.58 billion in compensation for the "loss of opportunity" to develop the Contract 302 Properties. However, as even Claimants' expert confirms, the chances of success were minimal and this must be reflected in the valuation. [Claimants disregard risk in their valuation.] [...]

10 The central element of Claimants' wishful thinking approach is Claimants' improperly early valuation date. Claimants set their valuation date to 14 October 2008, a date on which no state action had any actual effect on KPM and TNG and, moreover, a date which is months or even more than a year prior to many of the state measures Claimants complain of. By choosing 14 October 2008 as their valuation date, Claimants find a way to disregard many developments after that date[,] which drive down the value of their assets. In particular, Claimants ignore the sharp drop in oil prices, the sharp drop in demand for TNG's gas[,] and the failure to conclude the so-called tri-partite agreement with KazAzot. Taking into account these developments, as international law requires, Claimants' claims shrink decisively.

11 *There are also other instances throughout Claimants' case on damages in which Claimants completely disregard the existing facts or the legal framework surrounding KPM and TNG. For example, Claimants ignore that KPM and TNG were never able to export gas because they could not secure a contract for export. Claimants simply apply export prices – even though their own reserves reports from 2008 and 2009 reveal that at the time of events, they did not actually expect that they would be able to achieve export prices.*

12 *In a final attempt at inflating their damage claims, Claimants demand the compensation of moral damages in the amount of "at least" 10% of compensatory damages awarded. Since Claimants inflated damage claim comprises approximately USD 2.7 billion, their moral damages claim thus amounts to at least USD 270 million. This further inflation of Claimants' claim borders on the ridiculous as is reflected by the fact that the highest amount of moral damages ever awarded by an investment tribunal was USD 1 million. (R-III ¶¶ 1 – 12, partially quoted).*

D. Procedural History

6. On **26 July 2010** Claimants filed of their **Request for Arbitration** (C-0) and appointed Mr. David R. Haigh, QC of Canada as arbitrator. (C-0 ¶ 112).

7. On **23 September 2010**, Arbitration Institute of the SCC appointed Prof. Sergei Lebedev as an arbitrator.

8. On **28 September 2010**, Prof. Karl-Heinz Böckstiegel accepted his appointment as Chairman of the Tribunal.

9. On **10 November 2010**, the Chairman, on behalf of the Tribunal, issued his first email to the Parties and the Tribunal members, inviting the Parties to prepare for an in-person procedural meeting and to inform the Tribunal as to when and where to hold that meeting.

10. Respondent's then-counsel, Curtis, Mallet-Prevost, Colt & Mosle LLP, advised that it had been retained on 8 November 2010 but had only received the file on 12 November.

11. On **22 November 2010**, the Chairman, on behalf of the Tribunal, sent the Parties an **Annotated Preliminary Agenda of Issues Regarding the Further Procedure** in preparation for the First Procedural Meeting with the Parties in Stockholm, scheduled for 15 December 2010.

12. On **2 December 2010**, Respondent challenged the 23 September 2010 appointment of Prof. Sergei Lebedev as arbitrator. Respondent argued that, especially in light of the necessary translation issues and the fact that the arbitration involves a State as Respondent, the 21 and even 35-day time limits within which Respondent was to have filed its Answer were exceptionally short – even shorter than would have been demanded in a commercial arbitration. Respondent also noted that a member of the SCC Board is a Consultant in the King & Spalding firm, which is representing Claimants in this case, and indicated that this fact raises concerns about the undue haste. Respondent indicated that it has been prejudiced and that procedural fairness has been impaired by the hasty appointment.

13. On **15 December 2010** and after considering comments from the Parties, the Arbitration Institute of the SCC dismissed Respondent's challenge of Prof. Lebedev, having found no ground for disqualification.

14. On **20 December 2010**, the Chairman circulated the draft Procedural Order 1 (PO-1), which resulted from the First Meeting in Stockholm, to the Parties for their comment by 3 January 2011.

15. On **27 December 2010**, Respondent wrote to the Secretary General of the Arbitration Institute of the SCC, expressing disappointment with the Decision of 15 December and noting that no explanation had been provided for the decision. Neither the SCC nor Claimants' comments addressed whether Ms. Margrete Stevens of King & Spalding participated in any way in the consultations regarding the selection or appointment of Prof. Lebedev. Respondent again protested Prof.

Lebedev's appointment and argued that "*the SCC's own rules do not prescribe a specific time period for filing an Answer and appointing an arbitrator, and the short time given by the SCC was unreasonable and constitutes clear procedural unfairness*." Respondent maintained that the necessities of governmental procedures required due consideration in the setting of time limits. Respondent maintained its objections and indicated that it participates in these proceedings in good faith and with full reservation of all of its rights, defenses, and objections.

16. The Arbitration Institute of the SCC responded by letter dated **29 December 2010** and stated that Ms. Margrete Stevens, a member of the SCC Board, did not take part in the decisions made by the SCC Board on this case.

17. On **3 January 2011**, Claimants wrote to the Tribunal, indicating that they had no comments to the draft procedural order. They made two comments related to potential jurisdictional objections by Respondent and requested that the Tribunal "*clarify that, in the event Kazakhstan elects to make a jurisdictional objection, 1) it must do so in its Counter-Memorial, and 2) if Kazakhstan submits a reply on its jurisdictional objection in its Rejoinder, Claimants will be entitled to submit a brief rejoinder, on jurisdictional issues only, on 10 May 2012 (i.e., 30 days after receipt of Kazakhstan's Rejoinder)*."

18. On **3 January 2011**, Respondent submitted comments to the draft procedural order, objecting to calling the second week of the hearing an "*extension*." In response to Claimants' email of 3 January 2011, Respondent objected to any limitations on its right to assert jurisdictional objections. Respondent also objected to Claimants' request for an additional round of briefing on jurisdictional issues, explaining that Claimants had "*opposed bifurcation and agreed to the briefing schedule discussed at the December 15 meeting, fully aware that Respondent contemplated asserting jurisdictional objections. There is no reason to alter that arrangement*."

19. In a second email on **3 January 2011**, Claimants stated that they are merely seeking to ensure that both Parties have an equal opportunity to address jurisdictional objections and indicated that the issue of bifurcation had not been entirely decided at the meeting. Claimants then stated that, since the Tribunal had indicated that there would be no bifurcation, it would be appropriate to address the schedule for jurisdictional submissions.

20. On **12 January 2011**, the Tribunal issued **Procedural Order No. 1** (PO-1) The operative text is provided below for convenience:

Procedural Order (PO) No.1
Regarding the further procedure

1. Procedural Meeting Stockholm 15 December 2010

The Procedural Meeting was attended by:

For Claimants: *Mr. Ken Fleuriet, Esq. (King & Spalding)*

For Respondent:	*Ms. Miriam K. Harwood, Esq. (Curtis, Mallet-Prevost, Colt & Mosle LLP)*
	Ms. Aizhan Galimovna Irgaliyeva (Deputy Director, Legal Service Department, Ministry of Oil and Gas, Republic of Kazakhstan)
The Tribunal:	*David R. Haigh QC* *Prof. Sergei Lebedev* *Prof. Karl-Heinz Böckstiegel (Chairman)*

2. Results of Meeting

2.1. This PO records the results of the discussion and agreements reached at the Meeting. A draft of this PO was sent to the Parties after the Meeting inviting comments by 3 January 2011, if a Party considered that a result was not correctly recorded. Taking into account comments received, the Tribunal examined whether any changes seemed appropriate and hereby issues the Order in its final version.

2.2. At the beginning of the Meeting Respondent declared that it maintained its objections raised in its letter of 2 December 2010 regarding the appointment of Prof. Lebedev.

3. Communications

3.1. The Tribunal shall address communications to by e-mail to all Counsel of the Parties. In so far as such communications are confirmed by courier, such courier mail will be addressed to the lead counsel indicated by each Party.

3.2. Counsel of the Parties shall address communications directly to each member of the Tribunal (with a copy to counsel for the other Party and to the SCC)

- *by e- mail, to allow direct access during travel,*
- *and in addition, longer letters and substantial submissions as well as memorials shall be confirmed either by courier or by fax (but fax communications shall not exceed 10 pages).*

3.3. Deadlines for submissions shall be considered as complied with if the submission is received by the Tribunal and the other Party in electronic form or by courier on the respective date.

3.4. Longer submissions and memorials shall be preceded by a Table of Contents.

3.5. To facilitate word-processing and citations in the deliberations and later decisions of the Tribunal, the e-mail transmission of

memorials and substantial or longer submissions shall be in Windows Word, or in a PDF document that can be word-searched and from which text can be copied and pasted into Windows Word.

3.6. To facilitate that parts can be taken out and copies can be made, submissions of all documents including statements of witnesses and experts shall be submitted separated from Memorials, ***unbound in A5 size binders*** *and preceded by a list of such documents, consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc. for Claimant; R-1, R-2 etc. for Respondents) and with dividers between the documents. In addition, documents shall also be submitted in electronic form on a CD or USB-device (preferably in Windows Word to facilitate word processing and citations).*

4. Particulars Regarding the Procedure

4.1. The Procedure shall be in accordance with the SCC Rules of Arbitration in force as from 2010.

4.2. As decided by the SCC Board according to SCC letter of 23 September 2010, the seat of arbitration for this case is Stockholm.

4.3. The language of the arbitral procedure shall be English.

4.4. In view of Art. 37 SCC Rules and in order to avoid the considerable delay caused by bifurcation, the procedure will not be bifurcated. It will deal with any jurisdictional objections, liability and quantum in one procedural phase.

5. Timetable

5.1. ***By 1 March 2011****, the Claimant shall submit its Statement of Claim according to Art. 24 SCC Rules together with all evidence (documents, witness statements, expert statements) it wishes to rely on in accordance with the sections below.*

5.2. ***By 1 September 2011****, the Respondent shall file its Statement of Defence according to Art. 24 SCC Rules, including objections to jurisdiction if any, together with all evidence (documents, witness statements, expert statements) it wishes to rely on in accordance with the sections below.*

5.3. ***By 9 September 2011****, the Parties may request disclosure of documents from the other Party (with a copy to Tribunal).*

5.4. ***By 23 September 2011****, the receiving Party either produces the requested documents or replies by a reasoned objection to the other Party (with a copy to Tribunal).*

5.5. ***By 30 September 2011****, the Parties try to agree regarding the documents to which objections have been made.*

5.6. ***By 10 October 2011****, insofar as they cannot agree, the Parties may submit reasoned applications in the form of Redfern Schedules to the Tribunal to order production of documents.*

5.7. ***By 21 October 2011****, the Tribunal decides on such applications.*

5.8. ***By 4 November 2011****, the Parties produce documents as ordered by the Tribunal.*

5.9. ***By 16 January 2012****, the Claimant files its Reply Memorial with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Respondent's Statement of Defence or regarding new evidence from the procedure for document production above.*

5.10. ***By 10 April 2012****, the Respondent files its Rejoinder Memorial with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Claimant's Reply memorial or regarding new evidence from the procedure for document production above.*

5.11. Should Respondent's submission according to section 5.10. contain further arguments regarding objections to jurisdiction, Claimant may submit a brief Rejoinder on Jurisdiction, but only in rebuttal to these further arguments by Respondent, ***by 23 April 2012****.*

5.12. Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.

5.13. ***By 30 April 2012****, the Parties submit*

**notifications of the witnesses and experts presented by themselves or by the other Party they wish to examine at the Hearing including any information which witness or expert cannot testify in English,*

** and an updated list of all exhibits with indications where the respective documents can be found in the file and an electronic version on a CD or USBB-device of that list hyperlinked to the exhibits.*

5.14. ***By 7 May 2012****, a Party may amend its notification of witnesses and experts, if it considers that necessary in view of the notification received from the other Party.*

5.15. Thereafter, the Tribunal will send the Parties a draft of a Procedural Order regarding further details of the Hearing inviting comments from the Parties.

*5.16. **Within 3 weeks later**, at a date set by the Tribunal after consultation of the Parties, a Pre-Hearing Conference by telephone between the Parties and the Tribunal may be held, if considered necessary by the Tribunal.*

5.17. As soon as possible thereafter, Tribunal will issue a Procedural Order regarding details of the Hearing.

*5.18. **Hearing from 23 (afternoon) to 27 July 2012**, and, if found necessary by the Tribunal after consultation with the Parties, extended to continue from **30 July to 3 August 2012.***

5.19. Towards the end of the Hearing, the Tribunal will consult with the Parties whether the Parties shall submit Post-Hearing Briefs and further details of such briefs.

6. Evidence

The Parties and the Tribunal may use, as an additional guideline, the 2010 version of the "IBA Rules on the Taking of Evidence in International Arbitration", always subject to the SCC Rules and changes considered appropriate in this case by the Tribunal.

7. Documentary Evidence

7.1. All documents (including texts and translations into English of all substantive law provisions, cases and authorities) considered relevant by the Parties shall be submitted with their Briefs, as established in the Timetable.

7.2. All documents shall be submitted in the form established above in the section on communications.

7.3. New factual allegations or evidence shall not be any more permitted after the respective dates for the Rebuttal Briefs indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.

7.4. Documents in a language other than English shall be accompanied by a translation into English.

8. Witness Evidence

8.1. Written Witness Statements of all witnesses shall be submitted together with the Briefs mentioned above by the time limits established in the Timetable.

8.2. In order to make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as such witnesses are invited by the presenting Party or asked to attend the hearing at the request of the other Party, the available hearing time should mostly be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.

9. Expert Evidence

Should the Parties wish to present expert testimony, the same procedure would apply as for witnesses.

10. Hearing

Subject to changes in view of the further procedure up to the Hearing:

10.1. The dates of the hearing shall be as given in the Timetable above.

10.2. The hearing shall be held in Paris. (See Art. 20(2) SCC Rules) The chairman of the Tribunal will proceed with making appropriate reservations and then inform the Parties regarding further details and steps to be taken.

10.3. The Parties may present short opening statements of not more than two hours, unless decided otherwise by the Tribunal after receiving an application in that respect from a Party.

10.4. No new documents may be presented at the Hearing unless authorized in advance by the Tribunal. This also applies to documents regarding the credibility of a witness or expert. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.

10.5. Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest ***by 25 April 2012****.*

10.6. A live ***transcript*** *shall be made of the Hearing. The Parties, who shall share the respective costs, shall try to agree on and make the necessary arrangements in this regard and shall inform the Tribunal accordingly two months before the time set for the Hearing, i.e.* ***23 May 2012.***

10.7. Should the Parties be presenting a witness or expert not testifying in English and thus requiring ***interpretation****, they are expected to provide the interpreter unless agreed otherwise. Should more than one witness or expert need interpretation, to avoid the need of*

double time for successive interpretation, simultaneous interpretation shall be provided. The Parties, who shall share the respective costs, shall try to agree on and make the necessary arrangements in this regard and shall inform the Tribunal accordingly two months before the time set for the Hearing, i.e. ***23 May 2012.***

11. Extensions of Deadlines and Other Procedural Decisions

11.1. Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.

11.2. Extensions of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after an event has occurred which prevents a Party from complying with the deadline.

11.3. The Tribunal indicated to the Parties, and the Parties took note thereof, that in view of travels and other commitments of the Arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.

11.4. Procedural decisions will be issued by the chairman of the Tribunal after consultation with his co-arbitrators or, in cases of urgency or if a co- arbitrator cannot be reached, by him alone.

11.5. In view of the expected volume and complexity of the file in this procedure, the Tribunal may appoint an Administrative Secretary. The Tribunal will inform the Parties of such an appointment and of the fees of the Secretary. The costs for the Secretary shall be treated as expenses of the arbitration.

12. Other Issues

At the Meeting, Claimants notified the Respondents and the Tribunal that they may in the future seek interim measures in the event that the Government of Kazakhstan seeks to dispose of some or all of the assets that it has seized and are subject to these proceedings.

21. On **18 January 2011**, Respondent requested that the Tribunal "*order Claimants to engage in amicable settlement discussions as required by Article 26 of the ECT, and that the proceedings be suspended during the three—month period in satisfaction of that jurisdictional requirement*." Respondent argued that the Art. 26 ECT requirement that parties refrain from submitting a dispute to international arbitration unless and until three months have elapsed from the date on which a party requested amicable settlement of the dispute had not been met. Claimants asserted that Respondent breached its obligations on 21 July 2010 – five days before Claimants filed their Request for Arbitration. In addition, Claimants never gave notice that they intended to assert treaty claims under the ECT and this is in

violation of the requirements of the ECT. Claimants' reliance on two letters from 2009 was misplaced and did not satisfy the ECT requirements.

22. On **24 January 2010**, Claimants replied that they have observed the three-month notice period set forth in Art. 26(2) ECT. Claimants reject Respondent's arguments that there was insufficient notice of the dispute, and offered instances where, between 2008 and mid-2010, the Parties attempted to resolve their dispute. Claimants rejected Respondent's reliance on a recent decision, *Murphy Exploration and Production Co. Int'l. v. Republic of Ecuador*, calling it an aberration in terms of the weight of investment treaty case law on this subject. Alternatively, Claimants indicated that, although they would be willing to suspend the arbitration in order to attempt to achieve settlement, they are not willing to delay the merits hearing. Claimants would allow for a sixty-day extension of the proceedings if Respondent were to (1) agree to waive its objections to the notice period and (2) apportion the suspension time equally between the parties, and (3) make a settlement proposal or propose a settlement meeting, in a neutral location, within one week of the letter.

23. On **28 January 2011**, Respondent answered Claimants' letter.

24. The Tribunal responded to the Parties on **1 February 2011**. The Tribunal encouraged the Parties to make a good faith effort to agree on a solution, hopefully maintaining the agreed hearing dates. The Tribunal also indicated its willingness to select a new, later hearing date in October 2012.

25. On **2 February 2011**, Claimants responded to the Tribunal's letter of 1 February, and to Respondent's letters of 18 and 28 January 2011. Maintaining its objections to Respondent's points, Claimants proposed a 90-day suspension of the arbitration and proposed some changes to the submissions schedule, while maintaining the hearing date. Claimants indicated their agreement to this would be subject to Respondent's agreement that it will not use the suspension period to aggravate the dispute and requested a response by 4 February 2011 at 17:00 CET.

26. Respondent replied to Claimants' letter on **6 February 2011**, rejecting Claimants' arguments that there had been notice and that such notice had been sufficient under the ECT. Respondent proposed an alternative time table that would allow for a suspension of the hearing.

27. On **8 February 2011**, Claimants requested that that Tribunal advise the Parties as to its availability for a 2-week hearing in October 2012.

28. On **14 February 2011**, the Arbitration Institute of the SCC wrote to the Tribunal, stating that "*the final award in the above arbitration shall be rendered on 26 April 2011*" and that the Tribunal must request an extension of time for rendering the final award.

29. On **22 February 2011**, the Tribunal, in consultation with the Parties, created a revised time table for the dates in Section 5 of PO-1.

Procedural Order	***Event***	***Current Schedule***	***Revised Schedule***

5.1	*Statement of Claim*	*March 1, 2011*	*May 16, 2011*
5.2	*Statement of Defense*	*September 1, 2011*	*November 16, 2011*
5.3	*Document Requests*	*September 9, 2011*	*November 28 , 2011*
5.4	*Responses/Objections to Document Requests*	*September 23, 2011*	*December 9, 2011*
5.5	*Agreement on Documents*	*September 30, 2011*	*December 20, 2011*
5.6	*Redfern Schedule on Document Objections*	*October 10, 2011*	*December 30, 2011*
5.7	*Decision on Document Objections*	*October 21, 2011*	*January 10, 2012*
5.8	*Produce Remaining Documents (if any)*	*November 4, 2011*	*January 23, 2012*
5.9	*Claimants' Reply*	*January 16, 2012*	*April 2, 2012*
5.10	*Respondent's Rejoinder*	*April 10, 2012*	*June 26, 2012*
5.11	*Rejoinder on Jurisdiction (if any)*	*April 23, 2012*	*July 9, 2012*
5.13	*Pre-Hearing Witness Notifications and Exhibit Lists*	*April 30, 2012*	*July 16, 2012*
5.14	*Amended Pre-Hearing Witness Notifications*	*May 7, 2012*	*July 23, 2012*
5.16	*Pre-Hearing Telephone Conference (if necessary)*	*By May 28, 2012*	*By August 13, 2012*
5.18	*Hearing*	*July 23-27, 2012* *July 30-August 3, 2012*	*October 1-5, 8-12, 2012*

30. In its **Statement of Defence** (R-I), Respondent characterized this as the Tribunal having awarded a stay of proceedings with the intention of providing a window for settlement on 22 February 2011. (R-I ¶ 7.2; C-II ¶ 72).

31. On **4 March 2011**, the Arbitration Institute of the SCC granted the Tribunal an extension until 31 July 2013 render an Award.

32. The Parties met on **10 March 2011** in London for a settlement negotiation. (C-I ¶ 40).

33. On **18 May 2011**, Claimants submitted their **Statement of Claim** (C-I) to the Tribunal.

34. On **16 June 2011**, Respondent retained the law firm Norton Rose to represent it in this dispute, in place of the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP. The SCC reacted on 20 June 2011, sending a "*Power of Attorney*" for Respondent's new counsel.

35. On **29 June 2011**, Respondent returned the completed Power of Attorney forms to the SCC and informed the Tribunal and Claimants that the interests of the Republic of Kazakhstan will be represented by the Norton Rose law firm and by Prof. I. Zenkin, Attorney of Moscow Regional Collegium of Attorneys.

36. On **21 November 2011**, Respondent submitted its **Statement of Defence** to the Tribunal.

37. In a separate writing on **21 November 2011**, Respondent proposed trifurcation of the proceedings. Respondent argued that the Tribunal's reasons for refusing bifurcation were not compelling and that trifurcation would be necessary to re-balance the time table, especially in light of the size and complexity of the case.

38. On **8 December 2011**, Respondent submitted its **Request for Disclosure of Documents and the Explanatory Note thereto** to the Tribunal.

39. On **8 December 2011**, Claimants submitted their **Request for Production of Documents**. Claimants also requested production of the documents referred to and relied upon in the expert reports, which were not submitted with those reports. Claimants indicated that they would seek an order striking the so-called "*sleeper exhibits*" (witness statements disguised as exhibits) from the record.

40. Claimants produced 30 documents on **15 December 2011** and 14 documents on **22 December 2011**.

41. On **5 January 2012**, Claimants submitted their **Request for Production of Documents** and a cover letter detailing the request and responses to Respondent's production objections to the Tribunal. Claimants objected to Respondent's provision of so-called "*sleeper*" witness statements.

42. On **5 January 2012**, Respondent submitted its **Redfern Schedule** to the Tribunal.

43. On **5 January 2012**, Claimants submitted their **Redfern Schedule** to the Tribunal, along with lengthy arguments refuting Respondent's position.

44. On **16 January 2012**, Respondent submitted its WORD version of the **Redfern Schedule** to the Tribunal.

45. On **26 January 2012**, the Tribunal proposed the appointment of Katherine Simpson as Administrative Secretary to the Parties and requested their comment by 2 February 2012.

46. On **2 February 2012**, the Tribunal, after consultation with the Parties, appointed Ms. Simpson as Administrative Secretary.

47. The Tribunal issued **Procedural Order No. 2 on Production of Documents** (PO-2) on **3 February 2012**. The operative parts of that PO, but not the attached completed **Redfern Schedules**, is provided below:

Procedural Order (PO) No. 2
On Production of Documents

1. Introduction

1.1. The Tribunal has taken note of the submissions of the Parties regarding document production.

1.2. The Tribunal recalls ***Art. 26 SCC Rules*** *regarding evidence.*

1.3. The Tribunal further recalls ***section 5.6. of PO-1 providing for the submission of Redfern Schedules,*** *and that, by the Chairman's mails of 5 and 12 January 2012, the Tribunal had asked Respondent to submit its Redfern schedule in WORD format so that the Tribunal can insert its decisions. The Tribunal notes that, only on 16 January 2012, Respondent provided such a submission. Due to this delay, the Tribunal could only issue the present decision today.*

1.4. According to section 6 of PO-1, the ***"IBA Rules on the Taking of Evidence in International Arbitration"*** *can be used as a guideline giving indications regarding the relevant criteria for what documents may be requested and ordered to be produced. The Tribunal will use the IBA Rules (as re-issued 29 May 2010), taking into account the relevant practice of their application in international arbitration. In this context, the Tribunal has taken note of the Parties' submissions regarding the applicable criteria and will take them into account insofar as they are not in conflict to the IBA Rules.*

1.5. The Tribunal recognizes that, on the one hand, ordering the production of documents can be helpful for a party to present its case and in the Tribunal's task of establishing the facts of the case relevant for the issues to be decided. On the other hand, the process of disclosure may be time-consuming, excessively burdensome, and even oppressive. Unless carefully limited, the burden may be disproportionate to the value of the result. Further, the Parties may have a legitimate interest in confidentiality.

1.6. Further, the Tribunal notes that, insofar as a Party has the ***burden of proof****, it is sufficient for the other Party to deny what the respective Party has alleged and then respond to and rebut the evidence provided by that respective Party to comply with its burden of proof.*

2. Documents to be produced

All documents identified in requests to be "admitted" ***in the Annexes I and II attached*** *to this Order shall be produced* ***by 17 February 2012*** *to the other Party in this procedure, but not yet to the Tribunal, subject to the further qualifications and limitations in this Order. The receiving Party may then decide the extent to which it wishes to rely on such documents in*

its further submissions to the Tribunal and may submit the respective documents with its next Memorial.

3. Qualifications and Limitations of Document Production

3.1. All documents produced under this Order may be utilized by the other Parties only in direct connection with the present arbitration procedure.

3.2. Of the documents ordered by the Tribunal, the following documents or categories of documents ***need not be produced, but the reason for the non-production must be identified.*** *If they:*

do not exist or do not yet exist,

or are not in the possession, custody or control of a Party,

or have already been sent or copied to the requesting Party,

or contain commercially sensitive information,

or include information regarding third parties for which the ordered Party has an obligation of confidentiality,

or are subject to attorney-client privilege under the legal or ethical rules by which Counsel of the Parties are bound in their respective jurisdictions,

or which reflect the seeking or rendering of a legal opinion by internal or external counsel.

3.3. If a document or category of documents ordered by the Tribunal only contains some information or sections which do not have to be produced according to Section 3.3 above, the respective document ***may be redacted*** *in such a way that those sections are excluded from the production.* ***But the reason*** *for non-production or redaction and the extent of such redaction* ***must be indicated*** *in a separate note or in the document.*

3.4. "Documents" should be understood to include permanent records in any form, including on paper and electronic.

4. Adverse Inference

Insofar as documents ordered are not produced or are not produced as ruled in this Order, the Tribunal may take this into account in its evaluation of the respective factual allegations and evidence and may draw an inference against the Party refusing production.

5. Tribunal's Decisions in attached Redfern Schedules

According to Section 2 above, as Annexes I and II, the following Redfern Schedules submitted by the Parties are attached in which the respective decisions of the Tribunal are added in the last column:

Claimants' Redfern Schedule dated 5 January 2012,

Respondent's Redfern Schedule dated 5 January 2012, but submitted in WORD format on 16 January 2012.

6. Claimants' application dated 5 January 2012 regarding "Sleeper Expert reports and Witness Statements"

6.1. The Tribunal has taken note of Claimants' earlier letter of 8 December 2011 and Claimant's applications in its letter of 5 January 2012, to which Respondent has not yet replied.

*6.2. The Tribunal invites both Claimants and Respondent, after having taken note of the Tribunal's decisions on their Redfern schedules, to submit any further comments in this regard **by 17 February 2012**.*

48. The Chairman's email of **3 February 2012** is also provided for convenience:

Dear colleagues,

1. Production of Documents

Attached please find Procedural Order No.2 (PO-2) together with its two Annexes containing the Tribunal's decisions on the Parties' Redfern Schedules.

*Since, due to the delayed submission of the WORD version of Respondent's Redfern schedule, PO-2 could not be issued in time, as you see, the production is now ordered to be **by 17 February** which is the period of two weeks after the Tribunal's decisions originally provided in the agreed revised timetable confirmed by my mail of 2 December 2011.*

2. New date for Claimant's Reply Memorial

*In view of the above mentioned delay, the date by which Claimant is to submit its Reply Memorial is now set two weeks later, i.e. **16 April 2012.***
As, thereafter, Respondent's Rejoinder is only due by 26 June 2012, the remainder of the agreed timetable up to the hearing is maintained without prejudice to the further exchange under section 3 hereafter.

3. Respondent's Procedural Applications dated 21 November 2011

*After the decisions on document disclosure have now been issued, **Claimants** are hereby invited to comment **by 17 February 2012** on Respondent's procedural applications submitted by letter of 21 November 2011.*

4. Communications to Tribunal's Administrative Secretary

In follow-up to my mail of 26 January 2012, the Parties are from now on invited to send copies of all electronic and hard copy communications, in

addition to each member of the Tribunal, also to the Administrative Secretary:

Katherine Simpson
Graeffstr. 1
Zi. 1908
50823 Köln
Germany
Ksimpson.llm@hotmail.com

5. Correct Address of Prof. Lebedev

As communications to Co-Arbitrator Prof. Lebedev have been sent to different addresses, the Parties are invited to submit further communications only to his following address:

Moscow 129626, Staroalexeevskaya 16/49.

49. On **7 February 2012**, the SCC confirmed the appointment of Ms. Simpson.

50. On **16 February 2012**, Claimants wrote to Respondent, requesting the production of the documents and data referred to and relied upon by its party-appointed experts, Deloitte and GCA.

51. On **17 February 2012**, Claimants wrote to Respondent in response to PO-2. Claimants would provide Respondent's counsel 285 documents, in addition to those produced on 15 and 22 December 2011. Claimants indicated reasons for non-production of some of the requested documents.

52. On **17 February 2012**, Claimants requested that the Tribunal:

- *Order Kazakhstan to produce immediately all materials upon which Deloitte and GCA relied when preparing their expert reports;*
- *Clarify its decision with respect to Kazakhstan's "sleeper" expert reports and witness statements to the extent necessary;*
- *Order Kazakhstan to identify immediately all of the individuals who authored the twenty "sleeper" expert reports and witness statements;*
- *Reject Kazakhstan's application to trifurcate this proceeding;*
- *Reject Kazakhstan's request to "rebalance" the procedural calendar; and*
- *Reject Kazakhstan's request to extend the currently-scheduled 10 day hearing to 22 days in length.*

53. On **21 February 2012**, Claimants requested that the Tribunal instruct Respondent to comply with its document production obligations, or suffer the consequences of its failure to comply with the Tribunal's document production decision.

54. On **22 February 2012**, the Tribunal invited the Parties to submit any comments to the other's submissions of 16 and 17 February by 12 March 2012.

55. On **12 March 2012**, Claimants wrote in response to the Tribunal's 22 February 2012 request for additional comments, reiterating its earlier arguments and urging the Tribunal not to allow Respondent to benefit from its obstructionism, while protecting Claimants' right to a fair hearing.

56. On **24 March 2012**, the Tribunal issued Procedural Order No. 3 (PO-3). The entire text of PO-3 is set out below:

Procedural Order (PO) No. 3

1. Introduction

1.1. The Tribunal has taken note of the recent submissions of the Parties regarding document production and regarding the further procedure. Since the Parties had the opportunity to file two rounds of submissions and since the arguments put forward in these submissions are well known to the Parties, the Tribunal sees no need to repeat the many arguments of the Parties.

1.2. Taking into account all the arguments presented by the Parties, the Tribunal comes to the following observations and conclusions.

2. Document Production

2.1. The earlier rulings of the Tribunal, particularly in PO-2, its Annexes, and the Chairman's letter of 3 February 2012, are maintained and are hereby confirmed.

2.2. Due to a clerical error, Claimant's Request no. 48 in Annex 1 of PO-2 was not decided. It is now decided as follows:

"Admitted in so far as documents are referenced or relied upon in Exhibit R-118."

2.3. Regarding supporting documents to the reports by Deloitte, GCA, and Neftegazconsult, as well as to other reports submitted by Claimants and Respondent, it is confirmed that these have to be produced now, in so far as they have not yet been produced. If a Party chooses not to produce them, this will have the consequences mentioned in Section 4 of PO-2 and in the last paragraph on the title page of Annex 1 to PO-2.

2.4. Regarding what the Claimants refer to as "Sleeper" reports and statements, the Tribunal has already admitted the respective requests by Claimants in Annex 1 to PO-2, as explained in the last paragraph on the title page of Annex 1 to PO-2. It is clarified that the required disclosure includes the identification of the authors of such documents. And, it is confirmed that, if Respondent chooses not to produce, this will have the consequences mentioned in Section 4 of PO-2 and in the last paragraph on the title page of Annex 1 to PO-2.

*2.5. Insofar as the Parties in view of PO-2, in view of their further submissions thereafter regarding their own or the othe rParty's production up to now, and in view of the above clarifications in this PO, choose to still produce documents, they shall do so by **2 April 2012** in order to provide for the next procedural step according to the agreed timetable, i.e. to enable Claimant to take such documents into account in its Reply Memorial now due by 16 April 2012 according to my letter of 3 February 2012. Otherwise it will be assumed that the Party has chosen not to produce with the consequences mentioned above.*

2.6. Finally, the Tribunal confirms that it is left to each Party whether or not it will produce documents. However the Tribunal stresses, that both the Parties and the Tribunal have an interest that all relevant evidence is available for an orderly discussion and for decisions by the Tribunal and also an interest that neither non-production leads to adverse inferences nor that submitted evidence may be considered of little or even no evidentiary value due to non-production of supporting documents or information.

3. Further Procedure

*3.1. Regarding the **further procedure**, the Tribunal recalls Section 2.1 of PO-1:*

> *2.1. This PO records the results of the discussion and agreements reached at the Meeting. A draft of this PO was sent to the Parties after the Meeting inviting comments by 3 January 2011, if a Party considered that a result was not correctly recorded. Taking into account comments received, the Tribunal examined whether any changes seemed appropriate and hereby issues the Order in its final version.*

3.2. The Tribunal notes that Respondent is well acquainted with international arbitration procedures from other earlier cases and was represented at the Stockholm meeting by counsel also regularly active in this field.

3.3. It is further recalled that, in February 2011, the Parties submitted a joint proposal for a new timetable, which the Tribunal accepted by the Chairman's letter of 22 February 2011.

3.4. The Tribunal considers that changing the agreed and so far implemented procedure at the present stage would considerably disrupt the procedure and would only be acceptable for mandatory and urgent reasons. The Tribunal does not see any such reasons in the present case.

3.5. Therefore, the procedure shall proceed as established in PO-1 and later rulings of the Tribunal slightly adapting the timetable.

*3.6. According to the agreement recorded in Sections 4.3 and 7.4 of PO-1, English will remain the **language of this procedure**. However, while accordingly, the hearing shall also be conducted in English, the Parties may make arrangements at the hearing for simultaneous interpretation to Russian. Anyhow, if witnesses or experts are examined at the hearing who do not testify in English, such arrangement will have to be made by the*

Parties in accordance with Section 10.7 of PO-1. Therefore, it is suggested that the Parties when they contact the ICC Hearing Centre in accordance with the Chairman's mail of 4 April 2011 regarding the logistics of the hearing (it is suggested that they do so soon), they also request to use the logistics for simultaneous interpretation which are available at the Centre.

*3.7. Regarding the **length of the hearing**, the Tribunal recalls the agreement recorded in section 6.18 o fPo-1 which, taking into account the dates of the jointly proposed and accepted new timetable provides for the Hearing to be held from 1 to 5 October 2012, and, if found necessary by the Tribunal after consultation with the Parties, extended to continue from 8 to 12 October 2012.*

3.8. Further, the Tribunal recalls the agreement recorded in Section 10.5 of PO-1:

Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest by 25 April 2012.

3.9. To clarify the intention of the Tribunal regarding the conduct of the hearing, though further details will have to be determined later according to Section 5.17 of PO-1 after consultation with the Parties, the Tribunal already now informs the Parties that it intends to include the following rulings, which have proved to be efficient and acceptable to the parties in similar cases:

A. In order to make most efficient use of time at the Hearing, written Witness Statements or Expert Reports shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses or experts are invited by the presenting Party or asked to attend at the request of the other Party, the presenting Party may introduce the witness or expert for up to 10 minutes and add direct examination on issues, if any, which have occurred after the last written statement or report of the witness or expert has been submitted. The remaining hearing time shall be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.

B. The following Agenda is intended to be established for the Hearing:

1. Introduction by the Chairman of the Tribunal.

2. Opening Statements of not more than total of two hours for each Party

First on jurisdiction

a) Respondent up to 30 minutes

b) Claimants up to 30 minutes

Second on all other issues including the Merits

a) Claimants up to 90 minutes

b) Respondent up to 30 minutes

3. Unless otherwise agreed by the Parties: Examination of Claimants' fact witnesses:

a) Affirmation of witness to tell the truth.

b) Short introduction by Claimants

c) Cross-examination by Respondent.

d) Re-direct examination by Claimants, but only on issues raised in cross-examination.

e) Re-cross examination by Respondent but only on issues raised in re-direct examination.

f) Remaining questions by members of the Tribunal, but they may raise questions at any time.

4. Examination of Respondent's fact witnesses. For each: vice versa as under 3.a) to f) above.

5. Examination of experts as under 3.a) to f) above.

6. Any witness or expert may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness and expert during the time of the Hearing.

7. Oral closing arguments of up to 2 hours (or longer if authorized by the Tribunal after consultation with the Parties during the hearing) each for the

a) Claimants,

b) Respondent.

8. Remaining questions by the members of the Tribunal, if any.

9. Discussion regarding the timing and details of post-hearing submissions and other procedural issues.

3.10. Taking into account the above rulings and intended conduct of the hearing, and also taking into account, from the submissions already received, the

volume and complexity of the issues to be dealt with at the hearing, the Tribunal concludes that the period blocked for the hearing in accordance with the agreed timetable is sufficient.

4. Beyond the above observations and rulings, the Tribunal does not consider any action necessary from its side.

57. On **2 April 2012**, Respondent confirmed that it had sent Claimants approximately 32,000 pages of requested documents. Respondent also contacted the ICC Hearing Center. Finally, Respondent stated that the time period for the oral hearing on jurisdictional matters is not sufficient and proposed devoting the period from 1 – 5 October to jurisdictional matters.

58. On **4 April 2012**, Claimants requested an extension of six weeks for the preparation of their Reply, since that amount of time would be necessary to translate and read the 32,000 pages of documents sent by Respondent – sent 14 days prior to Claimants' deadline to submit the Reply.

59. On **10 April 2012**, the Tribunal wrote to the Arbitration Institute of the SCC. In light of changes in the case, it became necessary for the Tribunal to ask that its fees and the Security for Expenses be doubled.

60. On **11 April 2012**, Respondent wrote to the Tribunal, objecting to Claimants' requests for extensions of time unless the same time period would be granted for Respondent's Rejoinder.

61. On **21 April 2012**, the Tribunal circulated a draft of Procedural Order No. 4 (PO-4) to the Parties for their review and comment by 30 April 2012.

62. On **23 April 2012**, the Arbitration Institute of the SCC forwarded the Parties the Tribunal's letter of 10 April 2012 and requested their response by 30 April 2012.

63. On **24 April 2012**, Claimants provided their comments to draft PO-4. Claimants objected to moving the hearing date and proposed alternatives.

64. On **4 May 2012**, the Tribunal issued **Procedural Order No. 4** to the Parties. The entire text is provided below, for ease of reference:

Procedural Order (PO) No.4

A draft of this PO was sent to the Parties for comments by 30 April 2012. Taking into account the comments received from the Parties, the Tribunal now issues the PO in its final form.

1. Introduction

1.1. The Tribunal has taken note of Claimants' Application of 4 April and letter of 24 April 2012 and of Respondent's comments of 11 April and letters of 30 April 2012, both with attachments and proposals for a new timetable. Since the arguments put forward in

these submissions are well-known to the Parties, the Tribunal sees no need to repeat them here.

1.2. Taking into account all the arguments presented by the Parties, the Tribunal comes to the following observations and conclusions.

2. Relevant aspects of the procedure up to now

*2.1. The Tribunal recalls **Procedural Order No.3 (PO-3)**, particularly its Section 3. The respective rulings are confirmed, subject to changes hereafter in this PO.*

2.2. The Tribunal notes that both Parties now agree that the timetable as confirmed by PO-3 should be changed. But they disagree in which way it should be changed.

2.3. The Tribunal recalls the second introductory paragraph of Annex I to PO-2 dated 3 February 2012:

> *Further, the Tribunal clarifies that, in so far as Respondent has submitted exhibits, in particular statements and reports (which Claimants refer to as "Sleeper" Reports and Statements), the Tribunal has admitted Claimants' requests that documents on which such exhibits rely, etc., shall be produced. However, if Respondent chooses not to produce such documents, this will be taken into account by the Tribunal regarding the evidentiary value of such exhibits. The same may apply, if persons who have produced such exhibits and who are called for cross-examination by Claimants, do not appear at the hearing for cross examination.*

2.4. In their submissions dated 17 and 21 February 2012, Claimants identified and listed a number of such documents alleging that they had not been produced by Respondent and requested (pages 11 and 12 of the letter of 17 February 2012) that the Tribunal order Respondent to produce them "immediately."

2.5. The Tribunal understands that, rather than relying on the Tribunal's reaction concerning ordered but not produced documents identified in the paragraph quoted above from Annex I, Claimants considered the disclosure of these documents so essential for their Reply Memorial that they insisted on their production.

2.6. Taking into account Claimants' submissions and Respondent's further submissions, in Section 2 of PO-3, the Tribunal provided further clarifications and a further opportunity to the Parties to produce further documents by the new deadline of 2 April 2012.

2.7. By that date of 2 April 2012, Respondent submitted its letter of that date announcing the disclosure of a great number of documents which seem to include all those requested by Claimants.

2.8. By letter of 4 April 2012, Claimants submitted that they could not address this volume of documents now disclosed by Respondent by the deadline of 16 April set for their Reply Memorial. Therefore, they proposed a new timetable.

2.9. By letter of 11 April 2012, Respondent submitted comments on Claimants' letter. Particularly, Respondent listed a number of documents which it alleged Claimants should have disclosed according to PO-3 and proposed a new timetable different from that proposed by Claimants.

2.10. By letter of 24 April 2012, Claimants submitted comments on the draft PO and, particularly, declared themselves ready to submit their Reply Memorial on Jurisdiction and Liability by 7 May and their Reply Memorial on Quantum by 28 May 2012. On that basis, Claimants suggested new alternative timetables.

2.11. By letters of 30 April 2012, Respondent submitted letters and appended comments on the draft PO-4 and on Claimants' letter of 24 April 2012.

3. The Tribunal's Conclusions

3.1. The Tribunal understands that the Parties prefer to have as many relevant documents as possible available for their final Memorials before the hearing on the merits.

3.2. The Tribunal also feels that every effort should be made to have all relevant documentation on file in order to fully evaluate the Parties' submissions and evidence.

3.3. The Tribunal agrees with the Parties that, therefore, the timetable should be changed. The Tribunal recalls that, in its draft PO-4, it already asked for the Parties' views regarding a bifurcation with an early hearing on jurisdiction. The Tribunal notes that both the Claimants (in their Alternative 2) and the Respondent now accept bifurcation, though they do not agree on its scope.

3.4. Since the great majority of the large volume of documents which Respondent should have produced by 17 February 2012 according to the second introductory paragraph of Annex I to PO-2, but were produced only by 2 April 2012, concerns the quantum of the claims, the Tribunal finds that bifurcating the procedure into a first phase on jurisdiction and liability and a second phase on quantum, is the relatively best solution in order to avoid undue delay for the entire procedure under the present circumstances.

3.5. In this context, the Tribunal finds it helpful that Claimants now accept 7 May 2012 as an earlier deadline for their Reply Memorial on jurisdiction and liability, and still the originally suggested

deadline of 28 May 2012 for their Reply Memorial on quantum, and also foregoes its Rejoinder on Jurisdiction. Insofar as, from the list of allegedly missing documents according to Respondent's letter of 11 April 2012, Claimants are ready to submit such documents, they should at the latest be submitted with these Memorials.

*3.6. While the Tribunal agreed with Respondent that the deadline originally suggested by Claimants for Respondent's Rejoinder Memorial, i.e. 6 August 2012, was not sufficient, bifurcation would allow different deadlines for Respondent's two Rejoinder Memorials in the two phases. Since Claimants' Reply Memorial on Jurisdiction and Liability can now be submitted **by 7 May 2012**, the Tribunal considers that Respondent can now be expected to submit its Rejoinder Memorial restricted to jurisdiction and liability **by 26 July 2012**.*

3.7. Thereafter, as Claimants have forgone their right to submit a Rejoinder on Jurisdiction, there will be sufficient time for the further procedural steps up to a hearing starting at the originally agreed date of 1 October 2012, but restricted to jurisdiction and liability.

3.8. Regarding the procedure on quantum, a separate timetable could, thus, be set up leading to a shorter hearing on quantum only at a later time.

4. New Timetable

*4.1. Taking into account its above conclusions, the Tribunal hereby sets the following new **Timetable** for the further procedure using and adapting the originally agreed procedural steps in Sections 5.9 to 5.19 of PO-1.*

*4.2. **By 7 May 2012**, the Claimants file their Reply Memorial on jurisdiction and liability with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Respondent's Statement of Defence or regarding new evidence from the procedure for document production.*

*4.3. **By 28 May 2012**, the Claimants file their Reply Memorial on quantum with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Respondent's Statement of Defence or regarding new evidence from the procedure for document production.*

*4.4. **By 26 July 2012**, the Respondent files its Rejoinder Memorial on jurisdiction and liability with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Claimants' Reply Memorial or regarding new evidence from the procedure for document production.*

4.5. Thereafter, no new evidence may be submitted regarding jurisdiction and liability, unless agreed between the Parties or expressly authorized by the Tribunal.

*4.6. **By 3 August 2012**, the Parties submit*

* *notifications of the witnesses and experts presented by themselves or by the other Party they wish to examine at the Hearing on jurisdiction and liability including any information which witness or expert cannot testify in English,*

* *and an updated list of all exhibits regarding jurisdiction and liability with indications where the respective documents can be found in the file and an electronic version on a CD or USBB-device of that list hyperlinked to the exhibits.*

*4.7. **By 10 August 2012**, a Party may amend its notification of witnesses and experts, if it considers that necessary in view of the notification received from the other Party.*

4.8. Thereafter, the Tribunal will send the Parties a draft of a Procedural Order regarding further details of the Hearing inviting comments from the Parties.

*4.9. **Within 3 weeks later**, at a date set by the Tribunal after consultation of the Parties, a Pre-Hearing Conference by telephone between the Parties and the Tribunal may be held, if considered necessary by the Tribunal.*

4.10. As soon as possible thereafter, Tribunal will issue a Procedural Order regarding details of the Hearing on jurisdiction and liability.

*4.11. **Hearing from 1 to 5 October 2012**, and, if found necessary by the Tribunal after consultation with the Parties, extended to continue from **8 to 9 October 2012**.*

4.12. Towards the end of the Hearing, the Tribunal will consult with the Parties regarding the further procedure up to the hearing on quantum.

*4.13. Subject to any changes resulting from the discussion at the above hearing in October, **by 21 November 2012**, Respondent's Rejoinder on quantum.*

*4.14. Dates for a period of up to 4 days for the **hearing on quantum** will be determined after further exchanges between the Tribunal and the Parties as soon as possible.*

5. Logistics at the Hearing

5.1. The Tribunal recalls regarding the logistics at the Hearing:

* *Section 10.6 of PO-1 (transcript)*
* *Section 10.7 of PO-1 (interpretation)*
* *the Chairman's mail of 4 April to the ICC Hearing Centre in Paris, which was copied to the Parties (arrangements and billing at the Centre).*

*5.2. The Parties are invited to jointly make the necessary arrangements and inform the Tribunal accordingly **by 26 July 2012**.*

65. On **7 May 2012**, Claimants notified the Tribunal that it required an extension until 14:00 CET on 8 May in order to make its submission, due to the size of the submission, as well as lingering issues of obtaining signatures and translations across various jurisdictions.

66. On **8 May 2012**, Claimants submitted **Claimants' Reply Memorial on Jurisdiction and Liability** (C-II), together with 7 witness statements and 5 expert reports, to the Tribunal.

67. On **9 May 2012**, the Arbitration Institute of the SCC decided that additional advances, in the amount of EUR 422 000 shall be paid by Respondent by 23 May 2013 and so notified the Parties.

68. On **24 May 2012**, the Arbitration Institute of the SCC wrote to the Parties, reminding Respondent to pay the outstanding advance of EUR 422 000 and extending the deadline to 1 June 2012.

69. On **28 May 2012**, Claimants submitted **Claimants' Reply Memorial on Quantum** (C-III) to the Tribunal.

70. On **30 May 2012**, Respondent advised the Tribunal that Respondent appointed Dr. Patricia Nacimiento of Norton Rose LLP as counsel.

71. On **30 May 2012**, Respondent applied for an extension of the deadline to submit **Respondent's Rejoinder on Jurisdiction and Liability** (R-II).

72. On **31 May 2012**, the Tribunal confirmed receipt of Respondent's two letters of 30 May 2012 and invited Claimants to submit any comments thereto by 4 June 2012.

73. On **4 June 2012**, Claimants responded that they do not object to Respondent being provided a brief extension of one week or less for its Rejoinder, and left the matter to the Tribunal's discretion.

74. On **5 June 2012**, Respondent urged the Tribunal to grant the requested extension and arguing that an extension was necessary in order that Respondent adequately reply to Claimants' new evidence.

75. On **5 June 2012**, Claimants urged the Tribunal to grant a shorter extension that would leave the bulk of August and September available to prepare for the October hearing.

76. On **6 June 2012**, the Tribunal sent the following email to the Parties.

> *[T]he Tribunal has taken note of the Parties' recent communications. Since they are well known to all concerned, there is no need to repeat or summarize them again.*
>
> ***1. Regarding Respondent's 1st letter of 30 May 2012.***
>
> *In this regard, I as Chairman disclose the following.*
>
> *Dr. Patricia Nacimiento, who is announced as a new additional counsel, is one of my two co-editors of the book "Arbitration in Germany" published some years ago and planned for a 2nd edition in the future. I have not ever had and still do not have any other professional contact with her. I do not consider that her appointment raises any professional conflict either for her or for my involvement in this arbitration. However, as a precaution, I inform the parties of the above (which anyhow can be seen from the book having been on the market for some years). I add that the other members of the Tribunal also do not see any conflict. Unless we receive an objection from one of the Parties within one week of this letter, we consider this matter as closed.*
>
> ***2. Regarding Respondent's 2nd letter of 30 May 2012.***
>
> *After an examination of the Respondent's extension application and the comments received from the Parties, mainly for the reasons mentioned in the Respondent's letter of 30 May, the Tribunal concludes that the requested extension shall be granted as follows:*
>
> *The dates in PO-4 are changed as hereafter:*
> - ***Section 4.4. to 13 August 2012***
> - ***Section 4.6. to 20 August 2012***
> - ***Section 4.7. to 27 August 2012***
> - ***with the later sections and, of course, the hearing dates remaining unchanged.***
>
> ***3. Hearing on Quantum.***
>
> *Pursuant to 4.14 of PO-4, the Tribunal has had an exchange on possible dates for the Hearing on Quantum. It has turned out that, after the Respondent's Rejoinder due by 21 November 2012, the only period prior to April 2012 at which all three members of the Tribunal are available for the 4 day hearing, is **28 to 31 January 2013.***
>
> *Therefore, the Tribunal sets the hearing for these dates and requests the Parties to block that period for a hearing in Paris. Further details will be determined later.*

77. On **12 June 2012**, the Arbitration Institute of the SCC advised that Respondent still has not made the required EUR 422 000 payment. Claimants were, therefore, invited to make the payment by 19 June 2012.

78. On **20 June 2012**, the Arbitration Institute of the SCC advised that Claimants provided the additional advance of EUR 422 000, as ordered.

79. On **24 June 2012**, the Tribunal provided the Parties the ICC Centre's revised reservation confirmation for the shortened hearing in October 2012 and the ICC Centre's Quotation for the 2nd hearing to take place in January 2013. The Tribunal invited the Parties to confirm the reservation to the ICC Centre by 9 July 2012 and to inform the Tribunal by the same date.

80. On **4 July 2012**, Claimants announced the confirmation of the reservations with the ICC Centre for the October 2012 and the January 2013 hearings and also announced the relocation of its counsel's Paris office.

81. On **1 August 2012**, the Tribunal requested that the Parties submit Microsoft WORD versions of each of the Memorials to the Tribunal. The Parties complied on **3 August 2012**.

82. On **13 August 2012**, Respondent filed its **Rejoinder on Jurisdiction and Liability**, and the accompanying witness statements and export reports, with the Tribunal.

83. On **20 August 2012**, the Parties submitted their respective notifications of witnesses and experts for examination at the hearing, pursuant to PO-4 as amended on 6 June 2012, to the Tribunal.

84. On **23 August 2012**, the Chairman distributed the **Tribunal's draft for a Procedural Order No. 5 regarding the details of the hearing in October** to the Parties. The Tribunal requested responses by 7 September.

85. On **27 August 2012**, Respondent emailed the Tribunal. Respondent confirmed receipt of draft PO-5 and requested that the Tribunal confirm that, by the attached draft, the deadline initially established for 27 August 2012 for the Parties' comments to the respective letters of 20 August 2012 is superseded and that the next relevant deadline is 7 September 2012.

86. On **27 August 2012**, the Tribunal confirmed the 27 August deadline.

87. On **27 August 2012**, the Parties, in separate emails, confirmed their 20 August 2012 notifications of witnesses and experts for examination at the hearing and indicated that neither wished to make any changes to those lists.

88. On **7 September 2012**, Claimants and Respondent, in separate letters, submitted their comments to draft PO-5 to the Tribunal.

89. On **8 September 2012**, Respondent wrote in response to Claimants' letter of 7 September 2012, indicating that the contents of Claimants' letter deviated in part from the Parties' discussions. In particular, Respondent strongly objected to using the January hearing for any purpose other than quantum.

90. On **11 September 2012**, the Tribunal thanked the Parties for their cooperation on logistics and arrangements with the ICC Hearing Centre and invited them to a telephone conference at 15:00 Paris time on 15 September.

91. On **13 September 2012**, Claimants confirmed their attendance for the October hearing. While Claimants would prefer to hear expert testimony at the hearing, they are mindful that the Tribunal considers that oral testimony from the experts may be unnecessary. Instead, Claimants stated that they will not insist on presenting experts or on cross-examining Respondent's experts at the October hearing unless Respondent calls an expert. Finally, Claimants stated that they did not consider a pre-hearing telephone conference with the Tribunal to be necessary.

92. On **14 September 2012**, Respondent wrote to the Tribunal with comments on PO-5. Respondent suggested that the order of witnesses should be notified by 26 September, at the latest. Respondent also requested that witnesses Messrs. Smagulov, Aubakirov, and Aldashev be heard by video-conferencing. Respondent asked that the deadline for Post-Hearing Briefs be set after the January 2013 hearing.

93. On **14 September 2012** the Chairman replied, stating that Respondent would need to make witnesses Smagulov, Aubakirov, and Aldashev available for oral testimony at the hearing or, alternatively, could withdraw their witness statements, per section 3.6 of draft PO-5.

94. On **14 September 2012**, Claimants requested the Tribunal's permission to submit a limited number of documents into evidence in advance of the October hearing, pursuant to points 7.3 and 10.4 of PO-1.

95. On **16 September 2012**, Respondent urged dismissal of the request.

96. On **16 September 2012**, Claimants replied to Respondent's email, explaining that the evidence sought to be admitted is pertinent and responsive to new arguments made by Respondent.

97. On **18 September 2012**, the Tribunal issued **Procedural Order (PO) No. 5 Regarding further details of the Hearing on Jurisdiction and Liability** (PO-5). The entire text is provided below for ease of reference:

Procedural Order (PO) No.5
Regarding further details of the Hearing on Jurisdiction and Liability

A draft of this PO was sent to the Parties for comments by 7 September 2012.

Thereafter, taking into account:

- *the comments on the draft and further submissions received from the Parties,*
- *the Tribunal's letter to the Parties dated 11 September 2012*
- *and the submissions received from the Parties thereafter,*

the Tribunal now issues the PO in its final form.

1. Earlier Agreements and Rulings

*1.1. In order to have all rulings relevant for the hearing available in one document, this Order recalls the **earlier agreements and rulings** of the Tribunal and confirms them, to the extent that they are not amended in this PO, in bracketed text or elsewhere. The Tribunal particularly takes into account the recent submissions and letters of the Parties.*

*1.2. In particular, with reference to section 2.1 of PO-4, the **following sections of PO-3** are recalled and again confirmed:*

*3.7. Regarding the **length of the hearing**, the Tribunal recalls the agreement recorded in Section 6.18 of PO-1 which, taking into account the dates of the jointly proposed and accepted new timetable, provides for the Hearing to be held from 1 to 5 October 2012, and, if found necessary by the Tribunal after consultation with the Parties, extended to continue from 8 to 9 October 2012. [In this regard, section 4.11 of PO-4 decided on the bifurcation of the proceedings and ruled that extension days would include only 8 to 9 October.].*

3.8. Further, the Tribunal recalls the agreement recorded in Section 10.5 of PO-1:

*Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish **equal maximum time periods** both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest by 25 April 2012.*

*3.9. To clarify the **intention of the Tribunal regarding the conduct of the hearing**, though further details will have to be determined later according to Section 5.17 of PO-1 after consultation with the Parties, the Tribunal already now informs the Parties that it intends to include the following rulings which have proved to be efficient and acceptable to the parties in similar cases:*

[The later provisions of § 3.9 of PO-3 are not recalled, but are later included in this PO-5 in their amended form as now valid for the hearing.]

*3.10. Taking into account the above rulings and intended conduct of the hearing and also taking into account, from the submissions already received, the volume and complexity of the issues to be dealt with at the hearing, the Tribunal concludes that the **period blocked for the hearing in accordance with the agreed timetable is sufficient.***

*1.3 Further, the Tribunal recalls from **PO-1 the following sections:***

*10.4. **No new documents** may be presented at the Hearing unless authorized in advance by the Tribunal. This also applies to documents regarding the*

credibility of a witness or expert. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.

10.5. Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest by 25 April 2012.

*10.6. A live **transcript** shall be made of the Hearing. The Parties, who shall share the respective costs, shall try to agree on and make the necessary arrangements in this regard and shall inform the Tribunal accordingly two months before the time set for the Hearing, i.e. 23 May 2012.*

*10.7. Should the Parties be presenting a witness or expert not testifying in English and thus requiring **interpretation**, they are expected to provide the interpreter unless agreed otherwise. Should more than one witness or expert need interpretation, to avoid the need of double time for successive interpretation, simultaneous interpretation shall be provided. The Parties, who shall share the respective costs, shall try to agree on and make the necessary arrangements in this regard and shall inform the Tribunal accordingly two months before the time set for the Hearing, i.e. 23 May 2012.*

*1.4 Further, the Tribunal recalls from **the Tribunal's letter dated 11 September 2012** the following sections:*

1. Logistics of the Hearing

1.1. The Tribunal thanks the Parties for their arrangements with the ICC Hearing Centre.

*1.2. The Parties' selection of Mr. McGowan as **court reporter** is an excellent one. It should be pointed out to him that very few interruptions of the hearing will be possible so that he can bring a colleague in case he considers that necessary.*

*1.3. For the same reasons, the **interpreters** should be notified and it may be necessary for them to bring a second team to allow un-interrupted simultaneous interpretation.*

*1.4. In order to make sure that all the **logistics are ready before the beginning of the hearing Monday 1 October 2012 at 9:30,** it should be assured early enough (either on Sunday or very early Monday morning) that the hearing room is set up, including in particular that:*

* *All files of the Parties are set up,*
* *There is sufficient room for the members of the Tribunal to spread their files on their desks,*
* *The hearing binders for the Tribunal on separate carts behind every member of the Tribunal,*

* *Microphones for all speaking connected to loud speakers,*
* *All of the equipment of the court reporter is set up,*
* *All of the equipment for the simultaneous interpretation is set up, and*
* *There are sufficient plugs available for the individual laptops of the Parties, of the members of the Tribunal, and of the Tribunal Secretary, in addition to the live laptops of the court reporter.*

The Parties are invited to inform the Tribunal in advance at which time this preparation will be done so that the Tribunal Secretary can join them at an appropriate time.

1.6. Subject to the provisions below, for the case that Mr. Seong-Hoon Kim is to be examined orally, the Parties should make all arrangements for a ***video examination*** *from Korea for an appropriate time during the hearing agreed between the Parties and notified to the Tribunal.*

2. Fact Witnesses

2.1. The Tribunal thanks the Parties for reducing the number of fact witnesses to be heard at the hearing.

2.2. As agreed between the Parties, they are invited to notify the other Party and the Tribunal as early as possible and at the latest by the beginning of the hearing regarding the order in which the fact witnesses should be heard.

3. Experts

3.1 The Tribunal thanks the Parties for their efforts and suggestions regarding the examination of experts.

3.2. The Tribunal recalls from the chairman's letter of 23 August 2012 the indication that, in view of the extensive reports of most experts, the Tribunal considers that oral examination of most experts may not be necessary.

3.3. Having reviewed the various considerations and suggestions of the Parties in their recent communications in this regard, the Tribunal rules as follows:

3.3.1. With their 1st round of Post-Hearing Briefs after the October hearing, the Parties may submit comments of their experts, but only regarding any new developments or issues which they have not addressed in their earlier reports, if considered necessary.

3.3.2. With their 2nd round of Post-Hearing Briefs after the October hearing, the Parties may submit reply comments of their experts to the comments of the experts of the other Party submitted in the 1st round, if considered necessary.

3.3.2. [sic] If, in spite of the above opportunity for written additional comments by the experts, a Party insists that oral examination should take place at the hearing, the examination of experts will be conducted by expert conferencing of the experts from both sides on the respective issues as follows:

- *Short introduction up to 5 minutes of each expert by the Party which presented that expert,*
- *Questions by the Parties to the experts, but only regarding any new developments or issues which the experts have not yet addressed in their earlier reports,*
- *Additional questions by the Tribunal, if any, and*
- *Follow-up questions by the Parties on the questions raised by the Tribunal, if any.*

3.3.3. In so far as a Party insists on oral examination of an expert according to section 3.3.2. above, it shall notify the Tribunal ***by noon (Paris time) Friday 14 September 2012***

- *of the respective expert who should be examined,*
- *the respective expert from the other side who should join the conferencing, and*
- *the issues on which the conferencing examination should focus.*

3.3.4. In so far as a notification is made according to section 3.3.3. above, the Parties shall make the respective experts available at the hearing.

3.3.5. In preparation of the hearing, the notified experts regarding the same issues, in so far as they will attend the hearing, are invited to try to agree on a note, or otherwise send separate notes, listing major points of agreement and disagreement, and the ***Parties*** *shall submit such notes to the Tribunal* ***by 24 September 2012****.*

4. Further procedure

4.1. As the Parties must have sufficient time to prepare the hearing and assure attendance (including getting visas etc) of the witnesses and experts required at the hearing, the Tribunal intends to issue ***PO-5*** *as soon as possible after 14 September 2012 and any possible notifications received by that time. The Parties are invited to start their preparations for the hearing already now on the basis of the provisions in the draft PO-5 they received in so far as these are not affected by the rulings in this letter of the Tribunal.*

4.2. At the present time and in view of the above rulings, the Tribunal does not consider it necessary to, additionally, hold a telephone conference for which an option is provided in section 4.9 of PO-4," if considered necessary by the Tribunal".

4.3. In view of other commitments of the members of the Tribunal, the only possible date on which Mr. Haigh and the chairman would be available for a telephone conference on any further details would be Saturday 15 September. But Prof. Lebedev, who is travelling, is not sure he could join in.

*4.4. If the Parties agree that a telephone conference is still necessary and if they are available on that day, they are invited to arrange a telephone conference for that day which, in view of the time differences involved, should start at **15:00 hours Paris time on 15 September**.*

4.5. If it turns out that the Parties are not available on that date, the Tribunal will issue PO-5 taking into account any notifications and comments received from the Parties.

4.6. At the end of the January hearing, the Tribunal will consult with the Parties whether a one day hearing should be set for final pleadings in April 2013.

2. Procedural Steps before the Hearing

*2.1. Claimants are authorized to submit, **by 21 September 2012**, the new documents mentioned in its letter dated 14 September 2012. If Respondent wishes to submit any new documents in rebuttal to these documents, it may do so **by 27 September 2012**.*

*2.2. In view of the great number of exhibits submitted by the Parties and in order to facilitate references and using these exhibits at the Hearing and to avoid that each member of the Tribunal has to bring all of them to the Hearing, the **Parties** are invited to bring to the Hearing:*

- *for the other Party and for **each** member of the Tribunal **Hearing Binders** in **A5 format** of those exhibits or parts thereof on which they intend to rely in their oral presentations at the hearing, together with a separate consolidated Table of Contents of the Hearing Binders of each Party.*
- *a **USB-Device** with the contents of the Hearing Binders for the other Party, for each member of the Tribunal, and for the Tribunal Secretary.*
- *for the use of the Tribunal, in **A5 format one full set of all exhibits** the Parties have submitted in this procedure, together with a separate consolidated Table of Contents of these exhibits.*

3. Further Details regarding the Hearing

*3.1. As ruled in section 4.11 of PO-4, the Hearing shall be held at the **ICC Hearing Centre in Paris from 1 to 5 October 2012**, and, if found necessary by the Tribunal after consultation with the Parties, extended to continue from **8 to 9 October 2012.***

3.2. No extension of the hearing will be possible due to other commitments of members of the Tribunal.

3.3. To give sufficient time to the Parties and the Arbitrators to prepare for and evaluate each part of the Hearings, the daily sessions shall not go beyond the period between 9:30 a.m. and 5:30 p.m. However, the Tribunal, in consultation with the Parties, may change the timing during the course of the Hearings.

3.4. In accordance with section 10.5 of PO-1, the Tribunal establishes the following maximum time periods which the Parties shall have available for their presentations and examination and cross-examination of all witnesses and experts. Taking into account the Calculation of Hearing Time attached to this Order, the total maximum time available for the Parties (including their opening statements and closing arguments, if any) shall be as follows:

15.5 hours for Claimants
15.5 hours for Respondent

It is left to the Parties how much of their allotted total time they want to spend on their various Agenda items above, as long as the total time period allotted to them is maintained.

3.5. The Parties shall prepare their presentations and examinations at the Hearing on the basis of the time limits established.

3.6. If a witness whose statement has been submitted by a Party and whose examination at the Hearing has been requested by the other Party, does not appear at the Hearing, his or her statement will not be taken into account by the Tribunal. A Party may apply with reasons for an exception from that rule.

4. Conduct of the Hearing

4.1. In addition to the above cited provisions of PO-1, PO-3, and the Tribunal's letter dated 11 September 2012, the following shall apply:

*4.2. The following **Agenda** is established for the Hearing:*

1. Introduction by the Chairman of the Tribunal.

2. Opening Statements of not more than a total of two hours for each Party:

First on jurisdiction
a) Respondent up to 30 minutes
b) Claimants up to 30 minutes

Second on all other issues including the merits
a) Claimants up to 90 minutes,
b) Respondent up to 90 minutes.

3. Fact Witnesses:

3.1. In order to make most efficient use of time at the Hearing, written Witness Statements or Expert Reports shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar

as, at the Hearing, witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the presenting Party may introduce the witness for up to 5 minutes and add a short direct examination on issues, if any, which have occurred after the last written statement or report of the witness has been submitted. The remaining hearing time shall be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.

3.2. Unless otherwise agreed by the Parties: Examination of ***Claimant's fact witnesses*** *in the order set by Claimant:*

a) Affirmation of witness to tell the truth.
b) Short introduction by Claimants
c) Cross-examination by Respondent.
d) Re-direct examination by Claimants, but only on issues raised in cross-examination
e) Re-cross examination by Respondent but only on issues raised in re-direct examination
f) Remaining questions by members of the Tribunal, but they may raise questions at any time.

3.3. Examination of ***Respondent's fact witnesses*** *in the order set by Respondent:*

For each:
vice versa as under 3.a) to f) above.

4. Examination of experts*:*

No experts will be examined orally at the hearing. But attention is drawn to the respective rulings in the Tribunal's letter dated 11 September 2012, quoted above.

5. Any witness may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness during the time of the Hearing.

6. Remaining questions by the members of the Tribunal, if any.

7. Discussion regarding the timing and details of post-hearing submissions and other procedural issues, including the question whether Post-hearing Briefs shall be submitted soon after the October Hearing or only after the January Hearing.

4.3. Unless otherwise agreed between the Parties or ruled by the Tribunal, witnesses may be present in the Hearing room during the testimony of other witnesses.

5. Other Matters

5.1 The Tribunal may change any of the rulings in this Order, after consultation with the Parties, if considered appropriate under the circumstances.

*5.2. The Parties are invited to submit, **by 19 October 2012**, a short statement to the Tribunal regarding which Party made which payments up to the October Hearing for deposits on arbitration costs to the SCC, and for the expenses related to the reservation of the ICC Hearing Centre, the transcript, and the interpretation at the Hearing.*

Attachment to Procedural Order No. 5:

Calculation of Hearing Time

Time available	*Hours*
Hours	
	56
7 days of 8 hours	*56*
Time needed	
Lunch breaks: 7 x 1 hour	*7*
Various breaks (procedural and coffee)	*7*
Procedural discussions (estimated total)	*4*
Introduction by Chairman	*0.5*
Additional Questions by Members of Tribunal	*6.5*
Total time for other purposes	*25.0*
Total time available to Parties	*31*
Time available to each Party (including their opening statements and closing arguments, if any)	***15.5***

98. On **20 September 2012**, Claimants sent exhibits C-700 – C-717 to the Tribunal and to Respondent.

99. On **21 September 2012**, Respondent stated that it had not received any documents from Claimants prior to the deadline and requested that the Tribunal exclude the documents.

100. On **22 September 2012**, Claimants sent Respondent the allegedly outstanding exhibits, via email.

101. On **22 September 2012**, Respondent requested that the Tribunal exclude Claimants' new and allegedly late exhibits from the arbitration.

102. On **22 September 2012**, Claimants sent the Tribunal the FedEx tracking report, demonstrating that Claimants had met the Tribunal's deadline.

103. On **23 September 2012**, Claimants wrote in response to Respondent's request to exclude certain exhibits submitted on 21 September, explaining that Respondent's complaints are without merit and should be rejected.

104. On **24 September 2012**, Respondent again objected to Claimants' exhibits.

105. On **27 September 2012**, the Chairman invited the Parties to submit a final list of all persons attending the hearing, and their respective sides identifying their function, at the start of the hearing.

106. On **27 September 2012**, Respondent submitted new exhibits in reply to Claimants' new documents submitted on 21 September 2012. Respondent requested that the Tribunal order the Claimants to indicate specific parts of the documents they intend to rely upon.

107. On **28 September 2012**, the Tribunal wrote to the Parties in reference to Respondent's applications of 24 and 27 September. The Tribunal indicated that the application to exclude documents would be decided after the Tribunal has had an opportunity to discuss it at the beginning of the hearing. The Tribunal invited Claimants to indicate, at the beginning of the hearing, the specific parts of the exhibits submitted on 21 September 2012 upon which they intend to rely. The Tribunal also allowed Respondent to extend its direct examinations beyond 5 minutes, so far as the new exhibits would concern matters not previously addressed in the witness statements.

108. On **28 September 2012**, Claimants stated that they would not object to Respondent's new witness statements and agreed to withdraw the documents not accompanied by English translations. Claimants requested leave under PO-1 ¶ 5.12 to submit two additional documents.

109. On **1 October 2012**, Respondent had no objection to Claimants' withdrawal of its documents submitted on 21 September 2012. Respondent stated, however, that its preparation for the hearing would be prejudiced by the late submission of additional material. Respondent offered to allow the admission of new documents in exchange for Mr. Rakhimov being allowed to submit a third witness statement on the matter.

110. The **Hearing on Jurisdiction and Liability** was held at the ICC Hearing Centre in Paris from **1 – 8 October 2012**. A transcript was made. Reginald Smith, Kenneth Fleuriet, Kevin Mohr, Heloise Herve, Amy Roebuck Frey, Alexandra Kotlyachkova, and Valerya Subocheva of King & Spalding appeared on behalf of Claimants. Dr. Patricia Nacimiento, Joseph Tirado, Simon Ramsden, Zhanibek Saurbek, Max Stein, and Sven Lange of Norton Rose LLP and Prof. Igor V. Zenkin of the Moscow Regional Collegium of Advocates appeared on behalf of Respondent. Also appearing for Claimants were Zhennia Silverman and Vicki Mason of King & Spalding and Mihail Popovici of the Ascom Group SA. Also appearing for Respondent were Anastasia Maltseva and Natalia Nikiforova of Norton Rose, Marat Beketayev, Secretary of the Ministry of Justice and Deputy Minister of Justice, Yerlan Tuyakbayev, Director of the Department of Legal Support and International Cooperation of the Financial Police, Alan Tlenchiev, Head of the Division on the Supervision over Compliance with Environmental

Legislation of the Department of Supervision over Compliance with Legislation in the socio-economic sphere of the GPO Office, Aman Sagatov, Senior Prosecutor of the Division on the Supervision over Compliance with Environmental Legislation of the Department of Supervision over Compliance with Legislation in the socio-economic sphere of the GPO, Gani Bitenov, Chief Expert of the Department of Protection of State Property Rights of the Ministry of Justice, and Prof. Martha Brill Olcott, Carnegie Endowment for International Peace. Anatolie Stati, Artur Lungu, Grigore Pisica, and Alexandru Condorachi were also present.

111. On **1 October 2012**, the Tribunal heard the Parties' respective opening statements on jurisdiction / merits and heard testimony from Artur Lungu.

112. On **2 October 2012**, the Tribunal heard testimony from Mr. Anatolie Stati, Mr. Grigore Pisica, Mr. Victor Romanosov, and Mr. Alexandru Condorachi.

113. On **3 October 2012**, the Tribunal heard testimony from Alexandru Condorachi, Mr. Alexandru Cojin, Mr. Veaceslav Stejar, Mr. Eduard Calancea, and Minister Sauat Mukhametbayevich Mynbayev.

114. On **4 October 2012**, the Tribunal heard testimony from Mr. Herve Chagnoux, Mr. Andrey Kravchenko, and Mr. Medet Suleymenov.

115. On **5 October 2012**, the Tribunal heard testimony from Mr. Arman Testemirovich Rakhimov and Mr. Daniyar Mukanovich Turganbayev.

116. On **6 October 2012**, Respondent notified the Tribunal of its intention to call Mr. Akhmetov for direct examination.

117. On **8 October 2012**, the Tribunal heard testimony from Dr. Seong Hoon Kim, Mr. Serik Dosymovich Rakhimov, Mr. Rustam Nurlanovich Akhmetov, Mr. Mirbulat Zarifovich Ongarbaev, and Mr. Salamat Sartevich Baymaganbetov. At the close of the hearing, the Chairman asked the Parties if they had any objections to the procedure, as conducted to date. The Parties each answered that they had no objections.

118. On **15 October 2012**, the Tribunal issued **Procedural Order No. 6** (PO-6):

Procedural Order (PO) No. 6
Regarding the further procedure after
the Hearing on Jurisdiction and Liability

1. Timetable

Resulting from the discussion between the Parties and the Tribunal at the end of the Hearing on Jurisdiction and Liability in Paris, the following timetable is set for the further procedure:

1.1. ***By 19 October 2012****, as ruled in § 5.1 of PO-5, the Parties are invited to submit a short statement to the Tribunal regarding which Party made which payments up to the October Hearing for deposits on arbitration*

costs to the SCC and for the expenses related to the reservation of the ICC Hearing Centre, the transcript, and the interpretation at the Hearing.

1.2. *By **21 November 2012**, as ruled in § 4.13 of PO-4, Respondent is invited to submit Respondent's Rejoinder on Quantum.*

***No new evidence** on quantum may be submitted after this date unless the Tribunal has authorized such submission in reply to a reasoned request by a Party.*

1.3. ***By 3 December 2012**, the Parties are invited to notify which witnesses and experts on quantum presented by themselves or the other side they wish to examine at the January Hearing.*

1.4. ***By 10 December 2012**, the Parties are invited to notify whether they wish to change their notifications of 3 December in view of the notification received from the other side.*

1.5. *In preparation of a possible expert conferencing at the hearing, **experts** that have been notified for examination at the January hearing are invited to contact, either directly or with the help of the Parties, the expert from the other side addressing the same issues and try to agree on a short note identifying the major sub-issues on which they agree and disagree.*

1.6. ***By 11 January 2013**, the Parties are invited to submit*

- *either the notes agreed by the experts according to section 1.5 above or separate notes of each expert in so far as they cannot agree on a joint note,*
- *lists of the persons which intend to participate in the hearing from their respective sides.*

1.7. ***28 to 31 January 2013**, starting at 9:30, **Hearing on Quantum** at the ICC Hearing Centre, 112 Avenue Klebèr, Paris. The Parties are invited to make the necessary logistical arrangements as they did for the October hearing. The Tribunal intends to issue a Procedural Order closer to the time of the hearing regarding further details, in a similar fashion as it did for the October hearing.*

1.8. ***By 8 March 2013**, simultaneous submission of 1st Round Post Hearing Briefs by the Parties regarding all issues addressed in the October and January hearings. As provided in § 3.3.1 of the Chairman's letter of 11 September 2012, the submissions may include comments of their experts on issues of jurisdiction and liability, but only regarding any new developments or issues which these have not addressed in their earlier reports. Further details regarding the Post Hearing Briefs may be determined in a discussion with the Parties at the end of the January hearing.*

1.9. ***By 29 March 2013****, simultaneous submission of 2nd Round Post Hearing Briefs, but only addressing issues in rebuttal of the 1st Round Post Hearing Brief of the other side.*

1.10. ***By 19 April 2013****, simultaneous submission of Cost Statements will be made by the Parties.*

1.11. ***By 26 April 2013****, simultaneous submission of comments, if any, regarding the Cost Statement of the other side.*

2. Other rulings

The Tribunal may change or amend the above rulings if considered appropriate after consultation with the Parties.

119. On **17 October 2012**, Respondent requested a two-week extension on its deadline to make its submission on quantum, to 5 December 2012.

120. On **18 October 2012**, the Tribunal granted the extension until 1 December 2012, so long as both Parties could agree and confirm that they could maintain the procedural steps in the timetable in PO-6.

121. On **18 and 19 October 2012**, respectively, Claimants and Respondent confirmed that they could maintain the procedural timetable and consented to the extension.

122. On **19 October 2012**, Claimants submitted a costs summary to the Tribunal, detailing Claimants payment of the SCC costs to date, amounting to € 1,034,000.00.

123. On **19 October 2012**, Respondent stated that it will pay its share of the costs upon receipt of the invoices.

124. On **1 December 2012**, Respondent filed its **Rejoinder on Quantum,** together with supplementary evidence, to the Tribunal.

125. On **3 December 2012**, Respondent submitted the English version of Mr. Khalelov's witness statement to the Tribunal.

126. On **3 December 2012**, Claimants and Respondent each submitted their respective notifications of witnesses and experts to the Tribunal.

127. On **7 December 2012**, Claimants wrote to Respondent, renewing requests that Respondent produce the four referenced enclosures to R-41.1.

128. On **10 December 2012**, Claimants and Respondent each submitted their updated notifications of witnesses and experts to the Tribunal. Each commented on the other's notifications. Claimants moved to exclude newly submitted evidence and renewed arguments to exclude other evidence.

129. On **13 December 2012**, Respondent answered Claimants' arguments from their 10 December 2012 letter.

130. On **17 December 2012**, the Tribunal issued **Procedural Order No. 7** (PO-7):

Procedural Order (PO) No.7
Regarding the Preparation and Conduct of the Hearing on Quantum

1. Introduction

In view of the recent submissions of the Parties, the Tribunal considers that it should already now issue its Procedural Order provided for in section 1.7 of ***PO-6****.*

2. Preparation of the Hearing

2.1. The Tribunal also confirms its earlier rulings on the form and contents and on the timetable for the Parties' submissions including those on the still outstanding procedural steps according to PO-6.

2.2. The Tribunal considers that, at this stage, it should not exclude any evidence provided by the Parties. But this is without prejudice to later decisions during or after the hearing in view of the following.

2.3. As is clear from the earlier rulings of the Tribunal, the hearing in January is strictly limited to matters of QUANTUM.

2.4. The Parties are invited to prepare their presentations and examination of witnesses and experts at the hearing accordingly. Any parts of submissions or any evidence going beyond that limit will not be considered by the Tribunal. In so far as the Parties disagree in this regard, they may explain their positions at the hearing and the Tribunal will take that into account.

2.5. The Parties may, in direct contact, try to reach agreement on the final list of witnesses and experts to be examined at the hearing and on the order of examination, and inform the Tribunal in this regard ***by 11 January 2013****.*

3. Conduct of the Hearing

3.1. The hearing shall take place at the ICC Hearing Centre from 28 to 31 January 2013.

3.2. Subject to PO-6 and to the following provisions, the rulings on the conduct of the October Hearing in ***PO-5*** *apply, mutatis mutandis, also to the January Hearing.*

3.3. Particular attention is drawn to the following provisions of PO-5:

3.3.1. § 2.2. on ***Hearing Binders***

3.3.2. § 3.4. on ***time slots*** *attributed to the Parties.*

In this context, according to the adapted calculation of hearing time as annexed to this PO, the total maximum time available for the Parties (including their opening statements and closing arguments, if any) shall be as follows:

8 hours for Claimants
8 hours for Respondent

It is left to the Parties how much of their allotted total time they want to spend on their various Agenda items, as long as the total time period allotted to them is maintained.

At the beginning of the hearing, the Parties are invited to nominate one member of their teams who will coordinate the time keeping with the Tribunal Secretary.

*3.3.3. § 4.2. on the **Agenda of the Hearing***

*3.3.4. After the preparation according to sections 1.5 and 1.6 of PO 6, § 1.4.3. of PO-5 provided on **expert conferencing**:*

(T)he examination of experts will be conducted by expert conferencing of the experts from both sides on the respective issues as follows:

- *Short introduction up to 5 minutes of each expert by the Party which presented that expert,*
- *Questions by the Parties to the experts, but only regarding any new developments or issues which the experts have not yet addressed in their earlier reports,*
- *Additional questions by the Tribunal, if any, and*
- *Follow-up questions by the Parties on the questions raised by the Tribunal, if any.*

Attachment to Procedural Order No. 7:

<u>Calculation of Hearing Time</u>

Time available	*Hours*
4 days of 8 hours	*32*
Time needed	
Lunch breaks: 4 x 1 hour	*4*
Various breaks (procedural and coffee)	*4*
Procedural discussions (estimated total)	*4*
Introduction by Chairman	*0.5*
<u>Additional Questions by Members of Tribunal</u>	*3.5*

Total time for other purposes	*16.0*
Total time available to Parties	*16*
Time available to each Party (including their opening statements and closing arguments, if any)	***8***

131. On **18 December 2012**, Suvi Lappalainen of the SCC wrote to the Parties. In reference to the correspondence between the Tribunal and the Parties about appointing an Administrative Secretary, the SCC decided that additional advances in the amount of EUR 60 000 shall be paid in equal shares and will cover the fee of the secretary. The Parties were requested to make payment by 2 January 2013.

132. On **18 December 2012**, Claimants requested that Respondent provide the documentation or data relied upon in the expert reports submitted on 1 December 2012, pursuant to Art. 5(2)(e) IBA Rules. Claimants pointed out that Respondent had already failed to provide such information earlier in the procedure, requiring a procedural order to be issued. Claimants argued that they are highly prejudiced by Respondent's failure to provide this documentation, since it hinders their trial preparation.

133. On **31 December 2012**, Claimants informed Respondent and the Tribunal that, on 17 December 2012, Claimants entered into a Sharing Agreement with the holders of the majority of the notes issued by Tristan Oil Limited.

134. On **2 January 2013,** Claimants sought instruction from the Tribunal that Respondent is not excused from bringing Mr. Mynbayev and Mr. Suleymenov to the Quantum Hearing.

135. On **2 January 2013**, Claimants submitted **Claimants' Application to Compel Production** to the Tribunal. Therein, Claimants requested the production of four documents that the Tribunal ordered produced in PO-2. Claimants requested that the Tribunal draw specific adverse inferences against Respondent, should Respondent fail to produce these documents.

136. On **3 January 2013**, the Arbitration Institute of the SCC notified the Tribunal and the Parties that payment of 30 000 Euro had been made by Claimants, and that 30 000 from Respondent was still outstanding. Later that day, Respondent confirmed that payment had been made.

137. On **4 January 2013**, Respondent submitted **Respondent's Application for Postponement of the Hearing on Quantum**. Respondent also requested that the Tribunal grant it leave to reply to Claimants' "Application to Compel Production" and to submit a response to the Sharing Agreement and to dismiss Claimants' Application to Compel Production.

138. On **7 January 2013**, Claimants submitted their **Opposition to Respondent's Application for Postponement of Hearing on Quantum**.

139. On **9 January 2013**, Respondent argued that postponement of the Hearing and the dismissal of Claimants' "Application to Compel Production" is the only way to safeguard procedural justice and to restore procedural equality.

140. On **10 January 2013**, the Tribunal issued **Procedural Order (PO) No. 8 Regarding several Applications of the Parties**, provided below:

Procedural Order (PO) No.8
Regarding several Applications of the Parties

1. Introduction

The Parties have submitted several Applications before the Hearing scheduled from 28 to 31 January 2013. As they are well-known to all concerned, the Tribunal will not repeat or summarize these Applications or the arguments put forward by the Parties. And, as it is in the interest of the Parties to have these Applications decided without any delay, to avoid longer deliberation exchanges between members of the Tribunal, this PO will not go into any details of the Tribunal's reasoning in dealing with the arguments presented by the Parties. Rather, in this PO, the Tribunal will immediately turn to its conclusions and decisions on the Applications.

2. Claimants' Application dated 2 January 2013 for Document Production

The procedure to compel document production has been concluded at a much earlier stage of the proceedings in this case. Insofar as a Party has not produced as ordered by the Tribunal, the consequences of such have already been identified in section 4 of PO-2. Issuing a further order on document production is not provided in the timetables of POs 6 and 7 and would seriously disturb the preparation of the Hearing both for the Parties and the Tribunal.

Therefore, this Application is dismissed. However, the Parties are free to argue at the hearing and in their Post-Hearing Briefs in this regard.

3. Claimants' Application dated 2 January 2013 to instruct Respondent that it is not excused from bringing Mr. Mynbaev and Mr. Suleimenov to the Hearing on Quantum

The timetable of PO 6 provided that the last changes to the Parties' requests to have witnesses of the other side attending had to be submitted by 10 December 2012. On 20 December 2012, Claimants submitted a further change regarding the above mentioned witnesses. Claimants point out that Respondent has not articulated any prejudice by this late request. However, in view of the clear timetable set by PO 6, the Tribunal concludes that it is not appropriate to order the attendance of the two witnesses.

Therefore, this Application is dismissed. However, Respondent is free to bring these witnesses to the Hearing and Parties are free to submit any arguments in this regard at the Hearing or in their Post-Hearing Briefs.

4. Claimants' submission on 31 December 2012 of the Sharing Agreement with Tristan Noteholders, and Respondent's request for leave to submit a written statement thereto

The Sharing Agreement is a new development with relevance for the Hearing on Quantum and the submission could not be filed earlier in the procedure. Indeed, not filing it would have been inappropriate.

Therefore, the Tribunal accepts this submission. The Parties are free to argue in this regard at the Hearing and in their Post-Hearing Briefs.

5. Respondent's Application to Postpone the Hearing on Quantum

In view of the dismissal of Claimants' Applications in sections 2 and 3, above, the major reasons for this Application of Respondent are moot. The Tribunal is not persuaded by Respondent's arguments that, even in case of such dismissals, it would be prejudiced in its preparation of the Hearing. As provided above, the Parties are free to submit further arguments in this regard at the Hearing and in their Post-Hearing Briefs. For the same reason, the late submission of the Sharing Agreement does not justify a postponement of the Hearing. After the bifurcated and very long procedure in this case, a postponement of the hearing (which would probably delay the procedure for at least several months in order to find a new hearing period at which all concerned would be available) could only be justified for absolutely compelling reasons. In view of the above considerations and conclusions, such reasons do not exist.

Therefore, this Application is dismissed. However, again, the Parties may submit further arguments in this regard at the Hearing and in their Post-Hearing Briefs.

141. On **11 January 2013**, Respondent made a Procedural Objection regarding the Tribunal's decision to dismiss Respondent's Application for Postponement of the Hearing on Quantum.

142. On **11 January 2013**, Claimants and Respondent provided the Tribunal information regarding the Hearing on Quantum, pursuant to PO-6 and PO-7.

143. On **18 January 2013**, the SCC informed the Tribunal that the additional advance on costs has been paid as ordered.

144. On **18 January 2013**, Claimants requested authorization from the Tribunal to submit documents into evidence in advance of the Quantum Hearing.

145. On **19 January 2013**, the Tribunal invited Respondent to submit comments on Claimants' Applications of 18 January 2013 by 22 January 2013.

146. On **22 January 2013**, Respondent (1) requested that the Tribunal deny Claimants' request for leave to submit new documents, (2) proposed the order of witness and expert examination, (3) requested the Tribunal's guidance on whether the presence of Mr. Sachsalber would be necessary at the Hearing, (4) requested that Ms. Hardin appear at the Hearing, and (5) remarked on proposed corrections to the valuation experts' testimony.

147. On **23 January 2013**, the Tribunal issued **Procedural Order (PO) No. 9 Regarding further Applications of the Parties and further Details of the Hearing (PO-9)**, provided below:

Procedural Order (PO) No.9
Regarding further Applications of the Parties
and further Details of the Hearing

1. Introduction

By letters dated 11, 18, and 22 January 2013, the Parties have submitted several further Applications and some information and suggestions regarding the conduct of the Hearing scheduled from 28 to 31 January 2013. As they are well-known to all concerned, the Tribunal will not repeat or summarize these submissions or the arguments put forward by the Parties. And, as it is in the interest of the Parties to have these matters decided without any delay, to avoid the need of longer deliberation exchanges between members of the Tribunal, this PO will not go into any details of the Tribunal's reasoning in considering the arguments presented by the Parties. Rather, in this PO, the Tribunal will immediately turn to its conclusions and decisions.

2. Claimants' Application dated 18 January 2013 for leave to submit certain documents

The submission of a considerable number of further documents just a few days before the hearing would seriously disturb the preparation of the Hearing, both for the Parties and the Tribunal, and would not provide Respondent sufficient time to evaluate the documents, formulate replies, and try to find any rebuttal evidence. The Sharing Agreement has already been accepted by section 4 of PO-8 and, as mentioned in section 1 of Respondent's letter of 22 January 2013, has been available to Respondent since 31 December 2012.

Therefore, with the exception of the admission of the Sharing Agreement, this Application is dismissed. However, the Parties are free to argue at the hearing and in their Post-Hearing Briefs in this regard.

3. Respondent's Application to submit a two-page note correcting minor errors in Deloitte's valuation report of 30 November 2012.

Since such a note would be more convenient for all concerned than oral corrections at the beginning of the examination of the expert, the submission is admitted.

4. Agenda of the Hearing

Taking into account the submissions from the Parties, and subject to any final changes agreed at the beginning of the Hearing, the Tribunal intends to follow the following Agenda:

1. ***Introduction*** *by the Chairman of the Tribunal.*

2. ***Opening Statements*** *of a length determined by each Party*

3. ***Examination of Fact Witnesses***

   3.1. *In order to make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination, though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the* ***presenting Party may introduce the witness for up to 5 minutes, and add a short direct examination*** *on issues, if any, which have occurred after the last written statement of the witness has been submitted. The remaining hearing time shall be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.*

   3.2. *Unless otherwise agreed by the Parties: first, there will be the Examination of* ***Claimants' fact witnesses*** *in the order set by Claimants:*

   For each witness, the examination will be conducted as follows:

   a) *Affirmation of witness to tell the truth*
   b) *Short introduction by Claimants*
   c) *Cross-examination by Respondent.*
   d) *Re-direct examination by Claimants, but only on issues raised in cross-examination*
   e) *Re-cross examination by Respondent but only on issues raised in re-direct examination*
   f) *Remaining questions by members of the Tribunal, but they may raise questions at any time.*

   3.3. *Examination of* ***Respondent's fact witnesses*** *in the order set by Respondent:*

   For each: the examination will be conducted in the same pattern vice versa as mentioned for Claimants' witnesses.

4. ***Examination of Experts***

4.1 By letters of 11 January 2013, the Parties have communicated an agreement, and the Tribunal agrees, on the following order of examination:

a) Claimants' experts

* *Direct examination of Claimants' expert by Claimants*
* *Cross-examination by Respondent*
* *Re-direct examination by Claimants, but only on issues raised in cross- examination*
* *Re-cross examination by Respondent but only on issues raised in re-direct examination*

b) Respondent's experts

The same order vice versa as for Claimants' expert shall apply

c). Experts conferencing by the Tribunal
d) Follow-up questions by the Parties on the questions raised by the Tribunal, if any

*5. Any witness or expert may only be **recalled** for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness during the time allotted to the Parties at the Hearing.*

*6. Remaining **questions by the members of the Tribunal**, if any.*

*7. **Discussion of the further procedure**, taking into account the timetable already established by PO-6, and any new developments and submissions after that PO.*

5. Certain Further Details of the Conduct of the Hearing

5.1. The Tribunal has taken note of the Parties' communications regarding the attendance of witnesses and experts.

*5.2. Unless, in reply to Respondent's letter of 22 January 2013, Claimants notify Respondent no later than **12 noon Friday 25 January 2013 Paris time**, that they insist on orally examining **Mr. Sachsalber, Mr. Powell and Mr. Rhodes,** these persons do not have to attend the hearing.*

*5.3. In view of the explanation in Respondent's letter of 22 January 2013, the Tribunal accepts that **Mr. Seitinger**, who is situated in Pakistan, will be examined at the hearing in the morning of the last day of the hearing, i.e. 31 January 2013.*

5.4. If, as notified by Claimants' letter of 11 January 2013, ***Ms. Hardin*** *will not be available for examination at the hearing, the Parties are free to argue at the hearing and in their Post-Hearing Briefs in this regard.*

6. Respondent's Application to Extend the Time limits for Submission of the Post-Hearing Briefs and Cost Submissions

This matter will be discussed with the Parties at the end of the Hearing on Quantum in order to find an agreement between and with the Parties, and otherwise will be decided by the Tribunal.

148. On **23 January 2013**, Respondent submitted its "*Additional Note to the Expert Report dated 30 November 2012*" to the Tribunal.

149. On **24 January 2013**, Claimants requested leave to submit an explanatory note from FTI to correct errors that FTI discovered in reviewing the Deloitte GmbH expert report and preparing for the expert conferences.

150. On **25 January 2013** the Tribunal admitted FTI's 6 page correction note.

151. On **25 January 2013**, Respondent submitted the joint issue list of Claimants' expert Ryder Scott and Respondent's expert GCA.

152. On **25 January 2013**, Claimants submitted (1) the Sharing Agreement (C-721), (2) the Explanatory Note of FTI, and (3) a revised translation of Catalin Broscaru's witness statement, to the Tribunal. Claimants also gave notice that they intend to call Mr. Romanosov for direct examination.

153. On **26 January 2013**, Respondent wrote to the Tribunal with regard to Claimants' submission of the "*FTI Amendments to Expert Report*" and the Direct Examination of Mr. Romanosov and other witnesses.

154. On **27 January 2013**, Claimants submitted the revised schedules and supporting documents requested by Respondent on 26 January 2013.

155. The Hearing on Quantum was held at the ICC Hearing Centre in Paris from **28 – 31 January 2013**. A transcript was made. Reginald Smith, Kenneth Fleuriet, Kevin Mohr, James Toher, Heloise Herve, Amy Roebuck Frey, Alexandra Kotlyachkova, and Valerya Subocheva of King & Spalding appeared on behalf of Claimants. Dr. Patricia Nacimiento, Max Stein, and Sven Lange of Norton Rose, LLP and Joseph Tirado of Winston & Strawn appeared on behalf of Respondent. Also appearing for Claimants were Zhennia Silverman and Vicki Mason of King & Spalding, and Mihail Popovici of Ascom Group, SA. Also appearing for Respondent were Zhanibek Saurbek, Anastasia Maltseva, and Natalia Nikiforova of Norton Rose, Marat Beketayev, Secretary of the Ministry of Justice and Deputy Minister of Justice, Yerlan Tuyakbayev, Director of the Department of Legal Support and International Cooperation of the Financial Police, Aman Sagatove, Senior Prosecutor of the Division on the Supervision over Compliance with Environmental Legislation of the Department of Supervision over Compliance with Legislation in the socio-economic sphere of the GPO, Gani Bitenov, Director of the Department of Protection of the States Property Rights, Ministry of Justice, and

Done Tulegen, Deputy Director of the Legal Services Department, and the Ministry of Oil and Gas.

156. On **28 January 2013**, the Tribunal heard opening statements on Quantum from Claimants and from Respondent. The Tribunal also heard testimony from Mr. Artur Lungu. Counsel for Claimants and counsel for the Respondent also indicated that they had agreed to request "*an additional hour or two*" per side, to present their case. The Tribunal indicated that the hearing could not go beyond Thursday evening, but stated that it may be possible to add time at the end.

157. On **29 January 2013**, the Tribunal heard testimony from Mr. Victor Romanosov, Mr. Catalin Broscaru, Mr. Alexandru Cojin, Mr. Anatolie Stati, and Mr. Nurlan Rahimgaliev.

158. On **30 January 2013**, the Tribunal heard testimony from Prof. Martha Brill Olcott, Prof. Tomas Balco, Mr. Michael Nowicki, and James Latham of Ryder Scott, and Dr. Stephen Wright, Mr. Tony Goodearl, and Mr. Michael Wood of GCA. The Tribunal, after considering arguments from both Parties, decided to give each Party an additional hour to present its case, over Dr. Nacimiento's objection.

159. On **31 January 2013**, the Tribunal heard testimony from Mr. Michael Nowicki, Jr. James Latham, Dr. Stephan Wright, Mr. Michael Wood, and Mr. Tony Goodearl via witness conferencing. The Tribunal also heard testimony from Mr. Howard Rosen of FTI and Mr. Tomas Gruhn of Deloitte GmbH, separately, before taking testimony from both via witness conferencing. The Tribunal also heard testimony from Mr. Peter Seitinger. Finally, the Tribunal discussed the further procedure with the Parties. At the close of the hearing, the Chairman asked the Parties if they had any objections to the way the Tribunal has conducted the procedure up until that point. Dr. Nacimiento, on behalf of the Respondent, answered "*we have filed objections and, with all due respect, we uphold our objections*." Mr. Smith for Claimants answered that there were no objections on behalf of Claimants.

160. On **4 February 2013**, Claimants provided Respondent and the Tribunal access to the 3D seismic data, via a secured website and a CD/DVD.

161. On **6 February 2013**, the Tribunal sent its draft of PO-10 to the Parties and requested comments thereto by 13 February 2013.

162. On **13 February 2013**, Respondent submitted its response to draft PO-10, together with a reiteration of Respondent's objections and 5 Annexes.

163. On **13 February 2013**, Claimants stated that they have no comments to PO-10.

164. On **14 February 2013**, the Chairman, on behalf of the Tribunal, invited Claimants to submit any comments it may have to Respondent's submission, no later than Saturday, 16 February 2013.

165. On **16 February 2013**, Claimants responded to Respondent's submission of 13 February 2013 by letter supported by three annexes.

166. On **17 February 2013**, Respondent responded to Claimants' letter of 16 February 2013.

167. On **20 February 2013**, the Tribunal issued **Procedural Order (PO) No. 10 Regarding the Further Procedure**:

Procedural Order (PO) No. 10
Regarding the Further Procedure

1. Introduction

1.1 This PO contains rulings resulting from the discussion between the Parties and the Tribunal at the January Hearing. On 6 February 2013, a draft of this PO was circulated to the Parties for comments within one week. Taking into account the discussion at the hearing and the comments received from the Parties, this PO is now issued in its final form.

1.2 The Tribunal records that, at the end of the hearing, Claimants agreed to provide, by Monday 4 February 2013, the 3D Seismic data discussed at the hearing and the related documentation to Respondent.

2. Respondent's Applications dated 13 February 2013.

2.1. In reply to the Tribunal's invitation to comment on the Tribunal's draft of PO-10, on 13 February 2013, Respondent filed a submission which included the following Applications:

(a) Allow for an opportunity to submit an expert report on the new subject matter introduced by Claimants within a period of three months as of submission of the full data information and documents as specified below;

(b) Provide for a hearing with the opportunity to address the new subject matter introduced by Claimants, in particular through examination of the parties' experts and witnesses;

(c) Order Claimants to submit data, information and documents as specified below;

(d) Allow Respondent to submit further witness and/or expert testimony relating to the new subject matter introduced by Claimants as specified below;

(e) The proposed periods for the two rounds of post-hearing briefs and the oral closing submissions shall be maintained and shall commence after the hearing on the new subject matter introduced by Claimants

91 In addition, Respondent seeks clarification as to the scope of the first round of Post Hearing Briefs as specified in the second bullet point of section 2.1 and the admissibility of new documents as specified in the last bullet point of section 2.1.

2.2. On 14 February 2013, the Tribunal invited Claimants to submit any comments they may have. On 16 February 2013, Claimants filed a submission which included the following request:

Claimants firmly oppose the bulk of the relief requested in Respondent's Submission. Claimants do acknowledge that the Munaibay 3D information has only recently been analyzed by Ryder Scott and GCA, and Claimants do not object to cross-examination of the quantum experts regarding, and limited to, the Munaibay 3D information – if that examination is scheduled in a manner that does not delay the procedural calendar.

2.3. Thereafter, the Parties filed further submissions providing further arguments and maintaining their above requests.

2.4. As they are well-known to all concerned, the Tribunal will not repeat or summarize these submissions of the Parties or the arguments put forward by the Parties. Indeed, many of the arguments presented in the most recent submissions by Respondent and, in reply, by Claimants, were already presented during the January hearing and taken into account in the Tribunal's deliberations after that hearing and in the draft PO-10 resulting from these deliberations which was sent to the Parties for comments. While all arguments of the Parties have been considered by the Tribunal, in this PO the Tribunal will thus focus on the arguments it considers determinative for its conclusions and decisions.

*2.5. It is recalled that, according to Art. 19 SCC Rules, the Tribunal **may** conduct the arbitration in such a manner as it considers appropriate (19.1), but **shall** conduct the procedure in an expeditious manner (19.2). It is further recalled that, for the same purpose, Art. 37 SCC Rules provides a time limit of 6 months for the final award, and that this time limit has already been extended considerably in the present case.*

2.6. The Tribunal's duty to conduct the procedure in an impartial manner (Art. 19.2) includes an obligation to take into account the interests of both Claimants and Respondent. In that context, obviously, due process does not mean that every application of a party must be accepted. In particular, it is the Tribunal's authority and duty to decide on the most efficient consideration of evidence in a given phase of the procedure as long as both sides have an opportunity to present their case.

2.7. In the present case, there have been long and many opportunities for the Parties to submit evidence and two hearings to orally examine witnesses and experts presented by the Parties.

2.8. In the judgment of the Tribunal, any new information and evidence that became available to the Parties before and at the hearing on quantum, can be commented by the Parties in a following written procedure without the need for another evidentiary hearing. Therefore, the Tribunal had suggested, in its draft for this PO

* *a first round of Post-Hearing Briefs within a period of more than two months after the hearing,*

* *a hearing for oral closing arguments three weeks later,*

* *a final round of Post-Hearing Briefs within a period of one further month after that hearing.*

2.9. *Nevertheless, the Tribunal considers that the hearing scheduled for 2 May 2013 could also be used for an oral examination of the technical experts of both sides on the update of the Munaibay 3D information. The Tribunal considers that these further three rounds provide the Parties more than ample opportunities to evaluate, comment, and rebut whatever they consider new information and evidence that became available before, at, and immediately after the hearing on quantum.*

2.10. *Taking all these considerations into account, Respondent's Applications are therefore dismissed in so far as they are not covered by the timetable set hereafter.*

3. New Timetable

*The **timetable originally set in PO-6** is changed and amended as follows:*

3.1. ***By 8 April 2013,** the Parties shall simultaneously submit their respective **1st round Post Hearing Briefs** to the Tribunal:*

- *Regarding all issues addressed in the October 2012 and January 2013 hearings,*

- *Regarding any submissions and documents admitted by the Tribunal and filed by the other side after the October 2012 hearing.*

- *The Tribunal recalls that, according to section 4.5 of PO-4 and section 1.2 of PO-6, no new evidence may be submitted unless authorized by the Tribunal. However, the Parties may attach to the Post Hearing Briefs the following:*

  * *As provided in § 3.3.1 of the Chairman's letter of 11 September 2012, comments of their experts on issues of jurisdiction and liability, but only regarding any new developments or issues which these have not addressed in their earlier reports,*

  * *updates of the Reports of Claimants' and Respondent's technical experts and quantum experts heard at the hearing on quantum,*

* *new documents, but only in rebuttal to submissions and documents filed by the other side filed after the October hearing and admitted by the Tribunal.*

As a precaution, the Tribunal notifies the Parties that it does not intend to grant any extensions of the above deadline for submissions, since the following period until the Final Hearing on 2 May 2013 is required for the preparation of all concerned, and a postponement of that hearing would lead to unacceptable further delays in the procedure.

3.2. ***On 2 and 3 May 2013, a two day Final Hearing*** *will be held at the ICC Hearing Centre in Paris. The Tribunal has made a provisional reservation of rooms for this hearing at the Centre. The Parties are invited to confirm this reservation with the Centre in the same manner as they did for the two earlier hearings. Details of the conduct of this Hearing will be set by the Tribunal after consultation with the Parties closer to the time of the hearing.*

In the morning of 2 May, the Parties' technical experts, Ryder Scott *and GCA, will be examined, but exclusively limited to the update of the Munaibay 3D information. Unless the Parties agree otherwise, this examination will be conducted by conferencing similar to the manner used at the January hearing.*

Starting in the afternoon of 2 May, the Parties may present a first round of final oral arguments.

In the morning of 3 May 2013, the Parties may present a second round of final oral arguments.

Further details of the hearing will be set by the Tribunal after the Parties' submissions have been received by 8 April 2013.

3.3. ***By 3 June 2013****, the Parties shall simultaneously submit their respective* ***2nd Round Post Hearing Briefs****, but only addressing issues in rebuttal to the other side's 1st Round Post Hearing Brief and regarding issues addressed in the hearing of 2 and 3 May 2013.*

As earlier listings partly overlapped or were incomplete since focusing on one hearing only, with these 2nd round submissions, the Parties shall file:

- *Final complete lists of all witness statements and expert reports including their updates and attachments if any,*
- *Final complete lists of all documents submitted or handed out at the hearings with their exhibit numbers,*
- *Hyperlinked versions of the above lists on two new master USB devices, one from Claimants and one from Respondent, enabling easy access to all statements, reports, and documents listed.*

3.4. ***By 1 July 2013****, simultaneous submission of Cost Statements by the Parties.*

3.5. ***By 8 July 2013****, simultaneous submission of comments, if any, regarding the Cost Statement of the other side.*

4. Questions

At any time during or after the above timetable, the Tribunal may address the Parties inviting comments on specific questions on which the Tribunal feels further clarifications may be helpful.

168. On **21 February 2013**, the Parties attempted to resolve issues with the 2D data.

169. On **22 February 2013**, Respondent sent Respondent's opening Presentation for the Hearing on Quantum in PDF format, to the Tribunal.

170. On **6 March 2013**, Respondent filed a Procedural Objection with the Tribunal.

171. By email of **7 March 2013**, the Chairman, on behalf of the Tribunal, invited Claimants to respond to this objection, by 22 March 2013.

172. On **14 March 2013**, Respondent submitted the Squire Sanders Legal Due Diligence Report, the PwC Financial and Tax Due Diligence Report, the KMG EP Presentation on Asset Assessment as at September 2008, and the RBS Presentation on Asset Assessment as at 31 July 2009, as listed in Exhibit R 41.1 and as requested by Claimants, to Claimants and to the Tribunal.

173. Claimants submitted their response to Respondent's procedural objection on **22 March 2013**.

174. On **8 April 2013**, the Parties simultaneously submitted their respective first Post Hearing Briefs and related Expert Reports to the Tribunal.

175. On **12 April 2013**, the Tribunal issued PO-11, provided below:

Procedural Order (PO) No.11
Regarding Further Details of the Hearing

1. Earlier Rulings

The Tribunal recalls its earlier rulings in section 3.2 of PO-10:

On 2 and 3 May 2013, a two day Final Hearing *will be held at the ICC Hearing Centre in Paris. The Tribunal has made a provisional reservation of rooms for this hearing at the Centre. The Parties are invited to confirm this reservation with the Centre in the same manner as they did for the two earlier hearings. Details of the conduct of this Hearing will be set by the Tribunal after consultation with the Parties closer to the time of the hearing.*

In the morning of 2 May, the Parties' technical experts, Ryder Scott and GCA, *will be examined, but exclusively limited to the update of the Munaibay 3D information. Unless the Parties agree otherwise, this examination will be conducted by conferencing similar to the manner used at the January hearing.*

Starting in the afternoon of 2 May, the Parties may present a first round of final oral arguments.

In the morning of 3 May 2013, the Parties may present a second round of final oral arguments.

Further details of the hearing will be set by the Tribunal after the Parties' submissions have been received by 8 April 2013.

2. Procedural Steps before the Hearing

*2.1. A live **transcript** shall be made of the Hearing. The Parties, who shall share the respective costs, shall try to agree on and make the necessary arrangements in this regard and shall inform the Tribunal accordingly by **25 April 2013**.*

*2.2. By **25 April 2013**, the Parties shall inform the Tribunal which persons in which functions will attend the hearing from their respective sides.*

*2.3. In view of the great number of exhibits submitted by the Parties and in order to facilitate references and using these exhibits at the Hearing and to avoid that each member of the Tribunal has to bring all of them to the Hearing, the Parties are invited to **bring to the Hearing:***

- *for the other Party and for each member of the Tribunal **Hearing Binders** in A5 format of those exhibits or parts thereof on which they intend to rely **in their expert examination** at this hearing,*
- *together with a separate consolidated **Table of Contents** of the Hearing Binders of each Party,*
- *a **USB-Device** with the contents of the Hearing Binders for the other Party, for each member of the Tribunal, and for the Tribunal Secretary.*

3. Further Details Regarding the Hearing

*3.1. **No new documents** may be presented at the Hearing unless authorized in advance by the Tribunal. This also applies to documents regarding the credibility of an expert. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.*

*3.2. The Hearing shall be held at the **ICC Hearing Centre in Paris** on 2 May and in the morning of 3 May 2013. No extension of the hearing will be possible due to other commitments of members of the Tribunal.*

*3.3. The Tribunal sets the following **Agenda:***

1. *Short **Introduction** by the Chairman of the Tribunal.*

2. ***Opening Statements** of up to 10 minutes by each Party*

3. ***Examination of the Parties' technical experts**, Ryder Scott and GCA, **but exclusively limited to the update of the Munaibay 3D information.** In view of the limited time available, **each Party has a total of one hour** for all of its following examinations:*

   a) *Claimants' experts*
      * *Direct examination by Claimants*
      * *Cross-examination by Respondent*
      * *Re-Direct, if any*
      * *Re-Cross, if any*

   b) *Respondent's experts*
      * *Direct examination by Respondent*
      * *Cross-examination by Claimants*
      * *Re-Direct, if any*
      * *Re-Cross, if any*

   c) *Experts conferencing by questions of the Tribunal only*

   d) *Follow-up questions by the Parties on the questions raised by the Tribunal, if any.*

   e) *Remaining questions by the members of the Tribunal, if any.*

   The above examination shall be finished by 13:00 hours, before the lunch break.

4. *Starting at 14:00 hours: **1st Round Closing Statements by the Parties***

   a) *Claimants up to 90 minutes*

      Coffee Break

   b) *Respondents up to 90 minutes*

5. *Starting at 9:30 on 3 May: **2nd Round Closing Statements by the Parties**, but only in rebuttal of the other side's 1st Round Statement:*

   b) *Claimants up to one hour*

      Coffee Break

   c) *Respondent up to one hour*

6. Final Questions of the Tribunal, if any.

7. Discussion of any remaining procedural issues, if any.

3.4. The Hearing shall end no later than 13:00 hours. An extension is not possible.

176. On **16 April 2013**, the Tribunal wrote to the Parties to confirm that the hearing on 2 May would begin at 9:30 a.m., as usual.

177. On **17 April 2013**, Respondent wrote to the Tribunal in reference to the May hearing.

178. On **18 April 2013**, the Tribunal responded with the following email

As the hearing is fast approaching, the Tribunal replies without delay to Respondent's letter dated 17 April 2013.

Point 1 of the letter regarding the 2nd Round PostHBs can be discussed at the Hearing.

Point 2: The Tribunal encourages the Parties to make an effort similar to, mutatis mutandis, sections 1.5 and 1.6 of PO-6:

*In preparation of the examination of the experts at the 2 May Hearing, the **experts** are invited to contact, either directly or with the help of the Parties, the expert from the other side and try to agree on a short note identifying the major sub-issues on which they agree and disagree.*

*The Tribunal would be grateful if, **by 29 April 2013**, the Parties could submit either the notes agreed by the experts according to section 1.5 above or separate notes of each expert in so far as they cannot agree on a joint note*.

179. On **22 April 2012**, Claimants and Respondent each wrote to the Tribunal in reference to the Hearing and explained procedural objections against the other. Respondent also submitted an updated translation of R-360.

180. On **24 April 2013**, Respondent wrote in response to Claimants' letter of 22 April 2013. In a separate email, Respondent informed the Tribunal that it had made grids prepared by GCA for its 3D seismic analysis available to Claimants through an FTP server and provided the Tribunal that data.

181. On **24 April 2013**, Claimants responded to Respondent's letter of the same date.

182. On **25 April 2013**, Respondent replied to Claimants' letter of 24 April 2013.

183. On **25 April 2013**, Claimants and Respondent provided the Tribunal a list of hearing attendees.

184. On **29 April 2013**, Respondent wrote to the Tribunal and objected to Claimants' amendments to the transcript.

185. On **29 April 2013**, Respondent sent the Joint Issue List of Ryder Scott and GCA for the testimony at the hearing to the Tribunal.

186. On **1 May 2013**, Claimants wrote in response to Respondent's letter concerning the issue of corrections to the hearing transcripts.

187. A hearing was held in Paris from **2 – 3 May 2013**. Reginald Smith, Kenneth Fleuriet, Kevin Mohr, James Toher, Heloise Herve, Amy Roebuck Frey, Alexandra Kotlyachova and Valerya Subocheva of King & Spalding appeared on behalf of Claimants. Dr. Patricia Nacimiento, Max Stein and Sven Lange of Norton Rose LLP and Joseph Tirado of Winston & Strawn LLP appeared on behalf of Respondent. A transcript was made.

188. At the end of his introduction at the start of the hearing, the Chairman informed the Parties of the following rulings from the Tribunal's deliberations prior to the hearing (quoted from the manuscript read by the Chairman, Tr. May 2013 pp. 4 – 5):

By their recent letters, the Parties addressed the following issues in particular:

1. Regarding the Testimony of Mr. Wood (Respondent's expert from GCA):

Taking into account […]

- *section 3.2 of PO-10,*
- *and the arguments submitted by the Parties,*
- *and the **Experts' Joint List of Issues** submitted by Respondent by its mail of 30 April 2013,*

the Tribunal has concluded that

- *Mr. Wood **can** be examined at this hearing*
- *But that the 2nd Round of Post-Hearing Briefs provides an opportunity for the Parties and their experts to submit further comments on the issues addressed.*

2. Regarding Comments on expert reports and Claimant's objection to the 2nd Deloitte report:

*The Tribunal has taken note that, at the end of their letters of 24 April, the **Parties agree** that, with their 2nd Round Post-Hearing briefs, the Parties may submit further comments*

- *Both by Ryder Scott and GCA*
- *And by FTI and Deloitte.*

In fact, taking into account also the Tribunal's letter of 11 September 2012 admitting such comments as well for the experts at the Hearing on

*Jurisdiction and Liability, this means that comments by **all** the experts may be submitted with the Parties' 2nd Round Post-Hearing Briefs, **but only in rebuttal** to the previous reports by the respective experts from the other side.*

*And from all these rulings it is obvious and confirmed by the Tribunal that these 2nd Round submissions are the final round of submissions, and that **NO further comments** may be submitted thereafter either by the Parties or by their experts.*

*However, in case it turns out that the **Tribunal has further questions** to the Parties, the Tribunal may address the Parties during the time of its deliberations.*

3. ***Regarding Transcript Corrections***

*The Tribunal points out that corrections are only necessary in so far as the transcript is incorrect **with relevance to substantial issues**.*

*Regarding the **first two** hearings, the Parties had ample time to examine the transcripts while drafting their 1st Round Post-Hearing Briefs. Regarding the very short **final hearing**, such examination can easily be done while drafting their 2nd Round Post-Hearing Briefs which are due by 3 June 2013.*

*The Tribunal **encourages the Parties** to agree on a timely procedure for joint corrections. If that cannot be achieved, each Party may submit suggested corrections to the other side **by 15 May 2013**.*

If or in so far as the Parties cannot agree on joint proposals, each Party may submit, together with its 2nd Round Post-Hearing Briefs, its suggested corrections and comments on the suggestions of the other side. The Tribunal will examine such suggestions and take them into account in so far as they are relevant for its conclusions.

*In view of the above, **an extension of the date set for the Post-Hearing Briefs is NOT necessary** in the view of the Tribunal, but also not possible as the planning of the Tribunal for its deliberations shortly after the deadline for the 2nd Round Post-Hearing Briefs would otherwise be delayed considerably.*

4. ***If the Parties feel** that any **other procedural issue** has to be addressed at the beginning of this Hearing, this can be done in the short Opening Statements which follow now.*

189. After brief opening statements by Mr. Smith and Dr. Nacimiento, respectively, the Tribunal heard testimony from Mr. Michael Nowicki, Dr. Stephen Wright, and Mr. Mike Wood. The three experts also testified through witness conferencing.

190. As recorded in the transcript (page 100), at the end of the Hearing the Chairman of the Tribunal raised the following question:

The Tribunal has, of course, taken note of the procedural objections that were put on record at an earlier stage, and we take it that these will be maintained. So my usual question at the end of a hearing only is: are there any further procedural objections at this stage regarding the way the Tribunal has conducted this procedure?

191. The Parties replied as follows:

For Claimant MR SMITH: None from the Claimants.

For Respondent DR NACIMIENTO: And none from Respondent.

192. On **29 May 2013**, the Chairman, on behalf of the Tribunal, sent a letter to the Arbitration Institute of the SCC, suggesting that the SCC extend the deadline for the issuance of the Award to 31 December 2013.

193. On **3 June 2013**, Respondent sent its **Second Round Post-Hearing Brief** (RPHB 2) to the Tribunal. Respondent also submitted Deloitte GmbH 2nd Supplemental Expert Report, GCA Fourth Expert Report, the Second Expert Report of Tomas Balco, the Third Expert Report of Prof. Didenko, and the Third Expert Report of Prof. Ilyassova to the Tribunal.

194. On **3 June 2013**, Claimants submitted their **Second Round Post-Hearing Brief** (CPHB 2) to the Tribunal. Claimants also submitted the Third Maggs Report, the Third Suleymenov Report, The Second Malinovsky Opinion, the Corrected Final Hearing Transcripts, the Fourth Expert Report of Howard Rosen (FTI), the Fourth Expert Report of the Ryder Scott Company, and a photo array of all witnesses.

195. By letter of **10 June 2013**, the Arbitration Institute of the SCC decided that the Final Award shall be rendered by 2 January 2014.

196. On **1 July 2013**, Claimants and Respondent each submitted their respective Statements on Costs to the Tribunal.

197. On **8 July 2013**, Claimants and Respondent each submitted their responses to the Costs Submissions submitted by the other side.

198. On **12 December 2013**, the Arbitration Institute of the SCC issued its decision on costs, recorded later in this Award.

E. Relief Sought by the Parties

E.I. Relief Sought by the Claimants

199. Claimants' most current Request for Relief is found at ¶ 396 of their Second Post-Hearing Brief of 3 June 2013. This Request for Relief replaces those found at ¶ 664 of **Claimants' First Post-Hearing Brief** of **8 April 2013**, ¶ 626 of **Claimants' Reply Memorial on Jurisdiction and Liability** of **7 May 2011**, ¶ 99 of **Claimants' Reply Memorial on Quantum**, dated **28 May 2012** at ¶¶ 116 and 117 of **Claimants' Request for Arbitration** submitted on **26 July 2010,** and ¶ 470 of **Claimants' Statement of Claim** submitted on **18 May 2011**.

> ***VI. REQUEST FOR RELIEF***
>
> *396. For the reasons set forth herein, Claimants respectfully request an award granting them the following relief:*
>
> - *A declaration that Kazakhstan has violated the ECT and international law with respect to Claimants' investments;*
>
> - *Compensation to Claimants for all damages they have suffered, as set forth in Claimants' Statement of Claim and Reply on Quantum and as further updated at the January 2013 Hearing and in Claimants' First Post-Hearing Brief, corresponding to the following amounts:*

Tolkyn	***US $478,927,000***
Borankol	***US $197,013,000***
Munaibay Oil	***US $96,808,000***
LPG Plant	***US $245,000,000 cost plus discretionary portion of US $84,077,000***
Contract 302 (other than Munaibay Oil)	***US $31,330,000 cost plus discretionary portion of US $1,498,017,000***

> - *All costs of this proceeding, including Claimants' attorneys' fees and expenses as well as fees and expenses of the Tribunal and the SCC;*
>
> - *Pre-award compound interest at a rate of 10.5% from October 14, 2008 to the date of the Award;*
>
> - *An award of compound interest at a rate of 10.5% until the date of Kazakhstan's final satisfaction of the Award; and*
>
> - *Any other relief the Tribunal may deem just and proper.*

E.II. Relief Sought by the Respondent

200. Respondent's most recent Request for Relief is found at Part VI of its Second Post-Hearing Brief of 3 June 2013. This replaces the Requests for Relief found in **Part IV of its First Post-Hearing Brief** of **8 April 2013**, Section F of **Respondent's Rejoinder on Jurisdiction and Liability**, dated **13 August 2012,** and at ¶ 58 of **Respondent's Statement of Defence**, dated **21 November 2011**.

> *1069. The Republic requests the Arbitral Tribunal to issue:*
>
> *(a) an order dismissing Claimants' claims in their entirety;*
>
> *(b) an order that Claimans [sic] must bear all costs of this arbitration and must reimburse Respondent all costs which Respondent incurred and will incur in this arbitration, including inter alia fees and expenses of the SCC, the Arbitral Tribunal, experts, consultants, witnesses and legal counsel plus interest. Respondent hereby reserves the right to detail and document its claim for such foregoing costs, which by their very nature are continuing, at the appropriate future time as directed by the Arbitral Tribunal*

F. Factual Background

201. The Tribunal has considered all of the facts presented by the Parties, even if not explicitly stated below. This section summarizes the facts and events leading to the current dispute, as presented by the Parties in their submissions and testimony and without prejudice to the relevance the Tribunal may give to facts and issues. More comprehensive coverage of the facts can be found in C-0 ¶¶ 5 *et seq.*, C-I ¶¶ 2 - 238, C-II ¶¶ 16 - 42 and 210 – 422, CPHB 2 ¶¶ 37 – 196; R-I ¶¶ 4,17 – 31, R-II ¶¶ 241 – 832, RPHB 1 ¶¶ 15 – 413; and RPHB 2 ¶¶ 15 – 382.

F.I. General Background Information

202. Natural hydrocarbon resources are one of the principal assets of the Republic. Within the next ten years, Kazakhstan will be among the top five oil producers, holding 30 billion barrels of proven oil and 85 trillion cubic feet of gas reserves. KPM and TNG were important to the economic framework of and have played a strategic role in the Mangystau region's economy, providing 80% of the fuel needed for the local power plant and employing a considerable number of people. (R-I ¶¶ 4.1, 31.52; R-II ¶ 322).

203. The Borankol and Tolkyn fields are approximately 50 km apart in the Mangystau region. Aktau, the capital of the Mangystau region, is approximately 400 and 500 km from the Borankol and the Tolkyn fields, respectively. The closest town to the Borankol field is Opornaya, which is approximately 15 km away. (C-I ¶ 52).

204. The Respondent is the government of the Republic of Kazakhstan, which is the sovereign body responsible for managing the investment in and exploitation of Kazakhstan's natural resources. (R-I ¶ 4.4).

205. Claimant Anatolie Stati is a natural citizen of Moldova and Romania who has invested in Turkmenistan since 1995. Based on his testimony and the testimony of Prof. Olcott at the Hearing on Jurisdiction and Liability, Respondent argues that Anatolie Stati was a "*novice*" in the oil and gas industry when he entered Kazakhstan. Respondent presents a history of the Stati family's involvement in Moldova's politics, as well as in the politics and businesses of other states. Claimants and Respondent agree that Anatolie Stati is not a political opponent of President Nazarbayev. (C-0 ¶ 10; C-II ¶ 79; R-II ¶¶ 24 – 33, 38 – 39, 267; RPHB 1 ¶¶ 21, 118).

206. Claimant Gabriel Stati is a natural citizen of Moldova and Romania and is the son of Anatolie Stati. (C-0 ¶ 11; C-II ¶¶ 79 - 80).

207. Claimant Ascom Group S.A. is a joint stock company incorporated under the laws of Moldova, with headquarters in Moldova. Ascom's operational subsidiaries were located in Kazakhstan. The Parties dispute whether Anatolie Stati owned 100% of Ascom, which owned 100% of KPM or that Ascom has substantial business activities in or is controlled from Moldova. Respondent argued that Anatolie Stati is Ascom's 100% shareholder. (C-0 ¶ 12; C-II ¶¶ 85, 86, 95, 128; R-II ¶¶ 51 – 54; RPHB 1 ¶ 124).

208. Claimant Terra Raf Trans Traiding Ltd. is a limited liability company incorporated under the laws of Gibraltar. (C-0 ¶ 13; C-II ¶ 96, 129; R-I ¶ 9.81, 14.9).

209. Respondent states that Tristan Oil Ltd. ("*Tristan*") is an affiliate of KPM and TNG and is 100 % owned by Anatolie Stati. Tristan was created as a special purpose vehicle with the purpose of issuing notes. (R-II ¶ 728).

210. Mr. Lungu is the Executive Vice President and CFO of Tristan and the Commercial Vice President of Ascom. (RPHB 1 ¶ 138).

211. TNG is a Kazakh company that owned the subsoil use rights to the Tolkyn field and the Tabyl Block pursuant to Contracts 210 and 302 on Exploration and Extraction of Hydrocarbons at the "*Tolkyn*" deposit and the Tabyl Block (Mangystau Oblast), executed between the Agency of the Republic of Kazakhstan on Investments and TNG, and dated 12 August and 31 July 1998, respectively. Contract Nos. 210 and 302 were issued pursuant to the Licenses for the right to explore and/or exploit the hydrocarbons, Series MG No. 242-D (oil) and MG No. 243-D (oil), both dated 4 December 1997 and issued by the Government. (C-0 ¶ 18, partially quoted, citations omitted; C-I ¶¶ 3, 47; R-I ¶ 13.55).

212. KPM owned the subsoil use rights to the Borankol field pursuant to Contract 305 on Exploration and Extraction of Hydrocarbons at the "*Borankol*" deposit (Mangystau Oblast), executed between the Agency of the Republic of Kazakhstan on Investments and KPM, and dated 30 March 1999. Contract 305 was issued pursuant to the license for the right to use subsoil, Series MG No. 309-D (oil) dated 23 May 1997, issued by the Government to KPM. (C-0 ¶ 16, quoted, citations omitted; C-I ¶¶ 3, 42; R-I ¶ 13.2).

213. Over 90% of KPM's and TNG's work force was comprised of local Kazakh citizens, nearly 1,000 of which were employed on a permanent basis. (CPHB 1 ¶ 123).

214. Respondent considers KMG to be two separate, distinct entities: KazMunaiGaz Exploration Production (KMG EP) and KazMunaiGaz National Company (KMG NC). Respondent explains that KMG EP is not a state entity, but is a commercial entity listed on the London Stock Exchange and the Kazakhstan Stock Exchange. KMG NC is a state entity that considers the social and economic implications of an acquisition to the Republic as a whole. (R-II ¶ 350 – 351; RPHB 2 ¶ 10).

215. Mr. Timur Kulibayev is President Nazarbayev's son-in-law and the Chairman of KMG NC, but not of KMG EP. (C-I ¶ 189, R-II ¶ 352).

F.II. Timeline of Events

216. As will be seen later in this Award, in the present dispute the timeline of events is of particular importance to the considerations and conclusions by the Tribunal. It is, therefore, provided in much greater detail than would normally be necessary. The following timeline records events mentioned by the Parties in their submissions, without prejudice to the relevance the Tribunal may attach to each item.

217. The Borankol structure was discovered in 1959, with test drilling finalized in 1973. The Tolkyn field structure was discovered in 1992 (C-I ¶¶ 42, 46).

218. KPM was established as a closed JSC joint venture / non-commercial organization on 24 March 1997. The companies Polmak Sondazh Sanaii A.Şh. (from the Republic of Turkey) and CJSC Joint Kazakh-Estonian-Irish Company Aksai were the founders and equal 50% owners of the company. (R-I ¶¶ 13.1 – 13.3).

219. On 27 January 1999, Promtorgbank JSC Industrial and Trade Bank transferred 800 TNG shares to Kainar LTD. As a result, a controlling stake was acquired and permission for the transfer was required. Respondent never gave permission. (RPHB 2 ¶ 273 citing R-18).

220. On 29 March 1999, Shagyrly-Shomyshty LLP transferred 1000 TNG shares to Kainar LTD. As a result, a controlling stake was acquired and permission for the transfer was required. Respondent never gave permission. (RPHB 2 ¶ 273 citing R-18).

221. Claimants began investigating investment opportunities in Kazakhstan in 1999. (C-I ¶ 42).

222. On 18/19 November 1999, KPM submitted a request to the Agency of the Republic of Kazakhstan on Investment for consent to Ascom Group's acquisition of a 62% share of KPM. (C-I ¶ 45; C-II ¶¶ 169, 165; RPHB 2 ¶ 275).

223. On 9 December 1999, Ascom purchased the 62% share in KPM. Respondent disputes the legality of this purchase. (R-II ¶ 117).

224. On 13 December 1999, KPM was reorganized from a non-commercial to a commercial organization. Claimants dispute this and state that KPM was always a commercial entity. They suggest that the change could have been to remedy a registration error by the Republic. (R-I ¶ 13.12; C-II ¶ 155).

225. On 24 January 2000, KPM obtained a national identification number with respect to the initial issuance of its shares. (C-II ¶ 149).

226. Claimants' interest in TNG and the TNG Subsoil Use Contracts began with Ascom's acquisition of a 75% interest on 17 May 2000. Claimants requested and received consent for the transfer. The State believed its pre-emptive rights were inapplicable to the transfer. (C-0 ¶ 19).

227. Respondent acknowledges that, in relation to the TNG shares, Claimants have produced evidence of certain payments being made by Ascom to Kaihar TOO in the amounts of USD 421,000 and USD 1,137,000 at the time of the acquisition on 30 May 2000, but notes that this investment was made by Ascom and not Terra Raf. Respondent states that the formal shares themselves were purchased for USD 189,185 on 16 January 2009. Respondent states that this discrepancy has not been explained by Claimants. (R-I ¶ 14.3 (stating that the amount was USD 190,000); R-II ¶ 118).

228. On 30 May 2000, Kainar LTD transferred 3050 TNG shares to Ascom S.A. As a result, a controlling stake was acquired and permission for the transfer was required. Respondent never gave permission. (RPHB 2 ¶ 273 citing R-18).

229. As of July 2000, Claimants were the operators for both the Borankol and Tolkyn fields. (C-I ¶ 49).

230. The MEMR was created on 13 December 2000. (C-II ¶ 167).

231. KazRosGas LLP was created in 2001 pursuant to an agreement between the governments of Kazakhstan and Russia. It was designated as the single operator to buy, sell, and market Kazakhstan's export gas. Gazprom owns 50% of KasRosGas. Domestic producers that wish to export gas must contract with Gazprom. (R-I ¶ 49.13; R-III ¶¶ 253 - 262).

232. In 2001, NIPI Neftegaz issued the Borankol Raw Materials Base Project, a design of KPM's gathering and treatment facility as a single technological process. (CPHB 2 ¶ 74; RPHB 2 ¶ 204).

233. On 25 April 2001, State Expert Review of Projects approved construction of KPM's pipelines, including the 18 km pipeline that is at issue. (CPHB 2 ¶ 74).

234. On 4 March 2002, the State Inspection for Emergency Situations, the Fire Safety Supervising Agency, the State Sanitary Surveillance Department, the Ministry of Environmental Protection for the Mangystau Region, the State Inspection for Architecture and Construction, and NIPI Neftegaz approved the commissioning of KPM's 18-kilometer pipeline. No mention was ever made of that pipeline being a trunk pipeline. (C-II ¶ 272; CPHB 2 ¶ 74; RPHB 2 ¶ 214).

235. On 13 March 2002, Ascom transferred its 75% interest in TNG to its subsidiary, Gheso S.A. ("*Gheso*"). (C-0 ¶ 19; C-I ¶¶ 50, 140 et seq.) Claimants did not obtain consent from either the Government or MEMR for this transfer. (R-I ¶ 13.28; R-II ¶ 158; RPHB 2 ¶ 273).

236. On 30 April 2002, Kainar LTD transferred 950 shares of TNG to Gheso. Claimants state that they received consent, and provide the Tribunal with Exhibit C-134, which Claimants say TNG received from the MEMR, granting permission for the share transfer. (C-II ¶ 168). In response, Respondent states that consent should never have been granted without a waiver of the Republic's pre-emptive right and that Exhibit C-134 cannot be deemed as consent by the appropriate body, as Claimants allege. (R-I ¶ 13.28, RPHB ¶ 273).

237. On 3 May 2002, Production-Commercial Firm Bobro and Anavi respectively transferred 100 and 200 TNG shares to Gheso, resulting in Gheso becoming the 100% owner of TNG. Respondent states that Claimants did not obtain consent from either the Government or MEMR for these transfers. (R-I ¶ 13.28).

238. In September 2002, KPM and TNG applied to the MEMR for licenses covering its new gathering system. On 26 September 2002, MEMR issued the requisite licenses to KPM and TNG for their production, treatment, and transportation activities. (C-I ¶ 83; C-II ¶ 274; CPHB 2 ¶ 74).

239. On 12 May 2003, Gheso transferred its 100% interest in TNG to Terra Raf. (C-0 ¶ 20; C-I ¶ 50; CPHB 2 ¶ 117). Respondent states that Claimants did not obtain consent for this transfer. (R-I ¶¶ 13.28 – 13.29).

240. Claimants state that the transfer was complete on 28 May 2003 when TNG's share registrar, Zerde, registered the Gheso-Terra Raf share transfer. (CPHB 2 ¶ 117). Respondent disagrees – a transfer cannot be validly registered under Kazakh law without consent being obtained under Art. 53(1). (RPHB 2 ¶ 273).

241. Starting in 2004, Claimants conducted the initial seismic work on the Contract 302 properties. (C-I ¶ 66).

242. In 2004, Claimants had discussion with GazImpex, a gas-exporting company which Claimants allege is controlled by Mr. Kulibayev, about the sale of a 35% stake in TNG. The parties were never able to reach agreement because Claimants valued TNG at USD 567 million, while GazImpex valued it at USD 27.8 – 32.9 million. (C-II ¶ 375). Respondent states that Claimants have failed to prove that Mr. Kulibayev owned or controlled GazImpex and argue that these negotiations are irrelevant to this arbitration. (R-II ¶¶ 341 – 344).

243. Respondent states that Claimants have produced a document identified as C-514, dated 15 September 2004, which expressly refers to Ascom being the owner of TNG as of that date. Claimants provide no explanation of how this could be the case, given that by this point, Terra Raf had acquired TNG from Gheso. Respondent states that, according to Claimants at C-I ¶ 50, the last time Ascom owned TNG was in 2002. (R-II ¶ 173).

244. In November 2004, Ascom acquired the remaining 38% interest in KPM. Respondent acknowledges that Claimants have provided evidence of USD 9 million having been provided by Ascom and Terra Raf for this purchase. (C-I ¶ 45; C-II ¶ 184; R-II ¶ 117).

245. On 1 December 2004, Kazakhstan passed a law giving the State a pre-emptive right over certain transfers of subsoil users. (CPHB 2 ¶ 117).

246. The 8 December 2004 enactment of Law No. 2-III, which amended Art. 71 of the 1996 Subsoil Use Law, gave Kazakhstan a pre-emptive right to acquire shares in subsoil users. (C-II ¶ 184).

247. In May 2005, KPM was reorganized from an OJSC to a LLP. Claimants state that the Government approved of this change by letter. (C-I ¶¶ 45, 51).

248. On 16 May 2005, Terra Raf reorganized TNG from an OJSC to a LLP. Claimants notified MEMR of this reorganization, and the change from TNG OJSC to TNG LLP was memorialized in the State-executed 2006 Supplements to the TNG Subsoil Use Contracts. (C-0 ¶ 20; C-I ¶ 50; CPHB 2 ¶ 117). Respondent states that when TNG was reorganized from an OJSC to a LLP in 2005, there was an error: Terra Raf never was a lawful shareholder of TNG and could not carry out its reorganization from an OJSC to a LLP. (R-I ¶¶ 13.32; 13.45).

249. After the alleged reorganizations, KPM and TNG applied to re-license their pipelines. MEMR re-issued licenses on 5 August 2005. (C-I ¶ 82; C-II ¶ 274; CPHB 2 ¶ 74).

250. In 2006, TNG contracted with Vitol to construct and operate the LPG Plant. The Parties dispute the amounts invested. (C-I ¶¶ 62, 64; R-II ¶ 123).

251. In May 2006, Claimants halted construction on the LPG Plant for financial reasons. (C-I ¶ 64).

252. On 31 July 2006, the exploration period for Contract 302 was extended. Flooding in the Caspian Sea basin, however, suspended exploration work for two years and eight months. The MEMR extended the exploration period until 30 March 2009, without counting this *force majeure* against the two permissible contractual extensions. (C-I ¶ 47; R-I ¶ 14.20).

253. On 19 October 2006, the State asked TNG whether Ascom had transferred any of its interest in TNG during the period of 1 December 2004 to 19 October 2006. TNG replied that Terra Raf was the sole interest holder in TNG since May 2003. (C-0 ¶ 21; C-I ¶ 143; CPHB 2 ¶ 117).

254. In 2006, Claimants began the "*Bonds Project*", under which Tristan Oil (a company under the control of Claimants), issued 3 tranches of bonds with maturity of 1 January 2012, for a total amount of USD 531 million. The bonds were issued at the EURO MTF Market of the Luxembourg Stock Exchange and were guaranteed by KPM and TNG. The charter capital of each company at the date of issuance of guarantees amounted to USD 50,000, *i.e.* 0.018% of the par bond issue. (R-I ¶¶ 9.59 – 9.62).

255. The first tranche of the Bonds Project was issued on 20 December 2006. (R-I ¶ 9.59).

256. On 11 January 2007, Kazakhstan adopted a new Law on Licensing, pursuant to which the MEMR would remain the licensing authority for production activities and operation of pipelines other than "*main*" or "*trunk*" pipelines. (C-II ¶ 275; CPHB 2 ¶ 74). Since the Parties have used the terms "*main*" and "*trunk*" pipelines interchangeably, so too shall this Award.

257. In early 2007, Kazakhstan approached Claimants with a proposal for the provision of gas to KazAzot as part of a project of national priority to allow the Republic to develop an Ammonia-Carbamide project, which required a secure gas supply. (C-I ¶ 58; R-I ¶ 15.5 et seq.). Claimants state that they agreed to provide specific volumes of gas to KazAzot, provided that Claimants would be allowed to export specific volumes of gas at international market prices. (C-I ¶ 58).

258. On 13 February 2007, Respondent notified Claimants that they had failed to obtain consent for the 2003 transfer of Gheso's 100% interest in TNG to Terra Raf and that Claimants had not notified the Republic that Ascom's shares had been transferred to Gheso. Respondent notified Claimants that they had failed to give the Republic the opportunity to exercise its pre-emptive right to purchase TNG. (R-I ¶ 13.47; RPHB 2 ¶ 277). Respondent requested that TNG apply for retroactive permission for the 2003 transfer and TNG complied. (C-I ¶ 143; CPHB 2 ¶ 117). Claimants state that MEMR also notified Claimants that the transfer had been proper and the pre-emptive right was not applicable. (CPHB 2 ¶ 117).

259. On 19 February 2007, TNG informed the MEMR that the Republic's pre-emptive right did not apply in February 2007. (RPHB 2 ¶ 277).

260. On 21 February 2007, Terra Raf noted KazRosGas's interest in acquiring a stake in TNG, and asked KazRosGas to send a written offer. (C-II ¶ 376). Respondent states that this is irrelevant to this arbitration, and there is no link to the Republic. Likewise, Claimants have not proven that Mr. Kulibayev controls this company. (R-II ¶¶ 341, 345).

261. On 7 May 2007, Claimants, the MEMR, the Governor of the Mangystau Region, the operator of the main gas pipeline KazTransGas (a subsidiary of the national oil company KMG), and the owner KazAzot agreed to enter into gas supply and transport arrangements and signed a Memorandum of Understanding. Pursuant to these arrangements, Claimants would sell certain volumes of gas at a price substantially above the discounted prices to KazAzot (first at near-market prices, then at the international market price after two years), and TNG, through KazTransGas, would be allowed to export certain volumes of gas at international market prices. Over the following year, Claimants conducted extensive negotiations to conclude the prices, volumes, and conditions of the agreement. (C-I ¶ 59). Respondent disputes that there was any reference to the ability to sell oil in the Memorandum of Understanding. (R-I ¶ 15.7).

262. On 14 June 2007, the second tranche in the Bonds Project was issued for USD 120 million. (R-I ¶ 9.59).

263. On 19 June 2007, President Nazarbayev issued a Presidential decree that transferred authority for licensing the operation of trunk pipelines from the MEMR to the ARNM – the regulator and controller of activities of natural monopolies and regulated markets. (R-II ¶ 589). Claimants state that the MEMR (later called the Ministry of Oil and Gas or "*MOG*") remained the licensing authority for activities related to production and to operation of pipelines other than trunk pipelines. (C-II ¶ 275). Respondent, however, states that the ARNM has the power of issuing licenses to operate transfer gas pipelines, oil pipelines, trunk pipelines, and oil product pipelines. It neither polices who owns trunk pipelines nor does it classify whether a pipeline was trunk. (R-I ¶ 25.2; R-II ¶¶ 544, 589; CPHB 2 ¶ 74). The Parties have acknowledged that, since 2007, competency to issue licenses in relation to trunk pipelines lies with the ARNM. The Parties are aware that anyone wishing to operate a trunk pipeline needs to apply for a license. (CPHB 1 ¶ 155, R-I ¶ 26.9; R-II ¶¶ 464 – 465, CPHB 2 ¶ 61; RPHB 1 ¶¶ 198 – 202).

264. On 6 December 2007, KPM and TNG each applied to the MEMR for permits to allow the transfer of their ownership interests to Tristan Oil for the purpose of conducting an IPO on the London Stock Exchange. (C-0 ¶ 22; C-I ¶ 144; R-I ¶ 9.70).

265. On 26 December 2007, the Kazakh Inter-institutional Committee recommended that the MEMR (1) grant permission for the transfer and (2) waive the State's pre-emptive rights to purchase 100% of KPM and TNG. (C-I ¶ 144; CPHB 2 ¶ 117).

266. By letters to KPM and TNG dated 29 December 2007, the MEMR granted permission for the transfers and expressly waived its pre-emptive rights. According to Claimants, the State indicated that it was interested in purchasing the assets within the IPO. (C-0 ¶¶ 22, 79; C-I ¶ 144; CPHB 2 ¶ 119).

267. Production in the Tolkyn Field declined from 2005 – 2007, until there was a jump in production from 2007 – 2008. This sudden increase in gas production led to an associated increase in water production ("*water cut*"), which led to a significant and sustained reduction in gas production, a situation that continues to date. In relation to the Borankol field, liquid production declined beginning in 2005 and gas production declined beginning in 2004. (R-I ¶¶ 15.2, 16.1, 46.13).

268. In April 2008, Claimants received the Miller & Lents reserves report, which showed that their estimates for production from Borankol had been overstated by 300%. (RPHB 2 ¶ 61).

269. On 8 April 2008, Kazakhstan amended its 2005 laws regarding the payment of export taxes. Pursuant to the 2008 amendments, a USD 109.91/ton duty was imposed on exported crude oil. The 2008 amendments contained specific provisions, pursuant to which no export tax would be applied to exported crude oil that had been extracted under Subsoil Use Contracts containing specific exemptions from the Crude Oil Export Tax. (C-I ¶ 162).

270. On 28 April 2008, the MEMR, TNG, KazAzot, and KazTransGas entered into a first agreement setting out their understanding, entitled "*Agreement for the Implementation of the Memorandum of Understanding of 7 May 2007*." (C-I ¶ 60).

271. On 5 May 2008, Mr. Cornegruta of KPM wrote to the MEMR for the re-issue of KPM's license for the performance of certain activities. The operation of trunk pipelines was not mentioned, but the exploitation and storage of gas were. Respondent states that, objectively, the letter specifically and deliberately requested a license for the operation of trunk pipelines. (RPHB 2 ¶ 162)

272. On 16 May 2008, the Prime Minister of Kazakhstan, the MEMR, KMG, KazTransGas, KazAzot, and TNG agreed that the parties should enter into tri-partite agreements to resolve the outstanding issues. (C-I ¶ 60).

273. On 26 May 2008, the MEMR wrote to KPM, directing KPM to apply to the ARNM for other licenses it may need, pursuant to the change of law and ARNM's new authority. (C-II ¶ 313, CPHB 2 ¶ 74; RPHB 1 ¶ 204).

274. On 29 May 2008, the MEMR re-issued KPM and TNG their licenses for various operations, including "*oil, gas, and oil products production*", pursuant to the 2007 Law on Licensing. (C-II ¶ 275; CPHB 2 ¶ 74).

275. On 13 June 2008, Mr. Cornegruta wrote to ARNM, requesting permission to carry out activities. The Parties dispute whether this letter was an admission that KPM operated a trunk pipeline. This is later referred to as the "*confession*" letter and was relied on by the Republic as the admission of certain facts. (C-II ¶¶ 313 – 317, R-I ¶¶ 9.83; 21.9, 25.11, 27.55 - 27.56; R-II ¶ 633, RPHB 1 ¶¶ 205 – 208). Respondent explains that the letter was clearly an incomplete application for a license and that it was only one piece of evidence of much more showing that the KPM Pipeline was trunk. (RPHB 1 ¶¶ 205, 209; RPHB 2 ¶ 215). Claimants state that KPM wrote to ARNM inquiring as to whether it needed to have its license re-issued by the ARNM in light of the changes in the new Law on Licensing. (CPHB 2 ¶ 74).

276. KPM's 13 June 2008 application was rejected in July 2008 because the submitted package of documents did not meet the requirements of the legislation. The ARNM suggested that KPM submit the documents in accordance with the legislation. KPM did not submit any documents after that. (R-I ¶¶ 21.9, 25.12; RPHB 1 ¶ 202; RPHB 2 ¶ 218).

277. On 3 July 2008, after KPM had notified the Customs Committee of its contractual exemption from specific export taxes, the Customs Committee notified KPM that "*Contract no. 305 contains no regulations as to the exemption from export tax and, thus, export tax shall be applicable to the crude oil exported under the foregoing contract*." Pursuant to this notice from the Customs Committee, KPM was prohibited from exporting 22,000 tons of crude oil for August 2008 without payment of the Crude Oil Export Tax. KPM conditionally paid these export taxes and concurrently commenced a legal action challenging imposition of the tax. (C-0 ¶¶ 69 – 70; C-I ¶ 19).

278. In summer 2008, Claimants made an "*independent business decision*" to explore a sale of KPM, TNG, and the LPG Plant, excepting the Contract 302 properties (the so-called Tabyl Block). This was nicknamed "*Project Zenith*" and Claimants retained Renaissance Capital to facilitate the sale process. (C-I ¶¶ 69, 184, C-II ¶ 397; R-I ¶ 9.67).

279. On 14 July 2008, the ARNM responded to Mr. Cornegruta's letter of 13 June 2008, and stated that further documentation needed to be submitted. Both Parties accept that none was ever received. (RPHB 1 ¶¶ 210 – 211). Claimants state that the ARNM responded by informing KPM that the type of activities listed in KPM's 2005 license to not require separate licensing from the ARNM. (CPHB 2 ¶ 74).

280. On 18 July 2008, Renaissance Capital sent a "*teaser*" offer to 129 potential purchasers, including KMG. (C-I ¶ 69; R-II ¶ 775, RPHB 1 ¶ 82).

281. On 20 July 2008, TNG discovered gas and condensate deposits in the East Munaibay structure of the Tabyl Block. Productivity testing demonstrated a commercial flow of 120,000 cm/day and 150,000 cm/day of rich gas in the Asselian and Artinskian strata, respectively, without any treatment for productivity enhancement, and 3D seismic interpretation of the structure is commensurate with a substantial find. (C-0 ¶¶ 23, 57; C-I ¶ 13).

282. By letter dated 24 July 2008, TNG informed the Geology and Subsoil Use Committee of the MEMR that it had discovered an oil and gas field by drilling the Munaibay No. 1 well in Contract 302. (C-I ¶ 67 CPHB 1 ¶ 129; CPHB 2 ¶ 151).

283. Later in the summer of 2008, a tri-partite agreement between TNG, KazAzot, and KazTransGas containing the formula for the price calculation, the volumes of gas concerned, and the conditions of supply and export was created ("*KazAzot Tripartite Agreement*"). Subsequently, Kazakhstan replaced KazTransGas with its parent company, KMG. (C-I ¶ 60).

284. On 11 August 2008, TNG filed an application for the evaluation/appraisal phase for Munaibay No. 1. (C-I ¶ 67; CPHB 2 ¶ 151).

285. In mid-August 2008, Renaissance Capital distributed the Information Memorandum to 41 parties that had expressed an interest in the properties and signed a confidentiality agreement, including KMG. (C-I ¶ 70; RPHB 1 ¶ 82).

286. On 29 August 2008, KPMG issued a complete Vendor Due Diligence presentation for Project Zenith. (C-I ¶ 69).

287. On 25 September 2008, based on information provided by Claimants and upon invitation by Claimants, KMG EP tendered an indicative offer of USD 754 million in Project Zenith. Respondent states that, prior to Claimants' invitation, KMG EP was not interested in investing. Claimants state that this was among the lowest of the bids received, amounting to less than half the highest indicative offer (KNOC's offer of USD 1.55 billion), and more than 25% below the average of all eight indicative offers (USD 1.05 billion). Respondent alleges that Renaissance Capital "*tweaked*" the numbers by conditioning access to the data room on higher offers. (C-I ¶¶ 12, 16, 71; C-II ¶ 378; R-II ¶¶ 356 – 357, 781).

288. On 26 September 2008, KNOC submitted an indicative bid, based on the assumption that higher export prices could be achieved as a result of the KazAzot Tripartite Agreement. (RPHB 1 ¶ 95)

289. Based on Tristan's financial statements, on 30 September 2008, the cash on hand and cash equivalents of the Tristan group (KPM, TNG, and Tristan) were USD 9.7 million, despite the issuance of notes in mid-2006 for USD 300 million and at the beginning of 2007 for USD 120 million. (RPHB 1 ¶ 47)

290. By 1 October 2008, Claimants had received 8 non-binding indicative offers in Project Zenith. (C-I ¶ 12, 71; R-I ¶ 16.9; R-II ¶ 775).

291. On 6 October 2008, then-President of Moldova, Vladimir Voronin, wrote a letter to President Nazarbayev of Kazakhstan, stating that Mr. Anatolie Stati was using proceeds from Kazakhstan's mineral resources to invest in areas subject to UN sanctions, in particular, in South Sudan. At the time, Claimants did not view the letter as particularly problematic, since Anatolie Stati had frequently sparred with President Voronin over Moldova's democratic transformation. Claimants state that letter contained false and defamatory personal accusations against Anatolie Stati. Claimants state that Anatolie Stati is not funding terrorist groups in South Sudan. Claimants admit that Anatolie Stati has normal, commercial investments in the oil and gas industry in South Sudan and has contributed enormously to the well-being of the population of South Sudan by making substantial investments in oil and gas exploration and by building schools, a hospital, medical clinics, and means of transportation in the region where his investments are located. Claimants maintain that Anatolie Stati's investments in South Sudan have never been a secret and have never violated UN sanctions. Respondent states that there is no evidence that Stati's investments contribute to the well-being of the population of South Sudan. Respondent states that Claimants' insinuation that President Nazarbayev asked President Voronin to write the letter is ludicrous. (C-0 ¶ 25; C-I ¶ 74; C-II ¶ 194, 211; R-I ¶¶ 9.56, 19.21; R-II ¶¶ 43 – 44; RPHB 1 ¶¶ 188, 374 – 376; RPHB 2 ¶ 156).

292. On 7 October 2008, the MEMR acknowledged TNG's August 2008 application for evaluation of the discovery on the Contract 302 property. (C-I ¶¶ 13, 67).

293. On 10 October 2008, Claimants withdrew their statement of intention filed on 11 August 2008 because they felt it was still too early in the exploration stage to commence evaluation. (C-0 ¶ 57). In its Post-Hearing Brief, Claimants explained that TNG informed Kazakhstan that it was withdrawing its August 2008 application to move to the appraisal phase for Munaibay because it intended to fully and thoroughly explore the contractual territory because the Munaibay 1 well suggested "*a high probability of additional discovery of more deep-lying raw hydrocarbon reservoirs on Munaibay area*." (CPHB 1 ¶¶ 129, 234; CPHB 2 ¶ 151).

294. On 14 October 2008, Claimants applied to MEMR to extend the exploration period in the Tabyl Block by two years. (C-II ¶ 175, CPHB 1 ¶ 129, CPHB 2 ¶ 151; R-I ¶ 31.68; R-II ¶ 416). In October 2008, Claimants commenced an exploratory well in the Tabyl Block's Bahyt structure, which had shown evidence of gas in the lower Triassic stratus. Through October 2008, Claimants had invested USD 43 million in exploration work in the Contract 302 properties. (C-0 ¶ 57, C-I ¶¶ 66 – 68).

295. As of 14 October 2008, the yield to maturity of the Tristan notes stood at 26.319%, meaning that the Tristan note course stood at USD 65.125 for a nominal value of USD 100. (RPHB 1 ¶¶ 48, 77)

296. On 14/16 October 2008, President Nazarbayev issued a document (Exhibit C-8), which contains both the dates of 14 and 16 October 2008 in the Russian original and in the English translation. (The Tribunal decided not to address these two different dates as the difference has no impact on the present dispute. Both dates are used in the Parties' submissions and in various parts of this Award.) In the document, the President instructed Kazakh Deputy Prime Minister, Umirzak Shukeyev, and the head of the Financial Police, Sarybai Kalmurzayev, to "*thoroughly investigate*" / "*thoroughly check[]*" all of Claimants' business activities in Kazakhstan. (C-0 ¶ 25; C-I ¶ 75; C-II ¶ 16 CPHB 2 ¶¶ 38, 61, 115, 117, 128; RPHB 1 ¶¶ 188, 377; RPHB 2 ¶ 10). Respondent disputes the translation of this order, and states that Claimants' ability to obtain this internal government document, points to serious corruption on behalf of Claimants. (R-I ¶¶ 19.22 – 19.23; R-II ¶ 214). Respondent nonetheless explains that the note is nothing more than a pro-forma document by which a complaint from one head of state is forwarded to the competent authorities, as is the etiquette of dealings between CIS leaders. As explained at the hearing, the letter received no special treatment from the Financial Police by virtue of the fact that it came from the President. Respondent stated that the fact that President Nazarbayev does not have any specific interest in Claimants' operations in Kazakhstan was confirmed by Minister Mynbayev during cross-examination. (RPHB 1 ¶¶ 377 – 383; RPHB 2 ¶¶ 42 – 44).

297. On 16 October 2008, the Deputy Prime Minister issued order No. 6497, pursuant to which the Financial Police, under the supervision of that office, ordered the MEMR and the Tax and Customs Committees to conduct comprehensive or complex audits of KPM and TNG, which commenced on 28 October, 10 November, and 18 November 2008, respectively. Claimants report that the (1) MEMR, (2) Tax Committee, (3) Customs Committee, (4) National Bank of Kazakhstan, (5) Geology Committee, (6) Ecology Committee, and (7) MES were ordered to conduct audits and investigations of KPM and TNG. (C-0 ¶ 25, C-I ¶ 76; CPHB 2 ¶¶ 38, 128). Respondent states that Claimants have exaggerated the nature of the audits and that there has been no evidence that audits by the Customs Committee, the Ecology Committee, or the MES occurred. (R-I ¶¶ 20.3 – 20.6).

298. On 18 October 2008, the Financial Police instructed the Customs Committee to audit KPM's and TNG's compliance with export tax laws. (C-I ¶¶ 161 – 163, CPHB 2 fn. 209).

299. On 18 October 2008, the Financial Police wrote to the Customs Committee regarding Anatolie Stati's travel through Kazakhstan. (CPHB 2 ¶ 38, C-11).

300. On 19 or 20 October 2008, after deciding not to proceed to the firm bidding phase of Project Zenith, Mr. A. Stati learned of President Nazarbayev's 14 October 2008 Order. (Stati 2nd p. 4).

301. On 20 October 2008, the Financial Police wrote to the MEMR and an official in Moldova requesting information on Anatolie Stati, KPM, and TNG. (CPHB 2 ¶ 38).

302. On 24 October 2008, the Chief Inspector of the Financial Police, Mr. Turganbayev, reported that "*with respect to the companies controlled by A. Stati,[…] inspections regarding the completeness of payment of taxes, compliance with labor legislation, environmental protection legislation, as well as legislation in the sphere of subsoil use and industrial safety have been [initiated]*." He requested that the Deputy Head of the Department for Investigations of the Financial Police extend the inspection term two months to 16 December 2008. (C-430; C-II ¶ 213; CPHB 2 ¶ 38, 128).

303. On 24 October 2008, the Financial Police ordered comprehensive tax inspections of KPM and TNG. (CPHB 2 ¶¶ 38, 128).

304. On 24 October the MEMR responded to the Financial Police request for KPM's and TNG's corporate documents showing their shareholdings. (CPHB 2 ¶ 117).

305. By letter of 27 October 2008, Gazprom refused to accept KazTransGaz as the exporter. (RPHB 2 ¶ 499).

306. On 28 October 2008, the Financial Police ordered the Geology Committee, the Ecology Committee, the National Bank of Kazakhstan, the Tax Committee, and the MES to carry out inspections of KPM and TNG and insisted that Financial Police be permitted to participate. (C-0 ¶ 36, CPHB 2 ¶¶ 38, 61, 128).

307. On 30 October 2008, the Financial Police issued a finding that Anatolie Stati is not a registered businessman in Kazakhstan, but that he carries out his business through Ascom. They found that "*ASCOM SA owns 100% of the participation share in KPM*." (C-II ¶ 86; CPHB 2 ¶ 38).

308. On 30 October 2008, the Financial Police reported on KPM's and TNG's activities and noted specific items to inspect, but found that KPM and TNG were compliant with their investment obligations. (CPHB 2 ¶ 38).

309. In the fall of 2008, TNG's largest non-local customer, Kemikal, failed to post bank guarantees that were part of its required payment terms. Claimants state that, because Kemikal had an erratic payment history, TNG chose not to renew that contract without the bank guarantees in place (and in fact, ended up pursuing Kemikal until June of 2009 to acquire the last of Kemikal's overdue payments). TNG approached KazRosGas about purchasing its excess gas for export, but KazRosGas never responded. (C-II ¶ 382, partially quoted; R-II ¶¶ 751 - 752). Respondent notes that Kemikal is a commercial entity that cannot be attributed to the state. Likewise, KazRosGas is a joint venture under equal participation of Gazprom and KMG and the Republic is not responsible for its actions. Kemikal stopped payments toward the end of 2008 because of "*liquidity and insolvency*" issues, per the PwC Due Diligence Report. (R-II ¶¶ 757 – 758; RPHB 2 ¶¶ 21 – 23, 61, 124).

310. In November 2008, Renaissance Capital asked KNOC to revise their bid. (RPHB 1 ¶ 95).

311. By 1 November 2008, Financial Police informed the Deputy Prime Minister of Kazakhstan that it had discovered that Anatolie Stati left Kazakhstan in 2007. (C-II ¶ 212).

312. On 1 November 2008, Financial Police reported to Deputy Prime Minister, confirming the ownership of KPM and TNG and informing him that inspections were being carried out. (CPHB 2 ¶ 38).

313. On 4 November 2008, the Committee of Geology and Subsoil Resources Use of the MEMR commenced an audit of KPM and TNG regarding compliance on legislation on industrial safety. This inspection was organized and attended by the Financial Police and was scheduled to last until 15 November 2008. (C-I ¶ 89; CPHB 2 ¶¶ 38, 61; RPHB 2 ¶ 157).

314. On 7 November 2008, the Tax Committee initiated a targeted audit of KPM and TNG at the request of the Financial Police regarding transfer pricing ("*Transfer Price Audit*"). (C-I ¶ 172; CPHB 2 ¶¶ 38, 128). Respondent does not admit that the audit was instructed by the Financial Police. (R-I ¶ 30.62).

315. On 7 November 2008, Anatolie Stati wrote to President Nazarbayev, assuring him that there were no reasons to investigate KPM and TNG. (CPHB 2 ¶¶ 38, 142).

316. On 7 November 2008, the Financial Police ordered the Customs Committee to inspect KPM and TNG for compliance with payment of export duties. (CPHB 2 ¶¶ 38, 128).

317. The comprehensive tax audits of KPM and TNG began on 10 November 2008. The audits covered the period from 1 January 2005 through 31 December 2007 for KPM, and 1 January 2003 through 31 December 2007 for TNG. The audits pertained to corporate income tax, royalties, individual income tax, social tax, property tax, land tax, tax on vehicles, excise taxes, corporate income tax on non-resident legal entities, and payment for use of natural and other resources. (C-0 ¶ 60; C-I ¶ 156; CPHB 2 ¶¶ 38, 128).

318. On 11 November 2008, the MEMR's Geology Committee concluded its audit (4 days ahead of schedule) and found that KPM and TNG were in compliance with their obligations. (C-I ¶ 89; CPHB 2 ¶¶ 38, 61). Respondent reports that an inspection was carried out to assess whether KPM and TNG were acting in compliance with their licenses. Reports were written after the inspection and were signed by Mr. Cornegruta (KPM) and Mr. Cojin (TNG). (RPHB 1 ¶ 192). The Financial Police attended this meeting, but the ARNM did not. (R-I ¶ 26.8; R-II ¶ 455). The Financial Police found that KPM did not have a trunk pipeline license. (C-II ¶¶ 16, 380). .

319. On 12 November 2008, following the site visit, the Financial Police asked ARNM whether KPM, TNG, and another Stati company called "*Kok Mai*" held a license for a trunk pipeline. (CPHB 1 ¶ 155; CPHB 2 ¶ 61; R-I ¶ 26.9; R-II ¶¶ 464 – 465; RPHB 1 ¶¶ 198 – 202).

320. On 12 November 2008, the Financial Police ordered the Customs Committee to inspect KPM's and TNG's import/export volumes. (CPHB 2 ¶ 38).

321. On 13 November 2008, the Tax Committee noted that including the Financial Police in inspections would be illegal and proposed that a working group be established instead to review inspection results. (CPHB 2 ¶¶ 38, 128).

322. On 14 November 2008, the MEMR reported to the Financial Police on KPM's and TNG's export volumes. (CPHB 2 ¶ 38).

323. On 14 November 2008, the ARNM replied to a request for clarification by Mr. Turganbayev that KPM and TNG had each applied for – but neither held - licenses to operate main pipelines, and that operation of a trunk pipeline requires such a license. (C-I ¶ 90, CPHB 2 ¶ 61; R-I ¶ 26.10; R-II ¶ 466; RPHB 2 ¶ 164).

324. Claimants allege that, on 14 November 2008, Financial Police insisted that Mr. Cojin and Mr. Cornegruta sign inspection reports "*admitting*" that KPM and TNG do not hold licenses to operate "*main*" pipelines. (CPHB 2 ¶ 61). Respondent contests this allegation and states that it is only supported by the incredible testimony of Mr. Cojin. (RPHB 2 ¶¶ 158 – 160).

325. On 17 November 2008, the Financial Police determined that the pipelines were trunk pipelines, and then discovered that KPM and TNG did not have the necessary licenses. (R-I ¶ 38.22; RPHB 2 ¶¶ 165 – 172). Claimants refer to this as the "*reclassification*" and Respondent calls it a "*discovery*." (C-II ¶ 249; R-I ¶¶ 22.6, 23.19, 38.22; R-II ¶¶ 451, 542).

326. On 17 November 2008, the Financial Police ordered a new audit of KPM and TNG to determine the income from its trunk pipeline operations, as well as KPM's entire revenue for onward sales of oil. (C-0 ¶ 42; C-I ¶ 92; CPHB 2 ¶¶ 38, 61, 81; R-II ¶ 469; RPHB 2 ¶¶ 172 – 173). .

327. A 17 November 2008 agreement memorialized the TNG, KazAzot, and KazTransGas (later replaced with its parent company KMG) tri-partite terms on price, volumes, and conditions. TNG and KMG signed the agreement and it was hand-delivered to KazAzot for signature, but KazAzot never signed the agreement. (C-I ¶ 60; CPHB 1 ¶ 130).

328. On 18 November 2008, the Financial Police issued a resolution for the inspection of unpaid customs taxes by TNG. (CPHB 2 ¶¶ 38, 128).

329. On 18 November 2008, the ARNM replied that TNG and KPM did not hold licenses for trunk pipelines and that Kok Mai had never been asked about such licenses, previously. (RPHB 1 ¶ 198).

330. KPM and TNG first made contact with the MES, the state authority responsible for the supervision and control of industrial safety of in-field and main pipelines, on 19 November 2008. (R-I ¶ 28.10).

331. On 19 November 2008, the Tax Committee, at the request of the Financial Police, determined that the amount of "*illegal profit*" from operation of the trunk pipeline was 41.8 billion Tenge (USD 348 million as of November 2008) for KPM, and 37.7 billion Tenge (USD 314 million as of November 2008) for TNG. (C-0 ¶ 42; C-1 ¶ 92 (stating 2 December 2008); C-II ¶ 330; CPHB 1 ¶ 160; CPHB 2 ¶¶ 61,

81). Claimants state that these were crude calculations that amounted to all of KPM's and TNG's oil and gas production revenues from the Borankol and Tolkyn fields for the audited period 2005-2007. (C-0 ¶ 42). Claimants provide the Tribunal with a detailed explanation as to how the Tax Committee erred in its calculation at C-II ¶¶ 330 – 331, which Respondent contests at R-II ¶ 620. Respondent states that these calculations were based on TNG's own tax filings and were based on the underlying materials of KPM. (R-I ¶ 26.19).

332. On 19 November 2008, the Specialized Interdistrict Court of Mangystau Region delivered a judgment in KPM's favor in response to KPM's challenge of export duties. The Court ruled that the imposition on KPM of the Crude Oil Export Tax was illegal. (R-I ¶ 30.56; R-II ¶ 743; C-I ¶ 164).

333. On 19 November 2008, KPM and TNG obtained written confirmation from the MES that "***all pipelines operated by your enterprise**, from the place of extraction **to the point of transferring the hydrocarbons to the oil and gas main pipelines are not main pipelines**. We would also like to communicate that **the extraction of oil** (crude oil, gas condensate, and natural gas) to the surface, **treatment and transportation of oil to the place of transfer into a main pipeline and (or) another means of transport form a single technological process of oil production.***" (C-II ¶ 283, partially quoted, emphasis maintained; CPHB 1 ¶ 172; CPHB 2 ¶¶ 38, 61, 98).

334. Respondent clarifies that the 19 November 2008 letter from the MES states that only some of Claimants' pipelines are not trunk pipelines. In any event, the letters were beyond the competence of the MES. (R-I ¶¶ 28.11 - 28.13).

335. On 20 November 2008, the Financial Police commenced an investigation concerning KPM's contractual export tax exemption. (C-0 ¶ 72). They ordered an economics expert from the Ministry of Justice to confirm Tax Committee calculations and instructed that the calculation include transport fees received from TNG's and KPM's revenues from sales of oil. (CPHB 2 ¶ 81).

336. On 21 November 2008, Financial Police ordered the MES to withdraw its statements confirming that KPM's and TNG's pipelines are not "*main*" on the basis that the MES is not competent to provide that conclusion. (CPHB 2 ¶¶ 38, 61, 98; R-I ¶ 26.12).

337. On 25 November 2008, Financial Police wrote to Ministry of Finance inquiring into why the Customs Committee "*exonerated*" KPM from oil export duties, given that KPM had provisionally paid the disputed duties. (CPHB 2 ¶¶ 38, 128).

338. In late November 2008, KazAzot requested that KMG perform another audit of the ammonia-carbamide complex project, especially regarding the delivery prices of gas, which KazAzot allegedly wanted reconsidered. KazAzot indicated that it would sign the 17 November 2008 agreement within six months, subject to the audit. (C-I ¶ 61).

339. On 28 November 2008, the Ministry of Justice economics expert confirmed the Tax Committee's calculation and concluded that KPM's illegal profits exceeded 41 billion Tenge. (CPHB 2 ¶ 81).

340. By a correspondence stamped with the date 28 November 2011, the National Bank acknowledged letters from the Financial Police dated 28 October and 31 October 2008 by which the National Bank was directed to conduct exceptional inspections and to include members of the Financial Police in the control team. The National Bank stated that although it could not comply with the request to include the financial police employees among the auditors, it would issue conclusions regarding the compliance by the companies with current legislation. The letter informed that an extraordinary inspection of KPM had occurred, while extraordinary inspections of TNG and Kok Mai had not occurred. (C-15).

341. On 2 December 2008, Financial Police sent an internal report confirming that KPM operated a "*main*" pipeline without a license and had gained illegal income of over 41 billion Tenge. (CPHB 2 ¶¶ 38, 61).

342. Claimants attempted to obtain a bridge loan to provide additional working capital in connection with their decision to put the companies on the market. On 5 December 2008, Credit Suisse sent Claimants a term sheet for a USD 150-175 million facility. (C-II ¶ 381).

343. On 10 December 2008, Mr. Turganbayev (Financial Police) reported to the Prime Minister that KPM and TNG were operating trunk oil and gas pipelines, but further inquiries were necessary since the Financial Police are not competent to classify pipelines. (C-II ¶ 220, CPHB 2 ¶¶ 38, 61; R-II ¶ 473).

344. The Transfer Price Audit was suspended on 12 December 2008. (R-II ¶ 407).

345. On 15 December 2008, the Financial Police opened a criminal investigation against KPM based on suspicions that KPM was operating a truck pipeline without a license, due to the following findings: (1) on 13 June 2008, KPM applied to the ARNM for re-issuance of a license, indicating that it believed it was operating a trunk pipeline, (2) on 14 July 2008 ARNM informed KPM that it needed to submit documents for the license to operate a trunk pipeline, (3) a 4 December 2008 MEMR report confirming that neither KPM nor TNG had been issued licenses for the operation of trunk pipelines, (4) confirmation that KPM had been operating the pipeline at least since 2005, (5) an expert report stating that TNG's pipeline was a trunk pipeline, and that this one was similar to KPM's, and (6) a 28 November 2008 report stating that KPM's income from operating the pipeline without a license amounted to 41,166,014,544 Tenge. (R-II ¶¶ 294; 475; RPHB 1 ¶ 222, RPHB 2 ¶¶ 177 – 179; CPHB 1 ¶¶ 168, 346; CPHB 2 ¶¶ 38, 61). Respondent concedes that the investigation phase started in December 2008 without a conclusive finding that the pipeline was trunk. (RPHB 2 ¶ 178).

346. On 18 December 2008, the yield to maturity on the Tristan notes increased from 26.319% to 45.666%. (RPHB 1 ¶¶ 77, 78).

347. On 18 December 2008, notified TNG of irregularities in the 2003 Gheso transfer and the corresponding potential violation of the State's pre-emptive right. The MEMR informed TNG that it was "*cancelling*" the State's explicit ruling of 20 February 2007 that allowed the 2003 transfer of TNG from Gheso to Terra Raf. The MEMR demanded that TNG submit a new application for the transfer. The notice required TNG to submit all documentation regarding Terra Raf's ownership

within 10 days, and that failure to do so would result in the MEMR unilaterally terminating TNG's Subsoil Use Contracts for the Tabyl Block and the Tolkyn field. (C-0 ¶ 27; C-I ¶¶ 19, 145, 276; C-II ¶¶ 16, 189, 228, 380, 402, CPHB 1 ¶ 214; RPHB 2 ¶ 281).

348. On 18 December 2008, INTERFAX issued a report accusing Claimants of having altered documents in order to defraud the State of its pre-emptive right to purchase the companies. The Parties dispute whether the Tribunal should view this as a MEMR press release (Claimants) or whether this was an independent press item that cannot be attributed to Respondent (Respondent). Respondent states that INTERFAX received the information from unofficial sources. (C-II ¶¶ 400, 402; CPHB 1 ¶¶ 137, 215, 347 – 348, 350; CPHB 2 ¶¶ 38; 117; R-II ¶¶ 171, 747 – 749, 796; RPHB 2 ¶¶ 7, 97).

349. On 18 December 2008, Credit Suisse sent Mr. Lungu of Ascom the INTERFAX press release and requested an explanation. After discussions, Credit Suisse informed Claimants that it would not provide the bridge loan until Claimants resolved their disputes with the Kazakhstan government. (C-II ¶ 381; CPHB 2 ¶¶ 117, 210 – 211). Respondent states that Claimants have not provided any proof that the news agency piece caused Credit Suisse to step back from providing the bridge loan. (R-II ¶¶ 747 – 749; RPHB 2 ¶¶ 95 – 99).

350. On 20 December 2008, the Financial Police began interrogation of KPM and TNG employees. (CPHB 2 ¶ 38).

351. On 22 December 2008, TNG refused to submit the required application before the MEMR and lodged objections to the State's reversal of its consent to the 2003 transfer. (C-I ¶ 146; CPHB 2 ¶ 117).

352. On 23 December 2008, the Board of Appeal of the Mangystau Regional Court accepted an appeal by the Aktau territorial customs body of the 19 November 2008 court ruling in favour of KPM. Subsequent appeals of the Mangystau Regional Court's decision were dismissed. (C-0 ¶ 72; C-I ¶ 165, CPHB 2 ¶ 128).

353. Claimants received a letter dated 24 December 2008 from the Financial Police, but disagree as to the legal content of the letter. The letter requested information regarding (a) the level of protection of the company, and (b) sales made by KPM to agents, individuals, and other businesses. (R-I ¶ 26.20; CPHB 2 ¶ 38). Claimants state the letter notified KPM that it was the subject of a criminal investigation for operating a main pipeline without a license. (C-0 ¶ 43; C-I ¶ 94). Respondent reports that this was not a notice of criminal investigation. (R-I ¶ 26.20).

354. On 24 December 2008, the Financial Police issued a summons for Anatolie Stati, Mr. Cojin, Mr. Salagor, and Mr. Cornegruta. (CPHB 2 ¶ 38).

355. On 24 December 2008, the State issued a decision that the Crude Oil Export Tax would not be applicable to crude oil exports subject to the Rent Tax, starting on 1 January 2009. (C-0 ¶ 73; C-I ¶ 166).

356. On 25 December 2008, Mr. Rakhimov of the Financial Police summoned and questioned KPM's General Manager, Mr. Cornegruta. Mr. Cornegruta was

considered a witness at the time. (C-I ¶ 95; R-I ¶¶ 26.21, 27.38). Claimants state that he was not allowed to be accompanied by counsel. (C-I ¶ 95). Respondent denies this and states that he was entitled to be accompanied by counsel. (R-I ¶ 27.39).

357. On 26 December 2008, Mr. Rakhimov summoned and questioned the then-Deputy Manager General for Finance of KPM and TNG, Mr. Veaceslav Stejar. (C-I ¶ 95; R-I ¶ 26.21).

358. On 26 December 2008, Financial Police ordered the seizure of TNG documents regarding contracts with third parties and the construction of pipelines. (CPHB 2 ¶ 38).

359. On 29 December 2008, the MEMR requested that TNG provide notarized documents evidencing the 2003 change in ownership of TNG. (C-I ¶ 147; CPHB 2 ¶ 117).

360. On 30 December 2008, KPM submitted a declaration for the quantities of crude oil to be exported by it in January 2009 (c.a. 21,000 tons) to the Aktau territorial customs body. KPM did not pay the Crude Oil Export Tax for these January 2009 exports and instead paid the newly applicable Rent Tax for Export. (C-0 ¶ 74; C-I ¶ 167).

361. On 30 December 2008, the Financial Police conducted an on-site investigation at the Borankol and Tolkyn Fields. (C-I ¶ 95; CPHB 2 ¶ 38). Respondent says that the purpose of the inspection was to specify the process of production, refining, and further transportation of hydrocarbon material, and to make sure that the pipelines matched the documents describing their construction, placement, and other physical features. (R-II ¶ 481).

362. Oil and gas prices were severely depressed in December 2008 and January 2009. (R-II ¶ 738). Respondent states that Tristan Oil's Annual Report for the Financial Year 2009 revealed a decrease in sales of 65.4%. (R-II ¶ 740).

363. On 30 December 2008, the Tax Committee issued an Act of Inspection, claiming that TNG cannot deduct 100% of drilling expenses the year they are incurred for corporate income tax purposes. (CPHB 2 ¶ 128).

364. The EPT for the year ending 31 December 2008 was USD 11.2 million for KPM and USD 20.8 million for TNG. Claimants have not contested the imposition of these tax payments. (R-II ¶¶ 761 – 762).

365. In January 2009, the second phase of Project Zenith began. Potential bidders, including KMG EP, were given access to the data room. (R-I ¶ 16.10; R-II ¶ 358).

366. On 5 January 2009, Mr. Rakhimov asked the MEMR to ascertain whether KPM's 17.9 km pipeline was a main pipeline. (CPHB 1 ¶ 171, CPHB 2 ¶ 61).

367. On 5 January 2009, the research and design institute of KMG NC concluded that the KPM and TNG pipelines are not main pipelines. (CPHB 1 ¶ 173; CPHB 2 ¶¶ 61, 98).

368. On 8 January 2009, the National Scientific and Research Centre on Industrial Safety of the MES confirmed that the relevant KPM and TNG pipelines were field pipelines and not main pipelines. (CPHB 1 ¶ 172, CPHB 2 ¶¶ 61, 98).

369. On 9 January 2009, NIPI Neftegaz confirmed that KPM's and TNG's pipelines are not "*main*." (CPHB 2 ¶¶ 61, 98).

370. On 14 January 2009, the Fitch ratings agency issued a rating watch for Tristan's long-term default rate, due to the cloud on TNG's title and the criminal investigation of KPM. (CPHB 1 ¶¶ 219, 349; CPHB 2 ¶¶ 38, 117).

371. On 14 January 2009, the Financial Police issued a resolution to appoint three investigators to the criminal investigation. (CPHB 2 ¶ 38).

372. On 15 January 2009, Moody's reported a downgrade review, as a result of the criminal investigation of KPM and the pre-emptive right claim concerning TNG. (CPHB 2 ¶¶ 38, 117).

373. The 16 January 2009 JSC Registrar Zerde for TNG shows 8 share transfers involving TNG. (RPHB 2 ¶ 273).

374. On 19 January 2009, KPM and TNG submitted complaints against the actions being taken by the Financial Police with the GPO, the Ministry of Justice of the Republic of Kazakhstan, the Financial Police itself, the MEMR, and the Western Regional Transport Prosecutor. They nevertheless complied with the request for documents. (C-I ¶¶ 96, 332; CPHB 2 ¶¶ 38, 117, 142).

375. On 20 January 2009, KPM and TNG submitted complaints to the Transport Prosecutor for Mangystau region, describing the illegal actions of the Financial Police and the fact that their pipelines are not "*main*" pipelines. (CPHB 2 ¶ 142).

376. On 20 January 2009, TNG complied with the MEMR's 29 December 2008 requested for notarized documents evidencing the change in ownership of TNG. (C-I ¶ 147).

377. On 21 January 2009, the Transport Prosecutor of the Mangystau Region forwarded KPM's and TNG's complaints to prosecutor for the Western Region. (CPHB 2 ¶ 142).

378. On 22 January 2009, Financial Police requested corporate documents from KPM. (CPHB 2 ¶ 38).

379. On 23 January 2009, Financial Police requested corporate documents from TNG. (CPHB 2 ¶ 38).

380. On 22 – 23 January 2009, the GPO forwarded KPM's and TNG's complaints to the Regional Prosecutor. (CPHB 2 ¶ 142).

381. On 26 January 2009, the GPO sent KPM, through Mr. Cornegruta, a letter (C-629). (CPHB 2 ¶ 38).

382. On 27 January 2009, the Transport Prosecutor forwarded KPM's and TNG's complaints to the prosecutor for the Western Region. (CPHB 2 ¶ 142).

383. On 29 January 2009, KPM and TNG sent complaints to the Financial Police regarding seizure orders and requested a copy of the order that was serving as the basis for the criminal investigation. (CPHB 2 ¶ 142).

384. On 30 January 2009, the Deputy Transport Prosecutor for the Western Region informed KPM and TNG that the complaints are under investigation pending responses from the Financial Police. (CPHB 2 ¶ 142).

385. On 2 February 2009, the Financial Police notified Claimants that their complaints were rejected and that TNG was the subject of a criminal investigation on the same basis, which led to criminal charges against the in-country manager of TNG from 2002 to 2009. The charges were later suspended. The Financial Police rejected the request to provide the order on the ground that no person was the subject of the investigation. (C-0 ¶¶ 43, 54; C-I ¶ 96; CPHB 2 ¶¶ 38, 61, 142). Respondent accuses Claimants of submitting a misleading translation of C-98. (RPHB 1 ¶ 1065).

386. On 4 February 2009, KPM and TNG wrote to the ARNM and asked to be included in the analysis for the classification of the pipelines. (CPHB 2 ¶ 142).

387. On 4 February 2009, the GPO forwarded complaints from KPM and TNG to the Transport Prosecutor of the Mangystau Region. (CPHB 2 ¶ 142).

388. On 4 February 2009, Financial Police interviewed Mr. Cojin (General Manager of TNG) to determine whether he or Mr. Cornegruta would be the appropriate defendant in any criminal proceedings. (R-II ¶ 480).

389. On 4 February 2009, the MEMR wrote to the Financial Police that the KPM pipeline "*belongs to pipelines working as a gathering manifold and is not a main pipeline*." (CPHB 1 ¶ 171; CPHB 2 ¶¶ 38, 61, 98). Respondent states that this MEMR letter was withdrawn on the MEMR's own accord on the basis that it had not been reviewed by the legal department. (RPHB 1 ¶¶ 229 – 230; RPHB 2 ¶ 183). The 4 February 2009 letter is an internal government document which was not included in Mr. Cornegruta's criminal file. In this regard, Respondent reiterated its concerns about Claimants' access to internal documents. (RPHB 2 ¶ 186).

390. On 5 February 2009, KPM and TNG wrote to the MEMR asking to be included in the analysis regarding the classification of the pipelines. (CPHB 2 ¶ 142).

391. On 5 February 2009, the Transport Prosecutor of Mangystau Region forwarded complaints of KPM and TNG to First Deputy Transport Prosecutor of the Western Region. (CPHB 2 ¶ 142).

392. On 9 February 2009, the Financial Police ordered the College of Experts of the MOJ to produce an expert report to classify the KPM pipeline. (C-I ¶ 104; C-II ¶ 249; CPHB 1 ¶ 181; CPHB 2 ¶¶ 38, 61). Respondent states that the cover letter to the 9 February 2009 Order explained that the Financial Police were under time

pressure and required determination of the issue. Mr. Baymaganbetov stated that these resolutions were received frequently by the department in respect of investigations of companies. (R-II ¶ 553).

393. On 10 February 2009, Mr. Baymaganbetov met Mr. Turganbayev, who had previously been in charge of the inspection and of procuring a preliminary report on the classification of pipelines. (R-II ¶ 554). The two men set out the four documents that had been given to Mr. Baymaganbetov. (CPHB 2 ¶¶ 38, 61; RPHB 2 ¶ 195). Mr. Baymaganbetov was entitled to seek out as much further information as he needed. Respondent states that the four other so-called "*expert*" opinions procured by Claimants were not shown to Mr. Baymaganbetov because they could have unfairly tainted his opinion. (RPHB 2 ¶¶ 195 – 196).

394. The comprehensive tax audits of KPM and TNG lasted until 10 February 2009. (C-0 ¶ 61). On that date, the State sent notices/Acts of Inspection to KPM and TNG that the Article 23 amortization rate, and not the Article 20 rate, was applicable to the companies' well drilling costs for the years 2005 to 2007 and assessed approximately USD 62 million in back taxes and penalties against the companies. (C-0 ¶ 61 and 53 partially quoted, cites 69 million; C-I ¶¶ 19, 159; C-II ¶¶ 16,223, 380; CPHB 1 ¶¶ 139, 243; CPHB 2 ¶¶ 38, 128).

395. On 11 February 2009, the letter prepared on 4 February was replaced by a letter dated 11 February, in which the MEMR wrote to KPM and TNG stating that it was not competent to resolve their complaints. (RPHB 1 ¶ 229).

396. On 13 February 2009, MEMR wrote to KPM and TNG stating that it is not competent to resolve their complaints regarding the criminal prosecution and suggested that they write to the GPO. (CPHB 2 ¶ 142).

397. On 13 February 2009, the MEMR wrote to the Financial Police and provided them information on how the definition of "*trunk pipeline*" in Art. 1 of the Law on Oil should be interpreted. The MEMR noted that an expert would need to be appointed to determine the status of the pipelines. (RPHB 2 ¶ 183).

398. On 13 February 2009, Mr. Baymaganbetov issued the expert decision that KPM's pipelines were trunk pipelines. He based this decision only on the documents received from Mr. Turganbayev. Respondent states that Mr. Baymaganbetov came to his decision quickly because the matter at hand was not unduly complex and he had time to devote to the issue, which fitted with the Financial Police's need for a prompt opinion. In any event, Mr. Baymaganbetov required at least three times as long to issue his opinion than did Claimants' purported expert, Mr. Idrisov. (R-II ¶¶ 554 – 555; CPHB 2 ¶¶ 38, 61, 98; RPHB 2 ¶¶ 188, 193).

399. On 16 February 2009, TNG provided the 12 May 2003 SPA between Gheso and Terra Raf to the MEMR. (CPHB 2 ¶ 117).

400. On 18 February 2009, Moody's downgraded the Tristan debt due to the "*amplified regulatory and operational risk*" posed by the unresolved criminal investigation of KPM and the pre-emptive right claim concerning TNG. (CPHB 2 ¶¶ 38, 117).

401. In mid-February 2009, Turkish Petroleum Corporation and PSA Energy Holding SPC were granted access to the Project Zenith data room containing over 2,000 reports, agreements, surveys, maps, and other documents relating to KPM's and TNG's geological data, operations, and financial, tax, and legal matters. The geological data contained in the data room included 3D seismic data, interpreted seismic horizons, faults (cuts and boundaries), and well tops and coordinates. These companies later withdrew from the bid process. (C-I ¶ 186; R-II ¶ 763).

402. On 24 February 2009, Financial Police seized KPM's corporate documents. (CPHB 2 ¶ 38).

403. On 24 February 2009, TNG complained to MEMR regarding the negative effects of the December 2008 publication on its business and reputation. (CPHB 2 ¶ 117).

404. On 27 February 2009, the State responded to TNG's objections to the 18 December 2008 notice, stating that the transfer of TNG to Terra Raf had breached the State's statutory pre-emptive right to acquire TNG. The State demanded that TNG submit a new application for the consent to the transfer and waiver of the State's pre-emptive purchase right and that failure to do so would result in termination of TNG's Subsoil Use Contracts. (C-0 ¶ 28, partially quoted; C-I ¶ 148; CPHB 2 ¶¶ 38, 117). This was the last action from the MEMR with regard to the pre-emptive rights claim. (CPHB 2 ¶ 117).

405. On 27 February 2009 and 2 March 2009, respectively, KPM and TNG filed separate complaints before the Tax Committee requesting cancellation of the 10 February 2009 notices. The Tax Committee refused to consider the complaints and Claimants spent the next 1.5 years litigating the matter before Kazakh courts. (C-0 ¶ 63; C-I ¶ 159; CPHB 2 ¶¶ 128, 142).

406. Claimants report that, in February 2009, Claimants made a management presentation for TOTAL. After examining the data room and the management presentation, TOTAL stated that they were going to speak with the Kazakh authorities about the properties before they would be willing to move ahead with a binding proposal. Claimants state that TOTAL spoke with the Kazakh authorities in late February or early March 2009, and withdrew from the bid process, allegedly for technical reasons relating to the properties, but likely because Kazakh authorities discouraged them. (C-I ¶ 187). Respondent states that Claimants have not provided substantiation of their claim that Kazakh authorities spoke to TOTAL. (R-II ¶ 799).

407. On 3 March 2009, NIPI Neftegaz and the Kazakh Research and Design Institute of KMG confirmed to TNG that drilling wells amounts to construction and, thus, drilling expense can be deducted 100% in the year incurred as expenses for own-account construction. (CPHB 2 ¶ 128).

408. On 3 and 4 March, 2009, Financial Police seized KPM's and TNG's corporate documents. (CPHB 2 ¶ 38).

409. On 5 March 2009, Moody's downgraded the Tristan debt again, based on the worsening treatment of KPM and TNG by Kazakhstan and, in particular, the opening of a formal criminal investigation against TNG. (CPHB 2 ¶ 38).

410. On 9 March 2009, Claimants re-filed their notice of discovery in the East Munaibay structure and filed a notice of discovery in the Bahyt structure with the MEMR. Claimants also re-notified the MEMR of their intention to exercise their contractual right to extend the exploration period in the Tabyl Block by two years. (C-0 ¶ 58, partially quoted; C-I ¶ 176). Because there had been no response to the extension request, Claimants declared their intention to appraise those discoveries. (CPHB 2 ¶ 151).

411. On 11 March 2009, the MEMR confirmed to KPM that the drilling of wells amounts to construction and that, thus, drilling expenses can be deduced 100% in the year incurred as expenses for own-account construction. (CPHB 2 ¶ 128).

412. On 18 March 2009, TNG responded to the State's 27 February 2009 notice of breach and offered the State three alternatives: (1) revocation of the notice that purported to "*reverse*" the State's February 2007 decision; (2) TNG's reapplication for a transfer permit, if the State would agree to pay USD 1.347 billion in compensation if the permit was denied, or (3) referral of the dispute to the Arbitration Institute of the SCC and maintenance of TNG's status quo rights under the TNG Subsoil Use Contracts, pending a final arbitral decision. (C-0 ¶ 29; C-I ¶¶ 38, 149; CPHB 2 ¶ 117). Respondent cites this letter as an attempt to provoke the Republic. (R-I ¶ 9.76).

413. On 18 March 2009, KPM and TNG filed a complaint against initiation of criminal cases undertaken by the Financial Police, with the GPO. (C-I ¶¶ 96, 332; CPHB 2 ¶¶ 38, 142).

414. On 19 March 2009, a meeting chaired by the MEMR Executive Secretary, Mr. A. B. Batalov, and attended by representatives of Terra Raf, TNG, Ascom, and KPM was held at the MEMR offices. All of the State's actions against Claimants since President Nazarbayev's 14 October 2008 investigative directive were discussed. Claimants state that Mr. Batalov assured Claimants that all of these issues would be disposed of in favour of TNG and KPM, and that TNG's Subsoil Use Contracts would not be cancelled, if TNG simply submitted a new application for its transfer to Terra Raf and permitted the State to re-evaluate its prior consent. Mr. Batalov also stated that, because the size and value of TNG had changed since the 2003 transfer to Terra Raf, the State would require a new and contemporary evaluation of TNG's books and assets (as of February 2007) in order to properly re-evaluate the transfer. KMG would conduct this new evaluation. Claimants state that the MEMR assured them that the pre-emptive right claim would be resolved in their favour. (C-0 ¶¶ 30 – 31, 82; CPHB 2 ¶¶ 38, 117, 151). Claimants also report that Mr. Batalov and his deputy indicated that the reclassification of sections of TNG's and KPM's in-field pipelines as trunk pipelines was, in the MEMR's view, due to a defect in the applicable legislation. Finally, Claimants state that the MEMR also indicated that the Financial Police ought to rely on opinions of experts. Minutes of the meeting were prepared by Mr. Grigore Pisica and were offered to Mr. Batalov for his signature, but he refused to sign. (C-I ¶¶ 106, 150, 152, 177). Respondent agrees with the above, but states that "*it is simply not the case*" that Mr. Batalov assured the Claimants that all outstanding issues in relation to TNG and KPM would be resolved in Claimants' favour, or that there was any "*reclassification*" of pipelines. (R-I ¶¶ 13.47(e)(v), 21.1).

415. On 24 March 2009, TNG applied for permit for the transfer of TNG's ownership to Terra Raf and for a written decision on the State's waiver of its pre-emptive rights. (C-0 ¶ 32, partially quoted; C-I ¶¶ 153, 332).

416. On 24 March 2009, TNG applied to MEMR for the inclusion of the issue of the extension of the exploration period of Contract 302 for 2 years into the agenda of the next meeting of the Expert Commission. (R-I ¶ 31.69).

417. On 24 March 2009, KPM and TNG sent a complaint to President Nazarbayev. (CPHB 2 ¶ 142).

418. On 25 March 2009, TNG sent the State a request for a written decision regarding the right of TNG to transfer Terra Raf's ownership interests to a prospective third party buyer, including KMG, based upon a competitive bidding process and direct negotiations. No response was ever received. (C-0 ¶ 32, partially quoted; C-I ¶¶ 153, 154, 332).

419. On 27 March 2009, Financial Police order KPM and TNG to submit originals of their corporate documents. (CPHB 2 ¶ 38).

420. On 30 March 2009, KPM responded to the Financial Police's request for documents and requested copies of the criminal investigation order. The Financial Police ordered TNG to submit additional original company documents. (CPHB 2 ¶ 38).

421. On 30 March 2009, the Transport Prosecutor for the Western Region wrote to KPM and TNG stating that complaints were under investigation and noted that it had received nothing from the Financial Police in response to inquiries. (CPHB 2 ¶ 142).

422. On 30 March 2009, Contract 302 expired. (R-II ¶ 411).

423. In April 2009, KMG received access to the complete Project Zenith data room. (C-I ¶ 191; C-II ¶ 383).

424. Claimants removed CASCo, a Stati-owned service company that was doing the service work in the fields, from the field in 2009. (C-II ¶ 409; R-I ¶ 9.70; R-II ¶ 791). Respondent notes that Anatolie Stati's testimony regarding ownership of CASCo was inconsistent with and, indeed, was contradicted by other witnesses, his previous statements, and Claimants' own due diligence of 29 August 2008. (RPHB 1 ¶¶ 117 – 136).

425. Respondent reports that, in April 2009, Gabriel Stati was arrested following elections in Moldova, amid allegations that he was involved in the organization and financing of civil unrest and attempting to overthrow the Moldovan government. Moldovan authorities extradited him from the Ukraine. (R-II ¶ 35).

426. On 2 April 2009, the Expert Commission passed the Decision, recommending the extension of Contract 302 for 2 years. (R-I ¶ 31.70; CPHB 1 ¶ 236, CPHB 2 ¶ 151).

427. On 6 April 2009, Financial Police requested information on TNG's costs for oil and condensate in relation to the criminal case against KPM. (CPHB 2 ¶ 38).

428. On 9 April 2009, the MEMR issued a written statement to execute the extension of Contract 302 to 30 March 2011, which Claimants state that they requested on 9 March 2009, and which Respondent states was requested on 24 March 2009. Claimants state that MEMR notified TNG of its agreement to extend Contract 302 and undertook to execute the amendment by 2 July 2009. (C-0 ¶ 58; C-I ¶¶ 22, 178; C-II ¶ 241, CPHB 1 ¶ 224, CPHB 2 ¶ 151; R-I ¶ 31.71). Respondent states that the adopted decision has the character of a recommendation and is only one of many legal actions required for a valid contract extension. (R-I ¶¶ 31.72 - 31.73; R-II ¶ 414). Respondent states that the true translation of the decision highlights that actual prolongation of the contract remains to be undertaken. (R-II ¶¶ 413, 419 – 424). Since TNG did not apply for a renewal license No. 243-D in conjunction with the application for the extension, the competent authority had no right to extend the term of the Contract 302. (R-I ¶ 31.79; R-II ¶ 436). To add context, Respondent states that, in 2008, the competent authority received 152 applications for extension of exploration periods. Of these, 31 were refused. In 2009, the competent authority received 139 applications, of which 38 were refused. (R-I ¶ 31.81).

429. On 13 April 2009, five experts from the Russian Science and Research Institute for the Construction and Operation of Pipelines and Energy Facilities issued expert opinions affirming that the pipelines in question were not trunk pipelines. (C-I ¶ 101; C-II ¶ 289; CPHB 2 ¶¶ 61, 98).

430. On 20 April 2009, Mr Rakhimov decided to detain KMG's general manager, Mr. Cornegruta, and opened criminal proceedings against him for the crime of illegal entrepreneurial activity under Art. 190(2)(b) of the Criminal Code of the Republic. At that time, Mr. Cornegruta was named as a potential defendant. (R-II ¶ 487; RPHB 1 ¶ 230, RPHB 2 ¶ 189).

431. On 22 April 2009, the Financial Police ordered additional documents from KPM. (CPHB 2 ¶ 38).

432. On 25 April 2009, the Financial Police arrested Mr. Cornegruta and took him in for interrogation. (CPHB 2 ¶¶ 38, 61).

433. On 26 April 2009, Claimants filed complaints against the Financial Police, including its head investigator, Mr. Rakhimov. The same day, 900 employees of KPM, TNG, and CASCo that were on shift addressed and signed a letter to the Governor of the Mangystau Region expressing their concerns. (C-I ¶¶ 109).

434. On 27 April 2009, Mr. Batalov was fired as Executive Secretary of MEMR. (C-I ¶¶ 106, 332).

435. On 27 April 2009, the court of Aktau considered and rejected a petition against Mr. Cornegruta's arrest. (RPHB 1 ¶ 244).

436. On 28 April 2009, KazAzot explained that it did not sign the 17 November 2008 Tri-Partite Agreement because, among other things, an audit that it had carried out,

particularly in light of the impact that the global financial crisis had had on the mineral fertilizers market, had demonstrated the unfeasibility of the project. (R-I ¶ 15.7).

437. On 30 April 2009, the Financial Police issued attachment orders in respect of KPM's and TNG's Subsoil Use Contracts. (R-I ¶ 29.2). Claimants report that the Financial Police issued no fewer than 10 orders for the sequestration of property, which resulted in freezing KPM's and TNG's shares, KPM's Contract 305, TNG's Contracts 210 and 302, KPM's field oil pipeline, TNG's field gas pipeline, TNG's condensate pipeline, and the companies' other property. Those orders prevented KPM and TNG from selling or depreciating the value of those assets. (C-I ¶ 121; C-II ¶ 335; CPHB 1 ¶ 140; CPHB 2 ¶¶ 38, 61).

438. On 30 April 2009 and on 4 May 2009, TNG submitted Addendum No. 9 of TNG's Tabyl Block Subsoil Use Contract to the MEMR for execution. TNG never received the MEMR's signature to the addendum extending TNG's exploration rights. (C-0 ¶ 58; C-I ¶¶ 22, 178; CPHB 2 ¶ 151).

439. On 30 April 2009, the Deputy Minister of the MES wrote to Claimants and asked them to withdraw his previous letters of 19 November 2008, as their issuance was beyond his competence. (R-I ¶ 28.13).

440. On 1 May 2009, the decision to detain Mr. Cornegruta was confirmed on appeal. (R-II ¶ 487; RPHB 1 ¶ 244).

441. Claimants and Respondent report that construction of the LPG Plant was halted in May 2009 due, at least in part, to "*cash constraints*." (C-I ¶ 64; R-I ¶ 19.24).

442. On 4 May 2009, Mr. Rakhimov of the Financial Police ordered an unscheduled inspection to determine the amount of income KPM had obtained by operating a trunk pipeline without a license. (RPHB 2 ¶ 190).

443. On 6 – 7 May 2009, pursuant to a search warrant dated 30 April 2009, the Financial Police conducted an overnight search of KPM's and TNG's offices for the other General Managers of KPM, Messrs. Salagor and Spasov, and the General Manager of TNG, Mr. Cojin, as well as information on their whereabouts. (C-I ¶ 111, CPHB 2 ¶ 38; R-I ¶ 27.47; R-II ¶ 486; RPHB 1 ¶ 233). The three in-country managers had been charged with the same offense as Mr. Cornegruta. The initial phase of the search started at 4:20 p.m. on May 6 and ended at 4:15 a.m. on May 7, 2007. (C-I ¶ 111). The search was carried out in the presence of Deputy Director General for Economic and Financial Affairs of TNG, Mr. Stejar. (R-I ¶ 27.47). Respondent states that the Financial Police procured human resources and financial records from KPM and TNG. (R-II ¶ 483). Respondent states that it became clear during the course of the investigation that most senior managers had left Kazakhstan. (R-II ¶ 486). The Parties dispute the level of inconvenience caused by the search. (C-I ¶ 111; R-II ¶¶ 301 *et seq.*). Claimants state that the Financial Police seized other documents not listed in the warrant and searched Mr. Cornegruta's flat. (C-I ¶ 112). Respondent makes no admission as to C-I ¶ 112, but notes that no complaints were made at the time. (R-I ¶ 27.48).

444. On 7 May 2009, Mr. Anatolie Stati, on behalf of Claimants, wrote to President Nazarbayev to obtain the release of Mr. Cornegruta, to protect the former and current management of KPM and TNG, and to end the dispute. (C-I ¶¶ 39, 113, 332, C-43; CPHB 2 ¶¶ 38, 142). Anatolie Stati decided to pause construction on the LPG Plant and to reduce planned development efforts at Tolkyn and Borankol. (CPHB 2 ¶ 38). Claimants also state that this letter made clear that Claimants intended to bring arbitration claims against Kazakhstan for the diminution of value of their investments once the sale to Cliffson closed. (C-II ¶ 392). While Respondent makes no admission as to whether any letter was written or sent to or received by President Nazarbayev, Respondent confirms the existence of the letters. (R-I ¶ 27.49; R-II ¶ 226). Respondent also notes that the Cliffson transaction, at earliest could have started in February 2010. (RPHB 2 ¶ 7).

445. On 13 May 2009, the Mangystau Regional department of the MES withdrew its letters about whether the pipelines were trunk pipelines. Respondent states that this was in response to the 30 April 2009 letter from the Deputy Minister of the MES and not to the letter from the Financial Police, dated 21 November 2009, as asserted by Claimants at C-I ¶ 91. (R-I ¶ 28.14).

446. On 15 May 2009, the Financial Police issued attachment orders in respect of KPM's and TNG's Subsoil Use Contracts and requested additional documents from KPM. (R-I ¶ 29.2; CPHB 2 ¶ 38).

447. On 15 May 2009, the Financial Police notified KPM and TNG that it had seized Claimants' equity interests in KPM and TNG two days before, on 13 May 2009. The asset and equity seizures were designed to prevent KPM and TNG from selling or transferring their interests during the course of the criminal proceeding against Mr. Cornegruta. (C-I ¶ 121). While Respondent does not admit that the Financial Police notified KPM and TNG that it had seized KPM's and TNG's equity interests on 13 May 2009, Respondent states that such a seizure would seem entirely appropriate in the circumstances, and if the Financial Police moved to gain interim measures of security over KPM and TNG pending the resolution of a *bona fide* underlying dispute, this would not be surprising. (R-I ¶ 26.26).

448. On 18 May 2009, the College of Experts of the Ministry of Justice calculated KPM's purported "*illegal profits*" from oil and gas transportation services at 5.9 million Tenge (approximately USD 48,300) for the period from 2002 through 2008. (C-I ¶ 92). This calculation also showed "*illegal profits*" of approximately 1,935,547 Tenge (approximately USD 15,000) for March 2007 – May 2008. (C-I ¶ 119). Respondent denies this and states that that expert considered that the value of income from illegally operating the trunk pipeline amounted to 65,479,414,197 Tenge for the period from April 2002 – 2008, and that its income during the relevant period in 2007 and 2008 was 21,673,919,031 Tenge. (R-I ¶¶ 26.23; 26.26; R-II ¶ 484; RPHB 2 ¶ 190). Respondent states that this calculation was necessary to determine whether the crime of illegal entrepreneurship had been triggered. (R-II ¶ 484). Respondent admits that the Court relied on this document when determining the amount of fine to be imposed on KPM. All of Claimants' other assertions concerning this report are denied. (R-I ¶ 27.60).

449. On 18 May 2009, the Financial Police issued an order on the refusal to initiate a criminal case. According to this, the Financial Police declined to initiate a criminal

case against Mr. Cornegruta based on the checks carried out by the MES, the Ministry of Environmental Protection, the Customs Control Committee of the Ministry of Finances, or the MEMR. (RPHB 2 ¶ 191).

450. On 18 May 2009, Mr. Rakhimov issued application to exclude Claimants' expert opinions about the classification of the pipelines. (R-II ¶¶ 631 - 632). The expert reports included a report dated 5 January 2009 from the Kazakh Scientific, Research, and Design Institute of Oil and Gas (a division of KMG) that found the pipelines owned by KPM and TNG "*do **not** belong to the category of **main** pipelines and are designated to ensure the process of hydrocarbons production*." (C-I ¶ 98, emphasis maintained). The expert reports also included a report that the Scientific, Research, and Design Institute of Oil and Gas Industry of NIPI Neftegaz concluded on 9 January 2009 that the pipelines owned by KPM and TNG were correctly "*classified as **in-field** pipelines*." (C-I ¶ 99, emphasis maintained). The court later deemed the Claimants' expert opinions to be inadmissible. (R-II ¶¶ 631 - 632). These so-called "*expert*" opinions did not evidence KPM and TNG's requests for those opinions, making it impossible to divine the scope of the request. There was no indication that the bodies were independent of Claimants, and some of the experts whose reports were excluded had a role in the construction of the pipelines and in the legal amendments regarding their status. In any event, they were not qualified to issue such opinions and had not been appointed pursuant to Art. 243 of the CPC. (RPHB 2 ¶¶ 203 – 207).

451. On 18 May 2009, the Kazakh Financial Police expressly determined that Anatolie Stati could "*not be held liable for performance of illegal business activities*" with respect to his companies in Kazakhstan. (C-II ¶ 213).

452. On 19 May 2009, the Financial Police ordered KPM and TNG to provide a valuation of all the property that it had seized. (C-II ¶ 335; CPHB 2 ¶ 38).

453. On 19 May 2009, Mr. Rakhimov announced the completion of the investigation and allowed Mr. Cornegruta and his lawyer to study the files of the criminal case. (R-II ¶ 488).

454. On 20 May 2009, Mr. Cornegruta's lawyers submitted a complaint to the Regional Prosecutor's office regarding his illegal arrest. (CPHB 2 ¶ 142).

455. Beginning on 25 May 2009, Mr. Cornegruta had access to lawyers who reviewed the file with Mr. Cornegruta. A defendant is entitled to an unlimited amount of time to consider the evidence put against him, as explained by Mr. Kravchenko at the Hearing on Jurisdiction and Liability. Mr. Cornegruta and his attorneys had access to the file until 30 July 2009. (RPHB 1 ¶ 245).

456. In May 2009, the Financial Police declared the reports from the KMG institute, the MES research center, NIPI Neftegas, and the Russian institute inadmissible in the criminal proceeding. Without making her own independent assessment, the judge also declared them inadmissible. (CPHB 2 ¶ 98).

457. At least by 5 June 2009, the Prime Minister, the MEMR, the Ministry of Justice, the Ministry of Finance, and Samruk-Kazyna contemplated a "*buyout*" of KPM and TNG and/or a termination of their Subsoil Use Contracts. (CPHB 2 ¶ 38).

Respondent notes that C-293, upon which this allegation is based, was obtained in violation of the law, and it is unclear what reliability it could have. (RPHB 1 ¶¶ 1120 – 1138).

458. On 12 June 2009, Terra Raf and Ascom filed petitions to lift the seizures. (C-0 ¶ 45; C-I ¶ 122).

459. On 15 June 2009, Mr. Cornegruta submitted a petition to stop the criminal proceedings against him. (CPHB ¶ 142).

460. On 15 June 2009, the Financial Police investigation team presented the indictment dated 15 June 2009 to the prosecution department of the Ministry of Justice. (R-II ¶¶ 446, 490).

461. Claimants state that they were only able to weather the liquidity storm in the summer of 2009 by obtaining emergency bridge financing from a group of venture capitalists (the "*Laren Facility*") on 16 June 2009. The Parties agree that the terms of the Laren Facility were terrible for Claimants (35% interest on a USD 60 million note, plus the issuance of USD 111 million of new Tristan notes). (C-II ¶ 384, CPHB 2 ¶ 117 (stating 11 June), R-II ¶¶ 765 – 766; R-268; RPHB 1 ¶¶ 58 – 61).

462. On 16 June 2009, TOTAL E&P's geologist Philippe Mallard sent Radu Constantin of Ascom an email containing TOTAL E&P's findings and concerns about chances of development, based on the 3D and 2D seismic data received. He requested additional information, but Claimants never provided it. The email ends with a recommendation to abandon the Project Zenith. (RPHB 1 ¶¶ 99 – 103).

463. On 17 June 2009, the Financial Police publically announced that the investigative phase had concluded and that the four former and current managers of KPM and TNG would be prosecuted for having realized an "*illegal profit*" of 147 billion Tenge (approximately USD 980 million as of June 2009). (C-0 ¶ 45, C-II ¶ 602; CPHB 2 ¶ 38 (calling the 147 billion the potential fine); R-I ¶ 26.24).

464. On 19 June 2009, the third tranche of the 2006 Bonds Project was issued, for USD 111.11 million. (R-I ¶ 9.59).

465. On 23 June 2009, the Financial Police submitted the case to the Public Prosecutor of the Western Regional Transport for consideration. (R-I ¶ 26.24).

466. On 23 June 2009, KPM and TNG separately filed cases against the Tax Committee in the Astana Economic Court seeking cancellation of the 10 February 2009 notices. (C-0 ¶ 64).

467. On 27 June 2009, the Terra Raf and Ascom petitions to lift the seizures were denied. (C-0 ¶ 45; C-I ¶ 122).

468. On 27 June 2009, Mr. Cornegruta was indicted and the Regional Prosecutor's Office wrote to Ascom and Terra Raf noting that an international search was underway for Mr. Cojin. (CPHB 2 ¶ 38; RPHB 2 ¶ 191).

469. On 30 June 2009, Squire Sanders confirmed that the 2003 transfer to Terra Raf was valid, but in light of the MEMR's claim of violation, recommended that waiver of the State's pre-emptive right regarding the 2003 transfer be a condition precedent to a sale. (CPHB 2 ¶ 117). Respondent states that this is misleading. Squire Sanders considered it unlikely that MEMR would terminate Contracts 210 and 302 because of the issue, but stated that Claimants had breached Art. 71 of the Subsoil Law because TNG did not apply for the necessary pre-emptive rights waiver. (RPHB 2 ¶ 279).

470. On 30 June 2009, Mr. Cornegruta moved to stop the criminal proceedings. This motion was rejected the following day. (CPHB 2 ¶ 142).

471. By 30 June 2008, the current ratio for KPM and TNG had decreased from 5.74 at the year end 2007 to 3.06 and their quick ratios had decreased from 5.33 at the year end 2007 to 2.91. The cash ratio had decreased from 0.51 to 0.13 for the same period. (RPHB 2 ¶ 67).

472. On 2 July 2009, the self-imposed deadline to extend Contract 302 expired, without an extension of that contract. (CPHB 2 ¶¶ 38, 151).

473. On 2 July 2009, Prof. Suleymenov, author of Kazakhstan's Law on Oil, issued an expert legal opinion that KPM's pipelines are not "*main*." (CPHB 2 ¶¶ 61, 98).

474. On 10 July 2009, a Fitch Ratings Press Release indicated that market observers were concerned about "*weak corporate governance standards at Tristan*." (RPHB 2 ¶ 61).

475. The trial involving Mr. Cornegruta and KPM lasted from 30 July until 18 September 2009. (CPHB 2 ¶ 98 (trial until 14 September, verdict on 18 September). At the trial, the State introduced a letter Mr. Cornegruta had written on 13 June 2008 to the ARNM as its principal evidence that Mr. Cornegruta had "*confessed*" that KPM operated a trunk pipeline. (C-0 ¶ 47; C-I ¶¶ 115 – 116; CPHB 2 ¶ 38; R-I ¶ 27.5). In his defense at trial, Mr. Cornegruta's counsel argued that Mr. Cornegruta is not an entrepreneur, that he is an employee of KPM, that he does not own KPM, that his June 13, 2008 letter was not a "*confession*," and that the KPM gathering system pipelines are not "*trunk*" pipelines.

476. Respondent states that KMG EP withdrew from Project Zenith in July 2009 after deciding that it was not commercially sensible to purchase the assets due to the amount of debt involved. (R-II ¶¶ 359, 790).

477. Claimants state that, in July 2009, KNOC re-entered the bid process. Claimants state that KNOC examined the Project Zenith data room, Claimants conducted a management presentation for them in July, and that representatives of KNOC also went for a site visit of the properties in August of 2009. KNOC was only willing to proceed with a binding bid after it had spoken with the Kazakh authorities about the properties. Claimants later learned that KNOC had spoken with the Kazakh authorities in late August or early September 2009. After that conversation, Claimants never heard from KNOC again. (C-I ¶ 188; C-II ¶¶ 402 *et seq*.). Respondent disputes the above and submits that Claimants have not provided any proof of these contentions and argue that KNOC was not even involved in Phase II

of Project Zenith. (R-II ¶ 798). After the Hearing on Quantum, Respondent accepted that KNOC had visited Claimants in Bucharest for a meeting and presentation on KPM and TNG. During examination, Dr. Kim of KNOC stated KNOC had not re-entered negotiations. (RPHB 1 ¶ 95).

478. On 24 July 2009, TOTAL E&P informed Renaissance Capital that it had left Project Zenith. (RPHB 1 ¶ 104).

479. On 31 July 2009, RBS reported that it valued KPM and TNG (without Contract 302) at between USD 855 million and 1 billion, as of 1 October 2009. (CPHB 1 ¶ 38).

480. On 30 and 31 July 2009, Mr. Zlupacarov of the Financial Police had chased Mr. Cornegruta's attorneys and his wife, while driving after and filming them from his car. (CPHB 1 ¶ 203).

481. In August 2009, Starleigh, a Kazakh-owned company that Claimants believe to be owned and controlled by Mr. Kulibayev, contacted Claimants. Starleigh was represented by a middle man, Mr. Arvind Tiku, whom Claimants understand to be one of Mr. Kulibayev's business partners. Starleigh examined the Project Zenith data room. (C-I ¶¶ 189 - 190). Respondent states that Claimants have provided no evidence that Mr. Kulibayev is linked to Starleigh or that Starleigh is in any way linked to the Kazakh government. (R-II ¶¶ 341, 346 – 347).

482. On 6 August 2009, the second day of Mr. Cornegruta's trial, Mr. Cornegruta's defense counsel requested that the judge order Financial Police officer Zlupacarov, who was present, dismissed from the courtroom and the proceeding. (CPHB 1 ¶ 203; RPHB 2 ¶ 241). Although the hearing was public and Mr. Zlupacarov was permitted to attend, Mr. Cornegruta's request was considered and immediately granted. (RPHB 2 ¶ 241).

483. In a supplementary expert opinion on 25 August 2009, the Russian Science and Research Institute for the Construction and Operation of Pipelines and Energy Facilities confirmed that KPM's pipeline was a "***field pipeline***" and that the unfounded report of the Kazakh Ministry of Justice "*cannot serve as a ground to consider [KPM's pipeline] as a main pipeline*." (C-II ¶ 289).

484. On 25 August 2009, the Russian Joint Stock company VNIIST concluded that KPM's pipeline is not "***main.***" (CPHB 2 ¶¶ 61, 98).

485. On 26 August 2009, Mr. Cornegruta's defense counsel moved for postponement of less than one week so that the judge and counsel could question the authors of the expert reports that contradicted the conclusions of Mr. Baymaganbetov. The motion was denied, without explanation. (CPHB 1 ¶ 201).

486. In August 2009, Kazakhstan, the Governor of the Mangystau Region, KazAzot, and Mitsubishi confirmed their intention to go forward with the ammonia-carbamide complex. (C-I ¶ 61).

487. Claimants report that, on 26 August 2009, the Governor of the Mangystau Region asked Prime Minister Massimov to accelerate the State's cancellation of TNG's

and KPM's Subsoil Use Contracts and to transfer TNG's assets to KazAzot. The Governor referred to instructions dated 5 June 2009 given by the Kazakh Prime Minister to the MEMR, the Minister of Finance, the Ministry of Justice, and the multi-billion sovereign wealth fund of Kazakhstan, Samruk-Kazyna. Claimants state that the Prime Minister instructed these Kazakh authorities to orchestrate the termination of Claimants' Subsoil Use Contracts. (C-I ¶ 61; CPHB 1 ¶ 316). Respondent states that the letter in question is a complaint concerning the failure by the MEMR to provide the necessary information concerning its investigations of KPM and TNG. The letter calls for action in light of the deteriorating condition of TNG and KPM. (R-I ¶ 19.25). Respondent challenges Claimants' characterization of this letter and says that Governor Kusherbayev was aiming at a regular purchase of the companies because of the problems that were surrounding them. (R-II ¶ 326). It in no way proposes an expropriation. (RPHB 1 ¶¶ 398 – 403). Respondent also states that Claimants' possession of this confidential and internal letter, identified as C-293, points to serious corruption on behalf of Claimants. (R-II ¶ 214).

488. Respondent states that the 27 August 2009 meeting referenced in exhibit C-294 is not an indication of a planned government taking. Claimants have confirmed that the state of TNG and KPM was dire in the summer of 2009, so it should be no surprise that the government was concerned about the companies and the potential social consequences. Claimants have produced no evidence for their contention that the meeting was a working group to discuss ways to "*finish off the planned taking*." (RPHB 2 ¶ 381).

489. On 29 August 2009, Mr. Baymaganbetov was cross-examined. (RPHB 2 ¶ 240).

490. On 8 and 9 September 2009, the Astana Economic Court ruled against KPM and TNG's 23 June 2009 filing and found that the tax assessments were proper. KPM and TNG appealed the ruling. (C-0 ¶ 64; R-I ¶ 19.24; CPHB 2 ¶ 128).

491. On 17 September 2009, TNG wrote to MEMR regarding the promised Contract 302 extension and requested execution of Addendum No. 9. (CPHB 2 ¶ 151).

492. On 18 September 2009, the Aktau City Court of the Mangystau Oblast rendered a guilty verdict against Mr. Cornegruta for illegally engaging in entrepreneurial activities by operating KPM trunk pipelines without a license. (C-I ¶ 118, CPHB 2 ¶¶ 38, 61, 74, 98; R-I ¶ 27.58; R-II ¶¶ 446, 645; RPHB 2 ¶ 266). In accordance with the Court Decision, KPM was ordered to pay the illegal revenue in the amount of 21,675,854,578.00 Tenge (approximately, USD 145,475,534.08) to the Kazakhstan state budget. (C-0 ¶ 50; C-I ¶ 119, C-II ¶ 318, CPHB 2 ¶¶ 38, 81, R-II ¶¶ 615, 645; RPHB 2 ¶¶ 246 -261). Mr. Cornegruta was sentenced to 4 years imprisonment, and Respondent reports that he escaped from prison. (C-0 ¶ 49; C-I ¶ 118; R-I ¶ 9.79; RPHB 1 ¶ 303).

493. On 21 September 2009, President Nazarbayev's Head of Administration issued an order regarding the "*free of charge transfer of [Claimants'] assets*." (CPHB 2 ¶ 38). Respondent notes that C-294, upon which this allegation is based, was obtained in violation of the law, and it is unclear what reliability it could have. (RPHB 1 ¶¶ 401, 1120 – 1138).

494. On 22 September 2009, Claimants requested an official copy of the verdict. (C-0 ¶ 51; CPHB 1 ¶ 208; CPHB 2 ¶ 98; RPHB 2 ¶ 269). The request was signed by "*Acting General Director of KPM Oskolkov V.V.*", and Claimants have provided no evidence that Mr. Oskolkov was properly appointed or was authorized to make the application. There is no evidence that the request was ever received by the court. (RPHB 2 ¶ 269).

495. A 28 September 2009 letter from MEMR to the Ministry of Industry and Trade noted the risk of arbitration as one of the reasons why it would be better to obtain KPM and TNG through an acquisition rather than a premature termination of the Subsoil Use Contracts. (C-II ¶ 392; CPHB 1 ¶ 321). Respondent explains that the MEMR was responding to the concern at the decline of the businesses of TNG and KPM and the resultant social problems, caused by Claimants' decision to wind down operations. The solution under consideration was the transfer of KPM and TNG into state control. (R-I ¶¶ 19.20, 19.26; RPHB 2 ¶ 381). Respondent states that the notion of a gratuitous transfer of assets was rejected by MEMR. (R-II ¶ 327). Respondent also states that Claimants' possession of this confidential and internal letter, identified as C-294, points to serious corruption on behalf of Claimants. (R-II ¶ 214).

496. On 30 September 2009, the Financial Police ordered the Aktau territorial customs body to conduct a new audit of KPM based on its failure to pay the Crude Oil Export Tax for its January 2009 exports. (C-0 ¶ 75; C-I ¶ 168; CPHB 2 ¶¶ 38, 128).

497. On 1 October 2009, Mr. Cornegruta appealed the criminal judgment of the Aktau City Court. (CPHB 2 ¶ 98).

498. In October 2009, Starleigh presented an initial bid of USD 450 million for Claimants' properties. (C-I ¶ 190).

499. 4 October 2009 was the last day that an appeal could be filed in the case against KPM and Mr. Cornegruta. KPM did not appeal the sentence of 18 September 2009 within the 15 days allowed. (R-II ¶ 636; RPHB 1 ¶ 304, RPHB 2 ¶ 268).

500. On 22 October 2009, the Financial Police interviewed Mr. Condorachi, the General Counsel of KPM and Deputy General Counsel of TNG, regarding KPM's alleged obligation to pay 2008 export taxes. (C-I ¶ 168; CPHB 2 ¶¶ 38, 128).

501. On 28 October 2009, the Civil Collegium of Astana Court reversed the Astana Economic Court's ruling of 10 February 2009 and remanded it for a new hearing at the Specialized Interdistrict Economic Court. (C-0 ¶ 64; CPHB 2 ¶ 128).

502. In November 2009, Starleigh dropped its offer from USD 450 million to USD 350 million, due to concerns about the USD 145 million fine that had been imposed on KPM in connection with criminal action brought by the State. (C-I ¶ 190).

503. Respondent states that KMG NC did not express an interest in purchasing TNG and KPM until November 2009, and explains that it took an interest in the assets in order to play a "*white knight*" role. (R-II ¶ 360).

504. In November 2009, Claimants were invited to attend a meeting with KMG in Amsterdam. When Anatolie Stati and Mr. Lungu arrived, they saw principals of Claimants' main noteholders leaving the meeting room. The noteholders told them that KMG had just offered 25 cents on the dollar to purchase their interests, which the noteholders refused. Anatolie Stati and Mr. Lungu then met with representatives of KMG, who presented them with an offer of USD 20 million for their equity interests, which they refused. (C-0 ¶ 84 (stating September 2009); C-I ¶ 192; C-II ¶ 386).

505. Claimants report that, in November 2009 (or in early 2010), they received an offer from Starleigh for USD 50 million and a buyout of the noteholders, which Claimants refused. (C-I ¶ 190; C-II ¶¶ 387, 415).

506. Claimants report that, on 3 November 2009, in an effort to pressure KPM into paying the Crude Oil Export Tax, the Financial Police interrogated and intimidated Mr. Cornegruta (in jail) and other employees of KPM. The interrogation of Mr. Cornegruta regarded KPM's alleged obligation to pay 2008 export taxes. The Aktau territorial customs body also informed KPM that it was required to pay the Crude Oil Export Tax for its January 2009 exports, amounting to USD 4 million. (C-0 ¶ 75; C-I ¶ 168; CPHB 2 ¶¶ 38, 128).

507. Mr. Cornegruta appealed his verdict with the Mangystau Regional Court. On 12 November 2009, the Regional Court upheld the Aktau City Court's verdicts against both Mr. Cornegruta and KPM. (C-0 ¶ 52; C-I ¶ 120, CPHB 2 ¶¶ 38, 98; R-I ¶ 27.60; R-II ¶ 446, 586, 646; RPHB 2 ¶ 266). Judge Ryskalieva's decision was scrutinized by three judges, all of whom agreed with her. (R-II ¶ 586). Respondent admits that KPM was not a named party in either the initial trial or the subsequent appeal. However, it is denied that KPM was not represented in either hearing. (R-I ¶ 27.60). Neither KPM (which was able to) nor Mr. Cornegruta appealed to the Supreme Court. (RPHB 2 ¶ 266).

508. Grand Petroleum offered to purchase KPM and TNG for USD 1.15 billion. (CPHB 2 ¶ 38).

509. In an instruction of the President of the Republic of Kazakhstan dated 19 November 2009, the President highlighted the inadmissibility of a production shutdown at the enterprises TNG, KPM, Borankol Gas Treatment Plant, TOO "*KASKO*" and the company "*Caspian Gas Corporation*" in connection with the conducted inspections. (R-I ¶ 18.7; CPHB 2 ¶ 38). The President instructed responsible authorities to revisit these issues in view of anti-crisis measures of the Government. (R-II ¶ 332).

510. The President issued a further instruction on 23 November 2009, which expressed the President's concern that the investigations of KPM and TNG might be interfering with the operation of those companies. (R-I ¶ 19.24).

511. On 23 November 2009, Mr. Cornegruta was transferred from a temporary detention facility in Aktau to the prison in Atyrau. (C-I ¶ 120).

512. On 23 December 2009, the 19 November 2008 decision of the Specialized Interdistrict Court of Mangystau Region was cancelled on procedural grounds by the Board of Appeal of the Mangystau Regional Court. (R-I ¶ 30.56).

513. On 25 December 2009, Astana Economic Court issued a new decision against KPM regarding the comprehensive tax audits notice issued 10 February 2009. (C-I ¶ 159).

514. On 25 December 2009, the Specialized Interdistrict Economic Court issued a consolidation decision, rejecting KPM's and TNG's challenges to corporate back taxes. (CPHB 2 ¶ 128).

515. On 28 December 2009, TNG wrote to MEMR again requesting execution of Addendum No. 9 to Contract 302. (CPHB 2 ¶ 151).

516. Prior to 29 December 2009, Claimants negotiated a major new gas supply and purchase agreement with MAEK SPA and two major new gas supply and purchase agreements with AktauGasServise SPA. (R-II ¶ 409).

517. On 29 December 2009, the Aktau City Court issued a writ of execution against KPM, in execution of the verdict of the Mangystau Regional Court of 12 November 2009. (C-I ¶ 123, CPHB 2 ¶¶ 81, 98; R-I ¶¶ 29.7; R-II ¶ 648). Claimants appealed this. (R-II ¶ 649).

518. Claimants state that the Tax Committee Transfer Price Audit lasted 13 months, ending in 29 December 2009. (C-0 ¶ 78; C-I ¶¶ 19, 173). Respondent states that it lasted only 30 working days. The audit commenced on 12 November 2008 and was suspended on 12 December 2008, recommenced, and was concluded on 29 December 2009. This audit did not involve more than 5 members of the Tax Committee at any one time. (R-II ¶¶ 368, 369, 407, 410).

519. In the Transfer Price Audit, all of the sales invoices of KPM and TNG from 1 January 2004 to 31 December 2007 were disclosed to the State and audited in the process. The State assessed approximately USD 5 million in back transfer price taxes and penalties. KPM's and TNG's appeals of this remained pending on 22 July 2010. (C-0 ¶ 78; C-I ¶¶ 19, 173; CPHB 2 ¶ 38). Respondent presents that the audit showed that KPM and TNG had underreported their taxable income for the period 1 January 2005 – 31 December 2007. Respondent states that the audit revealed, in relation to KPM, underpayments of 191,391,320 Tenge, to which a late payment charge of 196,254,044 was added. In relation to TNG, the audit revealed underpayments of 172,766,494, to which a late payment of 154,900,840 was added. Respondent presents that KPM owed additional corporate Income tax of 2,255,019,100 Tenge and a penalty of 1,002,105,500 Tenge. TNG owed an additional 4,007,519,000 Tenge and a penalty of 1,898,215,500 and a "*reduction in loss*" of 1,558,600,300 Tenge. (R-II ¶ 373). For KPM, the amount was USD 2,607,070.00, and for TNG USD 2,203,694.00. (R-II ¶ 402; CPHB 2 ¶ 128). Neither company, however, paid the taxes. (R-II ¶ 404).

520. On 31 December 2009, KPM declared a dividend of USD 52.9 million. (R-II ¶ 142). The audit also revealed that, for the year ending 31 December 2009, Mr.

Anatolie Stati received a bonus of USD 3,863,000, down from USD 4,435,000 that he received in 2008. (R-II ¶ 143).

521. In January 2010, KPM commenced a legal action concerning the illegal imposition of the Crude Oil Export Tax on its January 2009 exports. (C-0 ¶ 75; C-I ¶ 169).

522. In January 2010, KPM commenced new legal proceedings challenging the Financial Police's claim that it owed 2008 export taxes on oil exports. (CPHB 2 ¶ 128).

523. On approximately 5 January 2010, the Aktau Division of the Enforcement Officers of the Mangystau Oblast issued the Decree on Initiating of the Enforcement Proceedings against KPM on Recovery of the Revenue, for USD 145 million. (C-II ¶ 337; R-II ¶ 648; CPHB 2 ¶ 81). The relevant Claimants appealed. (R-II ¶ 649). Enforcement measures were taken from January – June 2000. (CPHB 2 ¶ 81).

524. On 6 January 2010, TNG and KPM successfully appealed the 25 December 2009 ruling by the Astana Economic Court. (C-0 ¶¶ 64 – 66).

525. On 10 January 2010, the Chief of the Aktau Territorial Department of Judicial Executors issued a court order attaching several of KPM's "*second-tier*" bank accounts. (C-I ¶ 125, CPHB 1 ¶ 212, CPHB 2 ¶ 38; R-I ¶ 29.7). The seized accounts included two settlement accounts with Kazkommertsbank in Bostandykskyi District, forty-one settlement accounts with Kazkommertsbank in Aktau City, and nine settlement accounts with Halyk Bank of Kazakhstan in Aktau City. The order included instructions to those banks to inform the judicial executor whenever it received any funds from KPM. The order also included a warning to KPM's General Manager and Chief Accountant that criminal responsibility could result from failing to comply. (C-I ¶ 125; CPHB 2 ¶ 38).

526. On 14 January 2010, KPM requested and received an official copy of the 19 September 2009 verdict. (C-0 ¶ 51; CPHB 2 ¶ 98).

527. On 14 January 2010, the MEMR invited KPM and TNG to a working group meeting to take place on 21 January 2010 to discuss agreements and terms of additional projects, as well as negotiations. (CPHB 2 ¶ 151).

528. On 21 January 2010, KPM challenged the court decisions dismissing its complaints against enforcement. (CPHB 2 ¶ 98).

529. On 21 January 2010, KPM and TNG were informed upon their arrival at the MEMR's office that the working group meeting had been cancelled due to the need to conduct an unscheduled inspection of their operations. (CPHB 2 ¶ 151).

530. On 22 January 2010, KPM submitted a new complaint against enforcement orders. (CPHB 2 ¶ 98).

531. On 22 January 2010, the Chief of the Aktau Territorial Department issued an order finding that KPM had "*not paid the debt to the state and [had] not fulfilled the requirements of the judicial executor in due time*." As a result, the order attached

eighteen different motor vehicles belonging to KPM. It also instructed the Road Police Department to take notice of the vehicles' registrations and to seize and impound them in order to make a formal inventory of their value. KPM received a copy of this order on 1 February 2010. (C-I ¶ 126; R-I ¶ 29.7).

532. On 22 January 2010, Mr. Mynbayev ordered an unscheduled inspection. (CPHB 1 ¶ 273). Claimants provided the MEMR documents evidencing compliance with the working programs on this date. (C-I ¶ 209).

533. On 25 January 2010, the MEMR notified KPM and TNG that it would perform a week-long audit / inventory of KPM's assets, beginning 26 January 2010. The resulting inventory listed 2,186 different assets, including 63 oil drilling wells and 10 gas drilling wells. (C-I ¶¶ 127, 128, 196, C-II ¶ 244; R-I ¶ 29.7; C-171).

534. On 25 January 2010, the Committee on Judicial Administration - a division of the Supreme Court of Kazakhstan - wrote to Mr. Stejar of KPM to inform him that the judicial acts pertaining to the Writ of Execution for 21.6 billion Tenge remained unexecuted. Further, the Deputy Administrator of Mangystau Oblast courts, Mr. Tursynbayev, instructed the Chief of Aktau Territorial Department to execute enforcement procedures by 30 January 2010. The instructions included: (i) to visit the Borankol Village to confirm whether KPM was operating, and if so, to make an inventory of and attach its property; (ii) to demand all documentation from KPM; and (iii) to make note of and inventory any motor vehicles discovered that were previously attached. (C-I ¶ 127; C-124).

535. On 25 January 2010, KPM filed a request with the Aktau City Court to reinstate the missed time for the appeal of the verdict of 18 September 2009 and filed an independent appeal of that verdict with the Board of Appeals of the Mangystau Regional Court. (C-0 ¶ 53, CPHB 2 ¶ 98; R-II ¶ 647).

536. From 25 January – 5 February, the MEMR noted that it was still considering the draft Addendum No. 9 to Contract 302. (CPHB 2 ¶ 151).

537. From 25 January – 6 February 2010, the MEMR inspection team noted that Kazakhstan had delayed providing necessary protocols to KPM and TNG because of its failure to execute the extension. (CPHB 2 ¶ 151).

538. From 25 January 2010 – 6 February 2010, the Department for Direct Investments in Subsoil Exploitation, the Department for Development of Oil Industry, and the Inspection Department for Geology and Subsoil Exploitation of the MEMR conducted an unscheduled comprehensive audit of KPM and TNG regarding their historical compliance with the subsoil use contracts and Kazakh law. (C-0 ¶ 55; C-II ¶ 290; CPHB 2 ¶¶ 38, 61).

539. On 26 January 2010, the Ministry of Finance commenced bankruptcy proceedings against KPM. (CPHB 2 ¶¶ 38, 128).

540. On 29 January 2010, the Aktau City Court denied KPM's right to appeal the 18 September 2009 decision as untimely. Respondent explained that KPM's failure to appeal in time could not be attributed to failures by the Republic and that everyone

had knowledge of the appeals deadline. (C-0 ¶ 53; R-II ¶¶ 636, 647; RPHB 1 ¶ 305).

541. On 3 February 2010, the Ministry of Finance notified KPM that it was monitored for bankruptcy on 26 January 2010 for 3.8 billion Tenge, including interest. The back taxes and penalties regarding the corporate income tax represented 85% of the amount notified by the Ministry of Finance, or 3.2 billion Tenge (approximately USD 40 million). (C-0 ¶ 65; C-I ¶ 160, CPHB 2 ¶ 38; R-I ¶ 29.3). Respondent states that the bankruptcy proceedings were unsuccessful. (R-II ¶ 377).

542. The unscheduled inspection ended on 6 February 2010. MEMR concluded that KPM and TNG were in compliance with the Kazakh law, including with respect to the pipelines. (C-0 ¶ 55; C-I ¶ 18; C-II ¶ 290; CPHB 2 ¶¶ 38, 61). The MEMR report clearly states that the pipelines are part of a "*single technological process*" and are, therefore, not main pipelines. (CPHB 2 ¶¶ 61, 74). According to the 6 February 2010 Report of the MEMR on Unscheduled Inspection for KPM, and the 5 February 2010 MEMR Report on Unscheduled Inspection for TNG, Claimants invested more than USD 1.1 billion (USD 772 after deduction of taxes and administrative expenses). (C-II ¶ 121).

543. On 8 February 2010, KPM challenged the appeal court's refusal to reinstate the time period for appeal. The letter also challenged the court's refusal to provide a copy of the 18 September 2009 judgment. (CPHB 2 ¶ 98; RPHB 2 ¶ 269).

544. On 13 February 2010, Claimants negotiated the sale of 100% of the shares and participatory interests in KPM and TNG to Cliffson Company S.A. (C-0 ¶ 85 (stating 2 February); C-II ¶¶ 393 – 395). The total value of the agreement, including the buy-out of the companies' noteholders and payment for Claimants' equity interests and the assumption of liabilities, exceeded USD 920 million. (C-I ¶ 193 (stating USD 930 million); C-II ¶¶ 388; CPHB 2 ¶ 371 and 418; R-II ¶ 814). Claimants state that this was a reduced value taking the criminal judgment and its enforcement against KPM into account. (CPHB 2 ¶ 38). USD 267 million represented the equity interests in TNG, KPM, and Tristan. (C-II ¶ 418). One condition of this sale was that MOG would grant permission for the sale and waive the State's alleged pre-emptive right to purchase KPM and TNG. (C-I ¶ 194; R-II ¶ 815). MOG conditioned permission for the sale on removal of the attachment orders and on its receipt of information about the financial solvency of Cliffson Company and about its technical and managerial capabilities, and on the receipt of other additional materials. (C-I ¶ 194). Respondent states that it cooperated fully with Claimants, but that Claimants delayed their waiver application by 2 months and ultimately failed to provide the information necessary for an approval and a waiver. (R-II ¶¶ 816 – 817).

545. On 16 February 2010, KPM submitted a claim to suspend the enforcement measures. (CPHB 2 ¶ 98).

546. On 17 February 2010, the President of the Blagovest fund wrote to Minister Mynbayev to make a suggestion to "*resolve the question of nationalization of the assets posed in 2008*." (CPHB 2 ¶ 38).

547. On 19 February 2010, the Chief of the Aktau Territorial Department issued a writ of execution, noting that prior collection orders had gone unfulfilled. This order formally attached the 2,186 assets listed in the 26 January 2010 inventory and it specifically warned KPM's General Manager, Mr. Stejar, that he could face criminal responsibility for embezzlement or alienation of that property. KPM received this order on 1 March 2010. (C-I ¶ 129; R-I ¶ 29.7).

548. On 23 February 2010, the Chief of Aktau Territorial Department issued an order prohibiting KPM from executing import and export formalities regarding the transportation of oil. It meant that KPM could not deliver oil from its gathering system to the main pipeline operated by KazTransOil. (C-I ¶ 130; R-I ¶ 29.7).

549. On 23 February 2010, in response to the Akim (Governor) of the Mangystau Region's proposal for TNG to borrow funds from State agencies to complete the LPG Plant (CPHB 2 ¶ 219). Anatolie Stati wrote to the Akim to seek his assistance in resolving the companies' legal problems. (CPHB 2 ¶ 142).

550. On 24 February 2010, the Regional Customs Committee notified KPM and TNG that the companies were liable for Crude Oil Export Tax on their January 2009 exports. (C-I ¶ 170; CPHB 2 ¶¶ 38, 128; R-I ¶ 30.56).

551. Akim Kusherbayev wrote to Prime Minister Massimov on 24 February 2010, in an effort to broker a compromise by submitting a proposal made by Mr. Stati to the Prime Minister. Under Anatolie Stati's proposal, Claimants were to complete construction of the LPG Plant if claims against KPM and TNG were dropped. (R-II ¶¶ 324 – 325; CPHB 2 ¶ 221). Respondent also states that Claimants' possession of this confidential and internal letter, identified as C-665, points to serious corruption on behalf of Claimants. (R-II ¶ 214).

552. On 25 February 2010, KPM appealed the decision dismissing its claim to suspend enforcement measures. (CPHB 2 ¶ 98).

553. On 25 February 2010, Anatolie Stati sent a second letter to the Akim of the Mangystau Region, seeking his assistance. (CPHB 2 ¶ 142).

554. On 26 February 2010, the Chief of Aktau Territorial Department dismissed KPM's challenge to the writ of enforcement and issued an order to "*attach the oil pipeline from [the] OTP to Opornaya CRMB [Commodities and Raw Material Base of Opornaya Station] of 18 kilometers long*" and KPM's accumulator oil tanks, in order to fulfill the previous execution orders. This order also prohibited KPM from transferring oil to the main pipeline operated by KazTransOil once its accumulator tanks reached capacity. (C-I ¶ 131, CPHB 2 ¶ 98; R-I ¶ 29.7).

555. On 3 March 2010, the Interdistrict Economic Court of Mangystau Region dismissed KPM's action of January 2010. (C-0 ¶ 75; C-I ¶ 169).

556. On 4 March 2010, the Chief of the Aktau Territorial Department appealed to the President of the Second Aktau City Court for a change in the method and order of execution. He noted that, despite attaching fifty-two settlement accounts and numerous assets, "*monetary resources by collection orders do not arrive to the deposit account*." Claimants state that, as a result, he requested that the

enforcement procedure be changed to an in-kind transfer of land lots, including the three previously-attached plots of real property, the 18 kilometer pipeline, KPM's Contract 305 over the Borankol field, and KPM's subsoil use license No. 309. (C-I ¶ 133).

557. On 5 March 2010, KPM appealed the decision dismissing its challenge to the writ of enforcement. On the same date, KPM submitted a complaint regarding the enforcement measures. (CPHB 2 ¶ 98).

558. On 15 March 2010, the Chief of the Aktau Territorial Department issued orders for the valuation of KPM's assets, including three lots of property, eighteen motor vehicles, the 18 kilometer pipeline, the field camp, and the Borankol field that were attached in previous orders. (C-I ¶ 134; R-I ¶ 29.7).

559. On 16 March 2010, KPM moved to alter execution procedures so that production on the Borankol field could continue. (C-I ¶ 135).

560. On 17 March 2010, the Acting Head of Aktau Territorial Department of Judicial Executors complied with KPM's request and issued two orders that suspended execution of the orders of 23 and 26 February 2010, respectively. Both confirmed that suspension was necessary "*to avoid the suspension of production activity of 'Kazpolmunai' LLP*" / to ensure that KPM and TNG's business was not unduly affected by the execution orders. (C-I ¶ 137; R-I ¶ 29.7).

561. On 20 March 2010, the Acting Chief of Aktau Territorial Department of Judicial Executors proposed that the Prosecutor initiate a criminal case against Mr. Stejar, then-General Manager of KPM, for failing to enforce the 29 December 2009 writ of execution against KPM. (C-I ¶ 138).

562. On 26 March 2010, KPM appealed the criminal judgment to the Cassation Court. (CPHB 2 ¶ 98).

563. On 31 March 2010, the Central Customs Committee cancelled the 24 February 2010 notifications to KPM and TNG and stated that, pursuant to their Subsoil Use Contracts, KPM and TNG were not liable for export taxes from October 2008 onward. (C-I ¶ 170; CPHB 2 ¶¶ 38, 128; R-I ¶ 30.56; R-II ¶ 386). Respondent states that, in total, KPM paid USD 700,000 in respect of customs duties, and this payment was returned following the withdrawal of charges. (R-I ¶ 30.57). Respondent denies Claimants' positions that they paid USD 10 million or that they paid USD 12.77 million, USD 2.6 million of which was refunded. (C-0 ¶ 74; C-I ¶ 164; C-II ¶¶ 234 – 235; CPHB 2 ¶¶ 38, 128; R-II ¶¶ 387 – 391).

564. On 3 April 2010, Anatolie Stati's company, Komet, sent a notice of dispute to the Regional Government of Kurdistan to initiate arbitral proceedings. This notice was signed by Reginald Smith of King & Spalding. (RPHB 1 ¶ 137).

565. On 9 April 2010, KPM submitted a new complaint regarding enforcement measures. (CPHB 2 ¶ 98).

566. On 10 April 2010, Ascom and Cliffson conferred regarding the Cliffson SPA, specifically, the allocation among the four companies (TNG, KPM, CASCo,

Tristan) in the sale for purposes of completing government applications. (CPHB 2 ¶ 374).

567. On 12 April 2010, Claimants submitted applications for approval of the Cliffson sale and waiver of Kazakhstan's pre-emptive rights to the MOG and Ministry of Industry and Technology, respectively. (C-II ¶ 389; R-II ¶ 817).

568. On 23 April 2010, the Astana appellate court reversed the 25 December 2009 decision against KPM and TNG by the Astana Economic Court and found that KPM and TNG properly deducted drilling expenses. The Tax Committee's appeal was dismissed. (C-0 ¶ 66; CPHB 2 ¶ 128).

569. In connection with the bankruptcy proceeding, the State filed a request with the Specialized Interdistrict Economic Court of Mangystau Region for external management of KPM (appointment of a bankruptcy administrator) on 26 April 2010. (C-0 ¶ 65; C-I ¶ 160). This request was dismissed by the Interdistrict Economic Court on procedural grounds, and a subsequent replacement request was withdrawn by the State. (C-0 ¶ 66).

570. On 30 April 2010, the MOG responded to Claimants' 12 April 2010 request by: (1) requesting additional information regarding the terms of the transaction and the financial and technical abilities of Cliffson, (2) noting that based on Kazakhstan's seizures of the companies' assets, transfers of the shares of KPM and TNG were forbidden, and (3) concluding that the transaction would only be approved if KPM and TNG satisfied the requirements necessary to release the attachment of their shares. (C-II ¶ 389, CPHB 2 ¶ 38; R-II ¶ 818). Respondent states that Claimants failed to respond to this letter. (R-II ¶ 820).

571. On 6 May 2010, Cliffson executed an amendment to the SPA extending the time for the transaction. (CPHB 2 ¶ 374).

572. On 6 May 2010, Respondent sent a notice of breach, stating that TNG had failed to comply with the annual working program in respect of Contract 302 and requested response by 20 May 2010. (R-I ¶ 31.137; CPHB 2 ¶ 151). TNG received this on 7 May 2010. (C-I ¶ 197).

573. On 7 May 2010, the MOG notified TNG of inadequate fulfillment of license and contract provisions for 2009 and requested that TNG "*remove delays*" in its 2009 Contract 302 work program and present to the Ministry a draft appendix for the 2010 work program within one month. (C-I ¶ 197; CPHB 2 ¶ 151).

574. On 11 May 2010, KPM appealed the decision regarding enforcement to the Cassation Court. (CPHB 2 ¶ 98).

575. On 18 May 2010, there was an order not to prosecute Anatolie Stati, since there were no grounds on which to prosecute him, personally. (CPHB 1 ¶ 312).

576. On 27 May 2010, TNG wrote to the MOG, explaining that it had submitted an application for a two-year extension of the exploration period in its Contract 302 properties and the corresponding work program, in October 2008. TNG explained that MOG had agreed to the extension by letter dated 9 April 2009, that TNG

submitted the addendum for execution dated 30 April 2009, and that TNG never received an executed extension from MOG. TNG explained that it, therefore, suspended its exploration operations in the Contract 302 properties. TNG argued that it had fulfilled all of its contractual obligations. (C-I ¶ 198).

577. On 1 June 2010, the MOG sent an additional request to KPM and TNG for information regarding the Cliffson transaction. (C-II ¶ 389; R-II ¶ 821).

578. On 9 June 2010, the Court Execution Body of the Mangystau Region - the Acting Chief of Aktau Territorial Department of Judicial Executors - ordered the sale of KPM's assets as a single lot, so as to avoid any suspension of activities. (C-0 ¶ 87; C-I ¶ 139; CPHB 2 ¶ 98; R-I ¶ 29.7).

579. On 15 June 2010, Claimants wrote to Cliffson regarding Cliffson's "*backing out*" of the so-called Cliffson transaction. (CPHB 2 ¶ 375).

580. On 15 June 2010, the Acting Chief of Aktau Territorial Department issued a "*repeated warning*" to Mr. Stejar of KPM, claiming that KPM operated and carried out oil and gas extraction, sold the products, and gained income, but did not voluntarily make any payments as ordered by the court decision. The notice instructed KPM to execute the court order by paying 21.6 billion Tenge in full or by transferring assets corresponding to the amount owed, within two weeks' time. (C-I ¶ 139; R-I ¶ 29.7).

581. On 18 June 2010, KPM challenged the valuation of its property and the actions of state executors. (CPHB 2 ¶ 98).

582. On 22 June 2010, the Kazakh Court of Cassation dismissed the Tax Committee's claims that KPM and TNG owed USD 62 million in corporate back taxes for allegedly improperly deducting drilling expenses. The Court affirmed the appellate court decision in favor of KPM and TNG. (CPHB 2 ¶¶ 38, 128).

583. On 23 June 2010, Claimants replied to the MOG requests of 30 April and 1 June 2010 regarding the proposed Cliffson transaction. (C-II ¶ 390). The Parties dispute whether Claimants provided all of the necessary information. (C-II ¶ 390; R-II ¶ 822). Claimants state that they received no reply from Kazakhstan. (C-II ¶ 390).

584. On 24 June 2010, a change in the Subsoil Use Law was approved, which allowed Kazakhstan to terminate contracts when a contractor failed to cure 2 or more contract violations. (CPHB 1 ¶ 278).

585. After receiving no reply from the MOG, Cliffson wrote to MOG, stating that it refused to purchase the interests in TNG and KPM. (C-I ¶¶ 193 – 195).

586. On 25 June 2010, KPM submitted its complaint to the 9 June 2010 enforcement order. (CPHB 2 ¶ 98).

587. From 25 – 29 June 2010, there were unscheduled inspections of KPM and TNG from at least 7 agencies, on the order of the Prime Minister and with the involvement of the Financial Police and the GPO. (CPHB 2 ¶ 38).

588. On 28 June 2010, the GPO received a complaint from Messrs. Sadyrbaev, Makashev, Esenov, and Sagindikov about KPM and TNG related to non-payment of salaries, mass dismissal of employees, and failure to comply with environmental legislation and legislation on subsoil use. The complaint requested that the GPO take measures to prevent the loss of deposits and to establish a stable social environment. According to the petition, the individuals who submitted it were residents of the Beyneu District of Mangystau Province, where the Tolkyn and Borankol oil deposits as well as the KPM & TNG oil exploitation infrastructure were situated. (R-II ¶¶ 305, 676; CPHB 1 ¶ 265; CPHB 2 ¶ 178 (referring to alleged receipt)).

589. On 28 June 2010, Claimants provided documents related to its working program to the MEMR. (C-I ¶ 209).

590. Claimants and Respondent dispute aspects of the June – July 2010 inspections. Claimants state that a dozen Government agencies sent notices that unscheduled inspections of KPM and TNG would commence. (C-I ¶ 200). Respondent states that only 5 ministries requested further inspections. (R-I ¶ 31.98; R-II ¶ 306). Contrary to Claimants' assertion, Respondent does not admit that the MOG covered the same issues 6 months previously. (R-I ¶ 31.98). Respondent admits that TNG's compliance with Contract 302 was investigated as part of the July 2010 investigations. (R-I ¶ 31.138). Respondent states that the inspections initiated with the GPO and had nothing to do with the Financial Police. (RPHB 2 ¶ 45).

591. On 29 June 2010, the Ministry of Industry and New Technologies' Geology and Subsoil Use Committee ordered a two-week inspection of KPM and TNG to determine whether the companies were in compliance with subsoil use legislation. The Chief State Ecological Inspector of Mangystau Oblast notified KPM and TNG that an unscheduled inspection regarding compliance with environmental protection legislation would take place beginning 30 June 2010. The State Labor Inspector sent notices to KPM and TNG that unscheduled inspections would take place. The Immigration Police sent notifications of inspections that were to take place from 1 – 29 July 2010, in order to ensure that neither KPM nor TNG was in violation of Kazakhstan's immigration legislation. (C-I ¶¶ 199 - 201). Finally, Kazakhstan ordered its second round of unscheduled inspections of KPM and TNG, to take place in the same time period, to assess compliance with their subsoil use contract obligations. (C-II ¶ 343; CPHB 2 ¶ 178).

592. On 30 June 2010, the Ecology Committee began its unscheduled inspection of KPM and TNG. (CPHB 2 ¶ 178).

593. From June – July 2010, the Department for Emergency Situation carried out unscheduled inspections of KPM and TNG. (CPHB 2 ¶ 178).

594. From 30 June – 15 July 2010, MOG carried out its unscheduled inspections of KPM and TNG. (CPHB 2 ¶ 178).

595. From 30 June – 16 July 2010, the Geology and Subsoil Use Committee of the Ministry of Industry and New Technology carried out its unscheduled inspection of KPM and TNG. (CPHB 2 ¶ 178).

596. From 30 June – 29 July 2010, the Labor Department carried out its unscheduled inspections of KPM and TNG.

597. By July 2010, the LPG Plant was over 90% complete. (C-I ¶ 64).

598. By July 2010, KPM and TNG were both in breach of the Minimum Work Programs. (R-II ¶¶ 657, 659, 660).

599. From 1 July – 29 July 2010 the Immigration Police carried out their unscheduled inspections of KPM and TNG. (CPHB 2 ¶ 178).

600. On 3 July 2010, the Ecology Department issued an act of inspection for its environmental audit of KPM and TNG. (CPHB 2 ¶ 178).

601. Claimants state that, on 4 July 2010, the Financial Police arrived on KMG / TNG premises to conduct their investigation. The Financial Police requested access to the Human Resources Department. Claimants state that they feared that a search through personnel files would lead to another arrest and ordered the middle-management of KPM and TNG to evacuate Kazakhstan. (C-I ¶ 203; CPHB 1 ¶ 270). Respondent puts Claimants to proof that this investigation occurred and that it caused Anatolie Stati to instruct the evacuation of middle management from KPM. (R-I ¶ 31.98).

602. Claimants state that, on 9 July 2010, a representative from Mangystau Oblast's Entrepreneurship and Industry Department, a division of the Regional Authority of Mangystau, called TNG to inform it that Kazakh Prime Minister K.K. Massimov planned to visit the LPG Plant during a working trip to the region. He instructed TNG to prepare and/or construct: (i) landing pads in the vicinity of the LPG Plant to support the arrival of three helicopters; (ii) a presentation of the LPG Plant project, including photographs, technological specifications, and remaining financing required; and (iii) a platform on which discussion of the project could take place. (C-I ¶ 204; CPHB 2 ¶¶ 38, 178).

603. According to Claimants, on 9 July 2010, Financial Police officer S. Rakhimov reported to the Chief of Financial Police referencing ongoing inspections. (CPHB 2 ¶ 178). Respondent states that, at the Hearing on Jurisdiction, Mr. S. Rakhimov denied writing the report. (RPHB 2 ¶ 46).

604. On 9 July 2010 and on 12 July 2010, KPM and TNG, respectively, challenged the 29 December 2010 transfer price tax assessment. (R-I ¶ 30.65).

605. Claimants state that, on 12 July 2010, the Governor's office again contacted TNG to request that it make its land cruiser (which had been seized earlier that year), other automobiles, and drivers available for the entire delegation. The members of the Government delegation would include the Prime Minister, the Minister of Oil and Gas, the regional Governor, and several other high-level officials. (C-I ¶ 205; CPHB 2 ¶ 178).

606. On 14 July 2010, the MOG sent notices to KPM and TNG that the companies were in violation of their Subsoil Use Contracts 210 and 305. (R-I ¶ 31.19; C-II ¶ 346, CPHB 1 ¶ 296, CPHB 2 ¶¶ 74, 178; RPHB 1 ¶ 360; RPHB 2 ¶ 354). The notices

from the MOG were dated 14 July 2010, but were not received by KPM and TNG until 16 July 2010. (R-I ¶ 31.54). The notices set out (1) the contract to which the notice related, (2) the contractual breaches by KPM and TNG, (3) a deadline within which to respond, and (4) the consequences for failing to respond to the notice. (R-I ¶ 31.107). The notices gave KPM and TNG until 19 July 2010 to "*submit explanations on reasons of non-execution of contract terms and all necessary documents, ascertaining removal of the above-mentioned violations, as well as to inform [the MOG] on measures taken in order to avoid violation of contract terms*." Respondent reports that the violations in the notices included "*admissions*" by KPM and TNG that they had operated trunk oil and gas pipelines without a license and 13 additional alleged violations for which Claimants state that the State had provided no prior notice to KPM or TNG. (R-I ¶¶ 31.103 *et seq*.). Claimants report that the notices listed 16 alleged violations. The notice further provided that "*[i]n case of failure to comply with the request set forth in this Notice within the established time limit, the Competent Body is entitled to terminate the Contract[s]."* (C-0 ¶ 88; C-I ¶¶ 20, 206 – 208, 332). Respondent states that the violations contained in the notice of 14 July 2010 were detected by the competent authority as a result of permanent monitoring of the compliance by the subsurface users of their contractual obligations. (R-I ¶ 31.42). The audits proved that production activities at KPM and TNG had virtually stopped; there was little chance of employee salaries being paid. (R-II ¶ 692). The Parties state that, by this time, the majority of TNG and KPM senior and middle management had left Kazakhstan. (R-II ¶ 698; C-1 ¶ 218).

607. On 14 July 2010, the MOG sent a notice of contract violations, which treated Contract 302 as still in force. (CPHB 2 ¶ 151).

608. Claimants allege that the inspections may have never been officially concluded. (C-II ¶ 346).

609. On 19 July 2010, Claimants submitted written answers and explanations concerning each violation alleged in the 14 July 2010 notice. (C-0 ¶ 89, CPHB 2 ¶ 178; RPHB 1 ¶ 361, RPHB 2 ¶ 354).

610. On 20 July 2010, the Ministry of Industry and New Technologies issued its acts of inspections for the unscheduled inspections of KPM and TNG. (CPHB 2 ¶ 178).

611. On 21 July 2010, the State delivered to KPM and TNG two written notices terminating KPM Subsoil Use Contract 305 covering the Borankol field, and terminating TNG Subsoil Use Contract 210 covering the Tolkyn field. (R-I ¶ 31.129; CPHB 2 ¶ 178). The State did not deliver a specific written notice terminating TNG Subsoil Use Contract 302 covering the Tabyl Block, which the State says expired on 30 March 2009. (C-0 ¶¶ 59, 89; C-I ¶¶ 21, 217). On the same date, pursuant to the legislation, the MOG and KMG agreed to two trust management agreements over the subsoil areas for the Tolkyn and Borankol. (CPHB 2 ¶¶ 38, 178). Respondent stressed that these agreements transferred the property into temporary possession of KMG NC as a result of the termination of the contracts until a new subsoil user is found. (R-I ¶ 31.151; R-II ¶ 701). While terminating the contracts, the State made no claim that KPM and TNG owed outstanding corporate income taxes, transfer pricing taxes or export duties. (CPHB 2 ¶ 128).

612. Nine hundred employees of KPM and TNG resigned effective 21 July 2010. Many were rehired by KMG in the same positions they had held previously. (C-I ¶ 220; C-II ¶ 356). Respondent also does not dispute that many KPM and TNG employees joined KMG NC on their own volition. (R-II ¶ 713).

613. On 21 July 2010, the Kazakh Prime Minister, the MOG, and the Aktau Regional Governor, visited Claimants' LPG plant to personally carry out the transfer of ownership. (C-I ¶ 218). Claimants characterize this as the expropriation where they were told that they could either (1) sign an agreement to transfer operations, (2) become subcontractors, or (3) KMG would obtain a court order and obtain the business "*the hard way*." (C-0 ¶¶ 90- 91). Respondent states that the LPG Plant, which Claimants abandoned in May 2009, was never part of the property that was transferred to KMG trust management. It still remains the property of TNG. (R-I ¶ 31.152).

614. There was a phone call on 22 July 2010 between Mr. Calancea of TNG, Mr. Ongarbaev of MOG, and Mr. Utilgaliev of KMG in which all issues of the termination of the contracts and the management of the assets going forward were discussed. (R-I ¶ 31.155 *et seq*.; R-II ¶ 705; CPHB 2 ¶ 178).

615. Claimants state that the termination notices faxed to KPM and TNG on 22 July 2010 informed both that the territories involved in Contracts 210 and 305 were to be transferred to the Republic of Kazakhstan and into the temporary possession and use by KMG. (C-I ¶ 222; C-II ¶ 354; CPHB 2 ¶¶ 74, 117). KPM continued to exist as a legal entity that could have asserted its legal rights, notwithstanding the transfer of assets. (R-II ¶ 378, R-I ¶ 31.150).

616. On 22 July 2010, the MOG sent TNG a notice of termination of Contract 302, alleging that Contract 302 had expired in March 2009. (CPHB 2 ¶ 178).

617. KMG forwarded Claimants contracts providing for the transfer of infrastructure, operations, and economic benefits to KMG and the State — contracts that KMG has already executed. (C-0 ¶ 91; C-I ¶¶ 225 – 230). Respondent states that the terms of the contracts proposed to KPM and TNG in order to transfer the territories to KMG NC to hold in trust management mirrored the terms of the main trust agreements signed the day before and provided that the transfer was temporary until a new subsoil user was found. (R-II ¶ 706). Claimants state that they never signed a transfer agreement with KMG. (C-II ¶ 230).

618. On 22 July 2010, all revenues generated from oil and gas production were put into a separate escrow account held by KMG. (C-I ¶ 231; R-I ¶ 31.164).

619. The MOG issued its notification of termination of Contract 302 on 22 July 2010. (RPHB 1 ¶ 347).

620. On 23 July 2010, KPM and TNG received letters from the MOG stating that, due to the unilateral termination of the contract from 00 hrs. 00 min. of 22 July 2010 all products produced on the enterprise had been transferred to the ownership of the Republic of Kazakhstan. (C-I ¶ 232).

621. On 24 July 2010, Claimants notified the State that it viewed the actions of KMG and the State as illegal takings of Claimants' rights and assets, and protested the revocations and seizures. (C-0 ¶ 91). Respondent confirms this conversation and points out that there was no one from Claimants left in Kazakhstan to run the companies. (R-I ¶ 31.156).

622. On 28 July 2010, Respondent employed the attorney provisions set out in Article 72(10) of the Subsoil Law and to arrange for an agreement to be entered into for the transfer of property to KMG. (R-I ¶ 31.160). The transfer of assets was finalized in Claimants' absence. (R-II ¶ 712).

623. Since being taken into trust management, KMG has delegated all immediate functions for the subsoil area trust management to the Aktau branch of its 100% affiliate KMT. (R-I ¶ 31.162).

624. On 26 August 2010, KPM and TNG wrote to the MOG to inquire about the status of their assets after the cancellation of the three contracts. (C-I ¶ 236).

625. A summons was issued for Mr. Stejar to appear at the transport prosecutor's office in or around September 2010. (C-I ¶ 138).

626. On 16 September 2010, the 29 December 2009 transfer price tax assessment decisions were upheld. (C-I ¶ 174; R-I ¶ 30.65).

627. On 3 November 2010, the Kazakh Supreme Court overturned the decisions of the appellate court and the Court of Cassation, thereby reinstating the trial court's findings that the corporate income tax assessment was proper. Claimants were unaware of this review until it was mentioned in the Statement of Defense filed in this arbitration. (CPHB 1 ¶¶ 255, 258; CPHB 2 ¶ 128; RPHB 2 ¶ 976).

628. On 24 January 2011, there was a TV interview of the former President of the Republic of Moldova. (C-78, minute 1:10:59). Claimants believe that this interview is an admission that former President Voronin composed the 6 October 2008 letter at the request of President Nazarbayev. (C-I ¶ 75). Respondent rejects this translation of the interview. (R-I ¶ 19.21).

629. On 29 April 2011, KMT obtained a license to operate main pipelines, including KPM's 18 km pipeline. (CPHB 2 ¶ 74).

630. In August 2011, former Ascom Vice President, Andrei Bastovoi, and his son were charged with misappropriating USD 185,000 of Ascom funds. Respondent states that Mr. Bastovoi defended himself by arguing that he was under orders to divert this funding from Sudan to another African country (Uganda) for corporate purposes. Respondent states that Mr. Bastovoi was rearrested in October 2011 for plotting the murder of members of the Stati family. (R-II ¶ 45).

631. On 17 December 2012, Claimants set up a so-called "*Sharing Agreement*" between them and the noteholders. The Sharing Agreement foresees that proceeds from an award be shared between Claimants and noteholders on a 30/70 basis. (RPHB 1 ¶ 1056).

632. As of January 2013, KMT trust manager Mr. Khalelov confirmed that no attempts have been made to recover allegedly outstanding taxes from KPM or TNG. (CPHB 2 ¶ 128).

633. Claimants state that, on 14 February 2013, the Sharing Agreement was accepted by 99.8% of the noteholders, effectively amending the notes and related security arrangements for all noteholders. The Sharing Agreement did not create or materially alter Claimant's obligations regarding the Tristan Debt. Instead, it was a renegotiation of Claimants' existing obligations and not a voluntary assumption of new liability. (CPHB 1 ¶¶ 626 – 630, 632; CPHB 2 ¶¶ 325 - 327).

F.III. Respondent's Alleged "*Playbook*" / Campaign of Harassment and Interference

634. The Tribunal has considered all of the facts presented by the Parties, even if not explicitly stated herein. This section introduces the facts and events related to what Claimants call Kazakhstan's "*Playbook*." This section is without prejudice to the Parties' further submissions and arguments.

1. Arguments by Claimants

635. Claimants argue that Respondent runs a "*playbook*" of harassment to coerce investors and to enrich powerful Kazakhs. The playbook typically commences with an executive-mandated investigative onslaught and ends with a firesale of assets to the State or an outright seizure. Groundless tax claims are an important element of the playbook. Respondent used these harassing and intimidating tactics to coerce Claimants into selling their investments to KMG at a firesale price and, when that failed, seized the investments under the appearance of legitimacy. (C-II ¶ 363; CPHB 2 ¶¶ 40, 128 – 139).

636. Claimants urge the Tribunal to view Respondent's conduct for what it was: "*a concerted attempt to coerce Claimants to sell their successful investments to KMG (or some other company owned by Timur Kulibayev) at a firesale price*." (C-II ¶ 373). Kazakhstan has a long-standing goal of "*claw[ing] back some of the value it had negotiated away to foreign investors in earlier deals*." (C-II ¶ 365). It accomplishes that by "*attempting to renegotiate contracts with foreign investors, and by acquiring interests in foreign-owned companies through KMG at a discount to fair market value. If foreign investors did not go along voluntarily, Kazakhstan brought pressure in the form of harassing inspections, outrageous tax assessments, criminal prosecutions, fines, etc*." (C-II ¶ 365). Claimants describe the "*playbook*" as follows:

> *[T]ax authorities and other regulators [in Kazakhstan] have been tasked to approach investors very aggressively in an effort to address the perceived unfairness of the deals struck with foreign investors in the republic's early years. The Financial Police have apparently been tasked a key role in implementing government policies designed to reverse these past "errors." Using methods similar to those often employed in neighboring Russia, the Kazakh government has become adept at harassing foreign companies with a barrage of fines, criminal allegations, and tax threats until it is able to extract from them whatever concessions it desires. Sometimes the tactics*

> *employed are designed to achieve a material modification of the economic essence of the transaction. On other occasions their intention seems rather more confiscatory, geared to driving the foreign investor away and seizing its investment. (C-II ¶ 365, CPHB 2 ¶ 129).*

637. This "*playbook*" typically involves three elements. First, there are the Financial Police. The Financial Police have powers to "*preempt, investigate, and prosecute economic, financial and corruption crimes and violations*." The Financial Police are closely controlled by President Nazarbayev and act as the "*President's instrument to coordinate multi-agency investigations and to ensure that other more independent agencies reach the desired conclusions*." (C-II ¶ 367). Second, there is the involvement of the judiciary. While the involvement of the judiciary may lend the appearance of normalcy and legitimacy to Kazakhstan's actions, it actually is just another tool through which the executive branch ensures a predetermined outcome. Kazakhstan has a weak and partial judiciary. Further, the use of criminal allegations and prosecutions puts tremendous pressure on investors and greatly enhances the bargaining position of the State: (C-II ¶¶ 367 – 369).

> *[…] First, it allows for dramatic pressure against individuals, who recognize that they may be held for protracted periods in investigative detention and subjected to aggressive interrogation in a country with a reputation for jailhouse torture and abuse and for ill-explained deaths in detention, which has no independent judiciary, and in which a conviction is a foregone conclusion in any case taken to trial. Second, it ratchets up pressure on those arrested to turn on their employer and provide information that may lead to the "discovery" of crimes or regulatory infractions, even when none were legitimately detected before. Criminal investigators offer immunity for employees who turn on an employer in this fashion. Third, the disruption produced by the criminal case can paralyze a business and bring it grinding to a halt. This can occur by distracting senior management from performing their jobs, through the seizure of business records which make the continuation of work all but impossible, through raids and searches of business premises which demoralize employees and stop work at critical junctures. The prosecution of a criminal case can thus destroy a business, even if no conviction results. (C-II ¶ 369).*

638. Third, Kazakhstan invariably makes it clear that the renegotiation of a contract or the sale of a substantial equity stake to KMG (or another Kazakhstan-owned entity) will make all these problems go away. This tactic has been used against at least four other investors in the oil and gas sector to date: (1) Tengizchevroil LLC (charged with "*illegal entrepreneurship*" for "*unauthorized overproduction*" of oil), (2) Agip KCO (publically accused of fraud), (3) Karachaganak Petroleum Operating BV (accused, among other things, of "*illegal entrepreneurship*" for "*profiting from oil output that was not approved by the state*", and (4) Caratube International Oil Company (repeated raids). (C-II ¶ 370).

639. Claimants state that observers have dubbed Kazakhstan's political system as an "*advanced kleptocracy or a 21st-century dictatorship*" and identify 2 motives for this. First, President Nazarbayev uses his tactics to enhance personal wealth and power of himself and his allies. His son-in-law, Timur Kulibayev, who has amassed a fortune of over USD 1 billion and holds the Chairmanship of KMG and

other positions, is one clear beneficiary of this. He controls an estimated 90% of the Kazakhstan economy. Second, Kazakhstan uses this "*playbook*" to weaken political opponents of President Nazarbayev by eliminating their sources of income. This motivation seems unlikely here, although Claimants were made vulnerable by the fact that Anatolie Stati was an adversary of Moldovan President Voronin. This was a vulnerability because it meant that no Moldovan diplomats would come to Anatolie Stati's rescue. (C-II ¶¶ 371 – 373).

640. Claimants argue that Respondent used its "*playbook*" to force Claimants to sell at a firesale price. Claimants have been refusing offers from companies controlled by Timur Kulibayev to purchase all or some of their Kazakhstan investments since at least 2004. In 2004, GazImpex – a company controlled by Mr. Kulibayev – attempted to purchase TNG. At the time, Claimants valued TNG at USD 567 million, but GazImpex valued TNG at USD 27.8 – 32.9 million. This was likely Mr. Kulibayev's first attempt to acquire Claimants' investments at a bargain price. In 2007, Claimants discussed the sale of TNG to another company controlled by Mr. Kulibayev – KazRosGas – a joint venture between KMG and Gazprom. KazRosGas wanted to purchase a 50% interest in TNG. But, when Terra Raf determined that selling a share in TNG of that size could trigger Kazakhstan's pre-emptive right to acquire the interest, it decided not to sell the partial stake to anyone. The message was that Claimants did not want to be in business with the Kazakhstan government (i.e., KMG). (C-II ¶¶ 373 – 376).

641. In summer 2008, Claimants marketed the 100% sale of their investments through Project Zenith. They included KMG in the potential purchaser targets, since they would not be in business with the buyer thereafter. Renaissance Capital sent KMG the Information Memorandum and the Due Diligence presentation, both of which contained substantial details about the companies and their assets. On 25 September 2008, KPM submitted an offer of USD 754 million, for KPM and TNG (minus the Contract 302 properties). This was the third lowest offer. Less than three weeks later, however, President Nazarbayev issued his order to investigate Claimants' companies, resulting in a "*barrage of investigations, false accusations, exorbitant tax assessments, and criminal prosecutions*." Claimants argue that the "*timing alone supports a strong inference that President Nazarbayev issued his order to help tip the scales in KazMunaiGaz's favor in the Project Zenith. The events that unfolded over the next 20 months make that inference extremely clea*r." (C-II ¶ 376 – 380). In particular, Claimants highlight the following events:

- *On November 11, 2008, the Financial Police's issuance of a finding that KPM did not have a main pipeline license, paving the way for the criminal trial and US$ 145 million fine on KPM;*

- *On December 18, 2008, the MEMR's reversal of its pre-emptive rights waiver as to TNG, and issuance of a press release alleging forgery and fraud in connection with the registration of TNG;*

- *On February 10, 2009, the assessment of US$ 62 million in back taxes, disregarding stabilization guarantees in its Subsoil Use Contracts; and*

- *On April 29, 2009, the arrest of KPM's general director. (C-II ¶ 380).*

642. This harassment campaign caused a liquidity crisis within Claimants' companies that, combined with falling energy prices, forced Claimants to obtain a bridge loan for additional working capital. Claimants had already finalized the details of a loan from Credit Suisse on 5 December 2008, but Credit Suisse – after seeing the 18 December 2008 press release and accusations – refused to provide the capital until Claimants resolved their disputes with Respondent. (C-II ¶ 381). Claimants' description of its additional liquidity problems are best taken from their own words:

> *382. Without that additional working capital, KPM and TNG's cash position became very tight in early 2009. Moreover, Kazakhstan exacerbated that liquidity problem by choking off TNG's access to gas markets. In the fall of 2008, TNG's largest non-local customer — Kemikal, a company controlled by Mr. Kulibayev — inexplicably failed to post bank guarantees that were part of its required payment terms. Because Kemikal had an erratic payment history, TNG chose not to renew that contract without the bank guarantees in place (and in fact, ended up pursuing Kemikal until June of 2009 to acquire the last of Kemikal's overdue payments). When local demand declined in the spring of 2009, however, the absence of the Kemikal contract left TNG with a shortage of demand. TNG approached KazRosGas about purchasing its excess gas for export, but KazRosGas never responded. TNG had previously sold gas for export through KazRosGas and GasImpex (both companies that were controlled by Mr. Kulibayev), and those companies had made a substantial profit on those contracts. Thus, the decision of KazRosGas not to export TNG's gas in the spring of 2009 seems suspiciously like a conscious attempt to choke off TNG's revenues at a critical time.*
>
> *383. This liquidity crisis reached its peak in June 2009, when KPM and TNG owed significant tax payments as well as loan repayments to Tristan needed to fund Tristan's coupon payments to noteholders. Not coincidently, KazMunaiGaz returned at exactly that time to make another lowball offer for the companies. KazMunaiGaz knew the predicament that KPM and TNG were in. As a result of the "re-evaluation" of TNG that the MEMR ordered in March, KazMunaiGaz received access to the complete Project Zenith data room — including KPM and TNG financials — in April 2009. Then, in June 2009, KazMunaiGaz offered only US$ 50 million for Claimants' equity interests and indicated that it would "deal separately" with the companies' debts, without providing any further detail. Even assuming that KazMunaiGaz intended to pay face value for the US$ 550 million in outstanding debt (which seems unlikely, based on KazMunaiGaz's offer of 25 cents on the dollar to the Tristan noteholders in November 2009), the total value of [KMG's] "offer" had decreased to at most US$ 600 million — which was at least US$ 150 million less than its indicative offer from September 2008. It is no coincidence that KazMunaiGaz showed up with this opportunistic offer at just the right time. This is the Kazakhstan harassment playbook at work.*
>
> *384. Claimants were only able to weather the liquidity storm in the summer of 2009 by obtaining emergency bridge financing from a group of venture capitalists (the "Laren Facility"). The terms of the Laren Facility were*

> *terrible for Claimants (35% interest on a $60 million note, plus the issuance of $111 million of new Tristan notes). Because of the substantial risks to lenders created by Kazakhstan's harassment campaign, those were the best terms that Claimants could obtain. They had no choice but to accept those terms while they continued to try to sell the companies to Total and KNOC in the summer of 2009. (C-II ¶¶ 382 – 384).*

643. As time continued, Respondent simply turned up the pressure. Kazakhstan interfered in the trial of Mr. Cornegruta to ensure a guilty verdict and then sentenced him to four years' incarceration in a notoriously dangerous prison system. Kazakhstan then threatened to do the same to KPM and TNG's other directors. Kazakhstan levied a massive fine against KPM that was large enough to bankrupt the company and provide a ground for seizing the assets. Through the continued inspections, audits, and seizures, Kazakhstan continued to interfere with the day-to-day operations of the business. Then, in November 2009, KMG made another, even lower bid to buy the companies. (C-II ¶¶ 385 – 386).

644. At around the same time, Mr. Kulibayev clandestinely made another attempt to purchase the companies, through a different company: the Starleigh Group. (C-II ¶ 387).

645. On 7 February 2010, the President of the Blagovest Fund, Mr. Zakharov, wrote a letter to the MEMR. (C-I ¶¶ 15, 181-2, CPHB 1 ¶ 335, CPHB 2 ¶ 38). Accompanying this Blagovest letter was a 19 November 2009 personal instruction from President Nazarbayev, which Claimants state indicates that he had wanted to strip the companies of their assets while maintaining the assets operational. This letter and the attached government instruction indicates that Kazakhstan planned a take over as early as 2008. (C-I ¶ 182; CPHB 1 ¶¶ 335 – 341).

646. Despite the campaign of harassment, Claimants were able to find a buyer for KPM and TNG in February 2010 – the Cliffson Company. The total value of this offer exceeded USD 920 million. On 12 April 2010, Claimants submitted applications for approval of the Cliffson sale and a waiver of Kazakhstan's pre-emptive rights. On 30 April 2010 and 1 June 2010, the MOG requested additional information about the transaction and Claimants provided all of the reasonably requested information on 23 June 2010. Rather than respond, however, Kazakhstan initiated the final inspection blitz that led to the ultimate expropriation of Claimants' assets on 22 July 2010. (C-II ¶¶ 388 – 391, partially quoted).

647. Claimants state that, by this time, they had made it clear that they intended to bring arbitration claims against Kazakhstan for the diminution in value of their investments once the Cliffson sale closed. This had been an issue of concern throughout the harassment campaign. Even the MEMR's 28 September 2009 letter to the Ministry of Industry and Trade noted that the risk of arbitration was one of the reasons why it would be better to obtain KPM and TNG through acquisition rather than premature termination of the Subsoil Use Contracts. (C-II ¶¶ 392 - 394, partially quoted).

648. In addition to completely interfering with Claimants' ability to use, manage, and enjoy their investments, Kazakhstan's conduct made it impossible for Claimants to sell their companies, as they had planned to do starting in mid-2008. Claimants do not contend that Kazakhstan's actions motivated their initial decision to sell. What

is important, however, is that none of the interested bidders was willing to follow through with the sale after Kazakhstan commenced its targeted harassment of KPM and TNG in October 2008. (C-II ¶¶ 396 - 397).

649. In response to Kazakhstan's argument that "*the majority of potential bidders decided not to make a bid for reasons unrelated to governmental harassment or interference, such as the global economic crisis, perceived lack of transport links, and other reasons outlined in a presentation by Renaissance Capital to Claimants*", Claimants point out that all of these factors existed in September 2008, well before the campaign of harassment began. Despite all of these factors, eight bidders showed serious interest in Claimants' investments. (C-II ¶ 398).

650. In response to Kazakhstan's argument that Claimants provided bidders inaccurate or incomplete information masking the illegalities of their purchase of KPM and TNG, Claimants state that there were no such facts to disclose. Claimants' acquisition and reorganization of KPM and TNG were legal, and the companies had valid licenses for all the activities they conducted. It was not until Kazakhstan retroactively reversed its waiver of pre-emptive rights and publicized allegations of fraud in December 2008 (as part of this harassment campaign) that there was ever any question about the legal status of Claimants' investments.

651. With respect to the five bidders who chose not to go forward, Claimants state that some change in circumstances having nothing to do with the data room (which they did not see), must have caused them to lose interest in the investments. The two events that occurred between the bidding and their decision not to participate were (1) Kazakhstan's retroactive reversal of its waiver of pre-emptive rights with respect to Terra Raf's purchase of TNG and (2) Kazakhstan's assessment of USD 62 million in alleged back taxes and penalties, in blatant disregard of the stabilization guarantees in the Subsoil Use Contracts. With respect to the two bidders who chose not to continue after seeing the data room, their exit does not cast any doubt on the accuracy of information provided to bidders in the first phase of Project Zenith or on the reliability of those indicative offers. Instead, Claimants state that "*it is possible that these two potential bidders withdrew from Project Zenith after learning of Kazakhstan's* allegations *of such illegalities, which Kazakhstan publicized in a press release on 18 December 2008. But since those allegations were wholly unfounded and a part of Kazakhstan's targeted harassment campaign, this possibility only supports Claimants' position that the harassment campaign had its intended effect of deterring potential bidders for Claimants' investments*." (C-II ¶¶ 401 – 402).

652. The final two bidders, Total and KNOC, withdrew only after speaking with Kazakh authorities. These companies likely knew about the ongoing harassment and its effect on KPM and TNG. Total has been understandably quiet and diplomatic about its real reasons not to pursue acquisition of KPM and TNG, as it is already involved in long-standing joint activities with KMG in Kazakhstan. This ownership and management structure insulates Total from the kind of harassment that Claimants have experienced, harassment which Total as a 100% disfavored foreign owner could also experience. KNOC would not proceed without speaking to Kazakh authorities. Respondent has not presented any witnesses to dispute that its personnel met with representatives of Total and KNOC and persuaded them not to acquire TNG and KPM. The letters that have been provided should be

disregarded unless their authors are presented for cross-examination. The authenticity of these letters is in question, as they were plainly solicited by Kazakhstan for this arbitration. In addition, the four companies that purportedly wrote the letters (R-41, 41.2, 41.4) continue to have significant investments in Kazakhstan (C-II ¶¶ 403 - 407).

653. Claimants state that the letter from KMG demonstrates how Kazakhstan's harassment campaign undermined the alienability of Claimants' investments. Of the six factors it states it discovered in the data room in March 2009, two were inaccurate and four were the direct result of Respondent's harassment campaign – and none were from any declines in KPM's and TNG's intrinsic worth. (C-II ¶¶ 407 – 410).

> *409. […] As described above, the US$ 60 million Laren loan (issue 2), and the issuance of US$ 111.1 million in additional Tristan notes in connection with that loan (issue 4), were only necessary because of Kazakhstan's harassment campaign. Moreover, the third issue referenced by KazMunaiGaz — the "other risks related to claims from Kazakhstan's government authorities" — refers presumably to the tax, duty, and criminal fine liabilities imposed wrongly on KPM and TNG as part of Respondent's harassment campaign. Additionally, the final factor mentioned by KazMunaiGaz — Claimants' removal of Casco from the field in 2009 — resulted directly from Kazakhstan's harassment campaign. Because of the cash flow shortfall discussed above, and the increasingly hostile investment environment, Claimants prudently reduced their drilling and workover activities in Kazakhstan and removed Casco personnel from the country. (C-II ¶ 409).*

654. Turning to Respondent's dismissal of the effect that its actions had on KNOC, Total, and other Phase 2 Project Zenith companies, Claimants remind the Tribunal that, prior to the Aktau City Court's issuance of the USD 145 fine on 18 September 2009, Kazakhstan had (1) retroactively reversed its waiver of pre-emptive rights with respect to Terra Raf's acquisition of TNG and publicly accused Claimants of fraud and forgery; (2) assessed millions of dollars in back taxes, blatantly disregarding its contractual stabilization guarantees; and (3) jailed KPM's general director on charges that could be leveled against most oil and gas producers in Kazakhstan. Each of these events was significant enough to deter foreign investors, making the timing of the bidder's withdrawals (prior to the fine assessment) less relevant. (C-II ¶¶ 412 – 414).

655. The KMG and Starleigh offers were significantly below FMV – not only because they valued equity at USD 50 million and because they promised to "*deal separately*" with the companies' debts – but because they were attempting to take advantage of Claimants' weakened position caused by Kazakhstan's harassment campaign. In light of the harassment, and with the knowledge that, because of it, Claimants were desperate to sell and that Kazakhstan could obtain the investments for KMG through expropriation, neither KMG nor Starleigh had any incentive to offer FMV for Claimants' investments. (C-II ¶¶ 415 – 417).

656. The Cliffson offer, which was for USD 267 million for all equity interests in TNG, KPM, and Tristan and for assumption of all of those companies' liabilities, was valued at USD 920 million. This offer was below the FMV because of the pressure

to sell, caused by Respondent's harassment campaign. Cliffson even indicated during negotiations that it was the only company that Kazakhstan would permit to purchase TNG and KPM. (C-II ¶¶ 418 - 422).

2. Arguments by Respondent

657. In its Post Hearing Briefs, Respondent explained:

> *(a) that there was nothing improper about President Nazarbayev's instructions based upon President Voronin's letter; [Indeed, to not investigate would have been an affront from a foreign policy perspective. (RPHB 2 ¶ 375)]*
>
> *(b) that no motive for harassment – be it political or financial – existed; and*
>
> *(c) that the Blagovest letter about which Claimants try to create a lot of confusion does not support their theories in any way;*
>
> *(d) that no "Playbook" exists and that the Financial Police and other authorities as well as the Kazakh courts acted independently and not as the extended arm of the executive. (RPHB 1 ¶¶ 371 – 373, partially quoted; RPHB 2 ¶ 375 et seq.).*

658. Respondent's arguments with respect to Claimants' "*Playbook*" theory are best taken from their own words:

> *244. Claimants' account of the "Kazakhstan Playbook" is nothing more than a fairytale. There is no "Kazakhstan Playbook" and certainly no campaign to expropriate Claimants' investments by using these so-called "Playbook" tactics. […] Claimants' Reply Memorial on Jurisdiction and Liability provides no evidence of a planned nor a concerted harassment of Claimants' business by the Republic or any person or entity associated with the Republic. Instead, the Republic legitimately investigated Claimants, uncovering substantial legal and contractual violations, ultimately leading to a rightful and lawful termination of the Contracts. Any conspiracy theory which Claimants concoct cannot circumvent these facts.*
>
> *245. Claimants' "Playbook" theory is completely unsubstantiated and wholly dependent on defamatory opinions of the Republic's oil and gas industry. Claimants fail to provide any factual evidence to support the existence or operation of a "Playbook". Notwithstanding this, Claimants still draw the most inconceivable conclusions to fabricate their conspiracy. The expert report they largely rely on from Scott Horton does not assist them in this regard. Notwithstanding this, Claimants still deem it appropriate to make ludicrous comments about the Republic, including describing its political system as an "advanced kleptocracy or a 21st-century dictatorship". These statements are not only irrelevant and inappropriate but also fundamentally incorrect.*

> *246. The "Playbook" theory itself hinges on a misguided belief that the Republic harasses foreign investors by "inspections, outrageous tax assessments, criminal prosecutions, fines, etc" using the Financial Police and the Kazakh courts and through coercing the investors to renegotiate their contracts, to "make all these problems go away". Claimants state that the motives for the Republic's "conduct" are to enhance President Nazarbaev's "personal wealth and power of himself and his allies" including Timur Kulibayev and to "weaken political opponents of President Nazarbayev by eliminating their sources of income". For the reasons set out below, each of these alleged tactics of harassment employed and motives for doing so are completely unfounded. Furthermore, the farcical manner in which Claimants seek to associate this theory with the very legitimate action taken by the Republic against them is completely misleading. Although Claimants' various legal and contractual violations will be addressed in other parts of this Rejoinder Memorial on Jurisdiction and Liability, the Tribunal should not, in any event, be persuaded that this "Kazakhstan Playbook" that Claimants have concocted exists. (R-II ¶¶ 244 – 246; RPHB 1 ¶¶ 409 – 413).*

659. Claimants completely mischaracterize the purpose and role of the Financial Police. The Financial Police are obliged by law to investigate and prosecute financial crimes. This includes carrying out investigations of subsoil users having potentially committed such offenses. They do not set out to harass foreign investors. The Financial Police has become an accountable agency. It is headed by professional security officials and is independent from the executive. Claimants have provided no evidence for their contention that the Financial Police act as President Nazarbayev's instrument. (R-II ¶¶ 247 - 249).

660. Closer examination reveals that Claimants were not subject to a barrage of seemingly random inspections, but rather were subject to two principle phases of inspection, each initiated for unconnected reasons by different organizations for different purposes. In each case, the outcome was different. The first phase of inspections took place from October – November 2008 in response to the concerns of President Nazarbayev in light of the letter from President Voronin of Moldova. The purpose of these investigations was to determine whether there was any truth in President Voronin's allegations. The result of this first phase of inspections was the criminal prosecution of Mr. Cornegruta for illegal entrepreneurial activity and a number of assessments of taxes and duties. The inspections that took place between November 2008 and July 2010 were principally a continuation of processes set in motion in October and November 2008 and share the justification and objective of those initial inspections. The second phase of inspections was initiated by the GPO in June and July 2010 in response to complaints that KPM and TNG were not fulfilling their obligations to employees and were failing to comply with legislation and their Subsoil Use Contracts. This second phase discovered a string of infringements that ultimately led the MEMR to terminate KPM and TNG's Subsoil Use Contracts, prior to transferring the companies' subsoil assets into trust management. (R-II ¶¶ 247, 280 – 285; RPHB 2 ¶¶ 375 – 382).

661. Subsoil users are always subject to a high level of scrutiny, which is simply a feature of the subsoil industry. Claimants were aware of this high level of scrutiny. It was expressly disclosed in their contracts and licenses, which contain ongoing

disclosure and record maintenance obligations and even reference legislative rights of inspection and audit contained in law. KPM and TNG were not subject to any greater degree of scrutiny than were any other subsoil users. To the contrary, from 2001 to 2010, KPM was inspected 88 times, TNG was inspected 100 times while other companies were inspected more: Karazhanbasmunai was inspected 246 times, Mangistaumunaigaz 298 times, Uzenmunaygaz 390 times, and Emir Oil 76 times. Considering the statistics for subsoil users in Mangystau Province, such as KPM and TNG, for the period of 2001 – 2010, KPM and TNG were the second and third least audited companies, with the state company Uzemunaigaz being the most audited. (R-I ¶¶ 20.29 – 20.31; R-II ¶¶ 286 - 291).

662. The criminal inspections of KPM and TNG were, of course, outside of the scope of the routine inspections, but were nonetheless justified and lawful. These inspections were motivated by allegations of criminal behavior. The results of these inspections were reviewed by a separate department of the Financial Police – independent from the individuals who had undertaken the inspections – before any decision was taken as to whether to proceed. Review confirmed that there was sufficient evidence that a crime had been committed in some respects, but that there was insufficient evidence to pursue criminal investigation of other findings. Those investigations were terminated. (R-II ¶¶ 292 – 297).

663. The continuation into 2009 of the initial inspection was a structured attempt to gather evidence to develop the case – it was not "*an unguided capricious exercise of power*." These investigations were far from sinister or threatening. Employees at KPM and TNG's premises were helpful. The Financial Police conducted the searches while unarmed (KPM and TNG's security forces were armed) and while outnumbered by KPM and TNG's security forces. Respondent describes steps undertaken to help KPM and TNG employees feel at ease throughout the search, especially since by that time they knew that Mr. Cornegruta had been arrested. Claimants' descriptions to the contrary are wildly exaggerated. (R-II ¶¶ 298 – 302).

664. The second round of inspections (June/July 2010) was initiated by the GPO in response to complaints that KPM and TNG had infringed the rights of their employees and had breached a number of contractual and legislative obligations. The complaints included allegations related to non-payment of salaries, mass dismissal of employees, failure to comply with environmental legislation, and failure to comply with subsoil use legislation. The investigation had nothing to do with the introduction of new subsoil legislation. Each agency that participated in this complex/comprehensive audit was specifically instructed based on its particular expertise. A complex audit was found to be more appropriate and less intrusive than a "*drip, drip*" of inspections to address the issues raised in the complaint. These inspections were led by the GPO and revealed a number of infringements by KPM and TNG. The Ministry of Environment Protection, the MOG, the Ministry of Industry and New Technologies, the Ministry of Labor and Social Protection, the MES, and the Sanitary and Epidemiological Inspection authorities found extensive violations. No contemporaneous complaint was received in relation to the conduct of the complex investigation. Claimants' statements that this was a "*final inspection blitz*" or that this was somehow the culmination of a campaign of harassment by the Republic are unfounded. (R-II ¶¶ 305 – 310, 317 - 320).

665. The results of the GPO inspections were not required to be recorded in an Act of Inspection. In response to Claimants' complaint that the Acts of Inspection were received too late to avoid termination of the contracts, Respondent notes the following:

(a) *The issue of operating a main pipeline without a license, referred to in the MEMR's letters of 14 July 2010, had been known to the companies since at least 18 September 2009 when Mr Cornegruta was convicted of the offence of illegal entrepreneurial activity. Therefore ample time had been available to respond to the allegation;*

(b) *The issue of non payment of taxes, also referred to in the MEMR's letters, had been known about since at least 8 and 9 September 2009 when the Astana City Court ruled against their challenge to the Tax Committee's assessment of corporate back taxes;*

(c) *Claimants admit that they received the MEMR's Act of Acceptance several days prior to the 19 July 2010 deadline set by the MEMR to reply to its notices of breach and sufficiently in advance for Mr Calancea to conclude that "Kazakhstan's allegations were essentially groundless" and for KPM and TNG to each provide 5 to 6 page responses to the MEMR's notices. (R-II ¶¶ 311 – 312; see also RPHB 2 ¶¶ 339 - 374).*

666. Given the nature of the infringements discovered, it was proper for the MEMR to address the breaches to the Subsoil Use Contracts.

667. Claimants' allegation that Kazakh courts are dominated by the executive is quite simply wrong, though western observers have not sufficiently noted the major steps that have been undertaken in recent years to reform the judiciary. Kazakhstan's constitution expressly refers to the independence of the judiciary and to the separation of powers between the executive legislature and the judiciary. Claimants have provided no evidence that the executive in any way controlled or influenced the courts as part of the alleged harassment of KPM and TNG. The Republic's position is that there is nothing incorrect or improper about the Aktau Court's decision to prosecute Mr. Cornegruta for illegal entrepreneurship. The decision was valid, correct, and was confirmed on appeal. (R-II ¶¶ 250 – 254, 495 – 627).

668. As the backdrop to the "*playbook*" argument, Claimants argue that the Republic made it clear that "*renegotiation of a contract or the sale of a substantial equity stake to KMG (or another Kazakhstan-owned entity) will make these problems go away*." First, there is nothing untoward with the Republic legitimately re-negotiating Subsoil Use Contracts and/or national companies acquiring interests in companies that had rights to exploit its subsoil. It certainly cannot be seen as part of some "*Playbook*" conspiracy against foreign investors. Instead, Respondent shows that the examples provided by Claimants involved companies that had very serious problems and had violated the terms of their contracts and Kazakh law, making contractual renegotiation and/or state assistance necessary. Second, there was likewise nothing untoward about the bids for TNG and/or KPM made by companies supposedly associated with the Republic or with Mr. Kulibayev. None of these bids confirm any alleged "*playbook*." Third, even if the Republic were to try to renegotiate contracts made in the 1990s which it believed to be too generous,

there is nothing untoward about such action and it certainly is not part of any conspiracy against foreign investors. (R-II ¶¶ 255 – 260, 270 – 271).

669. Claimants' arguments that the Republic and Mr. Kulibayev wrongfully tried to acquire KPM and TNG is nothing more than a fanciful attempt to frame what was a rightful termination of the contracts and transfer of contractual territories into trust management as some sort of fictional conspiracy theory against them. With respect to Claimants' arguments that GazImpex, KazRosGas, and Starleigh have attempted to purchase KPM and TNG, Claimants have failed to prove that Mr. Kulibayev owned or controlled any of these companies. (R-II ¶¶ 338 – 342; RPHB 2 ¶ 375).

670. The 2004 GazImpex offer for TNG is irrelevant to this arbitration. Those negotiations fell apart when GazImpex did not value the company as highly as Claimants did. The 2007 offer by KazRosGaz is also irrelevant, and there were no official proposals or negotiations. There is no connection to the Republic and there is nothing coercive about one company bidding for another. (R-II ¶¶ 343 – 345).

671. The Starleigh offer is also irrelevant, as Claimants have not proven that Mr. Kulibayev is linked to the company or, even if he is, if Starleigh is linked to the Kazakh government or if Starleigh was involved in any conspiracy against Claimants. Claimants' argument also makes little sense. Respondent hypothesizes "*if Starleigh genuinely believed it could somehow obtain KPM and TNG for no money at all, it surely would not have made the very substantial bid it did at the time, which included dealing with the debt Claimants had amassed, which amounted to more than US$500m*." (R-II ¶¶ 346 – 349, partially quoted).

672. With respect to the bids made by KMG EP and KMG NC, Respondent explains that these two distinct companies, which Claimants refer to misleadingly as KMG, made very different bids for KPM and TNG at very different stages. Claimants have provided no evidence that Mr. Kulibayev was the Chairman of KMG EP. Mr. Kulibayev was only the Chairman of KMG NC – a state entity that considers the social and economic implications of an acquisition. Mr. Kulibayev had no control over KMG EP and Claimants have provided no evidence that he had any role in KMG EP or KMG NC's bids for KPM and TNG, or that he was in any way influencing the Republic to coerce Claimants into selling KPM and TNG to KMG NC. Furthermore, a sale to KMG NC would not lead to a change in Mr. Kulibayev's wealth, as KMG NC is a state owned company. Finally, it is clear from the facts that neither KMG EP nor KMG NC were part of any alleged attempt by the Republic to force Claimants to sell KPM and TNG to entities allegedly owned or controlled by Mr. Kulibayev. In fact, KMG EP only bid on Claimants' companies after being invited to do so by Claimants themselves. Thereafter, Claimants invited KMG EP to participate in the second phase of Project Zenith – again, undermining the argument that the Republic was coercing it to sell to KMG EP. The bid was made based on information made available by Claimants – the bid was certainly not a form of harassment. KMG EP withdrew in July 2009 after deciding that it was not commercially reasonable to purchase the assets. KMG NC, on the other hand, only expressed an interest in purchasing TNG and KPM in November 2009, in order to play a "*white knight*" role in resolving the issues that Claimants had caused to its assets. (R-II ¶¶ 350 – 361, partially quoted).

673. Respondent explains that the motives that Claimants describe for the Republic to use a "*Playbook*" are entirely fictional. Turning first to the alleged motive of enhancing Timur Kulibayev's power and wealth, Respondent explains that Mr. Kulibayev is far from the omnipotent figure in the Kazakh regime that Claimants describe. Prof. Olcott explained that he had recently been dismissed from his position at Samruk-Kazyna. His role as a state servant in KMG NC is different and distinct from his separate business interests. In any event, Claimants have provided nothing beyond conjecture to support their argument that the Republic was trying to coerce them into selling to entities owned or controlled by Mr. Kulibayev. (R-II ¶¶ 261 – 264; RPHB 1 ¶¶ 384 – 385, 389 - 391; RPHB 2 ¶ 375).

674. Claimants have also failed to demonstrate that Mr. Kulibayev or any of the companies controlled by him was interested in acquiring KPM and TNG. With respect to KazRosGas, that is a Russian-Kazakh joint venture that is only 50% controlled by Kazakhstan. Accordingly, it is impossible that Mr. Kulibayev controls the company. Regarding GazImpex and Kemikal, Prof. Olcott was unable to find any proof that Mr. Kulibayev owned the companies. Claimants also lack evidence regarding Starleigh, and did not even mention it in the hearings in October 2012 or January 2013, making it likely that they have abandoned those contentions. Claimants' first allegation that KazAzot was controlled by Mr. Kulibayev was made at the Hearing on Jurisdiction and Liability. That allegation was denied by Minister Mynbayev. (RPHB 1 ¶¶ 392 – 397; RPHB 2 ¶ 375).

675. Kemikal did not "*inexplicably*" stop payment – Kemikal's "*liquidity and insolvency*" issues were the reason that Kemikal stopped making payments. The loss of Kemikal as a customer is not attributable to Respondent. (RPHB 2 ¶ 124).

676. With respect to governmental motives, Claimants rely on internal government correspondence, which they deliberately misinterpret. The correspondence confirms that government officials were worried about the social situation in the region. In particular, the letter from the Mangystau Governor Kusherbayev of August 2009 in no way proposes an expropriation. Instead, the idea of purchasing the assets was only considered as one method to address the problems surrounding the companies. (RPHB 1 ¶¶ 398 – 403).

677. Turning to the alleged political motives, Respondent states that Claimants have failed to provide any evidence to support their bold assertion that *"Kazakhstan frequently uses this harassment playbook to weaken political opponents of President Nazarbayev by eliminating their sources of income."* Claimants' own admission that Anatolie Stati is not a political opponent of President Nazarbayev, however, makes their attempts to twist the political dynamic to make it applicable to him is, at best, fanciful. That President Voronin of Moldova saw Anatolie Stati as an adversary is wholly irrelevant. The letter from President Voronin did not attempt to paint Anatolie Stati as an irresistible target, but was instead simply the kind of letter that required some sort of follow up.

678. To the extent that Claimants argue that the letter from President Voronin is proof of a campaign against Claimants, their argument fails for several reasons. First, the letter is a pro-forma document with which a complaint by one head of state is forwarded to competent authorities. Second, this letter received special attention because it was from another CIS head of state. Third, given post-soviet alliances, it

would be likely that President Nazarbayev would take the side of Anatolie Stati, rather than the side of President Voronin, due to their political connections prior to independence. Fourth, the letter accused Anatolie Stati of concealing profits from the states where those profits were being made, meaning potentially that taxes were being withheld from the Republic. Against this background, it would have been careless for President Nazarbayev not to inspect. The authorities indeed inspected the tax payments, and given the grave charges made by President Voronin, there was no reason to limit the inspections to taxes. The inspections turned up violations and the Financial Police were free to rely on other aspects proven by the inspections to open criminal investigations. Claimants are, therefore, incorrect when they argue that the accusations in President Voronin's letter were not investigated – they were, including the accusations of concealing profits from state authorities. Claimants attempt to use this "*playbook*" argument to district the Tribunal from this fact. (R-II ¶¶ 265 – 279; RPHB 1 ¶¶ 377 – 382; RPHB 2 ¶ 381).

679. Regarding Claimants' allegations of financial or strategic motives, Respondent also states the KPM and TNG were uninteresting targets with an equity value of 0 and an enterprise value of USD 186 as of 21 July 2010. (RPHB 1 ¶¶ 387).

680. Regarding the so-called Blagovest letter, that letter was from a private organization written on its own initiative. Claimants state that the Blagovest letter was written by Mr. Zakharov on the initiative of Mr. Andreyev, then-general director of KPM. The obscure circumstances surrounding this letter stem from the obscure action of KPM's general director at the time. There is no proof of any connection between the Republic and Mr. Zakharov, President of the Blagovest Fund. Testimony at the Hearing also demonstrated that Mr. Zakharov was "*far removed from the facts of real life*." Allegations of a plan to expropriate cannot be based on his letter. (RPHB 1 ¶¶ 404 – 408; RPHB 2 ¶ 372, 381, 382).

681. Respondent explains that the Blagovest Fund is a non-commercial and non-governmental organization in Kazakhstan. It is a social foundation (i.e. a private entity that serves a specific public interest). (R-I ¶ 19.27; R-II ¶ 335). The Blagovest Foundation applied to the MEMR to assist in solving problematic issues connected with KPM and TNG. (R-I ¶ 19.27). The director of Blagovest was a former director of KPM. (R-I ¶ 19.32). Mr. Zakharov, who had been approached by then-general director of KPM, believed himself able to mediate the dispute, in part because of the similar religious missions of the Blagovest Fund – a Cossack charitable fund – and the Stati family. Mr. Zakharov, however, refused to appear to be examined at the Hearings. (R-II ¶ 336; RPHB 2 ¶ 375, 381). Respondent confirms that an internal government instruction, which was not supposed to be seen by or disclosed to the public, was attached to the Blagovest letter. Respondent states that it is very likely that KPM obtained this document through bribery or otherwise by corrupting Kazakh officials. (R-II ¶ 213).

682. Claimants' argument that all Kazakh authorities – except the MEMR, which tried to defend Claimants – conspired against Claimants contradicts its previous allegations that the MEMR fabricated the pre-emptive rights waiver issue in December 2008 to harass TNG. Claimants' construction of Minister Mynbayev's testimony that MEMR defended KPM and TNG "*against the other Kazakh authorities involved, in an effort to protect from a unilateral takeover*" is simply not in the transcript. Nor is the alleged statement that President Nazarbayev's

instruction of November 2009 was a starting point for the MEMR's alleged "*work*" to terminate KPM and TNG's Subsoil Use Contracts. (RPHB 2 ¶ 377, 380). Claimants have also failed to respond to the Republic's arguments that no motive for the alleged harassment exists. (RPHB 2 ¶¶ 377 – 378).

G. Short Summary of Contentions

G.I. Summary of Contentions by Claimants

683. Claimants' contentions are taken from their own words, without prejudice to their further arguments:

> *6. Kazakhstan does not have — and never did have — any credible jurisdictional objections. Claimants are indisputably "Investors" who made qualifying "Investments" protected by the ECT.*
>
> *7. […] According to Kazakhstan's own figures, between 2000 and 2009, Claimants invested US $473 million in KPM and US $693 million in TNG, a total in excess of US $1.1 billion [and] paid over US $350 million in tax revenues to the Kazakh State. KPM and TNG permanently employed nearly 1,000 Kazakh workers, and TNG employed some 3,000 additional contract workers to construct the LPG Plant.*
>
> *8. Claimants' substantial investments transformed the previously fallow Borankol and Tolkyn fields into significant producers of oil, gas, and condensate. By 2010, Claimants had over 70 operational wells in the Borankol field and a total of 40 wells in the Tolkyn field and Contract 302 area. As of 2008, Claimants had produced 12 million barrels of oil and condensate ("MBbls") and 22 billion cubic feet ("bcf") of gas from the Borankol field, and 11 MBbls oil and condensate and 246 bcf of gas from the Tolkyn field. As a result of Claimants' investments, TNG became the fourth largest gas producer in Kazakhstan.*
>
> *9. Claimants also invested more than US $240 million in construction of an LPG Plant, which was substantially complete before construction was halted as a result of the State's misconduct. Kazakhstan viewed the LPG Plant as a "strategic asset" for the Mangystau region. Claimants also conducted extensive exploration and production work on TNG's Contract 302 Properties, including drilling the "Munaibay 1" well, shooting 3D seismic, and acquiring a deep drilling rig to explore the considerable "Interoil Reef" prospect.*
>
> *10. […] [P]rior to President Nazarbayev's directive of October 14, 2008, Claimants and their companies had enjoyed eight years of positive, productive relations with the Kazakh Government. That changed abruptly in the weeks following President Nazarbayev's personal instruction to "thoroughly check" KPM and TNG. During the previous eight years, however, Kazakh agencies had routinely inspected and audited the*

companies' operations and accounts and had consistently given them "clean bills of health."

11. *Notably, there had never been any allegation that KPM's or TNG's field pipelines were "main" pipelines, because they obviously were not. And Kazakhstan had taken express positions on other issues that it would directly contradict after October 2008 (and in this case). A simple review of Kazakhstan's change of position before and after October 14, 2008, demonstrates that President Nazarbayev's order caused the harm Claimants suffered in this case.*

12. *[…]The documentary record clearly indicat[s] that State agencies, led by the executive's Financial Police, had pursued KPM and TNG (and their personnel) on multiple fronts, including trumped-up [and contrived] charges of criminal wrongdoing, which caused immediate harm to Claimants' investments. […]*

17. *The campaign against Claimants' investments in KPM and TNG that Kazakhstan commenced in the final quarter of 2008 breached the ECT and international law in multiple respects. It clearly entailed indirect expropriation, because it materially interfered with Claimants' ability to manage, use, and dispose of their investments. The measures Kazakhstan adopted — interference with contractual rights, wrongful exercises of administrative and judicial authority, sequestration of the companies' assets and Claimants' shares, assessment of spurious tax penalties, and harassment and persecution of key personnel — all fall squarely within the bounds of indirect expropriation as understood in international law and treaty practice.*

18. *Kazakhstan's campaign was equally a violation of the ECT's fair and equitable treatment and impairment provisions, as well as its "most constant protection and security" clause. Kazakhstan subjected Claimants' investments in KPM and TNG to severe harassment and coercion as well as inconsistent and contradictory conduct, and it created an environment that was thoroughly unstable and unpredictable (if not treacherous). Kazakhstan also flagrantly violated due process and committed "denial of justice" in relation to KPM and its general director. At the same time, Kazakhstan's state apparatus, led by the Financial Police, utterly failed to provide legal (and in some cases physical) protection and security to Claimants' investments and personnel, much less the "most constant protection and security" required by the ECT.*

19. *Kazakhstan also breached key provisions of Claimants' Subsoil Use Contracts. For example, Kazakhstan imposed groundless and extra-contractual tax assessments on KPM and TNG, and perhaps most notably, it terminated those contracts in violation of their termination provisions. Those acts were breaches of the ECT's "umbrella clause."*

20. *In July 2010, Kazakhstan directly expropriated Claimants' investments by terminating KPM's and TNG's Subsoil Use Contracts and seizing their assets outright. Like the campaign that preceded it, Kazakhstan's ultimate*

expropriation was thoroughly groundless and illegal. By that point, however, Claimants' investments had already suffered 20 months of indirect expropriation and other mistreatment that clearly violated the standards of protection afforded by the ECT and international law.

[October 14, 2008 is the correct valutation date because (1) Kazakhstan's campaign against Claimants' investments in KPM and TNG commenced immediately after the directive, in breach of the ECT and international law, (2) the 2008 campaign harmed Claimatns' investments almost immediately and the injuries continued thereafter, and (3) due to the vicious downward spiral caused and fueled by the State's campaign, October 14, 2008 is the last date on which the Tribunal could assign a value to the investments that was not diminished by the consequences of Kazakhstan's illegal conduct.]

35. *Claimants' valuations of their investments are fundamentally sound and credible, as demonstrated by the fact that they are supported by multiple contemporaneous valuations performed by sophisticated third parties. Furthermore, they have been "reality-checked" by Claimants' experts — all of whose work is backed up with underlying data and modeling — against other independent indicators of value. The 89-page RBS Asset Valuation of mid-2009, performed with full access to Claimants' data room, clearly supports the main planks of Claimants' valuation. So too do the numerous indicative offers received from sophisticated energy companies during Project Zenith, as well as the arms-length Cliffson transaction of early 2010. FTI has also analyzed the trading prices of comparable companies, the terms of comparable transactions, and the trading value of the Tristan debt — all of which likewise support Claimants' valuation. […]*

37. *The "enterprise value" of Claimants' "Investments," KPM and TNG, is the appropriate measure of damages in this case, as it is in most treaty arbitrations involving "investments" in wholly–owned companies established in the host state. "Enterprise value" means the value of the companies' assets without deducting the companies' debts.*

38. *Kazakhstan's argument that the Tribunal should award "equity value" — i.e., that it should deduct the debts of KPM and TNG — is wrong as a matter of fact and of law. Fundamentally, Kazakhstan's "equity value" argument is wrong because Kazakhstan seized all the assets of KPM and TNG, without assuming or extinguishing their debts. By seizing their assets, Kazakhstan left KPM and TNG unable to satisfy their debts, and Claimants remain responsible for doing so from the proceeds of any award in this case.*

39. *The clear terms of the ECT as well as established treaty practice indicate that compensation should include the debts of KPM and TNG, especially in cases such as the present in which Claimants remain responsible for the debts. Indeed, Kazakhstan has conceded that if Claimants remain responsible for the debts of KPM and TNG — which they clearly do — an award of "enterprise value" would be appropriate. An award of*

"enterprise value" is also necessary to prevent the unjust enrichment of Kazakhstan.

40. Claimants have firmly established that Kazakhstan agreed to extend Contract 302 until March 30, 2011, but wrongfully failed to execute the required addendum to the exploration contract. Claimants have also conclusively demonstrated that they were actively in the process of exploring and drilling in the Contract 302 areas in late 2008 and early 2009 — until the State's refusal to execute the addendum and other misconduct stymied their exploration activities — and that they had the intent and the means to continue exploration through March 2011. Claimants were particularly active in relation to the substantial Interoil Reef prospect, in respect of which they had shot and interpreted 3D seismic and acquired a specialized deep drilling rig that was being prepared for transport to Kazakhstan.

41. As a direct result of Kazakhstan's refusal to execute the addendum and its campaign against KPM and TNG, Claimants were prevented from advancing their exploration activities and drilling the wells necessary to determine if hydrocarbons were present in the Contract 302 areas, at what depths, and in what quantities and qualities. The only exception was Munaibay Oil, where sufficient drilling had been completed to confirm a significant discovery. For the other Contract 302 properties, however — including the Interoil Reef — the State's illegal conduct halted exploration prior to the point at which Claimants had obtained all the data necessary for their experts in this case to establish a fair market value. Claimants therefore had no choice but to submit a prospective valuation for the Contract 302 properties (except for Munaibay Oil).

42. The Tribunal should nevertheless exercise its discretion to award a significant portion of the Contract 302 prospective valuation to Claimants under the "loss of opportunity" doctrine. That doctrine exists precisely for situations such as this in which claimants have been unable to demonstrate their losses with greater certainty as a direct result of the host state's illegal conduct. A number of treaty tribunals have relied on the doctrine in circumstances such as the present, and this Tribunal should do the same. Indeed, a failure to do so would reward Kazakhstan for its misconduct. (CPHB 1 ¶¶ 6 –42).

684. Claimants make the following contentions regarding compensation (CPHB 2 ¶ 396):

Tolkyn	**US $478,927,000**
Borankol	**US $197,013,000**
Munaibay Oil	**US $96,808,000**
LPG Plant	**US $245,000,000 cost plus discretionary portion of US $84,077,000**

Contract 302 (other than Munaibay Oil)	**US $31,330,000 cost plus discretionary portion of US $1,498,017,000**

685. Claimants contend that they are entitled to (1) compound interest at an appropriate rate, (2) recovery of principal, interest, and penalties on the Tristan notes, (3) moral damages in the amount of 10% of the total compensatory damages awarded to Claimants, and (4) a full award on costs.

G.II. Summary of Contentions by Respondent

686. Respondent's contentions are taken from its own words, without prejudice to their further arguments:

11. The Republic is only prepared to offer the right to arbitrate to a certain pool of investors. The parameters of entitlement are framed by the provisions of the arbitration agreement in article 26 of the ECT, the rules of the Stockholm Chamber of Commerce, international law and the relevant rules of applicable law. The Republic has not consented to resolve any dispute with any of the Claimants under the ECT through arbitration.

12. The Republic's responses can be summarised as follows:

(a) The ECT should be interpreted in accordance with international law which includes the requirement to act in good faith in accordance with the general principle of pact sunt servanda.

(b) Anatolie Stati and Gabriel Stati, who allegedly own and/or control Ascom, Terra Raf, KPM and TNG, are not true investors and none of the Claimants is entitled to benefit from the ECT for the following reasons:

- *Anatolie Stati is a political creature whose political connections, previous expertise and other international dealings strongly suggest that any investments he has made in Kazakhstan are not made as a commercial investor in energy resources with which the ECT are concerned. The same is true of Gabriel Stati who is more a playboy than a businessman.*
- *The benefits of the ECT are denied to Ascom under article 17 of the ECT.*
- *Gibraltar is not a party to the ECT and therefore Terra Raf cannot seek protection from the Treaty.*

(c) No investments have in fact been made

- *There is an inherent meaning of "investment" which has to* include *international law and national law. As such the inherent meaning includes (1) Salini characteristics (which are relevant if not exhaustive), and (2) compliance with the laws of the host State and good faith.*

- *There was no investment on the facts.*

  - *There is insufficient evidence of investments being made.*

  - *Claimants have not demonstrated that it has acted in good faith.*

  - *Moreover, the investments allegedly made by the KPM and TNG were in violation of Kazakh law.*

(d) *In any event, even if (any of) the Claimants were entitled to benefit from the ECT (and can demonstrate to the relevant standard that investments had been made), Claimants did not comply with the cooling off period and therefore no jurisdiction vests in the tribunal.*

13. *Lastly, Claimants have not discharged their burden of proof. Casting Claimants' arguments in the most flattering light, the case they now present is at best ambiguous and unclear. As set out in the recent award of ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, "a State's consent to arbitration shall not be presumed in the face of ambiguity." Where such consent is uncertain, no jurisdiction should be found, and the case against the Republic falls at the first hurdle. More likely, their assertions that their claims are entitled to any further consideration by the tribunal are simply unevidenced and unfounded. (R-II ¶¶ 11 – 14).*

1053. *In their Reply Memorial on Jurisdiction and Liability, Claimants allege that the umbrella clause embodied in the last sentence of Article 10(1) of the ECT covers not only contractual but also statutory and regulatory obligations, that the Subsoil Use Contracts and Contract No. 302 are relevant under the umbrella clause and that the Republic has violated the umbrella clause. However, these arguments have no merit. (R-II ¶ 1053).*

1108. *The guarantee under Article 10(12) of the ECT refers to the legislative obligation to provide a fair and efficient system of justice and does not encompass isolated failures of the judicial system in individual cases. Yet, the Claimants misconceive the meaning of the duty arising from Article 10(12) of the ECT. Instead of addressing the adequacy of domestic legislation, the Claimants focus on the judicial proceedings in one individual case. In fact, the Claimants have not even contended, let alone proven that the Republic has enacted legislation which does not provide a fair and efficient system of justice.*

864. *Claimants allege that "in July 2010" the Republic directly expropriated Claimants' investment after already having indirectly expropriated it "over the October 2008-July 2010 period". Claimants go as far as claiming that in this period, the Republic took several measures and "any*

number of them individually constitute an act of indirect expropriation". In making these assertions, Claimants effectively defeat their own argument. Simple logic prescribes that something that has been taken once cannot be taken again unless it has been returned. However, Claimants were not expropriated once, twice or even several times – they were not expropriated at all. (R-II ¶ 864).

890. *The Republic has explained that neither of these actions constitutes a direct expropriation due to a lack of a transfer of title. Claimants sole ground of opposition to the Republic's argument is that the fact that no transfer of title took place was "immaterial as a matter of international law". They have thus conceded that no transfer of title to the Republic took place. Since, as explained above, there is no basis for Claimants' contention that transfer of title is not required for direct expropriation to occur, the only available conclusion is that the Republic did not directly expropriate Claimants investments. (R-II ¶ 890).*

993. *To reiterate the Republic's position, the standard of fair and equitable treatment needs to be considered against all the factual circumstances. In a situation where the state action that the injured party claims of is one which the aggrieved party has been granted a right to resolve at a local level, there can be no conclusion that the state has acted unfairly and inequitably if the aggrieved party has not actually pursued those rights. In other words, a state (acting fairly and equitably) may provide an opportunity (through the provision of contractual protection or through the court system) for the claimant to seek redress of actions taken by the state that may have been incorrect. This might apply to a decision of a first instance court or the actions of an administrative official. This is a fundamental part of providing a fair and equitable as well as stable and predicable environment for the investment. As set out in Helnan v Egypt, a treaty claim for the breach of fair and equitable treatment is likely to be less successful where the claimant has not been able to show that the system of investment protection in the host state has been unfair and inequitable vis-a-vis the aggrieved party.*

982. *[The] duty of most constant protection and security requires a host state to diligently implement reasonable mechanisms of protection. Claimants have not challenged that the Republic disposes of the necessary legal framework to provide protection to foreign investors and investments from physical damage or violence. Yet, it is Claimants who need to prove the absence of reasonable measures. Since they have failed to establish such absence, their claim fails on this ground alone.*

983. *Apart from this, the legal and administrative system of the Republic is indeed sufficiently developed and refined to the extent which can be expected from a vigilant state exercising due diligence. The Republic has enacted sufficient laws to protect nationals and foreign investors alike from any physical harm.*

984. *Even if the scope of Article 10(1) of the ECT was not restricted to the duty to implement reasonable measures for protection - which, as explained*

above, it is - Claimants still fail to establish that prerequisites of this provision have not been met in this case. In their Reply Memorial on Jurisdiction and Liability Claimants contend that the Republic violated the guarantee by not providing the necessary physical security of Claimants' assets. This reasoning is flawed. (R-II ¶¶ 982 – 984).

1009. [...] Claimants [...] begin their section by listing five cases in which the tribunals found the respective host state to have violated [the duty to refrain from unreasonable or discriminatory measures impairing the investments pursuant to Art. 10(1) ECT.] However, […] the Republic has adhered to its obligations under Article 10(1) of the ECT at all times. Its measures were neither unreasonable nor discriminatory, nor was the management, maintenance, use, enjoyment or disposal of Claimants' investments impaired in any way. (R-II ¶ 1009).

1145. [...]Claimants allege that the Republic has failed to permit them to employ key persons of their choice contrary to their obligation pursuant to Article 11(2) of the ECT. However, Claimants content themselves with drawing the conclusion that the Republic violated this provision and do not bother subsuming any facts under Article 11(2) of the ECT. Such conclusion has no merit. […] [The criminal proceedings and interrogations of KPM's and TNG's employees have not hindered Claimants from employing key personnel of their choice.] (R-II 1145, 1159, partially quoted).

687. Respondent's contentions regarding causation are summarized in RPHB 2 ¶ 61:

(a) Claimants mismanaged their assets on numerous occasions, for example by putting alarmingly incompetent personnel in charge of important tasks and by promising sales to business partners that they could have never made.62 The mismanagement went so far that market observers were concerned about "weak corporate governance standards at Tristan".63 The overall level of mismanagement comes as no surprise given that Claimants had no prior experience in oil and gas production and in the Kazakh or international markets.

(b) KPM's and TNG's business was very risky from the start, as was set out clearly in the Tristan note prospectus.

(c) KPM's and TNG's financing structure, which aimed at removing capital from the companies, made them vulnerable to situations of crisis.

(d) Claimants took business decisions aimed only at short-term profit. In particular the ramping up of production at the end of 2007 was short sighted, as it led to a loss of available gas production for the LPG Plant and the allegedly expected possibility of gas export (which the Republic denies).

(e) In April of 2008, Claimants found out that their estimates for production from Borankol had been overstated by 300%. At the time, Claimants received the new Miller&Lents reserves report68 which set out 2P reserves of 24.6 MMboe. The earlier report by Ryder Scott had provided for 2P

reserves of 72.4 MMboe. 69 The effect of this loss was particular[ly] significant because Borankol is a predominantly oil producing field and oil production is much more valuable than gas production.

(f) KPM and TNG were already in severe financial difficulties as of Claimants' valuation date, as is evidenced by the development of the Tristan notes price.

(g) Severe drops in energy prices and in demand, in particular due to the loss of Kemikal as a customer, led to a very restricted cash position for KPM and TNG. At the same time, the need for capital expenditure increased markedly, putting further pressure on the companies.

(h) Against this background, when uncontestedly legal tax demands were raised by the state in the summer of 2009, Claimants had to take out the horrendous Laren loan and issue new notes in the amount of USD 111.1 million in connection thereto.

(i) Thereafter, Claimants deliberately chose to withdraw cash from KPM and TNG, all while not fulfilling the annual work programs. This was effectively the deliberate abandonment of the companies.

688. Respondent's contentions in the case of quantum can be summarized as follows:

13 […] Claimants' claims fail for a lack of damage. In the following, the Republic will establish through serious and thorough experts that

*(a) the asset value of Contract No. 302 is **zero**;*

*(b) the LPG Plant may at best have **salvage value** which Claimants failed to determine;*

*(c) the asset value of the Borankol field is **USD 62.8 million**;*

*(d) the asset value of the Tolkyn field is **USD 123.2 million***

*(e) debt under the Tristan notes in the amount of **USD 531.1 million** as well as other debt must be **deducted** from any asset value assigned to the assets in question.*

*(f) the final result after proper valuation and deductions is **zero**. (R-III ¶ 13, emphasis added).*

689. Respondent contends that (1) Claimants grossly inflated their damage claim, (2) 21 July 2010 is the proper valuation date, (3) the Cliffson SPA and the offers made in Project Zenith are irrelevant to damages, (4) Claimants are not entitled to moral damages, (5) the appropriate interest rate for compensation would not apply to Claimants' "*loss of opportunity*" claim, and (6) that the Respondent is entitled to a full award on costs.

H. Preliminary Considerations and Conclusions of the Tribunal

690. The Tribunal has considered the extensive factual and legal arguments presented by the Parties in their written and oral submissions. The Tribunal's use of one Party's terms as opposed to another's is not a reflection of the Tribunal's legal interpretation of an issue – rather, effort has been made to use consistent terminology through this Award in order to facilitate understanding. Below, the Tribunal discusses the arguments of the Parties most relevant for its decisions. The Tribunal's reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal considers to be the determinative factors required to decide upon the issues arising to decide on the relief sought by the Parties. The Tribunal considers, however, that brief repetition of certain aspects of its conclusions in the context of particular issues is necessary, or at least appropriate, in order to avoid misunderstanding.

H.I. Jurisdiction

1. The Parties' Consent to Arbitration before the SCC

a. Arguments by Claimants

691. The Tribunal's jurisdiction over this dispute arises from Art. 26 ECT, the language of which clearly points to the SCC as the proper forum for this dispute. The ECT entered into force for Kazakhstan on 16 April 1998. (C-0 ¶¶ 92 – 95; C-I ¶¶ 26 – 28; C-II ¶¶ 23 – 33; CPHB 1 ¶ 43; CPHB 2 ¶ 9).

692. After the Hearing on Quantum, Claimants argued that Respondent seemed to abandon its linguistic contentions regarding the ECT. (CPHB 1 ¶¶ 43 – 46).

693. Claimants reject Respondent's linguistic analysis of Art. 26. (C-II ¶¶ 43 – 48). There is no support for Respondent's argument that the capital "*A*" in "*Arbitration institute*" refers to the International Court of Arbitration of the ICC, and support to the contrary is found on the official Russian language website of the ECT. (C-II ¶ 44). Likewise, there is no support for Respondent's argument the use of the word "*international*" is determinative in meaning. (C-II ¶ 45). Claimants also state that the words "*in Stockholm*" do not denote a seat and point out that references to arbitral seats are notably absent in the other arbitration options in Art. 26(4) ECT. (C-II ¶ 46). As Respondent admits, all other authentic versions of the ECT clearly refer to the Arbitration Institute of the SCC as the forum. The Russian-speaking Contracting Parties to the ECT understood this. This is sufficient for the Tribunal to find that the SCC is the proper forum. (C-II ¶¶ 34 – 35). In addition, the publications of the ECT Secretariat consistently refer to Art. 26 ECT as providing for SCC, and not ICC, arbitration – to no state's objection. (C-II ¶ 51).

694. Even if Respondent's translation arguments are correct, the Russian ECT must be interpreted in conformity with the five others. (C-II ¶¶ 40 – 42). Claimants state that under the rule of treaty unity – a core principle of interpretation of plurilingual treaties enshrined in Art. 33(3) VCLT – treaty terms are presumed to have the same

meaning in each authentic text. Although the ECT is plurilingual in expression, it is one single treaty with a single set of terms. Indeed, even Art. 33(4) VCLT directs the Tribunal, to adopt the meaning that best reconciles the texts. Therefore, the Tribunal should make every effort to find a common meaning among the ECT texts, before preferring one to another. (C-II ¶¶ 38 – 39).

695. Other Kazakh documents, including a BIT between Kazakhstan, Belgium, and Luxemburg and the Law of Kazakhstan on Foreign Investment use the language "*in Stockholm*" as a reference to the SCC and not to an arbitral seat. (C-II ¶ 46 – 48).

696. Claimants state that tribunals have accepted jurisdiction in all SCC arbitrations involving Russian-speaking states brought under the ECT to date. None of the respondent states have raised any doubt as to whether Art. 26(4)(c) ECT referred to the SCC. (C-II ¶¶ 50 – 52). The commercial arbitration cases relied on by Respondent do not compel a different conclusion.

b. Arguments by Respondent

697. Respondent argues that it is not bound to arbitration under the ECT because the offer to arbitrate contained in Art. 26(4) ECT is ambiguous and, thus, pathological. (R-II ¶ 241). The text in the Russian language refers to the Arbitration Institute of the ICC, while the equally authentic texts in other authentic languages (English, Spanish, Italian, German and French) refer to the Arbitration Institute of the SCC. Pursuant to Art. 50 ECT, consistent with Art. 33 VCLT, the Russian ECT is authentic, regardless of these differences. (R-I ¶¶ 6.5 – 6.8; 6.31 – 6.32). As a result, the offer contains indications for two different arbitration institutions. The ambiguity of the offer stems from the irremovable discrepancy between the Russian and other authentic texts of Art. 26 ECT. (R-II ¶ 242). Since the acceptance of an ambiguous offer cannot result in the conclusion of a valid arbitration agreement, the alleged arbitration agreement between the Republic of Kazakhstan and Claimants concerning dispute examination in the Arbitration Institute of the SCC does not exist. (R-II ¶ 243). Accordingly, the Tribunal should decline jurisdiction. (R-I ¶ 6.2).

698. Kazakhstan and Moldova assumed obligations under the ECT on the basis of the Russian language text. (R-I ¶¶ 6.33 – 6.36). Turning to Art. 26(4)(c) ECT, the Russian text permits an investor to submit the dispute "*to an arbitral proceeding under the Arbitration institute of the international chamber of commerce in Stockholm.*" Respondent argues that each word in the ECT must be given due consideration and submits that the key expressions for the Tribunal's consideration and analysis are "*under the Arbitration institute*" and "*in Stockholm.*" (R-I ¶¶ 6.11, 6.24).

699. Regarding the term "*under the Arbitration institute*", Respondent submits that the term means that a dispute should be considered by an arbitral tribunal acting under the framework of a permanent arbitration centre – one with an institutional framework for the administration of proceedings, a list of arbitrators, and rules for proceedings. (R-I ¶¶ 6.12 – 6.22). One such institution would be the International Court of Arbitration of the ICC, and the use of the capitalized "*A*" lends credibility to the argument that that particular institute was intended. (R-I ¶¶ 6.21 – 6.23).

700. Regarding the language "*in Stockholm*", Respondent submits that the only correct interpretation of the Russian text is that "*disputes may be submitted for proceedings in Stockholm, and shall be considered by an arbitral tribunal constituted under the rules of the ICC*." (R-I ¶¶ 6.24 – 6.30). Respondent highlights international arbitration cases that have considered similarly ambiguous arbitration agreements and where the tribunal or court also found that the city reference was merely to the place where arbitration was to occur, and not the institution. (R-I ¶ 6.28).

701. Respondent concedes that the clause may be simply ambiguous, lending itself to several alternative meanings, including that it refers disputes to the "*International Court of Arbitration of the International Chamber of Commerce in Stockholm*" (in which case, the words "*Arbitration Institute*" would be interpreted to mean "*International Court of Arbitration*") or the "*Arbitration Institute of the Stockholm Chamber of Commerce*" (and the words "*international*" should be replaced with "*Stockholm*"). (R-I ¶¶ 6.9 – 6.10). The first of these alternatives is, however, most plausible. (R-I ¶ 6.10).

702. Respondent presents that arbitration is based on consent. Here, the investor must accept the Art. 26(4)(c) ECT offer to arbitrate by submitting a request for arbitration to the relevant institution. (R-I ¶¶ 6.39 – 6.44). Here, the agreement to arbitration is void for uncertainty, the Moscow Commercial Arbitrazh Court (R-95) and the Federal Supreme Court of Germany (R-96) have come to similar conclusions in similar circumstances. (R-I ¶¶ 6.44 – 6.47).

703. Respondent argues that Art. 26(4)(c) ECT violates the *jus cogens* norm of the sovereign equality of states and is, therefore, void. (R-I ¶ 6.49 – 6.61). All of the ECT texts, except the Russian version, allow an investor to commence arbitration proceedings in the SCC. (R-I ¶ 6.58). The consequence of this is that a Swedish investor could commence proceedings with a Swedish arbitration institute (the SCC) against a foreign state and potentially receive a ruling against that foreign state, as has already occurred. (R-I ¶ 6.59). This is a violation of the principle of sovereign equality, because it gives Swedish investors an inequitable right to commence proceedings in a (home) Swedish arbitration institute, which has a right that other investors do not have – i.e., a Kazakh investor cannot commence proceedings in a (home) Kazakh arbitration institute against Sweden. (R-I ¶¶ 6.58 – 6.61).

704. Based on the foregoing, Respondent argues that the Tribunal is under a duty to decline jurisdiction. (R-I ¶ 6.48).

c. The Tribunal

705. While Claimants have stated that the consent to arbitrate pursuant to Art. 26 ECT is no longer at issue (CPHB 2 fn 2), Respondent continues to incorporate its arguments relating to Art. 26 through the second post hearing brief. (RPHB 2 fn 714).

706. There is no dispute between the Parties that Art. 26 ECT is the provision ruling on jurisdiction. The ECT entered into force for Kazakhstan on 16 April 1998.

707. However, Respondent maintains its argument that the Russian text of the ECT does not provide for arbitration under the rules of the SCC. The Tribunal is not persuaded by Respondent's linguistic analysis. All other authentic versions of the ECT clearly refer to the Arbitration Institute of the SCC as the forum of jurisdiction. In addition, the publications of the ECT Secretariat consistently refer to Art. 26 ECT as providing for SCC, and not ICC, arbitration – to no state's objection.

708. As Respondent concedes (R-I ¶¶ 6.9 – 6.10), the clause may be simply ambiguous, lending itself to several alternative meanings, including that it refers disputes to the "*International Court of Arbitration of the International Chamber of Commerce in Stockholm*" (in which case, the words "*Arbitration Institute*" would be interpreted to mean "*International Court of Arbitration*") or the "*Arbitration Institute of the Stockholm Chamber of Commerce*" (and the words "*international*" should be replaced with "*Stockholm*"). However, Respondent argues that the first of these alternatives is most plausible. (R-I ¶ 6.10). The Tribunal disagrees. First, the Tribunal is not persuaded by Respondent's linguistic analysis of the Russian text of the provision, as the states ratifying the ECT were aware of the texts in the other languages referring to the SCC and not objecting thereto or to the respective publications of the ECT Secretariat. But, second, even if Respondent's translation arguments were correct, the Russian ECT must be interpreted in conformity with the five others under the rule of treaty unity, which is the core principle of interpretation of plurilingual treaties contained in Art. 33(3) VCLT: treaty terms are presumed to have the same meaning in each authentic text. Although the ECT is plurilingual, it is one single treaty with a single set of terms which should be interpreted as having one meaning. Respondent has not provided any evidence that the Russian text was intended to provide a different meaning regarding the jurisdiction.

709. Therefore, the Tribunal concludes that it has jurisdiction under Art. 26 ECT and under the Rules of the SCC.

2. Jurisdiction Ratione Personae

a. Arguments by Claimants

710. The Tribunal's jurisdiction is governed by the express terms of the ECT. Each of the four Claimants qualifies as an investor under Art. 1(7) ECT. (C-I ¶¶ 29 – 32; C-II ¶¶ 76 – 78; CPHB 1 ¶¶ 47 – 49).

711. Under Art. 1(7) ECT, "*Investor means… (i) a natural person having the citizenship or nationality of* ***or*** *who is permanently residing in that Contracting Party in accordance with its applicable law*." Anatolie Stati and Gabriel Stati each hold the nationality of Moldova and Romania, which are Contracting Parties to the ECT. They are, therefore, qualified as "*investors*" under the ECT. That is the end of the inquiry. Their residence does not matter. Claimants have provided the Tribunal with *prima facie* proof of nationality for each, including identification cards and passports (C-II ¶¶ 79 – 80, CPHB 1 ¶¶ 47 – 49; CPHB 2 ¶ 10).

712. Respondent's arguments that neither Anatolie Stati nor Gabriel Stati is an "*investor*" are either wrong or irrelevant. Additionally, they are also contrary to

Kazakhstan's own internal documentation, which identifies Anatolie Stati as an investor. (C-II ¶ 81). Claimants explain as follows:

> *82. Second, to the extent that Kazakhstan's jurisdictional objections relating to Anatolie Stati and Gabriel Stati pertain to the legality of their investments, they are misplaced. The legality of an investment has no bearing on whether an individual qualifies as an "investor" under Article 1(7) of the ECT. [...]*
>
> *83. Third, Kazakhstan's contention that because "Ascom is not an investor, Anatolie Stati also cannot be considered as an indirect investor in the meaning of the ECT" is a non sequitur, and of no relevance to the definition of "investor" under the ECT. Ascom qualifies as an "investor" under the ECT on its own, as demonstrated below. Even if it did not, the ECT protects indirect investments, and does not require that any intermediary company qualify as an "investor" for an indirect owner to be an "investor."*
>
> *84. Fourth and finally, Kazakhstan's argument that "Anatolie Stati does not have the capacity to act as an investor in the Republic of Kazakhstan" is also beside the point. Nothing in the definition of "investor" under Article 1(7) of the ECT requires that the individual qualify as an "investor" within the meaning of the national law of the host state. Kazakhstan's attempt to add its own self-serving requirement to the definition of "investor" under the ECT is unavailing. (C-II ¶¶ 81 – 84, emphasis in original, citations omitted).*

713. The accusations that have been made against Mr. Anatolie Stati by the President of Moldova are absolutely meritless. Claimants explain that "*Mr. Anatolie Stati's investments in South Sudan are normal, commercial investments in the oil and gas industry. He has contributed enormously to the well-being of the population of South Sudan by making substantial investments in oil and gas exploration and by building schools, a hospital, medical clinics, and means of transportation in the region where his investments are located*." (C-II ¶¶ 194 – 195).

714. No legal authority exists that would allow Respondent to add additional requirements into Art. 1(7) ECT. Respondent's personal attacks on Claimants "*smack of desperation by a party with a losing* case." (CPHB 1 ¶¶ 47 – 48).

715. Turning to Ascom, Claimants produced the Certificate of Incorporation of Ascom in Moldova as an exhibit to their Request for Arbitration and to their Statement of Claim, and Kazakhstan does not contest the authenticity of that document. Kazakhstan's arguments concerning whether Ascom is a 100% owner of KPM – a fact which has been recognized by the Financial Police – are irrelevant to establishing whether Ascom meets the definition of investor under Art. 1(7) ECT. (C-II ¶¶ 85 – 86).

716. Respondent seeks to improperly and retroactively deny ECT benefits to Ascom on the basis of the so-called "*[denial] of benefits*" provision of Art. 17 ECT. Respondent contends that because Ascom is incorporated in Moldova and controlled by a Romanian national, Mr. Anatolie Stati, Ascom falls within the

denial of benefits provision in Art. 17 ECT. Kazakhstan's reliance on Art. 17 ECT is misplaced. Article 17 ECT only applies to Part III of the ECT, leaving unaffected the dispute resolution provision in Art. 26 ECT. Article 17 ECT concerns only the merits and not jurisdiction, and this view has been relied on by the tribunal in *Plama v. Bulgaria*, and was adopted by the *Yukos* tribunal. Regardless, however, Art. 17 ECT only applies if a state invoked that provision to deny benefits to an investor before a dispute otherwise arose. Since Kazakhstan did not exercise this right, Art. 17 ECT is completely irrelevant to this case. (C-II ¶¶ 87 – 90; CPHB 1 ¶¶ 50 – 52; CPHB 2 ¶ 13).

717. Article 17 ECT has only a prospective effect and, even if this Tribunal were to find that exercise of the "*denial of benefits*" could be retroactive, Art. 17(1) would still be inapplicable because the two elements of that article are not met, namely: i) that a legal entity be owned or controlled by citizens or nationals of a third state and (ii) that that entity has no substantial business activities in the Area of the Contracting Party in which it is organized. First, as is clear from the text of the ECT, a "*third state*" under the ECT is a state that is not a party to the ECT. Second, the second element is also missing, as Ascom's board of directors and management direct and control Ascom from its headquarters in Chisinau, Moldova. Even if Art. 17 could be applicable, Anatolie Stati is the sole shareholder and has dual Romanian and Moldovan citizenship. Both countries are parties to the ECT. Accordingly, neither of the cumulative requirements of Art. 17 ECT would be satisfied. (C-II ¶¶ 91 – 95; CPHB 1 ¶¶ 50 – 52; CPHB 2 ¶ 12).

718. Claimants state that Terra Raf was incorporated on 1 March 1999 by Southbridge Services Limited and Cresmount Services Limited. On 27 January 2000, Messrs. Stati acquired Terra Raf's two sole shares and replaced the former directors as Terra Raf's new directors. In September 2004, Messrs. Stati increased their shares to a thousand each, with each receiving an additional 999 shares. Claimants state that Terra Raf's certificate of incorporation clearly name Messrs. Stati as directors and sole shareholders, directly owning and controlling 50% of it and of TNG and its assets. (C-0 ¶ 13; C-II ¶ 96, 129).

719. In response to Kazakhstan's contention that this Tribunal does not have jurisdiction over Terra Raf because the ECT does not apply to Gibraltar, Claimants explain that, as the *Petrobart v. Kyrgyzstan* tribunal held, the ECT applies to Gibraltar by way of Art. 45(1) ECT, which addresses provisional application of the Treaty. (C-II ¶¶ 96 – 98; CPHB 1 ¶¶ 53 – 54; CPHB 2 ¶ 11). Kazakhstan argues that "*[p]rovisional application of the ECT will cease: (a) by virtue of the Treaty coming into force pursuant to Article 45(1); or (b) by virtue of a written notification pursuant to Article 45(3)(a)*" and that "*the provisional application was de facto terminated on that date in respect of the United Kingdom and all sovereign territories of the UK, including Gibraltar*." (C-II ¶¶ 99 – 100, partially quoted). This argument ignores ECT's provisions which do not provide for *de facto* termination. Instead, Art. 45(3)(a) ECT requires that provisional application be terminated by written notification. This view was endorsed by the *Petrobart v. Kyrgyzstan* tribunal and this view was upheld when the Svea Court of Appeal declined to annul the award and found that the tribunal had correctly addressed the jurisdiction issue. This is the only tribunal to date that has considered the applicability of the ECT to Gibraltar. To date, no written notification has been made with respect to Gibraltar.

720. Kazakhstan's attempts to distinguish *Petrobart* are misplaced. First, with respect to the timing of the investment, that was not a consideration in the *Petrobart* tribunal's reasoning. That tribunal's reasoning solely concerned the analysis of Art. 45 ECT and the regime to terminate provisional application under that article, i.e., a notification under Art. 45(3) ECT. The text of Art. 45 ECT does not indicate that the timing of an investment should be of any relevance to termination of provisional application. The question turns solely on whether the United Kingdom or Gibraltar has made a declaration to terminate provisional application of the ECT to Gibraltar. Neither has done so. (C-II ¶ 103). Second, Kazakhstan's contention that "*the terms of the UK's ratification document were clear notice that the UK intended to end the application of the ECT to Gibraltar*" is wrong. The UK ratification document simply does not refer to Gibraltar at all. Furthermore, the notification and the note verbale indicate Gibraltar's intention to ratify the ECT later. Both indicate that ratification by the United Kingdom and by Gibraltar will be dissociated in time, thereby leaving intact the provisional application of the ECT in the meantime. (C-II ¶ 104). This interpretation is supported by Art. 40(2) ECT on the application of the treaty to overseas territories, which clearly anticipates the possibility of a dissociation between the date of entry into force for a state and an overseas territory, and which provides that "*[a]ny Contracting Party may at a later date [i.e., later than at the time of signature, ratification, acceptance, approval or accession], by a declaration deposited with the Depository, bind itself under this Treaty with respect to other territory specified in the declaration*." (C-II ¶ 105). Finally, termination of provisional application of the ECT has not been noted on the Members' page of the Energy Charter Secretariat, though it has notes on the end date of Russia's provisional application. (C-II ¶ 106). With regard to Dr. Tietje's allegation that the treaty practice of the United Kingdom since 1967 is not to make a declaration regarding inclusion of an overseas territory at the time of signature since such would usually have to be reconfirmed a the time of ratification, it is clear that the United Kingdom did confirm that the ECT provisionally applied to Gibraltar. (CPHB 1 ¶¶ 53 – 56).

721. Alternatively, should the Tribunal find that the ECT ceased to apply provisionally to Gibraltar, the ECT nevertheless applies to Gibraltar on the basis that Gibraltar is a part of the European Community, which is itself party to the ECT. (C-II ¶ 108; CPHB 2 ¶ 11). Gibraltar's parliamentary reports indicate that the ECT applies to it on that basis. Pursuant to Art. 52 TEU and Art. 355 of the Treaty on the Functioning of the European Union, Gibraltar is a European territory. (C-II ¶¶ 108 – 110, CPHB 1 ¶ 56).

722. Finally, while there should be no doubt that Terra Raf is a qualified "*investor*" under the ECT, the issue is of little ultimate relevance, because Terra Raf is owned and controlled by Messrs. Anatolie and Gabriel Stati. The ECT protects their indirect investments in Kazakhstan. (C-II ¶ 112).

b. Arguments by Respondent

723. Respondent agrees that the definition of "*investor*" is set out in Art. 1(7) ECT. If Claimants can provide evidence to discharge their burden of proof to the Tribunal, namely that Claimants Anatolie and Gabriel Stati are citizens, nationals or permanent residents of a contracting party, it is not for the Respondent to dispute it. (R-I ¶¶ 8.1 – 8.6, 8.62; R-II ¶ 19).

724. Nevertheless, the inquiry does not end there. Rather, when assessing jurisdiction, the question of nationality is one which the Tribunal, may examine from the standpoint of international law. Such an analysis, which mirrors the analysis to be undertaken with respect to whether an investment has been made, considers the overall nature of the Claimants and their general conduct. (R-II ¶¶ 20 – 23; RPHB 1 ¶¶ 420 – 422).

725. Turning first to Anatolie Stati, Respondent states that he cannot be seen as an investor under the ECT because (1) he has not made any direct investments in Kazakhstan, (2) his so-called investments are invalid under the laws of Kazakhstan, and (3) he is not an indirect investor in any firm, since he does not hold the legal capacity to act as an investor. (R-I ¶¶ 8.56 – 8.61).

726. Respondent argues that Anatolie Stati is a highly skilled political animal who is adept at converting long term assets into the short term aims of *"advancing political goals."* Anatolie Stati's background is in the corrupt construction sector in the former USSR. While his method of entry into the oil and gas industry is not clear from Claimants' submissions, it is clear that Anatolie Stati has established himself in a position of power by playing in the political field in Moldova. Anatolie Stati operates among a web of political figures who are engaged in corrupt practices and terrorism – and that these actors have direct interests in Anatolie Stati's investments in Kazakhstan. Indeed, it appears that Anatolie Stati pays politicians in return for political power, business connections, and opportunities. Equally, politicians pay him to act as a front for their business endeavours, as evidenced by Anatolie Stati's investments in Turkmenistan, where Anatolie Stati was involved in a document smuggling operation, for which his political ties helped him in avoid prosecution. (R-II ¶¶ 24 – 33; 38 – 39; RPHB 1 ¶¶ 420 – 427).

727. Claimants' activities in Sudan (1) have been regarded as non-beneficial to the local population, (2) have been questioned for a lack of transparency and (3) shed serious concerns as to whether Claimants are entitled to protection under the ECT. The statements made by both President Voronin and Mr. Andreyev in relation to Mr. Anatolie Stati's financing of illegal militant groups in Sudan in circumvention of UN sanctions are not "***defamatory***." There is nothing to suggest that both President Voronin (as a political adversary) and Mr. Andreyev (as a former employee) would not have had actual knowledge of Claimants' businesses in Sudan, given their respective relationships with Claimants. Their stories are consistent, even though they have not interacted with one another. Moreover, since the assets in Sudan are non-producing, it is likely that Claimants used money received from Kazakhstan to finance the illegal activities there. (R-I ¶ 9.57; R-II ¶¶ 40 – 46; RPHB 1 ¶¶ 430 – 431).

728. Gabriel Stati – the pampered son of Anatolie Stati – is more a playboy than a businessman. No stranger to controversy, he was arrested following the April 2009 elections in Moldova amid allegations that he was involved in the organization and financing of civil unrest and attempting to overthrow the Moldovan government. The Moldovan authorities attempted to extradite Gabriel Stati from the Ukraine. There is little to suggest that he has had any active involvement in Claimants' alleged investments in Kazakhstan. (R-I ¶ 8.62; R-II ¶¶ 34 – 36; RPHB 1 ¶¶ 428 – 429).

729. Respondent disputes legality of Ascom's 9 December 1999 purchase of the 62% interest in KPM. Claimants made no payments in relation to this initial purchase, but instead likely paid monies to a company called Telwin under a brokerage agreement. Respondent alleges that, pursuant to this brokerage Agreement, Telwin was obliged to find the owner of the rights in the exploration of the Borankol field and to assist in the acquisition of those rights for Ascom. Telwin, however, held 85% of the shares of Aksai at the time and, therefore, received USD 1.5 million in consideration for locating the owner of the rights, which it must have known that Aksai owned all along. Respondent also states that payment of the purchase price has not been proven. (R-II ¶ 117).

730. The benefits of the ECT to Ascom should be denied under Art. 17(1) ECT, pursuant to which a state can deny the benefits under the ECT if citizens or nationals of a third state own or control the investor and if the investor has no substantial business activity in the state in which it is organised. Presently, Ascom fulfils both parts of this test. First, Ascom is controlled by citizens of a third state. It is organized under the laws of Moldova, but is not controlled by citizens of Moldova (since "*third state*" means any state other than the state of incorporation). Thus, since Claimants state that Anatolie Stati and Gabriel Stati are controlling Ascom, the Tribunal would have to find that Anatolie and Gabriel Stati, as citizens of Romania, are citizens of a third state for the purposes of Art. 17(1) ECT. Although Claimants attempt to avoid this conclusion by arguing that "*third state*" in Art. 17(1) ECT means "*states other than contracting states of the ECT*," this argument is contradicted by the ECT's use of the term "*third state*" in other provisions, such as Art. 7(10)(a)(i) ECT. As a result, third state can mean contracting and non-contracting states. Accordingly, Romania is to be treated as a third state, thereby fulfilling the first part of the text. (R-I ¶¶ 8.9 – 8.10; R-II ¶¶ 47 – 52; RPHB 1 ¶¶ 432 – 434).

731. Second, Claimants have only made the unsupported contention that Ascom's Board of Directors and management direct and control Ascom from Moldova. Claimants have not met their burden of proving that Ascom has substantial business activities in Moldova, leaving the second part of the test fulfilled. (R-I ¶ 8.10; R-II ¶¶ 53 – 54).

732. Since Ascom does not meet the requirements of Art. 17(1) ECT, Respondent can deny it benefits under the ECT. Contrary to Claimants' contention, the Republic can do this retrospectively and Claimants did not challenge this in the Hearings. The mere existence of Art. 17(1) ECT is a clear warning for a putative investor that protection can be denied if the prerequisites of the provision are fulfilled. The tribunals in the *Plama* and *Yukos* decisions erred when they based their findings on the argument that a retrospective application would undermine an investor's legitimate expectations regarding the existence of protection under the ECT. The *Plama* and *Yukos* decisions render Art. 17(1) inapplicable. These decisions are also in clear neglect of investment practice. Foreign investors often times do not even have to inform host states of their investment in the first place and investment is made "*under the radar*" of the host states. Under such conditions, an effective application of the denial of benefits clause would not be possible. Yet, tribunals have frequently held that the effective interpretation of treaty provisions is important. Thus, the tribunals in *Ulysseas Inc. V. Ecuador* and in *Pac Rim Cayman*

v. El Salvador were correct when they held that a denial of benefits clause could have retrospective effect. (R-II ¶¶ 55 – 61).

733. With respect to Terra Raf, Respondent does not admit that Terra Raf is validly incorporated in Gibraltar. Even if it were, however, Terra Raf would not be entitled to protection under the ECT because the ECT does not apply provisionally to Gibraltar, nor is Gibraltar a party to the ECT based on the EU's signature to the ECT. (R-I ¶ 8.11; RPHB 1 ¶ 440).

734. Regarding the provisional applicability, although the Parties agree that the ECT applied provisionally to Gibraltar prior to the United Kingdom's ratification thereof on 13 December 1996, the ECT no longer applies to Gibraltar on a provisional basis. Provisional application of the ECT is regulated by Art. 45 ECT, which provides for two methods of termination of the provisional application. Under the *de facto* method of Art. 45(1) ECT, the entry into force of the ECT automatically brings provisional application of the ECT to an end. The ECT entered into force in the United Kingdom on 16 April 1998, and provisional application was *de facto* terminated on that date in respect of the United Kingdom and all sovereign territories of the UK, including Gibraltar. Alternatively, under the notice method set out in Art. 45(3)(a) ECT, the entry into force of the ECT constituted notice of the United Kingdom's intention that Gibraltar would not be part of the ratification of the ECT, and that its provisional application would also terminate. The United Kingdom's practice since 1967 has been to expressly declare the specific territories to which a treaty shall extend, and Gibraltar was not included in the United Kingdom's declaration. Thus, to the extent that the ECT ever could have provisionally applied, that terminated with the United Kingdom's ratification of the ECT on 13 December 1996. (R-I ¶¶ 8.12 – 8.41; R-II ¶¶ 62 – 69; RPHB 1 ¶¶ 443 – 444).

735. The United Kingdom was within its rights to refuse to apply the ECT to Gibraltar, even without consulting it. Further, the United Kingdom's intention not to apply the ECT to Gibraltar is confirmed by a *note verbale* dated 27 July 2004, which made it clear that Gibraltar did not want the United Kingdom to ratify the ECT on its behalf. (R-I ¶¶ 8.27 – 8.30).

736. Respondent states that Claimants have seemed to drop their assertion that the ECT applied to Gibraltar *via* the EU's signature on the ECT and seemed only to maintain their position that the ECT applies provisionally. Nevertheless, Claimants' EU arguments rest on the incorrect assumption that the EU is a contracting party of the ECT. Respondent reminds the Tribunal that the EU is not a contracting party to the ECT. The United Kingdom signed the ECT as an EU Member State in a "*mixed agreement*." This means that, the Member State signed in respect of those matters where Member States align their policies with the EU. There is a strong presumption that mixed agreements are concluded in territorial areas which fall within the regulatory scope of the application of EU law. Respondent states that Gibraltar is a disputed territory as between the United Kingdom and Spain and, as a result, important aspects of EU policy do not apply to Gibraltar. (R-II ¶¶ 70 – 72; RPHB 1 ¶¶ 440 – 442).

737. Respondent denies that the case *Petrobart v. Kyrgyzstan* is a binding precedent or that it may even serve as guidance to this Tribunal, since it was decided on the

basis of facts different to those of this case. Notwithstanding the absence of precedent in international arbitration, the Tribunal in *Petrobart* considered the application of the ECT to Gibraltar in the context of investments made during the period of provisional application of the ECT, but prior to its entry into force following ratification. The present case, however, involves alleged investments made several years after ratification of the ECT, by which time the ECT had ceased to have any effect in Gibraltar. It is also noteworthy that the Respondent in that case raised its objection to the ECT extending to Gibraltar at a very late stage in the proceedings. Further, the *Petrobart* decision has been criticized on the basis that the correct analysis should have been that Parties have to "*opt in*" on ratification, rather than "*opt out*." (R-I ¶¶ 8.11, 8.42 – 55).

738. Accordingly, Terra Raf is not an "*investor*", as defined in the ECT. Any Art. 1(6) ECT "*investments*" otherwise owned or controlled by it (100% of TNG, its assets and the LPG Plant) have no protection under the ECT. (R-II ¶ 72).

739. Respondent contests Messrs. Stati's ownership of Terra Raf. Respondent states that Claimants' evidence at C-32 does not contain any information about Messrs. Stati each owning 50% of the company and states that C-33 lists two British companies as the founders of Terra Raf Traiding Ltd. Respondent states that Claimants have not produced a single document that demonstrates their relationship to Terra Raf. Respondent states that it appears that Terra Raf is a shell company, existing only to hold shares of TNG. (R-I ¶ 9.81, 14.9). To the extent that Claimants seek to recover losses suffered by TNG, its assets and the LPG Plant, clearly no double recovery for the same loss should be available (if it is found that Terra Raf is an "*investor*" within the definition). (R-II ¶ 72).

c. The Tribunal

740. As is not contested between the Parties, the Tribunal's jurisdiction is governed by the express terms of the ECT and particularly the definition of "*investor*" in Art. 1(7) ECT. As is also undisputed, Claimants have the burden of proof that each one of them qualifies as an investor under this definition.

741. The Tribunal will, therefore, address this issue for each of the four Claimants.

742. Regarding **Messrs. Anatolie and Gabriel Stati**, as natural persons, Art. 1(7) ECT provides: "*Investor means […] (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law*."

743. Claimants have provided the Tribunal with *prima facie* proof of nationality for Messrs. Anatolie and Gabriel Stati, including identification cards and passports. (C-II ¶¶ 79 – 80, CPHB 1 ¶¶ 47 – 49; CPHB 2 ¶ 10). These show that each holds the nationality of Moldova and Romania, which are Contracting Parties to the ECT. Messrs. Anatolie and Gabriel Stati are, therefore, qualified "*investors*" under the ECT. Their residence would only matter, as is clear from the wording of the definition in Art. 1(7) ECT by the second alternative after the word "*or*", if they would not have the nationality of a Contracting State.

744. Regarding the third and fourth Claimants, Ascom and Terra Raf, the definition in Art. 1(7)(ii) ECT, according to which "*Investor means [...] a company or other organization in accordance with the law applicable in that Contracting Party*" applies.

745. To prove the Tribunal's jurisdiction over **Ascom**, Claimants have produced the Certificate of Incorporation of Ascom in Moldova (as an exhibit to their Request for Arbitration and to their Statement of Claim), and Respondent does not contest the authenticity of that document. Respondent's argument that Ascom falls within the denial of benefits provision in Art. 17 ECT is not relevant in the present context. Article 17 ECT, as clearly indicated by its introductory words "*of this part*", only applies to Part III of the ECT, leaving unaffected the dispute resolution provision in Part V with Art. 26 ECT (see tribunal in *Plama v. Bulgaria*). And further, Art. 17 ECT would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose and Respondent did not exercise this right.

746. Turning to the fourth Claimant, Claimants state that **Terra Raf** was incorporated under the laws of Gibraltar on 1 March 1999 and that Terra Raf's certificate of incorporation name Messrs. Stati as directors and sole shareholders, directly owning and controlling 50% of it and of TNG and its assets. (C-0 ¶ 13; C-II ¶ 96, 129). Respondent argues that this Tribunal does not have jurisdiction over Terra Raf because the ECT does not apply to Gibraltar. In that regard, the Tribunal considers that it does not have to decide whether the ECT applies to Gibraltar by way of Art. 45(1) ECT, which addresses provisional application of the ECT. (C-II ¶¶ 96 – 98; CPHB 1 ¶¶ 53 – 54; CPHB 2 ¶ 11). In addition, the Tribunal need not consider whether, as Respondent argues, that provisional application of the ECT has ceased or whether the decision of the the *Petrobart v. Kyrgyzstan* tribunal provides guidance in this respect. For, in any case, the ECT applies to Gibraltar on the basis that Gibraltar is a part of the European Community, which is itself party to the ECT. According to Art. 52 of the Treaty on the European Union and Art. 355 of the Treaty on the Functioning of the European Union, Gibraltar is included in its territory.

747. For the above reasons, therefore, the Tribunal concludes that all four Claimants qualify as investors under the ECT.

3. Jurisdiction Ratione Materiae – Existence of Investment

a. Arguments by Claimants

748. All of the acts complained of occurred after the ECT entered into force for Moldova, Romania, and Kazakhstan on 16 April 1998. Claimants' investments fall clearly within the definition of "*Investment*" in Art. 1(6) ECT, which Claimants note is broader than the definition in many other investment treaties. This definition includes every kind of asset, owned or controlled by an investor, "*including tangible and intangible assets, a company or business enterprise, shares, equity participation, debt, claims to money or performance, returns, and any rights conferred by law or contract*." (C-I ¶¶ 33 – 35; C-II ¶¶ 119, 123 – 124; CPHB 1 ¶ 59; CPHB 2 ¶ 14).

749. To take from Claimants' words:

> *120. KPM and TNG are energy companies that held Subsoil Use Contracts and Subsoil Use Licenses from Kazakhstan for the exploration and production of hydrocarbons. Claimants' tangible and intangible holdings in Kazakhstan included ownership of oil and gas wells, drilling equipment, gathering pipelines, treatment and storage facilities, vehicles, offices, an LPG plant, equity interests in KPM and TNG, and contractual rights conferred by Kazakhstan to KPM and TNG under the Subsoil Use Contracts and Licenses for the Borankol field, the Tolkyn field, and the Contract 302 Properties. These are "any investment associated with an economic activity in the energy sector" for the purpose of Article 1(6), and they are encompassed by subcategories (a), (b), (c), (e), and (f) of Article 1(6). (C-II ¶ 120, citations omitted; see also C-I ¶ 34).*

750. Claimants argue that the double-barreled *Salini* test, which requires establishing an investment under both the applicable investment treaty and the ICSID Convention, is not applicable here, as it only applies in ICSID cases. After the Hearing on Quantum, Claimants reminded the Tribunal that the controversial *Salini* test is applied in ICSID arbitrations because, unlike the ECT, ICSID does not define "*investment*." Furthermore, at best, ICSID applies the *Salini* test as a flexible guideline, rather than as a strict jurisdictional requirement. (CPHB 1 ¶¶ 60 – 62). The *Salini* test – and likewise all cases that rely on it – is irrelevant to this arbitration, and Respondent has not provided any ECT cases that apply the *Salini* criteria. Although Claimants' investments would clearly satisfy the *Salini* test, there is no basis for the Tribunal to apply criteria outside of the ECT to establish whether Claimants made a valid investment. The only relevant definition of investment is that found in Art. 1(6) ECT. (C-II ¶¶ 114 – 116, 118, 122; CPHB 2 ¶ 15).

751. Characterizing Respondent's contributions arguments as "*irrelevant*", Claimants explain that their investments resulted from substantial financial contributions, including the over USD 12 million purchase price for KPM's and TNG's shares, as well as investments in accordance with the working programs (which the MEMR recognized that Claimants exceeded, both in terms of investment values and financial obligations. Respondent has not contested that the amounts exceeded the companies' working program obligations by USD 400 million for KPM and USD 475 million for TNG. From 2000 until the end of 2009, Claimants invested more that USD 1.1 billion in KPM and TNG. (C-II ¶ 121; CPHB 1 ¶¶ 63 – 67; CPHB 2 ¶ 16).

752. After Hearings on Jurisdiction and Liability and on Quantum, Claimants explained that they initially funded the operations of KPM and TNG through shareholder loans, which are investments under Article 1(6) ECT. Furthermore, substantial contributions to KPM and TNG were made through the reinvestment of profits. By the end of 2008, KPM and TNG had nearly USD 400 million in retained earnings on their balance sheets. This is disregarded by Respondent. Reinvesting profits is an investment, as Art. 14(1) ECT guarantees Claimants the right to take the profits or "*Returns*" of KPM and TNG and to distribute them as dividends or to spend or invest them as they saw fit. (CPHB 1 ¶ 68 – 72; CPHB 2 ¶ 16).

753. Respondent's argument that the Tristan Loan financial structure deprives the Tribunal of jurisdiction because it shielded Claimants from risk in relation to the investments in KPM and TNG is factually and legally meritless. The Tristan note offering was a normal public debt offering in which sophisticated investors examined the business and financial status of KPM and TNG and found them creditworthy. The third party financing for KPM and TNG from Kazcommerzbank was approximately USD 145 million at the end of 2006. In 2006, the debt portion of the capital structure was refinanced through the Tristan note offering, in order to increase the available credit line and to obtain better credit terms. The notes were issued by Tristan and were secured entirely by the assets of KPM and TNG and pledges of Claimants' equity interests in KPM and TNG. Claimants' investments remained at risk at all times, since Terra Raf and Ascom pledged their entire equity interests in KPM and TNG to the Tristan noteholders as security. The pledge agreements provided that in the event of default, Ascom and Terra Raf would be required to provide any payments of any kind to the Tristan noteholders, including payments received as a result of this arbitration. This pledge is in and of itself an investment under Art. 1(6) ECT, which broadly defines investment as including pledges. The pledges also satisfy the inapplicable *Salini* requirements of substantial contribution, risk, duration, and benefit to the host State: "*They are substantial contributions to KPM and TNG in the form of legal obligations that enabled KPM and TNG to raise hundreds of millions of dollars from the Tristan noteholders. Those contributions entailed substantial risk, namely, Claimants' risk of losing their entire equity stakes in KPM and TNG and any payment received through arbitration. Those contributions had a lengthy duration; Claimants entered into the Pledge Agreements in 2006, and they remain in force today. And the contribution benefited Kazakhstan, because it enabled KPM and TNG to raise hundreds of millions of dollars to finance operations that provided jobs to hundreds of Kazakh citizens and significant tax revenues to the Kazakh treasury*." This is analogous to the case *Enron v. Argentina*, where the tribunal observed that a guaranty could be treated as part of the investment. (CPHB 1 ¶ 72 – 80; CPHB 2 ¶ 17).

754. Claimants state that there is no "*origin of capital*" language in the ECT's broad definition of "*investment*." Thus, Respondent's contention that the "*real*" investor in KPM and TNG is Tristan Oil, and not Claimants, has no legal basis. Moreover, as is plain from the text of Art. 1(6) ECT, which refers expressly to "*every kind of asset, **owned or controlled** directly or **indirectly** by an Investor*" the ECT protects investments that are not only directly owned, but also investments that are indirectly owned or controlled. Claimants have demonstrated that Anatolie Stati indirectly owned and controlled KPM and its assets, and that he and Gabriel Stati each indirectly owned and controlled 50% of TNG and its assets. (C-II ¶¶ 125 – 129; CPHB 1 ¶ 67).

755. Regarding the benefit that Claimants' investments had for Kazakhstan, Claimants point out that Kazakhstan has even recognized the "*strategic role*" that Claimants' investment and development of the oil and gas fields has had for the Mangystau Region and for Kazakhstan. This disproves Respondent's allegations to the contrary. In addition, from 2000 – 2009, Claimants KPM and TNG paid USD 163 and 187 million in taxes and administrative expenses, respectively. They employed over 900 Kazakh citizens as permanent workforce and employed nearly 3,000 on a contract basis. (CPHB 1 ¶¶ 81 – 85; CPHB 2 ¶ 18).

756. Even though Claimants' investments were made in good faith and in accordance with Kazakh law, the ECT contains no such requirement that they be so made. Indeed, if the contracting states had intended there to be such a requirement, they could have written it into the text of the Treaty, as explained in the ICSID case of *Saba Fakes v. Turkey*. Neither the ECT nor customary international law requires that an investment comply with the minutiae of domestic and administrative legal requirements in order to qualify for protection. Furthermore, tribunals under other treaty regimes have only excluded an investment from protection in instances of calculated misconduct amounting to fraud. (C-II ¶¶ 130 – 131; CPHB 1 ¶¶ 86 – 87).

757. Regardless, even where a treaty requires that an investment be made in accordance with domestic law, it does not follow that any violation will preclude jurisdiction. Indeed, tribunals that have rejected jurisdiction based on illegality – like the *Phoenix* and the *Plama* tribunals - have done so when an investment amounted to fraud. At issue here, however, are allegations of technical, minute – and meritless – violations of formalities of Kazakh corporate law, coming nowhere close to fraud. Hyper-technical, formalistic allegations of "*illegality*" precluding jurisdiction have been uniformly rejected in treaty cases, including *Tokios Tokeles* and *Saluka*, and this Tribunal should likewise do the same. (C-II ¶¶ 132 – 137).

758. Respondent's allegations of illegal corporate formation are contrived and meritless. Despite benefitting from, inspecting, and monitoring the corporate structures for years, Respondent failed to allege that anything was illegal or improper prior to this arbitration. This suffices for the Tribunal to reject Respondent's formalistic claims of illegality in this case. Claimants argue that Respondent created these illegalities as part of its campaign of indirect expropriation, initiated in October 2008. (C-II ¶¶ 135 – 141; CPHB 2 ¶¶ 20 – 22).

759. Turning to the issue of KPM's formation and share issuance, even if KPM failed to submit appropriate documents, such failure does not result in a *per se* illegal formation. Rather, such a failure would merely give Kazakh officials the right to challenge the legality of KPM's formation before a Kazakh court, pursuant to Art. 16 of the SM Law. Kazakhstan never did so and, by the time of the transfer of KPM's shares to Claimants, the registration requirement had been abolished. Claimants concede that the previous shareholders of KPM failed to register KPM's initial share issuance as required by law. Kazakhstan and investment tribunals, such as *Saluka*, accept that there is a distinction to be made between former shareholders and failings by claimants in an arbitration. The alleged technical illegalities by former shareholders of KPM cannot taint Claimants' title to shares. Claimants state that Respondent is trying to create an issue where none. (C-II ¶ 142 – 143; CPHB 1 ¶¶ 88 – 91).

760. Further, Kazakh law does not recognize a concept of a transaction that was *void ab initio*. Rather, pursuant to Art. 157(1) CC RK, all transactions remain valid until voided by a court. Not only have there been no claims brought by Kazakhstan to challenge KPM's formation, but the 3-year statute of limitations for such claims, which runs from the date when the person knew or should have known about the violation, expired on 24 June 2000. (C-II ¶¶ 144 – 145).

761. Despite Respondent's arguments to the contrary, Ascom's acquisitions of KPM shares in 1999 and 2004 were lawful, despite not being registered, because JSCs were exempted from an obligation to register their initial issuance of shares in 1998 – before the transactions at issue here. Further, as part of the amendments to the law, the issuance of shares not subject to state registration required a national identification number. After completing its review, the National Securities Commission could either assign a national identification number, or refuse to do so if its review of the submitted documents revealed any violation of law by the issuer. KPM obtained a national identification number with respect to the initial issuance of its shares on 24 January 2000. If there had been any irregularities, the National Securities Commission was under a duty to notify KPM of these, rather than assigning a number. Therefore, KPM's initial issuance of shares duly complied with Kazakh law from at least that moment forward. Claimants cured any alleged defect in registration upon their acquisition of 62% of KPM's shares in 1999. (C-II ¶¶ 146 – 149; CPHB 1 ¶¶ 88 – 91; CPHB 2 ¶ 23).

762. Claimants also state that KPM has always been a commercial company – the so-called "*re-registration*" as a commercial entity was nothing more than Kazakhstan's correction of its own clerical error. This is plain from a review of KPM's Foundation Agreement, which explicitly calls KPM a commercial organization. KPM's Charter contains no provisions related to the non-profit goals of the company. Further, opposite of the goals of a non-profit, the explicit main goal stated in KPM's Foundation Agreement is that KPM is to obtain a profit. Finally, KPM has engaged in commercial activity since its establishment and its acquisition of a Subsoil Use License in May 1997 – 2 years before the alleged re-registration. This Subsoil License even explicitly states that KPM's main area of business is commercial activities. The same commercial orientation is noted in Contract 305. Indeed, if the registration authorities had correctly performed their obligations, they would have registered KPM as a commercial organization from the outset. Claimants state that they have no knowledge of the December 1999 re-registration or of the documents Respondent has submitted. (C-II ¶¶ 150 – 155; CPHB 1 ¶ 90 – 93).

763. Claimants present a history of Claimants' acquisitions of KPM and TNG and their development of these investments, and this is also contained in this Award in the Timeline, above. Importantly, Contracts 305, 302, and 210 each contained stabilization clauses stating that "*[c]hanges and additions to the legislation made after the signature of the Contract that deteriorate the position of the Contractor shall not be applicable to this Contract.*" (C-I ¶¶ 42 – 73). Claimants explain that all of their acquisitions in KPM and TNG occurred after the elimination of the licensing regime and authority. Moreover, Kazakh law required consent of the Competent Authority only for transfers of subsoil use rights from one user to another, not transfers of shares in a subsoil user. KPM's and TNG's subsoil use rights were valid, and TNG and KPM violated no provisions of Kazakh law when making amendments to their Subsoil Use Contracts without amending the respective subsoil use licenses. Claimants explain that the 1995 Law on Licensing did not apply to the issuance and emending of KPM's and TNG's subsoil licenses. The subsoil licenses were issued in 1997, and are subject to the Subsoil Use Law, enacted on 27 January 1996. This law and Government Resolution No. 1017 (16 August 1996) contained the licensing procedures for subsoil users. In August 1999, Kazakhstan abolished the dual licensing and contracting system with respect

to subsoil use, moving directly to a contract-only system. Amendments to Subsoil Use Licenses were effectively replaced by amendments to the subsoil use agreements after the 1999 Amendments Law. (C-II ¶¶ 173 – 182; CPHB 1 ¶¶ 93 *et seq*.). The specific arguments are best taken from Claimants' words:

> *158. In August 1999, Kazakhstan abolished its dual licensing and contracting system with respect to subsoil use and moved to a contract-only system of subsoil use ("1999 Amendments Law"). Pre-existing subsoil use licenses remained in force and their "suspension, revocation, termination, and invalidation" were still governed by the 1996 Subsoil Use Law in force prior to the 1999 Amendments Law. The 1999 Amendments Law effectively "froze" the licenses, which could only be suspended or withdrawn—but not amended—by the state authorities. Thus, only the subsoil use contracts could reflect amendments to the terms of a subsoil user's rights and obligations.*
>
> *159. The 1999 Amendments Law also resulted in a number of sweeping changes to various legislative acts that largely eliminated references to a Licensing Authority and its powers. In particular, those amendments deleted Article 7 of the 1996 Subsoil Law (Transfer of Subsoil Use Rights), which had empowered the Government of Kazakhstan to issue and amend licenses for subsoil use. Additionally, Article 8(1) of the 1996 Subsoil Law, which previously stated that the Competent Authority "submits to the Licensing Authority proposals for revocation of a License or making amendments thereto," was amended to provide that the "[Competent Authority] issues consents for transfer of Subsoil Use Rights." Likewise, the amendments substituted the Competent Authority for the Licensing Authority in Article 14 of the 1996 Subsoil Law, which thereafter provided:*
>
> > *The transfer of Subsoil Use Rights by the subsoil user to another party, made either against payment or for free, including by contributing to the charter capital of a new legal entity, except for the transfer of the subsoil use right as collateral, shall be permitted only with the consent of the Competent Authority [authorized government body]. (C-II ¶¶ 156 – 159)*:

764. Claimants even sought clarification on the relationship between the licenses and subsoil use agreements in December 1999. The Agency on Investment – the then-competent authority – informed KPM by letter dated 18 January 2000 that, pursuant to the amendments to the Law on Subsoil Use (11 August 1999), that licenses for subsoil use shall no longer be issued, nor shall changes or amendments be introduced into earlier-issued licenses. This was confirmed by the Government of Kazakhstan on 14 May 2002 and by the MEMR in December 2008. (C-II ¶¶ 178 – 181; CPHB 1 ¶¶ 95 – 104).

765. Turning to Respondent's argument under Art. 53 of the 1995 Law on Oil, while that statute technically existed, it did not apply as a result of Kazakh laws governing the hierarchy of statutory acts, pursuant to which in the event of contradictory statutory provisions, the latter enacted Act shall prevail. Here, the later amended 1999 Amendments were applicable. These required consent only for the transfer of a subsoil use contract and not for the transfer of shares in a subsoil user. (C-II ¶¶ 161 – 163; CPHB 95 – 96).

766. In spite of this, however, KPM and TNG twice sought consent for the transfers – and they either received it or were informed that consent was not required. (C-II ¶¶ 156, 164). Only after Kazakhstan commenced its expropriation campaign in October 2008 did Kazakhstan contend that those share transfers lacked the required consents. (C-II ¶ 156; CPHB 1 ¶ 96). It is simply not true that Claimants applied to the wrong authority. On Respondent's own evidence, the Competent Authority on 26 April 1999 was the Agency on Investment, and the MEMR did not even exist until 13 December 2000. (C-II ¶ 166). It is also worth noting that on 20 February 2007, when the Appraisal Commission (responsible for deciding requests for alienations of subsoil use agreements) allowed for the transfer of TNG shares from Gheso to Terra Raf, and also expressly found that there was no deadline within which TNG had to seek approval for the transfer of shares from Gheso to Terra Raf. (C-II ¶ 167). Claimants state that exhibit C-134, which TNG received from MEMR because it was the document granting permission for the share transfer, shows that the appropriate governmental body consented to the transfer. Finally, Claimants state that Respondent has conceded that it had approved the transfer, stating that as part of its indirect expropriation campaign, it "*annulled the earlier issued permit*." (C-II ¶ 168).

767. Respondent's argument that the reorganizations of KPM and TNG from JSCs to LLPs in 2005 were unlawful because Claimants were not the lawful shareholders, is meritless. Ascom and Terra Raf were the lawful shareholders of KPM and TNG (respectively) when the reorganization occurred. (C-II ¶¶ 169, 170). Registration is deemed complete upon state registration, occurring here at the latest in May 2005, when the Kazakh Ministry of Justice approved and registered KPM's transformation from a closed JSC into a LLP. Respondent did not question these reorganizations until filing its Statement of Defense. (CPHB 1 ¶ 92).

768. Nonetheless, even if the reorganizations were invalid, there is no "*domino theory*" to chain transactions in Kazakhstan – a court's finding that one transaction in the chain was invalid will not serve to invalidate all later transaction. Rather, every transaction remains valid until voided by a court. (C-II ¶¶ 170 - 172).

769. Turning to Respondent's arguments that Claimants failed to apply for necessary waivers of the Republic's rights to purchase KPM and TNG, Claimants state that Respondent had no pre-emptive rights at the time that any of the transactions occurred – the last of which being Ascom's acquisition of the remaining 38% shareholding in KPM in November 2004. The state's pre-emptive right did not arise until 8 December 2004, with the amendments to Art. 71 of the 1996 Subsoil Use Law. It applied only prospectively. Further, any attempts to cure defects in the transfers after December 2004 would not trigger the Republic's ability to exercise a preemptive right. (C-II ¶¶ 183 – 186; CPHB 1 ¶ 106).

770. It is not disputed that Claimants twice obtained waivers of pre-emptive rights from Kazakhstan – once in 2007 in preparation of an IPO on the London Stock Exchange and again in February 2007 when TNG applied for permission for the 2003 transfer of TNG ownership to Terra Raf (which TNG did not believe was required at the time). Claimants state that it was not until 18 December 2008 that Respondent attempted to revoke the waiver of pre-emptive rights, baselessly accusing Claimants of fraud and forgery in connection with that waiver. Respondent never provided any evidence of fraud or forgery, and never acted on

the allegations. Respondent's only objective in that retroactive revocation must have been to cast a cloud on Claimants' title to TNG, making it impossible for Claimants to sell the business. (C-II ¶¶ 187 – 190, 228, CPHB 1 ¶ 105).

771. It was a surprise when Kazakhstan requested that TNG apply for retroactive consent for the 2003 transfer of TNG shares from Gheso to Terra Raf. Respondent had no pre-emptive right request to any acquisition or share transfer in TNG, since such prospective rights first arose on 8 December 2004 through the amendment to Art. 71 of the 1996 Law on Subsoil Use. Respondent's argument that the transfer was not "*completed*" until 16 May 2005 and that that is why consent was required has neither factual nor legal basis. Kazakhstan's witness, Mr. Ongarbaev confirmed that the transfer was completed at the latest on 28 May 2003. The only reason that the 16 May 2005 date is relevant is because that was when TNG was reorganized from an open JSC to an LLP, and that re-organization was re-registered with State authorities and had nothing to do with pre-emptive rights. Finally, Respondent only made this objection during proceedings and not even KMG's international counsel, Squire Sanders, raised any concerns about TNG's registration, even after analyzing the pre-emptive rights topic. Rather, and contrary to Respondent's selective quoting and mischaracterization of that report, international legal counsel to KPM E&P, Squire Sanders, considered that Terra Raf's ownership of TNG was proper and legal and issued an opinion to that effect in a due diligence report, which Respondent withheld from the Tribunal. (CPHB 1 ¶¶ 93 – 94, 106 – 110; CPHB 2 ¶¶ 25 – 26).

772. Each of Respondent's bad faith arguments – *i.e.* that (i) proceeds from those investments were used to fund terrorist activities in South Sudan; (ii) KPM and TNG guaranteed bonds issued by Tristan Oil, which "*diverted*" money from Kazakhstan; and (iii) Claimants tried to illegally sell an investment they did not legally own in the "*Project Zenith*" process – are frivolous and irrelevant. These complaints are supported by unsubstantiated statements made by a disgruntled former-employee in the context of a wrongful termination lawsuit, a defamatory letter from a political opponent of Anatolie Stati, former President Voronin of Moldova, and Respondent's own misstatements. First, it has never been shown that Anatolie Stati funded terrorist groups in South Sudan. Rather, Anatolie Stati's normal, commercial investments in the oil and gas industry have contributed enormously to the well-being of the population of South Sudan by building schools, a hospital, medical clinics, and means of transportation in the region. Second, President Voronin's letter merely demonstrates that he and President Nazarbayev teamed up to undermine Anatolie Stati's investments in one country and his pro-democracy movement in the other. Third, in relation to Respondent's puzzling claims with respect to KPM and TNG guaranteeing bonds for Tristan Oil, the bonds show no evidence of bad faith and the issue is irrelevant for whether KPM and TNG are valid investments under the ECT. Finally, turning to the bad faith allegations with respect to Project Zenith, Claimants state that they were completely within their rights to offer these companies for sale – Kazakhstan acted in bad faith and in breach of the ECT by interfering with Project Zenith and in making the sale of KPM and TNG impossible. (C-II ¶¶ 192 – 197).

b. Arguments by Respondent

773. In order to receive protection under the ECT, the investments must meet the definition of investment as articulated in Art. 1(6) ECT. The term "*investment*" has a meaning in and of itself, and simply meeting one of the categories listed under Art. 1(6) ECT is not sufficient. Instead, there are gaps in the Art. 1(6) ECT definition of "*investment*", and there is evidence to suggest that the Treaty parties intended the term to mean more than "*any right property or interest in money or money's worth*." (R-I ¶¶ 9.11 - 9.15, R-II ¶¶ 73 – 85, 83; RPHB 1 ¶ 446; RPHB 2 ¶¶ 384 – 385).

774. The first step this analysis is Art. 31(1) VCLT, which establishes the need to interpret a treaty in good faith. (R-I ¶ 9.40; R-II ¶ 79; RPHB 2 ¶ 385). International law is applicable by virtue of Art. 26(6) ECT, which allows the Tribunal to apply applicable general principles of international law. (R-II ¶ 77). Cases, such as *Salini* and *Phoenix*, are also relevant, since they amount to an expression of international law. (R-II ¶ 79).

775. The Tribunal – like the tribunals in *Romak, Alps Finance and Trade AG v. Slovak Republic*, and *Compagnie International de Maintenance (CIM) v. Ethiopia* – should consider the term's ordinary meaning, in light of other ECT provisions and the ECT's object and purpose, and should also consider the use of the term in international law, as applied by other tribunals. (R-II ¶¶ 84 – 87). Accordingly, Respondent asks the Tribunal to consider a broader meaning of "*investment*." (R-II ¶¶ 80 – 82).

776. Contrary to Claimants' argument, the definition of "*investment*" is not institution-specific – indeed, to make it so would (1) encourage forum shopping within the ECT (where investors have a choice of commencing arbitration under three different institutions) and (2) would violate the principle endorsed in *CIM v. Ethiopia* that Parties should search for a consistent meaning across investment treaties. (R-II ¶¶ 97 – 100; RPHB 1 ¶ ¶ 448).

777. The test for an investment available in ICSID arbitrations is one that should and could equally apply in ECT arbitrations. This is because the ICSID and ECT treaties are each predicated on general principles of international law, which allows for a wider definition of "*investment*" than that set out in the text. Thus, it is entirely appropriate for this Tribunal to employ tests like the ICSID-originating *Salini* test, which has been employed in cases where Tribunals have had to construe the word "*investment*" in accordance with its inherent meaning. (R-I ¶ 9.5; R-II ¶¶ 95, 96, 99).

778. Pursuant to the *Salini* and *Phoenix* awards, an investment must have the following six characteristics: (a) a contribution of money or other assets; (b) a certain duration; (c) an element of risk; (d) a contribution to the host state's development that is made (e) in accordance with the laws of the host state and (f) in good faith in accordance with general principles of international law. It is Claimants' burden to demonstrate that these characteristics have been exhibited in this case. (RPHB 2 ¶ 389). (R-I ¶¶ 9.4 – 9.5, 9.10, 9.36 – 9.41, 9.45 – 9.47; R-II ¶¶ 100 – 108; RPHB 1 ¶¶ 449 – 450).

779. Regarding the financial contribution requirement (a), Respondent notes that, although some tribunals have adopted the approach that an investment need not be

substantial, the low purchase prices for the assets, placed in context of the arbitration, raises doubts as to whether Claimants made was a true economic contribution when making the investment. Claimants initially invested in the businesses by way of share purchases and work programs. While Respondent acknowledges that Ascom and Terra Raf provided USD 9 million for the purchase of 38% of shares in KPM, it notes the Ascom - and not Terra Raf - purchased the TNG shares for only USD 189,185. Claimants have not provided a share purchase agreement for the purchase of the other 62% of shares in KPM. Instead, they have only provided a brokerage agreement between Ascom and Telwin. For TNG, while excerpts of the share purchase agreements were provided, the parts providing the purchase price were withheld. All that was provided was Mr. Pisica's allegation that a total of USD 617,333 was paid for 100% of the TNG shares, which Respondent notes is ridiculous when compared with Claimants' claim of the alleged value. No additional specification was ever given for Claimants' assertion that, between 1999 and 2004, Claimants invested over USD 12 million to acquire KPM and TNG. (R-I ¶¶ 9.27, 9.29 – 9.30; R-II ¶¶ 109 – 110, 116 – 118, 127; RPHB 1 ¶¶ 450 – 456; RPHB 2 ¶¶ 391 – 393).

780. Respondent also notes that it appears that Tristan Oil was contributing to and getting value from the assets. Tristan Oil was the main financier of KPM and TNG, and that this is not disputed by Claimants, who state that the ECT contains no "*origin of capital*" requirement. (R-II ¶¶ 120 – 131).

781. Further, Respondent points out discrepancies in figures for amounts that Claimants state were invested in the LPG Plant, the Contract 302 properties, or Claimants' alleged own operating plant, as well as a huge disparity between the investment purportedly made and the amounts claimed in damages. (R-I ¶ 9.31; R-II ¶¶ 123 – 126).

782. Respondent has not submitted arguments with respect to the element (b) duration. Regarding the risk element (c), Respondent states that Claimants' description of their payments demonstrates that Anatolie Stati took on the least amount of risk possible and that there was a lack of risk undertaken by other Claimants. Claimants protected themselves from the companies' liability by creating the Tristan Oil structure and overexposing KPM and TNG to debt. This lack of risk devalues Claimants' arguments that they made investments in accordance with the inherent meaning of the word. (R-II ¶¶ 119, 128 – 132; RPHB 2 ¶ 394).

783. Respondent argues that financial gain may not have been the primary motivator for Claimants. (R-II ¶¶ 128 – 132).

784. Respondent states that there was a lack of contribution to the economy of Kazakhstan (d). First, Respondent notes that Claimants imported foreign labor into Kazakhstan, rather than using local resources. Claimants failed in their obligation to train Kazak specialists. Claimants' evidence is incomplete and that Respondent cannot assess whether USD 14,166,558 was in fact provided. Second, while Claimants contend that they can do what they wish with their profits, Respondent states that the entire structure of Claimants' investment was aimed at taking any money created by the investments off shore and not to making a contribution to the host state, resulting from the investment. In 2008 and 2009, money and profits were diverted from KPM and TNG into Montvale Invest – a Stati-owned BVI

company. Ascom responded to the financial crisis by stripping TNG and KPM of their assets – by declaring dividends and paying a large bonus to Anatolie Stati. At the same time, KPM and TNG paid little of the taxes due to the Republic. USD 62 million in corporate back taxes remain outstanding. The service agreements with Ascom were typical of contracts that are used to transfer money between two related companies without any actual services being performed. (R-II ¶¶ 122, 133 – 145; RPHB 1 ¶¶ 459 – 462; RPHB 2 ¶ 395).

785. Respondent states that there was an undue exploitation of Kazakhstan's assets and that this harmed the Kazakh economy. Claimants' increase of production in the Tolkyn gas field was inconsistent with the strategy of maintaining the long-term usefulness of the asset and resulted in falling reservoir pressure. Respondent alleges that this action could indicate the "*deliberate action of the shareholder, which could be the result of irreversible loss of much of recoverable hydrocarbons and growth capital expenditures of drilling new wells (each worth USD 15 million).*" Confirmation of the diminished value of the assets are confirmed by Claimants' attempted sale in "*Project Zenith*" where no interested buyer could be found once buyers discovered the value of the assets. At the Hearing on Jurisdiction and Liability, Mr. Ongarbaev described the treatment of the field as "*barbaric.*" (R-I ¶¶ 9.69 – 9.70; R-II ¶¶ 133 – 145).

786. Regarding the legality of the investment (e), investments must be made in accordance with the law of the host state. This is supported by both the *Plama* and the *Yallisoletana SL v. Republic of El Salvador* decisions. The *Phoenix* and *Plama* tribunals have agreed that national law forms part of the international legal principles to be applied. Further, providing protection for investments that contravene the laws of the host state undermines a broader compliance with international law. Claimants' investment was not made in accordance with Kazakh law. Claimants have admitted that they breached Kazakh law and this admission is enough to demonstrate that Claimants are not entitled to protection under the ECT. Their breaches were not of "*mere formalities*" – they were substantial. (R-I ¶¶ 9.5 – 9.10, 9.25 – 9.16, 9.74, 9.87, 10.3, 25.10 – 25.14; R-II ¶¶ 78, 100 – 108, 147 – 204, 209; RPHB 1 ¶ 465 – 466; RPHB 2 ¶¶ 396 – 398).

787. Article 53 of the 1995 Law on Oil states that consent is required from both the Licensing Authority and Competent Authority when there is a transfer of shares in a company with subsoil use rights. As Claimants admit, the 1995 Law on Oil was in existence when the share transfers occurred, and even when the law was amended in 1999, the requirement for obtaining consent under Art. 53 was maintained. In response to Claimants' argument that it only needed to comply with Art. 14(1) of the 1996 Subsoil law, as explained by Prof. Ilyassova, pursuant to both Art. 14(1) of the 1996 Subsoil Law and Art. 2 of the 1995 Law on Oil, the 1995 Law on Oil actually took precedence over the 1996 Subsoil Law in the event of any inconsistency. Accordingly, Art. 53 of the 1995 Law on Oil applied to the transfers. Claimants are wrong that the 1996 Subsoil Law would have been exclusively applicable – the laws had distinct scopes, one concerning oil and one concerning subsoil use. A company would need to comply with both. (R-II ¶¶ 152 – 157, 168; RPHB 1 ¶ 469, 470; RPHB 2 ¶¶ 399 – 403).

788. Claimants failed to obtain consent from the Licensing Authority and Competent Authority in relation to any of the eight transfers that involved TNG. Although

Claimants received one authorization 4 years after the last share transfer in TNG (from Gheso to Terra Raf), that consent does not "*heal*" the prior failures to obtain consent for the three preceding transfers in TNG. Each of those prior transfers was invalid under Art. 14 of the 1996 Subsoil Law. Further, the consent given was legally invalid – Claimants failed to provide pertinent information, and the Republic never granted a waiver of its pre-emptive right. There can be no doubt that Terra Raf's investment in TNG was not in accordance with Kazakh law – the necessary and late-obtained consent for Terra Raf's investment in TNG was validly revoked as a result of Claimants' provision of false and misleading information. (R-II ¶¶ 148 – 149; 150 – 167; RPHB 1 ¶ 468 – 471).

789. Even when making their application for retro-active consent to the transfer of TNG from Gheso to Terra Raf in February 2007, Claimants expressly conceded that Art. 53 of the 1995 Law on Oil was in force. Accordingly, Respondent had a right, under Art. 71 of the 1996 Law on Subsoil Use as amended on 8 December 2004, to purchase TNG. This made the purported transfer invalid if the Republic would not waive its rights. (RPHB 2 ¶ 404 - 407).

790. In 2008, when the MEMR realized that it had been misled by Claimants regarding the necessity of the waiver, the MEMR was obliged to revoke the waiver, pursuant to Art. 15(2) of the 1996 Subsoil Law. Respondent denies that the revocation had anything to do with alleged "*harassment*" and deny that there was an official MEMR press release regarding this. Respondent states that KPM and TNG were given the opportunity to dispute the charges, as evidenced through the correspondence and meetings held. Nevertheless, it is evident that the problems arising out of the transfer of TNG from Gheso to Terra Raf were caused by Claimants themselves, likely in an effort to avoid having to obtain a waiver of the Republic's pre-emptive right. (R-II ¶¶ 170 – 176).

791. Claimants have provided no evidence for their argument that they were led to believe that no consent was required for the transfer of TNG from Gheso to Terra Raf because they were affiliated companies, and they did not make this argument at the hearings. Mr. Pisica is not qualified to opine on Kazakh law. Further, any alleged "*affiliation*" did not prevent TNG from belatedly requesting consent to the transfer. Respondent argues that Claimants always believed that they needed consent but simply chose not to obtain it. (R-II ¶ 162 -163; RPHB 1 ¶ 472, 473).

792. In response to Claimants' statements during the Hearing on Jurisdiction and Liability, Respondent reminds the Tribunal that it was correct in questioning the transfer from Gheso to Terra Raf. Respondent notes that there have been additional irregularities in the many transfers involving TNG. Claimants have produced a document which refers to Ascom owning TNG as of 15 September 2004, and at the same time argue that the last time Ascom owned TNG was in 2002. Further, Respondent it never conceded that Terra Raf's acquisition of TNG took place in 2003 and was registered at that time. (R-II ¶ 173; RPHB 1 ¶¶ 474 – 475).

793. The waivers obtained in 2007 in relation to the transfer of TNG and KPM to Tristan Oil bear no relation to the TNG-Gheso-Terra Raf transfer. Nevertheless, the Republic would not have waived its right in regard to the proposed transfer to

Tristan Oil had it known that Claimants should have requested a waiver at the time of the TNG-Gheso-Terra Raf transfer. (R-II ¶¶ 178 – 180).

794. Since the start of this arbitration, Respondent has discovered other serious breaches of Kazakh law in relation to Claimants' investment, which were concealed from Respondent. Since Respondent was not aware of these, they were not grounds for termination of the subsoil contracts. These violations include:

(a) Violations of Kazakh law in relation to the issuing of shares in KPM;

(b) KPM was transformed from a "non-commercial" entity into a commercial entity in breach of Kazakh law;

(c) The transfer of KPM's shares to Ascom was illegal due to the failure to obtain consent from the Licensing and Competent Authorities;

(d) The reorganisation of KPM and TNG into LLPs was illegal; and

(e) KPM and TNG failed to amend their licenses when amending their contracts. (R-II ¶¶ 181 – 182, citations omitted, see also R-II ¶ 148 – 149; RPHB 1 ¶ 477).

795. Respondent argues that KPM's share issue was *void ab initio* – a concept that exists in Kazakh law. Claimants admit that KPM failed to submit the relevant documents to obtain state registration, meaning that it did not have a national identification number. It is unacceptable to describe this as a mere "*technical*" error. Instead, under Art. 15 of the SM Law, the documents needed to be submitted as part of the share issue – absent these, the share issue cannot be registered pursuant to Art. 17(1) SM Law and, therefore, shall be deemed invalid under Art. 17(2) SM Law. The Republic was not, as Claimants allege, required to pursue this issue in court to challenge the validity of the registration. Likewise, the matter is not time barred. Accordingly, being that the initial share issue in KPM was invalid and Claimants nonetheless purchased the company, they cannot be regarded as investing in accordance with host state law, as required under international legal principles. At the Hearing on Jurisdiction and Liability, Claimants addressed this issue and admitted that the shares were not registered pursuant to Art. 16 of the SM Law. Claimants continued to rely on Prof. Maggs's report. Prof. Ilyassova explained, however, that under Kazakh law, transactions can be considered invalid, without a court order. Likewise, the late registration of KPM's shares did not cure any defect with their registration. (R-II ¶¶ 183 – 188; RPHB 1 ¶ 478; RPHB 2 ¶¶ 408 – 411).

796. Regarding KPM's illegal transformation into a commercial company on 13 December 1999, Claimants have not provided any evidence that this was a mere correction of a prior error or that Claimants were unaware of the change. Accordingly, Respondent states, Claimants willingly invested in KPM as a non-commercial entity, knowing it was carrying out commercial activities in breach of Kazakh law. (R-II ¶¶ 189 – 192).

797. Regarding the unlawful transfer of KPM's shares to Ascom, Respondent states that this transfer required State consent under the 1995 Law on Oil. All that Claimants have presented to demonstrate their consent is a letter from the State showing that

further action needed to be taken to obtain consent. As it cannot be said that Ascom obtained consent to the transfer, Ascom acted in breach of Kazakh law by making its investment in KPM. (R-II ¶ 195).

798. Regarding the reorganization of KPM and TNG into LLPs, Respondent argues that, since neither Ascom nor Terra Raf were legal shareholders in KPM and TNG, the attempted reorganization of those companies into LLPs was ineffective and a further breach of Kazakh law. The change was void *ab initio* – therefore, Claimants' point regarding there being no "*domino theory*" under Kazakh law is misplaced. Further, Claimants cannot employ the statute of limitations to argue that it did not breach Kazakh law as a matter of fact. Respondent states "*[a]s to the alleged three year limitation period which now supposedly bars the Republic's claim, the Republic has already explained above that the majority of the illegalities came to light only after the commencement of this arbitration, by which point any scope for bringing a claim would have been useless (since Claimants had abandoned KPM and TNG).*" (R-II ¶¶ 196, 199).

799. Claimants failed to amend the licenses in accordance with the amendments to the contracts. Claimants' interpretation of Kazakh law that they did not need to amend the licenses is simply wrong. Under Art. 26 and 29 of the 1995 Law on Oil, they needed to extend their licenses as well as their contracts, just as other companies did. (R-II ¶¶ 200 – 204).

800. Respondent states that Claimants do not deny breaching fundamental aspects of Kazakh law throughout their investment, including:

> *(a) Unlawfully investing in the Republic and illegally engaging in activity involving the Republic's subsoil resources;*
>
> *(b) Illegally operating a trunk pipeline without a licence in order to exploit the subsoil area KPM and TNG operated in;*
>
> *(c) Failing to pay legally imposed taxes as well as penalties it incurred; and*
>
> *(d) Repeated violation of the Contracts resulting in their valid termination. (R-II ¶ 207).*

801. The *Salini* requirements (e) and (f) apply, even though not expressly mentioned, because it would be absurd to suggest that such fundamental principles of national and international law would be inapplicable. Good faith has been recognized as relevant for the ECT. Respondent's arguments concerning "*good faith*" are best taken from its own words:

> *9.43 An analysis of general principles of international legal practice and the doctrine suggests that an investor's behaviour is not considered to be in good faith if it:*
>
> > *(a) does not comply with local laws and contracts concluded by the Investor (specifically the local law and the concluded contracts upon which the legitimate expectations of the Investor are based, subject to the protection of international law);*

(b) does not correspond to social and moral requirements (for example if in violation of public order and justice); or

(c) does not respect the rights of counterparties and other participants in civil commerce (the equal status of the parties). (R-I ¶ 9.43, citations omitted).

802. Claimants' attempt to counter the above has been limited to attempts to discredit Prof. Olcott, who Claimants nevertheless quote when criticizing the quality of the rule of law in Kazakhstan. This selective use of Prof. Olcott's work suggests that Claimants' criticism of Prof. Olcott is superficial. (RPHB 2 ¶ 413).

803. Regarding (f) whether Claimants have made a *bona fide* investment, Respondent highlights that there is no evidence that Claimants have made their investment in good faith. Rather, Respondent presents that it is difficult to believe that Claimants Anatolie and Gabriel Stati have behaved as normal, commercial investors and instead accuses them of corruption and engagement in criminal and terrorist activities and/or civil unrest groups. As evidence of their corruption, Respondent points to Claimants' possession of confidential, internal government documents in this case. At the Hearing on Jurisdiction and Liability, Claimants admitted to their involvement in obtaining stolen documents. This is further evidence of Claimants' corruption. (RPHB 1 ¶ 481). Their illegal activities also include those regarding the unlawful transfers, described above. (R-I ¶ 9.51 – 9.59; R-II ¶¶ 210 – 214; RPHB 2 ¶ 412).

804. Allowing a claim for damages based on the Tristan Notes to go forward would enable the Claimants to circumvent the jurisdictional and substantive requirements of investment arbitration. In particular, the noteholders would not need to demonstrate either nationality or investment to bring the claim under the Kazakh BIT. By claiming "*enterprise value*", which represents the net present value of the operating cashflow of an entity and includes the cash flows to creditors, Claimants are claiming their own alleged damage and the damage of the Tristan noteholders. Thus, this is a claim by one party on behalf of a third party, the Tristan noteholders and this is impermissible. (RPHB 1 ¶¶ 415 – 419).

c. The Tribunal

805. The ECT provides the following definition of "*Investment*" in Art. 1(6):

"*Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

806. By this extremely broad definition, particularly extended by its section (f) quoted above, it stands in contrast to the ICSID Convention which contains no definition of "*investment*" and thus needs further interpretation as regularly done by ICSID tribunals. Guidelines and tests of criteria developed in this jurisprudence on the ICSID Convention and similar treaties, therefore, cannot be used as long as any right or activity is clearly covered by the wording of the above definition in ECT cases. Therefore, the so-called *Salini* test, controversial and much discussed both by the Parties in this case and otherwise in ICSID and similar arbitrations, even if applied as a flexible guideline rather than as a strict jurisdictional requirement, cannot be used for the definition of investment under the ECT or, likewise, in the present case. The Tribunal, thus, sees no need to examine the various criteria discussed for the *Salini* test.

807. Further, the VCLT expressly provides in its Art. 31.1 that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms. Article 32 VCLT provides that supplementary means of interpretation may only be used in order to confirm the meaning from the terms of the treaty or, if the Art. 31.1 interpretation leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. These latter conditions for recourse to supplementary means of interpretation are clearly not fulfilled by the wide and highly detailed above definition of "*investment*" in the ECT.

808. KPM and TNG are energy companies that held Subsoil Use Contracts and subsoil use licenses from Kazakhstan for the exploration and production of hydrocarbons. Claimants' tangible and intangible holdings in Kazakhstan included ownership of oil and gas wells, drilling equipment, gathering pipelines, treatment and storage facilities, vehicles, offices, an LPG Plant, equity interests in KPM and TNG, and contractual rights conferred by Kazakhstan to KPM and TNG under the Subsoil Use Contracts and Licenses for the Borankol field, the Tolkyn field, and the Contract 302 properties. These are encompassed by the subcategories (a), (b), (c), (e), and (f) of Art. 1(6) ECT and, further, by the language "*any investment*

associated with an economic activity in the energy sector" for the purpose of Art. 1(6).

809. Claimants' explanations as well as the evidence show that Claimants initially funded the operations of KPM and TNG through shareholder loans, which are investments under Art. 1(6) ECT, and that, later, substantial contributions to KPM and TNG were made through the reinvestment of profits. Reinvesting profits is also an investment, as Art. 14(1) ECT allowed Claimants to take the "*Returns*" of KPM and TNG and to distribute them as dividends or to spend or invest them as they saw fit.

810. The Tribunal is not persuaded by Respondent's argument that the Tristan Loan financial structure deprives the Tribunal of jurisdiction because it shielded Claimants from risk in relation to the investments in KPM and TNG. The Tristan note offering was a public debt offering in which investors examined the business and financial status of KPM and TNG and found them creditworthy. The Tribunal cannot see why this would prevent the investment from being covered by the definitions in the ECT.

811. Further, the Tribunal is not persuaded by Respondent's contention that the "*real*" investor in KPM and TNG is Tristan Oil, and not Claimants. It is clear from the text of Art. 1(6) ECT referring expressly to "*every kind of asset, owned or controlled directly or indirectly by an Investor*" that the ECT protects investments that are not only directly owned, but also investments that are indirectly owned or controlled. Claimants have demonstrated that Anatolie Stati indirectly owned and controlled KPM and its assets, and that he and Gabriel Stati each indirectly owned and controlled 50% of TNG and its assets. (C-II ¶¶ 125 – 129; CPHB 1 ¶ 67).

812. Respondent has also argued that Claimants' investments were either illegal from the beginning or became so at a later stage. First, the Tribunal notes that the ECT contains no requirement in this regard. Indeed, if the contracting states had intended there to be such a requirement, they could have written it into the text of the Treaty, as explained in the ICSID case of *Saba Fakes v. Turkey*. This consideration is even more valid in view of the extremely detailed definition of investment and other details regulated in the ECT. At least with regard to jurisdiction, the Tribunal does not see where such a requirement could come from. Whether that aspect is also relevant for the merits of the case, will have to be examined later in this Award. In addition the Tribunal notes that, as the timeline above demonstrates, while inspecting and monitoring Claimants' investments and their corporate structures for years, Respondent failed to allege that anything was illegal or improper prior to October 2008.

813. For the above reasons, the Tribunal concludes that it has jurisdiction over the investments made by Claimants.

4. Jurisdiction – Compliance with Three-Month Waiting Period

a. Arguments by Claimants

814. After the Hearing on Quantum, Claimants asserted that, after the Hearing on Jurisdiction and Liability, it appeared that Respondent had abandoned its "*cooling off*" period arguments. In any event, Claimants satisfied any alleged duties during the three month stay of proceedings. (CPHB 1 ¶ 44, CPHB 2 ¶ 27).

815. While Claimants argue that they have complied with the three month waiting period under Art. 26(2) ECT, they also argue that this is not a jurisdictional requirement, but rather is a procedural hurdle. The procedural nature of the waiting period has been confirmed by the vast majority of arbitral tribunals called upon to decide upon the jurisdictional objections related to a claimant's alleged failure to comply with such a period. This solution is dictated by procedural economy, since denying jurisdiction would simply force a claimant to re-start proceedings a few months later – a solution that is in no party's interest. (C-II ¶¶ 53 – 57).

816. Claimants present cases where the tribunal has concluded that the waiting period is procedural and not jurisdictional. In the *Lauder* case, the tribunal found that the claimant had failed to comply with a six-month waiting-period under the applicable BIT by filing its Request for Arbitration 17 days after the notice letter, but did not consider that to be a bar to jurisdiction. Likewise, in *Wena v. Egypt*, in accepting the respondent's offer to withdraw its objection to jurisdiction based on Wena's alleged failure to comply with the three-month waiting period under the applicable BIT, the tribunal viewed the requirement as procedural. The tribunal in *SGS v. Pakistan* also chose to treat consultation periods as procedural rather than jurisdictional. In *Bayindir v. Pakistan*, the tribunal held that the claimant's failure to comply with a waiting period under the applicable BIT did not affect its jurisdiction. In *Occidental v. Ecuador*, the tribunal noted Ecuador's own acknowledgment at the hearing that "*this is not an objection to jurisdiction that has fared extremely well in many cases*," as well as Claimants' argument that the waiting-period requirement need not be respected if attempts at a negotiated solution have proven futile. The tribunal found that "*attempts at reaching a negotiated solution were indeed futile in the circumstances*," and as a result, it rejected Ecuador's objection. Most recently and with reference to the *SGS v. Pakistan* and *Lauder v. Czech Republic* decisions, the tribunal in the *Paushok* case held that "*[a]rguendo, even if they had failed to abide by the negotiating period, this would not go to jurisdiction, as that delay has long expired*." Respondent has presented no reason for this Tribunal to stray from such a consistent line of case authority. (C-II ¶¶ 58 – 63, partially quoted).

817. Claimants two additional responses to Respondent's arguments are best taken from their own words:

> *64. Should the Tribunal consider that the requirement to observe a "waiting period" is not a procedural requirement, the most appropriate alternative characterization would be to regard the requirement as one of admissibility, not of jurisdiction. In the Western NIS case relied on by Kazakhstan in its correspondence with Claimants, the tribunal found that the claimant had not given notice to the respondent as required under the applicable BIT. The tribunal however concluded that this defect could be cured by a suspension of the proceeding for the duration of the "waiting*

> *period." In doing so, the tribunal effectively treated the requirement as one of admissibility, not jurisdiction*
>
> *65. Kazakhstan disregards the well-established line of case law on this issue and relies on a distinctly minority view espoused in two cases, Murphy Oil v. Ecuador and Burlington v. Ecuador. Those cases are distinguishable from the present case on the facts, notably insofar as they did not involve a stay of the arbitration for the parties to conduct settlement negotiations. (C-II ¶¶ 64 – 65).*

818. In any event, Claimants maintain that they had complied with the "*waiting period*" by the time they filed the Request for Arbitration on 26 July 2010. The waiting period runs from the date Kazakhstan became aware of the dispute, which Claimants (in an exercise of futility) raised on numerous occasions, starting at least in March 2009. (C-0 ¶¶ 109 – 110; C-I ¶¶ 38 – 39; C-II ¶¶ 66 – 68). This is similar to the *Paushok* case. In any event, Tribunals – such as the recent *Abaclat* tribunal which considered a similarly worded treaty, have emphasized that compliance with a waiting period is not required where it would be futile. (C-II ¶¶ 69 – 70).

819. Claimants agreed to stay proceedings in February 2011 in order to give Kazakhstan an additional three month period. If any doubt remains, Claimants have indisputably satisfied the "*waiting period*" requirement through their agreement to a suspension of the arbitration for three months in 2011. During that time, there were attempted settlement negotiations, which resulted in one meeting in London on 10 March 2011. Respondent even concedes that the procedural requirements of Art. 26(2) ECT have been met. (C-I ¶ 40; C-II ¶¶ 71 – 72). Claimants state: "*[h]aving demanded and agreed to the suspension of the arbitration for the express purposes of complying with the 'waiting period' in Article 26 of the ECT, it is preposterous for Kazakhstan now to contend that the Tribunal has no jurisdiction over the dispute because Claimants failed to comply with the 'waiting period' in Article 26*." (C-II ¶ 73). Respondent's own statements confirm that the suspension would ensure even jurisdictional compliance with Art. 26 ECT. (C-II ¶ 74).

b. Arguments by Respondent

820. Claimants have not fulfilled the waiting period prior to initiating arbitral proceedings, and this is fatal to Claimants' case. The waiting period is a jurisdictional requirement under Art. 26(1) and (2) ECT. This was recognized as a safeguard in the case *Murphy v. Ecuador*. (R-I ¶¶ 7.11 – 7.14; R. ltr. of 18 January 2011; RPHB 1 ¶¶ 482 – 483).

821. Respondent presents arguments applying Art. 31(1) VCLT (on giving words in a treaty their ordinary and natural meaning in light of the Treaty's object and purpose) to Art. 26(1) and (2) ECT.

> *219. Article 26(1) provides that disputes "shall, if possible, be settled amicably." The types of dispute that are to be settled amicably in compliance with Article 26(1) include alleged breaches of the obligations owed by a State under Part III of the ECT. Article 26(2) states that one of the dispute resolution mechanisms thereunder can be invoked if disputes arising under Part III "can not be settled…within a period of three months*

from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution…".

220. Therefore, the primary goal of the dispute resolution mechanism is settlement (disputes "shall…be settled amicably"). The word "shall" is not permissive, but mandatory and obligatory. This is clarified by the caveat ("shall, if possible"), which assumes that settlement may not always be forthcoming. In this case, where one party has requested amicable settlement and this has not been settled within three months of such notification, the Investor may submit the dispute for resolution in accordance with the terms of the remainder of the article. As to the nature of those settlement discussions, it is settled under international legal principles that they must be conducted in good faith. (R-II ¶¶ 219 – 220).

822. The importance and mandatory nature of the three-month period, as well as the obligation to use that time to attempt settlement in good faith rather than simply "*wait it out*", is clear from the words of the ECT and this was noted by the tribunal in *Amto v. Ukraine*. (R-II ¶¶ 221 – 223).

823. Prior to the 26 July 2010 **Request for Arbitration**, the Republic had no notice (express or otherwise) of the imminent arbitration proceedings to be launched against it, nor of the dispute (as set out in Article 26(1) ECT) to be referred to arbitration. The events at issue occurred on 22 July 2010 – not five days before. Even if the cooling off period were to begin to run from the date on which Kazakhstan "*became aware of the dispute*", as Claimants contend, this was not prior to the Request for Arbitration. Finally, neither the letter dated 18 March 2009 nor the letter dated 7 May 2009 fulfilled the requirements of Art. 26(2) ECT. First, both letters predate the majority of events which Claimants state gave rise to this arbitration. Second, neither letter mentioned the ECT or contained an offer to arbitrate. Third, even if these constituted effective notice, they could not have constituted effective notices in respect of KPM, Gabriel Stati or Anatolie Stati, as they were sent by TNG and Ascom. (R-I ¶¶ 7.8 – 7.9; R-II ¶¶ 224 – 228; R ltr. of 18 January 2011).

824. Claimants cite decisions of other tribunals to support their contention that the cooling off period is procedural, rather than jurisdictional. These cases are irrelevant – not only because arbitration knows no precedent, but because these cases bear little resemblance to Art. 26(2) ECT. The *Lauder* case, for example, considered treaty provisions that were less strict and less specific than the ECT. In *Wena*, the tribunal considered a treaty provision that required neither notice, nor amicable settlement – and the respondent abandoned its jurisdictional objection in any event. *Western NIS* concerned a BIT that did not explicitly provide for notice (contrary to Claimants' assertions) and found that notice was not a jurisdictional requirement. It should be noted, however, that the tribunal in *Burlington* considered similar wording and came to a different conclusion. What is most important is that none of these cases concerned breaches of the ECT and are, therefore, wholly irrelevant to the interpretation of Art. 26(2) ECT. Unlike the definition of "*investment*" under Art. 1(6) ECT, this is not an instance where general principles of international law demand a wider meaning; the words are specific and sufficient. (R-I ¶ 7.15; R-II ¶¶ 229 – 236).

825. If, however, the Tribunal is to consider comparisons with other investment treaties as instructive, Art. 26(2) ECT is similar to provisions in the BIT between Belgium and Burundi. Cases concerning that BIT have held that jurisdiction was not established where the cooling off period was not satisfied. (R-II ¶¶ 234 – 236).

826. Finally, the stay of arbitral proceedings cannot be conflated with a "*cooling-off*" period.

> *237. The timing of any settlement discussions between the parties is key to establishing whether or not the "cooling-off" period is satisfied. In this case, the settlement discussions occurred after the Request for Arbitration was submitted and therefore cannot be considered to fulfill the requirement for the "cooling-off" period.*
>
> *238. Claimants missed the "cooling off" period and no notice was given to trigger access to the dispute resolution mechanism in Article 26(2). Such failures cannot be cured retrospectively. The investor has all the time in the world to bring the claim. The waiting period is also supposed to allow the State to properly react and to properly prepare its defence. If the waiting period is ignored, there is an imbalance. This imbalance cannot be remedied by staying the proceedings at a later point in time. The defence needs to be strong from the start. If it is not, it might be too late. (R-II ¶¶ 237 – 238; see also R-I ¶ 7.5).*

827. The Republic has been willing to settle, and Claimants have not denied this. The Tribunal awarded by consent on 22 February 2011 a stay of proceedings with the intention of providing a window for settlement. In this order, the Tribunal acknowledged that the cooling off period was not satisfied. (R-I ¶ 7.10). While procedurally, the provisions of Art. 26(2) ECT have been met, the settlement period proposed by the Republic was without prejudice to the jurisdictional issues that this defect could later cause. (R-I ¶¶ 7.1 – 7.4, 7.16 – 7.18; R-II ¶ 239). Accordingly, the Tribunal does not have jurisdiction over this matter.

c. The Tribunal

828. Art. 26(1) ECT provides for a primary stage to settle a dispute amicably. And Art. 26(2) ECT provides for a three month waiting period for such settlement discussions, before the dispute may be submitted to arbitration.

829. By the express reference in subparagraphs (1) and (2), it is clear that the intention of Art. 26 ECT is to provide an opportunity of three months to the Parties to settle the dispute. In view of this obvious intention, the Tribunal considers that to be a procedural requirement rather than one of jurisdiction, at least as long as the Parties have indeed had such a three months opportunity.

830. The Respondent concedes that the Tribunal awarded on 22 February 2011, by consent with both Parties, a stay of proceedings with the intention of providing a window for settlement. (R-I ¶ 7.10). During that time, there were attempted settlement negotiations, which resulted in one meeting in London on 10 March 2011, but did not reach a settlement. According to Respondent, while procedurally, the provisions of Art. 26(2) ECT have been met, the settlement period proposed by the Republic was without prejudice to the jurisdictional issues that this defect could

later cause. (R-I ¶¶ 7.1 – 7.4, 7.16 – 7.18; R-II ¶ 239). The Tribunal does not agree. In view of the clear intention of Art. 26(1) and (2) ECT as indicated above, after the failed discussions during the granted three month period, there is no prejudice to either Party and there is no reason to deny jurisdiction.

5. Admissibility of Claimants' Claims Pursuant to ECT

a. Arguments by Claimants

831. Claimants' arguments that there is no merit to Kazakhstan's objection under Article 18(2) ECT are best taken from their own words:

> *200. Kazakhstan alleges that it is clear from Article 18(2) that the provisions of the ECT – including the dispute resolution clause – do not apply to issues related to a State's rules governing the system of property ownership of energy resources. Respondent contends that, pursuant to Article 18(3) and 18(4), "facilitating access to energy resources through, inter alia, licenses and contracts forms part of the system of property ownership." Therefore, according to Kazakhstan, the Tribunal has no jurisdiction to hear claims relating to Kazakhstan's right to audit KPM and TNG, the operation of trunk pipelines, the tax proceedings, the enforcement proceedings, the refusal to extend the period of the Contract 302 Properties, and direct expropriation. These assertions are ludicrous.*
>
> *201. Kazakhstan's contention that Article 18 limits Contracting Parties' obligations under Part III of the ECT has no merit, and Kazakhstan does not cite a single legal authority or case in which its interpretation of Article 18(2) has been accepted.*
>
> *202. First, the plain text of Article 18 (Sovereignty over Energy Resources) does not limit in any way the obligation of Contracting Parties under Part III. It merely re-states the well established principle of sovereignty over natural resources.*
>
> *203. Second, Kazakhstan fails to mention Declaration No. V (appended to the ECT) [which states in relevant part "The representatives declared that Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty."] and the Chairman of the ECT Conference's Statement at the Adoption Session for the ECT on 17 December 1994:*
>
> > *Finally, I note that the representatives of Norway supported by the representatives of … Kazakhstan, Moldova… have declared that the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969.* ***In particular in the context of Article 18(2) they recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty****. The Treaty shall be interpreted*

> *in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (C-II ¶¶ 198 – 209, partially quoted, emphasis maintained).*

832. Claimants point out that Declaration V is the only Declaration made by all ECT signatories. It was made to preclude the very argument put forward by Respondent, namely that Art. 18(2) permits a state to evade its obligations under Part III of the ECT. This conclusion is supported by recourse to supplementary means of interpretation, like the *travaux préparatoire*. (C-II ¶¶ 206 – 209).

b. Arguments by Respondent

833. Respondent presents that the rights of the investor must be balanced against those rights of the host State. As recognized in Art. 18 ECT, the State has the right to regulate natural resources. (R-I ¶¶ 4.9 – 4.12). Respondent presents that "*the failures of the Claimants to provide any meaningful return to the Republic for their alleged investments (in particular in relation to the payment of taxes and the failure to contribute to the technological information exchange key to development) not only attracted legal consequences in the Republic, but importantly casts doubts on the Claimants' suitability to benefit from investment protection at the international leve*l." (R-I ¶ 4.12).

834. Respondent argues that the Tribunal's ability to hear Claimants' claims is limited by Art. 18(2) ECT, which states that the ECT "*shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.*" This applies to all articles of the ECT, including Art. 26 which concerns the dispute resolution procedure. (R-I ¶ 11.1).

835. The Russian language text of the ECT is more restrictive than the English one. Whereas the English text says that the ECT "*shall in no way prejudice*", the Russian text says "*shall in no way affect*" or "*shall in no way concern*." Although the texts are equally authentic pursuant to Art. 50 ECT, Art. 33(2) VCLT commands the Tribunal to apply the meaning that best reconciles the tests, having regard to the object and purpose of the Treaty. Accordingly, the Russian text shall apply in the present case, as it is narrower and reconciles both texts that, "*the ECT shall not apply to the provisions of national legislation governing the system of property ownership of energy resources*." Likewise, Art. 26 ECT shall not extend to issues related to the state's rules governing the system of ownership for energy resources, making also claims under Art. 10 and 13 ECT are inadmissible. (R-I ¶¶ 11.5 – 11.15)

836. The majority to Claimants' allegations fall within the Republic's right to govern the system of property ownership for its energy resources and, therefore, pursuant to Art. 18(2), the Tribunal lacks jurisdiction over these claims. These claims include (1) The Republic's right to audit KPM and TNG, (2) the claims regarding the operation of trunk pipelines, (3) tax proceedings, (4) execution proceedings, (5) the extension of the period for exploration under the Contract 302 fields, and (6) the direct expropriation. (R-I ¶ 11.16 – 11.28, 11:30, 13.48 – 13.63). Accordingly, the Tribunal should decline jurisdiction.

c. The Tribunal

837. Art. 18(2) ECT provides:

> *Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources*.

838. In addition, as Claimants have correctly submitted in this context, this provision must be interpreted together with Declaration No. V, which is appended to the ECT and which states in relevant part:

> *The representatives declared that Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty*.

839. In addition, the Chairman of the ECT Conference's Statement at the Adoption Session for the ECT on 17 December 1994 is also relevant:

> *Finally, I note that the representatives of Norway supported by the representatives of […] Kazakhstan, Moldova […] have declared that the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969.* ***In particular in the context of Article 18(2) they recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty***. *The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (emphasis added).*

840. Declaration V is the only Declaration made by all ECT signatories. From this exceptional step, it is clear that it was adopted to preclude that Art. 18(2) would permit a state to evade its obligations under Part III of the ECT. Therefore, Respondent's argument that the Russian language text of the ECT is more restrictive than the English one cannot change this interpretation.

841. In view of these considerations, Art. 18(2) ECT does not prevent or limit this Tribunal's jurisdiction. Whether any of Respondent's arguments, particularly referring to the licensing and contracting structure within Kazakhstan (R-I ¶ 11.16 – 11.28; 13.48 – 13.63), are relevant regarding the merits of this case will have to examined later in this Award.

H.II. Applicable Law

1. Arguments by Claimants

842. Pursuant to Art. 22(1) SCC Rules, this Tribunal shall decide the merits of the dispute based on the rules of law agreed upon by the Parties. Accordingly, since the Parties consented to arbitrate under the ECT and Art. 26(6) ECT contains an

express choice of law provision providing that the Tribunal "*shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*," the Tribunal's task is to determine whether Kazakhstan violated the ECT and international law. (C-I ¶¶ 239 – 242; C-II ¶¶ 423 – 437).

843. A state may not invoke its domestic law to justify or avoid liability for a violation of its international obligations. This is incontestable. This is also true for investment law cases. Kazakhstan is not permitted to evade its international obligations to Claimants by contending that its subsoil use laws, its corporate laws, or any other domestic legal rule excused its conduct. If the Tribunal determines that Kazakhstan violated any of the substantive protections in the ECT or any applicable rule of international law, that is the end of the inquiry. At most, Kazakh law is relevant as a factual matter. No provision of Kazakh law alters that conclusion. (C-I ¶¶ 239 – 242; C-II ¶¶ 423 – 437, partially quoted).

844. Claimants' argument with respect to the Tribunal's approach with respect to the choice-of-law clauses in the Subsoil Use Contracts is best taken from its own words:

> *438. [...Even] if the Tribunal were to consider the articles on applicable law of Contracts No. 305, 210, and 302 – which it should not – those articles would require the application of the ECT and international law:*
>
> *For the Contract as well as for other agreements signed on the basis of the Contract, the law of the State shall be applied, unless otherwise stated by international treaties to which the State is a party. (C-II ¶ 438).*

845. Claimants also argue that Kazakhstan cannot justify its past conduct through "*new*" arguments under Kazakh law. Even though Kazakh law is irrelevant as far as governing law is concerned, Kazakhstan is making arguments that it never raised contemporaneously. New arguments include (1) claims regarding the alleged illegality of Claimants' investments in Kazakhstan, (2) Kazakhstan's assessment of export duties, (3) the reclassification of TNG's and KPM's filed pipelines as trunk pipelines, and (4) new termination grounds for the Subsoil Use Contracts. Even if Kazakhstan could rely on domestic law to evade its ECT obligations, Kazakhstan would not be permitted to excuse its prior unlawful conduct by retroactively conjuring up new legal arguments that allegedly might have justified its prior conduct, but did not actually motivate its conduct at the relevant time. Indeed, this is the same conclusion reached in *Wena Hotels Ltd. v. Egypt*, where the Respondent attempted to retroactively excuse its seizures by arguing that Wena had failed to comply with the leases. The same was true in *Siag v. Egypt*, where the Tribunal rejected Egypt's novel attempts to retroactively justify its expropriation of Mr. Siag's investments under Egyptian law. Indeed, in *Siag*, the tribunal rejected each of Egypt's *ex post facto* arguments and found that "*an illegal expropriation was carried out by Egypt, which may not be remedied by reference to Egyptian municipal law*." (C-II ¶¶ 440 – 447). Claimants' final point is best taken from its own words:

> *448. Kazakhstan's new theories similarly ask the Tribunal to imagine that Kazakhstan had chosen to rely upon legal grounds that allegedly would have made its conduct legal under Kazakh domestic law, rather than adopt the outrageous and unlawful course of action that it actually employed.*

Beyond the fact that Kazakh domestic law cannot be used to excuse a Treaty breach, Kazakhstan's revisionist history is highly speculative and dubious. Kazakhstan has cited no principle of international law (and Claimants are aware of none) by which a State's blatantly unlawful conduct can be excused retroactively on the basis that the State supposedly could have accomplished the same end lawfully (but did not). The present Tribunal should refuse to entertain Kazakhstan's attempts to retroactively excuse its conduct. Whatever theories it now espouses, Kazakhstan cannot undo the fact that it blatantly violated the ECT and international law in its treatment of Claimants' investments. (C-II ¶ 448).

2. Arguments by Respondent

846. Respondent's arguments related to applicable law are best taken from its own words:

834. As Claimants agree, pursuant to Articles 22(1) of the SCC Rules and 26(6) of the ECT, the arbitral tribunal shall decide the merits of a dispute in accordance with the ECT and applicable rules and principles of international law. However, many aspects of a complex investment arbitration case are not covered precisely enough by the ECT and international law. These lacunae need to be filled in by the host state's domestic law. [...]

837. In investment treaty arbitrations, the body of law best suited for filling in the gaps of international law is the host state's domestic law because foreign investment always requires compliance with the domestic law of the host state. Private and public international law aspects are intrinsically linked:

> *"Investment disputes are about investments, investments are about property, and property is about specific rights over things cognisable by the municipal law of the host state."*

838. Since international law and domestic law are intertwined with respect to foreign investments, the host state's domestic law is highly relevant for determining any dispute. [...]

841. The host state's domestic law is highly relevant to a number of issues. In particular, it is relevant to the question of whether an investment exists. Furthermore, as noted by Newcombe and Paradell, it is relevant to:

> *"whether the investment is held in the territory of the host State, its validity, the nature and scope of the fights making up the investment and whether they vest on a protected investor, the conditions imposed or assurances granted by national law for the operation of investment, as well as the government measures allegedly in breach of the investment treaty." (R-II ¶¶ 834 – 843).*

847. Respondent explains that the Subsoil Use Contracts explicitly provide that both Kazakh law and international law are applicable in relation to the relationship between Claimants and the Republic. Kazakh law is essential for assessing (1) whether an investment exists, (2) the legitimacy of the audits, inspections, criminal proceedings, (3) the termination of the Subsoil Use Contracts, and (4) the classification of Claimants' pipelines. (R-II ¶¶ 844 – 847). Respondent states that Claimants have admitted that Kazakh law is highly relevant, even alleging violations of the Kazakh constitution and Kazakh statutes in their memorials. (R-II ¶ 848).

848. In response to Claimants' irrelevant allegation that Respondent is relying "*on domestic legal arguments that it never made contemporaneously*", Respondent states that this is irrelevant for the determination of applicable law and, indeed, Claimants have failed to explain why this should have any impact on the applicable law pursuant to Art. 22(1) SCC Rules and Art. 26(6) ECT. New legal arguments for prior conduct do not change anything about the high relevance of the host state's domestic law in investment treaty arbitrations and the decisive significance of Kazakh law with respect to claims in the dispute at present. (R-II ¶¶ 849 – 850, partially quoted).

849. Likewise, since Respondent only became aware of many breaches after commencement of these proceedings, it is wholly logical that arguments about that past conduct could not have been made contemporaneously. (R-II ¶¶ 853 – 857).

850. With respect to the use of international law, Respondent encourages the Tribunal to recognize, as have other tribunals like the *S.D. Myers v. Canada* tribunal, that the determination on whether a state has acted unfairly or inequitably *"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."* (R-II ¶ 860). There is no breach of international law if the state court's decisions are reasonably tenable and made in good faith. Accordingly, when addressing the conduct of the Republic from an international law perspective, the Tribunal should consider the policy reasons that generally guide the Republic in the regulation of subsoil use. The Republic has a reasonable expectation that foreign investors make and manage their investments in a lawful manner and in a manner which furthers the wealth of the Kazakh people. Through its laws and through the authorities applying its laws, the Republic implements a policy that aims to ensure that these expectations are being met by foreign investors. (R-II ¶¶ 858 – 863, partially quoted).

3. The Tribunal

851. The Tribunal agrees with the Parties that pursuant to Art. 22 (1) SCC Rules and Art. 26(6) ECT, the Tribunal shall decide the merits of the dispute in accordance with the ECT and applicable rules and principles of international law.

852. The question of in which way and to which extent the domestic law of Kazakhstan becomes relevant will be discussed later in this Award in the context of the breaches of the ECT alleged by Claimants.

H.III. Considerations Regarding the Arbitral Procedure

1. Arguments by Claimants

853. Claimants argue that Respondent has obstructed these proceedings from the outset. It has attempted to "*railroad the Tribunal*" by (1) successfully requesting a 3-month extension in order to satisfy Art. 26 ECT, after which Respondent continued to argue that the same 3-month waiting period had not been met and that this deprived the Tribunal of jurisdiction, (2) raising five objections to jurisdiction, including the ludicrous one that the ECT is void because of an incomprehensible interpretation of the Russian text, (3) submitting "*sleeper*" witness statements, disguised as exhibits, that did not meet the requirements of Art. 4(5) IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules), (4) withholding 30,000 pages of mostly Russian-language documents relied upon by sleeper witnesses, which was in contravention of Art. 5(2)(e) IBA Rules and the Tribunal's orders, until the Tribunal threatened evidentiary sanctions, and (5) accusing Claimants' counsel of withholding documents. In addition, Respondent has made exaggerations and misstatements of law that go beyond zealous advocacy. (C-II ¶¶ 21 – 31; CPHB 1 ¶ 4; CPHB 2 ¶ 28).

854. Claimants reject Respondent's allegations that they intentionally submitted misleading translations, illegally obtained documents, and obtained not genuine documents. The errors to which Respondent points in the translations, in particular the "*investigate*" and "*thoroughly check*", among others, are distinctions without difference – the expressions have the same meaning and Kazakhstan has not explained the difference that these words could have in this case. In contrast, however, Respondent has made numerous errors and omissions in its translations, in particular with regard to Mr. Ongarbaev's witness statement, where entire paragraphs were deleted and sentences were added. (CPHB 1 ¶¶ 111 – 114; CPHB 2 ¶ 28).

855. Respondent has provided no support for its allegation that C-520 was altered, and the incorrect registration number on that document is likely a clerical error. Nevertheless, Respondent bears the burden of proving that the error was intentional. (CPHB 1 ¶¶ 115).

856. Regarding the allegations of corruption in that Claimants presented internal government documents, Kazakhstan has not established that the documents were confidential or that they were obtained improperly. Their authenticity has never been questioned. (CPHB 1 ¶ 116; CPHB 2 ¶ 28).

857. Exhibit C-704 came from the Court and Claimants produced it exactly as they received it. It was a draft transcript that was prepared prior to the judge's amendments. As explained at the hearing, it is completely unremarkable that Claimants obtained a copy of the Blagovest letter, produced as Exhibit C-23. (CPHB 1 ¶¶ 117 – 118).

858. Respondent has provided no explanation for why Claimants would forge the Report from Mr. Rakhimov to the Chief of the Financial Police, produced as

Exhibit C-711. Mr. Rakhimov has also confirmed that such reports were created. (CPHB 1 ¶¶ 119).

859. Respondent has exacerbated the volume and complexity of this case by, in addition to the above, submitting an entirely new case on quantum shortly before the January 2013 Hearing on Quantum. This has led to the unprecedented situation that Claimants had to address an entirely new case in a post-hearing brief. (CPHB 1 ¶ 3).

2. Arguments by Respondent

860. Respondent argues that it has acted properly throughout this arbitration procedure. Every example provided by Claimants is flawed.

861. Respondent's request for a stay of proceedings in order to attempt amicable resolution of the dispute was proper, and was agreed to by Claimants. Respondent's goal was to end the proceedings with a settlement agreement. Claimants' attempt to intertwine this stay with their failure to comply with Art. 26 ECT is, however, incorrect. The Republic proposed the settlement period, *expressis verbis*, without prejudice to the jurisdictional issues that this defect could later cause. (R-II ¶¶ 1160 – 1163).

862. Respondent's jurisdictional claims are meritorious and are made in good faith. Claimants ignore the fact that lack of jurisdiction is a very common and decisive issue in investment treaty arbitrations. In many prominent investor-state disputes under the ECT tribunals have held a preliminary hearing on jurisdiction. This is not obstructionism: this is perfectly common and rightful behavior in an investment treaty arbitration. (R-II ¶ 1164).

863. With respect to the so-called "*sleeper*" reports, Claimants allege that the fact witness statements do not meet Art. 4(5) IBA Rules. The IBA Rules, per PO-6, are only guidelines. They are, therefore, not mandatory in this proceeding. The SCC Rules, which Respondent is following, do not set such narrow limits to the submission of witness statements. Thus, the allegation that the documents do not meet the IBA Rules is irrelevant. Moreover, PO-2 Annex I already outlined the next steps that the Republic needed to take with regard to the documents on which the "*sleeper*" reports rely. (R-II ¶¶ 1165 – 1169).

864. Respondent states that "[c]*onsidering this detailed roadmap on the production of documents on which the "Sleeper" reports rely and the adverse procedural consequences looming in case of disregard, the arbitration proceedings have not at all been obstructed. Quite the contrary, the Republic is committed to procedural transparency and has been advancing the proceedings by complying with its procedural duties in general and the aforementioned request of the Tribunal to produce the documents in particular. This is acknowledged by Claimants in their Reply Memorial on Jurisdiction and Liability, where they admit that the backup documents have been disclosed by the Republic on 2 April 2012*." (R-II ¶ 1170).

865. As for Claimants' argument that the documents on which the "*sleeper*" reports rely were withheld, in violation of Art. 5(2)(e) IBA Rules, those rules do not apply and are only guidelines. Claimants' argument is irrelevant. (R-II ¶ 1171).

866. Claimants' complaints regarding the April 2012 document production are unfounded. The timely submitted documents were technical documents that were known to Claimants. Despite the large volume of documents, Claimants opposed extending the deadline. (RPHB 2 ¶ 1033). As for the withholding of documents, counsel explained in an email to the Tribunal on 11 April 2012 that, due to the pre-requisite coordination with public authorities to obtain documents, it was not feasible to produce those prior to 2 April 2012. Crucially, Respondent provided them before the expiration of the deadline set out in PO-3. This was not, as Claimants contend, a meticulous plan to force Claimants to seek extensions. Respondent met the deadline – Claimants only have themselves to blame for the extension. Furthermore, Claimants' counsel was ineffective in analysing the documents – documents which were largely already in Claimants' possession at that time. (R-II ¶¶ 1172 – 1175).

867. As another demonstration of Claimants' bad faith, Respondent argues that Claimants brought this present arbitration in an effort to avoid criminal liability in the US as a result of their bond issuances and their unwillingness to pay interest or to repay the amounts received. Respondent also accuses Claimants of submitting false information with the Statement of Claim. (R-I ¶¶ 9.71 – 9.72).

868. Respondent also presents that the procedural timetable in this matter has been unduly short for the issues at hand, and has been inherently biased in favor of Claimants. (R-I ¶ 3).

869. In Respondent's First Post Hearing Brief, Respondent accused Claimants and Claimants' counsel of procedural misconduct and encouraged the Tribunal to draw its own conclusions about the credibility of witnesses based thereon. First, Respondent alleged that some documents submitted by Claimants were obtained in violation of Kazakh law, notably exhibits C-293 and C-294, C-704, and also those listed in Respondent's opening presentation at slide 29 and that this has been conceded by Claimants and it remains unclear how these documents were obtained and what reliability they may have. In this regard, Claimants' C-704 is quite questionable. While it purports to be the hearing minutes of Mr. Cornegruta's Trial, it contains no stamps and no signatures – it is neither a draft nor a copy. In any event, it was not obtained lawfully. (RPHB 1 ¶¶ 1120 – 1138). Second, Respondent accuses Claimants of submitting forged documents, including C-495, C-520, C-702, C-704, and C-711.1. For the transcript of Mr. Cornegruta's trial (C-704), when compared to Respondent's official version (R-315.1 and R-315.2) contain differences. Claimants' transcript does not reflect a motion filed by Mr. Cornegruta. Testimony was also changed. Third, Claimants have submitted intentionally misleading translations in this arbitration, and the Republic has raised this issue previously, especially in regard to C-8, C-98, and the fact that Claimants have relied on these incorrect translations to create their claim. The correct English translations are essential in this arbitration. (RPHB 1 ¶¶ 1139 – 1175; RPHB 2 ¶¶ 39 – 49).

870. Further complaints relate to Deloitte GmbH and the allegedly new case on quantum. Claimants' FTI Report was severely flawed and then Claimants silently failed to produce Ms. Hardin, the main author of FTI 1 and FTI 2, for cross-examination. The Supplemental Expert Report of Deloitte does not exceed the

scope indicated by the Tribunal on 24 April 2013, and Claimants never requested to cross examine Mr. Gruhn again. (RPHB 2 ¶¶ 1034 – 1037, 1054, 1059).

871. The Republic was not authorized to disclose various due diligence reports prepared for KMG EP in 2009. KMG EP is not the state, but later consented to disclosure after the Hearing on Quantum. The content of these reports is excellent proof of the lack of procedural misconduct by the Republic. They contradict Claimants' allegations and support the Republic's position. There was no reason, beyond confidentiality, to withhold them. (RPHB 2 ¶ 1038 – 1039).

872. Claimants' argument that they were excluded from submitting further evidence or from cross-examining witnesses, like Mr. Suleymenov and Mr. Mynbayev is without merit – they never asked to do so and they did not hesitate to provide new evidence during the Hearing on Quantum. (RPHB 2 ¶ 1040).

873. Claimants' continuous changes of their requests and the underlying facts put Respondent at a considerable disadvantage. Claimants' inability to produce the main author or of the FTI Reports, Ms. Hardin, is one such example. It was obvious that Mr. Rosen was not familiar with the first and second FTI Reports. At the same time, he attempted to disregard the fact that Ms. Hardin had ever worked on the documents. The Tribunal should exclude the FTI Reports in their entirety. (RPHB 2 ¶¶ 1041 – 1048). In addition, to the extent that Claimants continue to move for exclusion of the Deloitte Reports, Respondent requests the exclusion of the FTI Reports. (RPHB 2 ¶¶ 1052 – 1053).

874. In addition, Claimants were disruptive prior to each of the three hearings in this case, thereby shortening and disrupting Respondent's preparation time. In the lead up to the Hearing on Jurisdiction and Liability on 1 October 2012, this included (1) the 14 September 2012 request to submit new documents, (2) the 20 September 2012 request to submit different new documents, the 28 September 2012 request to withdraw documents. In the time leading to the hearing on Quantum starting 28 January 2013, Claimants (1) made a midnight submission of the "***Sharing Agreement***", on 31 December 2012, (2) submitted a "***Request to compel production***" containing new arguments and statements on 2 January 2013, (3) submitted a further request regarding witnesses to the Tribunal on 2 January 2013, (4) moved to submit new documents, including 3D seismic data, on 18 January 2013, (5) submitted a revised calculation of FTI on 25 January 2013, (6) submitted the supporting materials for the revised FTI calculation and 27 January 2013. Then, on the third day of the Quantum Hearing and in violation of the Tribunal's order, Claimants submitted the new evidence relating to 3D data, anyway. Next, immediately prior to the First Post-Hearing Briefs and the Closing Hearing, Claimants opposed Respondent's request for an adequate, three-month, opportunity to digest the newly submitted materials. To date, Claimants have failed to explain their belated and clandestine submission of supporting documents to the Ryder Scott Third Report. Then, one week before the Closing Hearing, Claimants objected to the testimony of Mike Wood of GCA, since FTI's Mr. Rosen would not be present. (RPHB 2 ¶¶ 1050 - 1051).

875. Claimants often unfairly attempted to limit the Republic's defenses. (RPHB 2 ¶¶ 1054 – 1056). They delayed filing their May 2012 submission, as well, without excuse. (RPHB 2 ¶ 1057).

876. Claimants' experts were complicit in supporting Claimants' unfair procedural strategy, and helped Claimants to have a procedural and substantive advantage in having more time for the analysis of the 3D seismic data. (RPHB 2 ¶ 1058).

877. Respondent upholds its procedural objections and consideration must be made not only to the number of submissions, but also to whether sufficient time for preparation was granted. Respondent upholds its objection of 11 January 2013 and made orally on Day 1 of the Hearing on Quantum (objecting to the late submission of the Sharing Agreement and reserving the right to address it in writing, to submit expert opinions on it, and to request an additional hearing). Respondent also upholds its objection of 6 March 2013, which was also raised on Day 3 of the Hearing on Quantum (objecting to the revised report). Claimants' experts' testimony confirm that this objection is fully justified. Ryder Scott had been complicit with Claimants in misleading the Tribunal though the Joint Issue List and in submitting new and relevant evidence by surprise. These actions gave Ryder Scott significantly more time to review the 3D seismic data, thereby giving Claimants a procedural advantage over the Republic. Respondent's experts (GCA) confirmed that the time constraints had limited the scope of their work. While they knew that the work existed previously, they had not reviewed it. (RPHB 2 ¶¶ 31 – 37, 1160 – 1067).

878. The Final Hearing also made Ryder Scott's partiality apparent. Upon questioning by the Tribunal about Ryder Scott's role, Mr. Nowicki agreed that they had been engaged by the client and might have that role (as opposed to having the role of independently assisting the Tribunal). Repeatedly, Ryder Scott presented Claimants' counsels findings as its own. (RPHB 2 ¶¶ 35 - 37

879. Claimants have changed and amended their case on quantum, in the amount of USD 841 million (RPHB 2 ¶ 52):

	Statement of Claim (million USD)	Δ	Reply on Quantum (million USD)	Δ	Hearing on Quantum (million USD)	Δ	1st PHB (million USD)
Borankol Field	193	+ 38.5	231.5	- 33.49	197.01		197.013
Tolkyn Field	561	- 52.6	508.4	- 29.47	478.93		478.927
LPG Plant (cost)	208.5	+ 36.5	245		245		245
Contract 302 (prospective)	1,766	- 186	1,580	- 132	1,448	+ 188.9	1,636.9
LPG Plant (prospective)	344	+ 64.3	408.3	- 79.2	329.1		329.1

880. Claimants are not entitled to update their requests without the Republic being heard on those requests or to simply leave it to the Tribunal to decide for them. (RPHB 2 ¶¶ 50 – 55).

881. Claimants have alleged that the Republic has not produced certain government instructions in these proceedings, but that allegation is misleading since Claimants have not requested such production, outside of in their first post-hearing submission. (RPHB 2 ¶ 381).

3. The Tribunal

882. Throughout this procedure, the Parties have raised numerous objections to the procedural conduct of the other side. The Tribunal has addressed these by a great number of rulings in letters and procedural orders, all reflected in the summary of the Procedural History provided earlier in this Award.

883. As recorded in the transcript (page 100), at the end of the last Hearing on 3 May 2013, the Chairman of the Tribunal raised the following question:

> *The Tribunal has, of course, taken note of the procedural objections that were put on record at an earlier stage, and we take it that these will be maintained. So my usual question at the end of a hearing only is: are there any further procedural objections at this stage regarding the way the Tribunal has conducted this procedure?*

884. The Parties replied as follows:

> *For Claimant MR SMITH: None from the Claimants.*
>
> *For Respondent DR NACIMIENTO: And none from Respondent*

885. After the hearing, at the end of this procedure, the Tribunal notes that Claimants have not raised any further objections against the way the Tribunal conducted this procedure.

886. At the end of this procedure, in its 2nd Post-Hearing Brief, Respondent upheld its earlier procedural objections.

887. The Tribunal does not see any need to reiterate its many rulings recorded in the summary of the Procedural History provided earlier in this Award, all of which were made in an effort to grant the Parties the opportunity to present its case and to comment on the other side's submissions and keep up a high standard of due process.

888. The final hearing in May 2013 provided the Parties not only an opportunity for a further examination of the technical experts, but also two rounds of oral closing arguments.

889. Thereafter, as provided in PO-10, the Parties had and used the opportunity to submit 2nd Round Post-Hearing Briefs (without any page limit) by 3 June, cost claims 1 July, and comments thereon by 8 July 2013.

890. Taking all these procedural steps together, the Tribunal concludes that the Parties have had ample opportunities to present their case and comment on the other side's submissions and every aspect of the case.

J. Liability

J.I. Whether Kazakhstan Provided the Claimants' Investments with Fair and Equitable Treatment According to Art. 10(1) ECT

1. Arguments by Claimants

891. Article 10(1) ECT obliges Respondent to treat Claimants' investments fairly and equitably. As the term "*fair and equitable treatment*" (FET) is not defined in the ECT, the term must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the object and purpose of the treaty. Given the breadth of the terms "*fair*" and "*equitable*," their context in the ECT and the object and purpose of the ECT, the FET standard in the ECT prohibits a wide array of governmental misconduct and omissions. Thus, the Tribunal "*will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable*." (C-I ¶¶ 337 – 339).

892. With respect to the ordinary meaning of the terms "*fair*" and "*equitable*", Claimants explain that the ICSID tribunal in *MTD v. Chile* concluded that the "*ordinary meaning*" of "*fair and equitable*" is "*just, even-handed, unbiased, legitimate*." (C-I ¶ 340, partially quoted).

893. With respect to the context and the object and purpose of the ECT, the *Saluka* tribunal explained that the other provisions of the treaty, including the Preamble, are relevant. Claimants explain that, pursuant to the Preamble and Art. 2 and 10(1) ECT, the ECT was created to boost investor confidence and to increase investment flows. (C-I ¶¶ 341 – 343).

894. Claimants also state that the Tribunal should consider the manner in which the FET standard has been interpreted and applied under international law by the many international investment tribunals that have considered the standard in recent years. There is a considerable body of case law that has added specific meaning and content to the standard, making it clear that specific types of host state misconduct are prohibited. (C-I 344 – 348, C-II ¶ 501). The prohibited conduct includes:

- *Actions that violate an investor's legitimate expectations in relation to the investment;*
- *Conduct that creates an unstable or unpredictable legal framework or business environment for the investment;*
- *Conduct that violates due process or results in a "denial of justice," including (but not limited to) improper judicial or administrative proceedings as well as governmental interference in such proceedings;*

- *Interference with a contractual relationship;*
- *Actions that treat an investor or an investment inconsistently, ambiguously, or with a lack of transparency;*
- *Failure to sufficiently notify an investor in advance of impending acts that will impact the investment;*
- *Actions that are discriminatory;*
- *Harassment or coercive conduct; and*
- *Conduct that is in bad faith. (C-I ¶ 345).*

895. Investment case law, including *Waste Management v. Mexico*, confirms that the above list is an accurate representation of prohibited conduct. The *Tecmed v. Mexico* decision presents the most frequently quoted articulation of the FET standard, cited and applied by other Tribunals, including *CMS*, *Azurix*, *MTD*, *Occidental*, *LG&E*, *BG*, and *Suez*. (C-I ¶¶ 346 – 348). That description is as follows:

> *[The FET standard] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and to comply with such regulations... The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The foreign investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. (C-I ¶ 347).*

896. There is no exhaustion of local remedies requirement in applying the FET standard. The *Helnan* Annulment Committee expressly annulled the part of the arbitral decision that had taken the view Kazakhstan wants this Tribunal to adopt. There, that Committee stated, "*claimant's prospects of success in pursuing a treaty claim based on the decision of an inferior official or court, which had not been challenged through an available appeal process, should be lower, since the tribunal must in any event be satisfied that the failure is one which displays insufficiency in the system, justifying international intervention.* ***But that is a very different matter to imposing a requirement on the claimant to pursue local remedies before there can be said to have been a failure to provide fair and equitable treatment***." Thus, pursuance of domestic remedies is a factor in determining whether the State's treatment was fair, but it is not a pre-requisite. In any event, such a requirement – even if it were to exist – would not be applied if

pursuance of remedies would have been futile. (C-II ¶¶ 498 - 500, partially quoted, emphasis maintained).

897. From October 2008 – July 2010, Kazakhstan violated nearly every aspect of the FET standard that has been articulated to date, and Claimants refer the Tribunal to their arguments concerning Kazakhstan's excessive campaign of harassment and interference with Claimants and their investments, and to the outright seizure of the investment in July 2010. Claimants present 6 categories of actions which they state violated the FET standard, summarized and partially quoted below. (C-I ¶¶ 349 – 351).

898. First, Respondent "*fabricat[ed] the grounds for criminal actions against Mr. Cornegruta, KPM, and TNG*" and that that was in violation of the FET standard. This was based on the unfair, arbitrary, and false re-classification of KPM and TNG's pipelines into trunk pipelines. This reclassification was administered unfairly, with even the Judicial Executor admitting that the segment at issue was a mere "*field*" – and not "*trunk*" pipeline. The Financial Police were not a competent authority to determine whether the pipelines in question were field or trunk pipelines. There was no change in the pipelines that led to the re-classification. Kazakhstan's own officials approved the design and construction of the pipelines. Respondent's allegation that none of KPM's or TNG's previous licenses were sufficient for the type of pipeline is preposterous. Further, "*key personnel were targeted as criminally responsible for the funds that corresponded to the dates of their respective tenures as General Directors*." The reclassifications were discriminatory – KPM and TNG were the only companies singled out for reclassifications, "*despite similar gathering systems being owned and operated by other oil and gas companies in the immediate vicinity and throughout Kazakhstan*." Finally, these criminal actions violated Claimants' legitimate expectations toward proper and fair governmental conduct. (C-I ¶ 351, partially quoted; C-II ¶¶ 504 – 506; CPHB 1 ¶¶ 150 – 213 *et seq.*; CPHB 2 ¶¶ 71 – 79, 87, 97, 99 – 100).

899. According to Claimants, the segments of Claimants' pipes that are at issue extend from the principal joint where the KPM wellhead pipes converge to KPM's processing facility, and from the processing facility to TNG's storage tanks, where services are also provided to KPM. For the TNG gathering system, the segment extends from the principal joint where the TNG wellhead pipes converge to TNG's processing facility; from the processing facility directly to the CAC Pipeline for gas; and from the processing facility to TNG's storage tanks for condensate. Claimants state that identical gathering systems are owned and operated by other oil and gas companies in the immediate vicinity – and indeed throughout Kazakhstan – none of which are classified as trunk pipelines requiring licensure. Very few companies hold licenses for the operation of trunk pipelines. (C-0 ¶¶ 36, 39 – 40, partially quoted).

900. In any event, Claimants dispute that the pipelines are trunk pipelines. The segments of oil and condensate pipelines that are at issue carried oil and condensate to storage tanks, which are hardly another means of transport, processing, or consumption. Claimants also state that the pipelines are not trunk pipelines, because they are operated by contractors, and contractor's pipelines are not trunk pipelines as a matter of law. (C-II ¶¶ 258, 260).

901. The criminal allegation of "*illegal entrepreneurial activity in an especially large amount*" under Art. 190(2)(b) of the Kazakh Criminal Code was malicious and contrived. Respondent contrived the operation of the main pipeline to satisfy the "*illegal entrepreneurial activity*" element of the crime. The second element, "*in an especially large amount*" was manufactured by manipulating instructions to the Tax Committee and calculating the "*illegal profits*" by including both the transport fee KPM earned from TNG for use of the pipeline, as well as KPM's entire revenues from the onward sales of oil. Kazakhstan assessed "*illegal profits*" from operating the trunk pipeline – and this fine amounted to more than 65 billion Tenge for KPM and more than 82 billion Tenge for TNG – reflecting all of the revenue that both companies had generate for oil, gas, and condensate production from 2002 – 2008. These calculations were unfair, did not consider expenses or costs, and did not correspond to the transportation fees that would have applied if the pipeline segment was truly a trunk pipeline. Importantly, the fine was contrary to Kazakh law, which requires the deduction of lawfully obtained revenue from otherwise illegal activity. The proper calculation would have yielded USD 12,000 – 13,000 in illegal profits – below the USD 17,000 threshold for the crime. (CPHB 2 ¶¶ 80 – 84, 87)

902. Under *Vivendi II*, which provides guidance on the types of measures that give rise to international liability for disproportionate measures, the USD 145 fine against KPM for a failure to get an USD 80 license is disproportionate. Likewise, *Occidential v. Ecuador* found that the loss of an investment worth hundreds of millions of dollars was disproportionate to the state goal of deterrence. (CPHB 2 ¶¶ 92 – 93).

903. The pipeline was not indispensible to KPM's ability to sell oil, as Kazakhstan alleges. Even if the calculation were correct, which Claimants deny, the USD 145 million fine was grossly disproportionate, especially compared to the USD 80 fee to obtain a main pipeline license or the USD 12,000 – 13,000 in actual profits earned from operating the pipeline. It was higher than the total profits earned by KazTransOil during 2007 and 2008. This fine would be in violation of international law as being disproportionate to the wrong that the state is trying to address. Here, no harm resulted from KPM's operation of the pipeline and there was no risk beyond those presented by other parts of KPM's extensive gathering system. The USD 80 license is not material, and was only issued to KMT in 2011, a year after it took over KPM's operations. (CPHB 2 ¶¶ 81, 85, 89, 91, 95).

904. Whether the opaque regulations were a violation of the FET standard is an alternative case that the Tribunal may not even need to consider, since the evidence that neither KPM nor TNG operated a main oil and gas pipeline is overwhelming. Kazakhstan has essentially defended the wrongful and unwarranted "*main pipeline*" conclusions of its Financial Police, Mr. Baymaganbetov, and the Aktau City Court by arguing that its regulatory regime in relation to main pipeline licensing was so lacking in transparency that only the country's prosecutor could provide the correct answer. Even if Kazakhstan's argument were credible — which it is obviously not — it would do Kazakhstan no good in terms of escaping liability under the ECT. The ECT's FET standard requires a consistent, transparent regulatory framework every bit as much as it precludes arbitrary prosecutions and denials of justice. (CPHB 2 ¶¶ 75 – 79).

905. Claimants state that "[*i]t is simply no defense to Claimants' fair and equitable treatment claim for Kazakhstan to argue that its own laws were so confusing and unclear that multiple Kazakh officials applied them incorrectly for nearly a decade*."

> *507. Kazakhstan is in a conundrum. Either it unlawfully and unfairly reclassified KPM's and TNG's field pipelines as trunk pipelines as a pretext for taking over Claimants' investments — as the evidence overwhelmingly demonstrates — or Kazakhstan's laws and its application of those laws were so confusing and non-transparent that they amounted to unfair and inequitable treatment. Either way, Kazakhstan violated the ECT's fair and equitable treatment standard. (C-II ¶ 507).*

906. Second, Claimants allege that Respondent's prosecution "*and conviction of Mr. Cornegruta in a sham trial that also delivered a verdict against the non-party KPM*" was a violation of the FET standard. (C-I ¶ 351, partially quoted). They were "*factually incorrect, politically motivated, and riddled with due process violations. KPM was convicted in that proceeding, when it was not even named as a party and could not be named a party under Kazakh law. KPM was not officially notified of the proceeding, nor was it represented by counsel or allowed to appeal*." Mr. Cornegruta does not own KPM and that he was not an entrepreneur under Kazakh law. Rather, he was an employee of KPM. (C-0 ¶ 44, partially quoted; C-I ¶ 108; CPHB 1 ¶ 139). In addition, Kazakhstan "*failed to provide Mr. Cornegruta access to the allegations and supporting evidence against him, and the court summarily rejected the evidence demonstrating his innocence*." (C-II ¶ 509). This was an improper proceeding in the sense of *Petrobart*. Claimants' expert witnesses were compelled to withdraw their expert opinions, and "*Kazakhstan's interference in the criminal proceeding and the conviction of non-party KPM ensured that Claimants would not have 'a real possibility to present [their] position' on Mr. Cornegruta's and KPM's behalf, which the Rumeli and Tecmed tribunals deemed contrary to due process and a breach of the fair and equitable treatment standard.*" KPM was never named or made a party to the criminal action for allegedly operating a trunk pipeline without a license, and KPM was consequently not represented by counsel during the criminal trial against Mr. Cornegruta. (C-0 ¶ 46; C-I ¶ 108). This proceeding also amounted to a denial of justice under international law. (C-I ¶ 351, partially quoted; C-II ¶¶ 508 – 511; CPHB 1 ¶¶ 188 *et seq*.; CPHB 2 ¶¶ 97 - 114).

907. Claimants argue that this judgment violated not only international norms and standards of due process, but also violated Kazakh law and due process. The Judge was not bound by the 18 May 2009 decision that the expert opinions were inadmissible (a decision that Mr. Cornegruta only learned of after conviction). Instead, the judge could evaluate their value on her own. Claimants state that defense counsel introduced seven expert opinions explaining that the KPM gathering system pipelines are not trunk pipelines (two of which were subsequently withdrawn after the experts who rendered them received threatening letters from the Financial Police). (C-I ¶ 117; C-II ¶¶ 300 – 305).

908. Kazakh law only permits recovery based on the extent of enrichment of the guilty person. Only income unjustly earned by Mr. Cornegruta (the guilty person) could be recovered. The damages calculation failed in numerous respects, not the least of which that the judge refused to hear testimony from Claimants' expert Mr.

Suleymenov (who drafted the Law on Oil) and ignored the obvious fact that the "*illegal profits*" allegedly earned by Mr. Cornegruta were not profits (they were revenues), were not earned by him (they were earned by KPM), and did not correspond to sums earned through operation of a pipeline (they were simply total revenues earned by KPM, over 99% of which corresponded to onward sales of oil). There could be no recovery from KPM and Kazakhstan identifies no provision of Kazakh law supporting its notion that Mr. Cornegruta's purported unjust enrichment amounted to all of KPM's revenues. There is also no theory of "*quasi-criminal*" liability in Kazakh law. (CPHB 2 ¶¶ 86, 97 – 109).

909. The threats against KPM and TNG's employees that they would face similar trials to Mr. Cornegruta if they did not cooperate and the Financial Police's efforts to follow and intimidate Mr. Cornegruta's wife and lawyers outside of court violate the FET standard. (CPHB 2 ¶¶ 49 – 51).

910. Third, "*Kazakhstan's refusal to approve TNG's contractual rights to continue exploration in the 302 Contract Properties comprises two distinct breaches of the [FET] provision*." First, by simply ignoring TNG's request for an extension for six months, Kazakhstan violated Claimants' right to be notified of acts or omissions that would impact its investment. Second, Claimants' legitimate expectations were frustrated when Kazakhstan failed to extend the contract, despite having assured TNG that it would do so. This "*wrongful refusal to execute the addendum extending TNG's exploration rights in the Contract 302 Properties prevented Claimants from proving the Contract 302 Properties' reserves, which in turn prevented them from establishing the market value of their Kazakh investments*." At best, this is gross negligence. It is more likely, however, that this "*[bad faith] conduct represents deliberate interference with Claimants' rights over their investments, including KPM's and TNG's contract rights, because Kazakhstan never communicated any change in its position to them and gave them no justification for its refusal*." The termination also frustrated Claimants' legitimate expectations because they breached the contractually-mandated 90 day notice period before termination would be effective. (C-I ¶ 351, partially quoted; C-II ¶¶ 514, 516; CPHB 2 ¶¶ 149 – 176).

911. Fourth, Claimants allege that Kazakhstan "*saddl[ed] KPM and TNG with ownership and title concerns that destroyed Claimants' ability to dispose of their investments at market value*" and that this was a violation of the FET standard. Kazakhstan acted inconsistently and without transparency by "*continually changing its position on KPM's and TNG's transfer prices, corporate taxes, export tax exemptions, amortization rates, the extension of TNG's exploration period, and the State's pre-emptive rights. The imposition of clearly improper tax rates is tantamount to extortion*." In particular, Kazakhstan incorrectly assessed USD 6 million in back transfer price taxes and penalties against the companies. In effect, and in the sense of *CME v. Czech Republic* ruling, this eviscerated the arrangements that induced the Claimants to invest, and upon which Claimants relied. Furthermore, in violation of specific contractual and legal provisions that exempted KPM from paying export taxes, KPM was prohibited from exporting 22,000 tonnes of crude oil without paying the tax. KPM paid, under protest, and has legally challenged these actions. Claimants' characterization of the tax issues are best taken from their own words:

The State then introduced a new tax provision that replaced crude oil export taxes with a Rent Tax for Export. When a court decision exempted KPM from paying the Crude Oil Export Tax for its January 2009 exports, but instead obliged KPM to pay the newly applicable Rent Tax for Export, the Financial Police intervened. The Aktau territorial customs body subsequently informed KPM that it was required to pay the Crude Oil Export Tax, amounting to USD 4 million, which led to KPM filing additional legal challenges. The Financial Police's interference in KPM's and TNG's contractual relationship with the Ministry amounts to a violation of Kazakhstan's duty to treat Claimants' investments fairly and equitably. The changes of opinion with respect to export taxes also frustrated Claimants' legitimate expectations that that they would benefit from a contractually agreed tax exemption. (C-I ¶ 351).

912. In addition, "*Kazakhstan also refused to refund US$ 10 million that KPM and TNG paid under protest, after those taxes were found to have been improper*." (C-II ¶ 514). The three tax claims – the USD 10 million for export duties, the USD 62 million for corporate income taxes, and the USD 5 million in transfer pricing taxes were structured in such that they were, in *RosInvest's* words, "*linked to the strategic objective of returning petroleum assets to the control of the [State] and in an effort to suppress the [an investor]*." The Tribunal should conclude that Respondent's actions have breached the FET standard. (CPHB 2 ¶¶ 127 – 139).

913. Inconsistently and non-transparently, Kazakhstan raised questions as to the true ownership of TNG and clouded Terra Raf's title when, on 18 December 2008, it retroactively revoked its prior, express consent for the transfer of TNG's ownership from Gheso to Terra Raf and its prior waiver of pre-emptive rights. It is now common ground that Kazakhstan did not have a pre-emptive right in 2003, when Gheso transferred TNG to Terra Raf. Even throughout this arbitration, Respondent has shifted its arguments. When Kazakhstan argued that the Gheso-Terra Raf transfer was not valid until it was registered, Claimants proved that it was registered in May 2003 and was, therefore, complete. When Kazakhstan then argued that the 2003 transfer was not complete until the relevant Kazakh authorities consented to it, Claimants showed that Kazakh law did not require consent to be complete in 2003 and that Respondent consented to the transfer in 2007. The manner in which Respondent protested the transfer and then made false public claims of fraud and forgery, which immediately clouded title to TNG, violated the FET standard. (CPHB 2 ¶¶ 115 – 126).

914. All of these measures furthered the State's goal, expressed in 2008, to take over Claimants' investments, as these measures prevented Claimants from selling their investments. (C-I ¶ 351, C-II ¶ 513).Claimants state that Kazakhstan does not dispute that harassment and coercion of an investor constitutes a breach of the FET provision. Kazakhstan initiated a campaign of harassment and coercion that endured for 21 months. This campaign was carried out in bad faith, for the purpose of acquiring Claimants' investments at firesale prices. (C-II ¶¶ 512 – 513, partially quoted).

915. Fifth, Respondent "*fabricat[ed] the grounds for the direct seizures of Claimants' investments in July 2010"* and that this was a violation of the FET standard. Taken from Claimants' own words:

[…] The eleventh-hour allegations of breach were utterly without merit. For example, the Ministry of Oil and Gas raised its tired claim that TNG operated a main pipeline without a license as a ground for claiming breach of TNG's Contract No. 302, even though that contract for exploration in the area surrounding the Tabyl Block had nothing at all to do with KPM's or TNG's gathering systems. The Ministry later admitted that the violations it had alleged only days before were not the reasons for terminating Contract No. 302. (C-I ¶ 351):

916. Even if Respondent's allegations had been meritorious, they still violated the FET provision because Claimants were not given a meaningful opportunity to dispute or correct the alleged violations. The burdensome taxes and criminal prosecution described above, as well as the multiple inspections, raids, and interrogations of Claimants' personnel, "*destroyed the ability of KPM and TNG to operate normally*" and that was a violation of the FET standard. The asset seizures following the conviction forced KPM and TNG to spend valuable time and resources challenging the orders and protecting their business. Finally, the bad faith seizure, culminating "*the State's months-long, self-serving scheme to gain control and nationalize those investments […] included the takeover of all of Claimants' investments in Kazakhstan. In no way can the seizure of Claimants' investments be in accord with Kazakhstan's duty to treat Claimants' investments fairly and equitably*." (C-I ¶ 351).

917. Sixth, Claimants filed dozens of complaints to various Kazakh authorities about the mistreatment they were suffering. Every plea fell upon deaf ears. The Tribunal could consider this bureaucratic blame shuffling and ultimate non-reaction to be a violation of the FET standard, as the Tribunal in *Wena Hotels v. Egypt* found when it considered that Egypt's failure to take any action to prevent illegal action by state authorities constituted just such a violation. (CPHB 2 ¶¶ 140 – 148).

918. Regarding the content of the Cliffson deal, Claimants present that during negotiations they made it clear that they intended to bring an arbitration against Kazakhstan for the diminution in value of the investment once the sale closed. They explain that they only agreed to drop the arbitration amendment in exchange for "*the family's*" use of their influence to obtain the release of Mr. Cornegruta from prison. (C-II ¶¶ 392 – 395).

919. Each action describe above violates every element of the UNCTAD's description of abusive conduct that violates the FET standard. (CPHB 2 ¶ 58).

2. Arguments by Respondent

920. Throughout its dealings with KPM and TNG, Respondent has acted in a manner that was consistent with the expectations of investors and consistent with any legitimate expectations that KPM and TNG could reasonably have had. Claimants' attempt to argue that Respondent's adherence to due process is part of a so-called "*strategy of obstructionism*" is a figment of Claimants' imagination. (R-II ¶¶ 990 – 991). Regardless, Respondent has treated Claimants and their investments fairly and equitably. As far as the typical elements of FET, Respondent agrees with the facts that Claimants' list at C-I ¶ 345 (protection against actions in bad faith, the protection of legitimate expectations, the reliance on a stable and predictable business environment, the expectation of due process and the protection against interference with contractual relationships, harassment or coercive conduct).

Respondent reminds the Tribunal, that it must assess each allegation on a case-by-case basis, and none of the above factors, alone, is sufficient for a finding that of a breach of the FET standard. (R-I ¶¶ 37.32 – 37.34). Respondent's position is best taken from its own words:

> *993. [The FET standard] needs to be considered against all the factual circumstances. In a situation where the state action that the injured party claims of is one which the aggrieved party has been granted a right to resolve at a local level, there can be no conclusion that the state has acted unfairly and inequitably if the aggrieved party has not actually pursued those rights. In other words, a state (acting fairly and equitably) may provide an opportunity (through the provision of contractual protection or through the court system) for the claimant to seek redress of actions taken by the state that may have been incorrect. This might apply to a decision of a first instance court or the actions of an administrative official. This is a fundamental part of providing a fair and equitable as well as stable and predictable environment for the investment. As set out in Helnan v Egypt, a treaty claim for the breach of fair and equitable treatment is likely to be less successful where the claimant has not been able to show that the system of investment protection in the host state has been unfair and inequitable vis-a-vis the aggrieved party.*
>
> *994. Claimants say that Helnan v Egypt does not support this contention. This is incorrect. The basic principle in international law is that the parties should exhaust local law remedies first prior to pursing rights through diplomatic protection. In investor-state arbitration as a matter of jurisdiction, the exhaustion of local remedies is often not required since the parties agree in advance to resolve their disputes through arbitration. Therefore, this rule is dispensed with unless the parties agree otherwise.*
>
> *995. However, the Republic's argument here is not (as Claimants seem to suggest) a question of jurisdiction, nor that the "exhaustion of local remedies" as such is required. Rather, this situation concerns circumstances where the claimant alleges that certain domestic laws have been breached, and that accordingly, the standard of fair and equitable treatment has been not been met. The Republic's contention is that the claimants have not established that a breach of the standard of fair and equitable treatment (judged at an international level) has occurred simply by alleging that there have been breaches of law at a domestic level. This is all the more the case when there are available to the claimant, avenues of recourse which have not in fact been pursued. […] this is precisely the case here. (R-II ¶¶ 993 – 996, citations omitted, emphasis maintained).*

921. Claimants have not pursued remedies against the Republic, and this bars their claims. Instead, Claimants "*dismiss [...] this issue as if it were a minor technical hitch and quickly go on to simply reiterate their grievances against the Republic*." There is no legal basis recovery. In cases where there is an available remedy – via domestic law or through a contractual forum selection clause – the investor has a right to resolve a dispute. The granting of such a mechanism, if it works properly, must be considered as an action of the host state that is favorable to the investor and is aimed at ensuring a FET. If an investor fails to pursue such remedy, this counter-acts the allegation that the host state acted unfairly or inequitably. As a

host state cannot always guarantee that its officials will always act in accordance with the laws, the remedies available to rectify low level breaches are important. The analysis of FET must take the entire legal system of the host state and likewise, whether it was tested by the investor, into account. (R-I ¶¶ 37.3 – 37.12; R-II ¶ 997 – 999).

922. Other tribunals, such as *Parkerings v. Lithuania*, *MCI v. Ecuador*, and *Waste Management,* have held that, in cases of a sufficient domestic system of redress stemming from either domestic law or from the contractual forum selection clause, failure to pursue available remedies excludes the possibility of a breach of the FET standard. (R-I ¶¶ 37.12 – 37.17).

923. Furthermore, despite asserting that "*dozens of treaty tribunals*" have found violations in cases of "*less severe*" treatment, they have left unchallenged the Republic's observation that finding a breach of the FET standard is actually a very high bar. There is a high measure of deference that international law extends to the right of domestic authorities to regulate matters within their own borders. Only cases of blatant misconduct will support a finding of unfair and inequitable treatment. A mere breach of a host State's domestic law is not sufficient. The ECT, interpreted with due regard for its purpose, supports a restrictive understanding of FET, as an overly "*investor-friendly*" interpretation would prevent host states from admitting investors. This is a highly fact-specific analysis – it is simply not sufficient to "*trot out*" examples of whether other tribunals may have come to a finding that helps Claimants' arguments. (R-I ¶¶ 37.24 – 37.31; R-II ¶¶ 997 – 1000).

924. Initially, Claimants cited the following nine instances where they alleged Respondent breached the FET standard:

(a) The determination that KPM was operating trunk pipelines;

(b) the trial and conviction of Mr. Cornegruta and the verdict against KPM;

(c) the decision of the Republic's authorities not to prolong the exploration rights under Contract No. 302;

(d) the imposing of corporate back taxes, export duties and rent taxes as well as the subsequent withdrawing of some tax charges;

(e) the alleged revocation of the Republic's purported consent to the transfer of TNG to Terra Raf;

(f) the series of inspections and audits in 2008 and 2010;

(g) the seizure of KPM's assets based on the verdict against KPM;

(h) the termination of KPM's and TNG's contracts, allegedly without giving enough time to respond and without keeping the contractually agreed notice period;

(i) the taking into trust management of KPM's and TNG's assets after the termination of the contracts. (R-I ¶ 37.19).

925. The actions listed under (c), (d), and (h) arise out of the Subsoil Use Contracts and Contract 302. The contractual remedy in respect of those allegations has not been pursued, and Claimants are therefore barred from invoking these allegations. The remaining allegations fail because Claimants have not pursued available domestic remedies for them to their full extent. (R-I ¶¶ 37.20 – 37.21).

926. Over 100 enterprises hold licenses to operate trunk pipelines. (R-I ¶ 21.12). The term "*trunk pipeline*" is defined in Art. 14 of the Law on Oil, pursuant to which pipelines are classified according to how they operate. A trunk or main pipeline is an engineering structure intended for transportation of commercial oil (prepared in accordance with the requirements of technical regulations) from the points of intake (from Contractor's pipeline) to the places of: (a) transshipment to a different means of transport; (b) processing; (c) consumption; or (d) storage. (R-I ¶ 21.7). The length of a pipeline is irrelevant for the classification. The KPM Pipeline is not a gathering main mode pipeline (which would be excluded from the definition of "*trunk pipeline*"). Further, the KPM Pipeline shares oil with other contractors. Respondent states that the 1 km piece of pipeline at issue is located outside of the Contract Area, making it a trunk pipeline. (R-I ¶¶ 23 – 24; R-II ¶¶ 519 – 541). With respect to Claimants' comparisons between the KPM and the KazTurkMunai pipelines, Respondent finds this futile, since Claimants have not proven any like features between the two. Further, they have not established that the KazTurkMunai has a license for a trunk pipeline. (R-II ¶ 545).

927. Each of the four instances upon which Claimants now focus (rather than the six initially alleged) fails for two reasons: "*Firstly, each is a case where Claimants could have and should have pursued the issue further using the official systems put in place by the Republic. Secondly, Claimants misconstrue the facts to create a distorted and fictional picture in their favour*." (R-II ¶ 1001). Respondent's arguments are best taken from its own words:

1002. Claimants allege that the "reclassification" of the KPM Pipeline breached fair and equitable standards. […] Claimants have misconstrued the events that comprised the Financial Police's inspection and investigation of the pipeline issue, suggesting, wrongly that the Republic had premeditated the outcome that resulted in the prosecution of Mr. Cornegruta on behalf of KPM. In any case, there was no "reclassification" and therefore it is not possible that this activity was unfair or inequitable. The pipeline was always a trunk pipeline.

[The conclusion that the at-issue pipelines were indeed trunk pipelines is both legally and factually correct. The Parties' witnesses agreed on the legal definition of a trunk pipeline, which is provided in the Law on Oil. (RPHB 2 ¶¶ 219 – 236).]

1003. The Financial Police's inspection and investigation was carried out in accordance with due process and the laws prevailing at the time. The classification of pipelines is a legal question and one that in the case of a dispute should be resolved by reference to the judicial authorities. As such, classification decisions are not finally determined by industry specialists,

technical court experts in pipeline design, the MEMR, ARNM, or, for that matter, TNG or KPM. Moreover, the Financial Police is not a competent authority for the classification of pipelines, nor as it ever held itself out to be such. This is why the Financial Police spent a number of months in late 2008 and early 2009 collating the necessary evidence regarding the pipeline and its operation by KPM. [see also R-II ¶ 457]

1004. *Claimants suggest that the Republic admits that its laws are confusing, citing reference to the Judicial Executor's decision. This misconstrues the Republic's assertion which was simply that the way in which the Judicial Executor referred to the pipeline did not make it clear whether the pipeline was trunk or field: there was no statement by the Judicial Executor that the law was confusing. On the facts of this case, it is accepted that there were different views as to the correct classification of the pipeline. Since the application of the law always depends on the facts, it is not uncommon for there to be disagreement as to whether or not a particular law does or not apply, or how it applies. However, this does not lead to the inevitable conclusion that the law is unclear. More importantly, it does not absolve KPM and Mr. Cornegruta from the consequences of their illegal operation of the KPM Pipeline. [Further, Respondent denies that the Judicial Executor made any admission that the pipe in question was a field pipeline. As for the argument that their licenses gave them a legitimate expectation – the licenses only informed them of what type of pipeline they could operate. The license did not tell them what pipes they were actually operating. None of the licenses have ever been sufficient for the pipelines Claimants were actually operating. (R-I ¶¶ 37.36 – 37.41)]*

1005. *Claimants continue to contend that Mr. Cornegruta's conviction and the recovery of income from KPM was contrary to fair and equitable treatment standards. For the reasons set out in Section C.VI to C.VIII, this is not the case. In any event, Mr. Cornegruta could have appealed any decision against him to the Supreme Court. Similarly, KPM had an opportunity to challenge the recovery order and failed to do this within the correct time limits. Since he did not, Claimants are not now entitled to complain that the Republic's treatment of him was unfair. [Further, nothing in this proceeding constituted a "denial of justice", as alleged by Claimants. There was nothing shocking to judicial propriety. The decision was consistent with domestic law and accorded with international standards. Further, the calculation of illegal profit was correct and in accordance with the law (although even if it were incorrect, more than incorrectness is required to bring that into a treaty violation. (R-I ¶¶ 37.38; 37.42 – 37.50); RPHB 2 ¶¶ 151 – 218, 265 - 271)]*

1006. *In relation to the "harassment and coercion campaign" there simply was no such campaign against KPM or Claimants. […] In any case, Claimants' case is contradictory. On the one hand, they say that there was a "Playbook" employed by the Republic and wheeled out against systemically every foreign investor. At the same time, they argue that the campaign was unfair. At the very least, it must be recognised that if there was such a "Playbook" that was employed by the Republic (which is*

denied), its employment cannot, by definition, be "unfair" or "inequitable".

1007. Finally, with regard to the non-extension of Contract 302, Claimants' allegations equally amount to zero. It is not correct that the Republic ever agreed to an extension of the contract or that Claimants could rely on such an extension being granted. That is because the process for an agreement had simply not been gone through. The document that Claimants rely on as "proof" of a promise to extend the contract was a mere intermediate step in the process of reaching an agreement. It could not cause any reliance on the part of Claimants. Rather, the simple fact that no extension was agreed and signed created all the legal security that Claimants could expect, though to a different effect as they may have hoped for. [see also RPHB 2 ¶¶ 282 – 305]

1008. Claimants' further arguments with regard to the termination of Contract 302 are downright confusing. Claimants seem to allege that the MOG's notice of infringement of obligations prior to the contract termination somehow created reliance on the side of Claimants that the contract would be extended. It should be self-explanatory that a statement noting contract infringements cannot create any expectation of contract extension. (R-II ¶¶ 1002 – 1008, partially quoted; see also R-I ¶¶ 37.35 – 37.52).

928. Regarding the criminal proceedings, Respondent states that the Aktau court was asked to rule on whether Mr. Cornegruta, on behalf of KPM, was guilty under Art. 190(2)(b) of the Criminal Code of the Republic. (R-II ¶ 498). Respondent states that Mr. Cornegruta was the General Manager of KPM and, as such the most senior executive of that company. Given Mr Cornegruta's position within KPM, it was trite that he would in theory carry responsibility under law for any criminal activity of KPM. (R-II ¶ 510). Respondent rejects Claimants' characterization that this was a trial of Mr. Cornegruta. Strictly, it was the trial of KPM, at which Mr. Cornegruta was its representative. (R-I ¶¶ 27.50, 27.54, 27.57). Respondent explained that the necessity of arresting Mr. Cornegruta arose because other potentially liable individuals, including Mr. Cojin, Mr. Spasov, and Mr. Salagar, had already left the country. (RPHB 1 ¶ 230).

929. Respondent denies Claimants' contention that KPM was not criminally indicted. It is admitted that no civil action had been brought against KPM. It is admitted that KPM was ordered to pay 21,675,854,578 Tenge, based on the assessment of the income received by KPM as a result of its illegal entrepreneurial activity dated 18 May 2009. It is not admitted that the sum constitutes all of KPM's oil and gas production revenues from March 2007 – May 2008. It is not admitted whether KPM had already paid taxes on such income. However, to the extent that taxes had been paid on that income, it is apparent that KPM neglected to provide evidence of this to the court. It is not admitted whether the above sum bears any relationship to transportation fees earned by a trunk pipeline operator or whether such fees represent the sole income of such an operator. However, the relevance of these assertions to the computation of the sums KPM was obliged to pay is denied. (R-I ¶ 27.59). Claimants' criticism that the recovery was disproportionate misses the mark: the goal is to address and negate the unjust enrichment that results from the crime, not to punish the crime. The unjust enrichment is not limited to the hypothetical income for providing crude oil transportation services. Squire

Sanders assessed the amount subject to recovery to be reasonably over USD 80,000,000. (RPHB 2 ¶¶ 262 – 264).

930. [Respondent's prosecution of Mr. Cornegruta on behalf of KPM and the subsequent appeal were conducted in a lawful manner that adhered to Kazakh and international standards of due process. Mr. Cornegruta examined evidence, requested further evidence, and had the advice of qualified counsel. While some of his motions were not granted, others were. He had the opportunity to ask questions of witnesses and only those experts whose evidence was admitted pursuant to Art. 243 CPC were heard. With respect to the refusal to allow Claimants' so-called experts to testify, since their testimony was outside of Art. 243, it would not have attracted evidentiary weight in any event. (RPHB 2 ¶¶ 237 – 242).] Respondent denies that the Financial Police threatened any of KPM's experts and states that there were 5, not 7, experts. (R-I ¶¶ 27.52, 27.57). The State introduced a single expert opinion containing a statement that the KPM gathering system pipelines trunk pipelines. Respondent admits that the prosecutor relied on a single expert opinion, dated 13 February 2009. (R-I ¶ 27.57). Respondent states that the Judge considered evidence presented by KPM, but found it to be unpersuasive. (R-I ¶ 27.57).

931. Respondent maintains that the executive branch did not interfere with the trial. Claimants have produced little more than conjecture to support this contention. While it is true that the initial inspection was connected with the President's instructions, instructions did not lead to the conviction of Mr. Cornegruta. A proper review of the chronology of events reveals that the process, if anything, was bottom up, starting with the inspection of KPM and TNG's pipelines and ending in the prosecution, following due process. The rejection of the Mr. Cornegruta's expert opinions – first by the Financial Police, and then separately by the Judge in Aktau, was also according to due process. Mr. Baymaganbetov's expert report and the Court's use of Mr. Cornegruta's "*confession*" letter were proper. (R-II ¶¶ 628 – 634; R-I ¶ 27).

932. Claimants never exhausted the appeals system within the Republic, which stood open to Claimants. KPM missed the deadline to appeal. It was the Court's view that KPM had notice of the decision against it, since its senior management was present at the hearing. (R-II ¶ 635 – 638).

933. The termination of the contracts and the seizure of KPM and TNG's assets were in accordance with due process. The terminations were based on breaches of those contracts, including non-fulfillment of work programs. Claimants had the opportunity to dispute or correct the Republic's arguments. Claimants were involved in the inspection process, they were aware of the breaches, they provided inadequate responses to the Notices of Breach, and they never requested additional time to prepare fuller responses. Regardless, even if there was no due process, this would not change the fact that the Republic could validly terminate the contracts and that Claimants, thus, stood to lose their contractual rights. It was Respondent's substantive right to terminate the contract in light of Claimants' misbehavior and that caused Claimants' losses. The seizure was legal under Kazakh law and was necessary for the continued gas production of the region. (R-I ¶¶ 37.59 – 37.64; RPHB 2 ¶¶ 339 – 374).

934. Respondent states, in response to paragraph 11 of Mr. Calancea's Witness Statement, that the Republic would never have been in a position to compensate Claimants for the transfer. (R-II ¶ 708). The transfer did not involve a transfer in title. (R-I ¶ 31.162). Accordingly, KMG NC's role was clearly as trust manager and therefore it had no business in taking on the debts and liabilities, which remained with KPM and TNG. (R-II ¶ 711).

935. Claimants' allegations regarding the tax assessments fail in their entirety, as they were also in compliance with domestic law. Claimants could not legitimately expect anything except a lawful tax assessment, or that there would not be back assessments in the event of an incorrect tax declaration. (R-I ¶¶ 37.53 – 37.55).

936. As for the transfer from TNG to Terra Raf, the alleged reversal does not harm Claimants' legitimate expectations, as the application for the alleged approval was based on a flawed and inaccurate application. (R-I ¶¶37.56 – 37.57; RPHB 2 ¶¶ 272 – 281).

937. Respondent's investigations were at all times lawful. Thus, the argument cannot stand that these investigations and proceedings – brought on by Claimants' own illegal behavior – can be the basis for a claim of unfair and inequitable treatment. Claimants always had a duty to apply for the appropriate licenses for their work, and even upon being notified that their application was incomplete, they chose not to. (R-I ¶ 37.58; RPHB 2 ¶¶ 151 – 218).

938. Claimants' argument that Respondent forced Mr. Cojin and Mr. Cornegruta to sign inspection protocols after the MEMR's 4 – 11 November 2008 inspection is only supported by the incredible testimony of Mr. Cojin. After the hearing, Respondent explained that, while initially Mr. Cojin had stated that he accompanied the Financial Police on behalf of TNG, he admitted in cross-examination that he did not actually attend the inspection. Respondent argues that, since Mr. Cojin has testified dishonestly, there is no proof that he was forced to sign the inspection protocols. Not even the minutes of the meeting signed by Mr. Cojin or Mr. Cornegruta reflect this event. (RPHB 1 ¶¶ 194 – 196; RPHB 2 ¶¶ 157 - 161). ,

939. At the Hearing on Quantum, Claimants alleged that the gas market in Kazakhstan amounts to a violation of the FET standard. Respondent states that Claimants are seeking not fair, but rather preferential treatment, something that is not guaranteed. Claimants received the same treatment as other investors and when they did not receive special treatment, they felt persecuted. The Republic was under no obligation to create or find a market for Claimants' oil and gas. The Republic reserves the right to submit further submission on this point. (RPHB 1 ¶¶ 612 – 618, 698 – 700).

940. Respondent states that Claimants' statements about the contract negotiations with Cliffson, especially those related to the investment arbitration clauses, are beyond Respondent's knowledge. (R-II ¶ 827).

3. The Tribunal

941. To a large extent, the Parties seem to be in agreement regarding the abstract definition of what fair and equitable treatment (FET) is and intends to protect. In

particular, they agree that the host state has to act in a manner that is consistent with the legitimate expectations of investors.

942. In view of the breadth of the terms "*fair*" and "*equitable*," their context in the ECT, and the object and purpose of the ECT, the Tribunal has to interpret the FET standard in the ECT. The two terms as such provide little guidance. The VCLT, however, provides such guidance:

- *Art. 31.1 requires an interpretation of a treaty provision in their context and in the light of its object and purpose,*
- *Art. 31.2 requires an interpretation of the purpose of a treaty including its preamble and annexes, and*
- *Art. 32 allows recourse to supplementary means of interpretation*.

943. In the latter context, the Tribunal may take into account that the FET standard has been interpreted and applied under international law by many international investment tribunals, thereby creating a considerable body of case law that has added specific meaning and content to the standard.

944. But the Parties also seem to agree, and the Tribunal agrees as well, that the FET standard needs to be considered against all of the factual circumstances. Indeed, the application of the FET standard can only be case specific, taking into account:

- *the specific factual circumstances of the present case, and*
- *that these have to be evaluated in the present case in the legal context of the ECT*.

945. In view of this approach, the Tribunal will now first consider the factual circumstances by summarizing the Respondent's conduct *vis-à-vis* Claimants' investment insofar as it is considered relevant. In doing so, the Tribunal considers that, at least in the present case, as the term "*treatment*" already indicates, not one particular action by the host state has to be considered, but rather Respondent's "*treatment*" of Claimants' investment over a longer period allows its legal evaluation. In view of that, above in this Award, the Tribunal has included a detailed timetable of all relevant actions of the Parties.

946. Regarding the events and steps of the Parties from the beginning of contacts in 1997 to 6 October 2008, the Tribunal refers to the timetable recorded above in a separate section of this Award. It needs not to be summarized or repeated here and shows what the Tribunal considers, with some exceptions described below, to be a normal sequence of contacts and cooperation between the Claimants and Respondent regarding the investments made. It provides no indication that Respondent considered major aspects of the investment or the conduct of the investors as illegal or that it intended to bring the investment to an end.

947. Hereafter, the Tribunal describes in detail the treatment after the above date, which in its view is relevant for the alleged breach of the FET standard.

948. On 6 October 2008, Mr. Vladimir Voronin ("Voronin"), then-President of Moldova, wrote to Mr. Nursultan Nazarbayev, the President of Kazakhstan ("President Nazarbayev"). There is some indirect evidence (based on an unverified 24 January 2011 Moldovan television interview transcript) that President Nazarbayev may have requested that Voronin, at a meeting of CSI, provide him information about Anatolie Stati. (C-78). Respondent denies every allegation that President Nazarbayev asked Voronin for the letter as a pretext to any investigation, and disputes the translation of the interview – an interview where the name "Stati" was not even mentioned. (R-I ¶¶ 18, 19.21; RPHB 1 ¶ 375). The Tribunal, however, need not decide whether the content or translations of the interview, as presented by either side, are accurate in order to reach the conclusions, below.

949. The 6 October 2008 Voronin letter (C-77), in the interest of "*strengthen[ing] trust [and] develop[ing] relations free of any suspicious businessmen*," informed President Nazarbayev that Anatolie Stati conceals profits from the states where he has earned them and even "*use[s] of his profits from the deposits in Kazakhstan for investments in areas, for example, in Southern Sudan, that are subject to sanctions by international organizations, in particular the U.N*." The letter warns that this activity is damaging to the reputations of both Kazakhstan (as the state where Anatolie Stati earns his income) and Moldova (as "*the state of origin of the businessman*"). The letter also accuses Anatolie Stati of "*interfere[ing] with the development of the external and personnel policy of Moldova, creating a corrupt lobby of supporters of the trade agreements concluded with states subject to the U.N. sanctions*." (C-77, R-II ¶ 277).

950. What is undisputed is that, expressly based on the letter from President Voronin, President Nazarbayev issued an Order dated 14/16 October 2008 to the Kazakh Deputy Prime Minister, U. Sukeev, and the head of the Agency of the Republic of Kazakhstan for Fighting Economic and Corruption Crimes (the "Financial Police"), S. Kalmurzaev ("the Order"). (C-8). The Order used the terms *"[a]t the request of the Moldovan party*," to "*thoroughly check company's work and to take decision on its further work in the best interests of the country*." (C-II ¶ 213; R-II ¶ 283; RPHB 1 ¶ 1162; C-8 (partially quoted); Tr. Hr. 1 Day 1 Opening by Tirado (R) p. 35; Opening by Smith (C) pp. 94, 155; Mynbaev Day 3 p. 86).At approximately the same time as the Nazarbayev Order, on 14 October 2008, TNG notified the MEMR of its intention to exercise its contractual right to extend the exploration period by two further years pursuant to Contract 302. Among other things, this application refers to the "*[d]iscovery of new HC deposits on depths of over 5-6 km*…" and "*large deeply submerged reef fields…"* (C-67, partially quoted). The Claimants say these are unmistakable references to the Interoil Reef structure and that this application further indicated TNG's plans to complete the Munaibay-1 well. (C-I ¶ 67; CPHB 1 ¶ 129, 234 – 235; CPHB 2 ¶ 151; R-I ¶ 31.68; R-II ¶ 416; C-66; C-67; Lungu Tr. January 2013 Day 1 pp. 250 – 251). Prior to filing, On 24 July 2008, TNG informed the Geology and Subsoil Use Committee of the MEMR that it had discovered an oil and gas field by drilling the Munaibay-1 well in the Contract 302 area. Anatolie Stati testified that during the summer of 2008, TNG purchased a more robust drilling rig in Georgia with the intention of resuming the completion of the Munaibay-1 well and further exploration of the Contract 302 area. (Tr. January 2013 Hearing Day 2 pp. 84, 114 – 115). On 11 August 2008, TNG applied to move to the appraisal phase for Munaibay. TNG withdrew the appraisal

application on 10 October 2008 because it believed it was too early to begin appraisal. (C-0 ¶ 57; C-I ¶ 67; CPHB 1 ¶ 129; 234; CPHB 2 ¶ 151; C-66).

951. Shortly after it was issued, President Nazarbayev's instruction came to the attention of Major A. Rakhimov of the Financial Police ("Major Rakhimov"). In his testimony, he acknowledged that he had never received a personal directive from the President of Kazakhstan previously. (Rakhimov Day 5 pp. 81 – 83).

952. On 16 October 2008, the Deputy Prime Minister issued Order No. 6497 and, shortly thereafter, the Financial Police ordered the commencement of numerous audits and investigations of Anatolie Stati, KPM, and TNG (R-II ¶ 283), summarized by reference to the following events:

953. On 18 October 2008, the Financial Police wrote to the Customs Committee to enquire about Anatolie Stati's travel through Kazakhstan. (C-11).

954. By correspondence dated 20 October 2008, the Financial Police requested the Kazakh State Ministry of Energy and Mineral Resources ("MEMR") to investigate Anatolie Stati and his companies and to provide "*[c]opies of contracts, working schedules, LKU reports as well as the set of documents for obtaining the license*," as well as "*[i]nformation on the volume of extractions and investments at the closing date of the contracts*." (C-9). An internal request was also made for Mr. Turganbayev to provide information regarding Anatolie Stati's activities in Kazakhstan and off shore. (C-444).

955. On 24 October 2008, the Financial Police ordered the Tax Committee of the Ministry of Finance (the "*Tax Committee*") to conduct comprehensive or complex tax audits of KPM, TNG, and Kok Mai, which commenced on 28 October, 10 November, and 18 November 2008, respectively. Members of the Financial Police were to be included in the Tax Committee. (C-10).

956. On 24 October 2008, Mr. Turganbayev requested a prolongation of the inspection until 16 December 2008. (WS Turganbayev 2 ¶ 4.8; C-430).

957. On 28 October 2008 the Financial Police ordered the Committee of Geology and Subsoil Resources Use of the MEMR to commence an audit of KPM's and TNG's compliance with their subsoil use licenses and to involve the Financial Police in the audit. (CPHB ¶ 38; WS Turganbayev 2 ¶¶ 4.1 – 4.2).

958. By Order dated 28 October 2008, the Financial Police directed the Committee for Ecology Regulation and Control for the Ministry for Environmental Protection (the "*Ecology Committee*") to organize the inspection of KPM's and TNG's compliance with "*rational*" subsoil exploitation and petroleum operations (including burning gas over allowed limits) and to include members of the Financial Police in the inspection committee. (C-13; R-I ¶ 26.8).

959. On 30 October 2008, the Financial Police reported that Anatolie Stati was not a registered businessman in Kazakhstan, but carried on business through Ascom which, in turn, owned KPM. (C-366).

960. On 30 October 2008, the Financial Police reported on KPM's and TNG's activities, noting specific items to inspect, but finding that KPM and TNG were in compliance with all of their investment obligations. (C-438).

961. By correspondence dated 31 October 2008, the MES reported to the Financial Police on scheduling the examination of KPM's and TNG's compliance with industrial safety legislation for the years 2006 and 2007. (C-14).

962. Kemikal, which was TNG's largest non-local customer, which was under the control of the son-in-law of President Nazarbayev, Mr. Timur Kulibayev, through intervening entities he was said to control, namely, Gaz Impex and KazRosGas. Mr. Kulibayev was also the Chairman of KMG. In the Fall of 2008, Kemikal, failed to post bank guarantees that were part of its required payment terms. Claimants state that, because Kemikal had an erratic payment history, TNG chose not to renew that contract without the bank guarantees in place (and in fact, ended up pursuing Kemikal until June of 2009 to acquire the last of Kemikal's overdue payments). TNG approached KazRosGas about purchasing its excess gas for export, but KazRosGas never responded. (C-II ¶ 382; R-II ¶¶ 751 - 752).

963. On 1 November 2008, the Financial Police reported to the Deputy Prime Minister, confirming the ownership of KPM, TNG, and Kok Mai and informing him that inspections were being carried out. The letter also informed him that, based on the inspection, it had been ascertained that Anatolie Stati had left Kazakhstan on 29 March 2007. (CPHB 2 ¶ 38, C-600).

964. On 7 November 2008, the Tax Committee ordered a targeted audit of KPM and TNG regarding transfer pricing. Although the Respondent does not admit that the audit was instructed by the Financial Police, correspondence from the Tax Committee to the Financial Police, dated 11 November 2008 appears to acknowledge that such was the case. (C-38).

965. On 7 November 2008, Anatolie Stati sent a letter to President Nazarbayev assuring him that there was no reason to investigate KPM and TNG. (C-700). The President did not reply.

966. On 7 November 2008, the Financial Police ordered the Customs Committee to inspect KPM and TNG for compliance with payment of export duties. (C-440).

967. The comprehensive tax audits of KPM and TNG began on 10 November 2008. The audits covered the period from 1 January 2005 through 31 December 2007 for KPM, and 1 January 2003 through 31 December 2007 for TNG. The audits pertained to corporate income tax, royalties, individual income tax, social tax, property tax, land tax, tax on vehicles, excise taxes, corporate income tax on non-resident legal entities, and payment for use of natural and other resources. Respondent does not admit that the audit was instructed by the Financial Police, although C-38 shows that the Tax Committee disclosed information relating to the audit at the request of the Financial Police. (R-I ¶¶ 30.48, 30.62; RPHB 1 ¶ 1062; C-38; C-149; C-150).

968. From 4 to 11 November 2008, pursuant to Art. 37 of the Law on Oil and Art. 51 of the Law on Subsoil Use, the Geology Committee of the MEMR, with the

involvement of the Financial Police, carried out an inspection of KPM and TNG regarding compliance with legislation on industrial safety and their licenses. (R-I ¶ 26.8; R-II ¶ 455; RPHB 1 ¶ 192, RPHB 2 ¶ 157; WS Turganbayev 2 ¶ 4.2; C-86; C-87; C-14; C-439). Claimants state that the MEMR found that KPM and TNG were in compliance with their obligations. (C-I ¶ 89, CPHB 2 ¶¶ 38, 61; C-86; C-87).

969. On 12 November 2008, following the site visit, Mr. Turganbayev of the Financial Police asked the ARNM whether KPM, TNG, and Kok Mai held licenses for trunk pipelines. (R-I ¶ 26.9; R-II ¶¶ 464 – 465 (stating 14 November); RPHB 1 ¶¶ 198 – 202; WS Turganbayev 2 ¶ 5.1; C-441).

970. The Transfer Price Audit commenced on 12 November 2008. (R-II ¶ 407, WS Rahimgaliev ¶¶ 10.5, 10.6).

971. On 12 November 2008, the Financial Police ordered the Customs Committee to inspect KPM's and TNG's import/export volumes. (C-442).

972. On 13 November 2008, the Tax Committee noted that the inclusion of the Financial Police in inspections would be illegal and proposed that, instead, a working group be established to review inspection results. (C-38).

973. On 14 November 2008, the ARNM replied to a request for clarification by Mr. Turganbayev that KPM and TNG had each applied for, but neither held licenses to operate main or trunk pipelines, and that the operation of a trunk pipeline required such a license. (R-I ¶ 26.10; R-II ¶ 466; RPHB 2 ¶ 164; WS Turganbayev ¶ 5.3).

974. On 14 November 2008, the Financial Police met with Messrs. Cojin and Cornegruta. The Parties dispute whether the Financial Police insisted that each sign inspection reports admitting that KPM and TNG did not hold licenses to operate main pipelines.

975. On 14 November 2008, the MEMR reported to the Financial Police on KPM's and TNG's export volumes. (C-443).

976. KMG executed the 17 November 2008 Tripartite Agreement. The final signatory, KazAzot, however, never signed.

977. On 17 November 2008, the Financial Police determined that the pipelines were trunk pipelines, and then discovered that KPM and TNG did not have the necessary licenses. Claimants refer to this as the "*reclassification.*" (C-II ¶ 249; R-I ¶¶ 22.6, 23.19, 38.22; R-II ¶¶ 451, 542; RPHB 2 ¶¶ 165 – 172).

978. On 17 November 2008, Mr. Turganbayev of the Financial Police ordered the Tax Committee to conduct a new audit to calculate the profit that KPM and TNG received from operating a main pipeline without a license and to determine KPM's revenue for onward sales of oil. (R-II ¶ 469; RPHB 2 ¶¶ 172 – 173; C-89; WS Turganbayev 2 ¶ 5.4).

979. On 18 November 2008, the Financial Police issued a resolution for an audit of any unpaid customs taxes by TNG. (C-446).

980. On 18 November 2008, the ARNM replied that TNG and KPM did not hold licenses for trunk pipelines and that Kok Mai had never been asked about such licenses, previously. (RPHB 1 ¶ 198; C-88).

981. On 19 November 2008, the Tax Committee, at the request of the Financial Police and based on accounting information provided by TNG, determined that the amount of "*illegal profit*" from operation of the trunk pipeline was 41.8 billion Tenge (USD 348 million as of November 2008) for KPM and 37.7 billion Tenge (USD 314 million as of November 2008) for TNG. (R-I ¶ 26.19, C-202; C-450);

982. On 19 November 2008, the Specialized Interdistrict Court of Mangystau Region delivered a judgment in KPM's favour in response to KPM's challenge of export duties. The Court ruled that the imposition of KPM on the Crude Oil Expert Tax was illegal. (R-I ¶ 30.56; R-II ¶ 743). Despite this ruling in KPM's favour, the Financial Police and the Customs Committee challenged the ruling, resulting in further litigation. New claims were raised against KPM and TNG. On 31 March 2010, the Customs Committee conceded that neither KPM nor TNG was obliged to pay export duties. (C-161).

983. On 19 November 2008, KPM and TNG contacted the MES for a second opinion regarding the pipelines. (R-I ¶ 28.10). The MES confirmed that KPM's and TNG's pipelines were not main pipelines, but "*form a single technological process of all production*." (C-90; C-91). Respondent admits that this was the MES response, but states that the opinion only stated that some of the pipelines were not trunk and, in any event, the statement was outside of their competency. (R-I ¶¶ 26.12, 28.11 – 28.13; R-189).

984. On 20 November 2008, the Financial Police commenced an investigation concerning KPM's contractual export tax exemption. (C-0 ¶ 72).

985. On 21 November 2008, the Financial Police requested that the MES withdraw its statements confirming that KPM's and TNG's pipelines were not main pipelines, on the basis that the MES was not competent to provide that conclusion. (R-I ¶ 26.12; C-92; R-189).

986. On 25 November 2008, the Financial Police wrote to the Ministry of Finance inquiring into why the Customs Committee "*exonerate[d]*" KPM from oil export duties, given that KPM had provisionally paid the disputed duties. (C-162). The Customs Committee had, in fact, found that KPM was not contractually obliged to pay the export duty.

987. On 28 November 2008, a Ministry of Justice economics expert confirmed the Tax Committee's calculation and concluded that KPM's illegal profits exceeded 41 billion Tenge. (R-I ¶ 26.23, CPHB 2 ¶ 81; C-452).

988. By a correspondence stamped with the date 28 November 2011, the National Bank acknowledged letters from the Financial Police dated 28 October and 31 October 2008, by which the National Bank was directed to conduct exceptional inspections and to include members of the Financial Police in the control team. The National Bank stated that, although it could not comply with the request to include the financial police employees among the auditors, it would issue conclusions

regarding the compliance by the companies with current legislation. The letter informed that an extraordinary inspection of KPM had occurred, while extraordinary inspections of TNG and Kok Mai had not occurred. (C-15).

989. On 2 December 2008, the Financial Police circulated an internal report confirming that KPM operated a main pipeline without a license and had gained illegal income of over 41 billion Tenge. (C-85).

990. On 10 December 2008, the Financial Police reported to the Deputy Prime Minister that the Financial Police had determined that KPM and TNG were operating trunk oil and gas pipelines without licenses. They stated that the Financial Police, however, were not competent to make that decision, and reported that they had asked the ARNM to determine what type of pipelines KPM and TNG operated, taking their functions into account. Without a conclusion by the competent authority "*it is impossible to make a lawful procedural decision in respect of this case*." (C-II ¶ 220; C-448, partially quoted). Although Respondent states that "*no decision had been reached as to whether or not the pipelines were trunk at this point*" (RPHB 1 ¶ 197), this statement is belied by C-448. The Tribunal believes Respondent's earlier statement acknowledging that the Financial Police had, indeed, concluded that KPM and TNG were operating trunk pipelines, even though they were not legally competent to make that classification. (R-II ¶¶ 473 – 474).

991. The Transfer Price Audit was suspended on 12 December 2008. (R-II ¶ 407; WS Rahimgaliev Exhibit 12).

992. On 15 December 2008, the Financial Police formally opened a criminal investigation against KPM for allegedly operating a main pipeline without a license. (CPHB 1 ¶¶ 168, 346; CPHB 2 ¶¶ 38, 61; R-II ¶ 294, 475, RPHB 1 ¶¶ 219 – 221; RPHB 2 ¶¶ 177 – 180; C-632; Rakhimov Day 5 p. 20 – 21, 24-25; WS Rakhimov 2 ¶¶ 3.5 – 3.8, 4.1, 4.3, 4.4). While Respondent has argued that this investigation was opened, but not in respect to a particular person, the Tribunal notes that KPM is expressly named in the order, which instructs "*[t]o initiate the criminal case under Article 190 Part 2 item "b" CC RK involving the illegal entrepreneurial activity carried out by Kazpolmunai LLP and to accept it for examination*." (RPHB 1 ¶ 222, C-632; Rakhimov Day 5 p. 25).

993. On 18 December 2008, the MEMR informed TNG that it was cancelling the State's decision of 20 February 2007 that had further allowed the 2003 transfer of TNG from Gheso to Terra Raf. The MEMR demanded that TNG submit a new application for the transfer. The notice further required TNG to submit all documentation regarding Terra Raf's ownership within 10 days, and that failure to do so would result in the MEMR unilaterally terminating TNG's Subsoil Use Contracts for the Tabyl Block and the Tolkyn field. (CPHB 2 ¶¶ 38, 117; R-I ¶ 13.47; R-II ¶¶ 170 – 172; RPHB 1 ¶ 475 – 476; RPHB 2 ¶¶ 281, 377; C-134; C-140; C-424; Ilyassova (12 August 2012) ¶ 7; WS Ongarbayev ¶ 5.7).

994. The Parties are in agreement that an 18 December 2008 INTERFAX press release alleged that the State's pre-emptive rights had been violated and indicated illegal conduct by Terra Raf. They also agree that, on the same date, Credit Suisse sent Mr. Lungu of Ascom a copy of the INTERFAX press release and requested an explanation. (C-141). The Parties disagree as to where INTERFAX received its

information and whether that report is attributable to the Respondent. Respondent argues that the accusation that the INTERFAX report was somehow attributable to Respondent was not made contemporaneously. (R-II ¶ 171, *see e.g*. C-619; RPHB 2 ¶¶ 7). Indeed, while Mr. Lungu initially told Credit Suisse that "*there are a lot of errors in [the INTERFAX press release] which make us believe that this info is not from official sources*," (C-625, partially quoted), Claimants now argue that the INTERFAX press release is attributable to Respondent, "*given the level of detail in the in the information that the INTERFAX article sources to the MEMR*." (C-II ¶¶ 400; CPHB 1 ¶¶ 137, 215 – 216, 347 – 348, fn. 497 (partially quoted), 350; CPHB 2 ¶¶ 38, 117). Respondent dismissed Claimants' argument as speculative. (R-II ¶ 749). It provided evidence that the information did not originate in the Republic, including a 21 June 2012 letter from INTERFAX indicating that an inofficial source was used (R-264) and a 21 June 2012 letter from the MEMR that it did not provide the information (R-265). (RPHB 2 ¶¶ 7, 95 – 99). Respondent denies that the report was from official sources and Mr. Ongarbayev denied knowledge and stated that there was no official press release. (C-720, WS Ongarbaev (1 December 2012)). In this context, Respondent's argument that the INTERFAX item cannot be attributed to the Republic does not change the impact. Even if Claimants have not shown that the Republic was in any way involved in the publication of the INTERFAX item, it is obvious and not disputed by Respondent, that it was Respondent's actions starting in October 2008 that caused the publication.

995. On 20 December 2008, the Financial Police began conducting repeated interrogations of TNG and KPM employees. (CPHB 2 ¶ 38; R-I ¶ 26.22; C-46; C-96; C-620; C-621; C-622; C-623; C-624; C-626; C-627).

996. On 22 December 2008, TNG refused to submit the required application to the MEMR and lodged objections to the State's reversal of its consent to the 2003 transfer. (C-I ¶ 146; CPHB 2 ¶ 117; C-142).

997. On 24 December 2008, the Financial Police requested information from KPM and TNG on their gas and condensate outputs. In particular, the letter requested information regarding (a) the level of production of the company and (b) sales made by KPM to agents, individuals and other businesses. (R-I ¶ 26.20; CPHB 2 ¶ 38; C-94).

998. On 24 December 2008, the Financial Police issued summonses for Anatolie Stati, Mr. Cojin, Mr. Salagor, and Mr. Cornegruta. (C-654).

999. On 25 December 2008, Major Rakhimov of the Financial Police summoned and interviewed KPM's General Manager, Mr. Cornegruta. (R-I ¶ 26.21, 27.38; C-I ¶ 95). Mr. Cornegruta was considered a witness (R-II ¶ 480) and was, accordingly, not allowed to be accompanied by counsel (C-I ¶ 95). Respondent denies that Mr. Cornegruta was not permitted to have legal counsel in attendance for the interview. He was allowed to under Art. 82.3 CPC. (R-35). After the interview, Mr. Cornegruta was released and permitted to go about his business. (R-I ¶ 27.40).

1000. On 26 December 2008, Major Rakhimov summoned and interviewed the then-Deputy Manager General for Finance of KPM and TNG, Mr. Veaceslav Stejar; (C-I ¶ 95, R-I ¶ 26.21).

1001. On 26 December 2008, the Financial Police ordered the seizure of TNG documents regarding contracts with third parties and construction of pipelines. (C-605, C-606).

1002. On 29 December 2008, the MEMR requested that TNG provide notarized documents evidencing the 2003 change in ownership of TNG. (C-144).

1003. On 30 December 2008, the Financial Police conducted an on-site investigation at the Borankol and Tolkyn Fields. (C-I ¶ 95). The Respondent alleges that the purpose of the inspection was to specify the process of production, refining, and further transportation of hydrocarbon material, and to make sure that the pipelines matched the documents describing their construction, placement, and other physical features. (C-95). Mr. Turganbayev attended this inspection and confirms that it involved visiting KPM's pipeline. (R-I ¶¶ 13.47(e), 26.22; R-II ¶¶ 285, 481; WS Turganbayev 2 ¶ 6.3).

1004. On 30 December 2008, the Tax Committee issued an Act of Inspection, claiming that TNG could not deduct 100% of drilling expenses in the year they were incurred for corporate income tax purposes. (Maggs 2 Exhibit 2; CPHB 2 ¶ 128);

1005. On 5 January 2009, Major Rakhimov asked the MEMR to ascertain whether KPM's 17.9 kilometer pipeline was a main pipeline. (C-718, Rakhimov 3 ¶¶ 3.1 – 3.2; Rakhimov, Day 5 pp. 46 – 47).

1006. On 5 January 2009, the research and design institute of KMG NC concluded that the KPM and TNG pipelines were not main pipelines (C-99, C-100);

1007. On 8 January 2009, the National Scientific and Research Centre on Industrial Safety of the MES confirmed that the relevant KPM and TNG pipelines were field pipelines and not main pipelines (C-101; C-104);

1008. On 9 January 2009, NIPI Neftegaz confirmed that KPM's and TNG's pipelines were not main pipelines (C-101, C-102);

1009. On 14 January 2009, the Financial Police issued a resolution appointing three investigators to the criminal investigations of KPM and TNG. (C-453).

1010. In January-February 2009, KPM and TNG submitted various complaints regarding the illegality of the Financial Police's searches and seizures of documents and forwarded reports confirming that their pipelines were not main pipelines. (R-I ¶ 26.25; C-46, C-96, C-620, C-621, C-622, C-623, C-624, C-626, C-627, C-628, C-629, C-630).

1011. On 22 January 2009, the Financial Police requested corporate documents from KPM. (C-607).

1012. On 23 January 2009, the Financial Police requested corporate documents from TNG. (C-608).

1013. On 2 February 2009, the Financial Police informed TNG that, on 20 January 2009, they had formally opened a criminal investigation against TNG for the alleged

operation of main pipelines without a license. The Financial Police notified Claimants that TNG was the subject of a criminal investigation. The charges were later suspended. The Financial Police rejected a request to provide the order on the ground that no person was the subject of the investigation. (C-0 ¶¶ 43, 54; C-I ¶ 96; CPHB 2 ¶¶ 38, 61, 142; C-98 (translation disputed by Respondent); C-630; Condorachi ¶ 11).

1014. On 4 February 2009, the Financial Police interviewed Mr. Cojin, General Manager of TNG, to determine whether he or Mr. Cornegruta would be an appropriate defendant in any criminal proceeding; (R-II ¶¶ 298, 480; Rakhimov 2 ¶ 4.5).

1015. On 4 February 2009, MEMR wrote a letter to the Financial Police confirming that KPM's pipeline was part of its gathering system, and thus, was not a main pipeline. The Respondent alleges that this letter was later withdrawn as it was not reviewed by the legal department and/or because the MEMR has no authority to provide a classification regarding pipelines. (CPHB 1 ¶ 171; CPHB 2 ¶¶ 38, 61, 98; RPHB 1 ¶ 229; RPHB 2 ¶¶ 183 – 186; C-719; Rakhimov 3 ¶¶ 3, Rakhimov Tr. Day 5 pp. 47 – 49).

1016. On 9 February 2009, the Financial Police ordered the College of Experts of the Ministry of Justice ("MOJ") to appoint an expert to classify KPM's pipeline. (C-I ¶ 104; C-II ¶ 249; CPHB 1 ¶ 181; CPHB 2 ¶¶ 38, 61; R-II ¶¶ 549, RPHB 1 ¶ 226; C-109; R-245; R-362).

1017. On 10 February 2009, Mr. Turganbayev met with the MOJ expert, Mr. Baymaganbetov, and provided him with four documents on which to base his report. (R-II ¶ 554; Baymaganbetov. ¶¶ 3.2, 6.2; R-246).

1018. The comprehensive tax audits of KPM and TNG lasted until 10 February 2009. On that date, the State sent notices of an Act of Inspection to KPM and TNG that the Article 23 amortization rate, and not the Article 20 rate, was applicable to the companies' well drilling costs for the years 2005 to 2007 and assessed approximately USD 62 million in back taxes and penalties against the companies. (Exhibits 3, 4, 5, and 6 to Maggs 2; C-155). The corporate tax dispute embroiled KPM and TNG in litigation until 22 June 2010, when the Kazakh Court of Cassation dismissed the claim. (Exhibit 11 to Second Maggs Report; C-155). In the course of this arbitration, Claimants first learned that Respondent had appealed the Court of Cassastion's decision. They were, therefore, unable to participate in the process that led to the 3 November 2010 decision of the Kazakh Supreme Court, which overturned the decisions at the lower instances and found that the corporate income tax assessment was proper. (CPHB 1 ¶ 258; Rahimgaliev Exhibit 6).

1019. On 11 February 2009, the MEMR withdrew the letter prepared on 4 February 2009, allegedly on the basis that it had not been reviewed by the legal department of the MEMR. (Rakhimov 3 ¶ 3.5). A replacement letter was issued on 11 February 2009. (RPHB 1 ¶ 229).

1020. On 13 February 2009, three days after receiving the file and without having reviewed any other documents or visited KPM's pipeline, Mr. Baymaganbetov

issued his report. (R-II ¶¶ 549 – 568; RPHB 2 ¶ 188; C-110; Baymaganbetov ¶¶ 3, 4.1, 4.2, 6).

1021. On 13 February 2009, the MEMR wrote to the Financial Police to provide them with information on how the definition of trunk pipeline in Article I of the Law on Oil should be interpreted. The MEMR noted that an expert would need to be appointed to determine the status of the pipelines in question. (Rakhimov 3 Exhibit 4; RPHB 2 ¶ 183).

1022. On 13 February 2009, the MEMR wrote to KPM and TNG and informed them that it was not competent to resolve their complaints. The MEMR suggested that they write to the GPO, instead. (C-629, C-630).

1023. On 24 February 2009, the Financial Police seized KPM's corporate documents. (C-609).

1024. On 27 February 2009, the State responded to TNG's objections to the 18 December 2008 notice, stating that the transfer of TNG to Terra Raf had breached the State's statutory pre-emptive right to acquire TNG. The State demanded that TNG submit a new application for its consent to the transfer and a waiver of the State's pre-emptive purchase right Failure to do so would result in termination of TNG's Subsoil Use Contracts. (CPHB 2 ¶ 117; C-146).

1025. On 3 and 4 March 2009, the Financial Police seized KPM's and TNG's corporate documents. (C-610; C-611; C-612).

1026. On 18 March 2009, KPM and TNG complained to the GPO regarding the criminal investigations. (C-41; C-154; Condorachi ¶ 13).

1027. On 19 March 2009, a meeting chaired by the MEMR Executive Secretary, Mr. A.B. Batalov, and attended by representatives of Terra Raf, TNG, Ascom, and KPM was held at the MEMR offices. At this meeting, the State's actions against the Claimants since President Nazarbayev's 14 October 2008 Order were discussed. The Parties dispute whether Mr. Batalov assured the Claimants that all of these issues would be disposed of in favour of TNG and KPM, and that TNG's Subsoil Use Contracts would not be cancelled, if TNG would simply submit a new application for its transfer to Terra Raf, and would permit the State to re-evaluate its prior consent. Mr. Batalov also stated that, because the size and value of TNG had changed since the 2003 transfer to Terra Raf, the State would require a new and contemporary evaluation of TNG's books and assets (as of February 2007) in order to properly re-evaluate the transfer. KMG would conduct this new evaluation. The Claimants say the MEMR assured them that the pre-emptive right claim would be resolved in their favour. The Claimants also report that Mr. Batalov and his deputy indicated that the reclassification of sections of TNG's and KPM's in-field pipelines as trunk pipelines was, in the MEMR's view, due to a defect in the applicable legislation. Finally, the Claimants assert that the MEMR also indicated that the Financial Police ought to rely on the opinions of experts. Minutes of the meeting were prepared by Mr. Grigore Pisica and were offered to Mr. Batalov for his signature, but he refused to sign. The Respondent denies that Mr. Batalov assured the Claimants that all outstanding issues in relation to TNG and KPM would be resolved in the Claimants' favour, or that there was any

"*reclassification"* of pipelines. (C-I ¶¶ 106, 150, 152, 177; R-I ¶ 13.47(e)(v), 21.1); C-42; C-111; Lungu 43 – 45; Pisica ¶¶ 32 - 37, 43).

1028. On 24 March 2009, following the meeting with Mr. Batalov of the MEMR, TNG applied for a permit for the transfer of TNG's ownership to Terra Raf and for a written decision on the State's waiver of its pre-emptive rights. (C-0 ¶ 32, partially quoted; C-I ¶¶ 153, 332; C-147; Lungu ¶ 46; Pisica ¶ 38).

1029. On 24 March 2009, TNG applied to the MEMR for the inclusion of the issue of the extension of the exploration period of Contract 302 for two years into the agenda of the next meeting of the Expert Commission. (R-I ¶ 31.69; R-162).

1030. On 24 March 2009, KPM and TNG sent a complaint to President Nazarbayev. (CPHB 2 ¶ 142; C-631).

1031. On 25 March 2009, TNG sent the State a request for a written decision regarding the right of TNG to transfer Terra Raf's ownership interests to a prospective third party buyer, including KMG, based upon a competitive bidding process and direct negotiations. No response was ever received. (C-0 ¶ 32, partially quoted; C-I ¶¶ 153, 154, 332; C-148; Pisica ¶ 38; Lungu ¶ 46).

1032. On 27 March 2009, the Financial Police ordered TNG to submit originals of their corporate documents with reference to the criminal case against KPM. Claimants also allege that the same request was made of KPM. (C-614; C-615);

1033. On 30 March 2009, Contract 302 expired. (R-II ¶ 411; C-53).

1034. On 30 March 2009, KPM responded to the Financial Police's request for documents and requested a copy of the criminal investigation order. (C-615).

1035. On 31 March 2009, the Financial Police ordered TNG to submit additional original company documents. (C-616).

1036. On 2 April 2009, the Expert Commission passed a Decision, which recommended the extension of Contract 302 for two years. (CPHB 1 ¶ 236; CPHB 2 ¶ 151; R-I ¶ 31.70; R-163.2).

1037. On 6 April 2009, the Financial Police requested information on TNG's costs for oil and condensate in relation to the criminal case against KPM. (CPHB 2 ¶ 38; C-618).

1038. On 9 April 2009, the MEMR issued a written statement to execute the extension of Contract 302 to 30 March 2011, which the Claimants allege that they requested on 9 March 2009, and which the Respondent states was requested on 24 March 2009. The Claimants allege that the MEMR notified TNG of its agreement to extend Contract 302 and undertook to execute the amendment by 2 July 2009. Respondent states that the adopted decision has the character of a recommendation and is only one of many legal actions required for a valid contract extension. (C-0 ¶ 58; C-I ¶¶ 22, 178; R-I ¶¶ 31.71 – 31.73; C-II ¶ 241; CPHB 2 ¶ 151; R-II ¶¶ 413, 419 – 424; 436; C-27; C-27.2, R-163.1; R-163.2, Ongarbaev ¶ 7.2; Ongarbaev Day 6 pp. 67 – 68; RPHB 1 ¶ 323 – 325). Respondent states that the Parties agree that

Respondent was under no obligation to extend prior to the 9 April 2009 letter, at least. (Compare RPHB 2 fn 526 with C-II ¶ 242; see also CPHB 1 ¶ 224 (Parties experts' debate on obligation to extend contract after 9 April)).

1039. On 20 April 2009, Major Rakhimov decided to detain KMG's general manager, Mr. Cornegruta, and opened criminal proceedings against him for the crime of illegal entrepreneurial activity under Article 190(2)(b) of the Criminal Code of Kazakhstan. At that time, Mr. Cornegruta was named as a potential defendant. (R-II ¶ 487; RPHB 2 ¶ 189; R-243, Rakhimov 2 ¶ 7.1 - 7.5). On 22 April 2009, the Financial Police ordered additional company documents from KPM. (CPHB 2 ¶ 38; C-617).

1040. On 25 April 2009, the Financial Police arrested Mr. Cornegruta. (C-I ¶ 44, partially quoted; R-I ¶ 27.2; C-117; Exhibit 1 and 3 to Rakhimov 2). Respondent admits that Mr. Cornegruta was denied bail, pursuant to Kazakh law. (R-I ¶ 27.45, R-35).

1041. On 26 April 2009, the Claimants filed complaints against the Financial Police, including its head investigator, Major Rakhimov. The same day, 900 employees of KMG, TNG, and CASCo that were on shift addressed and signed a letter to the Governor of the Mangystau Region expressing their concerns, particularly in relation to Mr. Cornegruta's welfare. (C-I ¶ 109; C-113; Condorachi ¶ 16, 19; Pisica ¶ 41; Romanosov ¶ 31; Stati ¶ 26).

1042. On 27 April 2009, Mr. Batalov was fired as Executive Secretary of the MEMR. (C-I ¶¶ 106, 332; Pisica ¶ 43).

1043. On 27 April 2009, a petition against Mr. Cornegruta's arrest was considered and rejected by the Court of Aktau. (RPHB 1 ¶ 244; Kravchenko ¶ 13.14; Exhibit 6 Kravchenko).

1044. On 30 April 2009, the Financial Police issued attachment orders in respect of KPM's and TNG's Subsoil Use Contracts. The Claimants allege that the Financial Police issued no fewer than 10 orders for the sequestration of property, which resulted in freezing KPM's and TNG's shares, KPM's Contract 305, TNG's Contracts 210 and 302, KPM's field oil pipeline, TNG's field gas pipeline, TNG's condensate pipeline and the companies' other property. (C-I ¶ 121; R-I ¶ 29.2; C-486; C-487; C-488; C-489; C-490; C-491; C-492; C-493; C-494; C-495; C-496; C-497; C-498; C-499; C-500; Condorachi ¶ 38). Those orders prevented KPM and TNG from selling or depreciating the value of those assets. (C-I ¶ 121; CPHB 1 ¶ 140).

1045. The Claimants say that, on 30 April 2009 and on 4 May 2009, TNG submitted Addendum No. 9 of TNG's Tabyl Block Subsoil Use Contract to the MEMR for execution. TNG never received the MEMR's signature to the addendum extending TNG's exploration rights. (C-168).

1046. On 30 April 2009, the Deputy Minister of the MES wrote to the Claimants and asked them to withdraw his previous letters of 19 November 2008 (confirming that KPM's and TNG's pipelines were not main pipelines), as their issuance was beyond his competence. (R-189).

1047. On 1 May 2009, the decision to detain Mr. Cornegruta was confirmed on appeal. (R-II ¶ 487; RPHB 1 ¶ 244; Kravchenko 2 ¶ 13.15).

1048. On 4 May 2009, Major Rakhimov of the Financial Police ordered an unscheduled inspection to determine the amount of income KPM had obtained from operating a trunk pipeline without a license. (RPHB 2 ¶ 190; C-184).

1049. Pursuant to a search warrant dated 30 April 2009, on 6 and 7 May 2009, the Financial Police conducted an overnight search of KPM's and TNG's offices for the other General Managers of KPM, Messrs. Salgor and Spasov, and the General Manager of TNG, Mr. Cojin, as well as information on their whereabouts. The three in-country managers had by then been charged with the same offence as Mr. Cornegruta. The initial phase of the search started at 4:20 p.m. on 6 May 2009 and ended at 4:15 a.m. on 7 May 2009. The search was carried out in the presence of Deputy General for Economic and Financial Affairs of TNG, Mr. Stejar. The Respondent states that the Financial Police procured human resources and financial records from KPM and TNG and that it became clear during the course of the investigation that most senior managers had left Kazakhstan. The Parties dispute the level of inconvenience caused by the search. (R-I ¶ 27.47; R-II ¶ 301, 483, R-III ¶ 504 – 507, 511; RPHB 1 ¶ 170, 175 – 176, 233 – 238; C-114; Rakhimov 2 ¶¶ 4.09 – 4.20; Stejar ¶ 20; Pisica Day 2 p. 71; Rakhimov Day 5 pp. 1 - 6; Stejar Day 3 p. 35).

1050. On 7 May 2009, Anatolie Stati, allegedly on behalf of the Claimants, wrote to President Nazarbayev to obtain the release of Mr. Cornegruta, to protect the former and current management of KPM and TNG, and to end the dispute. Around this date, Mr. Stati decided to pause construction on the LPG Plant and to reduce planned development efforts at Tolkyn and Borankol. The Claimants also allege that this letter made clear that the Claimants intended to bring arbitration claims against Kazakhstan for the diminution in the value of their investments once the sale to Cliffson closed. Respondent admits that the letter was sent by Ascom and denies Claimants' allegations regarding notice. (R-II ¶ 226. The Respondent also notes that the Cliffson transaction, at earliest, could have started in February 2010. (C-43; Stati ¶ 28)

1051. On 13 May 2009, the Mangystau Regional Department of the MES withdrew its letters about whether the pipelines were trunk pipelines. (R-I ¶ 28.14; RPHB 2 ¶ 198; C-90; C-93).

1052. On 15 May 2009, the Financial Police notified KPM and TNG that they had seized the Claimants' equity interests in KPM and TNG two days before on 13 May 2009. The asset and equity seizures were designed to prevent KPM and TNG from selling or transferring their interests during the course of the criminal proceeding against Mr. Cornegruta. (C-I ¶ 121). In addition, the Financial Police requested additional documents from KPM. (C-668 and C-485). Respondent states that the Financial Police issued attachment orders. (R-I ¶ 29.2). Respondent does not admit that the Financial Police notified KPM and TNG that it had seized KPM's and TNG's equity interests on 13 May 2009. If the allegation is that Claimants were prevented from transferring their interests during proceedings, then that would be appropriate under the circumstances. (R-I ¶ 26.26(c)).

1053. On 18 May 2009, the College of Experts of the Ministry of Justice calculated KPM's purported illegal profits from oil and gas transportation services at 5.9 million Tenge (approximately USD 48,300) for the period from 2002 through 2008. This calculation also showed "*illegal profits*" of approximately 1,935,547 Tenge (approximately USD 15,000) from March 2007 to May 2008. (C-I ¶ 92, C-184). The Respondent denies this and states that that expert considered that the value of income from illegally operating the trunk pipeline amounted to 65,479,414,197 Tenge for the period from April 2002 to 2008, and that its income during the relevant period in 2007 and 2008 was 21,673,919,031 Tenge. (R-I ¶ 27.59(c), (h); C-117, C-184). The Respondent states that this calculation was necessary to determine whether the crime of illegal entrepreneurship had been triggered. (R-II ¶ 484; C-184). The Respondent admits that the Court relied on this document when determining the amount of the fine to be imposed on KPM. In all other respects, the Claimants' assertions concerning this report are denied. (R-I ¶ 27.60).

1054. On 18 May 2009, Major Rakhimov issued an application to exclude Claimants' expert opinions about the classification of the pipelines. (R-II ¶¶ 632; RPHB 2 ¶ 206; Kravchenko 2 ¶¶ 11.13, 11.14, 11.22; Kravchenko 2 Exhibit 2). The expert reports included a report dated 5 January 2009 from the Kazakh Scientific, Research and Design Institute of Oil and Gas (a division of KMG) that found the pipelines owned by KPM and TNG "*do **not** belong to the category of **main** pipelines and are designated to ensure the process of hydrocarbons production.*" (C-I ¶ 98, emphasis maintained; C-99; C-100).The expert reports also included a report that the Scientific, Research, and Design Institute of Oil and Gas Industry of NIPI Neftegaz concluded on 9 January 2009 that the pipelines owned by KPM and TNG were correctly "*classified as in-field pipelines*." The Court later deemed the Claimants' expert opinions to be inadmissible on the grounds that these so-called expert opinions did not evidence KPM and TNG's requests for such opinions, making it impossible for the court to divine the scope of the request. There was no indication that the bodies were independent of the Claimants, and some of the experts whose reports were excluded had a role in the construction of the pipelines and in the legal amendments regarding their status. In any event, they were not qualified to issue such opinions and had not been appointed pursuant to Article 243 of the CPC. (RPHB 2 ¶ 203 – 207; Kravchenko 2 Exhibit 2).

1055. On 19 May 2009, the Financial Police requested the valuation of sequestered property from KPM. (C-500).

1056. On 15 June 2009, Kazakhstan indicted Mr. Cornegruta. (C-454).

1057. On 17 June 2009, the Financial Police issued a press release that announced that the investigative phase had concluded. The media reported on the ongoing criminal investigations and reported that KPM and TNG had obtained illegal profits of 147 billion Tenge and that the companies' assets had been sequestered. (C-0 ¶ 45, C-II ¶ 602; CPHB 2 ¶ 38; R-I ¶ 26.24; C-118).

1058. On 27 June 2009, the Regional Prosecutor's Office corresponded with Ascom and Terra Raf noting the international search underway for Mr. Cojin. (C-183).

1059. On 2 July 2009, the MEMR failed to execute the extension of the exploration period of Contract 302. (C-27; R-163.1);

1060. Mr. Cornegruta's trial was held between 30 July and 14 September 2009. (C-704; R-315.1 (in Russian); R-315.2 (in Russian); R-316; R-317; R-318; R-319).

1061. On 18 September 2009, Aktau City Court found Mr. Cornegruta guilty of "*illegal entrepreneurial activity in an especially large amount*" for operating a main pipeline without a license and ordered recovery of USD 145 million from KPM. (C-117) Respondent admits that KPM was not a party to the criminal proceeding against Mr. Cornegruta and explains that the Court was asked to rule on whether Mr. Cornegruta, on behalf of KPM, was guilty of the crime. Respondent denies that KPM was not represented in either the hearing or the appeal. (R-I ¶ 27.60; R-II ¶¶ 615, 645; RPHB 2 ¶¶ 246 – 261; C-117).

1062. On 21 September 2009, President Nazarbayev's Head of Administration issued an order regarding "*free of charge transfer of [Claimants'] assets*." (RPHB 1 ¶¶ 401; C-294; Mynbaev Day 3 pp. 159 – 167).

1063. On 30 September 2009, the Financial Police ordered a new audit of KPM regarding alleged failure to pay export taxes. (Condorachi WS ¶ 34).

1064. On 22 October 2009, the Financial Police questioned Mr. Condorachi regarding KPM's alleged obligation to pay export taxes. (C-0 ¶ 75; C-I ¶ 168; CPHB 2 ¶¶ 38, 128; Condorachi WS ¶ 35).

1065. On 3 November 2009, the Financial Police interviewed Mr. Cornegruta in jail regarding KPM's alleged obligation to pay export taxes. (Condorachi WS ¶ 36).

1066. On 12 November 2009, the Appeal Court upheld the criminal judgment of Aktau City Court finding Mr. Cornegruta guilty of illegal entrepreneurial activity in an especially large amount and ordering recovery of USD 145 million from KPM. (C-565).

1067. On 19 November 2009, President Nazarbayev issued an instruction to the Prime Minister, Minister Mynbayev, and Timur Kulibayev to look into and resolve the issue with respect to KPM and TNG. (R-II ¶ 332; C-23).

1068. On 29 December 2009, a Writ of Enforcement was issued against KPM for USD 145 million. (C-119).

1069. On 29 December 2009, the Tax Committee concluded an audit of transfer pricing and claimed that KPM and TNG owed approximately 700 million Tenge (US $5 million) in unpaid transfer prices and penalties. (R-I ¶ 30.63; C-137 and C-138).

1070. KPM and TNG commenced legal action challenging the transfer pricing claim (R-II ¶ 649). This was still pending as of the State's 21-22 July 2010 take-over. (CPHB 2 ¶ 128).

1071. On 10 January 2010, Kazakhstan froze the bank accounts of KPM to satisfy the USD 145 million judgment against it. (C-I ¶ 125; CPHB 1 ¶ 212; CPHB 2 ¶ 38; R-I ¶ 29.7; C-119; C-121).

1072. From 25 January to 6 February 2010, MEMR carried out unscheduled inspections of KPM and TNG regarding historical compliance with Subsoil Use Contracts and Kazakh law. (C-0 ¶ 55; C-II ¶ 290; CPHB 2 ¶¶ 38, 61; C-171, C-385, C-386, and C-599). Respondent states that the purpose was to ensure compliance with contractual obligations and legislation, not to assess legality from 1997 to present. (R-I ¶ 31.96; C-171; C-174). While Respondent states that the purpose was to ensure compliance with contractual obligations and legislation and not to assess legality from 1997 to present, this stands in contradiction to C-174, which Respondent has also cited.

1073. From January to June 2010, Kazakh enforcement officers took repeated measures to recover funds from KPM to satisfy the court's criminal judgment. (C-79; C-122; C-123; C-124; C-125; C-199; C-201; C-298; C-501; C-502; C-503; C-504; C-505; C-506; C-507).

1074. On 26 January 2010, the Ministry of Finance began bankruptcy proceedings against KPM. (CPHB 2 ¶¶ 38, 128; C-157).

1075. On 17 February 2010, the President of Kazakh social fund "*Blagovest*" wrote to Minister Mynbaev to make a suggestion to "*resolve the question of nationalization of the assets posed in 2008*". (CPHB 2 ¶ 38; RPHB 1 ¶ 404 (saying 7 February); C-23).

1076. On 24 February 2010, the Customs Committee informed both KPM and TNG that they were liable for unpaid export taxes. (C-44; C-479). One month later, on 31 March 2010, the Customs Committee retracted this claim and conceded that the Subsoil Use Contracts exempted KPM and TNG from export taxes. (C-I ¶ 170; CPHB 2 ¶¶ 38, 128; R-I ¶ 30.56; C-130).

1077. By mid-March 2010, Kazakhstan's court administrators had seized nearly every asset of KPM, including key oil production equipment, and had prevented KPM from importing equipment and exporting oil. Nevertheless, the Claimants continued to pay the salaries of KPM's workers through TNG's accounts. While Respondent disputes that salaries were paid, Respondent, despite having access to information that would suggest otherwise, has not provided any. (CPHB 2 ¶ 194; RPHB 2 ¶ 349).

1078. On 30 April 2010, MOG informed KPM and TNG that a sale to Cliffson was not possible because the companies' shares were sequestered / arrested. (C-528; C-529). It would only be approved if KPM and TNG satisfied the requirements to release the attachment of their shares. (R-II ¶ 818).

1079. From 25 to 29 June 2010, on the order of the Prime Minister and with the involvement of the Financial Police, the GPO ordered unscheduled inspections of KPM and TNG from no fewer than seven different Kazakh agencies. (CPHB 2 ¶ 38; C-174; C-175; C-177; C-178; C-180; C-181; C-182; C-185; C-315; C-647; C-648; C-649; C-650; C-651; C-687; C-688; C-689; C-711).

1080. On 9 July 2010, while inspections were underway, TNG was notified that the Prime Minister had planned to visit the field facilities and the LPG Plant. TNG was instructed to make preparations for his 20 – 21/23 July visit. (C-186; C-299).

1081. On 14 July 2010, the MOG sent notices to KPM and TNG that the companies were in violation of Subsoil Use Contracts 210 and 305. (R-I ¶ 31.19; C-II ¶ 346, CPHB 1 ¶ 296, CPHB 2 ¶¶ 74, 178; RPHB 1 ¶ 360; RPHB 2 ¶ 354). The notices from the MOG were dated 14 July 2010, but were not received by KPM and TNG until 16 July 2010. (R-I ¶ 31.54). The notices set out (1) the contract to which the notice related, (2) the contractual breaches by KPM and TNG, (3) a deadline within which to respond, and (4) the consequences for failing to respond to the notice. (R-I ¶ 31.107). The notices gave KPM and TNG until 19 July 2010 to "submit explanations on reasons of non-execution of contract terms and all necessary documents, ascertaining removal of the above-mentioned violations, as well as to inform [the MOG] on measures taken in order to avoid violation of contract terms." Respondent reports that the violations in the notices included "admissions" by KPM and TNG that they had operated trunk oil and gas pipelines without a license and 13 additional alleged violations for which Claimants state that the State had provided no prior notice to KPM or TNG. (R-I ¶¶ 31.103 et seq.). Claimants report that the notices listed 16 alleged violations. The notice further provided that "[i]n case of failure to comply with the request set forth in this Notice within the established time limit, the Competent Body is entitled to terminate the Contract[s]." (C-0 ¶ 88; C-I ¶¶ 20, 206 – 208, 332). Respondent states that the violations contained in the notice of 14 July 2010 were detected by the competent authority as a result of permanent monitoring of the compliance by the subsurface users of their contractual obligations. (R-I ¶ 31.42). The audits proved that production activities at KPM and TNG had virtually stopped; there was little chance of employee salaries being paid. (R-II ¶ 692). The Parties state that, by this time, the majority of TNG and KPM senior and middle management had left Kazakhstan. (R-II ¶ 698; C-1 ¶ 218).

1082. On 19 July 2010, Claimants submitted written answers and explanations concerning each violation alleged in the 14 July 2010 notice. (C-0 ¶ 89, CPHB 2 ¶ 178; RPHB 1 ¶ 361, RPHB 2 ¶ 354). Claimants had, previously, on 22 January and on 28 June 2010, provided evidence of their compliance with the work program requirements. (C-I ¶ 209). In July 2010, they provided all that they had. KPM explained that it failed to pay costs costs amounting to US 114,809, because KPM this figure was a direct result of the Financial Police seizing KPM's assets in May 2009 and the judicial executor seizing bank accounts in January 2010. These seizures were a result of the state-initiated criminal investigation, which in and of themselves constituted a force majeure under the contract. KPM explained that it was unable to pay the USD 10,000 owed to the liquidation fund and various taxes because of the financial constraints caused by the criminal investigations. KPM also stressed that its pipeline was never a trunk or main pipeline. KPM responded to the allegation regarding its obligation to purchase goods, works, and services, by simply referring the Ministry to its previously submitted "*notes and objections*" explaining how this issue too, like all of the other claims, was groundless. TNG replied similarly, and submitted documentation showing that none of the Ministry's claims were proper. With respect to Contract 302, TNG documented its work and training programs, the purchase of goods, works, and services, and demonstrated that the re-classified pipeline was not trunk. (C-I ¶¶ 211 – 216). Respondent states

that Claimants' responses were inadequate and failed to address the violations. (R-154). For example, in response to the notice of KPM's and TNG's failure to instruct and train a Kazakh specialist, KPM and TNG referred to funding allocated for the training of all employees. In response to the notice of KPM's failure to pay costs according to the Additional Agreement of 13 June 2008, KPM simply denied liability based on "force majeure." KPM and TNG also argued force majeure to excuse their failure to contribute to the liquidation funds, as required by Contracts 305 and 210, and KPM used that argument to excuse its non-payment of taxes. Both tried to re-open the discussion on whether the pipelines were trunk. Importantly, Claimants refused to "*remove the violations of their obligations THI*" (R-I ¶ 31.121; RPHB 2 ¶ 354). R-I ¶ 31.122; R-154).

1083. Respondent, in any event, disputes that these responses were received on time and argues that they were received by the MOG after 21 July 2010. (R-I ¶ 31.54; RPHB 1 ¶ 362).

1084. Between 21 and 22 July 2010, the Prime Minister and the Minister of Oil and Gas publicly declared the takeover and abrogation of the Claimants' Subsoil Use Contracts, seized the assets of KPM and TNG, and caused them, in due course, to be transferred to KMG, which later appointed its subsidiary KazMunaiTeniz as "trust manager" for the companies. (R-I ¶¶ 31.129, 31.150 et seq.; R-II ¶ 701; C-3, C-4, C-5, C-189, C-190; C-194; C-195; R-152; R-153, R-200; R-257).

1085. Having considered all of the Parties submissions, even where not expressly stated herein, the Tribunal draws the following conclusions:

1086. The Tribunal considers that it need not find that there was a "playbook", as alleged by Claimants and as recorded above in this Award, to find that the conduct presented in the above timeline constitutes a violation of the FET. Indeed, for the Tribunal, the evaluation of the objective timetable is sufficient. While Respondent's explanations and justifications regarding some specific actions it has taken affecting Claimants' investments may perhaps at least be arguable, even if not convincing to the Tribunal, (1) the picture of them seen cumulatively in context to each other and (2) the difference of treatment of Claimants' investments before and after the Order of the President of the Republic on 14/16 October 2008, permit only the conclusion that Respondent's conduct after the President's Order was a string of measures of coordinated harassment by various institutions of Respondent and has to be considered as a breach of the obligation to treat investors fairly and equitably, as required by Art. 10(1) ECT.

1087. The Parties are in agreement, and the Tribunal agrees as well, that prior to November 2008, Respondent's authorities regularly inspected KPM's and TNG's pipelines. The Parties are in agreement, and the Tribunal agrees as well, that there was no change in the pipeline from the date that Kazakh authorities approved the design and construction of the pipelines until the 18 November 2008 inspection where the Financial Police – who Respondent agrees are not the competent authority to classify a pipeline – declared that the pipelines at issue were a "*trunk*" rather than field pipelines. (R-II ¶ 451). The Tribunal, however, is not persuaded by Respondent's argument that the Financial Police, in pursuit of their lawful obligations, simply made this discovery during an inspection – a discovery that was not made during any of the prior routine inspections that were made by agencies

who were competent to classify pipelines. Rather, it is far more likely that this alleged "*discovery*", as well as the events leading to it and those stemming from it, constitute violations of the FET and, in particular Claimants' legitimate expectations toward proper and fair governmental conduct.

1088. The Tribunal need not opine on whether the pipeline was a field or trunk pipeline in order to find that the procedure surrounding the discovery was in violation of the FET standard. The Parties have presented that Claimants operated a pipeline system that was approved by Kazakh authorities. During routine inspections from 2002 – until November 2008, there was no indication that anyone believed that the pipelines were trunk pipelines and Respondent has provided no indication that the proper authorities were in any way prevented from having made the same discovery sooner. Instead, the evidence demonstrates that, it was not until immediately prior to the "*discovery*", namely on 12 November 2008, that the Financial Police began to seek information on whether KPM and TNG held licenses to operate trunk pipelines. On Friday, 14 November 2008, the Financial Police received confirmation that neither company held such licenses. Immediately thereafter, on the following Monday, 17 November 2008, the Financial Police "*discovered*" that KPM and TNG operated a trunk pipeline and ordered the Tax Committee to calculate profit earned from operating that pipeline.

1089. Following the "discovery", Claimants received confirmation from numerous Kazakh authorities that the pipeline at issue was a field, rather than a trunk pipeline. Often, however, the Financial Police compelled these authorities, in particular the MES and the MEMR, to withdraw their statements. The evidence also indicates that even the Judicial Executor admitted that the segment at issue was a mere "*field*" – and not "*trunk*" pipeline.

1090. Accordingly, the Tribunal is persuaded by Claimants' argument which demonstrates that this was not a mere "*discovery*" but that, rather, this was a re-classification. As indicated, there were no changes to the pipelines prior to their change in designation. The segments of Claimants' pipes that are at issue extend from the principal joint where the KPM wellhead pipes converge to KPM's processing facility, and from the processing facility to TNG's storage tanks, where services are also provided to KPM. For the TNG gathering system, the segment extends from the principal joint where the TNG wellhead pipes converge to TNG's processing facility; from the processing facility directly to the CAC Pipeline for gas; and from the processing facility to TNG's storage tanks for condensate. Claimants state that identical gathering systems are owned and operated by other oil and gas companies in the immediate vicinity – and indeed throughout Kazakhstan – none of which are classified as trunk pipelines requiring licensure. (C-0 ¶¶ 39 – 40, partially quoted). The Tribunal is persuaded that the at-issue pipelines, likewise, were not trunk pipelines requiring licensure but were rather arbitrarily re-classified by Respondent. That the City Court of Aktau found that the pipes were trunk does not bind this Tribunal.

1091. The re-classification, viewed in light of President Nazarbayev's 23 November 2009 confidential instruction that was attached to the 7 February 2010 Blagovest letter (C-23), appears to have been an important step for the State to have obtained the assets of KPM and TNG, without sacrificing their working ability.

1092. While the Parties dispute many aspects of the June – July 2010 inspections, the Tribunal is satisfied that these sudden inspections, which involved no fewer than seven Kazakh agencies, unduly harassed Claimants. It appears from the evidence presented that these numerous agencies, each reacting to the same orders of the Prime Minister, the GPO, and the Financial Police, conducted inspections which, in some aspects, may have been duplicative of one another. In particular, the Tribunal notes that multiple agencies were tasked with reviewing KPM's and TNG's compliance with their Subsoil Use Contracts. These sudden inspections forced KPM and TNG to spend their time and resources addressing the inspections, rather than operating normally. Importantly, throughout this barrage of inspections, no remedies were available to Claimants. Despite filing complaints with relevant authorities, no help was forthcoming. Respondent's conduct and treatment of Claimants, therefore, violated the FET standard.

1093. The Tribunal is, finally, not convinced that Claimants violated Kazakh law. Even without determining whether the pipeline was trunk, the evidence indicates that the charge of "*illegal entrepreneurial activity in an especially large amount*" under Art. 190(2)(b) of the Kazakh Criminal Code did not comply with Kazakh law. Instead, the threshold calculation for "*illegal profits*" was only met by including both the transport fee KPM earned from TNG for use of the pipeline, as well as KPM's entire revenues from the onward sales of oil. Kazakhstan assessed "*illegal profits*" from operating the trunk pipeline – and this fine amounted to more than 65 billion Tenge for KPM and more than 82 billion Tenge for TNG – reflecting all of the revenue that both companies had generated for oil, gas, and condensate production from 2002 – 2008. These calculations were unfair, did not consider expenses or costs, and did not correspond to the transportation fees that would have applied if the pipeline segment was truly a trunk pipeline. Importantly, the fine was contrary to Kazakh law, which requires the deduction of lawfully obtained revenue from otherwise illegal activity. The Tribunal is persuaded by Claimants' argument that the proper calculation could have yielded USD 12,000 – 13,000 in illegal profits – an amount below the USD 17,000 threshold for the crime.

1094. Respondent disputes whether Kemikal's actions are attributable to the state and argue that, per the PwC Due Diligence Report, Kemikal stopped making payments due to "*liquidity and insolvency*" issues. (R-II ¶¶ 757 – 758; RPHB 2 ¶¶ 21 – 23, 61, 124). Claimants argue that the evident relationships between President Nazarbayev and his son-in-law are reason enough to believe that the Kazakh State were the cause of the various difficulties they encountered in endeavouring to secure their gas sales and export rights commencing in the fall of 2008 and continuing into 2009. They point to the close relationships said to exist between KMG, under the chairmanship of Mr. Kulibayev, and the KazAzot resistance to signing the Tripartite Agreement after over two years of negotiations and the signature of the other two parties to the agreement. They also point to their difficulties with Kemikal, and its failure, at the critical time in the fall of 2008, to continue supplying bank guarantees to secure payment of its accounts. The Tribunal finds that it is more probable than not that there was State influence at play with respect to the failure by KazAzot to sign the Tri-Partite Agreement. Similarly, the Tribunal finds that the relationship between Kemikal and Timur Kulibayev is established on the basis of Professor Olcott's evidence that Kemikal was managed by Samruk-Kazyna, which is the Kazakh state welfare fund and is 100% owned and controlled by Kazakhstan. Mr. Kulibayev was, as the Claimants

have submitted, close to Samruk-Kazyna, having served at one time as deputy manager of its holding company shortly after its launch in 2006 until 2007, later returning in 2008 as deputy CEO when Samruk's responsibilities increased. Considering these facts in the context of the familial ties between President Nazarbayev and Mr. Kulibayev, the Tribunal concludes that it is more probable than not that Kemikal's failure to provide the requisite bank guarantees to TNG in late 2008 was caused by Kazakhstan. While this evaluation of the evidence regarding non-implementation of the Agreement is by no means the sole reason for the Tribunal's conclusion, it does contribute to and confirm that it was part of and due to the Respondent's conduct found to be in breach of the ECT.

1095. Taking into account the above considerations, the Tribunal concludes that Respondent's measures, seen cumulatively in context to each other and compared with the treatment of Claimants' investments before the Order of the President of the Republic on 14/16 October 2008, constituted a string of measures of coordinated harassment by various institutions of Respondent. These measures must be considered as a breach of the obligation to treat investors fairly and equitably, as required by Art. 10(1) ECT.

J.II. Whether Claimants' Interests were Expropriated (Art 13 ECT)

1. Arguments by Claimants

a. Law on Expropriation

1096. Article 13 ECT prohibits direct and indirect expropriation, to the extent that expropriatory measures are not carried out in accordance with the requirements of Art. 13 ECT. (C-I ¶¶ 243 – 244). Under international law, as described in *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, "*an expropriation occurs where the state takes measures which deprive the owner of title, possession or access to the benefit and economic use of his property. 'A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected*.'" (C-I ¶ 246). Under Art. 13(3) ECT, expropriation may be of assets of a company that an investor owns, even as a shareholder. (C-I ¶¶ 246 – 247). Article 13 ECT expressly prohibits any measure of expropriation (direct or indirect) by Kazakhstan that does not cumulatively satisfy four distinct requirements: the expropriation must be "*(a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation*." Respondent's actions have met none of these requirements. (C-I ¶¶ 286 – 288, partially quoted).

1097. The minimum requirement for an expropriation to be lawful under Art. 13 ECT is that it be carried out in the public interest / for a bona fide public purpose. As the Tribunal in *ADC v. Hungary* found, a mere reference to "*public interest*" will not satisfy this requirement. Nevertheless, Respondent has never alleged that the taking was for the public interest, not that it in any event could satisfy that requirement. Instead, Respondent's many actions served an entirely different purpose, namely

the diminution of value in Claimants' investments, until the state seized them outright. Accordingly, since none of the actions of either indirect or direct expropriation were for a purpose that was in the public interest, the Tribunal should conclude that Kazakhstan's expropriation of Claimants' investments was unlawful under Art. 13 ECT and international law. (C-I ¶ 289 – 296).

1098. "*Due process*" encompasses procedural and substantive fairness, and this has been recognized by international tribunals. Claimants explain:

> *300. The failures of due process at issue in this case are markedly more numerous and severe than those at issue in ADC and Kardassopoulos. The Tribunal in both of those cases found that the host States had not given the investors a reasonable opportunity to be heard following an expropriation. In the present case, Claimants were given no chance at all to be heard or to object to the direct expropriation that occurred in July 2010. Furthermore, despite their many efforts to contest Kazakhstan's various measures of indirect expropriation during the October 2008 – July 2010 period, all of Claimants' objections, explanations, and appeals for assistance fell on deaf ears. Claimants vigorously contested the various audits, inspections, findings, criminal charges, fines, and seizures levied during that period, but all of their complaints fell upon deaf ears. (C-I ¶ 300).*

1099. Respondent's actions of indirect and direct expropriation were not carried out under due process of law, as required by Art. 13 ECT. The most blatant due process violations occurred in relation to the prosecution, trial, and conviction of Mr. Cornegruta and the conviction of non-party KPM. Claimants allege that the criminal charges and the substantive evidence were entirely fabricated and the court was obviously partial. Not only that, but KPM – a non-party to the criminal proceedings, an entity that could not even be prosecuted under Kazakh law – was convicted and ordered to pay a fine of more than USD 145 million. Among other things, this sum bore no relation to the charges and constituted all of KPM's oil and gas revenues for March 2007 – May 2008. The court made no effort to deliver the verdict to KPM or to provide KPM notice of its content. It was only after enforcement that KPM finally received a copy. Appeals were unsuccessful – KPM's appeal, filed after it finally received a copy of the verdict on 25 January 2010 – nine days after receiving a copy, was refused as untimely. (C-I ¶¶ 297, 301 – 306; CPHB 1 ¶¶ 188 – 213; CPHB 2 ¶¶ 97 – 114).

1100. The incessant criminal investigations against KPM and TNG starting in 2008 were baseless, unfair, politically motivated, and pursued without regard to due process. KPM and TNG's complaints to the relevant authorities regarding these were either ignored or served only to prompt more investigations. (C-I ¶¶ 307 – 309).

1101. Respondent also committed due process violations with regard to Claimants' rights to extend the exploration period for the Contract 302 properties and to confirm ownership of TNG to Terra Raf. Requests for action and assistance were ignored. Finally, Claimants were promised an extension, and then the Republic failed to issue it. (C-I ¶¶ 310 – 311) At the hearing, Respondent's witness Mr. Ongarbaev, formerly of MEMR, confirmed that the MEMR had decided to allow the extension. Documents that Claimants withheld, including the PwC Due Diligence Report, also confirmed the extension. (CPHB 1 ¶¶ 221 – 230, 237).

1102. The total take over to KPM and TNG in July 2010 was accomplished without reference to due process. KPM and TNG were given only 3 days to respond to and explain the multiple allegations of violation of the Subsoil Use Contracts before the contracts were repudiated. This lack of reasonable time alone is sufficient for a finding of violation of due process. In any event, the responses were wholly ignored and Kazakhstan unilaterally repudiated the contracts and physically took over KPM and TNG. (C-I ¶¶ 311 – 313).

1103. Claimants also allege that Respondent's expropriatory measures were discriminatory, and incorporate by reference its arguments regarding the ECT's FET standard and the ECT's impairment clause. (C-I ¶ 317, C-I ¶¶ 337 *et seq*., ¶¶ 352 *et seq*.).

1104. Respondent has also failed in its obligation to pay prompt, adequate, and effective compensation, as required by Art. 13 ECT and as firmly grounded in international law. To date, no compensation has been paid. (C-I ¶¶ 314 – 316).

b. Exhaustion of Remedies

1105. Respondent's arguments that Claimants are precluded from bringing a claim of illegal expropriation under the ECT because they have failed to exhaust dispute resolution mechanisms or to exhaust domestic remedies available to them is simply wrong. Claimants' first argument in this respect is taken from their own words:

> *452. There is a fundamental distinction between Kazakhstan's obligations to Claimants as qualified "Investors" under the Treaty, including the duty not to expropriate Claimants' investments unlawfully, and Kazakhstan's obligations to KPM and TNG under the contracts, including the duty not to terminate those contracts in violation of the contracts' termination provisions or applicable law. The respective parties and causes of action are different in the two situations. In short, "[a] treaty cause of action is not the same as a contractual cause of action." There would have been nothing preventing KPM and TNG, at least in a theoretical sense, from raising breach-of-contract claims against Kazakhstan while the Claimants commenced separate Treaty claims against Kazakhstan. In fact, KPM and TNG have not lost the right to pursue their contract claims against Kazakhstan, and whether they did so at the time or do so in the future has no bearing on either Claimants' right to bring an expropriation claim under the Treaty or whether Kazakhstan's unlawful termination of the Subsoil Use Contracts and takeover of KPM and TNG amounted to a direct expropriation of Claimants' investments. Kazakhstan is mistakenly conflating two different types of legal claims, only one of which (Claimants' claims for Kazakhstan's breaches of the ECT) is before this Tribunal. (C-II ¶ 452).*

1106. The ECT does not contain a requirement for exhaustion remedies, and investment case law affirms that no such requirement exists. The tribunal in *Helnan v. Egypt* (which Respondent cites elsewhere) rejected any requirement to pursue available remedies as an element of showing a treaty breach, since doing so "*would empty the development of investment arbitration of much of its force and effect, if, despite a clear intention of States parties not to require the pursuit of local remedies as a*

pre-condition to arbitration, such a requirement were to be read back in as part of the substantive cause of action." (C-II ¶ 453, partially quoted).

1107. The ECT contains a "*fork-in-the-road*" clause, under which Kazakhstan only consents to submit disputes under the ECT to international arbitration where an investor has not already submitted the dispute for resolution before local courts or tribunals or in accordance with other previously agreed upon dispute resolution procedures. Thus, if Claimants (as opposed to KPM or TNG) had chosen to challenge the expropriation before Kazakhstan's courts, they might have been precluded from bringing the present action. This makes it clear that no requirement of exhausting domestic remedies can exist in this case. (C-II ¶¶ 454 – 455).

1108. Moreover, the Subsoil Use Contracts precluded recourse to local courts and instead obliged parties to arbitrate disputes before the SCC. The logical extension of Respondent's argument would lead to the absurd result of requiring KPM and TNG to file one SCC claim before a new tribunal and then for Claimants to file a separate action before the SCC. (C-II ¶ 456).

1109. In any event, resort to local remedies would have been futile. This is not a matter concerning a single act of low level maladministration, but rather these cases stem from treaty violations perpetrated at the highest level of the Kazakh government. No Kazakh court would overturn an expropriation ordered at the highest levels of Kazakhstan's government. (C-II ¶¶ 457 – 458).

1110. In its Post-Hearing submission, Claimants argued that there is direct evidence that the executive mandated the takings at issue. This is true despite Minister Mynbayev's testimony that the MEMR was actually attempting to protect KPM and TNG against the Kazakh authorities. In his position having direct authority over KPM's and TNG's operations, he had in depth knowledge that the companies would need protection from higher authorities. The evidence and testimony before the Tribunal strongly suggests the direct involvement of Kazakhstan's political elite. (CPHB 1 ¶¶ 309 – 339).

c. Indirect Expropriation

i. General Principles and Jurisprudence Regarding Indirect Expropriation

1111. "*Indirect expropriation*" is widely understood as interference with an investment that "*leaves the investor's title untouched but deprives him of the possibility to utilize the investment in a meaningful way*", i.e. depriving the investor of its rights or attributes of ownership, without physically seizing the property. (C-I ¶¶ 259 – 269; C-II ¶ 469). The present case does not concern a "*creeping*" expropriation where numerous small events cumulatively amounted to an indirect expropriation. Rather, the measures were extreme and any number of them individually constitutes an act of indirect expropriation under international law. Cumulatively, the conclusion that Kazakhstan indirectly expropriated Claimants' investments is inescapable. (C-I ¶ 285; CPHB 2 ¶ 36).

1112. Respondent substantially deprived Claimants of the rights of ownership of their investments. There is a generous amount of jurisprudence describing the kinds of acts that can amount to indirect expropriation, which is often defined as a substantial deprivation of the rights or attributes of ownership of an investment. The deprivations and impacts that resulted from Kazakhstan's mistreatment of KPM and TNG over from October 2008 – July 2010 resemble those summarized by the tribunal in *PSEG v. Turkey*, when it summarized these constitutive aspects of an indirect expropriation:

> *[T]here must be some form of deprivation of the investor in the control of the investment, the management of day-to-day operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part. (C-II ¶¶ 474 – 476, partially quoted).*

1113. Investment tribunals have routinely found that substantial interference with an investor's ability to manage its investment entails indirect expropriation. Contrary to Respondent's argument, Claimants were not at fault for the start of these investigations. Respondent never alleged that KPM or TNG had violated the law before that date. Rather, the investigations were a pretext for Kazakhstan to prosecute Claimants' companies and ultimately gain control over them. Kazakhstan invented those grounds as early as November 2008, when the Financial Police reclassified the pipelines and ordered calculation of KPM's "*illegal*" profits (i.e., all of its revenues over the previous several years). The Court ignored and declared inadmissible evidence in Mr. Cornegruta's favor, and ignored the obvious fact that the "*illegal profits*" calculated as the penalty were actually not profits at all but were revenues, and were not even earned by Mr. Cornegruta. There should be no question that Kazakhstan's actions, which were carried out in bad faith, amount to indirect expropriation under the ECT and international law (C-II ¶¶ 479 – 480, partially quoted; CPHB 2 ¶¶ 97 – 100).

ii. Right to Regulate

1114. Respondent's arguments that its actions from October 2008 – July 2010 were a proper exercise of its regulatory powers fail for the simple reason that its actions were not regulatory in nature. In this regard, Claimants state as follows:

> *470. […] Kazakhstan's actions amounting to an indirect expropriation […] did not stem from enactment of new laws or regulations or the legitimate enforcement of existing regulations, and they were not designed to maintain "public order, health, or morality." Instead, they consisted of an egregious campaign of harassment and coercion designed to undermine and interfere with Claimants' management and control of KPM and TNG. The campaign involved a multitude of ministries led by the Financial Police, and it culminated in extraordinary denials of justice suffered by Mr. Cornegruta and KPM in the Kazakh courts. The campaign was carried out under an order from President Nazarbayev to investigate Mr. Stati. Far from being necessary to protect or promote a legitimate State interest, the Government's campaign intentionally interfered with Claimants' ability to manage, control, and dispose of their investments and*

> *was designed to force Claimants to sell KPM and TNG (or parts of the companies) to the State at bargain-basement prices. […]*
>
> *472. Moreover, even if Kazakhstan could show a legitimate purpose for its so-called "regulatory" conduct, and that its conduct was necessary and proportional to achieving that purpose, Kazakhstan would still be required to pay compensation to Claimants for its expropriatory measures. […]*
>
> *473. Thus, even if Kazakhstan's measures could be said to fall within the scope of normal, regulatory actions — which is vehemently denied — their devastating impact on Claimants' investments was to such a degree as to require compensation from Kazakhstan. Kazakhstan's failure to compensate Claimants alone establishes the unlawful nature of its indirect expropriation. (C-II ¶¶ 471 – 473, partially quoted).*

1115. The case law cited by Respondent is inapplicable here, as those cases concern states that actually took regulatory measures that tribunals found to be tied to a legitimate state interest.

> *471. […] In Tecmed, Mexico refused to renew the claimants' landfill permit on environmental protection grounds, which the tribunal found to fall within the state's regulatory powers (but which the Tribunal nevertheless found to amount to expropriation). Further, the Glamis Gold case involved application of the U.S.'s environmental protection laws, which were designed to promote public health and safety and therefore were proper regulatory measures; the Methanex case dealt with a ban on the MTBE additive in gasoline, which was a necessary regulatory measure to maintain public health and safety; and the LG&E tribunal found that a measure that has a social or general welfare purpose may be accepted when it proportionally addresses an established need. Kazakhstan has not even articulated what public purpose was served by its complete devastation of Claimants' investments through its harassment campaign and denials of justice, much less demonstrated that its measures were necessary and proportional to achieve such a purpose. (C-II ¶ 471).*

1116. The Tribunal does not need to abandon common sense. All of the legal and regulatory problems faced by KPM and TNG arise in the context of President Nazarbayev's October 2008 order and had never been experienced previously. (CPHB 2 ¶ 40). The events following President Nazarbayev's 14 October 2008 Order were not a coincidence. To argue so is to state that none of Kazakhstan's regulatory bodies had successfully carried out their functions for nearly a decade, by missing all of these serious infractions. The Tribunal should recognize that the acts described below were designed to (and successfully did) discourage third party buyers from paying FMV for Claimants' assets and required an inordinate amount of time and expense to (unsuccessfully) challenge before Kazakhstan's various administrative and judicial bodies. (C-I ¶ 278; CPHB 2 ¶¶ 41 – 43, 52 – 57).

iii. Acts Allegedly Amounting to An Indirect Expropriation

1117. Kazakhstan's measures from October 2008 to July 2010 interfered with Claimants' use and control of their investments and caused significant damage to the

alienability and economic potential of those investments. (C-I ¶ 270; CPHB 2 ¶ 38, 40).

> *271. Kazakhstan's campaign of indirect expropriation commenced on October 14, 2008, when President Nazarbayev personally ordered the Kazakh Financial Police and a variety of other Governmental agencies to "fully investigate" Claimants' business activities in Kazakhstan. The Financial Police and seven other ministries and agencies started their harassment campaign in earnest on the heels of President Nazarbayev's directive. Kazakhstan's harassment campaign – which included a groundless criminal prosecution and conviction of KPM's in-country manager (and a similarly groundless criminal verdict against KPM), freezing KPM's assets, multiple assessments of improper taxes, reversal of prior State approvals and waiver of the State's pre-emptive rights, and refusal to execute the agreed exploration period extension – entail "indirect" expropriation under Article 13 of the ECT and international law.* (C-I ¶ 271; CPHB 1 ¶ 112, stating that the difference between "*thoroughly check*", as Respondent translates, and "*thoroughly investigate*" is a difference without distinction. Claimants later use "*thoroughly check*" in their memorial at CPHB 2 ¶ 115).

1118. The events following President Nazarbayev's 14 October 2008 Order were not a coincidence. The measures described below discouraged third party buyers from paying FMV for Claimants' assets and required an inordinate amount of time and expense to (unsuccessfully) challenge before Kazakhstan's various administrative and judicial bodies (C-I ¶ 278; CPHB 2 ¶¶ 41 – 43, 52 – 57):

> *273. [The first measure taken against Claimants was Kazakhstan's refusal to extend the exploration for the Contract 302 properties. This wrongful refusal to execute prevented Claimants from proving the Contract 302 Properties' reserves and thereby affected the market value of that asset. This occurred after Claimants had begun to accept bids for the sale of KPM and TNG. To the extent that Kazakhstan argues that Contract 302 terminated on its own accord, Claimants state that it only terminated because of the State's refusal to extend, which was not in accordance with the contractual termination provisions. (see also CPHB 2 ¶¶ 149 – 176)]*
>
> *[[T]he Financial Police effectively commandeered KPM's and TNG's offices for months, from late October 2008 until March 2009, while they oversaw numerous inspections, intimidated employees, seized company documents, and prevented KPM's and TNG's personnel from carrying out their normal daily activities. Those inspections substantially interfered with the day-to-day management and operations of the companies. (C-II ¶ 476)]*
>
> *274. [In] November 2008, […] the Tax Committee initiated an audit of KPM and TNG and assessed approximately USD 6 million in back "transfer" price taxes and penalties. KPM and TNG spent the following months contesting this assessment in Kazakhstan's courts, legal actions that remained pending at the time Kazakhstan abrogated KPM's and TNG's Subsoil Use Contracts and directly expropriated Claimants' investments in July 2010.*

> *275. […] The February 10, 2009, refusal by Kazakhstan to apply amortization rates as contractually agreed in the KPM and TNG Subsoil Use Contracts raised additional concerns about the companies' financial health. The State wrongfully assessed against the companies approximately USD 69 million in back taxes on corporate income and associated penalties. In early 2010, the State pursued bankruptcy proceedings against KPM, further disrupting KPM's ability to operate and driving down the value of Claimants' investments.*
>
> *276. On December 18, 2008, the State reversed its earlier position and cancelled its prior approval of the 2003 transfer of TNG to Terra Raf, as well as its prior waiver of pre-emptive rights to purchase 100% of KPM and TNG, all amidst threats of termination of the Subsoil Use Contracts. Despite the Government's verbal assurances, it never granted the permit to "re-allow" the transfer of TNG's ownership to Terra Raf. From December 2008 onward, the lingering transfer and pre-emptive rights issues consumed an extraordinary amount of time, attention, and resources, and severely affected the marketability of TNG and KPM. [Kazakhstan's arbitrary reversal of its pre-emptive rights waiver, as well as its false announcements of "irregularities" at the companies and its later seizures of KPM's and TNG's assets, deprived Claimants of their ability to dispose of their investments.]*
>
> *277. […] On September 30, 2009, the State revived a dispute with KPM regarding payment of the explicitly inapplicable Crude Oil Export Tax for KPM's January 2009 exports, resulting in a purported financial penalty of over USD 10 million. (C-I ¶¶ 273 – 277, partially quoted; C-II ¶¶ 476 – 478, partially quoted; CPHB 2 ¶¶ 115 – 139).*

1119. The measures described above pale in comparison to the criminal proceedings that Kazakhstan waged against KPM, TNG, and their personnel. Claimants' employees were harassed and intimidated. They were coerced into signing inspection reports. Their families were intimidated. This harassment was in violation of the ECT. The baseless reclassification of KPM's and TNG's pipelines into trunk pipelines was the basis for Kazakhstan's prosecution of Mr. Cornegruta, and for Kazakhstan's "*conviction*" of KPM. Numerous expert reports were generated that confirmed by common sense that these pipelines had been wrongfully reclassified, and these were all rejected by the court. (C-I ¶¶ 279 – 280; CPHB 2 ¶¶ 48 - 51).

1120. The harassment and coercion constituted an illegal indirect expropriation by depriving Claimants of their incidents of ownership of KPM and TNG. (CPHB 2 ¶ 59). The constant investigations and then the conviction of Mr. Cornegruta and KPM seriously impaired the value of Claimants' investments, in a manner similar to those considered in the *Biloune* case, though more severe. The criminal proceeding cost Claimants considerably and severely impaired Claimants' right and ability to manage their investments, in particular in light of the hours and resources spent preparing Mr. Cornegruta's defense, as well as his and KPM's appeals. Kazakhstan callously argues that the imprisonment of Mr. Cornegruta had no impact on the Claimants' ability to operate their companies. Despite the fact that the Kazakh court specifically found (as if such a fact were in doubt) that while Mr. Cornegruta was in jail he "*could not fulfill any obligations related to the*

management of [KPM and TNG]," his arrest and imprisonment also caused other high-level KPM and TNG managers and personnel to flee the country, forcing Claimants to manage KPM and TNG remotely. There is, therefore, no question that Kazakhstan substantially interfered with Claimants' ability to manage KPM and TNG. (C-I ¶¶ 282 – 284; C-II ¶ 477; CPHB 2 ¶¶ 52 – 56).

> *281. In conjunction with this case, the Financial Police issued seizure orders against (i) KPM's Subsoil Use Contract, oilfield pipelines, and vehicles; (ii) TNG's Subsoil Use Contracts, and oilfield gas and condensate pipelines; and (iii) Claimants' participatory interests in KPM and TNG. These seizures were designed to prevent KPM and TNG from selling or transferring their assets during the course of the criminal proceedings, thereby preventing Claimants from disposing of their investments in Kazakhstan. Needless to say, those seizures and the criminal case massively interfered with Claimants' ability to enjoy or dispose of their investments, and they further diminished their market value. (C-I ¶ 281, partially quoted).*

1121. Kazakhstan's attempts to enforce its "*fabricated*" USD 145 million fine against KPM also resulted in the inalienability of Claimants' investments. The seizure of Claimants' operations interfered with rights under the Subsoil Use Contracts, measures that the *CME* and *Alpha* Tribunals deemed to be expropriatory. Those execution measures also led to the flight of more key personnel and further paralyzed Claimants' operations in Kazakhstan. (C-I ¶ 284).

1122. Respondent's actions, described above, placed a "*cloud*" over Claimants' title to TNG. With KPM facing a pre-ordained conviction, a baseless USD 62 million back tax assessment, and this cloud hanging over TNG, no investor could be expected to purchase the companies. Claimants also argue that Respondent maliciously defamed Claimants by disclosing information to INTERFAX. These public allegations of forgery and fraud exacerbated the above mentioned injuries, and made it difficult for Claimants to obtaining financing for their projects at reasonable rates. (CPHB 1 ¶¶ 138 – 145, 214 – 220, 346 – 357).

1123. Three baseless tax disputes — concerning assessments of back corporate income taxes, transfer pricing, and oil export duties — formed part of Kazakhstan's onslaught of harassment that commenced immediately after October 14, 2008. The "*comprehensive tax audit*" that the Financial Police ordered in October 2008 gave rise to no valid complaint regarding the companies' tax payments or filings. So at the urging of the Financial Police, the Tax and Customs Committees simply created baseless claims. First, in November 2008, the Customs Committee claimed that a previous, disputed assessment of oil export duties, in an amount exceeding USD 10 million, should be paid, despite both an initial court ruling and a previous concession from the Customs Committee that the companies were contractually exempt from such duties. Second, in February 2009, the Tax Committee claimed that KPM and TNG owed USD 62 million in corporate back taxes for failing to properly deduct drilling expenses. Third, in December 2009, it claimed that KPM and TNG owed USD 5 million in back transfer pricing taxes. None of these three claims had any merit, but were instead spurious assessment whose only purpose was to harass Claimants and to pressure them to sell KPM and TNG to the state at firesale prices. (CPHB 2 ¶¶ 127 – 134, 137).

1124. As of 21 July 2010, the Kazakh courts resolved the corporate back tax dispute and ruled that KPM and TNG owed no such taxes. Thus, Kazakhstan's assertion in its First Post-Hearing Brief that this claim continued to increase "until the valuation date of 21 July 2010" is patently wrong. To the contrary, as of July 21, 2010, KPM's and TNG's corporate back tax liability was zero (CPHB 2 ¶ 135). Kazakhstan revived the matter after July 2010 in bad faith, thereby ensuring that Claimants would have no ability to defend their position before the Kazakh Supreme Court (whose decision, in any event, was substantively incorrect). (CPHB 2 ¶ 136).

1125. Despite the Supreme Court ordering taxes due from KPM's and TNG's purported trust manager in November 2010, no collection efforts have been undertaken. Thus, it is likely that these tax actions were simply part of Kazakhstan's coordinated attack on Claimants' investments. Along with Kazakhstan's other acts of harassment and coercion, the tax assessments were measures that, in the words of the ***RosInvest*** tribunal, were "*linked to the strategic objective of returning petroleum assets to the control of the [State] and to an effort to suppress [an investor]*." Because that tribunal found that the State's measures were "*structured in such a way to remove [the investment company's] assets from the control of [the investors]*," it concluded that the State had committed an illegal, indirect expropriation. The Tribunal should not hesitate to reach the same conclusion here. (CPHB 2 ¶¶ 137 – 138).

1126. In order for the Tribunal to find that Kazakhstan breached the ECT and owes compensation to Claimants, the Tribunal need only be satisfied that the Kazakhstan's actions were unlawful and harmed Claimants' investments. While Kazakhstan's actions clearly demonstrated an intention to devalue, impair, and harm Claimants' investments from October 2008 onward, Respondent's intention is relevant for determining the valuation date. (CPHB 2 ¶¶ 44 – 45). The wrongful verdict against KPM and its assets was a measure of "*indirect expropriation*", since the enforcement destroyed what little remained of Claimants' "*incidents of ownership*" over KPM by that time. (CPHB 2 ¶¶ 97 – 114).

d. Direct Expropriation

i. Transfer of Title

1127. "*Direct*" expropriation refers to the overt seizure of a foreign investor's property or the title to such property by the host state. Respondent's argument that a formal transfer of title to the state or to a third party nominated by the state is "*the decisive element*" for the Tribunal in finding a direct, rather than an indirect, expropriation occurred is wrong as a matter of law. (C-I ¶¶ 249 – 252; C-II ¶ 459). Claimants' arguments are best taken from their own words:

> *460. The Santa Elena case, on which Claimants rely for this (undisputed) principle of international law, was cited with approval by the Telnor v. Hungary tribunal. It quoted the Santa Elena finding that "[t]here is ample authority for the proposition that a property has been expropriated when the effect of measures taken by the state has been to deprive the owner of title, possession, or access to the benefit and economic use of his property." The Metalclad tribunal similarly found that expropriation*

> *includes "open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State." Likewise, the Tecmed tribunal explained, "[u]nder international law, [direct expropriation occurs] where the use or enjoyment of benefits related thereto is exacted or interfered with . . . even where legal ownership over the assets in question is not affected. . . . " Thus, there is no requirement that Kazakhstan must have received title to Claimants' investments in order for this Tribunal to find that a direct expropriation occurred.*

> *461. Kazakhstan admits that Claimants' legal ownership of KPM and TNG and their assets were substantially affected and transferred to State control. It explains that "[u]pon termination of the Subsoil Use Contracts, the ownership rights of KPM and TNG automatically ceased to exist" and "the assets then had to be transferred to [State-owned KazMunaiGaz] so that they would be taken into trust management." That alone is sufficient to establish expropriation. By Kazakhstan's own case, Claimants lost their contracts and all the assets of KPM and TNG. That is precisely the kind of taking the Sempra tribunal, on which Kazakhstan relies, had in mind when it held that a direct expropriation requires that "at least some essential component of the property right has been transferred to a different beneficiary." (C-II ¶¶ 460 – 461).*

1128. It is beyond dispute that Kazakhstan directly expropriated Claimants' investments on 21-22 July 2010 by seizing Claimants' rights under the Subsoil Use Contracts and by seizing legal and physical control of the assets held by Claimants through KPM and TNG. The act of transferring Claimants' KPM and TNG Subsoil Use Contracts to KMG, as well as the subsoil area subject to those contracts was a compulsory transfer of title to property to the State. (C-I ¶¶ 253 – 254, CPHB 2 ¶ 196). As Respondent has confirmed, from the moment of termination, Claimants' contractual rights to ownership over the produced oil, gas, and condensate was terminated. Further, the MOG's and KMG's occupation of Claimants' offices and transfer of personnel and assets totally deprived Claimants of physical possession and control of their revenues, assets, and means of production. Claimants' description of the transfer of legal title is as follows:

> *256. Those seizures of legal title were personally instructed and overseen by the Kazakh Prime Minister, along with the Minister of Oil and Gas and the regional Governor, during their visit to Claimants' LPG plant to announce the seizures. The following day, Kazakhstan seized physical control of Claimants' investments. On July 22, 2010, Kazakhstan seized Claimants' offices, equipment, production, revenue, and other investments and operations, when a group of thirteen high-ranking officials from the MOG and KazMunaiGas arrived at Claimants' offices in Aktau, Kazakhstan. KazMunaiGas explained that government escrow accounts were being opened the same day, and "everything that has been extracted since [July] 22nd, extracted oil and payment for oil, gas and condensate - such income shall be deposited in the special account." The MOG's and KazMunaiGas' occupation of Claimants' offices and transfer of personnel and assets totally deprived Claimants of physical possession and control of their revenues, assets, and means of production. (C-I ¶ 256).*

1129. Indeed, such an outright seizure of physical assets, contractual rights, and legal title are textbook examples of "*direct*" expropriation. Hence, it is indisputable that Kazakhstan directly expropriated Claimants' investments under Art. 13 ECT and international law in July 2010. (C-I ¶¶ 255 – 257; CPHB 2 ¶¶ 178 – 179).

ii. Exercise of Regulatory Powers

1130. Respondent's argument that the unilateral termination of the Subsoil Use Contracts and its takeover of the companies was merely a normal exercise of its regulatory powers is fanciful, at best. (C-II ¶ 462).

> *464. Unilaterally terminating contracts and seizing rights and property are not the types of exercise of regulatory powers that normally exculpate a state from responsibility for harming investments protected by a treaty. Prima facie state measures comprising a lawful exercise of regulatory powers include taxation, trade restrictions, and/or measures of devaluation. But the outright taking of rights and property from an investor and transferring it to a State company — even if on a "trust management" basis until a third subsoil user can be found — is altogether different from regulating an interest of the state.*

> *463. Kazakhstan claims that its expropriatory acts were regulatory because they were in accordance with its Subsoil Law of 2010, the purpose of which was "to balance the host State's legitimate interest in furthering the wealth and well-being of its population and the investors' legitimate interest in making a return on its investment." Further, Kazakhstan contends that its regulatory powers under that Law require it to ensure that "investors [do not] take over the gas and oil production on a certain field forever but that production rights are tied to contracts which expire and have to be renegotiated regularly." (C-II ¶¶ 463 – 464).*

1131. Furthermore, the takeover was at odds with the interests allegedly expressed in the Subsoil Use Law. The takeover did not provide balance – like what may have been prior to 2008, when Claimants earned a return on their investments and paid taxes according to the Subsoil Use Contracts. After October 2008, there was no balance, as Respondent gradually took everything and left Claimants with nothing. The expropriation was aimed solely at expropriating the benefits of Claimants' production rights after Claimants had invested all the necessary time and money to make the fields productive. The July 2010 expropriation was largely a formality, formalizing Respondent's campaign of indirect expropriation. (C-II ¶¶ 465 – 468).

1132. In any event, Respondent cannot merely point to its domestic law to legalize its expropriation by way of the regulatory powers doctrine because Respondent would still be required to compensate Claimants for the taking. The Parties do not dispute that Respondent has paid no compensation to Claimants. (C-II ¶ 466).

1133. Respondent has been unable to point to any contemporaneously made allegation that would have supported its position. Instead, the justifications for the expropriation are based on snippets of witness testimony, which are contradicted by the contemporaneous evidence. (CPHB 2 ¶¶ 179 – 180).

1134. First, Minister Mynbayev's testimony at the October 2012 Hearing confirmed that the public policy grounds alleged do not justify the termination. He admitted that the inspections concluded that Claimants were in compliance with their subsoil use contract obligations. The reports also confirmed that Claimants exceeded their minimum work program for 1999 – 2009 by 6.6 times. For 2010, the MEMR noted that TNG had exceeded its contractual obligations by 3.4 times. (CPHB 2 ¶¶ 178 – 184). In any event, the alleged "*violations*" did not merit termination of the contracts. Three of the seven alleged violations against KPM were that it failed to satisfy financial obligations toward Kazakhstan. At the hearing, Claimants corrected the Respondent that KPM was accused of owing USD 114 thousand to Kazakhstan – not USD 114 million. KPM was accused of owing USD 10,000 for the liquidation and a vague amount in taxes, which KPM disputed and would not have been able to pay since the accounts were frozen. The other four grounds were completely baseless. These included that (a) KPM failed to train Kazakh specialists (at the hearing, Minister Mynbayev could not explain why this would be a valid ground for termination), (b) that KPM failed to provide information about compliance with the work program, (c) that it had breached obligations regarding the acquisition of goods, works, and services, and (d) that it operated a main pipeline without a license. The six allegations against TNG for Contract 210 were likewise meritless:

> *288. […] Like KPM, TNG explained that information regarding fulfillment of its work programs had been sent to Kazakhstan on multiple previous occasions. Kazakhstan also accused TNG of failing to provide annexes regarding the training of employees. TNG explained that those had been provided, along with its annual reports, and TNG provided them again in its July 19, 2010 response. TNG also explained that, like KPM, it had written to the Ministry of Oil and Gas to determine where to send its excess funds for training Kazakh specialists, which the Ministry ignored. In response to the claim that TNG owed some US $84,000 in historic costs, TNG explained and demonstrated that it properly paid its historic costs on a quarterly basis and that it had no arrears. TNG also explained, just as KPM had done, that it did not operate a main pipeline and that it had not breached any obligations for the acquisition of goods, works, or services.*
>
> *289. Amazingly, Kazakhstan also issued a notice of alleged violations with respect to TNG's Contract No. 302. Kazakhstan claimed that TNG had violated Contract No. 302 on five grounds: (i) the same alleged failure to provide information regarding its work program; (ii) the same supposed failure to provide annexes regarding employee training; (iii) the same contention that TNG had not trained Kazakh specialists; (iv) the false criminal allegation that TNG operated a main pipeline without a license; and (v) the same vague obligation that TNG had breached its obligations regarding the acquisition of goods, works, and services. (CPHB 1 ¶¶ 273 – 289, partially quoted).*

1135. Respondent's allegation that the Table 1-p in the English version of the MEMR inspection report, which was not provided due to a cut-off in printing, showed underperformance and mismanagement of the business is incorrect. The Russian version was provided and the missing English section does not provide any

evidence of non-compliance with contract obligations or Kazakh law. (CPHB 2 ¶¶ 184 – 185).

1136. Respondent's selective reliance on the PwC due diligence report is also unavailing. That report indicated that TNG had fallen behind on its 2008 and 2009 aspirational work programs. The MEMR also recognized that the company's aspirational working program was not the same as their minimum work obligations. Mr. Lungu admitted to no breach of the minimum work programmes, but was instead referring to the companies' own more aggressive annual work program. And this is consistent with Claimants' historic over-fulfillment of their minimum work requirements. (CPHB 2 ¶¶ 187 – 188).

1137. By summer 2009, TNG had reduced gas production in Tolkyn and this was noted by the MEMR – who did not find that the reduction amounted to a violation of contract or law. The reason for the reduction in production was due to the loss of Kemikal as a contractual partner (due to Respondent's harassment campaign) and the fact that the LPG Plant was not completed. In any event, the production slump was temporary and the production and sale of gas increased during winter 2009. (CPHB 2 ¶¶ 189 – 190).

1138. Even if there had been non-compliance with the minimum work obligations in 2009, it would be immaterial, since (i) MEMR expressly stated that there were no problems in the field as of February 2010 and that "*any falldown [or non-compliance] for certain years is compensated by the significant exceedings registered in the next or previous years*;" (ii) any failure to meet minimum work obligations would have been solely as a result of Kazakhstan's harassment and interference with Claimants' normal business operations; and (iii) any minimal "*falldown*" that may have existed was not sufficient to terminate the contracts, because it was not a reason the MOG gave for contract termination in July 2010. (CPHB 2 ¶¶ 191 – 193).

1139. Kazakhstan has provided no contemporaneous evidence that mass employee dismissals were a serious concern or that there was a risk of social tension. The opposite was confirmed in Mr. Calancea's, Mr. Condorachi's, and Mr. Ongarbayev's testimony. Payment was even made when the accounts were frozen. Upon the government's take over, 900 workers went to work for the state. (CPHB 2 ¶ 194).

1140. Kazakhstan's claims that Claimants were unwilling to cooperate with the State to cure contract breaches are misleading, given that Claimants had a mere 3 days to cure the alleged breaches and, as indicated above, by the time of the expropriation, Claimants had been appealing to multiple Government agencies since late 2008. Further attempts would have been futile. (CPHB 2 ¶ 195).

1141. Importantly, in Minister Mynbayev's testimony, it was revealed the allegations for breach of Contract 302 actually reveal that Kazakhstan considered that it had been extended, because otherwise it would have expired in March 2009. Furthermore, since it was an exploration contract, Claimants did not own or operate any transport pipelines. (CPHB 1 ¶¶ 290 – 292).

2. Arguments by Respondent

a. Law on Expropriation

1142. Respondent agrees that expropriation is governed by Art. 13 ECT. (R-I ¶ 33.4).

1143. Respondent also highlights that expropriation needs to be differentiated from valid government activity. Respondent implies that, since no expropriation occurred, the four factors presented in Art. 13 ECT are irrelevant. Quoting *Marvin Feldman v. Mexico*, Respondent states that "*the essential determination is whether the actions of the Mexican government constitute an expropriation or nationalization, or are valid governmental activity. If there is no expropriatory action, factors a-d [i.e. (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and article 1105(1); and (d) on payment of compensation] are of limited relevance, except to the extent that they have helped to differentiate between governmental acts that are expropriation and those that are not (…)*." (R-II ¶ 892).

1144. Respondent committed no due process violations with respect to the non-extension of Contract 302 and the 9 April 2009 letter did not oblige the MEMR to enter into an addendum for Contract 302. Claimants are incorrect to allege that Messrs. Mynbayev and Ongarbaev supported Claimants' interpretation of the 9 April 2009 letter. Mr. Ongarbaev never testified that MEMR had decided to extend Contract 302, but rather than the decision to recommend extension was made. (RPHB 2 ¶¶ 296 – 305). Minister Mynbayev's testimony was mistranslated:

> *304. When Minister Mynbaev explained that the decision of the Export Commission had only recommendatory character, he was translated to have said that it gave recommendations as to whether the subsoil user may count on the extension or not. However, the Russian verb «**paccgHTbIBaTb Ha**» translated into English as "count on" was used by the witness in the ordinary meaning of «**HageATbcA Ha**», or English "hope for". And certainly, a decision of recommendatory nature may raise hopes but it cannot give rise to legitimate expectations. (RPHB 2 ¶ 304, emphasis in original).*

1145. Claimants created the irregularities in the title to TNG when they wrongly asserted that Respondent's pre-emptive rights did not apply to the Gheso – Terra Raf transfer. There were 8 transfers involving a majority interest in TNG, and the consequence of failure to obtain consent in any of those transfers is that none of the transfers involving Claimants' companies were completed. The belated consent to one transfer does not cure all previous failures to obtain consent. (RPHB 2 ¶¶ 272 – 281).

b. Exhaustion of Remedies

1146. Respondent argues that Claimants' expropriation arguments are precluded by Claimants' failure to pursue available remedies in pursuance of their contractual claims or domestic legal claims. After every alleged action, KPM and TNG could have turned to the contractually agreed upon arbitral tribunals or to the Republic's domestic courts, and they chose not to do so. (R-I ¶ 33.6; R-II ¶ 865).

1147. Turning first to Claimants' contractual claims and citing *Waste Management and Parkerings v. Lithuania*, Respondent presents that an expropriation of contractual rights is not perfected until available remedies to address the alleged contractual breach have been pursued. (R-I ¶¶ 33.7 – 33.10; R-II ¶¶ 865 - 866).

1148. Claimants' claims for actions making up the direct expropriation and many claims regarding the indirect expropriation are contractual in nature. These actions include (1) the refusal to prolong Contract 302, (2) the termination of Contract 302, (3) the Republic's alleged refusal to apply contractually agreed amortization rates leading to an assessment of back taxes and penalties of USD 69 million, (4) the alleged non-application of a contractually agreed exemption to the Crude Oil Export Tax, and (5) the alleged revocation of the Republic's purported approval of the transfer of TNG to Terra Raf. These claims each fail for the simple reason that in each and every case, the Claimants – alone or through TNG and KPM – could and should have pursued these claims by way of arbitration, as agreed in the Subsoil Use Contracts and Contract 302. To be clear: the present arbitration does not satisfy the contractual requirements. (R-I ¶ 33.17 – 33.22; R-I ¶ 33.22 represents that KPM and TNG would be suing).

1149. In respect of domestic law, so long as the state provides effective remedies for breaches of domestic law, an expropriation cannot occur so long as the investor's attempts at pursuing those remedies have not failed. Respondent cites *Generation Ukraine v. Ukraine* and *EnCana v. Ecuador* in support of this position and summarizes that there have been several reasons that lead tribunals consider that a failure to pursue available remedies is fatal to an expropriation claim:

(a) Non-performance of a contract - and thus also termination of a contract - does not amount to an expropriation of the rights stemming from the contract as long as the loss of the right is not final, i.e. ultimately determined by the appropriate forum.

(b) An act of maladministration at the lowest level cannot amount to an expropriation. Otherwise, investors could invoke any minor mistake at the local level and bring investment arbitration claims.

(c) Tribunals generally are less knowledgeable about domestic law than domestic courts. Thus, in the absence of a valid reason for a failure to bring the claim to the appropriate forum, such failure puts into doubt that a right was actually taken from the investor. (R-I ¶¶ 33.10 – 33.15; quoting ¶ 33.15).

1150. Claimants' other indirect expropriation claims could have and should have been addressed in domestic courts, which were open to Claimants. Claimants never pursued all available appeals against lower-instance decisions. (R-I ¶¶ 33.23 – 33.26; RPHB 2 ¶¶ 265 – 271). With regard to the prosecution of KPM, Claimants never exhausted the appeals system within the Republic, which stood open to Claimants. KPM missed the deadline to appeal. It was the Court's view that KPM had notice of the decision against it, since its senior management was present at the hearing. (R-II ¶ 635 – 638). This excludes the notion of expropriation. (R-I ¶ 34.9).

1151. Claimants' position that the contracts precluded them from submitting breaches of contract to domestic courts is untenable. Claimants base their allegation that Contracts 210 and 302 provided for arbitration before the SCC was based on an alleged footnote in Maiden Suleymenov's chapter in "*Oil and Gas Law in Kazakhstan*." Suleymenov, however, states the opposite of what Claimants allege. (R-II ¶¶ 870 – 873).

> *874. Article 28 (2) of Contract No. 305 does indeed refer the parties, i.e. KPM and the Republic, to the SCC. However, the requirement for KPM to refer disputes to the SCC does not mean that "KPM and TNG would first have to commence arbitration proceedings at the Stockholm Chamber of Commerce for another international tribunal to determine whether Kazakhstan's actions amount to a breach of contract under Kazakh law". Firstly, only KPM is a party to Contract No. 305. Secondly, Claimants seem to suggest that the tribunal in the SCC proceedings would need to render a declaratory award in favor of KPM and on that basis, Claimants could then pursue their claim under the ECT. This is clearly not the case. Instead, there would only be two proceedings if KPM were unsuccessful in the SCC arbitration and Claimants then decided to pursue their claim under the ECT nonetheless. This is not at all "absurd". (R-II ¶ 874, emphasis maintained).*

1152. Respondent states that, having shown that remedies were available, it is for Claimants to prove their assertion that resort to local remedies would have been futile. Claimants have not even alleged that recourse to arbitration for the acts that they consider to be "*indirect*" expropriation would have been futile. The Republic refutes Claimants' contention that arbitration as a remedy against termination of the contracts would have been futile from the outset. Furthermore, Claimants have not explained why a tribunal constituted pursuant to the Subsoil Use Contracts would not have addressed their complaints. Finally, regarding Claimants' final futility argument regarding maladministration, Claimants cannot base any argument on their allegation that the termination notices were a result of a notification by the President of the Republic, which they were not. (R-II ¶¶ 875 – 878).

1153. Claimants misrepresent the contents of the decision taken in the *Helnan* annulment. *Helnan* was not an easy, one-way decision, but it was a quite nuanced ruling, striking a balance between an investor's interest in pursuing treaty arbitration and a state's interest in not being held liable for decisions of low-ranking officials. In pertinent part, that Tribunal stated "*Of course, a claimant's prospects of success in pursuing a treaty claim based on the decision of an inferior official or court, which had not been challenged through an available appeal process, should be lower, since the tribunal must in any event be satisfied that the failure is one which displays insufficiency in the system, justifying international intervention*." (R-II ¶¶ 866 – 867).

1154. Claimants allege that the Republic has failed to differentiate between treaty claims and contract claims. In response, Respondent state that, "*[o]bviously, a claim under a treaty is something quite different to a claim under a contract. However, this in no way precludes the fact that available remedies have to be pursued*." (R-II ¶ 869).

1155. In response to Claimants' fork-in-the-road argument, Respondent explains that TNG and KPM – as distinct parties from Claimants in this arbitration, needed to have pursued their own contractual remedies, prior to Claimants' initiation of proceedings. This would not have triggered the fork-in-the-road clause for Claimants, as was explicitly held in *CMS v. Argentina*.

c. Indirect Expropriation

i. General Principles and Jurisprudence Regarding Indirect Expropriation

1156. Indirect expropriation describes the rare situation in which no transfer of title occurs but the host State's measures nonetheless are "*tantamount*" to expropriation or have an equivalent effect. (R-I ¶ 35.2). The main criterion for a finding of an indirect expropriation is the effect that a governmental measure has on the rights of the investor. As stated by the tribunal in *Tecmed v. Mexico*:

> *[…][M]easures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are* ***irreversible and permanent*** *and if the assets or rights subject to such measure have been affected in such a way that "…****any form of exploitation thereof…" has disappeared****; i.e.* ***the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed****." (R-I ¶ 35.3, citing Tecmed v. Mexico, emphasis in original).*

1157. In order to succeed in their allegation that the inspections from October 2008 – March 2009 amounted to an expropriation, Claimants must demonstrate that the interference was in fact equivalent to an expropriation. Respondent argues that it did not interfere with the day-to-day management of KPM and TNG. Rather, the inspecting agencies made every effort to not disrupt the business of KPM and TNG, and Claimants have not proven that their day-to-day business was seriously disrupted, despite requests that they meet this burden of proof. Occasional and legitimate inspections and audits, clearly, do not prevent investors from directing the day-to-day operations of the investments, and Claimants have not proven otherwise. (R-I ¶¶ 35.21 – 35.23; R-II ¶¶ 907 - 910).

1158. In addition, at the Hearing on Jurisdiction and Liability, then-General Director of TNG, Mr. Cojin, stressed that the Financial Police "*could not disturb us too often because we were very busy with production [...]*." (RPHB 2 ¶ 23).

1159. It is noteworthy that the Claimants have not complained – and indeed cannot complain – that the laws in and of themselves were expropriatory. If the laws themselves are not expropriatory, only there misapplication can be. Hence, a showing of lawfulness under domestic law will preclude a notion of expropriation. (R-I ¶¶ 35.9 – 35.10, partially quoted).

1160. Finally, other tribunals have formulated further requirements for the State's right to regulate, including due process of law and non-discrimination. Respondent also cites *Azurix v. Argentina*, where the Tribunal held that no indirect expropriation had occurred because the impact on the investment due to the State's measures

was, in the aggregate, not attributable for the loss to the claimant, which still had control over the investment. Likewise, in *LG&E v. Argentina*, the tribunal found that there was no expropriation because the investor had not lost control over the investment. (R-II ¶¶ 901 – 903).

1161. Finally, the Republic's alleged reversal of its pre-emptive rights waiver (which Respondent denies) and its supposedly false announcement of irregularities did not deprive Claimants of their ability to dispose of their investment. (R-II ¶ 918). Respondent lawfully revoked its authorisation of the transfer from Gheso to Terra Raf. None of the alleged problems with Claimants' disposal of their assets were Respondent's doing. (R-II ¶ 919; RPHB 2 ¶ 272 – 281).

ii. Right to Regulate

1162. Prominent scholars in international law, including Ian Brownlie, Prof. Sornarajah, and Prof. Böckstiegel also agree that legitimate regulatory actions do not constitute a compensable expropriation. Extensive practice in international investment arbitration has also shown that valid state regulation is non-compensable. (R-II ¶¶ 950 – 956).

1163. A determination of whether there has been an indirect expropriation, even in cases similar to *Tecmed*, is limited by a state's police powers. Losses incurred by the investor which are "*incidental to the normal operation of laws of the State*" may be non-compensable. (R-I ¶¶ 35.5 – 35.6).

1164. The sovereignty of the state over its natural resources includes the right to regulate, and this has been confirmed in the Preamble to the 1991 European Energy Charter, the 1975 Helsinki Declaration, as well as other treaties. The laws of the host state are highly relevant, and the investor is entitled to compensation only for those damages, actions, or omissions by state bodies or officials that are contrary to the host state's legislation. (R-II ¶¶ 922 – 926).

1165. Respondent explains that a regulatory action does not constitute compensable expropriation. The definition of expropriation as provided in the Convention that establishes the Multilateral Investment Guarantee Agency, to which 176 states are party, defines expropriation in general terms, excluding "*non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activities in their territories*." (R-I ¶¶ 927 – 932).

1166. This is confirmed by Art. 1 of the Protocol 1 to the European Convention of Human Rights (1952), which states that the "*enforcement of laws, necessary to control the use of property in accordance with the general interest cannot constitute a compensable taking*."

1167. The approach taken by the ECtHR should be of guidance to this Tribunal. Respondent presents cases under the ECtHR where compulsory alienation of property, the imposition of a duty, or the withdrawal of a license, tax sanctions for violations of tax legislation, was found to be non-expropriatory. (R-I ¶¶ 933 – 940). The case practice of the ECtHR is relevant here, as that Court hears investment claims and its cases demonstrate that a deprivation of property in the form of fines, taxes, etc., does not constitute an expropriation and does not require

compensation. States are given a wide margin of discretion in determining the public interest and the measures required in the pursuance of these interests. The ECtHR first considers whether the measures were lawful under the laws of the host state and evaluates whether the law was sufficiently available, specified, and predictable. The ECtHR emphasizes throughout that its competence for assessment of the lawfulness of state authorities' actions is limited. Second, the ECtHR assesses measures in respect of their proportionality, taking into account the wrongfulness of the applicant's conduct, the interests of the host state and the investor, the requirements of public interests, and the requirements of protection of fundamental freedoms. (R-II ¶¶ 940 – 949).

1168. All of the measures at issue concerned the lawful enforcement of laws that are necessary to regulate the hazardous and strategically important exploration and extraction of oil and gas. (R-II ¶¶ 904 – 905). Contrary to Claimants' assertion, there was no "*campaign of harassment and coercion designed to undermine and interfere with Claimants' management and control of KPM and TNG.*" Rather, the measures at issue were legitimate and the state was entitled to regulate. (R-I ¶¶ 35.15, 35.20; R-II ¶ 906).

iii. Acts Allegedly Amounting to An Indirect Expropriation

1169. Claimants incredibly and wildly assert that various alleged treaty breaches, slowly and quickly, individually and/or in combination, breached the ECT. Respondent explains that Claimants have argued that the following actions individually and cumulatively amount to an indirect expropriation of Claimants' rights in KPM and TNG: (1) the Republic's refusal to prolong the exploration rights under Contract 302, (2) the assessment of back transfer price taxes and back taxes on corporate income, (3) the alleged revocation of the purported approval of the transfer of TNG's shares to Terra Raf, (4) the dispute about the application of the Crude Oil Export Tax, (5) the classification of KPM's and TNG's pipelines as trunk pipelines, (6) the ensuing trial and conviction of Mr. Cornegruta and the verdict against KPM, and (7) the seizure orders against KPM and TNG. (R-I ¶ 35.11). The assertions have changed so frequently that they are not credible. (RPHB 2 ¶¶ 419 – 423).

1170. Respondent also notes that "*Claimants have clandestinely dropped all relevant tax measures from the list of alleged expropriations and only mention them in a footnote in this section in which they claim that they had been deprived of their ability to dispose of the investment. Apparently, Claimants have come to the conclusion that the tax measures cannot constitute an expropriation and quite rightly so. The taxation measures do not fall within the jurisdiction of the Tribunal. In any event, the tax measures do not constitute expropriations under Article 13 ECT*." Further as has been demonstrated, the Tax Committee's assessment of corporate back taxes was legitimate, the 2008 crude oil export duties were lawful and were not paid by TNG, and the 2009 duties were withdrawn before either KPM or TNG made any payment. Respondent further states that "*the taxation measures were not expropriatory because neither was an 'acquired right' taken from Claimants nor could the tax measures be said to 'frustrate the complete operation of [Claimants'] activities in [Kazakhstan].*'" (R-II ¶ 920 - 921).

1171. Respondent's arguments and points on indirect expropriation are best taken from its own words:

> *899. The Republic did not indirectly expropriate Claimants. Even Claimants do not seem to be certain which measure is supposed to have indirectly expropriated them when they refer to "expropriatory conduct over the October 2008-July 2010 period". They later enumerate four allegedly expropriatory measures taken by the Republic but remain very elusive as to whether each of these measures is supposed to have constituted an expropriation or whether they collectively expropriated Claimants: Firstly, the Republic allegedly interfered with the day-to-day management of KPM and TNG when the Financial Police "commandeered" their offices from October 2008 - March 2009, secondly, the Republic allegedly deprived Claimants of their ability to manage their companies by arresting KPM's General Director in April 2009 and "hunting" other KPM and TNG senior officials, thirdly, the cumulative effect of Kazakhstan's alleged harassment campaign, including the refusal to execute the extension of Contract No. 302 supposedly deprived Claimants of their ability to prove their reserves and finally, the Republic's alleged reversal of its pre-emptive rights waiver and its supposedly false announcement of irregularities are said to have deprived Claimants of their ability to dispose of their investment.*
>
> *900. Claimants mischaracterise the Republic's actions in each of the above cases. Ironically, in the first two cases, the Republic's actions related to the need to investigate and later to punish the Claimants own misdeed or that of KPM and TNG and their employees. In each case, all measures taken by the Republic were legitimate and a legal applications of Kazakh law which were not expropriatory in nature. In any event, none of the measures even came close to the effect of a taking. (R-II ¶¶ 899 – 900; see also R-I ¶¶ 35.11 – 35.12 listing Claimants' claims)*.

1172. Claimants operated trunk pipelines without a license, at least since 2002. Mr. Cornegruta wrote to the MEMR in May 2008 to apply for a trunk pipeline, but the application was incomplete. The investigation that led to this conclusion demonstrates clearly that nothing about the criminal charges against Mr. Cornegruta was premeditated – the relevant agencies (MEMR and the Financial Police) operated independently of one another and, on 15 December 2008, the Financial Police opened a criminal investigation based on reasonable suspicions that KPM was operating a trunk pipeline without a license. This investigation was based on the following evidence: (1) letters from KPM and TNG to the MEMR requesting the re-issue of a licence, (2) a letter from KPM to ARNM requesting the re-issue of a licence, (3) a geological committee report, (4) a letter from ARNM confirming that KPM and TNG held no licenses for trunk pipelines, (5) an expert review based on a similar pipeline, and (6) the design documentation for the pipelines. Witnesses were interviewed and there was a physical examination of the pipeline. Mr. Rakhimov of the Financial Police finally obtained an expert opinion from Mr. Baymaganbetov on 13 February 2009 about whether the pipelines were, indeed, trunk. Mr. Baymaganbetov reviewed four reports provided to him by the Financial Police and, although he was free to seek out other opinions, he did not. Claimants' four expert opinions were not shown to him because their independence could not be verified and they risked compromising his independence. Claimants' reliance on 5 opinions from other governmental agencies fared just as well, since

Claimants filed to provide the scope of the request for the issuance of those opinions, the agencies may have been involved in the design or other aspects of the pipeline and, most importantly, none of them were appointed in accordance with Art. 243 CPC. (RPHB 2 ¶¶ 151 – 207).

1173. To repeat from above, the conclusion that the at-issue pipelines were indeed trunk pipelines is both legally and factually correct. The Parties' witnesses agreed on the legal definition of a trunk pipeline, which is provided in the Law on Oil. Importantly, the Parties have agreed that the relevant section of pipeline extends beyond the Contract Area, for which KPM never had a license. Claimants' allegation that they had all of the licenses that they needed can only be true if they demonstrate that they have only field pipelines – a type of pipeline that cannot go beyond the Contract Area. Contrary to Prof. Suleymenov's opinion, the classification of a pipeline is not a matter of industry analysis or the visual size of the pipeline. The Parties' experts agree that it is a question of law. Since "*(i) the KPM Pipeline extends beyond the Contract Area (i.e. it is not a field / contractors pipeline), (ii) third party oil as well as commercial oil is carried by the pipeline, (iii) that the oil is commercial, and (iv) that the oil is transported to places of transshipment, transport, processing or consumption*", the pipeline is a trunk pipeline. Claimants' new assertion that the Law on Oil excludes pipelines that are involved in the single technological process of oil and gas production from the classification as "*main pipelines*" is incorrect and is based on a mishearing of Mr. Romanosov's testimony. (RPHB 2 ¶¶ 219 – 236).

1174. It is to be noted that Claimants always had the duty to obtain a license for operation of a trunk pipelines before operating one. Claimants knew of the licensing laws and it would have been easy for them to seek clarification if needed. Their most recent application was incomplete and Claimants chose not to procure a license. (RPHB 2 ¶¶ 208 – 218).

1175. Penal measures following the violation of a criminal statute cannot give rise to a compensatory taking. Mr. Cornegruta was prosecuted and convicted in accordance with due process and Kazakh law. His conviction cannot constitute an indirect expropriation, and Claimants have not demonstrated how his absence affected the "*promoting, financing, and managing*" of the investment. In this regard, the *Biloune* case, cited by Claimants, is easily distinguishable from this matter. There, the claimant (Biloune, the investor) had a central role in promoting, financing, and managing the investment, and was expulsed from the host state. Here, however, Claimants have not even attempted to show to what extent Mr. Cornegruta had a central role, or how his absence made it impossible to pursue KPM's investment activity. Claimants have only made the less forceful assertion, that he was only an employee. This case is, thus, clearly distinguishable from *Biloune*. Respondent rejects Claimants' assertion that it was "*hunting*" KPM and TNG senior officials. (R-I ¶¶ 35.17 – 35.18; R-II ¶¶ 911 – 913).

1176. Kazakh law uncontestedly provides for the recovery of income obtained by means of illegal activity. Such recovery is necessary to address unjust enrichment obtained by criminal means. As KPM earned income from its general manager's criminal behaviour, namely the illegal operation of a main pipeline without a license, it was the natural consequence that the court ordered the recovery of this income. Kazakh law foresees recovery of illegal income from a company, even

where the company is not named as a party in the criminal case, and there is no requirement that the Republic bring a civil claim in order to recover this unlawful income. The amount of illegal income received in the course of illegal entrepreneurial activity is unjust enrichment. (RPHB 2 ¶¶ 243 – 261).

1177. Claimants' criticism that the recovery was disproportionate misses the mark: the goal is to address and negate the unjust enrichment that results from the crime, not to punish the crime. The unjust enrichment is not limited to the hypothetical income for providing crude oil transportation services. Squire Sanders assessed the amount subject to recover to be reasonably over USD 80,000,000. (RPHB 2 ¶¶ 262 – 264).

1178. In response to cases cited by Claimants, Respondent states as follows:

> *914. In Benvenuti & Bonfant v. Congo the Tribunal held that the investor had been expropriated because the army had seized the premises of a bottling factory. The only relevance of the fact that the manager had fled the country due to the risk of criminal proceedings was that this was one of the arguments to refute Congo's allegation that the investor could return anytime to take repossession of his property.*
>
> *915. Likewise, the facts in Biwater Gauff (Tanzania) Ltd. v. Tanzania bear no resemblance to the case at hand. In this case, the investor's senior management was forcibly deported from Tanzania while simultaneously the premises of the investor were seized. This does not compare to the lawful prosecution and conviction of Mr. Cornegruta. (R-II ¶¶ 914 – 915).*

1179. In response to Claimants' allegation that they were deprived of the ability to prove reserves, Respondent states as follows:

> *916. The cumulative effect of Kazakhstan's alleged harassment campaign, including the refusal to execute the extension of Contract No. 302 did not deprive Claimants of the ability to prove reserves.*
>
> *917. The Republic has demonstrated that no such harassment campaign existed. The non-extension of Contract 302 cannot constitute an indirect expropriation. It is telling that Claimants' consider the non-extension to be both a direct and an indirect expropriation when in fact it does not constitute a taking at all. Contract 302 expired on 30 March 2009. Vain hope to prolong a contract cannot constitute a taking and as demonstrated above, Claimants did not obtain a right to prolong the contract. (R-II ¶¶ 916 – 917).*

1180. The 9 April 2009 letter did not oblige the MEMR to enter into an addendum for Contract 302. In any event, TNG's successful application for a renewal of its license would have been a pre-requisite to such an extension. The subsoil use contract and the license for subsoil use are different documents with different natures. The fact that the MEMR is both the Competent Authority and the Licensing Authority did not abolish the need to amend existing licenses, nor did it change the procedure for such amendments. Mr. Suleymenov's last minute expert submission provides no support for Claimants' unfounded allegation that the MEMR agreed to extend Contract 302 and to execute an extension. As explained

by Prof. Ilyassova, the decision of the Expert Commission to recommend extension is part of the Competent Authority's internal process and cannot be equated with a decision to actually extend, nor can the letter of 9 April 2009, since it was not ordered by the Minister. (RPHB 2 ¶¶ 292 – 305).

1181. In addition, Claimants would not have been able to prove reserves, as they allege. Even if the Contract 302 had been extended, TNG would have been bound by the working program of 14 October 2008 and the draft addendum of 30 April 2009, which only contained exploratory work on Munaibay and Bahyt. Neither contained a reference to the Interoil Reef. Claimants' allegation that TNG would not have been bound by these working programmes is contrary to the testimony of their own witnesses and their opening statement. These were not "*minimum*" working programs, but were working programs. Addendum 5 to contract 302, Art. 3.3 does not contain the word "*minimum*" – the relevant Law on Oil and the Subsoil Law in force from October 2008 to March 2011 and the terms of Contract 302 would have required changes to the work programme if the subsoil user intended to go beyond the agreed working program. (RPHB 2 ¶¶ 319 – 328).

1182. The non-extension of Contract 302 made no interference with Claimants' ability to use and dispose of their investments. The subsoil belongs to the State and, as of 30 March 2009, Claimants lost all right to that area because they failed to declare a commercial discovery. (RPHB 2 ¶¶ 329 – 330).

1183. The tribunal in *LG&E* respected the State's power to adopt measures having social or general welfare purposes. That tribunal stated that, such a measure must be accepted without the imposition of liability, except where such a measure was obviously disproportionate. The tribunal in *Tecmed* considered the issue of proportionality:

> *[T]he Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, **whether such actions or measures are proportional** to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. Although the analysis starts at the **due deference** owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of [the expropriation provision of the BIT] to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. **There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.** (R-I ¶¶ 35.7 – 35.8, partially quoted, emphasis maintained).*

1184. Respondent reminds the Tribunal that KPM and TNG repeatedly broke Kazakh law by making incorrect tax assessments and operating a trunk pipeline without a license. The audit requests were reasonable given the strong suspicions of wrongdoing. Respondent states that it was Claimants' own fault that the authorities started investigations. (R-I ¶ 35.14).

d. Direct Expropriation

i. Transfer of Title

1185. A direct expropriation requires a transfer of title. Here, Claimants have conceded that no transfer of title took place. Since there was no transfer of title, no direct expropriation occurred. (R-I ¶¶ 34.2 – 34.3; R-II ¶¶ 879 – 881, 888 – 890).

1186. Respondent at no point in time expropriated Claimants' assets. Given the numerous violations of the Subsoil Use Contracts, Respondent had no choice but to terminate the contracts and to transfer the contractual territory of KPM and TNG into trust management. Proceeds from the operation of the fields are held in an escrow account. (RPHB 2 ¶¶ 415 – 417).

1187. Respondent explains how the transfer of KPM and TNG to state custody did not constitute a transfer of title and, therefore, was not an expropriation:

> *34.5 […] Upon termination of the Subsoil Use Contracts, the ownership rights of KPM and TNG automatically ceased to exist. Under Article 72(10) of the Subsoil Law (Exhibit R-152) and due to the circumstances set out in detail above, the assets then had to be transferred to KMG so that they would be taken into trust management.*
>
> *34.6 As explained above, and unlike in certain common law national jurisdictions, this does not entail any transfer of the title of the assets, although, under the provisions of the law, the trust manager is entitled to possess and use the facilities and equipment. This arrangement is set up so as to enable continuing production.*
>
> *34.7 Therefore, there is no transfer of title envisaged under article 72(10) of the Subsoil Law. Moreover, the subsoil user has the opportunity to have its contract reinstate. Where this is not possible or desired, the contract can be transferred to a new subsoil user with the assets. At this point, the payment of the subsoil users' costs and its property must be provided for in the new agreement.*
>
> *34.8 This does not amount to an expropriation. Rather, an inherent limitation in the rights held by KPM and TNG came to bear. Moreover, there are opportunities for compensation within provided for within the mechanism. (R-I ¶¶ 34.5 – 34.8).*

1188. Respondent presents that Claimants have mis-cited *Telnor v. Hungary*, which considered not a direct expropriation, but a creeping expropriation. Likewise, Claimants' citation of *Metalclad* is also misleading, as that tribunal did not differentiate between direct and indirect expropriation. Instead, the tribunal in *Metalclad* enumerated several actions that could amount to an expropriation – direct and indirect. It, therefore, cannot be relied upon to identify the requirements for a direct expropriation.

1189. Respondent argues that *Tecmed* concerns indirect *de facto* expropriation and accuses Claimants of inserting the quote "*direct expropriation*" in brackets

throughout their quotation of that text, and states that they, instead, should have inserted the phrase "*indirect expropriation*" to correctly quote the tribunal in that case. (R-II ¶¶ 882 – 887). Finally, the *Santa Elena* tribunal merely explained the general principles of expropriation and – without differentiating between direct and indirect expropriation – affirmed that in some cases (indirect expropriation cases), expropriation can occur without a formal transfer of title. (R-I ¶ 34.4).

1190. With respect to the LPG Plant, it is even more obvious that there was no expropriation since TNG still owns the plant and the plant was not transferred into trust management. (RPHB 2 ¶ 418).

ii. Exercise of Regulatory Power

1191. International law recognizes that, even in cases involving a transfer of title, there is not always an "*expropriation.*" States, in an exercise of their sovereignty, can take measures without being obliged to compensate investors, as explained by the *S.D. Myers* tribunal. Expropriatory acts must be differentiated from valid governmental activity. Here, the termination of the Subsoil Use Contracts, the non-extension of Contract 302, and the transfer to trust management of KPM's and TNG's assets were dictated by and consistent with Kazakh law and, thus, were a legitimate exertion of the Republic's regulatory power. (R-I ¶¶ 34.10 – 34.13; R-II ¶¶ 891 – 892). The assets have been protected and the monies held in escrow, where they will remain until a new subsoil user is found. (RPHB 2 ¶ 373).

1192. First, the non-extension of Contract 302 cannot constitute an expropriation, as it did not take anything from the investor. Second, the termination of the Subsoil Use Contracts cannot be a direct expropriation, as it was mandated by Kazakh law. The same is true for the transfer of the contractual territory into trust management – an action that was a legal consequence of KPM's and TNG's misconduct. (R-II ¶¶ 893 – 895; RPHB 2 ¶¶ 329 – 330).

1193. Claimants explain that an action that is legal under local law cannot constitute a treaty breach unless that law itself breaches the treaty. Claimants have not argued otherwise and, thus, concede that the relevant Kazakh laws are in accordance with international law. This is true, despite Claimants' arguments that the Republic cannot rely on domestic law to legalize the taking because the Republic must still provide compensation. As explained, neither the Republic nor any other state entity ever owned the contractual territories. Any compensation will be in the contract entered into with the new subsoil user that would compensate KPM and TNG. (R-II ¶¶ 896 – 897).

1194. Finally, Respondent states that any claim for expropriation must fail, because Claimants' own actions and external events were relevant in the demise of the companies. (R-II ¶ 898).

1195. Claimants were in continuing and serious breach of Contracts 210 and 305 as a result of their operation of a trunk pipeline without a license, their breaches of tax laws, their failure to comply with KPM's and TNG's minimum working programs, among others. Claimants have not disputed that KPM and TNG were in violation of labor laws in early 2010. In addition, Claimants' treatment of the fields can accurately be described as "*barbaric*." The actual work promised under the

working programs – like the drilling of wells - was not carried out, despite alleged financial investment in KPM and TNG (investment which, nevertheless, was insufficient from 2007 – 2009). Claimants' arguments that KPM and TNG were given "*a clean bill of health*" are without merit. Minister Mynbayev's testimony expressly confirmed that prior to the June 2010 inspections, Claimants were in breach. He also stated that, by July 2010, the situation was no longer tolerable. (RPHB 2 ¶¶ 339 – 349).

1196. The Republic, due to the breaches of environmental law, reports of Claimants' failure to pay salaries and reports of mass employee dismissals, and the poor conditions in the field, was obliged if not entitled to carry out inspections of KPM and TNG in June and July 2010. These inspections revealed additional serious violations of Contracts 210 and 305 by KPM and TNG. (RPHB 2 ¶¶ 350 – 352).

1197. The severity of the breaches of Contracts 210 and 305 left the Republic with no option but to act and serve notices of breach. Although they had previously been given opportunities to cure, their responses to the 14 July 2010 notice for breach on 19 July 2010 was inadequate and focused only on procedural reasons to challenge termination. For example, Claimants claimed "*force majeur*" for their failure to make payments related to KPM and TNG's historical costs, KPM's contributions to the Kazakh liquidation fund, and KPM's tax obligations due to the fact that KPM's accounts were frozen as a result of the execution of the recovery order for the operation of a pipeline without a license. The execution orders were not *force majeur* and, allegedly, they did not (as Claimants state) prevent Claimants from paying employees. Importantly – Squire Sanders also raised the issue of payment of historical costs by KPM and TNG, as well as other failures to meet obligations regarding the acquisition of goods, works, and services, in its June 2009 report. (RPHB 2 ¶¶ 353 – 358).

1198. In addition, Claimants neglected and mistreated the investment, having effectively abandoned it. There were reports of salaries not being paid, complaints about KPM and TNG's treatment of the fields, and reports that production had stopped. Claimants provide not support for their argument that these were "*post hoc*" justification for termination. There were quite clearly social problems and issues that were being experienced in June and July 2010, due to KPM and TNG's failure to pay wages. Claimants have misquoted Mr. Ongarbaev that there was no risk of unemployment, since employees would just be re-hired under trust management. Claimants quote GCA for support of the statement that the fields were in good condition, but this is inaccurate – GCA only referred to the facilities being "*adequate for the region*." (RPHB 2 ¶¶ 359 – 366).

1199. The Republic terminated Contracts 210 and 305 in accordance with the law. The Republic fully complied with Section 38 of the Law of Private Business when conducting inspections and Claimants always had the right to appeal the inspections reports. They failed to appeal within the permitted three days. Claimants' attempts to contest the very different Notices of Breach served under Subsoil Law 2010 cannot be said to be an appeal of the Acts of Inspection pursuant to the Law of Private Business. In any event, contrary to Claimants' position, a breach of the Law of Private Business would not result in a breach of Art. 72 of the Subsoil Law 2010, pursuant to which the Contracts were terminated. The two laws are different and there were grounds for termination arising from the monitoring of

KPM and TNG as well as for the inspections in June and July 2010. (RPHB 2 ¶¶ 367 – 368).

1200. Claimants' arguments, based on Mr. Suleymenov's testimony that there was a conspiracy behind the timing of the termination and the date the Subsoil Law 2010 was passed have not been proven. The law was heavily debated and took almost two years to pass. Mr. Suleymenov's opinion is irrelevant in this arbitration. (RPHB 2 ¶ 369).

1201. Claimants were given enough time to respond to the Notices of Breach and were aware of the many breaches set out therein. They participated in the July 2010 audit and were regularly involved in findings. The limited period for response was also justified by the breaches of monetary obligations and the requirement to provide information. Since production had nearly stopped, there was little chance of employees being paid, as senior managers left the country. Delay was not an option for the Republic. Claimants, however, made no attempt to seek an extension to the deadline and responded – insufficiently – within the period. (RPHB 2 ¶¶ 371 – 372).

3. The Tribunal

1202. It is the Tribunal's task to decide on the relief sought by Claimants, as recorded above in a separate chapter of this Award:

- *A declaration that Kazakhstan has violated the ECT and international law with respect to Claimants' investments;*

- *Compensation to Claimants for all damages they have suffered, as set forth in Claimants' Statement of Claim and Reply on Quantum and as further updated at the January 2013 Hearing and in Claimants' First Post-Hearing Brief, corresponding to the following amounts:*

1203. Regarding the first relief sought and repeated above, a declaration that Respondent has violated the ECT is possible already after a breach of the FET obligation has been found by the Tribunal.

1204. Regarding the second relief sought repeated above, if such damages are granted on the basis of one particular ECT provision, there is no need for the Tribunal to examine further whether the same relief would also have to be granted on the basis of another ECT provision.

1205. Since, in a previous chapter of this Award, the Tribunal has come to the conclusion that Respondent is liable for breach of the FET standard in Art. 10(1), it only needs to examine a possible further breach of Art. 13 by expropriation, if there are any further damages sought by Claimants not covered by the FET breach.

1206. As will be seen later in the chapters of this Award on Causation and Quantum, the FET breach has caused a taking of Claimants' investment, resulting in respective damages.

1207. In view of this, there is no need to examine whether the same results also from a breach of Art. 13 ECT.

1208. However, as will be seen and addressed in the chapter of this Award on Quantum, Art. 13 ECT provides some guidance regarding the calculation of damages.

J.III. Respondent's Provision of Domestic Legal Remedies (Art. 10(12) ECT)

1. Arguments by Claimants

1209. Article 10(12) ECT obliges each Contracting Party to "*ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations*." This obligation is distinct from customary international law, and is distinct but similar to the concept of denial of justice. Article 10(12) ECT was designed "*to prevent the travesties of justice that occurred in this case, by ensuring that an investor has an effective means to enforce its legal rights. Claimants had no ability to enforce their legal rights, and Kazakhstan is indisputably liable under the ECT for denying them the ability to do so*." (C-I ¶¶ 373 – 374, 379, partially quoted).

1210. The Tribunal in the *Chevron v. Ecuador* case stated that "*a failure of domestic courts to enforce rights 'effectively' will constitute a violation*" of the guarantee to provide effective means to assert claims and enforce rights. (C-I ¶¶ 373 – 374; C-II ¶ 548, partially quoted)

1211. The tribunal in *Chevron* also interpreted the "*effective means*" obligation as allowing the tribunal to examine the state's conduct, in addition to the system of laws and institutions in place. Claimants state that, in this way, the Tribunal is obliged to reassess the criminal case against Mr. Cornegruta. (C-I ¶¶ 375 – 376). Claimants explain as follows:

> *377. In the present case, the Tribunal need not assess the criminal case against Mr. Cornegruta and KPM de novo to determine that the Kazakh court issued decisions against Claimants that a "fair and impartial" Kazakh judge would never have reached. A fair and impartial judge would not have convicted KPM, which was not even named as a party in the criminal proceeding and could not have been, since criminal charges may not be brought against a company under Kazakh law. It would not have convicted KPM and Mr. Cornegruta when KPM had never operated a "main" pipeline, as acknowledged by the State itself in MEMR reports, and when Mr. Cornegruta was not an "entrepreneur" under Kazakh law but merely an employee of KPM. Additionally, a fair and impartial judge would have considered all the evidence before it. The Kazakh judge disregarded multiple expert reports from Claimants and based his decision solely on an unfounded and conclusory opinion from a Ministry of Justice employee.*
>
> *378. Further, a fair and impartial judge would have given KPM the opportunity to defend itself. It would not have confirmed the convictions on appeal and*

effectively prevented KPM from exercising its right to appeal. (C-I ¶¶ 377 - 378).

> *551. Finally, Kazakhstan's assertion that "it was legally correct and not to KPM's disadvantage that it was not a party to the [criminal] proceedings" is breathtaking. Claimants do not deny that "a measure of deference" is to be "afforded to the domestic justice system." However, Kazakhstan has far exceeded whatever "measure of deference" may exist under international law, as evidenced, inter alia, by its attempts to justify the findings of its courts ex post facto in the present arbitration. […].* (C-II ¶ 551).

1212. Kazakhstan's misconduct makes it liable to Claimants under the ECT and international law as Respondent has violated nearly every protection afforded foreign investors under the ECT and international law. (C-I ¶¶ 380 – 383).

1213. Claimants state that Respondent is mistaken in its contention that Claimants cannot invoke Art. 10(12) ECT with regard to the Subsoil Use Contracts because they largely did not turn to courts or contractually agreed arbitral tribunals. First, a foreign investor faced with a plethora of wrongful measures by a host state has the right to choose the forum with the more comprehensive jurisdiction. Using the umbrella clause, international arbitration under the ECT is the appropriate choice since it covers both disputes relating to investments and contractual claims. Moreover, the forum selection clauses in the Subsoil Use Contracts refer to the Arbitration Institute of the SCC. Second, Claimants have made a *bona fide* attempt to resolve their dispute before Kazakh courts, and this has been acknowledged by Respondent. As to appeals, Claimants were either denied the possibility of appeal or were precluded from pursuing their pending law suits, at the latest by the July 2010 seizure of their investments. Thus, Claimants utilized the means made available to them. (C-II ¶¶ 548 – 550).

1214. At the Hearing on Liability, Mr. Condorachi explained Claimants' attempts to complain about the investigation, prosecution, and conviction of Mr. Cornegruta and KPM. Respondent's witnesses also confirmed that there were at least 8 complaints from KPM and TNG, and one more from Terra Raf and Ascom. Respondent's argument that KPM could have appealed, but failed to, is disingenuous since KPM was not a party and, therefore, could not appeal and, second, the Aktau City Court refused to provide KPM a certified copy of the judgment to enable them to appeal. The evidence even shows that KPM challenged the court's refusal to send KPM this copy. (CPHB 1 ¶¶ 205 – 210). Kazakhstan's conduct in relation to the trial and the appeal violate its obligations under the ECT to provide effective means to assert claims and enforce rights. (CPHB 2 ¶¶ 97 – 114).

1215. During the hearing, the judge refused to entertain Mr. Cornegruta's defense counsel's motion for a postponement in order to examine Mr. Baymaganbetov's evidence. The trial transcripts also establish that the Financial Police were involved in the prosecution and influenced the trial process. (CPHB 1 ¶¶ 201 – 204).

2. Arguments by Respondent

1216. The text of Art. 10(12) ECT unambiguously establishes a legislative obligation to provide a fair and efficient system of justice, and does not encompass isolated failures of the judicial system in individual cases. (R-II ¶¶ 1108 – 1114, partially quoted).

1217. The availability of remedies hinders any claim if these remedies have not been pursued. Claimants, therefore, cannot bring a claim under Art. 10(12) ECT because they have failed to pursue remedies or exhaust appeals. As confirmed by other investment tribunals, the duty to exhaust remedies needs to be interpreted more strictly because of its specific meaning, which creates a legislative obligation to provide a fair and efficient system of justice. A high likelihood of success of these remedies is not required in order to expect a claimant to attempt them. (R-I ¶¶ 43.2 – 43.4, R-II ¶¶ 1125 – 1129, partially quoted; RPHB 2).

1218. Claimants conceded that they have not exhausted all remedies or appeals made available to them by Kazakh law. They have offered no evidence that pursuing such would have been ineffective or futile. With respect to their contract claims, they have not explained why they did not resort to the international arbitration proceedings as required in the Subsoil Use Contracts and in Contract 302. Contrary to their allegation, they did not have the right to choose the forum with the more comprehensive jurisdiction. The contract between the investor and the host state is the *lex specialis*, compared with the treaty between the two host states. Foreign investors must comply with exclusive forum selection clauses before they may rely on investment treaty guarantees. (R-I ¶¶ 40.1 – 40.4; R-II ¶¶ 1130 – 1134; RPHB 2 ¶ 374).

1219. Claimants did not appeal the Acts of Inspection of 15 July within the 3 days allowed as they could have under the Law of Private Business 2009. They, thus, have no basis to allege that they were denied the right to appeal the inspection reports. Claimants' contesting of the Notices of Breach served under the Subsoil Law 2010 are not appeals of the very different Acts of Inspection. In any event, Claimants were given enough time to respond to the Notices of Breach, and in any event, such allegations had been raised before. Claimants made no attempt to see an extension of either deadline. (RPHB 2 ¶¶ 368 – 372).

1220. Turning to Claimants' *Chevron* arguments, Respondent states that Claimants base their contention that *Chevron* is even applicable in this case on the allegation that case involved a similarly worded provision. Respondent compares these texts as follows (R-II ¶¶ 1110 – 1112, partially quoted, emphasis maintained):

> *1111. The relevant provision in the BIT between the USA and Ecuador, Article II(7), reads:*
>
> *Each Party **shall provide effective means** of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations. (emphasis added)*
>
> *1112. In contrast, Article 10(12) of the ECT stipulates explicitly:*
>
> *Each Contracting Party **shall ensure that its domestic law provides effective means** for the assertion of claims and the enforcement of rights*

with respect to Investments, investment agreements, and investment authorizations.

1221. That these provisions involve different requirements was confirmed by the *Amto v. Ukraine* tribunal, which clarified that the prerequisites of Art. 10(12) ECT are fulfilled if the foreign investor contends and proves legislative failures by the host state to provide a fair and efficient system of justice. (R-II ¶ 1115). This meaning of Art. 10(12) ECT is in accordance with the decision of the *Chevron* tribunal. Further still, even where tribunals have applied *Chevron* and considered Article II(7) of the BIT between the USA and Ecuador, tribunals have paid special attention to the legislative failures of a host state to provide a fair and efficient system of justice. (R-II ¶¶ 1116 – 1118).

1222. Claimants have neither contended nor proven that there was a legislative failure to provide a fair and efficient justice system, which is Claimants' responsibility under the *onus probandi* rule. With respect to the prerequisites carved out by the tribunal in *Amto v. Ukraine*, Claimants are required to contend and prove in particular that there was no legislation for the recognition and enforcement of property and contractual rights or that this legislation was not made in accordance with the constitution or was not publicly available or that there were no secondary rules of procedure so that the principles and objectives of the legislation could not be translated by Claimants into effective action in the domestic tribunals. (R-II ¶ 1119).

1223. Indeed, even if Art. 10(12) ECT extended to individual failures of the judicial system, Claimants would be required to prove procedural irregularity and interference, which they have not. With respect to the criminal proceedings against Mr. Cornegruta on behalf of KPM, Claimants' objection is that the proceedings were wrong in law. The Tribunal, however, is not a court of appeal for decisions of Kazakh courts. (R-II ¶¶ 1119 – 1123, 1135).

> *1135. A tribunal's review of the host State's legislation is limited. This follows a fortiori from the fact, that even in cases which do not involve Article 10(12) of the ECT tribunals have concluded that their review of the decisions by local courts is limited. In Chevron v. Ecuador, for example, the tribunal stated that a measure of deference needs to be afforded to the domestic justice system and that the tribunal was not empowered to act as a court of appeal reviewing every alleged failure of the local judicial system de novo. (R-II ¶ 1135).*

1224. Claimants' argument that the *Chevron* decision allows the Tribunal to step into the shoes of the domestic courts and decide the merits of the case as would a fair and impartial judge relies on a statement that has been taken out of context. The *Chevron* tribunal did not assume the position of a host state judge in finding whether the assertion of claims clause had been breached. This Tribunal is not an appellate court. (R-I ¶¶ 40.6 – 40.7, 43.6 – 43.7).

1225. A tribunal's finding of a violation of 10(12) ECT is rare. The only published case in that respect is *Petrobart v. The Kyrgyz Republic*, which in any event is not convincing, since the Tribunal provided no reasons for its disregard of the express reference to domestic law in Art. 10(12) ECT. That case also involved a high degree of interference, which has not been alleged here. Cases where violations of

similar provisions have been found related to undue delays. In *Chevron*, there was an "*undue delay of judicial proceedings*" because Chevron's cases had been pending for 13 – 15 years. In *White Industries v. India*, a delay in jurisdictional proceedings of nine years and the Supreme Court's inability to hear a jurisdictional appeal for over five years amounted to undue delay. (R-II ¶¶ 1136 – 1141).

1226. Here, Claimants have neither contended nor proven that the criminal proceedings against Mr. Cornegruta on behalf of KPM suffered from undue delay. None of Claimants' allegations about the trial in any way being unfair or impartial is true – and the fact that the decision came out against Claimants does not automatically mean that they were unfair. While Respondent admits that certain evidence was excluded from trial, this was due to a number of reasons including the lack of attendance of witnesses at trial and non-compliance with procedures for appointing witnesses. None of the expert reports complied with Art. 243 CPC, which requires that experts be drawn from a limited pool of expertise. Claimants provided no evidence of KPM and TNG's requests for these opinions, making it impossible to divine the scope of their requests, and there was no guarantee that any of the bodies issuing opinions – some of which were involved in the design and construction of the pipelines – were independent from Claimants. (R-I ¶ 28; R-II ¶¶ 1140 – 1144; RPHB 2 ¶¶ 203 – 207).

1227. At the Hearing on Jurisdiction and Liability, Prof. Olcott demonstrated that the principles of justice in the Kazakh legal system are in place and are complied with sufficiently to prevent violations of due process. Prof. Olcott – who demonstrated her credibility by also criticizing some aspects of the Kazakh legal system – explained the training that judges receive as well as the transparency of decisions. That the Kazakh legal system complies with the legal principle of due process is also confirmed by the Global Integrity 2008 report. Although Claimants allege that the Kazakh judiciary does not meet Western standards, the Republic has the elementary principles of justice in place to prevent violations of due process. (RPHB 1 ¶ 486 – 495).

1228. Also at that Hearing, Claimants made the flawed contention that the trial against Mr. Cornegruta amounted to a denial of justice. While Respondent concedes that it is acknowledged that the FET standard includes the obligation not to deny justice in criminal proceedings, such a claim "*requires a manifest and gross failure to comply with the elementary principles of justice" that "offend[s] a sense of judicial propriety."* Tribunals such as ***Loewen v. U.S.*** and ***Thunderbird v. Mexico*** confirm that his is a very high threshold, in absolute and in relative terms. For criminal proceedings, as elaborated in *Tokios Tokelés v Ukraine, "****the sense of judicial propriety must be shocked by a manifest and gross failure to comply with elementary principles of justice***." While this stands in stark contrast to the sophisticated legal framework in the Western world, this minimum standard has not been breached in the present case. With respect to the witnesses that "***were struck off***", Art. 311 CPC requires a witness to attend trial and to be examined in order that their evidence is accepted. None of the reports submitted complied with Kazakh law. Regarding the complaint that the criminal fine was assessed against KPM, this is consistent with Kazakh law and general principles of procedural fairness. KPM was always represented during the trial and had every opportunity to appeal. Regarding Claimants' allegation that the amount recovered was disproportionate to KPM's profits, this is not relevant in the denial of justice

analysis, which requires a manifest and gross violation of the elementary principles of justice. Finally, with respect to Claimants' contradictory complaint about the enforcement of the criminal fine, enforcement is a characteristic feature of the elementary principles of justice, not a failure to comply with those principles. (RPHB 1 ¶¶ 256 – 260; 496 – 520).

1229. Claimants could have appealed the 18 September 2009 decision against Mr. Cornegruta to the Supreme Court in Kazakhstan, but chose not to. KPM did not challenge the decision to not provide a copy of the hearing transcript or decision to KPM and its failure to appeal the decision – a decision that it always had access to – is not the fault of Respondent. (RPHB 2 ¶¶ 265 – 271).

.3. The Tribunal

1230. As explained above in the chapter on expropriation of this Award, it is the Tribunal's task to decide on the relief sought by Claimants as recorded above in this Award. If such relief is granted on the basis of one particular ECT provision, there is no need for the Tribunal to examine further whether the same relief would also have to be granted on the basis of another ECT provision.

1231. Since, in a previous chapter of this Award, the Tribunal has come to the conclusion that Respondent is liable for breach of the FET standard in Art. 10(1), it only needs to examine a possible further breach of Art. 10(12) ECT, if there is any other relief sought by Claimants not covered by the FET breach.

1232. Claimants' allegation of a breach of Art. 10(12) leads to no further relief sought than that resulting from the FET breach.

J.IV. Whether Kazakhstan Provided the Most Constant Protection and Security to Claimants' Investments (Art. 10(1))

1. Arguments by Claimants

1233. The ECT offers a more robust level of protection than most BITs and Claimants' investment is entitled to such protection:

> *318. Article 10(1) of the ECT provides that investments "shall enjoy the most constant protection and security." This provision is similar to – but notably stronger than - the more commonly-used language in investment treaties that obligates host States to provide "full protection and security" to investments. […]. (C-I ¶ 318).*

1234. Earlier cases, like *AAPL v. Sri Lanka*, stated that the only "*due diligence*" required to be undertaken by the host state in order to provide "*most constant protection and security*" was to have reasonable measures of prevention in place. This was confirmed in *AMT v. Zaire*, which added that the host state, Zaire, also needed to comply with its own national laws. These cases have since been expanded upon, such as in the case *CME v. Czech Republic*, which expanded the definition so as to include full protection of licensing rights, among others. (C-I ¶¶ 320 – 325).

1235. Claimants state that, while the "*most constant protection and security*" standard was at one time invoked for failure to provide physical protection to an investment, the standard today clearly encompasses legal security. This has been demonstrated by consideration of the standard by several investment treaty tribunals, including *Biwarter Gauff v. Tanzania*, *Siemens v. Argentina*, *Vivendi II*, and *National Grid v. Argentina*. These tribunals found that the standard was wider than mere physical protection – especially in cases involving intangible assets. (C-I ¶¶ 319, 326 - 328; C-II ¶¶ 482 - 484).

1236. In addition to failing to provide legal security, Respondent failed to provide physical security, as demonstrated by "*Kazakhstan's callous arrest of Mr. Cornegruta, its attempts to arrest the other senior in-country managers of KPM and TNG, and its harassment of company staff during its investigations[,] [which] clearly undermined the physical security of Claimants' investments and rendered them an unsafe place to work. Kazakhstan's outright physical seizure of KPM and TNG in July 2010 amounts to a breach of its duty to provide both physical and legal protection and security*." (C-II ¶ 485).

1237. Respondent cites no authority for its proposition that including "*legal security*" in "*most constant protection and security*" would make the standard identical to FET. Other tribunals have recognized the obligations to be separate. In any event, the fact that two protections rely on the same facts does not obviate the need for the Tribunal to consider each protection. (C-II ¶ 486).

1238. Claimants contend that Respondent has conflated the "*most constant protection and security*" standard with the obligation to provide effective means to assert claims and enforce rights under Art. 10(12) ECT. In making this argument, Respondent overlooks that it was the instigator and perpetrator of the violations. (C-II ¶ 488).

> *489. Kazakhstan cites three cases to support its argument that the obligation to ensure the most constant protection and security is one of mere diligence or vigilance of the host State. However, the issue arose in those three cases because the respective tribunals needed to determine whether the acts in question were attributable to the host state and whether the state could have protected claimants. In the present case, Kazakhstan does not — and cannot — dispute that the misconduct complained of was perpetrated by Kazakhstan. There is no issue of state attribution in this case. As the Tribunal in Wena v. Egypt concluded, where the host State is itself the instigator or a participant in the violations, there is "no question" that the obligation was breached. As it is Kazakhstan itself that instigated and carried out the breach of the ECT's most constant protection and security standard, it is not relevant that the standard might also import a due diligence standard in respect of the conduct of others. (C-II ¶ 489).*

1239. Claimants provide examples of Respondent's deliberate conduct and argue that Respondent's failures to respond to Claimants' requests for assistance make these violations even more severe. (C-I ¶¶ 332 – 333):

- *On January 19, 2009, Claimants filed complaints with the Western Regional Transport Prosecutor, the General Prosecutor's Office, the*

Ministry of Justice, and the MEMR against the Financial Police in respect to its illegal actions and to obtain the dismissal of the criminal case against KPM. The only answer Claimants received was a notice from the Financial Police that their complaints were dismissed and that a criminal case also being initiated against TNG.

- *On March 18, 2009, Claimants submitted a new complaint with the General Prosecutor's Office regarding the illegal initiation of criminal cases against KPM and TNG. Claimants never received an answer to this complaint.*

- *In the period from October 2008-March 2009, Claimants wrote to the MEMR to obtain the extension of the exploration period for Contract No. 302 prior to its expiration on March 30, 2009. The extension was never granted, in violation of the Government's commitments.*

- *As per the request of the MEMR, on April 30, 2009, Claimants submitted addendum No. 9 to Contract No. 302 for the extension of the exploration period for execution by the MEMR. Claimants never received an answer to this request for an extension.*

- *On March 24 and 25, 2009, Claimants requested that Kazakhstan confirm that Terra Raf was the legitimate owner of TNG and confirm its prior waiver of its pre-emptive rights. Claimants never received an answer to this request.*

- *On April 26-27, 2009, Claimants filed complaints with the Regional Prosecutor's Office and the Western Regional Transport Prosecutor regarding the arrest of Mr. Cornegruta. Claimants never received an answer to their complaints.*

- *On May 7, 2009, Claimants appealed directly to President Nazarbayev to obtain the release of Mr. Cornegruta, protect the former and current management of KPM and TNG, and end the dispute. President Nazarbayev ignored the request and never responded.*

- *After Mr. Cornegruta was sentenced to four years in prison, his wife and Claimants obtained an undertaking from Moldova to request the transfer of Mr. Cornegruta to serve his sentence in his home country, closer to his family. However, the Kazakh Prosecutor General, at the request of the Financial Police, always requested further assurances from Moldova that he would indeed serve his sentence. In the end, Kazakhstan refused to extradite him.*

- *Kazakhstan improperly assessed alleged corporate back taxes and penalties against KPM and TNG in the amount of approximately USD 62 million. While KPM's and TNG's court challenges to those assessments were pending, Kazakhstan issued a bankruptcy notice on February 3, 2010.*

- *On July 16, 2010, despite being only given three days to respond to the accusations of alleged violations of the Subsoil Use Contracts, KPM and TNG provided detailed explanations refuting the State's accusations. Claimants' timely responses were ignored, and Kazakhstan unilaterally repudiated the Subsoil Use Contracts. (C-I ¶ 332).*

1240. Kazakhstan failed to respond to Claimants' complaints, despite having the ability to do so, as it did upon receiving a hand-written complaint from four unknown residents of the Mangystau Region in July 2010. This conduct violates the most constant protection and security standard, as elaborated in *Siag v. Egypt* and *Wena Hotels v. Egypt*. (CPHB 2 ¶¶ 140 – 148).

1241. Kazakhstan's abrupt reversal of its 2007 commitment that it consented to the Gheso – Terra Raf transfer of TNG obliterated "*the agreed and approved security and protection*" of Terra Raf's ownership of TNG. This was in violation of Kazakhstan's duties to provide "*the most constant protection and security*" to Claimants' investments. In addition, Claimants have endeavored to have the MEMR withdraw its notices for breach of Contracts 210 and 302 for failure to honor the State's pre-emptive right, but Respondent took no action, effectively hanging an indefinite cloud over Claimants' reputation and title to TNG. (CPHB 2 ¶¶ 115 – 126).

1242. With regard to Kazakhstan's contention that "*Claimants have not attempted to show that Kazakhstan has failed to provide reasonable mechanisms of protection and that the facts put forward by Claimants are 'completely disconnected from Claimants' own legal understanding of the guarantee*", Claimants state that Respondent's assertion is contradicted by the facts. Claimants explain that "*[this] scheme was orchestrated by the President of Kazakhstan, other senior Government officials, and the Financial Police was carried out by officials, judges, and law enforcement and other agencies who, in violation of their duties and contrary to Kazakh and international law, conducted a campaign of harassment and coercion against Claimants from October 2008 until July 2010*." Claimants' further arguments that Kazakhstan's conduct violated the most constant protection and security standard of the ECT are best taken from their own words: (C-II ¶ 491 – 492)

> *492. […] the pretext for Kazakhstan's conduct was a letter from President Voronin to President Nazarbayev that provided the justification for Kazakhstan's actions. President Nazarbayev seized upon the opportunity and ordered Kazakhstan's State organs to effectively destroy Claimants' investments in Kazakhstan.*
>
> *493. In terms of physical security, Kazakhstan arrested and incarcerated Mr. Cornegruta, the general manager of KPM, on trumped-up criminal charges. The court decisions that sentenced Mr. Cornegruta to four years in jail and fined KPM in excess of US$ 145 million were entirely unfounded and unlawful because the provisions of Kazakh law relied on by the Kazakh courts did not, and could not, justify the reclassification of KPM's 18-km pipeline as a main pipeline. The ridiculous calculation of KPM's allegedly enormous "profits," and the sentencing of KPM — a non-party to the criminal trial – were further travesties of justice. Kazakhstan relied on the same frivolous legal grounds to initiate criminal*

actions against four other general managers of KPM and TNG and threaten their arrest. Those four general managers had no choice but to flee the country. Kazakhstan also summoned, interrogated, and threatened a number of Claimants' key in-country personnel, based on the same manufactured allegations. Respondent also conducted searches and raids of KPM's and TNG's offices, all in clear violation of the most constant protection and security standard.

494. Furthermore, the Kazakh courts, the Prosecutor's Office, the Financial Police, and numerous Government officials rejected Claimants' repeated protests, requests for assistance, lawsuits, and appeals filed by Claimants, KPM, TNG, and Mr. Cornegruta. From the President of Kazakhstan to the Financial Police, from the Governor of the Mangystau Region to the MEMR (and its successor, the MOG), Kazakhstan colluded to deprive Claimants of their investments.

495. Those State organs, including the courts, the central Government, and local authorities, acting in blatant violation of Kazakh law and international law, also harassed and coerced Claimants by requesting payment of debilitating taxes and custom duties that were never due, by refusing to extend the exploration period of the Contract 302 Properties, and by reversing the State's prior waiver of its pre-emptive right for the transfer of TNG to Terra Raf. (C-II ¶¶ 492 – 495).

1243. The intimidation, coercion, and threats by Kazakhstan, described in detail above, violate the standards of full protection and security. Other tribunals, like *Pope & Talbot v. Canada*, which found that the government's threat to refuse to grant future export quotas if the investor failed to cooperate with an audit, have found much less intense and less threatening conduct sufficient to constitute a violation of this standard. (CPHB 2 ¶¶ 49 – 51, 59).

2. Arguments by Respondent

1244. Contrary to Claimants' assertion, Article 10(1) ECT extends only to physical security and not to legal security. In addition, the prevailing view of tribunals in investment treaty arbitrations is that the standard encompasses solely physical protection and security. (R-II ¶¶ 957 – 960, 969 – 970).

1245. There are manifold reasons that tribunals have restricted the scope of the duty to provide full protection and security to only physical damage and violence. Some tribunals compare this duty with the customary international law duty relating to aliens to provide full protection and security of foreign nationals. Under customary international law, foreign nationals can expect to be protected from physical damage, but not from legal instability. This is because customary international law of aliens only establishes a minimum standard of protection. There is no reason to expect that "*legal security*" is included in the treaty, absent a statement to that effect. (R-I ¶¶ 36.3, 36.8 – 36.9; R-II ¶¶ 961 – 964).

1246. Respondent also contends that the standards FET and "*full protection and security*" have different substantive meanings. While the FET standard obliges the host state to abstain from a certain course of action, the full protection and security standard obliges the host state to actively create a framework which grants security.

Blurring these distinctions creates legal uncertainty. (R-I ¶ 36.11; R-II ¶¶ 965 – 967). A further argument is best taken from Respondent's words:

> *964. Another reason for the need to restrict the scope of the provision of full protection and security to physical damage and violence is the fact that this guarantee must have a meaning beyond, and distinct from, the standard of fair and equitable treatment. Legal protection in terms of an investor's legitimate expectation and its interest in a stable and predictable business environment is already encompassed by the provision on fair and equitable treatment. Claimants' assumption that both provisions can be read as comprising legal protection although they are stipulated separately from each other violates the principle of systematic interpretation, whereby a legal system is self-consistent and therefore no provision can be contrary to another. Furthermore, Claimants' assumption violates the principle of effective interpretation, requiring a purpose and object oriented interpretation, because the separate stipulation of two provisions aims at establishing two distinct guarantees. (R-II ¶ 964).*

1247. *Siemens v. Argentina*, cited by Claimants in support of their contention that the standard of most constant protection and security includes legal security, is inapplicable here. That case concerned the Argentina-Germany BIT which contained the term "*legal security*" in the relevant provision on full protection and security. The ECT does not expressly refer to legal security, and these facts have been ignored by Claimants. As Respondent states, "*by argumentum e contrario, Claimants' conveniently partial quotation of Siemens v. Argentina illustrates once more that the guarantee of most constant protection and security does not encompass legal security unless the investment treaty explicitly states otherwise. Rather, it requires the host state solely to provide protection from physical damage and violence*." (R-II ¶¶ 971 – 972).

1248. The duty of ensuring most constant protection and security requires a host state to diligently implement reasonable measures of protection, and the Republic has provided such measures. The broad consensus, as reflected in the *Noble v. Romania*, *AAPL v. Sri Lanka*, and *AMT v. Zaire* cases, is that reasonable measures are all that is required. Claimants even acknowledge that these cases confirm this argument. The facts in the present case do not alter the general principle that the duty of full protection and security is restricted by a concept of reasonableness. (R-I ¶¶ 36.4 – 36.5; R-II ¶¶ 973 – 978).

1249. Respondent's response to Claimants' comparison between Art. 10(1) ECT and Art. 10(12) ECT is best taken from its own words:

> *981. Whilst Article 10 (12) of the ECT requires the host state to implement reasonable measures of assertion of claims and enforcement of rights, Article 10(1) of the ECT requires the host state to implement reasonable measures of protection and security. In particular, the guarantee under Article 10(12) of the ECT refers to the legislative obligation of a host State to provide a fair and efficient system of justice. This illustrates the systematic coherence of the individual provisions within the ECT, not their conflation. By drawing the comparison between Article 10(1) of the ECT and Article 10(12) of the ECT, Claimants thus reinforce the fact that the*

implementation of reasonable measures is sufficient in terms of Article 10(1) of the ECT. (R-II ¶ 981).

1250. Further still, an obligation to provide "*legal security*" would run contrary to the purpose of the ECT. It would be vague and host states would be unable to determine whether their legal framework was adequate for future tribunals to rule in its favor. Such a standard, as expressed by the *Saluka* tribunal, would dissuade host states from admitting foreign investments, thereby undermining the purpose of the Treaty. (R-I ¶ 36.10).

1251. Claimants have not challenged that the Republic possesses the necessary legal framework to provide protection from physical damage and violence to foreign investors and investments. In order to prevail, however, Claimants must prove the absence of reasonable measures. They have not met this burden. (R-I ¶ 36.12; R-II ¶ 982 – 984). Respondent explains:

> *985. It is undisputed that Claimants and their assets have not been physically harmed and that not a single one of their representatives has been hurt. In particular, Mr. Cornegruta and the other senior in-country managers of KPM and TNG were not injured. As explained above, Mr. Cornegruta received a fair trial and the verdict was upheld upon appeal. The alleged harassment of company staff during the investigations did not result in any physical harm of the employees either. Although Claimants contend that the investigations rendered KPM and TNG an unsafe place to work, they have not offered any proof thereof because, again, not a single employee has been injured during these inspections and investigations. Apart from that, as has been established above, company staff have never been harassed but have rather experienced ordinary concomitants of lawful investigations. (R-II ¶ 985).*

1252. Further, Claimants' assets were not taken by use of force. Claimants' investments have not been taken, but rather have been held in trust management ever since they were abandoned by Claimants. To the extent that Claimants argue that their investments were taken by use of force, however, under the ruling in *SAUR International SA v. Republic of Argentina*, a take-over using police force does not violate the guarantee of full protection and security. (R-I ¶ 36.13; R-II ¶ 986).

1253. Finally, the facts pleaded by Claimants do not relate to the guarantee of most constant protection and security. Claimants have not proven that the alleged losses and injuries would have been prevented but for the alleged insufficiency of reasonable measures. As this has not been addressed by Claimants at all, Claimants have failed to establish a breach of the Art. 10(1) ECT guarantee of full protection and security. (R-I ¶¶ 36.2, 36.12 – 36.15; R-II ¶¶ 988 – 989).

3. The Tribunal

1254. As explained above in the chapter on expropriation of this Award, it is the Tribunal's task to decide on the relief sought by Claimants as recorded above in this Award. If such relief is granted on the basis of one particular ECT provision, there is no need for the Tribunal to examine further whether the same relief would also have to be granted on the basis of another ECT provision.

1255. Since, in a previous chapter of this Award, the Tribunal has come to the conclusion that Respondent is liable for breach of the FET standard in Art. 10(1), it only needs to examine a possible further breach of the obligation to provide most constant protection and security to Claimants' investment according to Art. 10(1) ECT, if there is any other relief sought by Claimants not covered by the FET breach.

1256. Claimants' allegation of this further breach leads to no further relief than that resulting from the FET breach. In fact, the protections granted in this regard and by the FET obligation overlap, though it may be arguable to which extent.

1257. There is, therefore, no need to examine whether such a further breach has been shown.

J.V. Whether Kazakhstan Impaired Claimants' Investment Through Reasonable and Non-Discriminatory Measures (Art. 10(1) ECT) (Alternative Claim)

1. Arguments by Claimants

1258. Article 10(1) ECT provides that "*no Contracting Party shall in any way impair by unreasonable or discriminatory measures*" the "*management, maintenance, use, enjoyment or disposal*" of an investment. To prevail in their argument under Article 10(1) ECT, it is sufficient for Claimants that Respondent's actions were either "*unreasonable*" or "*discriminatory*." Claimants present that Respondent's actions were both. (C-I ¶¶ 352 – 353).

1259. Claimants present that, "*over the past several years, the Tribunals in BG Group v. Argentina; Siemens v. Argentina; ADC v. Hungary; Azurix v. Argentina; and Saluka v. Czech Republic have all determined that conduct of a host State violated an impairment clause, thereby breaching the relevant treaty*." (C-II ¶ 517). While Respondent does not dispute that measures need only to be arbitrary to violate the ECT, Respondent nevertheless considers that this is a high threshold. Respondent's reliance on *ELSI* for the position that it is a high threshold is misguided. The definition of arbitrariness used in *ELSI* has faced criticism, since it does not accord with the ordinary meaning of the term as required by Art. 31(1) VCLT. None of the cases cited by Respondent have eschewed the ordinary meaning of the term or limited the notion of "*arbitrary*" treatment to Kazakhstan's narrow articulation of the standard. (C-II ¶¶ 518 – 520).

1260. The term "*reasonable*" - interpreted according to its ordinary meaning as required by the VCLT - means "*based on or using good judgment and therefore fair and practical*." In *Saluka v. Czech Republic*, the tribunal stated that "*reasonableness*" requires a state's conduct to bear "*a reasonable relationship to some rational policy*." Likewise, the tribunal in *CME* found the state's actions to be unreasonable because they were unjustified and improper. (C-I ¶¶ 355 – 357). Likewise, "*unreasonable*" has been found to refer to a wider scope of acts that are intentional, shocking or improper. (C-II ¶ 523). As the *EDF v. Romania* tribunal found, such unreasonable measures could include:

a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in willful disregard of due process and proper procedure. (C-II ¶ 523).

1261. In this regard, Claimants present seven examples of Respondent's conduct and argue why these were actions that were arbitrary, shocking, and in willful disregard to the due process of law. (C-II ¶ 524; CPHB ¶¶ 60 – 70, 97 - 114).

- *Kazakhstan's "reclassification" of KPM's and TNG's pipelines as "main" pipelines, despite there being no "main" pipeline as acknowledged by numerous State authorities and agencies;*

- *Kazakhstan's arrest, conviction, and incarceration of Mr. Cornegruta, which did not serve any legitimate purpose, were not based on legal standards, and were carried out in willful disregard of due process and proper procedure;*

- *Kazakhstan's criminal verdict against the non-party KPM, freezing of KPM's assets, and barring of KPM from lodging an appeal against its conviction, which inflicted considerable damage on Claimants without serving any legitimate purpose and violated applicable legal standards, due process and proper procedure;*

- *Kazakhstan's retroactive reversal of its approval of the transfer of TNG to Terra Raf and waiver of its pre-emptive rights, which did not serve any legitimate purpose, had no legal basis, and violated due process; [see also CPHB 2 ¶¶ 115 – 126).*

- *Kazakhstan's refusal to extend TNG's exploration period in the Contract 302 Properties, notwithstanding its express approval of the extension (CPHB 2 ¶¶ 149 – 176);*

- *Kazakhstan's imposition of the Crude Oil Export Tax on KPM, which violated exemption and legal stabilization clauses in the Subsoil Use Contract and inflicted damage on Claimants without serving any legitimate purpose; and [see also CPHB 2 ¶¶ 127 – 139]*

- *Kazakhstan's wrongful and unilateral repudiation of KPM's and TNG's Subsoil Use Contracts without any justifiable basis and without providing the companies any opportunity to cure the alleged deficiencies. (C-II ¶ 524).*

1262. Regarding the retro-active reversal, Respondent did not have a pre-emptive right to TNG in 2003 and, in any event, Respondent consented to the transfer in 2007. The

retroactive refusal of consent clouded Claimants' title to TNG and its reputation and prevented Claimants from selling. (CPHB 2 ¶¶ 115 – 126).

1263. The main pipeline charges were, in any event, reverse-engineered fabrications. The Financial Police first alleged that KPM and TNG did not have main pipeline licenses. They then confirmed that they could impose a devastating penalty. Then they sought out an authority to opine that the companies were operating trunk pipelines. At the time, Kazakhstan knew that it could potentially recover 41 billion Tenge (approx. USD 350 million) if the pipelines could be considered "*main*." (CPHB 2 ¶¶ 61 – 68).

1264. A reverse-engineered criminal conviction would meet every definition of an unreasonable measure provided in *EDF v. Romania*. (CPHB 2 ¶ 69). The same is true for every act of indirect expropriation. (CPHB 2 ¶¶ 69 – 70).

1265. The criminal allegation of "*illegal entrepreneurial activity in an especially large amount*" under 190(2)(b) of the Kazakh Criminal Code was malicious and contrived. They contrived the operation of the main pipeline to satisfy the "*illegal entrepreneurial activity*" element of the crime. The second element, "*in an especially large amount*" was manufactured by manipulating instructions to the Tax Committee and calculating the "*illegal profits*" by including both the transport fee KPM earned from TNG for use of the pipeline, as well as KPM's entire revenues from the onward sales of oil. This is contrary to Kazakh law, which requires the deduction of lawfully obtained revenue from otherwise illegal activity. The proper calculation would have yielded 12,000 – 13,000 in illegal profits. The threshold for such a crime was USD 17,000. (CPHB 2 ¶¶ 80 – 84, 87).

1266. The term "*discrimination*", means "*differential treatment; especially, a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored*." It entails two elements: "*first, the measures directed against a particular party must be for reasons unrelated to the substance of the matter .... Second, discrimination entails like persons being treated in an inequivalent manner*." (C-I ¶¶ 358 – 359, partially quoted). Claimants present that Respondent agrees with Claimants' and the *Saluka* tribunal's definition of discrimination that "*State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification*." (C-II ¶ 525).

1267. Claimants argue that they have met their burden of proof regarding the similarity of cases to establish discriminatory treatment. The extraordinary campaign of harassment and coercion between October 2008 and July 2010, and the outright seizure in July 2010 was discriminatory because these actions singled out KPM and TNG. Respondent's actions were also discriminatory because they singled out Claimants for different treatment from other investors in Kazakhstan's oil and gas industry. Claimants present that no other investor's in-field gathering systems were reclassified as trunk pipelines, and that no other investors were subjected to criminal prosecution based on that charge. Neighboring companies, including KTM, operate similar pipelines as part of their in-field gathering system. Furthermore, "*if Kazakhstan's contention that a contractor's pipeline extending outside the Contract Area is a [trunk] pipeline were correct, hundreds of oil and gas companies in Kazakhstan would operate [trunk] pipelines, but only Claimants' companies have faced that charge*." All of the information available to the

Tribunal suggests that the companies are comparable. Accordingly, as the tribunals in *Feldman v. Mexico* and *Nykomb* held, once *prima facie* evidence of *de facto* discrimination had been presented by the claimant, the burden of proof shifts to the respondent to rebut the presumption of discrimination. Respondent has not rebutted this presumption. (C-I ¶ 354 – 362; C-II ¶¶ 525 – 528).

1268. Respondent's violations of the ECT's impairment clause are beyond serious dispute. The *Saluka* tribunal defined "*impairment*" according to its ordinary meaning as required by Art. 31 VCLT as "*any negative impact or effect caused by measures taken by the host state*." While Respondent disputes that its conduct "*impaired*" Claimants' management, maintenance, use, enjoyment, and disposal of their investments, this is belied by the facts. By the time of Respondent's outright seizure of Claimants' investments in July 2010, Claimants' investments in KPM and TNG had already been impaired for twenty months. The intrusive audits following President Nazarbayev's 14 October 2008 order had just such a negative impact. Likewise, the 18 December 2008 repudiation of the unequivocal approval of the 2003 transfer of TNG to Terra Raf and the accompanying press release that accused Claimants of forgery damaged Claimants' ability to dispose of their assets. In addition, Respondent cannot deny the financial burden that the audits and inspections led by the Kazakh Financial Police had on Claimants. These audits resulted in the improper assessment of USD 62 million of alleged corporate back taxes in February 2009, the imposition of illegal export duties against KPM in December 2008, and an intrusive 13-month audit of KPM and TNG with respect to transfer pricing that began in November 2008. Respondent's refusal to execute the agreed upon extension of TNG's exploration period for Contract 302 prohibited Claimants from establishing the full market value of those properties. Finally, "*Kazakhstan's reclassification of the KPM and TNG gathering systems as [trunk] pipelines, which resulted in criminal proceedings against four then-existing and former general managers of KPM and TNG and a sham trial, conviction, and incarceration of Mr. Cornegruta, clearly impaired Claimants' ability to manage their investments. Top personnel left the country and the conviction itself was used to ultimately take over the companies. Similarly, Kazakhstan froze KPM's assets in an effort to execute the US$ 145 million judgment against KPM, thereby directly impairing Claimants' management, use, and enjoyment of KPM*." (C-II ¶¶ 529 – 535; CPHB 1 ¶ 207; CPHB 2 ¶¶ 149 – 176).

1269. The Subsoil Use Law changed on 24 June 2010 and permitted Kazakhstan to terminate contracts when a contractor failed to cure two or more violations. Respondent's failure to offer Claimants an opportunity to cure the alleged contract violations was not in good faith. As explained above, these minor violations did not merit termination of the contracts, making the termination unreasonable. As explained at the hearing, KPM and TNG received notices of alleged infringements on 16 July 2010 and were required to cure by 19 July 2010. This was confirmed in Mr. Pisica's testimony. Even if the claims had been valid – and they were not – it would have been impossible for Claimants to cure within the time given. (CPHB 1 ¶¶ 278 – 293).

2. Arguments by Respondent

1270. Respondent explains that is has adhered to its obligations under Article 10(1) ECT at all times. Its measures were neither unreasonable nor discriminatory. The

management, maintenance, use, enjoyment, or disposal of Claimants' investments was not impaired in any way. (R-II ¶ 1009).

1271. Using Art. 31 VCLT, which requires that a treaty term shall be interpreted in accordance with the ordinary meaning of the term, Respondent states that the ordinary meaning of "*unreasonable*" is "*irrational; foolish; unwise; absurd; silly; preposterous; senseless; stupid*." Respondent submits that the Parties agree that the term "*unreasonable*" is interchangeable with the term "*arbitrary*." For this reason, the *ESLI* court's definition of the term "*arbitrary*" can be transferred onto the term "*unreasonable*" in the sense of Art. 10(1) ECT. (R-II ¶¶ 1011 – 1013). The *ELSI* court's definition was as follows:

[B]y itself, and without more, unlawfulness cannot be said to amount to arbitrariness. [...] To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. [...] Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. [...] It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety. (R-II ¶ 1012).

1272. While Claimants have noted the similarities between the definition of "*unreasonable*" and "*arbitrary*", they overlook the conclusion that, given the similarities of both definitions, customary international law and the *ELSI* case both establish a high threshold for measures to be considered "*unreasonable*." (R-II ¶¶ 1013 – 1016). This is confirmed by scholars as well as by anecdotal evidence that, "*while 30 percent of arbitral tribunals find that certain state measures amount to unreasonable or arbitrary conduct over all, only 22 per cent of those applied the ELSI or a similarly high standard […]. It is because of this high threshold established in the ELSI case that findings of unreasonableness or arbitrariness are rare*." In three of the cases cited by Claimants, the tribunals did not find that the respective measures of the host state reached the allegedly low threshold of unreasonableness. These cases were *LG&E*, *National Grid PLC*, and *EDF v. Romania*. (R-II ¶¶ 1016 – 1018).

1273. It is untrue that the *ELSI* standard for arbitrary treatment has been "*the target of much criticism*." Rather, the overwhelming majority of scholars and tribunals have applauded the reasoning in the *ELSI* case. The tribunal in *Siemens v. Argentina* even adopted it as "*the most authoritative interpretation of international law*." (1019 – 1021).

1274. Respondent also presents an additional argument that "*unreasonableness*" is a high standard:

> *1022. The adoption of a lower threshold would result in classifying all governmental regulations adversely affecting foreign investors as inherently suspect, thereby shifting the burden of proof from the foreign investor to the host state. Forcing host states to demonstrate that their measures were not unreasonable because there were no less restrictive alternatives available would clearly contradict the onus probandi rule. For this reason the ELSI standard is widely deemed to be the most authoritative interpretation of the term "unreasonable". Furthermore, in view of the vagueness of all definitions of "unreasonable", the legal assessment of whether a certain measure is unreasonable or not remains a*

subjective process prone to unequal treatment and misjudgement. This forms another reason why a high threshold is justified. (R-II ¶ 1022).

1275. Respondent summarizes some case law on this point and presents how other tribunals have used the *ELSI* test. In *Genin v. Estonia* the test was further developed and refined, and the tribunal added the requirement "*willful disregard of due process of law*." The tribunal in *CME v. The Czech Republic* added a subjective element, that "*the host state's intention to deprive the investor of its investment as a pretext of a decision based on law*." Other tribunals, like *Enron v. Argentina* and *Sempra v. Argentina* considered the elements of arbitrariness, finding that "*regardless of intent, arbitrariness requires that some important measure of impropriety be manifest*." Finally, the tribunal in *Nobel v. Romania* found that an action would not be unreasonable if the proceedings of the kind in question are provided in all legal systems for much of the same reasons. By *argumentum e contrario*, only a measure which falls short of even such minimum standard will be unreasonable. (R-II ¶¶ 1023 – 1027).

1276. The Republic's measures did not reach the threshold of unreasonableness incorporated by the ordinary meaning of the term, let alone the one stipulated by the ICJ in *ELSI*. Respondent's actions and inactions were lawful and were not irrational or senseless or "*unreasonable*." The measures were not shocking to sense the judicial propriety in terms of the *ELSI* standard. This is confirmed by the fact that the Republic had no intention of depriving Claimants of their investments (unlike the respondent in the *CME* case), and the measures undertaken are provided for in all legal systems for much of the same reasons, just like Romania's measures in *Noble v. Romania*. (R-II ¶¶ 1028, 1037). Respondent's arguments related to each action alleged by Claimants are best taken from its own words:

1029. First, Claimants allege that the Republic's classification of KPM's and TNG's pipelines as trunk pipelines was unreasonable. However, Claimants had operated trunk pipelines without a licence. This was confirmed by the Republic's independent courts, warranting criminal proceedings and the levy of a fine. The due amount of this fine was equally assessed by an independent court. Also, the Republic only took enforcement measures and froze KPM's assets upon non-payment of the fine. In conclusion, the Republic applied the law correctly and its classification of KPM's and TNG's pipelines as trunk pipelines was not unreasonable. (see also RPHB 2 ¶¶ 151 – 218).

1030. Claimants continue by suggesting it was unreasonable of the Republic to arrest, convict and incarcerate Mr. Cornegruta. As to arrest, Mr. Cornegruta had been identified by the Financial Police as the likely individual responsible on behalf of KPM for illegal entrepreneurship under Section 190(b) of the Criminal Code of Kazakhstan. The decision to arrest him was taken on valid ground by the court in accordance with the relevant provisions of the criminal code. As to the reasonableness of the decision to convict Mr. Cornegruta, […] process was a key part of the way in which the decision and the later appeal of the decision against Mr. Cornegruta was taken. The actions of the various authorities were taken within the law.

1031. Subsequently, Claimants contend that the Republic's "criminal verdict against the non-party KPM" amounted to an unreasonable measure. However, as set out above, the recovery order was necessary in order to correct the unjust enrichment of KPM resulting from the criminal act of operating the main pipeline without a license. Importantly, contrary to Claimants' allegations, the recovery order was made in a perfectly proper procedure in which KPM was represented through its manager, Mr. Cornegruta. [see also RPHB 2 ¶¶ 243 – 264].

1032. Claimants also contend that it was unreasonable for the Republic to "retroactive[ly] revers[e] [its] approval of the transfer of TNG to Terra Raf and the waiver of its pre-emptive rights". However, Claimants actually failed to apply for the Republic's consent at the time of the transfer itself and they failed to prove that their belated request (after being prompted by the MEMR) was legitimate under Kazakh law. Furthermore, under Kazakh law, the Republic had the discretion to either approve or disapprove the transfer. Even if the Republic had approved of the transfer in the first place, a revocation of this approval was completely lawful because Claimants wrongly informed the Republic about the significant details of the transfer including the date when the transfer occurred, which impacted on whether a waiver to its pre-emptive right was required. Hence, the revocation of the alleged approval was not unreasonable. [see also RPHB 2 ¶¶ 272 – 281]

1033. Moreover, Claimants complain that the Republic's refusal to extend TNG's exploration period in the Contract 302 Properties was unreasonable. In fact, under Kazakh law, the Republic was not legally bound to extend or refuse to extend the exploration period in the Contract 302 Properties. Also, since the Republic had not signed the necessary addendum, Claimants could not rely on a prolongation of the exploration period. Thus, the refusal to extend TNG's exploration period in the Contract 302 Properties was not an unreasonable measure. [RPHB 2 ¶¶ 282 – 318]

1034. Claimants continue by alleging that the Republic's imposition of the Crude Oil Export Duties on KPM was another unreasonable measure. In reality, Claimants' invoked tax deductions which were provided for under Kazakh law or were withdrawn by the relevant authorities before any payment was made by KPM. This was confirmed by the independent Kazakh courts which found KPM to be liable for paying the Crude Oil Export Duties. Therefore, the Republic's assessment of Crude Oil Export Duties was lawful and not unreasonable.

1035. Finally, Claimants contend that it was unreasonable to repudiate KPM's and TNG's Subsoil Use Contracts. The Republic was entitled to terminate these contracts because of valid grounds for termination. Hence, the termination of KPM's and TNG's Subsoil Use Contracts cannot be deemed an unreasonable measure.

1036. In particular, as more specifically set out in the introduction to the section on direct expropriation, Claimants were in continuing and serious breach of the Contracts. In accordance with its rights to do so, the Republic

terminated the Contracts and Claimants' assets were taken into a specific trust arrangement. Claimants could have resolved this issue amicably by invoking one of the mechanisms in the Contracts or, indeed, complying with the voluntary mechanism in the Subsoil Law at article 72(10) for handing over of assets to the trust and appealing the decision in accordance with Article 73 of the Subsoil Law. The opportunity to resolve this issue in accordance with the Contracts themselves and/or the Subsoil Law was sidestepped by Claimants by filing substantive proceedings only five days after the terminations. It is difficult to see how this behavior can be considered unreasonable under the relevant test. (R-II ¶¶ 1029 – 1036, partially quoted; see also R-I ¶¶ 41.9 – 41.17).

1277. Respondent's measures were not discriminatory. As the Parties agree, a state's conduct is discriminatory if similar cases are treated differently without reasonable justification. Once the investor has demonstrated that its case and a reference case are similar, the burden shifts to the host state to demonstrate that there is a reasonable justification for the differential treatment. Here, Claimants have not proven the similarity between the cases of classification of pipelines and the conviction of Mr. Cornegruta and respective other cases. In particular, they have not established that the pipelines owned by KTM have features which would require their classification as trunk pipelines, nor have they demonstrated whether KTM holds a trunk pipeline license. Further, Claimants have not named a single case where authorities did not initiate criminal proceedings after they discovered the operation of a trunk pipeline without a license. Instead, they continue to make the baseless accusations that the Republic singled KPM and TNG out for some campaign of harassment. (R-I ¶¶ 41.14 – 41.24; R-II ¶¶ 1038 – 1043).

1278. Respondent's conduct has not impaired Claimants' investments. Contrary to the *onus probandi* rule, Claimants have failed to prove that the Republic's actions or omissions had any negative impact on the management, maintenance, use, enjoyment, or disposal of their investments, given Claimants' own mismanagement of KPM and TNG. (R-II ¶¶ 1044 – 1045). Claimants have neither shown nor even addressed whether the allegedly arbitrary measures caused their alleged loss. (R-II ¶ 1052). Respondent's arguments are best taken from their own words:

> *1046. First, […] companies of KPM's and TNG's size operating in the subsoil sector must be prepared […] [for] audits and inspections. [They] were not subject to any more audits or inspections than other subsoil users. Further, when companies fail to comply with the law, they must expect to be subject to audits and inspections. […] Those audits were no more intrusive than those undertaken at other companies that did not comply with the law. Claimants have not proven that the audits and inspections impaired Claimants' management, use and enjoyment of their investments, [as they have not proven how their daily management activities were affected, whether there was a cut in dividends or why they could not sell KPM and TNG].*
>
> *1047. Claimants continue by suggesting that a press release, which notified potential buyers that the Republic would assert a pre-emptive right over TNG and accused Claimants of having forged documents in order to defraud Kazakhstan, impaired the disposal of their investments. The so-called press release Claimants refer to is in fact the INTERFAX-*

KAZAKHSTAN news agency piece about the reversal of the pre-emptive rights waiver dated 18 December 2008. Claimants ignore that the reversal of the pre-emptive rights waiver was perfectly lawful. Moreover, they have not provided sufficient proof that it was this news agency piece that caused Credit Suisse to step back from providing the bridge loan. Finally, the news agency piece is not attributable to the Republic. For this reason the so-called press release did not impair Claimants' disposal of their investments.

1048. *Furthermore, Claimants contend that the financial burden of corporate back taxes, export duties and the audit of KPM and TNG with respect to transfer pricing impaired Claimants' management, use and enjoyment of their investments. However, neither KPM nor TNG paid any of the corporate back taxes or transfer price taxes. Claimants have made no complaint and produce no evidence concerning payments of export duties by TNG. Furthermore, the evidence suggests that Claimants were not prevented from managing and enjoying their investments in the period in question. In any event, Claimants could not reasonably expect that no back taxes would be assessed and that the export duties would not be imposed because the Republic was entitled to the payment of these levies. Therefore, the financial burden resulting from these taxes did not impair Claimants' management, use and enjoyment of their investments.*

1049. *Subsequently, Claimants allege that the Republic's refusal to extend the exploration period for the Contract 302 Properties impaired the management, use and enjoyment of their investments because this prohibited Claimants from establishing the full market value of these properties. Claimants ignore that KPM and TNG could not reasonably expect the exploration period under Contract 302 to be extended because the Republic was free to decide whether to prolong the contract or not. Hence, the Republic's refusal to extend the exploration period for the Contract 302 Properties did not impair the management, use and enjoyment of their investments. [RPHB 2 ¶ 329 – 330]*

1050. *Also, Claimants complain that the "criminal proceedings against four then-existing and former general managers of KPM and TNG and a sham trial, conviction, and incarceration of Mr. Cornegruta" impaired the management, use and enjoyment of their investments because top personnel left the country and the Republic froze KPM's assets. Again, Claimants have failed to prove to the necessary standard how the criminal proceedings affected their daily management activities, whether there was a cut in dividends and how and why Claimants could no longer dispose of KPM and TNG. Therefore, it is not evident that the criminal proceedings really impaired Claimants' management, use and enjoyment of their investments. In particular, in respect of the repudiation of the alleged pre-emptive rights waiver, and the press release on the same day, Claimants have produced no evidence to suggest that the Republic was wrong in highlighting its concerns about the legality of Terra Raf's activities. As set out in the Statement of Defence at paragraphs 13.47I(ii) and (iii) it was perfectly appropriate to air its concerns to INTERFAX, given the suspicions that Claimants had. It cannot be concluded from this that*

> *Claimants' investments were affected (or that if they were, that this was inappropriate). In respect of paragraph 534, Claimants have not produced any persuasive evidence that the top management left the country by reason of the Republic's investigations into Claimants' illegal activities or that this impaired their investments. (R-II ¶¶ 10–6 – 1050, summarized and partially quoted; see also R-I ¶¶ 41.25 – 41.30).*

1279. As recorded aboveRespondent also maintains that it terminated Contracts 210 and 305 in accordance with the law, and that Claimants failed to file a timely appeal or to request an extension, despite having ample time to do so. There was no conspiracy regarding the creation of the heavily debated Subsoil Law 2010, which took almost 2 years to pass. (RPHB 2 ¶¶ 367 – 372).

3. The Tribunal

1280. As explained above in the chapter on expropriation of this Award, it is the Tribunal's task to decide on the relief sought by Claimants as recorded above in this Award. If such relief is granted on the basis of one particular ECT provision, there is no need for the Tribunal to examine further whether the same relief would also have to be granted on the basis of another ECT provision.

1281. Since, in a previous chapter of this Award, the Tribunal has come to the conclusion that Respondent is liable for breach of the FET standard in Art. 10(1), it only needs to examine a possible further breach of the obligation according to Art. 10(1) ECT not to impair by unreasonable or discriminatory measures Claimants' investment, if there are any further damages sought by Claimants not covered by the FET breach.

1282. Claimants' allegation of this further breach leads to no further relief sought than that resulting from the FET breach. In fact, the protections granted in this regard and by the FET obligation overlap, though it may be arguable to which extent.

1283. There is, therefore, no need to examine whether such a further breach has been shown.

J.VI. Respondent‘s Observance of Obligations It Entered Into With Respect to Claimants' Investments (Umbrella Clause in Art. 10(1) ECT)

1. Arguments by Claimants

1284. Article 10(1) ECT contains a broadly worded "*umbrella clause*." The purpose of this clause is to expand the reach of the ECT's protections to obligations that are not covered by the ECT's other substantive provisions. The plain language of the umbrella clause does not differentiate between contractual obligations and legislative/regulatory undertakings. Four language versions of the ECT clearly indicate that each Contracting Party shall observe any obligation that it has undertaken towards (or, in two ECT versions, has assumed with regard to) an investor or the investments of an investor of another Contracting Party. (C-I ¶¶ 363 – 370; C-II ¶ 537, 539, partially quoted).

1285. That the umbrella clause does not differentiate between contractual obligations and legislative undertakings has been confirmed by a number of investment treaty tribunals, such as the *Eureko v. Poland* and the *Enron v. Argentina* tribunals that have confirmed that the umbrella provision extends to obligations undertaken through law and regulation. Furthermore, in light of the other terms of the ECT, including the ECT's definition of investment, it is indisputable that Kazakhstan undertook a number of contractual, legislative, and regulatory obligations with regard to Claimants and their investments, which are protected under the umbrella clause. (C-I ¶¶ 363 – 370; C-II ¶¶ 537, 539).

1286. Neither case on which Respondent relies to support its argument that a restrictive reading of the umbrella clause is necessary actually stands for that contention. The tribunal in *Al-Bahloul v. Tajikistan* held that the ECT umbrella clause "*is broadly stated, referring as it does to 'any obligation' and, as such, by the ordinary meaning of the words, includes both statutory and contractual obligations*." Likewise, the *CMS* ad hoc committee held that an even broader reading was possible – looking toward the law of the host state and possibly international law. (C-II ¶ 538).

1287. Respondent's argument that the arbitration provisions in the Subsoil Use Contracts bar claims relating to those contracts under the umbrella clause is wrong, and it conflates contract claims with treaty claims. Here, Claimants assert that Kazakhstan breached its obligation to observe all obligations undertaken with respect to their investments, and that includes its contractual obligations. This is permissible under the ECT, which provides jurisdiction over disputes relating to an investment for contractual claims that may arise under the umbrella clause. Contractual forum-selection provisions, on the other hand, would naturally cover only contractual claims (those belonging to KPM and TNG, rather than to Claimants). Thus, the cases cited by Respondent – *SGS v. Philippines* and *Bureau Veritas* – are plainly inapplicable to the present cases. In those cases, the claimants were parties to the contracts at issue, making it not surprising that the tribunal found that they were bound by the contract. Here, Claimants are not parties to the contracts at issue. Further, the cases cited do not involve the types of government measures that were involved here – and the tribunals in *SGS v. Philippines* and *BIVAC v. Paraguay* were not asked to consider whether the breaches constituted international treaty violations. Finally, in the *BIVAC* case, the tribunal held that "*a forum selection clause should not be permitted to override the jurisdiction to hear Treaty claims of a tribunal constituted under that Treaty*." (C-II ¶¶ 540 – 542).

1288. Turning to Respondent's focus on the contractual forum selection clause, a cause of action under the ECT is not subject to the exclusive jurisdiction clauses contained in the underlying contracts, regardless of whether the treaty claims relate to contractual issues. Claimants state that Art. 26 ECT allows foreign investors to choose between a contractually agreed forum for international arbitration before ICSID, UNCITRAL, or the SCC. The claimant's choice is not constrained by the forum selected in the contract. (C-II ¶¶ 543 - 545).

1289. Article 26(3)(c) ECT permits Contracting Parties to exclude international arbitration for violation of the umbrella clause, but Kazakhstan has not exercised this option. (C-II ¶ 544).

1290. Each of the following measures constitutes a distinct violation of the umbrella clause:

[1] Kazakhstan "reclassified" KPM's and TNG's pipelines as "main" pipelines, in violation of the approvals by its state authorities and agencies for the design, construction, and operation of the "reclassified" pipelines as in-field pipelines pursuant to Kazakhstan's Law on Oil and relevant regulations;

[2] Kazakhstan arrested, convicted, and incarcerated Mr. Cornegruta, in violation of general principles of due process and Articles 12 and 16 of the Kazakh Constitution recognizing each person's human rights and freedoms;

[3] Kazakhstan issued a criminal verdict against the non-party KPM, froze KPM's assets, and barred KPM from lodging an appeal against its conviction , in violation of general principles of due process and of Article 77(3) of the Kazakh Constitution;

[4] Kazakhstan approved the transfer of TNG to Terra Raf and waived its pre-emptive rights, and then later rescinded its express approval and waiver;

[5] Kazakhstan refused to extend TNG's exploration period in the Contract 302 Properties although it had expressly approved the extension;

[6] Kazakhstan imposed the Crude Oil Export Tax on KPM, in violation of exemption and legal stabilization clauses in the Subsoil Use Contract;

[7] Kazakhstan imposed amortization rates at higher than contractually-agreed rates, in violation of clear amortization and legal stabilization provisions in the Subsoil Use Contracts;

[8] Kazakhstan wrongfully and unilaterally repudiated KPM's and TNG's Subsoil Use Contracts, in violation of the contract terms; and

[9] Kazakhstan illegally seized Claimants' investments, in violation of general principles of law and Articles 6 and 26 of the Kazakh Constitution protecting private property. (C-I ¶¶ 371 – 372; C-II ¶¶ 546 – 547, partially quoted; see generally CPHB 1 ¶¶ 122 – 422; CPHB 2 ¶¶ 97 - 114).

1291. The 18 September 2009 judgment that sentenced Mr. Cornegruta to four years in prison and ordered the recovery of USD 145 million from non-party KPM constituted an egregious breach of Art. 10(1) ECT. Mr. Cornegruta was prevented from presenting evidence on his behalf and the judge relied only on information provided by the Financial Police. With regard to KPM, there is no theory of "*quasi-criminal*" liability in Kazakhstan – Kazakhstan has blatantly misconstrued clause 27 of the Regulatory Decree of the Supreme Court of June 20, 2005, "On hearing of a civil action in criminal proceedings" and Article 371, section 1(10) CPC to show otherwise. At most, Kazakhstan could have received compensation for "*property damage*" in cases where no civil action was filed – and this is totally inapposite to Mr. Cornegruta's case, where there is no issue of property damage.

In order to recover funds from a company for alleged criminal conduct, Kazakhstan would have had to have pursued a sanction under administrative law or file a civil suit. Simply imposing Mr. Cornegruta's fine on KPM was not an option. (CPHB 2 ¶¶ 97 – 114).

1292. Kazakhstan's 2007 commitments regarding Terra Raf's legal ownership of TNG (namely, that the State's pre-emptive right did not apply to the 2003 transfer) were breached in violation of the umbrella clause. (CPHB 2 ¶ 126).

1293. Respondent's "*spurious*" tax assessments violated the terms of the Subsoil Use Contracts and, likewise, were in violation of the ECT's umbrella clause. (CPHB 1 ¶ 261; CPHB 2 ¶ 139).

1294. When Kazakhstan failed to formalize the extension of Contract 302, which it expressed on 19 March 2009 and wrote on 9 April 2009, it breached the ECT's umbrella clause. The promise to extend the contract was an express "*obligation*", giving rise to a treaty obligation under the umbrella clause, as well as a legal obligation under Kazakh law to formalize the extension. Claimants legitimately expected the contract to be extended, as it had been in the past. TNG made a significant discovery in the Contract 302 properties at the Munaibay prospect, but retracted the application in October 2008 after determining that Contract 302 held greater reserves. It applied for an extension on 14 October 2008. The fact that Claimants retracted the declaration of the commercial discoveries – discoveries which would have given them the exclusive right to produce oil and gas from those fields – is a demonstration of their legitimate belief that the contract would be extended. Had the government been timely in addressing the application to extend, Claimants would have had the opportunity to undertake the appraisal work and declare commercial discoveries in the Contract area. Since the extension was promised, Claimants had no need to do further appraisal. (CPHB 1 ¶¶ 221 – 237, CPHB 2 ¶¶ 152 – 162, 176).

1295. This is not a pre-contractual dispute. Kazakhstan undertook to extend the contract, during the life of the contract. In the past, Kazakhstan granted an extension six months after the previous exploration had expired, with no consequence in the validity of the contract. Further, Kazakhstan treated the Contract 302 area as if the contract were still in force, ordering the sequestration of those assets on 30 April 2009 and remarking on the fulfillment of the work conditions of Contract 302 in 2010. Kazakhstan's actions demonstrate that it believed the contract to still be in force through 22 July 2010, when it formally terminated Contract 302. Respondent's failure to execute the addendum after expressly committing to is a violation of the umbrella clause. (CPHB 2 ¶¶ 163 – 171).

1296. Respondent's repudiation of the Subsoil Use Contracts was also in violation of the umbrella clause. There was no evidence that Claimants were in breach of any aspect of the Subsoil Use Contracts, the minimum work requirements or of Kazakh law, nor were they treating the fields badly. (CPHB 2 ¶ 191).

2. Arguments by Respondent

1297. Contrary to Claimants' assertion, the scope of the umbrella clause is limited to contractual obligations and does not extend to alleged breaches of the Republic's

domestic law. According to the VCLT, the wording of the umbrella clause must be interpreted such that its scope is limited to contractual obligations. The language "*to enter into*" or "*to undertake to bind oneself*", interpreted according to its plain meaning as required by Art. 31(1) VCLT, illustrates the consensual nature of the obligations in question. In addition, the use of the term "*with*" further indicates contractual obligations because statutes and regulations are not concluded *with* an individual party in one individual case. (R-II ¶¶ 1053 – 1058).

1298. Article 31(1) VCLT clarifies that the context of each term is crucial. Thus, when taking into consideration the ordinary meaning of "*to enter into*", the reference to "*any obligation a party enters into*" means "*any obligation a party has undertaken to bind itself to perform by an agreement*" and thus "*any contractual obligation.*" (R-II ¶ 1059).

1299. Regarding the different language across each equally authoritative version of the ECT, Claimants contend that four versions of the ECT refer to "*obligations assumed with regard to*" whereas 2 versions can be translated to mean "*to enter into*." Since all versions of the ECT are equally authentic, the ordinary meaning of these terms is significant:

> *1063. The ordinary meaning of "to assume with regard to" in the context of Article 10(1) of the ECT is "to take upon oneself; undertake". When a party takes an obligation upon itself, the party commits voluntarily to performing the obligation. Therefore, both terms, "to enter into" and "to assume [with] regard to" contain an element of voluntary collaboration. This element of voluntary collaboration makes sense when referring to a contractual obligation because, self-evidently, both parties are free to enter into a contract. It makes no sense when referring to a statutory or regulatory obligation because these apply notwithstanding the intention of those involved. Furthermore, it is general linguistic usage to say that a party enters into a contract and assumes obligations with regard to a contract, but it is not commonly heard that a party enters into a statute or assumes obligations with regard to a regulation. (R-II ¶ 1063).*

1300. If four versions of the ECT limit the scope of the umbrella clause to contractual obligations, but two extend it to legislative, then there would be a difference in meaning between the texts. In such a situation, Article 33 VCLT demands that the Tribunal adopt the meaning which best reconciles the texts, having regard to the object and purpose of the Treaty. The "*contractual obligations only*" interpretation is, however, the common denominator of both meanings, best reconciling the texts. The Tribunal should adopt this meaning. (R-I ¶¶ 39.3 – 39.5; R-II ¶¶ 1064 – 1065).

1301. The interpretation of Art. 10(1) ECT as only encompassing contractual obligations is supported by the object and purpose of the ECT, which is to promote long-term cooperation between investors and host states. If the umbrella clause were to encompass regulatory or statutory obligations, every breach of a host state's domestic law would form a breach of the ECT. Had the contracting parties to the ECT really wished to commit themselves to such a large extent, they would have amended the wording of the umbrella clause accordingly. Construing the scope of the umbrella clause to encompass statutory and regulatory obligations would alienate the contracting parties to the ECT and might ultimately cause them to

withdraw from the treaty. This would run counter to the ECT's purpose of promoting long-term cooperation of investors and host states. (R-II ¶¶ 1066 – 1067).

1302. Renowned scholars and tribunals alike have agreed that the scope of the umbrella clause is limited to contractual obligations. The *CMS v. Argentina*, which Claimants cite in their favor, clearly referred to consensual obligations under the law of the host state or under international law. Statutes and regulations are not of a consensual nature – only contracts are. Hence, the reasoning in CMS *v. Argentina* demonstrates, contrary to Claimants' assertion, that tribunals agree that the scope of the umbrella clause is limited to contractual obligations. This view was confirmed by the tribunal in *Al-Bahloul v. Tajikistan*, which had to deliberate on the umbrella clause in Article 10(1) ECT. *Eureko v. Poland* can be read to mean that the tribunal regarded any contractual obligations with regard to investments as encompassed by the scope of the umbrella clause – that tribunal did not even deliberate on whether statutory or regulatory conduct toward an investor constituted a breach of the umbrella clause. Further still, in *SGS v. Philippines*, the issue under consideration arose from consensual obligations. As for *LG&E v. Argentina* and *Enron v. Argentina*, the tribunals found that Argentina's Gas Law and its regulations were encompassed under the umbrella clause – but they contrasted them from legal obligations of a general nature. Those cases concerned specific promises made by the state concerning the laws, and those promises transformed the laws and regulations into obligations within the meaning of the umbrella clause. Respondent, thus, presents that all of the cases cited by Claimants in support of their reasoning either does not support Claimants' proposition, or contradicts it. There is no reported investment law decision where the scope of the umbrella clause was unconditionally extended to domestic law. (R-I ¶¶ 39.6 – 39.8; R-II ¶¶ 1068 – 1080).

1303. The exclusive arbitration agreements in the Subsoil Use Contracts, as well as in Contract 302, bar claims relating to these contracts under the umbrella clause. Those contracts' arbitration clauses oblige both parties to resort exclusively to international commercial arbitration once a dispute arises with respect to those agreements. Claimants have never referred the disputes regarding the Subsoil Use Contracts or Contract 302 to international commercial arbitration. Foreign investors need to comply with exclusive forum selection clauses before they may rely on the umbrella clause because this conforms to and enforces the maxim *pacta sunt servanda*. Therefore, the Subsoil Use Contracts and Contract 302 are utterly irrelevant in terms of the umbrella clause. (R-I ¶¶ 39.9 – 39.12; R-II ¶¶ 1081 – 1086, 1097).

1304. Tribunals in investment treaty arbitrations have ruled that foreign investors need to comply with exclusive forum selection clauses before they may rely on the umbrella clause. The tribunal in *SGS v. Philippines* clarified that a standard jurisdiction clause in an investment treaty between two states does not override the parties' binding selection of a forum to determine their contractual claims, because the contract between the parties needs to be regarded as *lex specialis* in relation to an investment treaty between two states. Respondent cites that this view has been confirmed by scholars and other tribunals, including *BIVAC v. Paraguay*, which added that contractual forum selection clauses needed to be regarded as a

"*voluntary waiver*" of resort to the umbrella clause. (R-I ¶¶ 39.9 – 39.12; R-II ¶¶ 1087 – 1095).

1305. Even if the Tribunal considers that the umbrella clause covers statutory and regulatory obligations and that the Subsoil Use Contracts and Contract 302 were relevant under the umbrella clause – which Respondent denies – the Republic nevertheless complied with domestic law. Each of the actions alleged by Claimants was consistent with and/or mandated by Kazakh law. (R-I ¶ 39.13; R-II ¶¶ 1098 – 1099).

1306. The classification of KPM's and TNG's pipelines as trunk pipelines was lawful. It was found that KPM were operating a trunk pipeline without the relevant licence. As a consequence, Mr. Cornegruta, KPM's representative, was found guilty of illegal entrepreneurship under Section 190(2)(b) of the Criminal Code of Kazakhstan. This decision was confirmed on appeal on 12 November 2009 by the Regional Court of Mangystau. It was Claimants that were in breach of Kazakh law, not the Republic. Due process and Art. 77(3) of the Kazakh Constitution were strictly adhered to in the investigation of the crime, as well as in the arrest, conviction, and incarceration of Mr. Cornegruta on behalf of KPM. The procedure of the recovery order – i.e. the recovery of illegal income of a company resulting from the crime of its manager – was at all times in accordance with Kazakh law. Procedural participation was safeguarded at all times through the presence of Mr. Cornegruta. (R-II ¶¶ 1100 – 1103; RPHB 2 ¶¶ 243 – 264).

1307. KPM and TNG were in serious breach of the terms of the Subsoil Use Contracts. Claimants were aware of these breaches and had unsuccessfully contested them in Kazakh courts. After notifying the companies of their breaches, the Republic rightly terminated the Subsoil Use Contracts in accordance with Kazakh law and the terms of the contracts themselves. The Republic's termination of KPM's and TNG's Subsoil Use Contracts did not violate the respective contract terms. Rather, it was Claimants who breached the contractual terms, thus leading to a legitimate termination. (R-II ¶ 1104).

1308. There was no seizure of Claimants' investments. There was a legitimate transfer into trust management in accordance with the Subsoil Law 2010, which is the lawful consequence following the termination of the Subsoil Use Contracts. This transfer in any event only took place well after Claimants had abandoned their investment. Since the Republic did not illegally seize Claimants' investments, it follows that the Republic did not violate general principles of law and Articles 6 and 26 of the Kazakh Constitution protecting private property. (R-II ¶ 1105, partially quoted; RPHB 2 ¶¶ 359 – 374).

1309. Regarding the transfer from Gheso to Terra Raf, there were 8 transfers that involved majority shares in TNG, the consequence being that none of the after-occurring transfers in TNG involving Claimants' companies was completed. Respondent's belated consent to one transfer does not cure all other previous failures. Thus, Respondent was fully justified in inquiring as to Claimants' position with respect to TNG. (RPHB 2 ¶¶ 272 – 281).

1310. At the Hearing on Quantum, Claimants alleged that the Republic's gas market breached the ECT's protections under the umbrella clause, as well as the FET and

impairment provisions of the ECT. This argument fails since the Republic never guaranteed an export market to Claimants. (RPHB 1 ¶¶ 698 – 700). This argument did not appear in Claimants' First Post-Hearing Brief and was not made in the final hearing. It appears that Claimants have dropped this claim. (RPHB 2 ¶¶ 423 – 424).

1311. The scope of the umbrella clause is limited to contractual obligations, as explained in *Siemens v. Argentina* to mean "*obligations [which] originate in a contract between the State party to the Treaty and the foreign investor*." (RPHB 2 ¶ 427).

1312. Claimants have attempted to argue that the non-extension of Contract 302 is a violation of the umbrella clause, but have failed to substantiate how such a claim could exist under investment law. Claimants have not demonstrated any reliance on the 9 April 2009 letter. In any event, Claimants have always accepted that Respondent was not under an obligation to extend Contract 302. Even if there had been no breach of the promise to extend the contract had not occurred, Claimants still would not have had a claim to develop the Contract 302 area because the contract would simply have terminated on 30 March 2009. Alternatively, even if the 9 April 2009 letter constituted a decision to agree to extend Contract 302 (which is denied), that was only a unilateral act, not a contract. Such unilateral acts are not covered by the umbrella clause. Additional steps, including an application for a new license, would have needed to be undertaken to perfect the extension. (RPHB 2 ¶¶ 292 – 305, 425 – 430).

3. The Tribunal

1313. As explained above in the chapter on expropriation of this Award, it is the Tribunal's task to decide on the relief sought by Claimants as recorded above in this Award. If such relief is granted on the basis of one particular ECT provision, there is no need for the Tribunal to examine further whether the same relief would also have to be granted on the basis of another ECT provision.

1314. Since, in a previous chapter of this Award, the Tribunal has come to the conclusion that Respondent is liable for breach of the FET standard in Art. 10(1), it only needs to examine a possible further breach of the obligations it entered into with respect to Claimants' investments by the Umbrella Clause in Art. 10(1) ECT), if there are any further damages sought by Claimants not covered by the FET breach.

1315. Claimants' allegation of this further breach leads to no further relief sought than that resulting from the FET breach. In fact, the protections granted in this regard and by the FET obligation overlap, though it may be arguable to which extent.

1316. There is, therefore, no need to examine whether such a further breach has been shown.

J.VII. Whether Kazakhstan Violated Its Obligation to Permit Claimants to Employ Key Personnel of Their Choice

1. Arguments by Claimants

1317. Claimants encourage the Tribunal to interpret Art. 11(2) ECT in good faith and under its ordinary meaning, pursuant to Art. 31(1) VCLT. (C-II ¶¶ 553 – 554). Claimants' argument is best taken from its own words, found at C-II ¶ 555:

> *555. According to the ordinary meaning of Article 11(2) of the ECT, Claimants were entitled to employ any key in-country personnel they wished. However, Kazakhstan arrested and incarcerated Mr. Cornegruta, the general manager of KPM, on trumped-up criminal charges. Moreover, Kazakhstan relied on the same spurious legal grounds to initiate criminal actions against four other general managers of Claimants and threaten their arrest. Those four general managers had no choice but to flee the country. Kazakhstan also summoned, interrogated, and threatened a number of Claimants' key in-country personnel, based on the same manufactured allegations, so that Claimants had no choice but to recall all their key personnel from Kazakhstan. Therefore, Kazakhstan violated its obligation to permit Claimants to employ key personnel of their choice under Article 11(2) of the ECT. (C-II ¶ 555).*

1318. Mr. Condorachi's testimony confirmed that Claimants' management decided that it would be best if he and several other middle managers leave Kazakhstan, based on their previous dealings with the Financial Police and the imprisonment of Mr. Cornegruta. (CPHB 1 ¶ 270). In addition, as explained by Mr. Broscaru, after the 14 October 2008 order, construction on the LPG Plant slowed significantly because the non-Kazakh workers on the project were unable to renew their work permits. (CPHB 1 ¶ 358).

2. Arguments by Respondent

1319. Article 11(2) ECT permits foreign investors to employ key personnel of their choice, so long as such personnel have the required work and residence permits. It prevents a host State from enacting any domestic employment legislation or committing any forceful action that would prevent the foreign investor from hiring key personnel. As scholars agree, this provision is unambiguous and does not require interpretation. (R-II ¶¶ 1145 – 1147).

1320. In response to Claimants' argument that Art. 11(2) ECT needs to be interpreted using Art. 31(1) VCLT, Respondent disagrees that there is ambiguity in other terms, but agrees that the term "*key personnel*" could require interpretation, as it is not defined in the ECT or any other investment treaty. The ordinary meaning of "*key personnel*" refers to employees of the foreign investor which are indispensable to the running of the investment and/or are decisive to the success of the investment. The meaning of the term does not extend to other individuals. Claimants have not proven that Mr. Cornegruta or any of the other unnamed four general managers are part of such an exclusive group. It has not been alleged that these are essential personnel. (R-II ¶¶ 1151 – 1154).

1321. It is not true that the lawful interrogations and criminal proceedings against Mr. Cornegruta on behalf of KPM or against the other four managers forced Claimants to recall their key personnel from Kazakhstan. Respondent states, however, that it "*is notable that Claimants suggest that this should require the removal of their key personnel from the country. This suggests that Claimants are willing to assist their key personnel from facing the consequences of illegal behaviour. In turn this*

suggests that the detention of Mr Cornegruta in April 2009 (on suspicion that he would flee the country) was well-founded." (R-II ¶¶ 1156 – 1159).

3. The Tribunal

1322. As explained above in the chapter on expropriation of this Award, it is the Tribunal's task to decide on the relief sought by Claimants as recorded above in this Award. If such relief is granted on the basis of one particular ECT provision, there is no need for the Tribunal to examine further whether the same relief would also have to be granted on the basis of another ECT provision.

1323. Since, in a previous chapter of this Award, the Tribunal has come to the conclusion that Respondent is liable for breach of the FET standard in Art. 10(1), it only needs to examine a possible further breach of the obligation according to Art. 11(2) ECT to permit to employ key personnel according to Art. 11(2) ECT for Claimants' investment, if there are any further damages sought by Claimants not covered by the FET breach.

1324. Claimants' allegation of this further breach leads to no further damages sought than those resulting from the FET breach. There is, therefore, no need to examine whether such a further breach has been shown.

K. Causation

K.I. Law on Causation

1. Arguments by Claimants

1325. Claimants agree that, as reflected in Art. 36 and 39 ILC Articles on State Responsibility, Claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host state's conduct. Tribunals have broad discretion in evaluating causation. As the tribunal in *Lemire v. Ukraine* explained, the element of causation requires the aggrieved party to "*prove that an uninterrupted and proximate logical chain leads from the initial cause ... to the final effect.*" As the *Lemire* tribunal explained, the causal link need not be direct, but can be established through a chain of connected events. The primary limitation on the principle of transitive causation is that the chain of events must be "*neither too remote nor too aleatory*." Classically, what is necessary is to prove that there is "*no [break] in the chain and [that] the loss can be clearly, unmistakably and definitely traced, link by link, to [the State's] act, [whereby] indirect losses are covered [so long as] in the legal contemplation, the [state's] action was the efficient and proximate cause and the source from which they flowed*." The requirement of proximate cause is closely related to the foreseeability of injury – the wrongdoer could have foreseen that through successive links, the irregular act would finally lead to damage. (CPHB 2 ¶¶ 199 – 202).

1326. The state is also responsible for all harm that proximately flows from its wrongful actions, even if concurrent causes contributed to the harm. As the tribunal in *CME v. Czech Republic* explained, the only exception to this would be in cases of contributory fault.

1327. The burden then shifts to the state to prove that an intervening event – such as a factor attributable to the victim or a third party – caused the damage alleged. As the tribunal in *CME v. Czech Republic* explained, however, unless the injury can be shown to be severable in causal terms from that attributed to the state, the latter is held responsible. Kazakhstan, therefore, can only escape liability for the injuries that naturally flowed from its conduct if it can prove that an intervening cause completely superseded the effects of its actions into a severable injury, and not merely that other concurrent events contributed to or amplified Claimants' injury. (CPHB 2 ¶¶ 200, 203).

1328. Finally, as the Tribunal in *Lemire* found, it is often not possible for a claimant to prove with certainty what would have happened "*but for*" the State's wrongful actions. Thus, it is sufficient for the Claimants to prove that it was probable that they would have had a different outcome, but for the State's actions. (CPHB 2 ¶ 204).

2. Arguments by Respondent

1329. Article 39 ILC Articles requires that the Claimants' conduct be taken into account in determining compensation. In investment cases, Tribunals have reduced damages by a percentage reflecting the investor's role in the events leading to a loss. Even in the *MDT v. Chile* case, cited favorably by Claimants in their "*full compensation*" arguments, the Tribunal reduced the damages otherwise due by 50 % to reflect the investors' negligent conduct. Here, there is a clear correlation in time between the companies' financial troubles and Claimants' conduct. (R-III ¶ 436 – 440).

3. The Tribunal

1330. The Parties agree, and so does the Tribunal, that, as reflected in Art. 36 and 39 ILC Articles on State Responsibility, Claimants bear the burden of demonstrating that the claimed quantum of compensation is caused by the host State's conduct.

1331. The Tribunal further agrees with Respondent that Art. 39 ILC Articles requires that the Claimants' conduct be taken into account in determining compensation. Indeed, in investment cases, Tribunals have reduced damages by a percentage reflecting the investor's role in the events leading to a loss.

1332. And the Tribunal agrees with Claimants that the burden then may shift to the state to prove that an intervening event – such as a factor attributable to the victim or a third party – caused the damage alleged, unless, as the tribunal in *CME v. Czech Republic* explained, the injury can be shown to be severable in causal terms from that attributed to the state.

K.II. Whether Respondent's Breaches of the ECT Caused Claimants' Alleged Damages

1. Arguments by Claimants

1333. The campaign of harassment and coercion that began in October 2008 and was publicized in December 2008 initiated a chain of events that irreparably harmed Claimants' investments and prevented Claimants from fully developing or alienating them from that moment forward.

1334. Claimants' search for bridge financing in November 2008 began on recommendation from Renaissance Capital. It was necessary in order to obtain a partial advance on the proceeds of the sale in order to reinvest them into other projects as soon as possible and, as Mr. Lungu explained, to protect against falling oil and gas prices. Further, although Kazakhstan sabotaged the Credit Suisse financing in December 2008, the liquidity position at KPM and TNG did not become problematic until the June 2009 Laren transaction. Respondent's argument about the "*going concern*" qualification issued by the auditors' is also disingenuous and expressly states that the "*going concern*" qualification was based on events after 31 March 2009. The reasons for this qualification were Kazakhstan's freezing of KPM and TNG's assets and Claimants' equity interests in KPM and TNG, the criminal investigations, and the USD 62 million back tax assessment. Finally, Claimants' financial position as of June 2009 was mainly due to Kazakhstan's conduct – it does not reduce the impact of Kazakhstan's interference on the Credit Suisse financing, but rather amplifies it. (CPHB 1 ¶¶ 405 – 408).

1335. Two events - the 18 December 2008 INTERFAX publication, which extensively quoted the MEMR's false accusations of forgery and violations of registration requirements, and the 15 December 2008 formal initiation of the criminal investigation against KPM – had a profoundly negative impact on Claimants' reputation and the value ascribed to their investments in capital markets. Based on those events, on 14 January 2009, Fitch ratings agency placed Tristan's long-term default rating and senior unsecured rating of B+ on the Rating Watch Negative. Fitch warned investors that the MEMR's cancellation of its pre-emptive rights waiver could result in the termination of TNG's Subsoil Use Contract. On 15 January 2009, Moody's placed Tristan's B2 rating on review for a possible downgrade, again based on both events. Accordingly, Kazakhstan's wrongful acts had a profound impact on the value of Claimants' investments not later than 14 January 2009. (CPHB 1 ¶¶ 346 – 357, 646 – 647; CPHB 2 ¶¶ 205 – 209).

1336. The INTERFAX article directly interfered with a specific financing transaction that Claimants were then negotiating with Credit Suisse. On 18 December 2008, Mr. Petrosius of Credit Suisse sent Mr. Lungu the INTERFAX article and requested his comments. After that, Credit Suisse refused to provide the bridge loan until Claimants resolved their disputes with the Kazakh government. Kazakhstan's argument that Claimants have not proven that the MEMR's actions caused the Credit Suisse loan to fall through is not persuasive. Moodys and Fitch confirmed that the MEMR's actions against KPM and TNG raised concerns to the companies' ability to service their existing debt. It would have been surprising if any lender would have gone forward with the new financing without resolution of the conflicts. (CPHB 2 ¶¶ 210 – 211).

1337. The financial crisis did not prevent the Credit Suisse transaction. Credit Suisse stated on 5 December 2008 – after the crisis erupted in September 2008 – that it aimed to execute the term sheet the following week. (CPHB 2 ¶ 212).

1338. The inability to receiving financing forced Claimants to enter into the Laren transaction in June 2009. It was a necessary transaction that was on horrible terms, which caused Moody's and Fitch ratings agencies to further downgrade Tristan's debt to the C level. Respondent's illogical and speculative argument that Claimants would have turned to the Laren loan sharks in August 2009 to refinance the Credit Suisse loan ignores the State's actions, completely. If Claimants had needed to refinance, they would have been able to do so on ordinary commercial terms, possibly even with Credit Suisse, on the same or better terms, since oil prices and credit markets had improved dramatically by that time. Respondent's argument that the Credit Suisse loan would not have helped Claimants to avoid the Laren loan is speculative and nonsensical. (CPHB 2 ¶ 213 – 214).

1339. The evidence that Kazakhstan's conduct interfered with Claimants' ability to sell their investments in KPM and TNG is overwhelming. First, the MEMR leak to INTERFAX clouded Claimants' title and reputation. Second, Kazakhstan sequestered Claimants' shares in KPM and TNG and KPM's and TNG's Subsoil Use Contracts, pipelines, and vehicles on 30 April 2009. Claimants were thereafter legally prohibited from selling their investments, through sale of either shares or assets. (CPHB 2 ¶¶ 233 – 235).

1340. The clouded title resulting from the INTERFAX press release interfered with Claimants' ability to sell KPM and TNG as of 30 April 2009, when Kazakhstan froze the shares in the companies. Kazakhstan's actions also affected several potential buyers in the Project Zenith sale process, to which Mr. Suleymenov testified. This affected price, as the RBS Report confirms that RBS and KMG E&P deducted liabilities attributable to Kazakhstan from their valuation. In addition, the KMG E&P confirmed its valuation by examining the trading price of the Tristan debt, which was also negatively affected by Kazakhstan's actions. (CPHB 1 ¶¶ 384 – 389).

1341. Kazakhstan's actions interfered with TNG's sales. Claimants inferred that Kemikal's sudden and inexplicable refusal to post bank guarantees that were required by its credit terms was part of Respondent's aggressive and hostile campaign to put pressure on Claimants. At the time, Kemikal was controlled by President Nazarbayev's son-in-law, Mr. Kulibayev. As a result, Claimants did not renew the contract with Kemikal when it expired at the end of 2008. Respondent frustrated TNG's attempts to find replacement buyers in summer 2009 in two ways. First, Respondent prevented TNG from selling gas on export markets (which required access to the CAC Pipeline, which required Claimants to sell through a Kazakh government affiliate, either Kemikal or KazRosGaz). Second, the arrest of Mr. Cornegruta and the inspections and harassment caused the management of TNG to devote much of their time responding to the State's harassment, rather than the day-to-day management of the company. Many managers wisely fled the country. As a result of being compelled not to renew the Kemikal contract and of being unable to find a replacement, TNG had to shut down production by 30 – 50% from March – July 2009, and by 100% for two weeks in

August 2009. TNG produced 17 BCF of gas and 311,000 barrels of condensate fewer than its own targets. (CPHB 2 ¶¶ 223 – 227).

1342. Advisors to the State controlled oil company, KMG EP, confirmed that the State's actions were material impediments to any acquisition of KPM and TNG. Squire Sanders recommended that KMG EP make the return of the companies' documents and the termination of the criminal proceedings and attachment orders a condition on any transaction. Those accounts posed an insurmountable obstacle to the sale of KPM and TNG to buyers other than KPM EP, who may have had the clout to stop the criminal actions. (CPHB 2 ¶ 236).

1343. PwC identified financial and tax issues that were directly attributable to Kazakhstan's wrongful actions as impediments to the purchase by KMG EP or, at least, issues to be considered in valuing KPM and TNG. The RBS valuation included USD 243.5 million in contingent liabilities, most of which are attributable to Kazakhstan. RBS disregarded the potential exposure of up to USD 1 billion in criminal fines, but suggested that those could be dealt with in the SPA – something only perhaps no other purchaser but KMG EP could have accomplished. Mr. Suleymenov testified that KMG EP valued the companies' equity in the range of negative USD 50 – 100 million after deducting the Tristan debt and contingent liabilities. Importantly, however, the Tristan debt alone would have been USD 111 million less but for Kazakhstan's action. Thus, KMG EP's valuation would have been positive, but for KMG EP's action. (CPHB 2 ¶¶ 237 – 238).

1344. The market price of the Tristan debt was negatively affected by Kazakhstan's illegal actions. It was also misquoted by Mr. Suleymenov, when he stated that the market price of the Tristan notes was only 25 – 28 cents on the dollar, when it was nearly double that on the date of the RBS valuation. Mr. Suleymenov acknowledged that the trading price of the Tristan notes no doubt incorporate Kazakhstan's actions. (CPHB 2 ¶ 239).

1345. Finally, when Claimants submitted the Cliffson transaction to the MOG for approval in 2010, the MOG conditioned the sale on the satisfaction on all legal obligations imposed by the state and the release of the sequestration orders. The sale could not be concluded. Claimants have proven that Kazakhstan's actions were the primary reasons that KMG EP did not buy KPM and TNG. Other potential buyers, like Total lost interest when the State precluded Claimants from completing the exploration well. Dr. Kim of KNOC testified that the inability of TNG to export gas was the principle reason that KNOC lost interest. Mr. Seitinger testified that OMV decided against the purchase for market reasons, but those were also influenced by Kazakhstan. Even with the global financial crisis, it is beyond serious doubt that KPM and TNG became unattractive assets as a result of Kazakhstan's actions, and that Kazakhstan is responsible for all of the injury to which its actions contributed. (CPHB 2 ¶¶ 240 – 245).

1346. The final expropriation in July 2010 caused the direct and egregious injury to Claimants, who thereby lost their remaining ability to sell the assets, to use them productively, and to direct the cash flows from those assets to the creditors. The seizure was just the final step in a series of actions starting in late 2008 that impaired Claimants ability to profitably and successfully operate, manage, control, and dispose of their investments. (CPHB 2 ¶ 246).

2. Arguments by Respondent

1347. Initially, Claimants argued that the inspections and investigations initiated in October 2008 had a severe impact on the operations of KPM and TNG. Now, however, they have abandoned that claim. At the hearing, Mr. Cojin even testified that the inspections and investigations "*could not disturb*" the people at TNG who were "*very busy with production*." Instead, Claimants now focus on the lack of funding of KPM and TNG which they allege to have been caused by the Republic. (RPHB 2 ¶¶ 92 – 94, 126).

1348. Claimants now argue that the INTERFAX press item of 18 December 2008 caused an injury to Claimants' reputation and ability to get credit. It should be pointed out that in the first hearing, when asked about what caused the cashflow problems in 2009, Mr. Lungu made no mention of the pre-emptive rights waiver issue. Regardless, the INTERFAX item cannot be attributed to the Republic. It was not issued by the Republic. INTERFAX obtained the information from unofficial sources. Claimants have not shown that the Republic was in any way involved in the publication of the item. (RPHB 2 ¶¶ 95 – 97).

1349. Claimants' case that the pre-emptive rights waiver issue harmed their ability to secure financing boils down to the negotiations with Credit Suisse for a bridge loan (which could have collapsed for any number of reasons) and Mr. Lungu's non-credible and illogical testimony. Under Mr. Lungu's testimony, the Credit Suisse loan would have needed to be refinanced in August 2009 already – Claimants, thus, would have needed to turn to the Laren loan sharks in August 2009 instead of June 2009. To the extent that Claimants have argued that the INTERFAX item prevented them from getting financing on more commercial terms, Claimants have provided no evidence to support this, especially in light of the other problems relating to the drop in demand and the increase in need for capital expenditure. Finally, Respondent denies the unproven contention that Laren is not an affiliate of Anatolie Stati. (RPHB 2 ¶¶ 98 – 104).

1350. Respondent denies interfering with gas sales of KPM and TNG. The loss of Kemikal as a customer is not attributable to the Respondent since, as confirmed by PwC, that was due to Kemikal's own liquidity issues. Kemikal is a private company that was not acting in any kind of governmental capacity. It has not been managed by the State. (RPHB 2 ¶¶ 124 – 126).

1351. Claimants have not shown any legal authority in favor of lowering the standard of proof regarding the alleged interference with the sale of KPM and TNG. None of the causes complained of mentioned by Claimants played any role in the companies' decisions not to purchase KPM and TNG. Claimants' failure to sell the companies had nothing to do with the Republic's actions. Rather, it was caused by the lack of commercial activity of KPM and TNG. Any interest that may have existed on behalf of some market players vanished upon closer review of the companies. (RPHB 2 ¶¶ 135 – 137, 150).

1352. Anatolie Stati was dishonest in his testimony in both hearings. His testimony was inconsistent with that of other witnesses. In particular, he informed the Tribunal

that Kazakh authorities allegedly told Total EP and KNOC that it would not permit sale. The testimony of Mr. Chagnoux of Total EP and Dr. Kim of KNOC, however, confirmed that no such talks with Kazakh authorities had taken place. (RPHB 1 ¶¶ 112).

1353. Claimants' arguments regarding the involvement of KMG EP are confusing and fundamentally inconsistent. On the one hand, KMG EP was part of the alleged harassment campaign, and on the other, Claimants treat KMG EP as a purely commercial entity for the purpose of their alienability arguments. In any event, it was not State actions that led to the KMG EP decision not to go forward with the deal. "*As the RBS valuation showed, KMG EP assumed in the base case an enterprise value between USD 473 million and USD 751 million for KPM and TNG (taking into account potential synergy effects). At the same time, KPM and TNG were liable for USD 531.1 million in noteholder debt with an interest of 10.5%. In other words: There was a considerable likelihood that the equity value of KPM and TNG was negative even disregarding any other liability but the noteholder debt*." Neither the pre-emptive rights waiver issue nor the sequestration of shares played any role. (RPHB 2 ¶¶ 146 – 149).

1354. Total E&P's ultimate lack of interest in purchasing KPM and TNG was that Total E&P was looking for situations in which they could add value or increase the reserves. In KPM and TNG, there was no such additional value. There is nothing incredible about this testimony and Claimants' attempts to discredit the witness, Mr. Chagnoux, are ridiculous. Mr. Chagnoux testified credibility and even discussed Total E&P's strategic decision to gain access to the data room by putting a value on the worthless LPG Plant. In any event, the Respondent did not hinder the sale by preventing Claimants from proving the resources in the Interoil Reef. TNG failed to prove these reserves, failed to drill deeply enough after the drill broke down, and failed to conduct a full and thorough 3D seismic analysis that covered the entire reef. Claimants, and not Respondent, are at fault. (RPHB 2 ¶¶ 138 – 142).

1355. In a fundamental reversal to Claimants' earlier positions, Claimants now agree that the lack of gas sales contracts caused KNOC to lose interest in KPM and TNG, despite testimony of their own witnesses, Anatolie Stati and Mr. Lungu, that the Kazakh authorities deterred KNOC. TNG's inability to secure gas contracts had nothing to do with the Republic. (RPHB 2 ¶¶ 143 – 145).

3. The Tribunal

1356. As indicated above in this Award, the Tribunal notes that the Parties' submissions indicate that the Claimants' investment proceeded in a more or less normal fashion before the Order of the President of the Republic on 14/16 October 2008.

1357. Prior to the 14/16 October 2008 order, Claimants were involved in three-way negotiations, at the behest of Kazakhstan, beginning in 2007. On 7 May 2007, the MEMR, the Governor of the Mangystau Region, KMG, KazAzot, Ascom, KPM, and TNG entered into a MOU that TNG would sell certain volumes of gas to KazAzot first at near market prices followed by the international market price after

two years and, further, that through KazTransGas, TNG would be allowed to export certain volumes of gas at international market prices. (C-300). It was argued that TNG was ideally suited to be considered as the primary supplier to the ammonia-carbamide project as it was the fourth largest producer of gas, it was locally situated, and it was a reliable provider of gas in large quantities. Over the following year, extensive negotiations took place among the parties regarding such issues as prices, volumes, and other conditions of the agreement.

1358. Beginning in 2007, TNG, in addition to its efforts to pursue what became the Tri-Partite Agreement, had also pursued gas sales opportunities with Kemikal. Claimants argue that this entity was believed to be under the control of the son-in-law of President Nazarbayev, Mr. Timur Kulibayev. Deliveries to Kemikal began in October 2007 and continued throughout 2008.

1359. On 28 April 2008, the MEMR, KMG, TNG, KazTransGas, and KazAzot made a first agreement among TNG, KazAzot, and KazTransGas. (C-301). A further Tri-Partite Agreement followed between TNG, KazTransGas, and KazAzot setting out the formula for the price calculation, the volumes of gas concerned, and the conditions of supply and export. (C-302).

1360. TNG's Contract 302 initially had a six year term. As a result of flooding from the Caspian Sea basin, the MEMR extended the exploration term for two years and eight months, until 30 March 2009. The MEMR did not count this *force majeure* against the two permissible contract extensions, which in any event required consent of the Republic. (R-I ¶¶ 14.20 – 14.25; R-165). On 24 July 2008, TNG informed the Geology and Subsoil Use Committee of the MEMR that it had discovered an oil and gas field by drilling the Munaibay-1 well in the Contract 302 area. Anatolie Stati testified that during the summer of 2008, TNG purchased a more robust drilling rig in Georgia with the intention of resuming the completion of the Munaibay-1 well and further exploration of the Contract 302 area. (Tr. January 2013 Hearing Day 2 pp. 84, 114 – 115). On 11 August 2008, TNG applied to move to the appraisal phase for Munaibay. TNG withdrew the appraisal application on 10 October 2008 because it believed it was too early to begin appraisal. (C-0 ¶ 57; C-I ¶ 67; CPHB 1 ¶ 129; 234; CPHB 2 ¶ 151; C-66). Instead, on 14 October 2008, TNG notified the MEMR of its intention to exercise its contractual right to extend the exploration period by two further years pursuant to Contract 302. On 14 October 2008, TNG submitted its formal application to extend the exploration period Contract 302 by two years. Among other things, this application refers to the "*[d]iscovery of new HC deposits on depths of over 5-6 km*…" and "*large deeply submerged reef fields…"* (C-67, partially quoted). The Claimants say these are unmistakable references to the Interoil Reef structure and that this application further indicated TNG's plans to complete the Munaibay-1 well. (C-I ¶ 67; CPHB 1 ¶ 129, 234 – 235; CPHB 2 ¶ 151; R-I ¶ 31.68; R-II ¶ 416; C-66; C-67; Lungu Tr. January 2013 Day 1 pp. 250 – 251).

1361. Following the direction of President Nazarbayev on 14/16 October 2008, the Deputy Prime Minister promptly issued Order No. 6497 on 16 October 2008, which ordered the MEMR and the Tax and Customs Committees to conduct comprehensive and complex audits of KPM, TNG, and Kok Mai. These audits began on 28 October, 10 November, and 18 November 2008, respectively.

1362. Under the direction and sometimes even the supervision of the Financial Police, KPM and TNG faced relentless inspections, including by:

- The Customs Committee (18 October 2008, C-11);
- The MEMR (20 October 2008, C-9);
- The Tax Committee (24 October 2008, C-10);
- The Geology Committee (28 October 2008, C-12);
- The Ecology Committee (28 October 2008, C-13);
- The MES (31 October 2008, C-14); and
- The National Bank of Kazakhstan (November 2008, C-15);

1363. KPM's former General Manager and subsequently Deputy General Manager of TNG, Alexandru Cojin, stated that these investigations and inspections were voluminous and harassing. He testified that the process began around November 2008 and continued for nearly two years. (WS Cojin ¶¶ 6 – 8). Similarly, KPM's and TNG's Technical Director, Victor Romanosov, testified that "*normal*" inspections in the field had previously occurred once yearly, but commencing in late 2008 and continuing thereafter, the frequency of these inspections increased to every quarter, such that, "*[a]s a result, [he] met with representatives from nearly a dozen agencies for weeks at a time every three months*." (WS Romanosov 1 ¶ 26). These investigations were unprecedented for KPM and TNG. Claimants provided evidence that these actions became an almost daily intrusion into the operations of KPM and TNG, so much so that many staff members were more occupied with responding to the inspections than with their normal everyday responsibilities.

1364. The following events are also of relevance:

1365. In fall 2008, Kemikal – TNG's largest non-local customer – failed to post the bank guarantees that were part of its required payment terms. These terms were required because Kemikal's payment history was erratic and large arrears accrued. Accordingly, TNG did not renew the contract with Kemikal at the end of that year. It required collection efforts until June 2009 for TNG to receive payment from Kemikal.

1366. A 17 November 2008 Tri-Partite Agreement between TNG, KMG (who had replaced KazTransGas), and KazAzot memorialized their agreement on price, volumes, and related conditions of sale and export. (R-393). TNG and KMG signed this Tri-Partite Agreement. It was hand-delivered to KazAzot for its signature, but KazAzot never signed. Instead, in late November 2008, KazAzot requested that KMG perform another audit of the ammonia-carbamide complex project, especially regarding the delivery prices of gas. KazAzot allegedly indicated at that time that it would sign the Tri-Partite Agreement within six months, subject to the outcome of this audit.

1367. Claimants attempted to obtain a bridge loan to provide additional working capital in connection with their decision to put the companies on the market. On 5

December 2008, Credit Suisse sent Claimants a term sheet for a USD 150-175 million facility. (C-II ¶ 381). Respondent states that this shows that Claimants likely began looking for financing in November 2008. (R-II fn. 775).

1368. On 18 December 2008, the MEMR informed TNG that it was "*cancelling*" the State's explicit ruling of 20 February 2007 that allowed the 2003 transfer of TNG from Gheso to Terra Raf. The MEMR demanded that TNG submit a new application for the transfer. The notice required TNG to submit all documentation regarding Terra Raf's ownership within 10 days, and that failure to do so would result in the MEMR unilaterally terminating TNG's Subsoil Use Contracts for the Tabyl Block and the Tolkyn field. (CPHB 2 ¶¶ 38, 117; R-I ¶ 13.47; R-II ¶¶ 170 – 172; RPHB 1 ¶ 475 – 476; RPHB 2 ¶¶ 281, 377; C-134; C-140; C-424; Illyassova (12 August 2012) ¶ 7; WS Ongarbayev ¶ 5.7).

1369. The Parties agree that, on 18 December 2008, INTERFAX issued a press release containing allegations that the Claimants had altered documents in order to defraud the State of its pre-emptive right to purchase the companies.

1370. Immediately after its publication, Credit Suisse sent Mr. Lungu of Ascom the INTERFAX press release and requested an explanation. (C-625). After discussions, Credit Suisse informed Claimants that it would not provide the bridge loan until Claimants resolved their disputes with Kazakhstan. (C-II ¶ 381; CPHB 2 ¶¶ 117, 210 – 211; WS Lungu 1 ¶ 7).

1371. On 22 December 2008, TNG refused to submit the required application before the MEMR and lodged objections to the State's reversal of its consent to the 2003 transfer. (C-I ¶ 146; CPHB 2 ¶ 117; C-142).

1372. Anatolie Stati testified that, following the State's actions in relation to its revocation of its previous waiver of pre-emptive rights regarding the transfer to Terra Raf, beginning December 18, 2008, he concluded he should be careful regarding the Kazakhstan Government's intentions. (Tr. January 2013 Hearing Day 2, pp. 84, 114 – 115). Thus, although this rig was ready for transport in January 2009, the newly purchased heavier drilling rig was not brought into Kazakhstan. (CPHB 2 ¶¶ 228 – 232). Respondent argues that Claimants would have needed to remove old rig, move the new rig in, assemble the new rig, and drill to 6000m in 3 months. Even if they had a new rig, it is unrealistic that a discovery would have been made. Not even Claimants foresaw it would go so quickly, having submitted a working program on 14 October 2008 that foresaw 7 months to drill Munaibay-1 from 5200 – 6000m. RPHB ¶ 119; fn. 209).

1373. On 14 January 2009, the Fitch Ratings agency issued a Rating Watch Negative report for Tristan's long-term default rate. A Dow Jones release indicated that the Rating Watch Negative report reflected Fitch's concern of "*a potential negative impact relating to the latest actions of the Kazakh authorities on Tristan's financial standing and business prospects*." The Dow Jones report referenced KPM being "*subject to a criminal investigation*." (CPHB 1 ¶¶ 219, 349; CPHB 2 ¶¶ 38, 117; C-590). Although Respondent has argued that the Tristan Notes were risky from the outset, the Tribunal considers that the evidence reflects that Respondent's actions worsened the market's treatment of these notes, and this was explicitly noted by the ratings agencies.

1374. On 15 January 2009, Moody's reported a downgrade review of Tristan, as a result of the criminal investigation of KPM and the pre-emptive right claim concerning TNG. (CPHB 2 ¶¶ 38, 117; C-744).

1375. On 18 February 2009, Moody's downgraded the Tristan debt from B2 to B3 due to the "*amplified regulatory and operational risk*" posed by the unresolved criminal investigation of KPM and the pre-emptive right claimed by the State against TNG. (C-744).

1376. On 24 February 2009, the Financial Police seized KPM's corporate documents. (C-609).

1377. On 24 February 2009, TNG complained to MEMR regarding the negative effects that the December 2008 publication of Respondent's actions had had on its business and reputation. (CPHB 2 ¶ 117; R-II ¶ 171; C-619).

1378. On 27 February 2009, the State responded to TNG's objections to the 18 December 2008 notice, stating that the transfer of TNG to Terra Raf had breached the State's statutory pre-emptive right to acquire TNG. The State explained that TNG was, therefore, in breach of Contracts 210 and 302. The State demanded that TNG submit a new application for Kazakhstan's consent to the transfer and waiver of the State's pre-emptive purchase right. Failure to do so would result in termination of TNG's Subsoil Use Contracts. (C-0 ¶ 28, partially quoted; C-I ¶ 148; CPHB 2 ¶¶ 38, 117; C-146).

1379. On 3 and 4 March 2009, the Financial Police seized KPM's and TNG's corporate documents. (C-610; C-611; C-612).

1380. On 5 March 2009, Moody's downgraded the Tristan debt again, based on the worsening treatment of KPM and TNG by Kazakhstan and, in particular, the opening of a formal criminal investigation against TNG. (CPHB 2 ¶ 38; C-744).

1381. In a hand-delivered letter dated 18 March 2009, which Respondent states should be viewed as an attempt to provoke the Republic, TNG responded to the State's 27 February 2009 notice of breach and offered the State three alternatives: (1) revocation of the notice that purported to "*reverse*" the State's February 2007 decision; (2) TNG's reapplication for a transfer permit, if the State would agree to pay USD 1.347 billion in compensation if the permit were denied, or (3) referral of the dispute to the Arbitration Institute of the SCC and maintenance of TNG's status quo rights under the TNG Subsoil Use Contracts, pending a final arbitral decision. (C-0 ¶ 29; C-I ¶¶ 38, 149; CPHB 2 ¶ 117; R-I ¶¶ 9.75 – 9.76; C-41, WS Pisica 1 ¶ 31, WS Lungu 2 ¶ 42).

1382. On 19 March 2009, the day after this correspondence from TNG to MEMR, a group of representatives from KPM, TNG, Terra Raf, and Ascom met with the MEMR Executive Secretary, Mr. A. B. Batalov, at the offices of the MEMR. At this meeting, the State's actions against the Claimants since President Nazarbayev's 14/16 October 2008 Order were discussed. The Parties dispute whether Mr. Batalov assured the Claimants that all of these issues would be disposed of in favour of TNG and KPM, and that TNG's Subsoil Use Contracts would not be cancelled, if TNG would simply submit a new application for its transfer to Terra

Raf, and would permit the State to re-evaluate its prior consent. Mr. Batalov stated that, because the size and value of TNG had changed since the 2003 transfer to Terra Raf, the State would require a new and contemporary evaluation of TNG's books and assets (as of February 2007) in order to properly re-evaluate the transfer. KMG would conduct this new evaluation. Minutes of the meeting were prepared by Mr. Grigore Pisica and were offered to Mr. Batalov for his signature, but he refused to sign. (C-I ¶¶ 106, 150, 152, 177; R-I ¶ 13.47(e)(v), 21.1; C-42; C-111; Lungu 43 – 45; Pisica ¶¶ 32 – 37, 43).

1383. On 24 March 2009, KPM and TNG sent a complaint to President Nazarbayev. (CPHB 2 ¶ 142; C-631).

1384. On 24 March 2009, following the meeting with Mr. Batalov of the MEMR, TNG applied for a permit for the transfer of TNG's ownership to Terra Raf and for a written decision on the State's waiver of its pre-emptive rights. (C-0 ¶ 32, partially quoted; C-I ¶¶ 153, 332; C-147; Lungu ¶ 46; Pisica ¶ 38).

1385. On 25 March 2009, TNG sent the State a separate request for another formal, written decision regarding the right of TNG to transfer Terra Raf's ownership interests to a prospective third party buyer, including KMG, based upon a competitive bidding process and direct negotiations (C-0 ¶ 32, partially quoted; C-I ¶¶ 153, 154, 332; C-148; Pisica ¶ 38; Lungu ¶ 46).

1386. On 30 March 2009, Contract 302 expired. (R-II ¶ 411; C-53).

1387. On 2 April 2009, the Expert Commission passed a Decision, which recommended the extension of Contract 302 for two years. (CPHB 1 ¶ 236; CPHB 2 ¶ 151; R-I ¶ 31.70; R-163.2).

1388. On 9 April 2009, the MEMR issued a written statement to execute the extension of Contract 302 to 30 March 2011, which the Claimants allege that they requested on 9 March 2009, and which the Respondent states was requested on 24 March 2009. The Claimants allege that the MEMR notified TNG of its agreement to extend Contract 302 and undertook to execute the amendment by 2 July 2009. Respondent states that the adopted decision has the character of a recommendation and is only one of many legal actions required for a valid contract extension including, for example, that TNG needed to apply for a license renewal, as well. (C-0 ¶ 58; C-I ¶¶ 22, 178; R-I ¶¶ 31.71 – 31.73; C-II ¶ 241; CPHB 2 ¶ 151; R-II ¶¶ 413, 419 – 424; 436; RPHB 1 ¶ 323 – 325; C-27; C-27.2, R-163.1; R-163.2, Ongarbaev ¶ 7.2; Ongarbaev Day 6 pp. 67 – 68).¶

1389. Despite these potentially promising developments of 2 and 9 April 2009, which indicated that an extension may be forthcoming, the MEMR never renewed Contract 302. This matter lingered over the following months, during which time, TNG occasionally followed up – on 30 April 2009 and on 4 May 2009 – and received hints that the renewal would be forthcoming. As a result of the State's inaction, however, following the expiration of Contract 302 on 30 March 2009, TNG was prevented from exercising its contractual rights under Contract 302 and, therefore, prevented from further exploration of the Tabyl Block. The East Munaibay discovery, first claimed by TNG in July 2008 and later further re-

notified to the MEMR on 9 March 2009, along with a further notice of discovery in the Bahyt structure, remained unfulfilled.

1390. On 25 April 2009, the Financial Police arrested Mr. Cornegruta. (C-I ¶ 44, partially quoted; R-I ¶ 27.2; C-117; Exhibit 1 and 3 to Rakhimov 2).

1391. On 30 April 2009, the Financial Police issued attachment orders in respect of KPM's and TNG's Subsoil Use Contracts. The Claimants allege that the Financial Police issued no fewer than 10 orders for the sequestration of property, which resulted in freezing KPM's and TNG's shares, KPM's Contract 305, TNG's Contracts 210 and 302, KPM's field oil pipeline, TNG's field gas pipeline, TNG's condensate pipeline, and the companies' other property. (C-I ¶ 121; R-I ¶ 29.2; C-486; C-487; C-488; C-489; C-490; C-491; C-492; C-493; C-494; C-495; C-496; C-497; C-498; C-499; C-500; Condorachi ¶ 38). Those orders prevented KPM and TNG from selling or depreciating the value of those assets. (C-I ¶ 121; CPHB 1 ¶ 140).

1392. On 30 April 2009 and 4 May 2009, TNG followed up with the MEMR to inquire about the status of the Contract 302 extension.

1393. On 7 May 2009, Anatolie Stati wrote to President Nazarbayev to obtain the release of Mr. Cornegruta, to protect the former and current management of KPM and TNG, and to end the dispute. Around this date, Mr. Stati decided to pause construction on the LPG Plant and to reduce planned development efforts at Tolkyn and Borankol.

1394. On 15 May 2009, the Financial Police issued attachment orders in respect of KPM's and TNG's Subsoil Use Contracts and requested additional documents from KPM. (R-I ¶ 29.2; CPHB 2 ¶ 38).

1395. On 15 May 2009, the Financial Police notified KPM and TNG that they had seized the Claimants' equity interests in KPM and TNG two days before on 13 May 2009. The asset and equity seizures were designed to prevent KPM and TNG from selling or transferring their interests during the course of the criminal proceeding against Mr. Cornegruta. (C-I ¶ 121). In addition, the Financial Police requested additional documents from KPM. (C-668 and C-485). Respondent states that the Financial Police issued attachment orders. (R-I ¶ 29.2). Respondent does not admit that the Financial Police notified KPM and TNG that it had seized KPM's and TNG's equity interests on 13 May 2009. If the allegation is that Claimants were prevented from transferring their interests during proceedings, then that would be appropriate under the circumstances. (R-I ¶ 26.26(c)).

1396. On 12 June 2009, Terra Raf and Ascom filed petitions to lift the seizures. (C-0 ¶ 45; C-I ¶ 122).

1397. On 15 June 2009, Kazakhstan indicted Mr. Cornegruta. (C-454).

1398. By early summer of 2009, most of the senior management of KPM and TNG, in light of the case of Mr. Cornegruta, had fled Kazakhstan in order to avoid arrest. The assets of KPM and TNG were under seizure. Credit Suisse had refused to provide financing, and the companies urgently needed to renew financing

arrangements in order to meet their tax and interest obligations. It was against this setting that the Laren Loan Facility was negotiated. (CPHB 2 ¶ 213).

1399. On 16 June 2009, Claimants entered into the Laren Loan Facility, described in detail in the summaries of the Parties' positions, above.

1400. On 17 June 2009, the Financial Police publically announced that their investigative phase had concluded and that the four former and current managers of KPM and TNG would be prosecuted for having realized an "*illegal profit*" of 147 billion Tenge (approximately USD 980 million as of June 2009). (C-0 ¶ 45, C-II ¶ 602; CPHB 2 ¶ 38 (calling the 147 billion the potential fine); R-I ¶ 26.24; C-118).

1401. On 19 June 2009, the third tranche of the 2006 Bonds Project was issued, for USD 111.11 million. (R-I ¶ 9.59).

1402. On 27 June 2009, the Terra Raf and Ascom petitions to lift the seizures were denied. (C-0 ¶ 45; C-I ¶ 122).

1403. On 27 June 2009, the Regional Prosecutor's Office wrote to Ascom and Terra Raf noting that an international search was underway for Mr. Cojin. (CPHB 2 ¶ 38; RPHB 2 ¶ 191).

1404. On 2 July 2009, the MEMR's self-imposed deadline to extend Contract 302 expired, without an extension of that contract. (CPHB 2 ¶¶ 38, 151).

1405. On 10 July 2009, a Fitch Ratings press release indicated that market observers were concerned about "*weak corporate governance standards at Tristan*." (RPHB 2 ¶ 61).

1406. In August 2009, Kazakhstan, the Governor of the Mangystau Region, KazAzot, and Mitsubishi confirmed their intention to go forward with the ammonia-carbamide complex. A few days after that announcement, on 26 August 2009, the Governor of the Mangystau Region asked Prime Minister Massimov to cancel TNG's and KPM's Subsoil Use Contracts. Claimants allege that this letter implicitly sought the transfer of TNG's assets to KazAzot. (C-I ¶ 61; C-293).

1407. Notwithstanding several attempts to obtain his release, Mr. Cornegruta remained incarcerated until the conclusion of "*his trial*" on 18 September 2009. Thereafter, following his conviction and sentence of four years, he remained in jail until he escaped.

1408. From the above chain of events, the Tribunal considers that Respondent's series of actions starting in October 2008, which are breaches of the FET standard of the ECT as found above in this Award and which were publicized beginning in December 2008, harmed Claimants' investments and prevented Claimants from proceeding with their investment from that moment, forward.

1409. This affected Claimants' search for bridge financing, which they began in November 2008 on recommendation from Renaissance Capital. Bridge financing, they state, was necessary at that time in order to obtain a partial advance on the

proceeds of the sale in order to reinvest them into other projects as soon as possible and, as Mr. Lungu explained, to protect against falling oil and gas prices.

1410. Thereafter, the 15 December 2008 formal initiation of the criminal investigation against KPM and the 18 December 2008 INTERFAX publication, which extensively quoted the MEMR's accusations of forgery and violations of registration requirements, had a profoundly negative impact on Claimants' reputation and the value ascribed to their investments in capital markets. This impact is easily understandable and obvious to the Tribunal. It is confirmed by the fact that, on 14 January 2009, the Fitch ratings agency placed Tristan's long-term default rating and senior unsecured rating of B+ on the Rating Watch Negative.

1411. In this context, Respondent's argument that the INTERFAX item cannot be attributed to the Republic as it was not issued by the Republic and INTERFAX obtained the information from unofficial sources, does not change the impact. Even if Claimants have not shown that the Republic was in any way involved in the publication of the INTERFAX item, it is obvious and not disputed by Respondent, that it was Respondent's actions starting in October 2008 that caused the publication.

1412. As well, Respondent's argument that, at the Hearing, Mr. Cojin testified that the inspections and investigations "*could not disturb*" the people at TNG who were "*very busy with production*," does not change the negative impact of Respondent's chain of actions, as that impact is by no means limited to keeping the staff of Claimants from engaging in more work on their normal business.

1413. Further, the Tribunal is not persuaded by Respondent's argument that Claimants have not proven that the MEMR's actions caused the Credit Suisse loan to fall through. Moody's and Fitch confirmed that the MEMR's actions against KPM and TNG raised concerns about the companies' ability to service their existing debt. The Tribunal agrees with Claimants that it would have been surprising if any lender would have gone forward with the new financing without resolution of Claimants' conflicts with the government of Kazakhstan.

1414. It is apparent that, even before the trial of Mr. Cornegruta, the relentless onslaught of inspections and, eventually, charges against KPM's most senior officer had, when considered together with these pre-trial seizures of assets on 30 April 2009, seriously disabled Claimants' companies.

1415. The Parties agree, and the Tribunal also agrees, that Claimants were only able to weather the liquidity storm of summer 2009 by obtaining financing through the Laren Loan Facility. (RPHB 1 ¶ 58, CPHB 2 ¶ 257). The Parties agree, and the Tribunal also agrees, that the terms of the Laren Facility were terrible for Claimants. (CPHB 2 ¶ 213; RPHB 1 ¶ 60; RPHB 2 ¶ 69(e)). Likewise, the Parties agree, and the Tribunal also agrees, that had Claimants obtained financing from Credit Suisse in December 2008, they would not have needed to resort to other lenders in June 2009. (CPHB 1 ¶ 353; RPHB 2 ¶ 102; 961).

1416. What the Parties dispute is whether Respondent's actions caused Claimants to enter into the Laren Facility. The Tribunal finds that the Laren Facility, with its onerous terms, was arranged in June 2009 because it was necessary for KPM and TNG to

secure these funds and because Respondent's actions prevented them from doing so sooner. By June 2009, ordinary lenders would not lend to these companies on commercial terms. Although Claimants drove the best bargain they could, the cumulative effect of the barrage of inspections and the very public revelation in December 2008 of the alleged forgery and fraud said to have been committed in relation to the transfer to Terra Raf, as indicated above, led to the severe downgrades by Moody's and Fitch rating agencies. While the worldwide economic crisis was affecting these companies in late 2008 and early 2009, the State's aggressive and concerted actions, including the inspections, the criminal charges, and the asset seizures - even before Mr. Cornegruta's trial in August and September 2009 – forced Claimants to accept the "*horrendous*" Laren Facility.

1417. Furthermore, the Tribunal also notes that, despite TNG's apparent attempts to comply with Kazakhstan's requests, the State never responded to TNG's applications of 24 and 25 March 2009 – applications that the State requested. As a result, Kazakhstan's alleged pre-emptive rights claim lingered throughout the following two year period. It was, no doubt, a cloud on Terra Raf's ownership rights which created continuing difficulties for Claimants.

1418. The Claimants have also alleged that the inspections commencing in October 2008 interfered with their sales and marketing of gas. The Claimants argue that the evident relationships between President Nazarbayev and his son-in-law are reason enough to believe that the Kazakh State was the cause of the various difficulties they encountered in securing their gas sales and export rights commencing in the fall of 2008 and continuing into 2009. They point to the close relationships said to exist between KMG, under the chairmanship of Mr. Kulibayev, and the KazAzot resistance to signing the Tripartite Agreement after over two years of negotiations and the signature of the other two parties to the agreement. They also point to their difficulties with Kemikal, and its failure, at the critical time in the fall of 2008, to continue supplying bank guarantees to secure payment of its accounts. The Tribunal notes Respondent's argument that the loss of Kemikal as a customer is not attributable to the Respondent since that was due to liquidity issues of its own, and that Kemikal is a private company that was not acting in any kind of governmental capacity. However, Kemikal's sudden refusal to post bank guarantees that were required by its credit terms was a change of its earlier business pattern for which the Tribunal sees no other convincing explanation than that it was part of Respondent's aggressive actions against the Claimants, irrespective of whether in that context the fact that Kemikal was controlled by President Nazarbayev's son-in-law, Mr. Kulibayev, played a role.

1419. The Tribunal notes in the present context the Parties' dispute whether the actions of the Kazakh State prevented the owners of KMP and TNG from selling their investments. The Claimants were persistent in their pursuit of selling KPM and TNG, with or without Contract 302. In order to consider any possible contribution to relevant causation, the following paragraphs highlight in a summary fashion the additional events which surround the Claimants' on-going efforts to sell KMP and TNG and the impact of the State's actions on those efforts.

1420. In the early summer 2008, Claimants decided that they wished to explore selling KPM, the LPG Plant, and TNG, excepting its Contract 302 properties (the Tabyl

Block). This activity was called Project Zenith. The Claimants engaged the services of Renaissance Capital to assist them.

1421. On 18 July 2008, Renaissance sent a preliminary "teaser" invitation to 129 potentially interested buyers, including KMG. In mid-August 2008, Renaissance distributed the Information Memorandum to 41 parties that had expressed interest in these companies and their properties and had signed confidentiality agreements. KMG was one of those companies.

1422. On 29 August 2008, KPMG issued a complete Vendor Due Diligence presentation for Project Zenith.

1423. By 1 October 2008, Claimants had received 8 non-binding indicative bids from various entities, including from KMG EP in the amount of USD 754 million and from KNOC in the amount of USD 1.55 billion. The average of the 8 indicative offers was USD 1.05 billion.

1424. On 30 April 2009, however, the Financial Police obtained a pre-trial order for the sequestration and arrest of all the shares of both KPM and TNG (C-486; C-487; C-488; and C-489). By their terms, these orders not only sequestered these shares, but also stated that all interested persons should be informed. The subsequent Minutes of 13 May 2009 stated, among other things, that 100% of the share ownership in the "statutory capital" of KPM and TNG had been sequestered and that, "*It is prohibited to carry out any actions related to the alienation or transfer of the sequestered property (100% share ownership in the statutory capital) to third parties*."

1425. In addition to these difficulties, the Claimants were faced with on-going taxation claims by the State, as well as the State's efforts to collect on the judgement made by the court against KPM. On 18 September 2009, in addition to a 4-year prison term for Mr. Cornegruta, the criminal court ordered KPM to pay 21,675,578.00 Tenge (approximately USD 145,475,534.08) to the Kazakhstan state budget. On 30 September 2009, the Financial Police ordered the Aktau territorial customs body to conduct a new audit of KPM based on its failure to pay the Crude Oil Export Tax for its January 2009 exports. By December 2009, following a number of court procedures, the Specialized Interdistrict Economic Court issued a consolidation decision, rejecting KPM's and TNG's challenges to corporate back taxes. At the same time, the Financial Police pursued interrogations of KPM employees with respect to a potential tax assessment in relation to 2008 export taxes. In early 2010, KPM commenced a new action to challenge the Financial Police's claim that it owed 2008 export taxes on oil exports. On 31 March 2010, after having paid significant sums in relation to export taxes, KPM and TNG were successful before the Central Customs Committee which notified them that pursuant to their subsoil use contracts, they were not liable for export taxes from October 2008.

1426. A myriad of enforcement actions ensued. On 29 December 2009, the Aktau City Court issued a writ of execution against KPM for the execution of the criminal courts' order to pay the fine of approximately USD 145 million. In early 2010, the Aktau Division of the Enforcement Officers of the Mangystau Oblast issued a Decree on Initiating of the Enforcement Proceedings against KPM for the Recovery of Revenue for the amount of USD 145 million. Enforcement measures

followed this decree from January to June 2010, including seizures of various bank accounts on 10 January 2010, seizure and impounding of motor vehicles on 22 January 2009, a further order on 25 January 2010 of the Mangystau Oblast court with respect to the outstanding Writ of Execution for the payment of 21.6 billion Tenge, together with various additional audits to determine the particulars of remaining assets. By 3 February 2010, the Ministry of Finance notified KPM that it was being monitored for bankruptcy (as of 26 January 2010) for the sum of 3.8 billion Tenge, including interest relating to alleged back taxes and penalties for corporate taxes. On 19 February 2010, the Chief of the Aktau Territorial Department issued a further writ of execution while noting that previous collection orders had gone unfulfilled. This particular order (actually received on 1 March 2010) attached some 2,186 assets previously listed in the detailed inventory. On 23 February this same official issued a further order prohibiting KPM from executing import and export formalities regarding the transportation of oil. On 26 February 2010, this same official dismissed KPM's challenge to the writ of enforcement and issued an order "*to attach the oil pipeline from [the] OTP to Opornaya CRMB [Commoditiies and Raw Material Base of Opornaya Station] of 18 kilometers*" and KPM's accumulator oil tanks. This order also prohibited KPM from transferring oil to the main pipeline operated by KazTransOil once its accumulator tanks reached their capacity. Later, on 4 March 2010, the Chief of the Aktau Territorial Department, despite attachment of numerous accounts and assets, complained that these efforts had not so far been successful and, accordingly, he wished to change course by seeking an enforcement procedure to in-kind transfers of land lots, the 18km pipeline, KPM's Contract 305 over the Borankol field and KPM's subsoil use license No. 309. By 17 March 2010, the Acting Head of the Aktau Territorial Department of Judicial Executors relented and agreed with KPM to suspend the effect of the previous orders made on 23 and 26 February 2010 in order to avoid the suspension of production activity by KPM.

1427. In the meantime, in October, 2009, Starleigh had presented an initial bid of USD 450 million for Claimants' properties in Kazakhstan. Later, in November 2009, Starleigh reduced this bid by USD 100 million, ostensibly in recognition of the USD 145 million fine that had been imposed on KPM by the criminal court. Around this same time, KMG NC began to pursue a possible purchase of the Claimants' assets. At a meeting in Amsterdam in November 2009, the Claimants received an offer from KMG NC of USD 20 million for their equity interests in their companies (immediately following a meeting between KMG NC and representatives of certain of the noteholders in which they were supposedly offered 25 cents on the dollar for their notes). Subsequently, Starleigh made a further offer of USD 50 million on the assumption they could buy out the noteholders. Grand Petroleum offered to purchase KPM and TNG for USD 1.15 billion.

1428. On 13 February 2010, the Claimants successfully negotiated the sale of 100% of their shares and participatory interests in KPM and TNG to Cliffson Company S.A. The total value of that agreement, including buying out the companies' noteholders (including the purchase of Tristam), payment for the Claimants' equity interests, and assumption of liabilities was in the order of USD 920 to 930 million. Claimants say this was a reduced value for their assets in view of the impact of the criminal judgement and its enforcement against KPM. One condition of this potential sale was that the MOG would grant permission for the sale and waive the State's alleged pre-emptive right to purchase KPM and TNG. The MOG conditions

for approval of this potential sale included removal of the attachment orders as well as assurances concerning the financial solvency and technical and managerial capabilities of the Cliffson Company. The Respondent says it co-operated with the Claimants on this matter while the Claimants say that Kazakhstan did not co-operate.

1429. On 30 April 2010, the MOG responded to the Claimant's application, dated 12 April 2010, for approval of the intended sale of their assets to Cliffson Company. The MOG requested additional information regarding the terms of the proposed transaction, but more importantly, noted Kazakhstan's previous seizures of the companies' assets and stated that transfers of the shares of KPM and TNG were forbidden. The MOG stated that, as a result, the transaction would only be approved if KPM and TNG satisfied the requirements necessary to release the attachment of their shares.

1430. On 6 May 2010, the Cliffson Company signed an amendment to the SPA to extend the time for completing the transaction. On 1 June 2010 the MOG renewed its request for further information in relation to the Cliffson Company transaction. By 9 June 2010, however, the Court Execution Body of the Mangystau Region – the Acting Chief of Aktau Territorial Department of Judicial Executors - ordered the sale of KPM's assets as a single lot, so as to avoid any suspension of activities.

1431. On 15 June 2010, the Claimants wrote to Cliffson Company to express their concern that it was "*backing out*" of the proposed transaction. Shortly after, on 23 June 2010, the Claimants wrote to MOG in reply to MOG's earlier requests, on 30 April and 1 June, for further information in relation to the Cliffson Company transaction. The Claimants subsequently learned that Cliffson Company had submitted a letter to the MOG stating that it refused to purchase the interests in TNG and KPM under their 13 February 2010 agreement.

1432. It is the mandate of the Tribunal to decide on the Relief Sought by the Parties, no less, but also no more. The Tribunal notes that Claimants, in their Relief Sought as cited above in this Award, do not request a separate amount allegedly caused by their prevention from selling the investment, but rather base their amounts requested on alleged violations related to the Borankol and Tolkyn Fields and Munaibay Oil, to the Contract 302 Properties, and to the LPG Plant. Therefore, the Tribunal hereafter will focus on these claims and considers that it does not have to decide whether Respondent's actions prevented Claimants from selling their investments, unless this issue may become relevant for one of the claims raised. This will be taken into account in the Tribunal's examination of the respective claims hereafter.

K.III. Whether Claimants' Alleged Inexperience and Own Actions Led to the Demise of KPM and TNG (Intervening Cause)

1. Arguments by Claimants

1433. When the State argues that injury resulted from acts of the victim or the market, rather than its own wrongful acts, the burden is on the State to prove such an intervening cause. Respondent has not met that burden. Respondent argues that the Tristan debt structure, the financial crisis, the drop in oil prices, and the "*constant withdrawal of cash from the companies*" led to "*a severe underfunding of KPM and TNG and subsequently, to the companies no longer complying with their obligations under the Subsoil Use Contracts and Kazakh law. The eventual termination of the contracts was a logical consequence*." While KPM and TNG experienced a short-term liquidity shortage in the first half of 2009, that problem was magnified by Kazakhstan's actions and, in any event, did not lead to the failure of the companies. There never were any lawful grounds for terminating the Subsoil Use Contracts of KPM and TNG, or seizing their assets. Claimants never abandoned their investments. (CPHB 2 ¶¶ 247 – 248).

1434. There is no credible evidence to support Respondent's argument that KPM and TNG were overleveraged prior to state action, and that that doomed them to fail after oil prices dropped due to the financial crisis. This argument is belied by the facts. Prior to 14 October 2008, KPM and TNG were neither insolvent nor overleveraged. Prof. Olcott's statement that the annual interest payment on the Tristan notes caused continuous and negative financial impact on KPM and TNG's operations is not credible and she was not qualified to make the statement. Likewise, Mr. Gruhn of Deloitte failed to perform any direct analysis of KPM and TNG's abilities to service their debt. Deloitte's argument concerning the trading value of the Tristan notes indicated financial distress is rubbish. As Howard Rosen of FTI explained, prior to the Lehman bankruptcy, Tristan notes were trading close to their USD 100 face value (at USD 95). The day immediately following, the trading price was USD 84.50 and the value steadily declined to around USD 65 on 14 October 2008. At the time, the markets were not trading on fundamentals, and investors sold securities for a variety of reasons, including raising cash to meet investor calls, to reduce risk, or simply due to panic. FTI analysed the finances of KPM and TNG and concluded that they were in good financial condition prior to October 2008, having respective current ratios of 3.1 and 3.0. (CPHB 1 ¶¶ 399 – 404; CPHB 2 ¶¶ 249 – 253).

1435. Kazakhstan partly caused and greatly exacerbated the liquidity problem that KPM and TNG experienced in 2009. When Kazakhstan argues that KPM and TNG only had USD 9 million in cash on hand at the end of September 2008, they ignore that they also held USD 22 million in inventory and USD 296 in trade receivables at that time. In total, their net working capital was USD 222 million. That was a solid cushion, and they were a very long way from insolvent. That the primary assets were in receivables did not create a liquidity issue, since KPM and TNG could use the prepayment provisions of the Vitol COMSA agreement as a revolving line of credit to manage their cash flow requirements. (CPHB 2 ¶¶ 254 – 255).

1436. In the first half of 2009, a number of factors nonetheless combined to produce a liquidity crunch, including (1) low prices and slow payments by customers, (2) reduction in gas and condensate sales due to the non-renewal of the Kemikal contract, and (3) Vitol's decision to stop funding LPG Plant, and to reduce the credit line under the prepayment terms of the COMSA agreements from USD 120 million to USD 40 million effective at the end of June 2009. As a result, Claimants

sought the Credit Suisse Loan, in order to protect the company in the event that prices should continue to decline. The decision to see bridge financing was not a sign of financial distress. Nevertheless, the cash problem came to a head in June 2009 when 2 large payments became due – the USD 22 million payment on the Tristan notes and an EPT of USD 25 million. The failure to make either of these payments would have jeopardized KPM and TNG, and this forced Claimants to seek out the Laren loan facility. (CPHB 2 ¶¶ 255 – 257).

1437. The market causes not attributable to Kazakhstan were temporary. The low oil price environment was over by the fourth quarter of 2009. 2008 was an anomalous year because oil climbed to unprecedented highs and shocking lows. The companies average realized gas price declined only 14.2 percent from 2008 – 2009. The 52.1% decline in the companies' gas sale revenue was due to reduced sales volumes, attributable to Kazakhstan's conduct. The companies nonetheless survived the temporary cash flow crisis and even continued paying employees. Even with low oil prices, KPM and TNG did not record substantial losses – KPM recorded a net loss of USD 13 million and TNG recorded a net profit of USD 9.4 million, after paying interest in Tristan debt. The companies were not overleveraged. (CPHB 1 ¶¶ 409 – 415). But for the actions of Kazakhstan, they would have been well positioned to rebound as oil prices climbed back toward historic highs in the second half of 2010. (CPHB 2 ¶¶ 258 – 261).

1438. The evidence shows that Claimants did not abandon their investments. Kazakhstan's argument that Claimants' stripped KPM and TNG of cash in preparation to abandon them is unsupported and wrong. KPM paid dividends in 2009 and 2010 to avoid seizure of the funds – not to prepare for voluntary abandonment. It was apparent that any money flowing into KPM's bank accounts was at risk to satisfy the USD 145 penalty illegal imposed on KPM on 18 September 2009. Further, allowing Tristan to collect funds that would otherwise have been frozen in KPM's bank accounts was reasonable. Tristan noteholders did not place Tristan in default based on those payments, indicating that the noteholders were satisfied with the steps that Claimants took to enable that coupon payment. Tristan Oil's payment of a USD 3.86 million bonus to Anatolie Stati is a non-issue, as he has a right to receive the profits of his investment. The payment did not exacerbate any liquidity problems at the end of 2009, because there were none. (CPHB 1 ¶¶ 416 – 422; CPHB 2 ¶¶ 262 – 264).

1439. The declaration of dividends was a reasonable effort to mitigate harm caused by Kazakhstan's actions. The assignment of receivables allowed Tristan to collect funds that otherwise may have been frozen and allowed Tristan to make the USD 28 million coupon payment in full. It prevented Tristan's default on the notes. (CPHB 2 ¶ 264).

1440. Claimants dispute Respondent's assertion that KPM and TNG had not collected USD 170 million in receivables from Montvale, because it invested funds from Vitol in certain non-liquid assets. In any event, this does not show that KPM and TNG's failure to collect receivables was part of a preparation to abandon the companies. (CPHB 2 ¶ 265).

1441. The evidence demonstrates that Claimants went to great lengths to protect their investments. The assignment of receivables prevented a default on the Tristan

notes. Claimants went to great lengths to pay KPM's employees after its accounts were frozen in 2010 by having TNG pay those employees from its accounts. The Laren loan was secured by a personal guarantee from Anatolie Stati and a pledge from Ascom of its assets in Iraq, and was necessary to keep the companies alive. Thus, Claimants made every effort to protect their assets, right up to seizure in July 2010. (CPHB 2 ¶ 266).

2. Arguments by Respondent

1442. KPM and TNG's demise, which was unrelated to Respondent and was related to self-inflicted and external financial stress, ultimately led to the breaches of the Subsoil Use Contracts and to the termination of those contracts and the invocation of the trust regime. In particular:

(a) *Claimants mismanaged their assets on numerous occasions, for example by putting alarmingly incompetent personnel in charge of important tasks and by promising sales to business partners that they could have never made. The mismanagement went so far that market observers were concerned about "weak corporate governance standards at Tristan". The overall level of mismanagement comes as no surprise given that Claimants had no prior experience in oil and gas production and in the Kazakh or international markets.*

(b) *KPM's and TNG's business was very risky from the start, as was set out clearly in the Tristan note prospectus.*

(c) *KPM's and TNG's financing structure, which aimed at removing capital from the companies, made them vulnerable to situations of crisis*

(d) *Claimants took business decisions aimed only at short-term profit. In particular the ramping up of production at the end of 2007 was short sighted, as it led to a loss of available gas production for the LPG Plant and the allegedly expected possibility of gas export (which the Republic denies).*

(e) *In April of 2008, Claimants found out that their estimates for production from Borankol had been overstated by 300%. At the time, Claimants received the new Miller&Lents reserves report which set out 2P reserves of 24.6 MMboe. The earlier report by Ryder Scott had provided for 2P reserves of 72.4 MMboe. The effect of this loss was particular significant because Borankol is a predominantly oil producing field and oil production is much more valuable than gas production.*

(f) *KPM and TNG were already in severe financial difficulties as of Claimants' valuation date, as is evidenced by the development of the Tristan notes price.*

(g) *Severe drops in energy prices and in demand, in particular due to the loss of Kemikal as a customer, led to a very restricted cash position for KPM and TNG. At the same time, the need for capital expenditure increased markedly, putting further pressure on the companies.*

(h) Against this background, when uncontestedly legal tax demands were raised by the state in the summer of 2009, Claimants had to take out the horrendous Laren loan and issue new notes in the amount of USD 111.1 million in connection thereto.

(i) Thereafter, Claimants deliberately chose to withdraw cash from KPM and TNG, all while not fulfilling the annual work programs. This was effectively the deliberate abandonment of the companies. (R-III ¶ 440; RPHB 2 ¶¶ 60 – 61).

1443. KPM and TNG were in poor financial health prior to Claimants' valuation date. Importantly, the Tristan note trading price stood at USD 65.125 for a nominal value of USD 100, translating to a yield to maturity of 26.319%, indicating that the markets expected a default. While Claimants try to attribute this to the Lehman bankruptcy, that statement is misleading. At the same time, oil and gas prices strongly decreased, putting additional pressures on the companies' revenues and the market's risk perception made it difficult to obtain financing. Additional key financial figures indicate that KPM's and TNG's financial figures deteriorated prior to 14 October 2008, including their current ratios, (which decreased from 5.74 at year end 2007 to 3.06 on 30 June 2008), for example. (RPHB 2 ¶¶ 62 – 68).

1444. The PWC Due Diligence also confirmed that external circumstances were to blame for the demise of KPM and TNG. PwC found that the decline in condensate prices and the decline in oil prices were the key reasons for falling sales and profitability of TNG and KPM, respectively. The loss of Kemikal as a customer – which, contrary to Claimants' invention, was due to Kemikal's insolvency issues and not state action – also resulted in a drop in demand for Claimants' goods. Claimants' liquidity was further exacerbated by KPM and TNG's decision to have Montvale (the intermediary between KPM, TNG, and Vitol) invest USD 170 million from Vitol in non-liquid assets, rather than make payments on KPM and TNG's receivables. (RPHB 2 ¶ 69).

1445. These cash constraints caused KPM and TNG to stop their capital investment programs, putting them in breach of their annual work programs and causing them to stop the LPG Plant project. Thus, that work stoppage cannot be attributed to Respondent. An additional consequence of these cash constraints was the infamous Laren loan and the corresponding issuance of USD 11.1 million in new Tristan notes. (RPHB 2 ¶ 70).

1446. Regarding Claimants' criticisms of the PwC Due Diligence Report, Claimants could have objected to its introduction or have asked for an opportunity to produce counter evidence – they did not. PwC prepared a financial due diligence report that did not assess the legality of any state action, as that was beyond the scope of the report. PwC assessed all circumstances that could affect the financial situation, caused lawfully or unlawfully. (RPHB 2 ¶¶ 71 – 72).

1447. Claimants' contention that the auditor's going concern qualification in the Interim Report shows that the Republic's actions caused injury to Claimants is not true. Instead, the qualification demonstrates the severity of Claimants' situation due to the uncontestedly lawful tax claims (EPT which have never been objected to by

KPM or TNG), the non-payment of which led to the freezing of KPM and TNG's accounts and the Montvale payment issue. (RPHB 2 ¶¶ 73 – 76)

1448. The oil price decline in 2008 and 2009 had a severe impact and was one of many factors affecting KPM and TNG. The drop in demand persisted through 2009, where Tolkyn was producing at 2005/2006 levels and then in 2010, when it produced at 2002 levels. At the same time, Claimants own evidence from Miller & Lents shows that Claimants needed an additional capital expenditure of USD 276.2 million to keep the estimated 2P production near the levels estimated in the 2008 Miller & Lents report. Thus, 2007 and 2009 are not comparable at all and 2009 was particularly volatile. Prices even dropped below USD 70/barrel in 2010. Claimants' argument that gas prices did not decline significantly is contradicted by Anatolie Stati's testimony. The objective evidence also shows that Anatolie Stati was lying when he stated that gas prices had been going up from summer 2008 to the beginning of 2009. (RPHB 2 ¶¶ 77 – 82).

1449. Claimants effectively abandoned the companies in 2009 and 2010, stripping as much cash from KPM and TNG as possible, issuing a USD 72 million dividend in 2009 and 2010 and transferring receivables to Ascom. These were paid in violation of the Tristan note indenture. As a result, KPM had no cash inflow. Claimants admit that they stripped the assets to avoid seizure by the State. Claimants have not proven that any of the USD 72 million was used to repay interest on the Tristan notes. Since the noteholders had not placed Tristan in default at that time, Claimants had not obligation to pay the interest. Claimants also suggested that the USD 72 million was used to repay Laren lenders and to keep paying KPM's employees, but this is also unproven. Finally, Claimants extension of the payment terms for Stadoil and General Affinities further stripped their assets. To date, Claimants have not clarified whether Stadoil or General Affinities ever made payments on the trade receivables. Accordingly, the evidence demonstrates that Claimants indeed abandoned KPM and TNG and only kept the companies on life support in order to force the Republic to terminate the contracts, so that Claimants could then advance these claims in arbitration. (RPHB 2 ¶¶ 83 – 90, 128).

1450. Claimants likely siphoned off more moneys by extending the due date on accounts receivables due from affiliated companies. Even the Tristan Oil Annual Report (2009) mentions that Claimants would cancel delivery for equipment to the LPG Plant, and then a third company, Perkwood Investments, would return the advance paid. Claimants have provided no trace of this money (USD 36,800,212) and likely pocketed it. Claimants would also divert cash to operating companies, such as by paying Anatolie Stati's CASCO double the market price to do work. There were also opaque service agreements with Ascom. Likely, there are other transactions, but Claimants' opaque financing structure makes it impossible to see those. FTI estimates that diverted monies could be as much as USD 226.6 million. (R-III ¶ 441; RPHB 1 ¶¶ 1038 – 1049; RPHB 2 ¶ 17).

1451. Assuming liability and causality, these financial difficulties have major implications for the calculation of damages and the selection of a valuation date.

3. The Tribunal

1452. As mentioned above, the Tribunal agrees with the Parties that

- as reflected in Art. 36 and 39 ILC Articles on State Responsibility, Claimants bear the burden of demonstrating that the claimed quantum of compensation is caused by the host State's conduct,
- Article 39 ILC Articles requires that the Claimants' conduct be taken into account in determining compensation,
- the burden may shift to the state to prove that a factor attributable to the victim or a third party caused the damage alleged, unless the injury can be shown to be severable in causal terms from that attributed to the State.

1453. The Tribunal has considered Respondent's arguments that KPM and TNG's demise was unrelated to Respondent and was caused by self-inflicted and external financial stress, ultimately leading to the breaches of the Subsoil Use Contracts and to the termination of those contracts and the invocation of the trust regime. Respondent adds a number of examples to prove that. In that regard, the Tribunal comes to the following conclusions.

1454. The evidence considered in the chapter above on the causation by Respondent's actions is so strong that, taking into account the above cited legal principles, the Tribunal concludes that the burden of proof has shifted to Respondent to show that, in spite of the causation by its own actions, Claimants caused or contributed in a relevant way to the damages that incurred to Claimants' investment. The Respondent has not been able to provide sufficient proof in this regard.

1455. As Claimants concede, KPM and TNG experienced a short-term liquidity shortage in the first half of 2009. But the Tribunal considers that this shortage was magnified by Kazakhstan's actions, and in any event did not lead to the failure of the companies. There is no convincing evidence to that KPM and TNG were over-leveraged prior to October 2008. The market causes not attributable to Kazakhstan were temporary. The low oil price environment was over by the fourth quarter of 2009. 2008 was an anomalous year because oil climbed to unprecedented highs and shocking lows. There is no convincing evidence that KPM and TNG would have become insolvent after oil prices dropped due to the financial crisis.

1456. Weighing the evidence submitted by the Parties, the Tribunal is not persuaded by the testimony of Prof. Olcott (who is not an economic expert) that the annual interest payment on the Tristan notes caused continuous and negative financial impact on KPM and TNG's operations. As Mr. Gruhn of Deloitte did not perform any direct analysis of KPM and TNG's abilities to service their debt, the Tribunal rather accepts FTI's testimony that the finances of KPM and TNG were in good financial condition prior to October 2008, having respective current ratios of 3.1 and 3.0.

1457. Respondent has also not provided sufficient evidence that Claimants abandoned their investments. Rather, Claimants' actions seem to have been caused by Respondent's measures. KPM paid dividends in 2009 and 2010 to avoid seizure of the funds by Respondent. It was apparent that any money flowing into KPM's bank accounts would be at risk of being taken to satisfy the USD 145 penalty imposed

on KPM on 18 September 2009. Further, allowing Tristan to collect funds is also understandable as these would otherwise have been been frozen in KPM's bank accounts. As well, the declaration of dividends, in the view of the Tribunal, seems to have been a reasonable effort to mitigate harm caused by Respondent's actions. The assignment of receivables allowed Tristan to collect funds that otherwise may have been frozen and allowed Tristan to make the USD 28 million coupon payment in full. It prevented Tristan's default on the notes.

1458. In view of these considerations, the Tribunal concludes that Respondent has not submitted sufficient evidence that Claimants' inexperience or own actions caused or contributed in a relevant way to the damages that occurred to Claimants' investment.

L. Quantum

L.I. Preliminary Considerations

1459. The Tribunal notes that Respondent has stated that its arguments made regarding damages are without prejudice to its position on jurisdiction and liability and to its position that no harassment campaign was ever started against Claimants. (R-III ¶ 15; R-I ¶¶ 34 *et seq.*, 35 *et seq.*, 47.2).

1460. Though the Tribunal found above that Respondent's primary breach of the ECT is that of Art. 10(1) to provide FET, since that breach resulted finally in a taking of Claimants' investment, some guidance can be provided by Art. 13 on expropriation regarding the date and measure for the calculation of damages. The second paragraph of Art. 13(1) ECT deals with "*compensation*" for a lawful expropriation and provides:

> "*Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment*." (herein referred to as the "*Valuation Date*").

1461. From this provision, the Tribunal takes guidance to the effect that the damages to be awarded for what it has found above to be not a lawful expropriation, but rather a breach of the ECT, shall not be lower than what the ECT prescribes for a lawful expropriation.

L.II. Valuation Date

1. Arguments by Claimants

1462. The selection of the appropriate valuation date is critical for assessing damages and awarding Claimants the full reparation as set out by the PCIJ in *Chorzów* and as codified in Art. 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts. (C-II ¶¶ 607 – 608).

1463. While the ECT provides that in cases of lawful expropriation, the State must pay "*prompt, adequate, and effective compensation*" amounting to the FMV of the investment at the time immediately prior to the expropriation, the ECT contains no rules for the standard of compensation for expropriations or other actions committed in violation of the ECT. Under customary international law on quantum, the Tribunal should award full reparation for the harm resulting from the state action. The FMV of the assets of KPM and TNG is the appropriate measure of damages for all of Claimants' claims, in light of the cumulative effect of Kazakhstan's numerous breaches of its obligations under the ECT. (CPHB 2 ¶¶ 268 – 273).

1464. In order to re-establish the situation that existed before the wrongful acts, Respondent must pay a sum that in the words of *Chorzów Factory*, would "*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*." Here, the act triggering or commencing the wrongful acts was the issuance of President Nazarbayev's 14 October 2008 order. The harassment campaign ensued immediately thereafter. There is a causal link between the campaign launched on 14 October 2008 and the seizure on 21 July 2010 that justifies setting the valuation date at the commencement of that campaign. Respondent has ignored the continuing injury to Claimants, including the active reduction in value of the properties and the impact that had on their efforts to sell the properties. (C-II ¶¶ 210 *et seq*., 476 – 478, 580 – 583; 607 – 609; CPHB 2 ¶¶ 274 – 275).

1465. This principal of full compensation, with its corollary mandate for re-establishment of the situation that existed before a state's wrongful conduct, is equally at play in the adjudication of indirect expropriation cases. Where a state's conduct has involved two or more instances of identifiable expropriative measures, the selection of an early measure, even if less severe or direct than a later measure, will assure both equity and full compensation for the State's unlawful conduct. This principle was at play in *Sedco v. Iran*. The Tribunal in *Amoco International Finance Corp. v. Iran* also awarded the claimant compensation based on a date earlier than the liability date, using the date that the claimant lost control over the future management direction of the investments as the valuation date. The relevant element for a loss of control was not the appointment of outside managers, but the degree of interference by those managers with the owners' property rights or '*fundamental rights of ownership*.' While there were no temporary managers appointed in this case, the State's campaign deprived Claimants of their ability to freely alienate their investments and their ability to freely manage their capital expenditures for improvement of their investments. (C-II ¶¶ 610 - 613).

1466. Claimants' additional arguments are best taken form their own words:

> *615. Where, as in the present case, there is a campaign of unlawful, interfering measures by the State, with the commencement of that campaign being an unfair and inequitable order that implements a deliberate strategy of expropriation through conduct that indisputably violates multiple standards of treaty protection, and the conclusion of that campaign being direct expropriation, equity and full compensation fairly demand that the intentional commencement date of that campaign be chosen as the valuation date. Equity and full compensation are not served by choosing*

> *the date of final seizure for valuation, or by granting Kazakhstan a grace period between the date of its order to commence its expropriative campaign and some arguable date thereafter when that campaign ostensibly had its first measurable effects.*
>
> *616. The Tribunal should accordingly adopt October 14, 2008 as the proper valuation date, and assess the fair market value of Claimants' investments as of that date based upon the information then available to a willing buyer.*

1467. Professors Reisman and Sloane explain that, when considering an indirect expropriation, Tribunals should distinguish the "*moment of expropriation*" from the "*moment of valuation*." If, for example, the moment of expropriation were to be confused with the moment of valuation, a Tribunal would be unable to award full compensation and would allow the wrongdoing state to benefit from its unlawful conduct throughout the campaign of indirect expropriation. In effect, such a Tribunal would reward the unlawful conduct. (C-I ¶¶ 404 – 407). Claimants' arguments against using 21 July 2010 as the valuation date are best taken from their own words:

> *584. […] Kazakhstan wants to pigeonhole Claimants' case into a classic claim of creeping expropriation under which alleged ownership-interfering actions by the State eventually "ripen" along a continuum into a taking. Misclassifying Claimants' case in this way provides Kazakhstan with an avenue to argue (unpersuasively) that no single action by the State during the course of its harassment campaign amounted to a State seizure — other than, of course, the State's ultimate seizure of Claimants' assets on July 21, 2010, which Kazakhstan then claims must be the valuation date if damages are to be awarded. Coupled with this argument is Kazakhstan's repeated and rote assertion that its harassment campaign was merely an appropriate exercise of State regulatory power, and that it was neither an intentional expropriative campaign nor executed in furtherance of a conspiracy to expropriate. Thus, under this argument, any diminution in the value or profitability of the assets to Claimants between October of 2008 and July of 2010 was not the fault of the State.*
>
> *585. By this argument, Kazakhstan is effectively contending that Claimants must itemize the loss caused by each discrete act in Kazakhstan's harassment campaign. […] Claimants do not contend that each particular event in Kazakhstan's harassment campaign caused the entirety of Claimants' losses. Rather, the combined effect of Kazakhstan's conduct caused Claimants to lose control over their investments, deprived them of the rights of autonomous stewardship and free alienability associated with ownership, and violated Claimants' rights to have their investments treated fairly and equitably and in accordance with the other substantive standards of protection in the ECT. (C-II ¶¶ 584 – 585).*

1468. There is no mechanical formula for determining whether one or more State actions amount to an indirect expropriation or a treaty violation. Here however, the harassment campaign that was initiated on 14 October 2008 was designed to (i) prevent Claimants from selling their properties to a third party, (ii) make normal daily operations an effective impossibility, and (iii) create an extremely risky

investment environment to stop Claimants from continuing to make capital outlays for development of their investments. This harassment campaign met its intended purpose: to devalue and impair the investments. Professors Reisman and Sloane would agree: where the intent to expropriate can be proven, the State's intent to expropriate should be given significant weight in the assessment of the proper valuation date. The campaign was expropriatory and violated the ECT. (C-II ¶¶ 210 *et seq*., 586 – 603, 614 – 616).

1469. The tribunals in *CMS v. Argentina* and *Vivendi v. Argentina* recognized that the task of putting claimants into the position they would have occupied but for the State's wrongful conduct necessarily involves uncertainty. The tribunal must consider how events far into the future may have developed but for the state's actions. As a result, and as confirmed by the annulment committee in *Rumeli v. Kazakhstan*, tribunals have broad discretion in establishing the appropriate quantum for compensation, and it is not a simple matter to be resolved on burden of proof. Once the tribunal is satisfied that the claimant has suffered some damage as a result of breach, the determination of damage is a matter of the tribunal's informed estimation. This is true for all of Kazakhstan's violations of the ECT, since they collectively led to the single injury of the impairment and taking of Claimants' investments. (CPHB 2 ¶¶ 270 – 272).

1470. As confirmed by Mr. Rosen's testimony at the Hearing on Quantum, the 14 October 2008 date is necessary to fully compensate Claimants for the injuries caused by Kazakhstan's violations of the ECT and international law. Respondent's valuation date does not account for any of the value-depressing effects of the State's actions, including the diminution in value caused by the allegations that the State made against KPM and TNG or the effect of actions taken against Claimants' reputation and ability to sell the investments free from state interference. 14 October 2008, or at least shortly thereafter, was the last day that Claimants had an opportunity to sell their investments in an open and unrestricted market. (CPHB 1 ¶¶ 426 – 430).

1471. Claimants note that Respondent has made no mention of other possible dates – like the 18 December 2008 reversal of the 20 February 2007 share transfer approval. In Respondent's effort to push the date forward all the way to 21 July 2010, Respondent only globally describes some aspects of its harassment campaign and summarily states that these could not have had any impact on operations or value of Claimants' assets. (C-II ¶ 594).

1472. In addition, on 14 October 2008, TNG notified MEMR of its intention to extend the exploration in the Contract 302 by two years. (C-I ¶ 175).

1473. The 14 October 2008 valuation date would not give Claimants double compensation, as asserted by Respondent. Claimants did not earn hundreds of millions of dollars between the valuation dates. Deloitte never stated that KPM and TNG earned anything at all between the valuation dates. Instead, Deloitte said that production was assumed by FTI have a value of USD 226.6 million (later USD 302.3 million). Deloitte purports to calculate the amount that KPM and TNG would have earned in between the valuation dates, but for the interference by Kazakhstan. The amount that KPM and TNG could have earned but for interference should not be deducted from the valuation because there was

interference. KPM and TNG did not produce as much oil and gas as they could have. Moreover, Kazakhstan impeded Claimants' efforts to sell the companies. Deducting this amount would improperly deny Claimants compensation for injuries that Kazakhstan caused during that time. (CPHB 1 ¶¶ 431 – 434).

1474. Regarding the distributions after 14 October 2008, KPM assigned USD 81.2 million in receivables to Tristan Oil and Ascom in the form of loan payments and dividends in 2009. Not only did Claimants reinvest more than this in the companies, those funds represented profits that KPM and TNG earned prior to 14 October 2008. At the end of September 2008, KPM and TNG combined had 221.5 million in net working capital and more than USD 367 in retained earnings on their balance sheets. (CPHB 1 ¶¶ 431, 435; CPHB 2 ¶ 288).

1475. Furthermore, an award based on 14 October 2008 would not overcompensate Claimants, since Claimants have not included working capital in their enterprise valuation. Claimants request damages in the amount of assets that Kazakhstan seized on the day it began its campaign to devalue and seize them. This is equivalent to a hypothetical asset sale – i.e., what Kazakhstan would have had to pay, had it purchased them on that date. Since Claimants have not included the working capital that KPM and TNG subsequently distributed to Claimants, there is no reason to reduce damages, since there is no double counting. (CPHB 1 ¶¶ 431, 436 - 437).

1476. It was never disputed or concealed that KPM paid USD 72 million in dividends in 2009 and 2010. After Kazakhstan imposed the unlawful USD 145 million criminal penalty in September 2009, Claimants prudently prevented cash from unnecessarily flowing into KPM and TNG. This was lawful under the ECT, which allows Claimants to retain profits. Claimants are not claiming damage in respect of these profits. The USD 72 million in receivables that KPM distributed as dividends, and the USD 143.4 million in uncollected receivables were generated prior to 14 October 2008. On 30 September 2008, KPM and TNG had a combined net working capital of USD 222.6 million. (CPHB 2 ¶ 290 – 294).

1477. There is no evidence to support Respondent's allegation that Claimants transferred hundreds of millions of dollars out of the Republic and did not subject it to Kazakh taxation. (CPHB 1 ¶ 438).

1478. Respondent's valuation date of 22 July 2010 fails to respond to Claimants' claims and fails to account for how the State's actions depressed the value of Claimants' investments, including the crippling diminution in value and alienability of KPM and TNG and the interference with normal business operations. Other tribunals have recognized that a state's wrongful actions can impair and depress an investor's assets long before the State actually acquires them. In *Santa Elena v. Costa Rica*, the tribunal adopted the date of the decree to expropriate that claimant's property, even though the date of actual expropriation was years later. The issue for the Tribunal is whether the State's conduct "*blights the possibility for the owner reasonably to exploit the economic potential of the property*." The state's intent to expropriate is relevant to the determination of the valuation date, since after that date, the investor's ability to develop its investment is lost. In this regard, Respondent's argument that it did not express an intent to expropriate on 14 October 2008 is unpersuasive, as the evidence establishes an intent at the highest

levels of government to deprive Claimants of their investment in 2008. A reasonable investor in the position of Claimants would have understood it as such. (CPHB 2 ¶¶ 276 – 282).

1479. The *Kardassopoulos v. Georgia* award also supports Claimants' valuation date. That tribunal premised its valuation date on the decree that cast doubt on the validity of the investor's concession, rather than on the later expropriatory decree. This Tribunal should follow that approach and award damages in the amount of what Claimants should have been paid if the state had observed its international obligations. Scholarly opinion from Prof. Reisman and Sloane also support this approach. (CPHB 2 ¶¶ 283 – 287).

1480. It is common for tribunals, as demonstrated in *Gemplus and Talsud v. Mexico*, *Santa Elena v. Costa Rica*, *Tecmed v. Mexico*, *CMS v. Argentina*, *Siemens v. Argentina*, and *Azurix v. Argentina* not to adopt either of the parties' valuation dates or damages calculations outright, but to nonetheless award damage once injury is proven. (CPHB 2 ¶¶ 295 – 300). For the sake of argument, even if the Tribunal were to adopt Kazakhstan's valuation date, it would not be bound to use Kazakhstan's valuation. (CPHB 2 ¶ 303).

1481. The RBS Assessment for KMG EP on 31 July 2009 (valuation of October 2009) contains substantial evidence on which the Tribunal could base its assessment of damages. Based on this report, the Tribunal could select 18 December 2008 (date of MEMR's challenge to Claimants' ownership of TNG), 30 April 2009 (state sequestration of Claimants' KPM and TNG shares and assets) or 18 September 2009 (judgment against Mr. Cornegruta). The RBS valuation, however, post dates all of the non-governmental factors that Kazakhstan argues harm the FTI valuation, and the Cliffson transaction executed on 13 February 2010. (CPHB 1 ¶¶ 581 – 582).

2. Arguments by Respondent

1482. Claimants' intention on setting an early valuation date should be readily apparent: an earlier valuation date helps inflate the claim by allowing the Tribunal to disregard negative developments that ultimately caused KPM and TNG to fail, including the drop in oil prices and demand. Moreover, the earlier the valuation date, the bigger the reserves in the Borankol and Tolkyn fields. Deloitte has calculated that 29.6% of Claimants' Borankol claim and 49.4% of Claimants' Tolkyn claim are based on cash flows occurring in the time in between the Parties' valuation dates. (RPHB 1 ¶¶ 1102 – 1104).

1483. Respondent states that "*the Tribunal can only rely on 14 October 2008 as the valuation date if it actually finds that there was a harassment campaign against Claimants. […] there was no such harassment campaign*." (R-III ¶ 37; RPHB 2 ¶¶ 375 – 382).

1484. Claimants' date of 14 October 2008 is far too early and should be rejected by the Tribunal. The Parties are in agreement: "*14 October 2008 is a date on which no state measures against KPM and TNG were executed. No contracts were cancelled on this day. No searches were conducted. No judgments were rendered. No promises were given or broken*." The only event was President Nazarbayev

forwarded a letter from President Voronin to authorities, asking them to thoroughly investigate President Voronin's accusations. That is not proof of a campaign against Claimants, instead, it is a courtesy required between CIS Heads of State. It is unclear that Claimants even knew about the Order until a considerable time thereafter. In any event, Claimants' argument that the letter of 14 October 2008 constituted a violation of the ECT is absurd. (R-I ¶ 47.8; R-II ¶¶ 272 – 279; R-III ¶¶ 14 – 19; 36 – 37, 46; RPHB 1 ¶¶ 1105 – 1107).

1485. Under international law, as held in the cases of *International Technical Products v. Iran*, *Tippets*, *Philips Petroleum v. Iran*, and *Santa Elena v. Costa Rica*, the valuation date is to be determined in reference to the actual expropriatory effect. According to international practice for cases of indirect expropriation and as explained in the ICSID case *Santa Elena v. Costa Rica* and in *Azurix v. Argentina*, the valuation date must be the date at which the deprivation of property rights has turned out to be irreversible. Here, the only date at which Claimants possibly could have been deprived of their ownership rights in KPM and TNG was 21 July 2010. In the *Sedco v. NIOC*, on which Claimants rely, there was a much harsher interference than alleged in the present case. Claimants' selective citation of Professors Reisman and Sloan completely disregards their denunciation of improperly early valuation dates. Finally, Claimants' reliance on the full compensation principle as set out in the *Chorzów* case to support an improperly early valuation date is unacceptable. The *Chorzów* requirement to "*wip[e] out the effects of the expropriatory state action presupposes that there are measures with actual effect on the companies, not mere purported intentions of state bodies*." Under that principle, Claimants must rely on conduct, not on alleged intentions. (R-III ¶¶ 24 – 32, 37 – 44; RPHB 1 ¶¶ 1108 – 1111).

1486. An unduly early valuation date would have the consequence of providing double compensation. KPM and TNG were producing oil until the 21 July 2010 termination of the contracts (also undermining the earlier valuation date). An improperly early valuation leads to double counting this income. For 2009, KPM's financial statements demonstrate that KPM earned at least USD 81,235,291 from the sale of oil. (R-I ¶ 47.3, R-III ¶¶ 45, 442 – 446). In 2010, KPM distributed dividends in the amount of USD 71.9 million, paid by assigning trade receivables to Ascom. Claimants have provided no evidence that this amount originated in profits earned prior to 14 October 2008 or that Ascom reinvested any of the money received (which would be contrary to Claimants' admission that they tried to take out the money to protect that they could). The only money that may have been reinvested was a coupon payment made by Tristan in the amount of USD 28 million. KPM and TNG also extended the due date of accounts receivables due from Stadoil Ltd. and General Affinity in the amount of USD 143.4 – money which was never paid. Since Claimants did not prepare financial statements for 2010, one cannot evaluate whether other significant cash outflow may have also occurred. An advance in the amount of USD 36,800,212 related to the LPG Plant has, likewise, not been accounted for. In any event, while the Republic has never argued that Claimants made profits during the relevant time period, FTI assumed that TNG's and KPM's production from 14 October 2008 to 21 July 2010 would have amounted to USD 226.6, corrected to USD 302.3 in Deloitte's Additional note. (R-III ¶¶ 442 – 446; RPHB 2 ¶¶ 883 – 892).

1487. Claimants need to prove that the payments made after 14 October 2008 were indeed paid from additional assets, earnings, and cash flows which would not have been included in the DCF cash flow analysis. They have failed to do so and only alleged that the dividends were paid out of pre-14 October 2008 funds, for the first time, in their First Post-Hearing Brief. They have only provided a conclusory statement that at the end of September 2008, KPM and TNG combined had USD 221.5 million in net working capital. The fact that the dividend distribution occurred on 31 December 2009 indicates that the receivables that were assigned (i.e. the dividend), accrued after 14 October 2008. Alternatively, had the receivables existed prior to 14 October 2008, obligations toward KPM and TNG would not have been fulfilled for 1 year 2 months. Thus, the receivables diverted from KPM to Ascom as dividends need to be deducted from the asset value and from an eventual award, if it were to be based on the FTI calculation. Likewise, the USD 143.4 million which appear to be due from two companies in the Stati Group – Stadoil Ltd. and General Affinity, would need to be deducted from an eventual award. It appears that money was transferred to these Stati subsidiaries to prevent these assets from being used to satisfy the recovery order. Claimants do not allege that these receivables were generated prior to 14 October 2008. These receivables need to be deducted from a damage calculation. (RPHB 2 ¶¶ 893 – 918).

1488. Claimants allege that the termination of Contracts 210 and 305 and the transfer of those assets into trust management on 21 July 2010 effected a direct expropriation. If one were to assume that a violation of the ECT had occurred, it is clear that 21 July 2010, under the international legal standard of compensation for expropriation, would be the valuation date of such an alleged direct or even indirect expropriation, since this is the date on which Claimants irreversibly lost rights in the dispute. Even in cases where the expropriation only came into effect later, the relevant date for valuation is the date of expropriation. (R-III ¶¶ 20 – 23; RPHB 1 ¶ 1114 – 1117; RPHB 2 ¶¶ 990 – 992).

1489. None of the four alleged actions – taken individually or collectively – which are to have occurred prior to 21 July 2010 can serve as the valuation date in this present case as they did not amount to an indirect expropriation because they did not cause Claimants to be deprived of their property rights. The only piece of evidence that Claimants used to attempt to show that they were deprived of their right to sell the companies was the Squire Sanders Due Diligence Report, which – contrary to Claimants' misinterpretation – made no mention that the Republic's assertion of its pre-emptive rights was improper. Instead, it recognized that the transfer in TNG from Gheso to Terra Raf was effected in breach of the government's first refusal right. Claimants have failed to prove that this would have actually deterred an interested buyer and, therefore, have failed to prove that they were irreversibly deprived of their rights prior to 21 July 2010. (R-III ¶¶ 33 – 35; RPHB 2 ¶¶ 993 – 1001).

1490. In their closing submissions, in particular in the discussion related to the Laren loan, Claimants also conceded that they were not deprived of their property rights prior to July 2010. They admitted to enjoying full property rights. (RPHB 2 ¶¶ 1003 – 1004).

1491. Even if the Tribunal relies on a valuation date prior to 21 July 2010, it should – in conformity with international practice – take external circumstances and Claimants' own actions up to 21 July 2010 into account. (R-III ¶¶ 425 – 426; RPHB 2 ¶¶ 1006 – 1009). Subsequent events may affect the extent of damage caused by illegal state actions. This was confirmed in *Amco Asia v. Indonesia* as well as in scholarly writings. Here, there is a clear correlation between the timing of the companies' financial troubles and external events. The impact of these external factors has been admitted by Claimants as well as by Respondent's independent valuation expert. These external factors led to a diminution of value – a diminution that Claimants would have suffered even in the absence of the alleged unlawful act. In particular, the Tribunal should consider:

(a) a sharp drop in oil and gas prices in 2008 and 2009;

(b) a sharp drop in local demand in 2009;

(c) the company's customers' conduct and the company's own business decisions;

(d) the general undercapitalization of the companies and the constant withdrawal of cash from the companies;

(e) the companies' failure to pay taxes on time as required by law;

(f) and the consequential taking out of the so-called Laren loan which was extremely risky and required the payment of very high interest rates. (R-III ¶¶ 426 (quoted), 427 – 435, R-II ¶¶ 722 – 726).

1492. Since Claimants have the burden of proof on the existence and extent, and since they have presented no other calculations other than those based on the improper 14 October 2008 valuation date, the damages claim must be dismissed in its entirety. The Tribunal cannot replace Claimants' failure to discharge their procedural duties by applying some form of discretion. The Tribunal may not unilaterally assist Claimants by determining a discretionary value at another valuation date. This is confirmed in *Rompetrol v. Romania*, which determined that no damages could be awarded when the claimant had presented only results from one valuation technique that the Tribunal had determined to be inappropriate. (RPHB 1 ¶¶ 1112 – 1113; RPHB 2 ¶¶ 56 – 58).

3. The Tribunal

1493. The Parties differ considerably regarding the valuation date. Claimants argue that the date of the President's Order 14 October 2008 is the date necessary to fully compensate Claimants for the injuries caused by Kazakhstan's violations of the ECT and international law. Respondent argues that, even if one were to assume that a violation of the ECT had occurred, it is clear that 21 July 2010, under the international legal standard of compensation for expropriation, would be the valuation date of such an alleged direct or even indirect expropriation, since this is the date on which Claimants irreversibly lost rights in the dispute.

1494. A preliminary question is whether the Tribunal can select any dates, other than those two, as the correct valuation date. Respondent argues that Claimants have

presented no calculations other than those based on the improper 14 October 2008 valuation date and the damages claim must be dismissed in its entirety if the Tribunal does not accept that valuation date. This is not correct, since Claimants have in fact addressed other valuation dates (CPHB 1 ¶¶ 581 – 582) and the quantum of damages to be calculated by such dates. Indeed, the RBS Assessment for KMG EP on 31 July 2009, though primarily relying on a valuation of October 2009, contains substantial evidence on which the Tribunal could base its assessment of damages either by 18 December 2008 (date of MEMR's challenge to Claimants' ownership of TNG), 30 April 2009 (state sequestration of Claimants' KPM and TNG shares and assets), or 18 September 2009 (judgment against Mr. Cornegruta).

1495. The Tribunal, therefore, is in a position to select another valuation date if it considers that appropriate. Separate therefrom, the Tribunal will have to examine later in the chapter on Quantum in this Award, which damages have been proved for the chosen valuation date.

1496. Turning to the question of which is the valuation date to be selected, the Tribunal considers that the date of 14 or 16 October 2008 suggested by Claimants cannot be accepted. Claimants have not shown that, already at that time, any damages were caused by Respondent's breaches of the ETC. Though the President's Order in October almost immediately caused various government actions against Claimants' investment, which were the beginning of a continuing breach of the FET-standard of the ECT, as seen above in the chapter on causation in this Award, the effects of these breaches damaging the investments only started in December 2008.

1497. The Tribunal considers that only by 30 April 2009, when the State sequestration of Claimants' KPM and TNG shares and assets occurred, actual, and permanent damages could be identified for the investments.

1498. Selecting a later date would be inappropriate, as the State sequestration made it impossible for Claimants to continue with their investments and the damages continued to occur from thereon. In particular, that implies that the damages had already occurred to a great extent before the valuation date in 2010 suggested by Respondent.

1499. Therefore, in its following considerations on the quantum of damages, the Tribunal will rely on 30 April 2009 as the determinative valuation date.

1500. Based on this valuation date, the Tribunal will have to hereafter proceed in all its calculation of damages. Since, contrary to that finding, the Parties have primarily relied on different valuation dates, i.e. Claimants on 14 October 2008, Respondent on 21 July 2010, for their calculations of damages, the Tribunal has to examine whether the Parties' arguments regarding the calculation of damages can still be applied to the valuation date found to be applicable by the Tribunal.

1501. This task is easier regarding Claimants' arguments, because the time difference between 14/16 October 2008 and 30 April 2009 is rather shorter and fewer relevant events have occurred during that period which might have changed the value of the investment and thus the calculation of damages. The Tribunal will take this

difference of the valuation dates relied upon into account when examining the various damage claims raised by Claimants.

1502. On the other hand, regarding Respondent's calculation, not only is the time difference between 30 April 2009 and 21 July 2010 considerably longer, but in particular the Respondent's conduct during that period, which the Tribunal found above in this Award to be a breach of the ECT and the cause of the damages, obviously had a a considerable influence on the value of the investment and, thus, the quantum of damages. It does not need any further explanation that this conduct caused the two companies affected to lose value due to the breaching treatment by Respondent and that Respondent cannot rely for the calculation of the damages on its own breaches and their effects.

1503. Respondent has argued regarding the calculation of damages on the basis of an earlier valuation date than the one it considers relevant, referring to the report of Deloitte GmbH, that KPM and TNG were already in severe financial difficulties even before October 2008 (RPHB 2 p. 17). The Tribunal will take this argument into account insofar as relevant when examining the various damage claims raised by Claimants.

L.III. Arguments Regarding the Treatment of Debt: Enterprise vs. Equity Value

1. Arguments by Claimants

1504. Claimants seek an award based on the value of the assets that Kazakhstan impaired and seized, namely the operating "*enterprises*" of KPM and TNG. Thus, Claimants seek the enterprise value of their investments, meaning the value of the companies' assets without deducting their debt. Enterprise value is the appropriate measure of damages under the ECT and customary international law, and has been used in similar cases. The equity value position argued by Kazakhstan is incorrect as a matter of treaty law and is unwarranted by the facts. At a basic level, the equity value argument is incorrect because Respondent did not simply seize Claimants' equity – it seized all of the assets of KPM and TNG without assuming or extinguishing their debts and, at the same time, making KPM and TNG unable to satisfy their debts. Thus, the injury includes the assets that were seized and the debts that the companies are unable to repay as a result of the seizures. Neither the ECT, nor scholarly commentary, nor basic economics provide support for Respondent's argument that the Tribunal distinguish between assets and debts and award only equity, thereby limiting the damages to the value of the shareholdings in KPM and TNG. To do so would unjustly enrich Kazakhstan. Moreover, the expropriation section of the ECT provides that compensation shall amount to the FMV of the investment exploited, which is the assets of KPM and TNG, not their equity. This approach is supported in scholarly commentary, as well. (CPHB 1 ¶¶ 597 – 601, 606 – 610, 617 – 620; CPHB 2 ¶¶ 304, 314).

1505. Respondent has misframed this issue into whether the Tribunal should "*add*" debts to Claimants' damages. Instead, however, the issue is whether the Tribunal should deduct the value of debts from the assets impaired and taken. The full enterprise value is the appropriate measure of damages, pursuant to the *Chorzów* measure of full reparation, pursuant to which the correct measure of damages "*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." But for Kazakhstan's action, KPM and TNG would have continued to operate their business, generating cashflows to KPM and TNG, and Claimants would have been entitled to direct those flows to reinvest, pay dividends, and/or to pay off debts of KPM, TNG, and Tristan (under the KPM and TNG guarantees). Since the Tribunal cannot order restitution, however, the Tribunal's award should include all future cash flows of the assets taken, without deducting debts. This would mirror restitution as closely as possible and wipe out all consequences of Kazakhstan's actions. Deduction of debts would give no compensation for Claimants' loss of their right to direct cash flows to repay creditors before distributing dividends to themselves. (CPHB 2 ¶¶ 305 – 309).

1506. Enterprise value is the correct measure, regardless of whether Claimants are directly liable for the debts, as authorized under Art. 13 ECT, pursuant to which FMV is to be paid for a lawfully expropriated investment. It is well settled under customary international law that the "*full reparation*" standard should apply to unlawful expropriation. The ECT's broad definition of "*Investment*" as including assets that are directly and indirectly owned by the Investor, as also recognized in scholarly commentary, also supports this argument that the enterprise value should be compensated. (CPHB 2 ¶ 313 – 316).

1507. At the Hearing on Quantum, Kazakhstan equated FMV with equity value, which is incorrect as a matter of international practice. It is true that a potential buyer would have deducted the companies' debt from the enterprise value, if the buyer were acquiring only the equity and, thus, assuming all the liabilities. Here, Kazakhstan took the assets of KPM and TNG, but did not assume or extinguish the companies' liabilities. Thus, the FMV says nothing about whether that measure should be applied to Claimants' equity stake. (CPHB 1 ¶¶ 611 – 614; CPHB 2 ¶ 314).

1508. Importantly, Respondent is liable for the injuries suffered, irrespective of whether Claimants remain liable for the debts (but all the more so, since they remain liable). (CPHB 1 ¶¶ 602 – 606).

1509. Respondent cites *Impregilo v. Pakistan* and *PSEG v. Turkey*, which are inapposite. Here, unlike in *Impregilo*, Claimants are the 100% owners of KPM and TNG and are not asserting claims on behalf of any other parties. Likewise, when the *PSEG* tribunal refused compensation, it did so in a case that did not involve companies that were wholly owned by the claimant, as is the case, here. (CPHB 2 ¶¶ 317 – 318).

1510. In its Rejoinder on Quantum, Respondent expressly agreed that, insofar as Claimants remain responsible for the Tristan debt, enterprise value is the correct measure of damages. While Respondent attempted to retreat from this statement at the May 2013 hearing, it did not attempt to reconcile its prior statement. The argument that Ascom and Terra Raf are not liable to repay the noteholders is, in any event, incorrect. They are obliged to repay the noteholders, pursuant to Section 6 of the Pledge Agreement. (CPHB 2 ¶¶ 319 – 322).

1511. An award of the enterprise value would under-compensate Claimants and enable Respondent to take the assets, worth at least USD 186 million, for free.

Respondent would be unjustly enriched. As a result, *Chorzów Factory* observed that damages should not be reduced by the amount of obligations that claimants owe to third parties, even if that means that third parties may receive a portion of an arbitral award. The tribunal in *Occidental v. Ecuador* also applied that principle to reject Ecuador's efforts to reduce the award by deducting obligations that the claimant there owed to third parties. As in *Occidental*, the Claimants have demonstrated their commitment to honor their obligations to the noteholders. The notion that Claimants would be enriched by the Sharing Agreement that noteholders embraced is outweighed by the unjust enrichment that would accrue to Respondent if it were obliged to compensate only the equity value of the assets taken. (CPHB 1 ¶¶ 637 – 640; CPHB 2 ¶¶ 323 – 328).

1512. While the Tristan Debt is the largest at issue, Respondent also argues that the damages award must be reduced by other debts allegedly owed by KPM and TNG including, (1) amounts owed to Vitol under the COMSA prepayment terms and LPG financing arrangements; (2) outstanding debts under the Laren facility; and (3) the USD 62 million corporate back tax assessment. These debts should not be deducted from Claimants' damages for the same reasons that the Tristan debt should not be. (CPHB 2 ¶ 328; CPHB 1 ¶¶ 641 – 649).

2. Arguments by Respondent

1513. Claimants use the noteholder claim to "*gross up*" their damages claim by creating an enterprise value for KPM and TNG that simply ignores the debt of those companies, which must be considered in a compensation claim. By the date of the first Post-Hearing Brief, Claimants had still not provided a full breakdown of KPM's and TNG's debts, making a complete valuation impossible and making it, likewise, impossible to show Claimants' damage. The debt under the Tristan notes is, therefore, used to evaluate the debt, here. (RPHB 1 ¶ 1050 – 1054, 1063, 1071; RPHB 2 ¶¶ 956).

1514. As of 21 July 2010, the minimum amount of noteholder debt could have stood at USD 559 million (principal of USD 531.1 million + interest of 27.9 million that Tristan had failed to pay). KPM and TNG are liable for more than 81.2 million in taxes. The additional debt that KPM and TNG had as of 13 February 2010 was valued by FTI to be USD 119 million. (RPHB 1 ¶¶ 1057, 1063 – 1067; RPHB 2 ¶ 923). Deloitte has determined that the enterprise value of KPM and TNG cumulatively amounts to USD 186 million. As 21 July 2010, they were liable for at least USD 759.2 million in debt. Accordingly, they had an equity value of zero, and Claimants have suffered no damage whatsoever. This is consistent with how debt markets treated the Tristan debt as of 14 October 2008, when they were treated as close to zero, being traded at USD 65.125 for a nominal amount of USD 100. This is an indication that the markets considered default more likely than not, in such event noteholders would only be able to recover 65.125%. Accepting the enterprise value of USD 186 million but ignoring the USD 759.2 million in debt, Claimants would receive USD 65.4 million of that amount by operation of Section 4(b) of the Sharing Agreement after the deduction of expenses. With an enterprise value of USD 186 million, Claimants would not have suffered any damage in the first place, but would nonetheless receive compensation. (RPHB 1 ¶¶ 1080 – 1084, 1099 – 1101).

1515. There is, however, no risk of unjust enrichment if the award is based on equity value. Claimants would receive the precise value of their shareholding. The noteholders could bring their own claims under the applicable BITs and obtain their own award against the Republic. Insofar as their claims would fail for lack of jurisdiction *ratione personae*, this does not lead to unjust enrichment, but is rather a result of the BITs and the fact that the Republic has only agreed to arbitrate disputes with certain investors and not with others. (RPHB 2 ¶ 953 – 955).

1516. A debt gross-up is contrary to international law. Claimants' arguments that the investment definition in the ECT requires compensation according to enterprise value, and that Ripinsky and Williams stated so in their book, and that there is international practice supporting an award based on enterprise value, are incorrect. (RPHB 2 ¶¶ 925 – 928).

1517. Respondent explains that Claimants' argument is logically flawed because it ignores that KPM and TNG pledged for the entire Tristan debt with all of their assets and the entire business enterprise. "*Thus, even if one assumed that the investments are the assets and the business enterprise of KPM and TNG, the Tristan debt must be deducted from the value of those assets and this business enterprise. As Tristan had no operative business of its own, KPM and TNG were practically liable for the Tristan debt themselves, meaning that all of their assets were subject to potential enforcement measures by the noteholders. This directly undercuts the value of these assets. Thus, even assuming that Claimants' investments were the assets and the business enterprise of KPM and TNG, debt would still need to be deducted and equity value would still be the correct measure of damages*." This argument has the unacceptable consequence that an investor could claim the enterprise value even if it had not remained liable for any of the investment vehicle's debt. This would allow for spectacular enrichment of an investor. Claimants' argument makes no differentiation between situations where an investor remained liable or not. Thus, it is no surprise that Ripinsky and Williams do not support Claimants' conclusions – they do not take any side of either enterprise or equity value. Claimants are citing authority where there is none. (RPHB 2 ¶¶ 929 – 931).

1518. There is no uncontroversial principle of international law that enterprise value can be claimed if the investor remained liable for the investment's debt. The opposite is true: the only international principle that has come into existence is the principle that debt must be deducted from the enterprise or asset value in question. As was explained in *Impregilo v. Pakistan* and *PSEG v. Turkey*, to hold otherwise would make it possible for an investor with standing to bring a claim on behalf of another who does not have standing. The fact that those cases involved investors who were not 100% shareholders in the local subsidiary makes no difference. *Impreglio* also observed that, like in this case, a tribunal has no means of compelling a successful claimant to pass on the appropriate share of damages to other shareholders or participants. The *Impreglio* tribunal, thus, contemplated the situation of shareholders as well as debtholders. (RPHB 2 ¶¶ 932 – 936).

1519. Claimants' reference to the *Enron* case is designed to confuse and to simulate the existence of authority where there is none. The paragraph referenced concerns the determination of the percentage of shares in a company that belonged to *Enron* and has no relevance here. *Occidential* also concerned a fundamentally different

question and not the value of the shareholding. Respondent does not understand why Claimants referenced *Azurix* in the Final Hearing. (RPHB 2 ¶¶ 937 – 938).

1520. Claimants' reference to *Chorzów* is misplaced. First, that case played out in a pre-BIT era where there was no possibility that debtholders were circumventing the requirements of their own claim – diplomatic protection did not foresee the bringing of claims by debtholders or by states on behalf of them. The *Chorzów* standard of restitution also misses the mark. The suggestion that Claimants must be put into a position in which they hold the cash flows created by KPM and TNG and in which they can direct these cash flows to Tristan noteholders is not supported by that decision. *Chorzów* does not provide for how the consequences of an illegal action should be wiped out. Factually, the repayment of the Tristan note debt was not to be conducted through the Claimants. Instead the repayment from Tristan to the noteholders was to be realized from the proceeds of loans that KPM and TNG had entered into with Tristan. It is not the case that Claimants were to forward KPM and TNG's cashflows to noteholders. An award that was grossed up for the Tristan debt "*would not recreate the hypothetical situation without the alleged breach if all hypothetical cash flows of KPM and TNG were directly awarded to the Claimants*." (RPHB 2 ¶¶ 939 – 943).

1521. Respondent will not speculate on whether "*Claimants are actively acting on behalf of the Tristan noteholders and as a front for the actual noteholder claim*." If successful, however, Claimants' claim has the practical consequence that Claimants serve for the noteholders to realize the noteholders' claim. It would have the same effect which was the salient point under *Impreglio* and *PSEG*, where the tribunals declined to compensate the claimants for the amounts they owed to creditors. (RPHB 2 ¶ 944).

1522. Ascom and Terra Raf are not liable toward the Tristan noteholders under Section 6 of the Terra Raf and Ascom Pledge Agreements. The limited scope of Section 6(b) clearly refers to "*dividends*" and "*distributions*." Hypothetical awards against Respondent are not covered. The Pledge Agreements must be interpreted under Kazakh law, pursuant to which only the activity of the LLP is subject to the pledges. Potential awards are not covered by the text of the pledges. The text of Section 6(b) also speaks against its argued purpose of covering payments from an award. In addition, the competent ICC tribunal has the authority to determine whether Claimants have liability to noteholders. Claimants' argument that Respondent needs to compensate Claimants before such liability has even been proven before an ICC tribunal is ludicrous. The only way that Respondent could theoretically even be liable for an enterprise value claim would be if Claimants did remain liable – but even then there are strong arguments under international law that only equity value could be awarded, and Respondent has never admitted the opposite. (RPHB 2 ¶¶ 945 – 952).

1523. Regarding additional debt, Claimants have not responded to Respondent's arguments that the debt under the Reachcom Facility Agreement, the Limozen Facility Agreement, and the Reachcom Receivables Purchase Agreement, need to be deducted. The Tribunal should consider this as a concession. (RPHB 2 ¶ 957).

1524. Regarding the KPM and TNG COMSA prepayment arrangements, the envisioned sharing of cash-flows from the envisioned joint venture capital company needs to

be deducted from a claim for the LPG Plant. The COMSAs, however, refer to an existing date as of the valuation date. Claimants do not contest that the COMSA debt existed as of 21 July 2010 and they do not explain why it would not need to be deducted from their claims. Claimants, therefore, admit that this debt needs to be deducted. (RPHB 2 ¶¶ 959 – 960).

1525. While Respondent disputes that it had any role in Claimants taking out the Laren loan, Claimants have not proven that their debt under the Laren loan has been repaid, beyond the incredible evidence of Mr. Lungu. It is also unproven that repayment caused any loss to Claimants. (RPHB 2 ¶ 961 – 962). Tax debt also needs to be deducted. (RPHB 2 ¶ 963).

1526. Contrary to the position advanced by FTI, the Tristan Note price is not an indicator of enterprise value and that valuation method is not commonly used, nor is the Morning Star Index. The Morning Star Index depicts the 5 year average of debt to total capital average of gearings (typical debt to typical capital ratio) for the oil and gas industry and stood at 19.5 % on 30 September 2008. Thus, FTI assumes that the market value of the Tristan notes (USD 273.5 million) represents 19.5% of the total enterprise value, making that value be USD 1.4 billion for KPM and TNG as of 14 October 2008. There is no typical debt to total capital ratio that applies to all companies in the oil and gas industry. There are wild variations, ranging from zero to 97%. Accordingly, the average is not a reliable method for valuation. As of both valuation dates, the markets expected Tristan to default on its notes, which means that the market value was close to the enterprise value of the companies at the time of the issue. This is because, in the event of default, the remaining relevant right of the noteholders is a primary claim to the enterprise value of the companies. As of 14 October 2008, the value of KPM and TNG as derived from the value of the Tristan notes was approximately USD 221.5 million – approximately one third of FTI's DCF calculations. As of the valuation date of 21 July 2010, the value was approximately USD 215.5 million, which is fairly close to Deloitte's DCF calculation of USD 186 million. (RPHB 1 ¶¶ 1031 – 1037).

3. The Tribunal

1527. The Parties disagree regarding the relevance of the *Chorzów* Award. The Tribunal considers that the starting point for the calculation of damages should indeed be the formula applied in the *Chorzów* Award, and often applied in investment arbitrations as well, i.e. that the damages awarded "*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*."

1528. For their respective arguments relating to the treatment of debts in this context, the Parties rely on several decisions of other tribunals, but disagree as to which of them are comparable to the situation in the present case and what their findings mean for the present dispute. The Tribunal finds that none of these earlier decisions exactly deal with a situation as exists in the present case. While taking into account the considerations in these earlier decisions, the Tribunal will turn to the specifics of the case at hand.

1529. The Parties disagree regarding the relevance of the **Sharing Agreement**. In that regard, this Tribunal considers that an approach similar to that taken by the tribunal

in the OPEC case *Occidental v. Ecuador* (R-355 §§ 654 *et seq*.) is the most appropriate: Such an agreement concluded long after the breach of the ECT in order to share the risk and proceeds of an award in the present case cannot be a factor reducing the damages owed by Respondent.

1530. In principle, Claimants are correct in their argument that, but for Kazakhstan's action, KPM and TNG would have continued to operate their business, generating cashflows to KPM and TNG, and Claimants would have been entitled to direct those flows to reinvest, pay dividends, and/or pay off debts of KPM, TNG, and Tristan (under the KPM and TNG guarantees).

1531. Since the Tribunal cannot order restitution and restitution is not a relief sought by Claimants, the Tribunal's award should include future cash flows of the assets taken.

1532. However, the Tribunal does not agree with Claimants that this approach would automatically mean that no debts of the seized companies can be deducted at all. Since Claimants, after the taking by Respondent, are no longer the owners of KPM and TNG, they should not be compensated for any debts for which they now are no longer liable and for which Respondent, or the new owner to which the assets were transferred, is now solely liable.

1533. As the Claimants have the burden of proof for all damages claimed, they must be considered to have the burden of proving that they remain liable for a debt after the taking by Respondent. On the other hand, Respondent must be considered to have the burden of proof for the exception that it, or the new owner to which it passed the assets, is solely liable for a debt.

1534. As recorded above in this Award, between 21 and 22 July 2010, the Prime Minister and the Minister of Oil and Gas publicly declared the takeover and abrogation of the Claimants' Subsoil Use Contracts, seizure of the assets of KPM and TNG and caused them, in due course, to be transferred to KMG, which later appointed its subsidiary KMT as "*trust manager*" for the companies. (C-3, C-4, C-5, C-189, and C-190).

1535. The Tribunal will, therefore, examine the debts which Respondent argues have to be deducted and will ascertain who is still liable for them at this time.

1536. Regarding the Tristan notes as the by far largest debt, Respondent expressly agreed in its Rejoinder on Quantum (R-III ¶ 383) that, insofar as Claimants remain responsible for the Tristan debt, enterprise value is the correct measure of damages. While Respondent's statement at the May 2013 Hearing may perhaps be understood as changing that position, it did not attempt to reconcile its prior statement and the Tribunal still agrees with Respondent's earlier position.

1537. Based on the information before it, the Tribunal concludes that Ascom and Terra Raf are still liable to repay the noteholders pursuant to Section 6 of the Pledge Agreement. That provision expressly includes in the payments to be made to the pledgeholder "*other payment or distribution of any kind*." The Tribunal sees no reason why this general language should be restricted to payments of KPM and TNG alone as Respondent has argued at the May 2013 hearing (Tr. day 1, pp. 246

and 247). Quite to the contrary, if Claimants, in the present arbitration, would not claim the value of the Tristan debts, they might be held liable for not pursuing the interests of the pledgeholders.

1538. Beyond the Tristan issue, regarding additional debt, the Tribunal agrees with Respondent that Claimants have not sufficiently responded to Respondent's arguments that the debt under the Reachcom Facility Agreement, the Limozen Facility Agreement, and the Reachcom Receivables Purchase Agreement, need to be deducted. Even if the Tribunal does not consider this as a concession, it does consider that Claimants have not fulfilled their burden of proof in this regard and that, therefore, these debts have indeed to be subtracted from any damages.

1539. Regarding the **obligations to VITOL** under the COMSA prepayment terms and LPG financing arrangements, the Tribunal does not agree with Respondent that these must be deducted from the damages awarded. As testified by Mr. Lungu (Tr. Hearing January 2013, day 1 p. 185/186), VITOL never owned part of the LPG Plant. As explained by Claimants (CPHB 1 ¶ 643), the prepayment arrangements guaranteed by KPM and TNG were not a separate debt but regarded VITOL's portion of the debt financing for construction of the LPG Plant. The Joint Operating Agreement with VITOL for the LPG Plant project (First FTI Scope of Review No.44) expressly provides that, in the event that the Government seeks any rights of pre-emption, VITOL is still entitled to payment from ASCOM of the fair value price and that ASCOM shall seek to recover such amounts from the Government.

1540. The **Laren debt** was caused by the conduct of Respondent which this Tribunal now found to be a breach of the ECT. Furthermore, it has been repaid as testified by Mr. Lungu (Tr. Hearing January 2013, day 1 p.191). The Tribunal sees no reason why it should be deducted from the damages awarded.

1541. Finally, the alleged **back tax obligations** were created by Respondent's conduct which this Tribunal found above to be a breach of the ECT. Further, KPM and TNG prevailed in their court challenges of the tax assessments. The only appellate decision in favour of Respondent was issued after the seizure of the investment in a review process alleged by Claimants to have been conducted without their knowledge or participation. In any case, the Tribunal considers that Respondent has not fulfilled its burden of proof that the tax assessment would have been valid even without the conduct found to be a breach above in this Award.

1542. In view of the above, the **Tribunal concludes** that only the debts under the Reachcom Facility Agreement, the Limozen Facility Agreement, and the Reachcom Receivables Purchase Agreement are to be deducted from the damages to be awarded.

L.IV. Quantum Related to Borankol Field and Tolkyn Field

1. Arguments by Claimants

1543. The hostile investment environment created by Respondent, combined with the liquidity shortage which was also caused by Respondent (i.e. the absence of Credit

Suisse loan), forced Claimants to reduce development efforts at Borankol and Tolkyn fields. This caused Claimants to decide not to drill or recomplete 13 wells at Borankol and Tolkyn in 2009 – 2010. This caused three injuries: (1) KPM and TNG lost revenue that they would have earned from their planned production; (2) the gap in the development efforts artificially depressed the production curve at Tolkyn and Borankol. The production that forms the basis for GCA's decline curve analysis is lower than it would have been had Claimants been able to develop the fields without Kazakhstan's influence. Claimants (3) were unable to promptly respond to the watering issues at the Tolkyn field. (CPHB 1 ¶¶ 365 – 368; CPHB 2 ¶ 222).

1544. After the Hearing on Quantum, Claimants stated that both Parties have valued the Tolkyn and Borankol fields using the DCF method, which is undisputedly the appropriate method for valuing these assets. Based on FTI's DCF valuation, which relies on the geological analysis of Ryder Scott, Claimants request the following damages (CPHB 1 ¶¶ 524 – 528):

Borankol	**US $197,013,000**
Tolkyn	**US $478,927,000**
Munaibay Oil	**US $96,808,000**

1545. Before the Hearing on Quantum, FTI's valuation of the Borankol field and the Tolkyn field as of 14 October 2008 was USD 231.5 million and USD 508.4 million, respectively. FTI arrived at these sums by assessing (1) distribution costs, (2) a mix of fixed versus variable costs in FTI's forecast of cost of goods sold, (3) recompletion CAPEX, (4) an estimate for liquidation expenses, and (5) depreciation. FTI has also adjusted its application of EPT to properly calculate EPT on income after corporate income taxes. (C-III ¶¶ 75 – 76).

1546. Claimants' right to export gas at international prices is relevant to TNG's and its prospective purchaser's reasonable expectations as of 14 October 2008. FTI assumed that a willing buyer, on 14 October 2008, would have been able to sell in export markets and acquire the prevailing international export prices for those sales. The CAC Pipeline – a direct export route – is proximate to the Tolkyn field. At the time, Respondent was forecasting both an expansion of total gas production from 33.7 Bcm^3 in 2008 to 61.5 Bcm^3 by 2015, with a concomitant export volume expansion from 6.2 Bcm^3 in 2008 to 12.9 Bcm^3 in 2015. Regarding pricing, in March 2008 there was every indication that companies from Turkmenistan, Kazakhstan, and Uzbekistan would export gas at European price levels, minus relevant transport and storage costs, by January 2009. In 2008, KMG even announced expectations that its own price could increase by 60 – 70% from January 2009, up to USD 306/mcm. (C-III ¶¶ 8 – 11).

> *10. That TNG's future receipt of international export prices was reasonably contemplated in 2008 is also clear from several of the indicative offers that Claimants received for TNG's Tolkyn field in the initial round of Project Zenith. A comparison of FTI's valuation of the Tolkyn field and the*

> *indicative offers demonstrates this. FTI has valued TNG's Tolkyn field as of October 14, 2008 at US $508.4 million, using a DCF methodology and incorporating as an important element the receipt of future gas export prices at a flat US $180 per 1000 cubic meters (a conservative estimate given the fact that export prices were set to be raised at the time to US $305 per 1000 cubic meters in January of 2009). By comparison, among the initial round of indicative offers received by Claimants, the Tolkyn field as a segregated component was valued by KNOC at US $1,067 million on an enterprise value basis, by OMV Exploration & Production GmbH at US $952 million on an enterprise value basis, and by Total at US $730 million on an equity basis using DCF methodology. The magnitude of these offers indicates that they certainly contemplated receipt of export prices for TNG's gas as a critical component. (C-III ¶ 10).*

1547. Deloitte makes the unreasonable assumption that all natural gas produced from the Borankol and Tolkyn fields would be sold on the domestic Kazakhstan market, even though a significant proportion of the gas production from these fields was sold on the export market. Deloitte's assumption is contrary to Claimants' right to export gas under the Subsoil Use Contracts (which Respondent has not contested), and is contrary to the negotiated (but not signed) Tripartite Agreement. Respondent does not address Claimants' explicit contractual right to export gas under its Subsoil Use Contract, the self-evident inclusion of export pricing assumptions in the initial round of Project Zenith offers, the proximity of the CAC Pipeline, or the State's own projections as of 2008 regarding increases in gas production, exports, and export prices. Instead, Respondent selectively focuses on deficiencies in the Tripartite Agreement. An examination of the negotiation documents, however, shows that the parties intended to enter into a long-term agreement for the supply of natural gas. The preliminary agreement signed by representatives of all three parties set out in careful detail the two explicit export pricing methodologies for deliveries of gas to KazAzot and KMG. That the Tripartite Agreement was not signed and that KazAzot decided against construction of the fertilizer plant is irrelevant for the establishment of TNG's and its prospective purchaser's reasonable expectations for two reasons. First, through August 2009, the Tripartite Agreement was a viable prospect and confirmatory reason for the belief that TNG would be able to export gas at international prices. Second, KMG executed the 17 November 2008 Agreement, giving its clear indication that gas exports and export prices could reasonable be presumed to be available to a prospective purchaser upon entry into negotiations with KMG, regardless of the KazAzot fertilizer project. This is an exception to the rule against consideration of events after the valuation date because it confirms management's expectations as of the valuation date. While KazAzot never signed the version that KMG executed, it had previously accepted a materially identical contract and one could reasonable assume that they would execute the agreement after the substitution of KMG as the exporter. Claimants explain that "*[i]t was, after all, KazMunaiGas through KazTransGas, not KazAzot, that was to take delivery of TNG's export gas and pay the specified export prices under the Tripartite Agreement. The export provisions in the Agreement were a separate component, providing for their own discrete gas stream from TNG for export, and providing their own pricing formula for the payment of international export prices. The fact that KazAzot might not need the portion of the gas allocated to it in the Tri-Partite Agreement means only that more of TNG's gas could be exported, not less.*

Respondent cannot now claim that an Agreement it effectively executed itself for TNG gas exports and export pricing is no evidence of the right, expectation, and ability to export gas at such pricing." (C-III ¶¶ 12 – 17, partially quoted; CPHB 1 ¶¶ 395 – 397, 492 – 494; CPHB 2 ¶¶ 346 – 352).

1548. Deloitte's new arguments demonstrate flaws in and the biased, outcome-driven nature of its work. Deloitte had every incentive to bias its secondary valuation analysis to make it appear to support the conclusions it had already published, and that is exactly what it did. In order to make the secondary analysis support its previous conclusions, Deloitte made unsupportable judgments and adjustments to the market data that biased the outcome downward. This is confirmed by the contemporaneous market analysis conclusions reached by KMG and RBS and the offers in Project Zenith. Analysis of those market actors, who had no reasons to bias their conclusions, corroborates FTI's market analysis. (CPHB 2 ¶¶ 340 – 345).

1549. Claimants respond to Respondent's argument that a price of USD 180 per 1000 m^3 is unreasonable and that an undocumented export price of USD 70 would have to be used, as follows:

> *19. […] What Respondent is actually describing appears to be an export gas racket pursuant to which a State-controlled middle man pays a domestic producer of gas a reduced price (e.g., US $70), flips the gas at the border for the international export price (e.g., US $180), and retains the difference between the two prices. Respondent attempts to put a gloss on this racket by suggesting that the export prices received by domestic producers "were regulated by the State and were significantly lower than [international] export prices due to the lack of any direct entry to international markets." Respondent does not, however, cite any "regulation" supporting this contention, and Claimants invite Respondent to provide a regulatory basis for this State sponsored profit-skimming enterprise. And Respondent's reference to a "lack of any direct entry to international markets" is simply a euphemistic way of saying that a State-controlled middle man must be paid an illegitimate cut if a domestic producer wants to export gas. There exists, after all, an otherwise "direct entry to international markets" in the form of the Center-Asia-Center pipeline running adjacent to the TNG and KPM oil and gas fields, which TNG and KPM had a legal right to access at commercially reasonable rates under their Subsoil Use Contracts. (C-III ¶¶ 18 – 19).*

1550. Claimants were subject to the "*racket*" in the past. They were unsatisfied with these artificially reduced prices for KPM and TNG's gas exports and consistently negotiated to acquire reasonable export prices. The Tripartite Agreement set as an effective benchmark a legitimate export price, tied to the prevailing price at the border, along with a 20% fee to KMG. (C-III ¶¶ 20 – 21).

1551. Respondent also fails to take Kazakhstan's changing gas market of 2008 into account, when the demand for gas was breaking Russia's monopolistic stranglehold on the export of Kazakh gas. Deloitte cites to reports that support this, but nonetheless assume 3 scenarios that are premised on whether TNG would be able to export gas at all. The probability of each of the three scenarios changed during proceedings, but Deloitte never produced the MOG review upon which

those assumptions were allegedly based. Deloitte also ignored the gas pricing assumptions that were made in connection with the 2009 RBS Asset Assessment, which contains an 80% likelihood that all of TNG's gas would be sold on the export market, although it was cited in their report. RBS valuations of the Tolkyn field range from USD 527 million to USD 765 million, based on the different export prices that could be achieved, not on whether TNG would be able to export gas. This report is fatal to Deloitte's 5% probability of its "*export scenario*", which is why Respondent instructed Deloitte to remove all references to the RBS Assessment from its report. (CPHB 1 ¶¶ 491 – 500; CPHB 2 ¶¶ 346 – 352).

1552. The RBS valuation was based on (1) the 2009 reserve report prepared by Miller Lents; (2) detailed legal due diligence by Squire Sanders; (3) detailed financial, tax, and environmental due diligence by PWC; (4) discussions with management of KPM and TNG; and (5) "*valuation discussions with KMG EP*." It was created as an independent valuation for the purpose of a potential transaction, not litigation. It concluded that, on 1 October 2009, the combined enterprise value of Tolkyn, Borankol, and the LPG Plant was USD 612 million in the Default-Base scenario and USD 760 in the Special-Base scenario, which assumed higher gas prices. For Tolkyn and Borankol alone, RBS concluded that Tolkyn and Borankol had a combined enterprise value ranging from USD 546 million in the Default-Base scenario, up to USD 784 million assuming higher gas pricing in the Special-Base Scenario. The Tribunal should increase any amount derived from the RBS Valuation by USD 243.5 million to account for contingent liabilities attributable to Kazakhstan that RBS included in its model. Due to the untimely production of the RBS Valuation, any uncertainty over whether RBS deducted liabilities in its calculation must be resolved against Respondent. The RBS valuation represents an alternative valuation which should establish a minimum value for these assets, if the Tribunal rejects the 14 October 2008 valuation date. The Tribunal should, however, draw the inference that it understates the value of these assets. (CPHB 1 ¶¶ 583 – 585; CPHB 2 ¶¶ 360 – 370).

1553. Respondent selectively embraces parts of the RBS Valuation and ignores others to argue that the valuation should be adjusted downward. To the extent that adjustments to the RBS valuation are appropriate, it is that the RBS valuation of Borankol is mistakenly low. RBS used volume assumptions from the 2009 Miller & Lents report that were materially higher than GCA's volume assumptions. RBS's valuation as of 1 October 2009 is less than one-third of Deloitte's valuation as of July 2010, when oil prices were higher. For Tolkyn, differences in gas prices – not condensate volumes – account for the difference between the Deloitte and RBS valuations. (CPHB 2 ¶¶ 363 – 367).

1554. Deloitte also completely disregards the 2009 RBS Asset Assessment, which was a comprehensive review of KPM and TNG that RBS prepared for KMG E&P. The RBS Assessment corroborates FTI's valuation and undermines Deloitte GmbH's conclusions. It concludes that 80% of gas is expected to be exported, that the LPG Plant will be assumed to have gas from both the Borankol and Tolkyn fields and from third parties, and that the Contract 302 extension had been granted on 9 April 2009. The RBS report contains six scenarios for valuing KPM and TNG, without considering the Contract 302 properties, and these range from USD 272 to USD 1,094 million. Although these were significantly higher than the Deloitte GmbH valuation, it is clear that these erred on the low side. The enterprise values are

depressed through the incorrect deduction of contingent liabilities, many of which were attributable to Kazakhstan's illegal actions, such as the Laren debt and tax liabilities. Since Kazakhstan withheld this information until 14 March 2013, Claimants were unable to question Mr. Suleymenov, who supervised the valuation, about how these liabilities were deducted. The Tribunal should draw the inference that they were incorrectly deducted, raising the enterprise value in the RBS Assessment to USD 855.5 (default base scenario) to USD 1,003.5 million (Special base scenario). While Deloitte had access to the report, it does not explain the divergence between its conclusions and those of RBS. Instead, in the Hearing on Quantum, Mr. Gruhn attempted to distance himself from the RBS Assessment, saying he had not relied on it. (CPHB 1 ¶¶ 513 – 518; CPHB 2 ¶ 363 – 367).

1555. Regarding Respondent's arguments and the GCA production forecasts for the Tolkyn field, Claimants explain that the data GCA reviewed was incomplete. GCA's failure to include relevant reserve and production data in its analysis and its choice of analytic methodology affects the credibility of the report and all reports that rely on it, including the Deloitte economic analysis. Importantly, GCA did not include any of the significant "*behind-pipe*" reserves in the Tolkyn field, provided in the first Ryder Scott report. These reserves amounted to proven and probable (2P) reserves of 1,869 MBO and 43.7 BCF of gas as of 14 October 2008. (C-III ¶¶ 22 – 25; CPHB 2 ¶¶ 335 – 336).

1556. The GCA production forecasts for the Borankol field are also inaccurate. What the GCA characterizes as "*unexplained production increases in 2015 and 2016*" in the Ryder Scott report are actually fully explained forecasted production increases for that report. Future operations for the Borankol field included 58 well completions and 4 developed wells to be drilled. Each was supported by complete geologic analysis, geologic interpretations, log analysis, volumetric analysis, and the development schedule. (C-III ¶¶ 26 – 27).

> *28. These production increases represent full exploitation of the remaining reserves in the Borankol field, exploitation that any reasonable operator would be expected to pursue, and reserves that any reasonable prospective purchaser would be expected to value. Indeed, Ryder Scott's estimate of remaining crude oil and condensate in the Borankol field as of October 14, 2008 was 18.8 million barrels. This is 344% of GCA's estimate of 5.45 million barrels of remaining crude oil and condensate as of July 21, 2010. To put this in perspective, cumulative production between October of 2008 and July of 2010 in the Borankol field was approximately 2.3 million barrels of oil and condensate, which means that GCA's forecasted future production ignores 11.05 million barrels of recoverable crude oil and condensate. GCA does this by simply assuming "a limited work program" for the Borankol field. GCA does not, however, provide any explanation of why a limited work program should be assumed, or why otherwise recoverable reserves should be left in the ground. Simply ignoring without explanation a vast quantity of recoverable crude oil and condensate is not, to say the least, a credible method of calculating the fair market value of an oil and gas field, and calls into serious question the overall credibility of the reports submitted by GCA and Deloitte. (C-III ¶¶ 28).*

1557. GCA modeled the Borankol field as a homogenous reservoir to be drained by hypothetical, identical, and undisclosed type wells. GCA's "*type well*" analysis of

the behind pipe reserves likely consisted of GCA's creation of a hypothetical "*type well*" from undisclosed historical production data. The record contains no evidence that GCA actually conducted a type well analysis, at all. Ryder Scott's well-by-well analysis is more thorough because it considered the behind-pipe potential of each well, based on the characteristics that had not been completed. In regard to the Tolkyn field, "*Ryder Scott performed a volumetric and performance based analysis for all of the Borankol and Tolkyn reservoirs, and used the appropriate data and methodology to estimate the available reserves in the two fields*." There was no selective bias, as GCA alleges. Ryder Scotts' estimate of behind pipe and undeveloped reserves in Borankol and Tolkyn were based on volumetric analysis, as is appropriate wherer there is no production data. The estimates for producing reserves in Borankol and Tolkyn were based on well-by-well performance analysis. For the Tolkyn Artinskian Dolomite, the analysis was based on its material balance analysis as confirmed by performance data. GCA, however, "*inappropriately used a field wide oil cut versus cumulative production analysis for its Borankol producing estimates, and did not identify in any discernible way how it estimated either its Tolkyn behind pipe or producing reserves*." (CPHB 2 ¶¶ 335 – 336). Ryder Scott performed a well-by-well analysis, using isochore maps for each reservoir zone to identify well candidates for recompletion. Ryder Scott then created a grid summarizing the available and unavailable well bores, just as a prudent operator would to maximize recover from the lower J-VII reservoir. While Respondent criticized this at the hearing, Ryder Scott's assumption that recompletions would perform strongly was based on a thorough geological analysis of the reserves. There is nothing about the "*bump*" in Ryder Scott's production profile, since a prudent operator would exhaust production from existing completions in declining zones before moving to higher zones that have more remaining productivity. Since GCA incorrectly assumed that recompletions would not perform strongly and did not schedule individual wells for recompletion, GCA has created a production profile that reflects a fictional decline curve that no prudent operator could expect to see. (CPHB 1 ¶¶ 465 – 470).

1558. GCA failed to conduct any volumetric assessment or independent mapping or analysis of Borankol and Tolkyn, and admitted as much at the end of its Third Report. For its "*other performance-based studies*", presumably the field-wide decline-curve analysis and the type-well analysis addressed by Ryder Scott, GCA has not produced its assumptions underlying its type well. GCA's decline-curve analysis is "*a simplistic extrapolation from field-wide data that ignores State-caused reasons for low field performance and is an inappropriate method to estimate future production from behind-pipe reserves*." (CPHB 2 ¶¶ 332 – 333).

1559. Respondent's conduct prevented Claimants from promptly addressing water cut issues. Nonetheless, Respondent's arguments concerning water production in the Tolkyn field wells are confused, contradictory, and largely wrong. Ryder Scott accounted for water cut in its report and found it to be a localized formation problem and not a field-wide issue. Evidence Respondent provided to Claimants' on 2 April 2011 supports this finding. (C-III ¶¶ 29 – 32).

1560. Respondent argues that over-production in the Tolkyn field in 2007 and 2008 caused the increase in water production in 2009 and 2010, and that Claimants' recovery should be reduced based on this injury to the field. This is based on the Neftegazconsult "*expert*" report, attached as Exhibit R-173. The contentions in

this report are "*absurd*" and are contradicted by the FDPs and working programs under which TNG and KPM operated, as well as the history of Tolkyn field production. In 2007, TNG's actual gas production from the Tolkyn field was intentionally 726 mcm less than expected under the Development Plan because TNG did not have an additional sales contract in place to cover seasonal downturn during summer domestic demand. The 2008 Development Plan anticipated gas production of 2500 mcm – an increase of 516 over the expected gas production of 1984 mcm, and twice TNG's actual production of 1257.2 mcm. In 2008, TNG's actual production was 2352.2 mcm – 147 mcm les than expected. The increase in production created a marginally larger than historical water production, which did not become apparent until 2009. The Development Plan was reduced from 2500 mcm to 1800 mcm. In 2009, TNG produced 1317.1 mcm, 482.9 mcm less than permissible. As should be readily apparent, there was no "*incompliance*" on the part of TNG and no violation of the Development Plans by TNG. This should be viewed as another attempt for Respondent to excuse or justify seizure of the asset. (C-III ¶¶ 33 – 46).

1561. FTI has dealt with the errors in the CAPEX, OPEX, depreciation, liquidation, and calculations of inflation and exchange rates contained in the Deloitte and GCA expert reports. It is clear that in the Deloitte and the GCA Reports, Respondent has significantly increased the CAPEX and costs in order to decrease the value of the fields. One example is GCA's invention of an unnecessary USD 41 million cost to be included in the Tolkyn field for future compression. As of Respondent's valuation date, however, the vast majority of the Artinskian producing wells were flowing at a tube pressure or above 2000 psig – above the pipeline pressure of approximately 540 – 680 psig and above the inlet pressure for the Borankol Plant of 870 psig. Little, if any, compression would be required prior to the expiration of the Tolkyn Subsoil Use Contract. There is no industry support for increased pressure to be used to alleviate water production in the Tolkyn field. Further, it is unclear how Deloitte has applied GCA's USD 41 million capital expenditure forecasts in its DCF models, as there is a discrepancy of USD 10.5 million. The timing with which GCA and Deloitte apply this unnecessary expense also maximizes it impact and creates the greatest possible reduction in overall value. (C-III ¶ 47 – 50). An additional argument is best taken from Claimants' own words:

> *51. In addition to the unnecessary compression recommended by GCA, Respondent has also submitted in its Neftegazconsult report a recommendation that an extensive testing, workover, new drilling, and directional sidetrack drilling program be commenced in December of 2011 in the Tolkyn field to allegedly address the water issue. Neftegazconsult does not provide any estimates of the costs or CAPEX for this undoubtedly costly program of testing and drilling. Neither does Deloitte. Indeed, Deloitte's report does not reference (or even acknowledge) the Neftegazconsult report in any way. And in a further indication that GCA's alleged compression requirement is itself both unnecessary and a purely fabricated expenditure, Neftegazconsult does not mention GCA's alleged compression requirement anywhere in its report.*
>
> *52. Neither the compression program put forward by GCA, nor the testing, workover, and drilling program put forward by Neftegazconsult, would do anything more to address the water cut issue in the Tolkyn field than the*

> *simple reduction in production that the State already incorporated into the 2009 Development Plan. And Respondent's inclusion of these two different, and enormously expensive, programs to allegedly address the water cut issue in the Tolkyn field, both intended to commence in 2011, begs a question: — It is now 2012; were either of these programs undertaken in 2011, or were they deemed unnecessary? Claimants have not been able to locate in the documents produced by Kazakhstan any indication that either program has been commenced, and if they have not, it is certainly logical to assume that Respondent simply invented them in order to impose the maximum possible negative impact on a discounted cash flow analysis and thereby suppress the value of the Tolkyn field. (C-III ¶¶ 51 – 52).*

1562. GCA's assumption that compression will be necessary in Tolkyn is based on the premise that wellhead pressure (varies from well to well), rather than the relevant bottomhole pressure (the natural force that drives production in the field), will decline. GCA's own data regarding bottomhole pressure (the most relevant to the possible need for future compression) shows that the need for compression should not be expected prior to 2018. On top of that, GCA manipulated the wellhead pressure data in Figure 3.1 by reporting only the low point from a range of pressure readings from each well. (CPHB 2 ¶ 337).

1563. Regarding the Tolkyn field, GCA's inclusion of a front-loaded capital expenditure for unnecessary compression drives down Deloitte's DCF valuation for the Tolkyn field. As conceded by GCA in testimony, no such compression was actually installed in 2011 and to date, none has been. No one would have expected compression to be needed in the Tolkyn field as of October 2008 or July 2010, even though the 2007 KazNIPIMunaiGas FDP contemplated the installation of compression at Tolkyn in 2012, but contrary to GCA's insinuation and as latter admitted by GCA, this was a freely amendable, non-mandatory plan. Further, the assumption about the installation of compression in the 2007 FDP was based on production rates that did not occur. GCA cherry picks with respect to this FDP, citing only that compression would be needed where it increases costs, but holding the projections for future production based on that plan. Ryder Scott's analysis analyzes the production profile and the need for compression as of 14 October 2008, rather than relying on the outdated 2007 FDP. In any event, that some compression will be required at some point in time is not a justification for a USD 40 million up front expense in the CAPEX calculation for 2011. At the Quantum Hearing, Mr. Goodearl conceded this point, explaining that a prudent operator would not install expensive compression to only marginally assist poorly producing wells. (CPHB 1 ¶¶ 471 – 477).

1564. After the Hearings, Claimants argued that the geological and valuation analyses of FTI and Ryder Scott are more accurate and more reliable than the corresponding work by Deloitte and GCA. GCA's valuation is not accompanied by any materials supporting the summary tables or conclusions in the GCA reports, and GCA representatives defended this failure to produce by citing commercial confidentiality. As a result, neither the Tribunal nor Claimants can scrutinize or verify GCA's summary assertions or conclusions beyond the wild variations and cherry picking that was done in their alarmingly lax analysis. The lack of transparency and failure to document its work (in violation of Art. 5(2)(I) IBA Rules) strongly suggests that GCA was engaged in an effort to arbitrarily maximize

cost estimates, minimize reserve and production estimates, and accelerate costs while denying revenues wherever possible. The reliance on "*commercial confidentiality*" for GCA's failure to follow the IBA Rules cannot be taken seriously. As Mr. Latham for Ryder Scott testified, if a document is confidential, an expert should not rely on it and should instead locate an alternate source of data. (CPHB 1 ¶¶ 439 – 444).

1565. Unlike Ryder Scott, GCA performed no independent petrophysical analysis, seismic analysis, well log analysis, mapping, material balance analysis, or work to assess the behind-pipe reserves or well recompletions. Without these, there can be no reliable estimate of the reserves and resources to create a FMV. Instead, GCA simply reviewed the work performed by Ryder Scott. This is no substitute for an independent and thorough analysis, like the one provided by Ryder Scott. (CPHB 1 ¶¶ 447 – 452).

1566. Deloitte relied entirely on GCA in its valuation. It is particularly unusual that Deloitte would rely on geologists and engineers of GCA for CAPEX and OPEX estimates, but Mr. Gruhn made it clear at the Hearing on Quantum that this was done. No effort was made to even compare those numbers to Claimants' historic costs. Importantly, all of the CAPEX, OPEX, and production forecast inputs for Deloitte's DCF valuations are based entirely on GCA's opaque, unsupported, and freely-fluctuating estimates, without verification. (CPHB 1 ¶¶ 445 – 446).

1567. Deloitte TCF's USD 16 million valuation for the Borankol field and Deloitte GmbH's USD 62.8 valuation were products of the summary reference estimates contained in GCA's reports, which estimated recoverable oil and condensate reserves to be only 5.45 million barrels (MBbls), and later 8.65 MBbls. Inexplicably, GCA cut off the forecast prior to the expiration of the contract. This forecast is absurd and is contradicted by Ryder Scott's estimate of 18.8 MBbls of remaining crude oil and condensate as of 14 October 2008 – 344% of GCA's initial estimate of 5.45 MBbls as of 21 July 2010. Production between those dates was only 2.3 MBbls. GCA initially reached its conclusion by assuming that an undefined "*limited work program*" would have applied to Borankol and in the second report purportedly based it on a review of a FDP (which FDP is unclear). GCA admitted that the FDP plan had its "*shortcomings*", but failed to note that KPM drilled 21 wells in Borankol after the FDP was prepared, making it severely outdated. Despite the addition of the behind-pipe recovery, GCA grossly underestimates the total recoverable reserves by 10.2 MBbls, likely based on its new methodology, which considers (1) a projected future production from existing wells based on "*oil cut vs. cumulative oil production*" and (2) projected production of behind-pipe reserves from 43 unidentified well recompletions based on a "*type well*" analysis. (CPHB 1 ¶¶ 453 – 458; CPHB 2 ¶ 334).

1568. The oil cut analysis is not reliable since it does not consider individual well production characteristics, geophysical characteristics of a reservoir, or volumetric analysis, all of which Ryder Scott considered. Here, there was a sharp decline in production form 2009 – 2010, and this was a product of the State's campaign against KPM and TNG and Claimants' decision to minimize exposure. GCA's analysis and estimates have a decline curve methodology that do not account for the production aberrations of 2009 or 2010, or for the enhanced production from a future re-commencement of completions. GCA ignores this – it acknowledges that

the 2007 FDP called for 45 new wells and 44 completions between 2007 and 2022, but concludes that the reduction in operations beginning in 2009 was the result of a reduction in actual recoverable reserves. GCA compounded this error in the selection of methodology with errors in the actual calculations of oil cuts, miscalculating the ratio of oil and water because it used a conversion based on fresh water, when the water in Borankol field is alt water and has a higher specific gravity than fresh water. As a result, GCA understates recoverable quantities of oil from existing wells by 15%. (CPHB 1 ¶¶ 459 – 464).

1569. Respondent's argument that FTI arbitrarily reduced its inflation assumption when it corrected its price forecasts from nominal to real in order to "*limit the impact of the correction*" is wrong for two reasons. First, the reduction was not arbitrary – while FTI had previously used a historical inflation rate, that rate was not appropriate for the adjustment of nominal price forecasts into real price forecasts. To make that adjustment, FTI used a forward-looking inflation rate, which was lower than the historical rate. To avoid selective bias, FTI incorporated a revised inflation assumption into its valuation, including in its discount rate determination, raising that from 13 to 14% and offsetting the allegedly arbitrary inflation rate reduction on future oil prices. This offset was ignored by Respondent and Deloitte. FTI rounded the discount rate to the nearest whole number avoid implying false precision in the estimation of WACC, which Deloitte acknowledges is appropriate. Deloitte GmbH merely disagrees with the degree of rounding, without support. Deloitte GmbH's criticisms of the FTI valuation of Munaibay Oil are mistaken and are discussed in FTI's response in the Fourth Report. (CPHB 2 ¶¶ 356 – 359).

1570. Contrary to industry practice, Deloitte GmbH failed to test its DCF valuations against another other indicators of value, including valuations performed by Deloitte TCF and RBS. FTI, on the other hand, considered six, including: (1) the Project Zenith indicative offers; (2) trading prices of comparable companies; (3) reported terms of comparable transaction; (4) trading value of the Tristan debt; (5) the Cliffson transaction; and (6) the RBS Report. In response to Mr. Gruhn's observation that not all of the "*comparable*" companies in FTI's analysis were truly comparable, there are few publically reported companies and transactions in Kazakhstan involving producers with similar gas resources. The 2008 KMG EP Report and the 2009 RBS Assessment used many of the same comparable companies that FTI examined. Claimants respond to Mr. Gruhn's questioning of FTI's analysis of implied enterprise value based on the market value of the Tristan debt guaranteed by KPM and TNG and his point that one cannot infer that a specific company has a capital structure that mirrors the industry average. Lenders constrain the ability of a borrower company to borrow beyond its capacity and markets will "*price-in*" risk of maintaining a capital structure that is not in line with the industry. Mr. Rosen confirmed that, although the Tristan notes were trading at 65% of face value at the end of September 2008, they were trading at close to face value prior to the Lehman bankruptcy. FTI's third report confirms that other oil and gas companies experienced similar declines. (CPHB 1 ¶¶ 501 - 521).

1571. Deloitte GmbH's valuation for Borankol, Tolkyn, and the LPG Plant assets is an outlier, containing unsupported assumptions and higher costs and lower revenues than other models, and should be disregarded (CPHB 1 ¶¶ 522 – 523).

1572. In light of Mr. Kulibayev's or the state welfare fund's Samruk-Kazyna's control over Kemikal, Claimants accuse Respondent of interfering with gas sales in an effort to put pressure on Claimants. Kemikal failed to pay its invoices when due. (CPHB 1 ¶¶ 378 – 383).

1573. Mr. Chagnoux's testimony regarding the Borankol and Tolkyn fields was also not credible. (CPHB 1 ¶ 392).

2. Arguments by Respondent

1574. The value of the Borankol field as of 21 July 2010 amounted to **USD 62.8 million**, based on the GCA and Deloitte GmbH reports. As of 21 July 2010, the Tolkyn field has a value of **USD 123.2 million**, based on the DCF methodology applied by Deloitte. (R-III ¶¶ 212, 217, 222; RPHB 1 ¶¶ 929, 940; RPHB 2 ¶¶ 731, 766).

1575. For the Borankol field, GCA estimates that, as of 21 July 2010, gas in the amount of 94 MMm3 and oil condensate in the amount of 1,185.2 Mtonnes could have produced until 2022. This plan is based on mapping contained in the FDP and on the actual production of wells on the valuation date. GCA concluded that most reservoir units had already produced significant percentages of the estimated and approved ultimate recoverable reserves, under the FDP. This production was largely from wells located in the best parts of the reservoir. Recompletions - the redrilling of a well to a new, usually shallower producing zone when the current zone is depleted – which are used to access the so-called "*behind pipes reserves*" – will be located in poorer regions and will not perform as well. In addition, historical production figures and high water cut indicate that less reserves than initially planned in the FDP will be produced. The drilling of new wells is not to be expected. (R-III ¶ 215 – 216).

1576. Contrary to Claimants' allegations, GCA has provided supporting documentation, including two detailed spreadsheets concerning estimated oil and gas production. GCA made changes to its methodology – changes that were entirely in Claimants' favor – in its Supplemental Expert Report. GCA accounted for the 34 expected recompletions, the FDP, and the behind pipe potential. (RPHB 2 ¶¶ 749 – 751).

1577. Claimants allege that GCA has understated the available reserves by 10.2 MMBbl. This criticism is misleading and relates to the production that occurred in between the valuation dates. Claimants' failure to consider the oil and gas production in the period between the Parties' valuation dates leads to an inflation of the available reserves and, likewise, to an inflation of the value of the field. Further, Claimants and Ryder Scott assume that 4 new wells and 58 recompletions would be implemented by the end of 2022. Ryder Scott, however, ignores that recompletions will be made in poorer regions of the field and will perform worse than current non-completed wells. Ryder Scott also overestimates the potential for drilling new wells. (R-III ¶¶ 220 – 221; RPHB 2 ¶¶ 746 – 748).

1578. Contrary to Ryder Scott's assumption, GCA has pointed out that there is no potential for recompletions in the late life of the Borankol field. Instead, GCA estimates a gradual decline in production. Ryder Scott, however, implicitly assumes that the field developer would deliberately choose to develop a reservoir unit only very late in the field life – a highly atypical profile. Ryder Scott's

methodology is optimistic, is inconsistent with the data, and shows no consideration of actual field performance. (RPHB 1 ¶¶ 531, 931 – 934).

1579. The J-IA reservoir is the second largest in the Borankol field. Ryder Scott expected 4.17 MMBbl of its 18.6 MMBbl of recoverable reserves to be recovered there. Ryder Scott's analysis of the J-IA reservoir shows how Ryder Scott inflated the oil in place and the ultimate recovery rates. Ryder Scott also assumed deep oil-water contacts, meaning the elevation above which oil, rather than water, can be found in the pores of the rock. Since oil is always above the water (and gas is always above the oil), a deeper oil-water contact means that a reservoir contains more oil and less water. GCA showed that Ryder Scott's assumption of comparatively deep oil-water contacts was proven incorrect by data from key wells within the reservoir and was not supported by the FDP drafted under KPM's instructions and approved by the Central Commission. Ryder Scott has ignored this data, specifically for well 78 in the J-IA reservoir, where it placed the oil-water contact at the middle interval, even though it knew that the specific entire interval was 100% water saturated. The Tribunal should disregard the Ryder Scott Borankol production profile and the resulting inflated value. (RPHB 1 ¶¶ 532 – 533, 935 – 939; RPHB 2 ¶¶ 734 – 739).

1580. At the Hearing on Quantum, Mr. Goodearl of GCA unequivocally explained that water production is a risk that should have been considered in establishing the well rates. This information was ignored when Claimants ramped up their gas production for 2008 and thereby ran the risk of permanently damaging the wells and losing the opportunity to produce gas from the rock matrix in the lower levels of the reservoir. (RPHB 1 ¶¶ 941 – 944).

1581. Another key issue in the composition of the reservoir is the depth of the gas-oil contact. Deeper gas-oil contacts mean that the reservoir is filled with more gas and less oil. One hopes for a shallower gas-oil contact, since gas is less profitable than oil. At the J-IC reservoir, Ryder Scott ignored the available well data that the B13 well penetrating the J-IC reservoir produced for only seven months in 2005 and at a very high gas-oil ratio, to arrive at their desired, shallower, gas-oil contact. Any recompletion potential would be limited to less valuable gas. Ryder Scott was also quite optimistic with the J-IB reservoir. For the J-I reservoir, Ryder Scott estimates a recovery of 838 Mtonne of oil, ignoring that, until July 2010, that reservoir has only produced 110 Mtonne. The only conclusions one could draw from this is that KPM was incompetent and drilled too deeply, or that Ryder Scott's analysis is unreliable. There is no evidence to suggest that Ryder Scott has done anything beyond estimate in place volumes and then apply an unsubstantiated recovery rate to them. Ryder Scott's estimates cannot be considered fit for the purpose of estimating FMV. (RPHB 2 ¶¶ 739 – 745).

1582. Claimants' allegation that Ryder Scott's alleged well-by-well analysis was more thorough than the type well approach applied by GCA is untenable, as Ryder Scott's purported well-by-well analysis ignored available well data and is, therefore, insupportably optimistic. Claimants have not shown why the use of historical production data would be inappropriate and would not reflect the potential of the field. While Respondent disputes that there was a harassment campaign or that the State caused work reductions in 2009 and 2010, the reductions do not skew the analysis. There was no change in the decline rate after October

2008 for any of the reservoirs. As demonstrated in the Chart at RPHB 2 ¶ 759, it is incorrect that production dropped "*incredibly quickly*" after Claimants' valuation date. Production from the various Borankol reservoirs began to decline in 2003. (RPHB 2 ¶¶ 752 – 760). GCA confirmed that Ryder Scott's insinuation that well performance deteriorated after Claimants' effective date is baseless. (RPHB 2 ¶¶ 113 – 116).

1583. There would be a sharp decline in oil production beginning in 2009, brought about by the end of the contract with TNG's biggest customer, Kemikal. Kemikal stopped payments on Claimants' products because of liquidity and insolvency issues. (RPHB 2 ¶ 124). This information is also disregarded by Ryder Scott. (R-III ¶ 241 – 245).

1584. Claimants' criticism that GCA's type well calculation used an oil cut versus cumulative production methodology that applied the incorrect water density and thereby reduced recovery by 15%, is incorrect. GCA never used the oil cut versus cumulative production method in forecasting production for Borankol. The only oil cut calculation that Ryder Scott referred to was made as part of the overall assessment of the field. GCA even made a higher ultimate recovery estimate, 3.1 million tones, than what Ryder Scott thinks GCA's estimate should be corrected to. Claimants' and Ryder Scott's attacks on GCA are, therefore, unfounded. (RPHB 2 ¶¶ 761 – 765).

1585. Regarding the valuation of the Tolkyn field, Deloitte reaches its **USD 123.2** valuation by taking three essential factors into account: production profiles, realistic gas prices, and capital expenditure. Deloitte's assumptions are based on GCA's production profile, according to which gas production reached its peak in 2008 and decreased significantly in 2009. GCA estimates that, until 2018, 60.9 Mtonnes of oil, 574.4 Mtonnes of condensate, and 5.8131 Bcm^3 of gas may be produced. In light of Ryder Scott's comments, GCA increased the total gas sales by 0.13 Bcm^3. (R-III ¶¶ 222 – 233; RPHB 1 ¶¶ 940 and chart). Ryder Scott and GCA are not separated by much. As of 21 July 2010, Ryder Scott assumed recoverable volumes of 66.76 MMBoe. GCA estimate recoverable volumes of 50.3 MMBoe. Claimants exaggerate the difference. (RPHB 2 ¶ 485).

1586. Regarding the "*behind pipe*" reserves in the Tolkyn field, GCA notes that recovery of such reserves is dependent on the high performance of the wells in the field during the contract period. Ryder Scott ignores the indicators that suggest a low recovery rate of the wells, despite claiming to have conducted a well-by-well analysis for the Tolkyn field. The trend of falling wellhead pressure was apparent as of 14 October 2008. GCA takes these factors into account. (R-III ¶¶ 234 – 239; RPHB 1 ¶ 534).

1587. As confirmed by examination at the Hearing on Quantum, Deloitte GmbH independently created three different scenarios with different gas price assumptions: "*contracts*", "*transition*", and "*export*." The "*contracts*" scenario, estimated at a probability of 65%, would allow companies to sell gas to the domestic market at defined prices. The "*transition*" scenario, estimated at a probability of 30%, considers the MOG's not-yet-implemented plans to increase the regulated prices in the domestic market. Under the "*export*" scenario, estimated at a probability of 5%, TNG and KPM would export 80% of their

product at international prices and sell 20% in the domestic market. (R-III ¶¶ 247 – 252; RPHB 1 ¶¶ 685 – 687).

1588. The "*contracts*" 65% likelihood estimate is optimistic for Claimants, since subsoil users cannot simply export gas in Kazakhstan. Even where they are not contractually prohibited from exporting, they are required to find a purchaser who has the capacity to get the gas to market. For landlocked Kazakhstan, this is difficult. For subsoil users, absent an agreement with a Gazprom, gas producers are bound to deliver gas domestically. Claimants have not argued that KPM or TNG, at any point, exported gas to Gazprom. FTI, however, completely disregards domestic gas sales in their export assumption for Tolkyn's gas. (R-III ¶¶ 253 – 362).

1589. Anatolie Stati's statement regarding a protocol signed by Gazprom and others had contained a price of USD 160 at the border of Kazakhstan and Russia was incorrect and referred to a price at the Moldovan border, 2000 km away. Anatolie Stati frequently changed his position on whether Gazprom was supporting him or was creating problems in selling gas. (RPHB 1 ¶ 117).

1590. Claimants' valuations of Tolkyn and Borankol are inflated because they wrongly assume that a willing buyer would expect KPM and TNG to achieve international export prices. On the valuation date of 21 July 2010, TNG and KPM did not export gas and Claimants have not indicated any prospect of exporting gas at that point in time. TNG's contractual rights to export and its proximity to the CAC Pipeline do not give rise to any expectation that TNG would have been able to export gas. The extent to which indicative offers received by Claimants in Project Zenith for the Tolkyn field can be relied upon as an indicator for reasonable expectations regarding the possibility to export gas is questionable. If those bidders assumed that TNG would be exporting gas, it was because Claimants had told them in the Information Memo that TNG would be able to export gas. (R-III ¶¶ 267 – 268, 338 – 342; RPHB 2 ¶¶ 502 – 506).

1591. FTI only arrives at the conclusion that Claimants could export gas and achieve international prices by relying on the unsigned and undated 2008 Tripartite Agreement. Neither of the two Tripartite Agreements was signed and, therefore, neither can serve as a basis to assume export prices. The 17 November 2008 Agreement on which FTI relied cannot show the expected price as of 14 October 2008. Further, based on the events of the time, it could not be expected that KazAzot would have signed the 17 November 2008 Agreement. (R-I ¶ 15.7(b); R-III ¶ 275; RPHB 1 ¶¶ 619 – 650; RPHB 2 ¶ 499).

1592. FTI made numerous errors with regard to the unsigned Tripartite Agreement. FTI misnamed the parties – it was made between KazAzot, KazTransGas and TNG – not KazAzot, KMG, and Ascom. Claimants themselves have also misquoted the recipient of deliveries under this text – it would be KazAzot and KazTransGas and not KMG. FTI ignored, for example, that the Tripartite Agreement only concerned gas produced from Tolkyn – no room was made to apply the prices or volumes considered therein to Contract 302. (R-III ¶ 275 – 290, 292; RPHB 1 ¶¶ 651 – 656; RPHB 2 ¶ 499).

1593. The Undated 2008 Agreement could not have come into force because it could not be expected that KazTransGas would become the exclusive exporter of Kazakh gas, as anticipated in para 2.2. This would not have been acceptable to Gazprom, who wants its 50% affiliate KazRosGas to participate in the export of Kazakh gas. Gazprom refused to accept KazTransGas as the exporter by letter on 27 October 2008. Neither KazTransGas nor KMG became the exclusive exporter. Even if the Tripartite Agreement had been signed, it could not have come into force because of the role of Gazprom. (R-III ¶¶ 291 – 296; *see also* R-I ¶ 15.7(b); RPHB 2 ¶ 499).

1594. The Tripartite Agreement represented a bargain – if TNG were to deliver gas to a strategic project, TNG would have the opportunity to sell gas. The supply of gas and the export of gas were entirely interdependent. KazAzot wrote to KMG that, without the fertilizer plant, Claimants could not achieve export prices. In 2008, however, it could not be expected that KazAzot would have further pursued the building of the fertilizer plant under the given conditions, which would call for KazAzot to pay very high domestic prices (USD 100 per 1000 m^3). By fall 2008, it was clear that KazAzot would not be able to pay. Combined with the sharp drop in the prices for fertilizers, this made the enterprise not profitable for KazAzot. (R-III ¶¶ 297 – 319; RPHB 2 ¶ 499).

1595. It would have been impossible for TNG to fulfill its obligations under the Tripartite Agreement, bringing it to a likely termination in at least by early 2009. The total volume demanded under the Tripartite Agreement was 19.25 Bcm^3 – almost double the reserves of Tolkyn. For 2012, TNG would have been able to produce less than half (Ryder Scott) or, more correctly, a little more than one third (GCA) of the amount required. TNG's inability to deliver would have been to the detriment of KazAzot, which could have terminated the contract under Section 10.1 for failure to perform. Due to distribution priorities, TNG would not have been able to export. TNG would first have needed to deliver gas to KazAzot, and then to the domestic market before the remaining gas be able to be exported. Under the scenarios, TNG could not have even met its obligation to KazAzot. (R-III ¶¶ 320 – 337; RPHB 2 ¶ 499).

1596. Having received a report clearly setting out the available reserves in April 2008, Claimants must have known that they would be unable to fulfill the contract or to export when negotiating the Tripartite Agreement. The use of the 2 agreements in valuation is belied by Claimants' actions, which demonstrate that they never believed that the Tripartite Agreement would go into effect. Even when evaluating his own assets, Anatolie Stati instructed Miller Lents to estimate the net oil, condensate, gas, gas plant liquid reserves, and future net reserves based on prices that were far lower than envisioned in the Tripartite Agreement. During both hearings, Anatolie Stati made it clear that he did not believe in the viability of the KazAzot project. He agreed that a Tripartite Agreement that is only signed between 2 parties has no value. He stated: "*I'm sorry, it's not signed. It's not signed by anyone. Why should we look into it?"* (RPHB 2 ¶ 501; RPHB 1 ¶¶ 657 – 668).

1597. Regarding CAPEX, the cost of **USD 40 million** for the installation of compression on the Tolkyn field needs to be taken into account. Compression is necessary to alleviate water production and to remedy the declining pressure on many of the wells. Without compression, gas cannot enter the CAC pipeline. Furthermore, the

Third GCA Expert Report shows that compression would be necessary to avoid shutting wells in. At the Hearing on Quantum, Claimants wrongly alleged that no independent research by Deloitte had been done to prove that USD 40 million in compression installation would be required. Deloitte relied on the GCA expertise for that figure, and GCA has the expertise to conclude that compression would be necessary and to estimate its cost. GCA did not arrive at their opinion merely based on the FDP, which demonstrates that Claimants recognized that compression would be necessary as they were running the field. Mr. Goodearl's testimony at the Hearing on Quantum and the GCA Supplemental Expert Report expressed the need for compression as being required due to declining well head pressures. The Third GCA Expert Report also shows that compression would be necessary to avoid shutting the wells in. In addition, considering Claimants' instruction to Miller Lents, Claimants have also assumed that compression would be necessary and this was confirmed by testimony as the hearing. GCA predicted that compression would be necessary by 2011, the same as in the FDP, based on the actual pressure decline in the reservoir. The need for compression was foreseeable as at 14 October 2008, since wellhead pressure significantly declined starting in the second half of 2007. The PwC Due Diligence Report also identified the necessity of compression and estimated the costs at USD 55 million. The fact that KMT has not yet installed compression does not disprove the necessity of compression – the non-installation has led to a significant decrease in production. (R-III ¶ 263; RPHB 1 ¶¶ 946 – 972; RPHB 2 ¶¶ 766 – 770, 774 – 780).

1598. GCA never stated that there was a "*fall back*" that only some compression would be needed at some point in time. Rather, GCA has firmly stated that compression would need to be installed by 2011/2012. Unlike Ryder Scott, who completed a static analysis, GCA focused on the trends and rates of pressures. (RPHB 2 ¶¶ 771 – 773).

1599. Claimants themselves assumed that USD 65 million in infrastructure capital expenditure for Tolkyn from 2010 – 2012 when they were operating it. They have failed to provide any justification for why they now want to apply zero costs for infrastructure for Tolkyn. (RPHB 2 ¶¶ 781 – 782).

1600. Claimants' valuations of the Tolkyn and Borankol are inflated by FTI's unrealistic and unachievable price assumption of USD 180 per 1000 m3 of gas at the valuation date. The only company achieving such prices were KazRosGas – a company 50% owned by Gazprom. Claimants also misquote the government's statement that an increase in price could be possible – there are no set plans to raise prices to USD 306. Domestic prices are set by the ARNM. (R-III ¶¶ 343 – 353; R-I ¶ 49.13; RPHB 1 ¶ 945).

1601. Claimants' export price assumptions are incorrect and have no correlation to the prices actually paid for the export of gas. They are based on the Yenikeyeff Report, which Prof. Olcott demonstrated is unverifiable. FTI assumes more than twice what RBS assumes for the export price, USD 180 per 1000 cm rather than USD 85 per 1000 cm, respectively. RBS's price of USD 85 per 1000 cm is consistent with prices paid by Gazprom to KazRosGaz, which was USD 110 for 1000 cm in 2008. (RPHB 1 ¶¶ 688 – 697; RPHB 2 ¶¶ 507 – 508).RBS agreed with Prof. Olcott's assumptions for a valuation on a stand alone basis. (RPHB 2 ¶¶ 513 – 520).

1602. Anatolie Stati instructed Miller Lents to apply the prices of USD 49 per 1000 m3 for 2009, up to USD 115 for 2018. The price of approximately USD 70 per 1000 m3 is the export price that GasTradeInternational received. It is clear that Claimants never considered FTI's USD 180 per 1000 m^3 to be a reasonable price. (R-III ¶¶ 355 – 365).

1603. With respect to 14 October 2008, TNG did not even export gas at that time, but rather sold the majority of its gas to Kemikal. Kemikal stopped payments in 2008 due to liquidity and insolvency issues. (RPHB 2 ¶ 124). The Yenikeyeff Report also does not support Claimants' claim that export could be expected or that European prices could be obtained. As dissatisfying as the inability to export may have been, this is what Claimants bargained for when entering the Kazakh market. They were not treated less favorably than other market players. Although the contracts provided Claimants the "*right*" to export gas, that did not guarantee an export market or export prices. The Republic was not responsible for finding a buyer or for guaranteeing transit. Anatolie Stati's alleged belief that he was also guaranteed a market is not supported by the contracts. (R-III ¶ 354; RPHB 1 ¶¶ 597 – 612, 669 – 671).

1604. The RBS valuation report conducted as part of the KMG EP Due Diligence in September 2009 and which Claimants consider to have been prepared by "*world class experts*" is a draft report. It focuses on what the assets would be worth if added to KMG EP's portfolio, not if owned by Claimants. It contains no documentation or reasoning. It is based on a valuation date that does not correspond to the legal considerations of this case. It has numerous inconsistencies. The RBS Report may serve the Tribunal to verify Deloitte GmbH's work. (RPHB 2 ¶¶ 809 – 810).

1605. The RBS proves that Claimants' valuation of the LPG Plant, and other assets, are bogus. Liquids can be sold for considerably higher prices than gas. Miller Lents assumes a high potential for the production of liquids, The Parties experts agree, however, that these high liquids reserves estimates are unsupported by the data. The RBS valuation for Claimants' Borankol claim is disproportionate since it relied on gas, rather than oil prices. Since Borankol is an oil producing field, it is only worth approximately one tenth of the USD 197 million suggested by Claimants. The RBS valuation also proves that Claimants exaggerated their Tolkyn claim in that it arrives at a comparable value to that estimated by FTI, despite the fact that RBS applied more optimistic reserves estimates than either Ryder Scott or GCA presented. RBS reached this result not by applying the numbers from GCA or Ryder Scott (which would have resulted in a lower value), but instead by relying on the reserve estimates of Miller Lents as of 1 January 2009. (RPHB 1 ¶¶ 986 – 987, 991 – 995; RPHB 2 ¶¶ 823 – 824).

1606. The RBS valuation supports Deloitte GmbH's valuation of USD 123.2 million. The only asset that brings the RBS valuation anywhere near the FTI valuation is the RBS's valuation of the Tolkyn field. In the "*KMG EP Base Case Scenario*", RBS assumed a value of USD 327 million for the Tolkyn field, to which USD 200 were added as the 80% export sales. It is undisputed that RBS applied the production estimates from the Miller & Lents 2009 report to arrive at its asset value. That report assumes an aggregate oil and condensate production that dramatically exceeds both experts' assumptions, without providing sources or

reasoning. The overstated production projection accounts for a difference of USD 203 million. If RBS had applied the production estimates of GCA, they would have arrived at a value for the Tolkyn field below the USD 123.2 million, as calculated by Deloitte GmbH. Had RBS applied Ryder Scott's production estimates, the value would fall below FTI's Tolkyn value. (RPHB 2 ¶¶ 509 – 512; 782 – 797, 821 – 823).

1607. RBS added USD 200 million to the Tolkyn value for the assumption that 80% of the gas would be exported. RBS, however, has agreed with Respondent's arguments as to why TNG and KPM could not have been expected to be exporting gas at the valuation date or later. RBS, thus, only assumed the export portion based on the assumption that KPM EP would purchase the assets and would, thus, benefit from the synergy effects of a major oil and gas producer in Kazakhstan. On a stand-alone basis, KPM and TNG could only sell at domestic process. Thus, for evaluating the stand along value of Tolkyn, the export of gas cannot be assumed. (RPHB 2 ¶¶ 509 – 512; 798 – 802, 811 – 820).

1608. The RBS valuation did not include contingent liabilities in the working capital. Thus, there is no justification for Claimants'' addition of USD 243.5 million. RBS deducted USD 1 million from the aggregate asset value in the Best Case Scenario and USD 20 million in the Special Case Scenario to reflect changes in working capital. Claimants, however, simply allege that the RBS report incorrectly deducted contingent liabilities, and that this should be added back to arrive at the FMV. The items listed as contingent liabilities in the RBS Report would conventionally be considered working capital items. The deducted USD 1 million and 20 million are far below the level of contingent liabilities that Claimants' assume. RBS deducted the respective USD 1 and 20 million from the aggregated asset value because they assumed that over the lifetime of the assets, the required working capital would increase by USD 1 million (discounted). (RPHB 2 ¶¶ 839 – 852).

1609. Deloitte GmbH conducted a hypothetical case to test Claimants' allegations and found that, if true, RBS would have assumed that the working capital would decrease by USD 242.5 or USD 223.5 over the life of the assets. That was logically not possible, however, since the combined working capital of KPM and TNG as of 31 March 2009 only amounted to USD 157 million. (RPHB 2 ¶¶ 853 – 858).

1610. There was also no basis to assume that projected capital expenditure may contain contingent liabilities. Deloitte has checked the RBS report figures against the figures in the Miller & Lents 2009 report and the PwC Due Diligence Report on which RBS based its capital expenditure estimates. If RBS had factored any contingent liabilities into the capital expenditure, the RBS figures would be different from the Miller & Lents and PwC figures. They were not. Likewise, there is no basis for Claimants' assumption that operating expenses or tax expenses may contain contingent liabilities. The double counting of capital expenditure can be excluded, as there is no evidence that capital expenditure may have been deducted in both the DCF and the working capital. (RPHB 2 ¶¶ 859 – 864).

1611. Deloitte's comparable companies and comparable transactions analyses corroborated Deloitte's valuation results in their DCF analysis. (RPHB 1 ¶¶ 1022 – 1023). Respondent explains the evaluation process as follows:

> *1024. A comparable companies analysis is conducted by first identifying a group of comparable companies whose shares are publicly traded. The more comparable the companies are, the more reliable the analysis will be. In the next step, the 2P reserves of these companies in barrels of oil equivalent (boe) are set in a relation to their enterprise value, with the enterprise value being determined based on the market price of shares and debt instruments of the companies as of the valuation date. The result are so-called "multiples". The 2P reserves of the asset in question, in this case the Borankol and Tolkyn fields, can then be multiplied with these multiples, leading to a value estimate. The basis of this method is the assumption that 2P reserves of liquids and gas are the main value driver in the oil and gas industry. (RPHB 1 ¶ 1024).*

1612. The comparable companies analysis based on GCA's 2P reserve estimates as of 21 July 2010 resulted in a combined asset value of the Borankol and Tolkyn fields of USD 96.6 million. The comparable transactions analysis based on the same resulted in a combined asset value of USD 216.1 million. These show that the FTI comparable companies and comparable transactions analyses for the Borankol and the Tolkyn fields for 14 October 2008 were overstated. Deloitte GmbH prepared their own companies and comparable transactions analyses based on Ryder Scott's reserves estimates and showed markedly lower values than the USD 675.9 million that FTI calculated in their DCF analysis. Deloitte GmbH's comparable companies analysis leads to a combined asset value of USD 169.6 million, or 25% of FTI's DCF calculated value and their comparable transactions analysis leads to a combined asset value of USD 277.8 million or 40% of FTI's DCF calculated value. FTI's calculations are massively overstated because (1) they use pre-financial crisis data without adjustment, (2) the used incomparable companies, and (3) they failed to find a company that was actually comparable. (RPHB 1 ¶¶ 588 – 590, 1026 – 1028).

1613. In the Second Post-Hearing Brief, Respondent demonstrated this by way of charts. Assuming the reserves as provided by Ryder Scott, the FTI valuation is the far outlier, and Deloitte GmbH's analysis was methodologically correct and within range. The FTI valuation based on the Cliffson transaction was widely outside of range. (RPHB 2 ¶ 874 – 880).

1614. Regarding Claimants' complaints regarding the multiples used for comparable companies ignores the inconsistencies in the multiples provided by RBS, numbers which even Renaissance Capital found to be inappropriate. If one applies the three transactions quoted by RBS that are the most relevant for Claimants' valuation date, one arrives at the average multiple of 2.17, which is less than one third of FTI's average comparable transaction multiple of 6.83. Applying the multiple of 2.17 to the 2P reserves assumed by Ryder Scott on 14 October 2008, one arrives at a value of USD 212 million for Borankol and Tolkyn, which is less than one third of the value alleged by FIT based on their DCF analysis. (RPHB 2 ¶¶ 881 – 882).

1615. FTI's calculations were flawed due to their use of an overstated multiple of about 6.98 for the comparable companies analysis, and 6.83 for the comparative transactions. This stands in stark contrast to the 2.3 multiple that Renaissance Capital used during Project Zenith on 27 September 2008, or the 2.99 that Renaissance Capital described on 31 October 2008 to represent the effects of the financial crisis. (RPHB 1 ¶ 1029).

3. The Tribunal

1616. As mentioned above in this Award, for each of its damage calculations, the Tribunal has to take into account that, above in this Award, it came to the conclusion that the correct valuation date for the calculation of damages in this case is 30 April 2009. Contrary to that finding, the Parties have primarily relied on a different valuation date for their respective calculations of damages, i.e. Claimants on 14 October 2008, Respondent on 21 July 2010. Therefore, first, the Tribunal has to examine whether the Parties' arguments regarding the calculation of damages can still be applied to the evaluation date found to be applicable by the Tribunal.

1617. The Parties agree that the DCF methodology is an appropriate method of calculation. The Tribunal agrees as well, as this method has been used in many comparable cases and decisions of other Tribunals. This Tribunal sees no reason not to apply it here. The Tribunal now turns to the issues of application of that method disputed between the Parties and their experts.

1618. After evaluation of the timeline of events summarized above in the chapter on causation, the Tribunal accepts Claimants' argument that Respondent's conduct, which was found above to be a breach of the ECT, including the liquidity shortage insofar as it was also caused by Respondent, forced Claimants to reduce development efforts at Borankol and Tolkyn fields and that, in particular, this caused Claimants to decide not to drill or recomplete 13 wells at Borankol and Tolkyn in 2009 – 2010.

1619. In this context, the Tribunal considers that Claimants have provided sufficient proof for three kinds of damages: (1) KPM and TNG lost revenue that they would have earned from their planned production; (2) the gap in the development efforts depressed the production curve at Tolkyn and Borankol more than it would have been, had Claimants been able to develop the fields without Respondent's breaching conduct, and (3) Claimants were unable to sufficiently respond to the watering issues at the Tolkyn field.

1620. Regarding valuation, as mentioned above, most of Respondent's arguments and their experts' calculations rely on the unacceptable valuation date 21 July 2010 and, therefore, cannot correctly be used for a calculation of the value of the investment at the correct valuation date before Respondent's breaching conduct had their impact on the value of the investment.

1621. Insofar as Respondent refers to an earlier valuation date, the Tribunal is not persuaded by Respondent's argument (RPHB 2 p.17) that relies on the report of its experts, Deloitte GmbH, that financial difficulties of KPM and TNG even before

October 2008 were causes. The Tribunal finds no convincing evidence that the above damages would have occurred absent Respondent's interference.

1622. In particular, before Respondent's interference, it could be expected that export of gas would be possible. The CAC Pipeline – a direct export route – is proximate to the Tolkyn field. At the time, Respondent was forecasting both an expansion of total gas production from 33.7 Bcm^3 in 2008 to 61.5 Bcm^3 by 2015, with a concomitant export volume expansion from 6.2 Bcm in 2008 to 12.9 Bcm^3 in 2015. Claimants' right to export gas is relevant to TNG's and its prospective purchaser's reasonable expectations as of 14 October 2008. The Tripartite Agreement confirms that TNG would be able to export gas. As Respondent itself rightly points out, the Tripartite Agreement represented a bargain – if TNG were to deliver gas to a strategic project, TNG would have the opportunity to sell gas. KMG executed the 17 November 2008 Agreement, giving its clear indication that gas exports could be presumed to be available to a prospective purchaser upon entry into negotiations with KMG, regardless of the KazAzot fertilizer project. The Tribunal is not persuaded by Respondent's argument that an Agreement it effectively executed itself for TNG gas exports and export pricing is no evidence of the right, expectation, and ability to export gas. The non-implemantation of the Agreement was part of and due to the Respondent's conduct found to be in breach of the ECT. The same is true for Respondent's argument that there would have been be a sharp decline in oil production beginning in 2009, brought about by the end of the contract with TNG's biggest customer, Kemikal. As suggested by Respondent itself, Kemikal stopped payments on Claimants' products because of liquidity and insolvency issues, but, as also discussed earlier in this Award, this discontinuance of payments was caused by Respondent's own breaching actions.

1623. Regarding the prices that could reasonably be expected, the Tribunal considers that Claimants have not fulfilled their burden of proof for the price of USD 180 they allege. Claimants instructed Miller Lents for the 2009 Report, which is closest to the valuation date accepted by this Tribunal, to apply a base price of USD 2.00 starting from the year 2009, which translates into about USD 70 per 1000m. (Miller Lents Report 2009 Attachment 1 Exhibit 349). This price of USD 70 is also the export price GasTradeInternational LLP received. (R-III ¶ 364). The Tribunal, therefore, considers that a price of USD 70 is appropriate for its calculation of damages.

1624. Regarding the resulting calculation of damages, the Parties have relied on the various expert reports provided to them and at various times. For the reasons given above, this Tribunal can only rely on those of these reports that use a valuation date of or close to 30 April 2009. In this context, the Tribunal considers that, rather than making an attempt to replace calculations of such expert reports by its own calculations, it is more appropriate to compare these reports and, if one is considered sufficiently convincing, to rely on that report. As Claimants have the burden of proof for the damages they allege, first the expert reports submitted from Claimants' side are considered.

1625. Of these, the Tribunal considers that the Ryder Scott reports on reserves estimates are convincing in their approach and results. However, based on these reserves estimates, the Tribunal finds that the FTI calculations provided by Claimants are less convincing and are considerably overstated for the reasons provided in more

detail by Respondent (RPHB 1 sections E to H, particularly H.II) and do not sufficiently fulfill Claimants' burden of proof. On the other hand, since in fact damages have been caused, the Tribunal considers that their calculation can be based on the alternative damage calculations conceded by Respondent, if its own valuation date is not accepted, for the valuation date of 14 October 2008 (RPHB 1 §§ 1027 *et seq*.) by referring to Deloitte's comparable transactions analysis, also based on the Ryder Scott Reports, leading to a combined asset value of USD 277.8 million.

1626. This is, therefore, the value that the Tribunal accepts as the correct damages.

L.V. Quantum Related to Contract 302 Properties

1. Arguments by Claimants

1627. Kazakhstan interfered with the exploration of the Contract 302 area. When TNG informed MEMR on 10 October 2008 that it no longer wished to enter into the appraisal phase but instead wanted a two-year extension on the exploration contract, TNG explained that it based that decision on the belief that the Contract 302 area had significant potential in deep-lying raw reservoirs and that TNG desired to more fully explore it. Mr. Lungu confirmed at the Hearing on Quantum that this referred to the Interoil Reef. The 14 October 2008 extension request and proposed work program indicated this intent and showed a planned drilling depth of 6000m and a second ultra-deep well on the subsalt horizon. While TNG could have penetrated the Interoil Reef structure by deepening the Munaibay-1 well rather than drilling a second exploration well, the work program could have been amended later to include more wells, like the second ultra-deep well, the Munaibay No. 3. The 3D seismic data showed that the Munaibay-1 well was in a good position to explore the Interoil Reef, although it lay somewhat deeper than the originally planned depth (6750m per Ryder Scott, 6300m per GCA). TNG had the capacity to explore the Contract 302 area, including the Interoil Reef – it only stopped drilling at 4700m because it encountered pressures that required a heavier rig. Claimants acquired a rig with a depth capacity of 7000m in Georgia and it was ready for transport in January 2009. Claimants declined to move the rig to Kazakhstan after the State commenced its harassment campaign, opting instead to resolve disputes with the MEMR before prudently continuing investment in the Contract 302 area. Kazakhstan's harassment campaign and ultimate refusal to formally extend Contract 302 prevented further exploration work on the area. (CPHB 2 ¶¶ 228 – 232). Mr. Chagnoux's testimony demonstrated that Kazakhstan interfered with Claimants' sale efforts by preventing them from proving resources in the Interoil Reef structure. (CPHB ¶¶ 393 – 394).

1628. But for Kazakhstan's harassment campaign, TNG would have penetrated the Interoil Reef before Contract 302 was set to expire on 30 March 2009. As Mr. Romanosov testified, it would reasonably take six months to drill one well into the Interoil Reef structure. (CPHB 1 ¶¶ 369 – 377).

1629. In its First Post-Hearing Brief, Claimants valued the Contract 302 properties as follows (CPHB 1 ¶ 557):

Investment Cost (excluding Munaibay Oil)	**US $31,330,000**
Prospective Value	**US $1,636,900,000**
Munaibay Oil Prospective Value	**(US $138,883,000)**
Prospective Value (Other Than Munaibay Oil)	**US $1,498,017,000**

1630. Regarding the Munaibay Oil claim, Claimants seek an award of USD 96,808,000, based on the DCF calculations performed by FTI, which relied on the geological analysis of Ryder Scott. It is undisputed that the DCF method is appropriate for valuing this asset. (CPHB 1 ¶¶ 524 – 527).

1631. Claimants' claim for the undrilled Contract 302 properties (excluding Munaibay Oil) is based on (1) their out-of-pocket investment costs, plus (2) a portion of the prospective value they could have realized if Respondent had not denied them the opportunity to make a commercial success of the project. This is not a claim for lost profits. FTI conducted the appropriate DCF calculation, which included updates and adjustments to the crude oil and condensate sales mix and liquids prices, transportation expenses effecting its liquid price assumptions, and infrastructure CAPEX. This DCF calculation showed the unrisked prospective value of the Contract 302 properties as USD 1.58 (C-III ¶ 78 (stating LPG Plant rather than Contract 302); C-III ¶ 61).

1632. To assess the Munaibay Oil, Ryder Scott analyzed the available seismic data and performed a thorough independent analysis to project a total recovery of 53.285 MBbls of oil and a need for a total of 75 development wells and one exploration well. This stands in stark contrast to GCA's "*finger-in-the-wind*" methodology, which drastically changed between the first and second reports and resulted in a development plan that (1) needed more wells for less oil and (2) increased the project CAPEX to USD 828 million and total OPEX to USD 188.5 million, thereby summarily wiping out the USD 68 million that Deloitte TCF had originally attributed to Munaibay Oil based on GCA's first report. GCA does not specifically state its reasons for drastically changing its analysis. Additionally, GCA compounded its errors by baselessly front-loading the development costs while delaying the assumed production and revenues. (CPHB 1 ¶¶ 478 – 484).

1633. Respondent's *de minimis* USD 68 million is wholly inappropriate. It recognizes only the value in the Munaibay Main gas resources and ignores most of the Contract 302 properties, including the Munaibay North, Bahyt, and Interoil Reef resource areas. That these properties should have no value is belied by the fact that Respondent has entertained bids for the Contract 302 properties, among others, after seizing them. (C-III ¶¶ 61 – 62).

1634. Deloitte's calculations use the ECOS, GCOS, and Risked Capital values supplied by the GCA, which provided no explanation for how GCA derived the ECOS

factors. Nevertheless, FTI – using these same values – made its own calculation of the value of the Munaibay Main oil, and arrived at USD 153 million. (C-III ¶ 63).

1635. The GCOS is whether a well will produce a sustained flow of hydrocarbons. There can only be one GCOS for a project. The GCOS, according to GCA, is 10%. This is reasonable and not particularly low for a prospect of this size. GCA and Ryder Scott differ primarily in their estimations of the size of the reservoir. By examining the horizons around the Interoil Reef structure, Ryder Scott was able to provide an image of the reef with a high degree of confidence. GCA, on the other hand, had to force or "*ghost*" the analysis. (CPHB 2 ¶¶ 382 – 385).

1636. GCA assumes a protracted and unreasonable exploration schedule that could not be accomplished by the exploration deadline of March 2011. GCA also assumes that additional 3D seismic would be required to assess the prospect before drilling. Additional 3D seismic is, however, unnecessary. While additional 3D seismic may be helpful to determine whether there is a trap, that could be better tested by drilling, as a prudent operator would. As Ryder Scott concludes, assuming that TNG had been able to use the deep drilling rig that Claimants acquired in 2008, there were no safety or engineering obstacles to drilling an exploratory well in the Interoil Reef Structure. (CPHB 1 ¶¶ 485 – 486).

1637. Although Claimants spent USD 43 million exploring the Contract 302 property, this work was truncated by the State, making it difficult express the values with certainty. Nevertheless, and as Respondent is aware, prior to the seizure, "*Claimants had already successfully test drilled the Tabyl and Munaibay resource areas, conducted seismic work in the Tabyl West, Munaibay North, Bahyt, and Interoil Carboniferous Reef resource areas, and commenced a test well in the Bahyt resource area that has log data to approximately 3950 meters. Furthermore, the Tabyl West and Munaibay North resource areas are immediately proximate to the already successfully drilled Tabyl Main and Munaibay Main resource areas, which, as explained in the geology report (Exhibit 4) accompanying Ryder Scott's First Report, significantly increases their geological chance of success*." (C-III ¶ 56).

1638. Although the valuation of the Contract 302 properties presents a greater challenge than the Tolkyn and Borankol fields, this is due to Respondent's wrongdoing. The benefit of the doubt belongs to Claimants as the victims and not to Respondent as the wrong-doer. Respondent continues to have full possession of the areas in question and "*should not be permitted to sit on these Contract 302 Properties without paying for them until the Tribunal renders an award that minimizes their value, and then prove by development the actual value of the bargain that it illegally acquired." (C-III ¶ 57).*

1639. Where it can be proven that the claimant has suffered a loss and the respondent has committed a legal wrong causing that loss, the respondent is not entitled to invoke burden of proof as to the amount of compensation for such loss to the extent that it would defeat the claimant's claim for compensation. Rather, in such a situation, the claimant need only provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss. (C-III ¶ 59). Respondent has conceded that there was at least a loss of USD 68 million in relation to the

Contract 302 properties. As a loss has been conceded, only the quantum of that loss remains to be determined. (C-III ¶ 60).

1640. Respondent's objection to the economic feasibility of the project is the potential for H2S contamination. GCA and Deloitte unreasonably assume a 100% chance of significant H2S contamination, despite having no knowledge of whether that gas is present. It is more reasonable to assume that the gas is not present, as the reason that TNG did not drill the exploration will that would have demonstrated the quality of the gas is Kazakhstan's illegal conduct. The infrastructure cost attributable to H2S contamination accounts for nearly half of GCA's estimated USD 2 billion CAPEX. This is problematic because there is no geological basis for GCA's opinion that H2S is present. GCA bases those assumptions on the Tengiz and Kashgan fields, which are 45 and 145 km away from the Interoil Reef, respectively. There is no reason to believe that H2S generating source rocks are present in the Interoil Reef structure. Second, the comparison to the Tengiz and Kashagan fields is inapposite, since those have very different fluid characteristics than the Interoil Reef. The Tolkyn field is likely the closest analog for estimating the composition of the Interoil Reef gas, which is what Ryder Scott used. (CPHB 1 ¶¶ 485 – 490, 556; CPHB 2 ¶ 385).

1641. Respondent has prevented Claimants from drilling the necessary exploration wells that would establish the extent of damages in the undrilled Contract 302 area. Thus, at the outset, Respondent should be precluded from arguing whether H2S contamination would be an issue, since Respondent prevented the drilling. Holding Claimants to a standard of reasonable certainty would be unfair, and international law gives the Tribunal to award damages that Claimants cannot establish with certainty. Claimants and FTI have never attempted to mislead the Tribunal about the certainty of their damages, and have clearly stated that their prospective valuation for the Contract 302 properties is an unrisked valuation, and Respondent's comments to the contrary are mere bluster. (CPHB 1 ¶¶ 528 – 533).

1642. Regarding Respondent's criticisms for well and infrastructure costs for the Contract 302 properties, FTI explained that it based its cost estimates for the Contract 302 properties on information provided by Claimants and discussed with Ryder Scott and confirmed against Claimants' historical experience. For the future, FTI forecasted well costs for deeper wells based on the same. (CPHB 2 ¶¶ 352 – 353).

1643. Finally, although Respondent made a number of misstatements and manipulations to support its argument that the RBS valuation corroborates Deloitte's valuation, the RBS valuation corroborates the FTI valuation. RBS did not value the Contract 302 properties – it did not, as Respondent argues, assign a zero value to the properties. KMG EP did not value the Contract 302 properties because, due to Respondent's wrongful action, Claimants could not provide any exploration data for Contract 302 to KMG EP. (CPHB 2 ¶ 362).

1644. Tribunals, most prominently the *Sapphire International v. NIOC* but also *AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Kazakhstan*, *SPP v. Egypt*, *Lemire v. Ukraine*, and *SOABI v. Senegal*, have awarded damages for the concept of loss of opportunity, even where damages cannot be proven with reasonable certainty. It has been recognized that it is exceptionally rare that lost

profits or opportunity can be precisely calculable. It is, therefore, appropriate to calculate these on the basis of a hypothetical maximum loss. Respondent's attempts to distinguish *Sapphire* are meaningless – that tribunal awarded out-of-pocket expenses, plus a portion of the amount that the investor could have earned based on the investor's estimate of best-case-scenario income. In *Sapphire*, unlike here, the claimant had performed no drilling or seismic work. This Tribunal could use *Sapphire* as a precedential guide and find that there is certainly enough evidence to determine the existence and extent of damage. In *AIG*, the tribunal awarded the 30% return that Claimants expected to earn on the full USD 16.3 million, less interest of 6% on the USD 12.74 million that those claimants never actually invested. The tribunals in *AIG* and *Gemplus* also rejected the DCF method, since the investment was an income generating activity. (C-I ¶¶ 424 – 429, C-III ¶ 50, CPHB 1 ¶¶ 534 – 536, 539 – 548).

1645. That the *Sapphire* decision was expressly decided according to the tribunal's *ex aequo et bono* powers simply means that it was a matter of discretion. The *Gemplus and Talsud v. Mexico* tribunal confirmed that arbitrators have the discretion to award damages for loss of opportunity, even without reference to *ex aequo et bono* powers. *Gemplus* also observed that the concept of damages for loss of chance/opportunity is recognized in many national legal systems (CPHB 1 ¶¶ 543 – 548).

1646. The only case that Kazakhstan cites for the rejection of the concept of damages for loss of opportunity is the inapposite *Chevron v. Ecuador*. There, the respondent argued that the award had to be reduced by the likelihood of the claimant prevailing on the court cases underlying the claim. Although that tribunal noted that the loss of opportunity doctrine does not have wide acceptance across legal systems, it observed that it exists in exceptional circumstances where such harm would be difficult to quantify, which was not the situation in that case. Indeed, the *Chevron v. Ecuador* and *Lemire v. Ukraine* cases show that the loss of opportunity doctrine exists for those situations where the claimant cannot show that its likelihood of success is greater than 50% - if it were greater than that, Claimants would be able to recover the full amount of lost profits without discounting for likelihood of success. Finally, even the scholar cited by Kazakhstan, Prof. Marboe, concludes that there are circumstances for which an award of damages for loss of opportunity is appropriate. (CPHB 1 ¶¶ 549 – 552).

1647. Applying the law on loss of opportunity to the Contract 302 prospect, there is ample evidence that the Contract 302 properties held substantial opportunity for large fields of commercially exploitable oil and gas. The only reason that Claimants cannot further prove this is because of Kazakhstan's unlawful actions. The *Sapphire*, *AIG Capital*, and *SPP* tribunals awarded their respective claimants their out-of-pocket expenses, plus an amount to compensate the potential upside of the opportunity. Here, Claimants invested USD 31,330,000 in exploring and analyzing the Contract 302 property, excluding the investment in the Munaibay-1 well. The amount USD 1,498,017,000 represents the middle case of the potential net income that would have been earned from those areas, absent Kazakhstan's actions. (CPHB 1 ¶¶ 553 – 555).

1648. Considering Respondent's criticism of the valuation of the Interoil Reef resource area, this area unsurprisingly holds the most potential of the Contract 302 resource

area, as well as higher risk. This area must, however, be considered valuable in a damages award, given Respondent's interest in gaining cost-free control over it by any nefarious means possible. Claimants urge the Tribunal to value the property at its full, unrisked, middle range, Best Estimate value. (C-III ¶ 64).

2. Arguments by Respondent

1649. Claimants have suffered no damage with respect to any of the other discoveries or prospects in the Contract 302 area. All have negative net present values, and Deloitte's findings remain unchallenged. GCA has, however, made a slight revision to its calculation on the Munaibay East Oil discovery, and arrived at a net present value of USD -223.7 million. (RPHB 1 ¶¶ 809 – 811). Anatolie Stati provided dishonest testimony that inflated the results of the seismic survey of the supposed Interoil Reef structure from 270 km2 to 380 km2. He was also dishonest when he stated that Claimants had firmly decided to drill deeply throughout the alleged reef structure. Even if it had been possible, Claimants were physically unable to drill beyond a depth of 4700m, due to pressure in 2008. (RPHB 1 ¶ 113 – 114).

1650. Applying the oft-cited *Chorzów* principle of damage compensation, Claimants' case unravels. Under *Chorzów*, the only damage that could be compensated would be reliance damages. There is no international law or doctrine pursuant to which the breach of a promise to conclude a contract would result in damages. Even if there had been no breach of the alleged promise to extend the contract, Claimants still would not have had a claim to develop the Contract 302 area because the contract would simply have terminated on 30 March 2009. Claimants have always accepted that Respondent was not under an obligation to extend Contract 302. Since Claimants complain of a "*bad faith refusal*" to extend the contract, under international law, Claimants' damages are limited to Claimants' expenditure made in reliance on MEMR's alleged April 2009 promise to extend Contract 302. Since Claimants have neither alleged nor demonstrated any damage based on reliance, their damage claim for Contract 302 is zero. (R-III ¶ 48, 52 – 53; RPHB 2 ¶¶ 521, 550 – 556).

1651. Even if the Republic had extended the contract period to 30 March 2011, it is unlikely that Claimants could have discovered the alleged Interoil Reef, even with the alleged Munaibay-3 well. In the 2008 Due Diligence, it was TNG's position that the capital expenditure set out therein correctly reflected TNG's future intentions. Thus, they cannot now claim that they intended to do more than stated in the program, especially since it was TNG's usual practice to abide by their programs. Ultra-deep drilling was not part of the exploration program that Claimants submitted to the MEMR in April 2009. Importantly, this program was submitted after the 3D seismic survey on the Munaibay area had been completed. It was, therefore, clear that they did not see the Interoil Reef as a viable prospect at the time. (RPHB 2 ¶¶ 120 – 122).

1652. Under Claimants' new theory that, but for the alleged harassment campaign, TNG would have penetrated the Interoil Reef with the Munaibay-1 well before 30 March 2009, Claimants could argue that they are entitled to more than reliance damage. Factually, however, the 4700m deep Munaibay-1 well never could have reached

the at least 6000m deep Interoil Reef and this is uncontested between the experts. (R-III ¶¶ 50, 105 – 201; RPHB 2 ¶¶ 557 – 558, 638 – 646).

1653. Claimants attempt to create a claim for damages where none exists, casting their claim as one for "*loss of opportunity*" to develop the Contract 302 area. This claim is based on the prospective value of USD 1.45 billion does not correspond with Claimants' case on liability regarding that area. Claimants did not add the claim of loss of opportunity or out-of-pocket expenses until the Hearing on Quantum. (RPHB 1 ¶¶ 702 – 707; RPHB 2 ¶ 521).

1654. International law does not recognize a principle of loss of opportunity. The cases cited by Claimants, including *Gemplus v. Mexico, SPP v. Egypt, Sapphire International v. NOIC, AIG Capital Partners v. Kazakhstan,* and *SOABI v. Senegal* do not support Claimants' claim. For example, *Gemplus* and *SPP v. Egypt* are factually distinguishable because, unlike in the present case, they each involved enterprises that had already proven themselves to be profitable. The tribunal in *Gemplus* stated that, under international law, claimants bear the burden of proving loss and "*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*." The *Sapphire* tribunal would have rejected Claimants' approach to its prospective damages, in that it awarded only 4.5% of the investor's total potential profit after taking all risks into account. This is in stark contrast to Claimants' claim for the unrisked prospective value of the Contract 302 property. The *Sapphire* tribunal also rejected the idea that all risks should be resolved against the Republic, as Claimants argue. *Sapphire* emphasized mutual reliance by investor and state on the probability of future profits, Respondent had not accumulated extensive documentation of the Contract 302 properties before it granted the exploration license to Claimants. Prior to this arbitration, neither the Republic nor KMG EP had valued the Contract 302 properties. In this regard, the minimum investment requirement under the working programme does not qualify as an indication of the Republic's reliance on the probability of discovering and commercially exploiting the Contract 302 properties, as each investor is required to undertake them. The *Sapphire* tribunal also had *ex aequo et bono* powers, which this Tribunal does not. In *AIG*, the Tribunal considered that "*the opportunity to make a commercial success*" qualified as an investment under the US/Kazakh BIT, without explanation. Lacking such explanation, it should not be used as a guide. This *SOABI* case is also in applicable, as it concerns the actual loss of an existing opportunity from an existing relationship, and not, as Claimants argue, with the non-granting of an opportunity to which Claimants were not entitled. Claimants' claim relates to what the *SOABI* tribunal would refer to as "*hypothetical damage, the occurrence of which is purely conjectural*" and cannot be awarded as compensation. (R-III ¶¶ 116 – 121; RPHB 2 ¶¶ 559 – 598).

1655. Under the international legal principle of *actori incumbit onus probandi*, the burden of proof lies with Claimants. They allege the entitlement to compensation and it is their burden to establish the existence and extent of that compensation, irrespective of whether the legal qualification of their claim is one for loss of opportunity or for loss of profits. This burden of proof is often why tribunals decline to award compensation for future profits in investment arbitration. (R-III ¶¶ 102 – 103; *see also* R-I ¶¶ 46.19 – 46.26).

1656. The investor must meet a high threshold to establish a claim for lost profits, especially due to the degree of economic, political, and social exposure of long-term investment projects. To meet this threshold, an investor must "*show that their project either has a track record of profitability rooted in a perennial history or operations, or has binding contractual revenue obligations in place which establish the expectation of profit at a certain level and over a given number of years*." This is true even for projects in early stages. Claimants have neither alleged nor proven either element. (R-III ¶¶ 129 – 135; R-I ¶¶ 46.19 *et seq*.).

1657. One of the best-settled rules of the law of state responsibility, as confirmed in cases such as *Levitt v. Iran* and *Autopista Concesionada v. Venezuela*, is to deny reparation for speculative damages. Respondent rejects Claimants' speculative fall-back position on loss of profits. The testimony of Dr. Kim of KNOC established that exploration blocks cannot be valued due to their speculative character. (R-III ¶¶ 122 – 128; R-I ¶ 46.19 *et seq*.).

1658. Claimants' "*benefit of the doubt*" argument turns the facts on their head, and ignores the maximum 5% GCOS for the Interoil Reef and that, during the 11-year life of Contract 302, Claimants did not undertake to explore the Interoil Reef. Even if the Republic had extended Contract 302, Claimants had no plan to explore (and, hence, no reason to make a discovery in) the Interoil Reef Thus, even if the contract had expired in March 2011, no work would have been undertaken there. (R-I ¶¶ 52 *et seq*.; R-III ¶¶ 48, 54 – 138; RPHB 2 ¶ 521).

1659. Claimants are responsible for a substantial part of the uncertainty regarding the Interoil Reef. They also failed to take any action during the life of the contract to explore the reef. The 2D seismic was shot in 2000 and 2001. TNG did not even start drilling the Munaibay-1 well until February 2008. They would have needed 2.5 years to drill the exploration well. They introduced the information so late in the proceedings that a thorough analysis, which could have led to clearer results, was impossible. It was not until the Hearing on Quantum that Claimants suddenly remembered that they had conducted a 3D seismic study on Munaibay and that, accordingly, they (1) were ready to build an exploration well, (2) had acquired the deep drilling rig just for that purpose, and (3) were prepared to move everything to Kazakhstan in fall 2008. Even if these allegations were true, however, Claimants could never have declared a commercial discovery of the alleged Reef within the extended period to 30 March 2011. Claimants cannot disregard the working program that they submitted on 14 October 2008 which contained slower drilling times, nor should Claimants' inexperience in ultra-deep drilling be ignored. Claimants chose to drill before having acquired the 3D seismic. As was made clear at the final hearing, the Munaibay-1 well would not have reached the Interoil Reef. According to Mr. Nowicki, that well would have needed to be more than 6750m deep, whereas its target depth was only 6000m. Thus, it was never possible that Claimants could have penetrated the Interoil Reef with the Munaibay–1 well prior to the end of the contract term. They chose an inadequate drill that broke down at 4700m in the face of high, but predictable, pressure. Then, they commissioned a 3D seismic survey which did not even cover the complete reef. There is no evidence of the existence of the alleged Georgian replacement drill, the existence of which Respondent denies. There are holes in the story, such as the gap between why Claimants would wait until early 2009 to drill, why the alleged reef was not contained in the draft addendum to Contract 302 submitted at the end of April

2009, why the working program did not foresee further drilling of Munaibay-1 well, or why other Munaibay-2 drilling was only scheduled for 4700m. The speculations about the time necessary to drill such a well also ignore the challenges of drilling in an H2S rich environment, the necessary administrative procedures for such drilling, and their own inexperience. Claimants' contentions regarding interference with the exploration of Contract 302 properties are contradictory. In order to reach the Interoil Reef depth by the end of the contract term, Claimants would have needed to remove the old rig from the well, move the new rig to the well, assemble the new rig, and drill to the required depth – all in a period of three months. Without being able to prove that the alleged discovery was commercially exploitable, Claimants would not have been able to assert rights to it pursuant to Section 8 of Contract 302. Thus, they have only themselves to blame and cannot be granted the benefit of the doubt. (RPHB 1 ¶¶ 708 – 735; RPHB 2 ¶¶ 117 – 119, 123, 638 – 646).

1660. At the Hearing on Quantum, even Ascom's geologists demonstrated their disbelief that the Munaibay-1 well would have reached the Interoil Reef, even if drilled to 6000m. They believed that the top of the reef could start at 6500m and that the Munaibay-1 well would penetrate the structure between 6600m and 6700m. Ascom's geologists informed Claimants' counsel about this prior to the Hearing on Quantum, but they and Claimants' witnesses deliberately concealed the position of Ascom's geologists, thereby misleading the Tribunal and Respondent. But, GCA concurs with Ascom's geologists that the well would not have reached the structure, even if Claimants had overcome their technical challenges to resurrect the Munaibay-1 well that they were forced to abandon at 4700m. It is clear, however, that Claimants used inadequate equipment and got stuck 1300m prior to reaching what in all likelihood would have been a dry hole. (RPHB 1 ¶¶ 799 – 808).

1661. Mr. Cojin's testimony was often incorrect. He testified that Contract 302 expired in 2018, when everyone knew it expired in 2009. He described how TNG Drilled the Munaibay-2 well, but in truth, that well was never drilled. (RPHB 2 ¶¶ 24 – 25)

1662. Claimants' claim for out-of-pocket expenses has no legal basis in either Contract 302 or in international law. Since Claimants never declared a discovery, they were not entitled to reimbursement for exploration expenses under Section 8.9 of Contract 302 and they knew that they were not entitled to reimbursement prior to April. Additionally, contrary to Claimants' assertion, the *Gemplus* tribunal did not award any out-of-pocket expenses. While the *Sapphire* tribunal awarded out-of-pocket expenses, it provided no explanation for having done so, beyond that the expenses were incurred in performing the contract. Here, as indicated, no discovery was declared during the life of the contract, rendering *Sapphire* inapplicable. The *SPP v. Egypt* tribunal awarded out-of-pocket expenses since those could not be recouped with future profits, due to the breach. Here, however, even if the alleged breach had not occurred, Claimants would not have been able to recoup their out-of-pocket expenses. The *AIG v. Kazakhstan* tribunal, while awarding out-of-pocket expenses, failed to provide reasoning for that decision. (RPHB 2 ¶¶ 599 – 612).

1663. Claimants used Mr. Nowicki of Ryder Scott to introduce new evidence of 3D seismic data on the "*Interoil Reef*." His statements were misleading because they insinuate that the 3D seismic data revealed slight modifications. Placing the 2D and 3D maps atop of one another, one sees that the 2D seismic data is at a different location than the 3D. It is apparent that the 3D data reveals an entirely new and different structure and was not a mere update. It also demonstrates that the old 2D data was of extremely poor quality, making any reliance on it suspect. The 3D data disproves the 2D based "*Reef*" interpretation in favor of the new 3D interpretation, , making the actual GCOS 0%. The 3D supersedes the 2D and replaces the earlier interpretation. Mr. Nowicki did not have sufficient time to do such an assessment, let alone to evaluate the 3D seismic data prior to testifying – he received the data less than one week before the Hearing. An assessment of 3D data requires months. Mr. Nowicki used the 3D data, presented in the "*Project Munaibay 3D Presentation*," which was prepared by Claimants, to arbitrarily increase the GCOS From 5% to 9%. It is clear that he simply presented the Claimants' assessment as his own, and this fundamentally undermines his credibility. In the new structure based on the 3D data, it is noted that the structure extends beyond the boundaries of the Contract 302 area and into the block of another subsoil user. This has substantial consequences for unitization, volumes, costs, and governmental approvals. Claimants' cost and development schedules need to be disregarded entirely. (RPHB 1 ¶¶ 521 – 529, 548; RPHB 2 ¶¶ 535 – 536, 544 – 548).

1664. Ryder Scott's interpretation of the "*Interoil Reef*" does not demonstrate closure, which is crucial to the assumption that there is a valid trap containing hydrocarbons. Without it, hydrocarbons could have migrated. Ryder Scott's reliance on a single 2D seismic line to suggest that there might be some indication of closure in the southwest of the structure is not credible. Ryder Scott testified that it never relied on the 2D line; GCA noted that the 2D line was poor and said nothing about the geological conditions of the surroundings. Mr. Nowicki's statement at the Hearing that "*in my mind, I know that there has to be more to that reef. It doesn't just end where the data ends*" is a demonstration of Ryder Scott's wishful thinking. Ryder Scott also attempted to avoid discussing faulting in the "*Interoil Reef*", which could make a trap invalid and enable hydrocarbons to migrate. GCA and Total E&P addressed the clearly visible and devastating faulting at the Interoil Reef interval. GCA has interpreted the data and found that the data does not show potential for further potential for hydrocarbons through a "*stratigraphic trap*". To the North and Southwest, the 3D seismic data is inconclusive. Total E&P reviewed the same 3D seismic data in 2009 and concluded that the roof does not close, meaning that there could not be a trap. (RPHB 1 ¶¶ 736 – 749; RPHB 2 ¶¶ 523 – 525, 532 – 533).

1665. Assuming for the sake of argument that there is a deep full scale closure and a large trap, Deloitte arrives at a negative net present value of USD – 89.4 million. This non-commerciality is the result of a comparatively high development costs and the length of development. The ECOS would remain unchanged for the model, but there is a change in the GCOS. The best ultimate recovery would amount to 58.5 Bcm^3, at a GCOS of 5%, due to the low probability of full closure and the likely lack of seal effectiveness. A full closure and a tight seal within the geological structure are important, because otherwise the oil could leak out, leaving a dry hole. There are several reasons to doubt the seal on the Interoil Reef, as there are several faults cut through the structure. This can destroy a seal and create

pathways along which hydrocarbons can migrate out of a trap, as they have in other parts of the alleged structure. Total E&P made the same observation when considering the property, and they observed seven faults above the reef structure. Where there is low seal effectiveness, Deloitte puts the unrisked net present value at USD -456 million. (RPHB 1 ¶¶ 780 – 798 R-III ¶¶ 86, 93 – 98 (net present value of -83.7 million)).

1666. In addition, the likely presence of H2S – which is confirmed by the Reef's location, Total E&P's analysis, and publications by Ryder Scott – greatly increases the necessary planning, drilling costs, drilling durations, and equipment costs and expenditures of the Interoil Reef. H2S is corrosive and toxic to humans and is associated with extended drill times. Mr. Romanosov's suggestion that treatment facilities for the Tolkyn field gas would be sufficient to handle the Interoil Reef is "*laughable*."(RPHB 1 ¶¶ 756 – 769).

1667. GCA evaluated the two "*Interoil Reef*" cases with different GCOS-es. GCA evaluated the "*Interoil Reef*" on the basis that 10% of the supposed gas stream will consist of H2S. Respondent's reliance on the Tengiz and Kashagan fields as analogs is appropriate because the Tengiz reservoirs and the "Interoil Reef" are roughly the same age. The Tolkyn field is millions of years younger. H2S is not a result of source rock contamination (necessary for Claimants' misinformed "*distance*" argument), but instead occurs at specific temperatures and pressures. Geographic vicinity plays only a marginal role – and in any event, the difference is only 11 km. (Tengiz is located 45 km away from the Interoil Reef, Tolkyn 34 km). Ryder Scott has admitted that there is a 50% chance of at least 1% H2S in the "*Interoil Reef*" gas and admits that that amount would require special treatment facilities. (RPHB 2 ¶¶ 614 – 621).

1668. Claimants argue that, if Tengiz and Kashagan are picked as analogs, then it is necessary to assume higher condensate yield. There is, however, no relationship between the presence of contaminates and the level of condensate yield. Condensate is created through a geological process, whereas contaminate levels depend on the reservoir itself. The thermochemical sulphate reduction is a chemical reaction that depends on reservoir temperature and not on source rock temperature. GCA has estimated that the depth of the reservoir and the geothermal gradient of that area indicates that a temperature of 160 – 180 C can be expected. This is the range at which thermochemical sulphate reduction occurs. Higher depths tend to mean less oil and condensate and more gas in a reservoir. In other evaluations, Ryder Scott has concluded that a contaminate level of 25% had to be expected in a gas stream from Type II prospects, like Tengiz and Kashagan. (RPHB 2 ¶¶ 622 – 631).

1669. The 3D seismic proves that the alleged Reef is non-commercial – the prospect is comparative small and has a high development cost and requires a long time for its development, due to the presence of significant quantities of H2S in the gas stream. In the best case scenario under GCA's interpretation, the ultimate recovery of gas amounts to 3.7 Bcm^3 and reaches a depth of 6150m. Compared to the Tolkyn field's peak performance of 2.37 Bcm^3, it is clear that the alleged reef does not provide for huge reserves of gas. (RPHB 1 ¶¶ 736 – 749). Ryder Scott's assumption about gas volumes, based on an unrealistic gas column of 2000m, is unrealistic. The largest gas column known to GCA is 1450m. It is apparent that

Ryder Scott's high case has never been observed and their low case has only been observed on 5% of all fields. Ryder Scott's maps also do not support the gas column estimates. (RPHB 2 ¶¶ 526 – 531).

1670. Claimants have ignored that the standard of sufficient probability would be applicable to a claim for lost opportunity. Applied here, Claimants would need to demonstrate a "*very strong chance*" that deposits of commercially workable oil exist in the concession area. Regarding the GCOS and ECOS, GCA estimates the GCOS of 10% of the Interoil Reef. This means that, in 90% of all cases, an operator will not find the structure as outlined. They estimate an ECOS of 50%, which is unchanged from the review of the 2D seismic data. These risks need to be accounted for, but even disregarding these, however, as Deloitte have calculated, the Interoil Reef has an unrisked net present value of USD – 249.3 million. (R-I ¶ 52; R-III ¶¶ 84 – 98; 113 – 115 (discussing 5% ECOS); RPHB 1 ¶¶ 777 – 779).

1671. FTI's drilling CAPEX estimates are so illogical that they have been empirically disproven by FTI. While FTI assumed responsibility for these flaws, they are not qualified to provide such estimates. At the Hearing, Mr. Rosen of FTI agreed that the deeper an operator drills, the higher the costs per meter will be. Claimants thereafter amended their well cost estimates to account for all instances of increasing costs per meter drilled, rather than decreasing costs per meter as previously stated and which Mr. Rosen had defended. The amendment shows that Claimants have admitted their mistake. Claimants' claim that an exploratory well to a depth of 4700m would cost USD 10 million is belied by FTI's own evidence, which calculated that the Munaibay-1 exploration well, which ultimately reached that same depth, cost USD 18 million. Regarding the non-drilling cost estimate and as confirmed at the hearing, FTI failed to provide any explanation for the infrastructure that they considered necessary for the development of the Contract 302 area. Mr. Rosen had no basic understanding of what was necessary to assess the costs of infrastructure. Instead, FTI simply adopted Claimants' assumptions in the cost estimates. At the Hearing on Quantum, Mr. Rosen of FTI conceded that FTI had applied incorrectly low administration costs for the Contract 302 area because FTI assumed that the Tolkyn and Contract 302 Area could operate jointly. In addition, FTI's valuation on gas pricing was based on the unsigned undated 2008 Agreement. FTI then applied this price to the Contract. 302 properties, even though §§ 2.3 and 3.1 of the Tripartite Agreement clearly state that it concerns only gas from Tolkyn. The new development schedule based on the 3D data can be criticized for the same reasons. (RPHB 1 ¶¶ 554 – 565, 581 – 587, 591 – 592; RPHB 2 ¶¶ 499 534; 537 - 543).

1672. FTI's update of their Contract 302 prospective valuation in the Third Report included an arbitrary rounding of the discount rate which inflated the valuation by USD 44 million. FTI understated the variable distribution costs by USD 9 million. And, by not incorporating an assumption for net working capital into the Contract 302 properties valuation, FTI inflated the valuation by USD 55 million. Accounting for the GCOS and ECOS as well, the value assumed by FTI would need to be reduced to USD 136. (RPHB 2 ¶¶ 459 – 460).

1673. FTI's costs for gas flowlines were understated by a factor of 20. They overlooked the need to construct an in-field facility to separate their gas and condensate from the Interoil Reef. They assumed that old, insufficient pipelines could be used and

thereby neglected to create data for a new pipeline. Costs for treatment facilities were also ignored, and it would be impossible for the resources from the Interoil Reef to be treated at the existing facility at Borankol. They also failed to provide facilities for the removal of H2S, and this would increase the cost by USD 200 million (assuming 1% H2S) or by USD 260 million (assuming 10% H2S). Finally it is unclear what is meant by FTI's term "*Changing the extraction system*." (RPHB 2 ¶¶ 542 – 543). FTI made no allowance for costs for the necessary facilities in their evaluation and this increases the damages claim. GCA estimates an infrastructure CAPEX of USD 459 to interpret the Interoil Reef. The alternative 5900m Reef that is not supported by 3D data requires a CAPEX of USD 2.35 billion. (RPHB 1 ¶¶ 770 – 773).

1674. Turning to witness credibility, Respondent argues that "*Claimants' costs and development schedule are untenable as a matter of substance, they are also non-credible since they are opaque, illogical and were apparently largely prepared by Claimants themselves rather than by Claimants' experts who lack the necessary expertise in these matters*." (RPHB 1 ¶ 547). In testimony, Ryder Scott was completely unaware of the regulatory requirements that were connected to the drilling schedules that formed the basis of the Ryder Scott valuation was outside of their expertise. Ryder Scott solved their knowledge problem by simply relying on Claimants' estimates and intentions, and then presenting them as Ryder Scott's own expert findings. In effect, Claimants have become their own experts. At the Hearing in May 2013, Claimants attempted to respond to Respondent's allegation. Ryder Scott does not claim authorship of Claimants' statement that "*25 wells are scheduled*" or that "*a two-rig schedule was implemented*." This can only mean that they were provided by Claimants. No response was given for FTI having hidden that it had taken over infrastructure cost estimates from Claimants. By contrast, GCA has the necessary experience to prepare reliable development schedules and cost estimates. (RPHB 1 ¶¶ 546 – 552; RPHB 2 ¶¶ 466 – 469).

1675. At the Final Hearing, Claimants argued that the fact that well costs were provided by Claimants was apparent from a footnote in the First FTI Report. The footnote referenced, "*We have discussed with Ryder Scott what a reasonable estimate for capital costs for wells drilled in the different depths/structures would be based on a review of Company's historical capital expenditure costs for wells with adjustments made for varying depth*s," however, gives no such indication. It leads the reader to believe that a historical analysis was conducted. FTI did not even purport to do any analysis on whether the well costs provided by Claimants were reasonable. Their analysis has no credibility. (RPHB 2 ¶¶ 470 – 474).

1676. In response to Claimants' contention that GCA should have provided several different scenarios involving costs related to H2S, GCA explained that the mid-case assessment was sufficient. (RPHB 2 ¶ 634).

1677. FTI's calculations that are based on higher condensate yield are misleading. First, a production start in 2012 is not possible since additional research, including new 3D seismic, would need to be completed. The present research is very poor and do not enable the flanks of the Interoil Reef to be mapped with confidence. Even Ryder Scott agreed that the 3D survey was not sufficient to

define the structure. Additional seismic surveying would only add one year. GCA explains that assuming a production start prior to 2018 is improper. The prices that would be realizable in 2019 are not the same as would be realizable in 2012 – that ignores seven years of inflation. FTI also ignores increases in the costs of production, taxes, and ECOS and GCOS. Deloitte performed a proper analysis using FTI's assumed condensate yield and still come up with a negative value of the Interoil Reef. (RPHB 2 ¶¶ 632 – 637).

1678. GCA provided an outline FDP setting out the steps for the development of the Interoil Reef. According to this, and based on challenges outlined, production would begin in 2018. Claimants' experts, on the other hand, unrealistically assume that the first two production wells on the Interoil Reef would be drilled in 2009 and that production would start in 2010. This is even inconsistent with Claimants' production history. The wells in Tolkyn, for example, were drilled in 2001 but only started producing non-negligible volumes of gas in 2004. The assumption that they would have more success with a deeper well is nonsensical. (RPHB 1 ¶¶ 774 – 776).

1679. Claimants' Munaibay Oil claim is overstated by 63.8% (USD 37.7 million). While Claimants accuse GCA of manipulating its resource and capital expenditures estimates, this is incorrect and GCA has explained the reasons for changes to the estimates. Changes were based on a later analysis of the result of the drilling on age-equivalent reservoirs in Tolkyn field. As a result, there were even upward corrections on some wells. GCA provided Chrystal ball sheets, as well as cost estimates, showing the changes. The minor error in the phasing of capital expenditure on Munaibay was admitted by GCA and was corrected in GCA's Third Report. The value of the Munaibay discover remains negative, despite the change. (RPHB 2 ¶¶ 549, 647 – 651).

1680. The RBS valuation report conducted as part of the KMG EP Due Diligence in September 2009 contains no value for any of the Contract 302 properties and provides no support for their alleged USD 1.5 billion loss of opportunity. (RPHB 1 ¶¶ 986 – 989). In FTI's Additional Expert Report of 25 January 2013, Claimants grant the Tribunal the discretion to decide which part of the highly exaggerated prospective value of USD 1.448 billion to award as opportunity damage for the Contract 302 properties. (RPHB 1 ¶ 986).

1681. Respondent also explained that FTI improperly disregarded risk by virtue of its inappropriate "*prospective*" valuation method. Such a "*prospective*" value bears no relationship to what real investors in an open market would pay for an asset and should, therefore, play no role for valuation purposes. The Uniform Standards of Professional Appraisal Practice (USPAP) only uses the term "*prospective value*" when in reference to real property and personal property. There is no reason to apply it to an oil and gas development. Furthermore, as Deloitte have shown, the use of a prospective value does not support the complete disregard of risk, as suggested by FTI. (RPHB 1 ¶¶ 566 – 569).

1682. Other methodological flaws in FTI's analysis include that they incorrectly mixed the nominal and the real valuation approaches. As a result, they applied inflation twice, causing revenues to increase disproportionately and cash-flows to be overstated. When they conceded this error, it reduced the overall value estimate by

USD 379 million. When correcting this mistake, they applied a different inflation rate to their assumption – 1.61%, rather than 2.82%, which leads to lower nominal cost projections. While they based this change on an assumption that the new rate was "more appropriate", in reality, the change was untenable. The sole reason for the change was to limit the impact of the correction that was necessary. In addition, FTI's arbitrary rounding of their discount rate from 14.41% to 14% adds USD 49.3 million to Claimants' claim. (RPHB ¶¶ 570 – 577).

1683. One risk associated with investment projects in the early stage is the creditworthiness of the purchaser. Since Claimants have not named any purchaser who would take their gas from the Contract 302 properties, they have not, *a fortiori*, accounted for the risks associated with such a purchaser. Further, if the claimant cannot establish that there was a reasonable certainly of lost profits, it cannot determine with reasonable confidence what those lost profits would be. As a result, their claim must be dismissed. (R-III ¶¶ 136 – 138).

3. The Tribunal

1684. The timelines of events provided above in this Award show that TNG informed MEMR on 10 October 2008 that it no longer wished to enter into the appraisal phase but instead wanted a two-year extension on the exploration contract. The 14 October 2008 extension request and proposed work program indicated this intent and showed a planned drilling depth of 6000m and a second ultra-deep well on the subsalt horizon. From the evidence supplied, the Tribunal is satisfied that when TNG stopped drilling at 4700m because it encountered pressures that required a heavier rig, Claimants acquired a rig with a depth capacity of 7000m in Georgia and it was ready for transport in January 2009.

1685. Only after Respondent started its breaching and harassing conduct did Claimants decline to move the rig to Kazakhstan, opting instead to resolve disputes with the MEMR before prudently continuing investment in the Contract 302 area. Taking into account the Tribunal's considerations above in this Award regarding causation, the Tribunal accepts that Claimants could have reasonably expected the extension of the Contract under the usual professional relationship with the Respondent's institutions as it existed before 14 October 2008. Kazakhstan's refusal to formally extend Contract 302 prevented further exploration work on the area must be considered as part of, and caused by, the treatment which the Tribunal has found above to be in breach of the ECT.

1686. Regarding the damages caused, the Tribunal sees no difficulty in accepting that the Claimants' investment of out of pocket expenses of **USD 31,330,000** in exploring and analyzing the Contract 302 property, excluding the investment in the Munaibay-1 well, are indeed such damages due.

1687. As both Claimants and Respondent submit, the further damages claimed for lost profit or lost opportunity provide a much higher threshold for Claimants' burden of proof. This threshold is high both legally and factually. The Parties rely in some detail on the various earlier decisions of other tribunals dealing with this issue and take very different views on their interpretation and applicability for the case at hand.

1688. This Tribunal does not need to go into these legal issues because it considers that, in any event, Claimants have not been able to provide sufficient factual proof for the lost profits they claim. In this context, Respondent (R-III ¶¶ 129 *et seq*.) has rightly referred to the comments in Prof. Crawford's Commentaries on the ILC Articles on State Responsibility and to respective comments in earlier awards that the investor must meet a high standard of proof to establish a claim for lost profits, especially due to the degree of economic, political, and social exposure of long-term investment projects. To meet this standard, an investor must show that their project either has a track record of profitability rooted in a perennial history of operations, or has binding contractual revenue obligations in place that establish the expectation of profit at a certain level over a given number of years. This is true even for projects in early stages.

1689. In the view of this Tribunal, Claimants have not proven either element. The Tribunal does not agree with Claimants that, in this regard, the benefit of the doubt belongs to Claimants as the victims and not to Respondent as the wrong-doer. Rather, the burden of proof remains with Claimants. While it is true that no absolute certainty of proof can be required for such losses in the future, a high threshold of sufficient probability must be applied to a claim for lost opportunity.

1690. During the 11-year life of Contract 302, Claimants did not undertake to explore the Interoil Reef. The 2D seismic was shot in 2000 and 2001. TNG did not start drilling the Munaibay-1 well until February 2008. Claimants would have needed 2.5 years to drill the exploration well. Claimants have not proven that they could have declared a commercial discovery of the Interoil Reef within the extended period to 30 March 2011. The working program that Claimants submitted on 14 October 2008 contained slower drilling times. Claimants had no experience drilling ultra-deep wells. Claimants chose to drill before having acquired the 3D seismic and drilled a well that, admittedly, would not have been sufficient to reach the 6000m deep Interoil Reef. Ultra-deep drilling was not part of the exploration program that Claimants submitted to the MEMR in April 2009. They first chose an inadequate drill that broke down at 4700m in the face of high, but probably predictable, pressure and only then acquired the Georgian drill. As pointed out in some detail by Respondent (RPHB 1 ¶¶ 799 *et seq*.) and at the Hearing on Quantum, even Claimants' geologists were not sure that the Munaibay-1 well would have reached the Interoil Reef, even if drilled to 6000m.

1691. Assuming that Respondent had extended Contract 302, and that Contract 302 would have expired in March 2011, Claimants have not provided sufficient evidence that they would have realized the alleged lost profit or opportunity.

1692. Therefore, this Tribunal concludes that Claimants have not fulfilled their burden of proof in this regard.

L.VI. Quantum Related to LPG Plant

1. Arguments by Claimants

1693. Shortly after President Nazarbayev issued the investigation order, construction on the LPG Plant slowed. Mr. Broscaru's unrebutted testimony is that this was because non-Kazakh workers were unable to renew their work permits.

Construction was paused indefinitely in 2009 because (1) TNG's liquidity position was deteriorating, due in no small part to Kazakhstan causing Claimants to lose the Credit Suisse loan facility and causing Vitol – another investor – to draw down its revolving line of credit, and (2) it became too risky to invest additional capital on construction of the LPG Plant. These delays increased the ultimate cost of completing the LPG Plant by approximately USD 50 million (per GCA). But for Kazakhstan's actions, however, these delays would not have occurred and the LPG Plant would have gone online in June 2009. Kazakhstan's actions changed the investment environment such that it was too risky to invest additional capital in an asset that Kazakhstan could seize. As President Nazarbayev acknowledged on 19 November 2009, construction on the LPG Plant had halted as a result of inspections by law enforcement. This was also acknowledged in the MEMR report on its January 2010 inspections. When the Akim of the Mangystau Region offered a proposal for TNG to borrow funds from State agencies to complete the facilities, Anatolie Stati explained that the delays in the LPG Plant resulted from the State's actions, which precluded Claimants from raising or investing additional funds. The Akim then reported to the Prime Minister Massimov that the construction had stopped due to the financial and legal problems of the company and urged the Prime Minister to dismiss the legal actions so that construction might resume. (CPHB 1 ¶¶ 358 – 364; CPHB 2 ¶¶ 215 - 222).

1694. Claimants seek to recover their investment costs of USD 245 million and the lost opportunity since, but for Kazakhstan's actions, Claimants would have developed the LPG Plant and would have even been able to develop the evidence needed to establish the FMV of the plant. As the tribunals in Sapphire and Gemplus also agreed, the Respondent should not benefit from the evidentiary uncertainty that results from its own misconduct. (CPHB 1 ¶¶ 558 – 559). Claimants request that the Tribunal award damages for the LPG Plant that are equal to Claimants' investment in the plant, plus some of the prospective value that Claimants could have realized from processing the Contract 302 gas in the LPG Plant (CPHB 1 ¶ 580):

Investment Cost	**US $245,000,000**
Prospective Value	**US $329,077,000**
Prospective Value Above Cost	**US $84,077,000**

1695. Respondent's market value of the LPG Plant of – USD 89.9 million is incorrect. It completely and baselessly disregards the possibility of processing third party gas at the LPG Plant – an assumption not even adopted by KMG EP. The FMV is not an appropriate measure of an asset that Claimants were prevented from turning into a commercial success. Instead, the investment value, as held by the tribunals in *Metalclad v. Mexico*, *Vivendi v. Argentina*, and *Wena Hotels v. Egypt*, is the appropriate measure of damages for an asset that was not yet a going concern at the time of the taking. Those tribunals recognize that when a state's actions deprive an investor of the opportunity to earn a profit, the investor is entitled to receive a portion of that potential profit as compensation for that lost opportunity. (CPHB 2 ¶¶ 386 – 389).

1696. FTI's prospective DCF valuation of **USD 408.3 million** for the LPG Plant is a reasonable estimate of the value of the LPG Plant to Kazakhstan. The Tribunal should not take seriously any argument that salvage value is an appropriate award for a seized LPG Plant that Kazakhstan is on the verge of putting into operation at full capacity:

> *66. As a preliminary matter, Deloitte's assumption of salvage value is intrinsically an inappropriate premise. As of the appropriate October 14, 2008 valuation date, Claimants fully intended to finish construction of the LPG plant and put it into operation, and in connection with all of Claimants' efforts to sell the LPG Plant both before and after October 14, 2008, Claimants offered the Plant, and prospective purchasers bid on the Plant, not as scrap but as prospectively operational. This fact is clearly reflected in the indicative offers made by interested buyers in 2008, which valued the LPG Plant at US $150 million on average. Indeed, the offer made for the LPG Plant by KazMunaiGas at that time was US $199 million. While Claimants did not accept these offers because at the time they deemed them too low and did not feel that they would lead to a sale, the Tribunal should note that State-owned KazMunaiGas itself offered almost US $200 million for the Plant, more than six times the highest value assigned to the LPG Plant by Deloitte of US $32 million. Little more is needed to demonstrate that Deloitte's salvage value assumptions and calculations are worthless.*
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> *67. Furthermore, current publicly available information indicates that Kazakhstan is in fact gearing up to finally open the LPG Plant in 2012. In a document entitled "List of Investment projects of the Mangistauskoi Region, which are being supervised in 2011," there is a specific reference to the LPG Plant under "Regional Projects". The project is identified as having a cost of US $315 million (47 billion Tenge), and it is expected to start up in the first half of 2012 with a capacity of 7 mcm of gas per day. It is clear that, with an identified cost of US $315 million, Kazakhstan has been in the process of spending additional capital to complete the LPG Plant since its seizure, and that consequently Kazakhstan does not view the Plant as scrap. Furthermore, Kazakhstan is training specialists for operation of the LPG Plant, a clear indication that Kazakhstan is going to complete the Plant and put it into operation. […] (C-III ¶¶ 66 – 69).*

1697. FTI made its prospective DCF valuation under the conservative and reasonable assumption that only gas supplies from Tolkyn, Borankol, and the Contract 302 properties would be processed in the LPG Plant. When Claimants commenced the LPG Plant project, they believed that the Tolkyn field alone would produce sufficient gas for the LPG Plant to produce 7 mcm per day for several years. There were also plans to produce gas from the Contract 302 properties as production from Tolkyn declined. While the LPG Plant had the capability to process gas from third party sources, TNG always expected to use the LPG Plant to process its own gas supplies. (C-III ¶¶ 70 – 71).

1698. Respondent's objection to the FTI's prospective DCF valuation, namely that there would not be enough gas from Claimants' properties or from third parties to make it profitable, is inconsistent with Respondent's current plans for the LPG Plant. The viability of the LPG Plant does not hinge on the availability of gas from the

Tolkyn field or the Contract 302 properties. FTI did, however, create an unrisked NPV of the plant that assumed full production from Contract 302, due to uncertainty regarding the terms of third-party gas sources. With these adjustments, the prospective value from the LPG Plant is USD 408.3 million. (C-III ¶ 73 - 75, 77; CPHB 1 ¶ 568).

1699. At minimum, Claimants' recoverable investment value for the LPG Plant is USD 245 million. This amount includes the USD 37 million expenditures through May 2009 that Claimants would not have incurred had Claimants been able to sell the LPG Plant in October 2008. (C-III fn. 179).

1700. FTI based its assessment of the investment value of the LPG Plant on the book value of the LPG Plant as of 14 October 2008 as contained in TNG's Third Quarter financial statements, which were not prepared for litigation and were reviewed by KPMG. The Tristan Oil Annual Report for 2009 was used to reflect investments after 14 October 2008. By contrast, Mr. Wood effectively admitted that his cost estimates are simply a "*black box*", based on his experience. (CPHB 2 ¶¶ 354 – 355).

1701. In early submissions, FTI applied the "*book value*" for the LPG Plant as a proxy for FMV, because "*the value of the LPG Plant, assuming only the use of the Borankol and Tolkyn field volumes, is less than the book value of the assets which is the total incurred capital expenditures of the LPG as at the Valuation Date*." This value, **USD 208.5 million**, was very conservative and did not provide a value for Claimants' lost opportunity from to earn profits from the LPG Plant upon completion. (C-I ¶¶ 419 – 420).

1702. Kazakhstan asserts that damages should be reduced by the debts owed by KPM and TNG to Vitol under the COMSA prepayment terms and the LPG financing arrangements. Respondent's arguments that Claimants' damages must be reduced because Vitol was a fifty-fifty joint partner in the LPG Plant, and because of the debt owed by Montvale to Vitol under the COMSA prepayment arrangement, are legally and factually incorrect. First, Vitol never owned an equitable interest in the LPG Plant but rather promised to provide (but never provided) half of the financing for the construction of the LPG Plant in exchange for the right to market the off-take of the Plant and to receive a portion of the LPG Plant's profits. The Joint Operating Agreement with Vitol for the LPG Plant project addressed the rights of the parties upon termination, including for the event that Kazakhstan asserted rights to the LPG Plant. In that agreement, contrary to Kazakhstan's contention, the parties contemplated that all of Vitol's rights would transfer to Ascom upon termination and that Ascom would seek compensation from the Government in the event that the Government asserted ownership rights over the plant. This is an illustration of the necessity of the *Chorzów* and *Occidental v. Ecuador* principle not to reduce the damages by the amounts owed to third Parties. Vitol never had any ownership interest in that Plant and was never an "Investor" for purposes of the ECT. To the extent that Claimants owe contractual obligations to Vitol under the Joint Operating Agreement, that issue is not before this Tribunal. Accordingly, the Tribunal should not consider any such obligations, which are disputed, in calculating the amount of compensation due to Claimants for the assets that Kazakhstan wrongfully seized. (CPHB 1 ¶¶ 641 – 645).

1703. Under the intended financial structure for the LPG Plant, Claimants and Vitol had originally planned to finance the LPG Plant with a combination of USD 20 million equity contribution from Vitol and Ascom, each financing from KazCommerzBank. This intended financial structure, which in any event is irrelevant for purposes of quantum, never came to pass. Instead, Claimants retired all KazCommerzBank debt in 2007 and Vitol drew down its debt financing to USD 46 million in addition to the USD 20 million contribution. As a result, TNG financed all of the construction of the LPG Plant, apart from the USD 66 million provided by Vitol. The LPG Plant was not a "*black hole*" with ever increasing costs – the cost increases corresponded with observed increases in inflation and LPG product prices. (CPHB 1 ¶¶ 573 – 576).

1704. At the Hearing on Quantum, Mr. Rosen (FTI) explained how the investment cost basis is an appropriate standard of valuation for the LPG Plant. FTI assumes that the LPG is a "*going concern*" since it would have been completed and would have operated, absent Respondent's interference. While one would typically consider the cashflow basis to evaluate the value of a going concern, that information was lacking. Accordingly, Mr. Rosen looked to the cost basis or investment basis to determine the LPG Plant's value. (CPHB 1 ¶¶ 560 – 561).

1705. Kazakhstan's cost assumption of USD 100 million is a massive, USD 50 million overstatement of the costs required to complete the LPG Plant, as confirmed in GCA's testimony at the Hearing on Quantum. But for Respondent's actions, construction would not have stopped and it would have only cost USD 50 million to complete. (CPHB 1 ¶ 562).

1706. Kazakhstan assumes – contrary to the evidence – that the LPG Plant would have gone online first in mid-2011. Accordingly, it fails to account for two full years of production that would have been achieved, but for Kazakhstan's violations. Evidence regarding third party gas was also ignored by Deloitte. As explained at the Hearing on Quantum, although TNG expected to load the LPG Plant from its own gas, the LPG Plant could also be used to process gas from other producers. The Joint Operating Agreement for the operation of the LPG Plant between Ascom, Terra Raf, TNG, and Vitol confirms that the processing of third party gas was anticipated. The 2009 RBS Assessment also assumed that the LPG Plant would be loaded with third-party gas, based on discussions with KMG E&P. (CPHB 1 ¶¶ 563 – 567, 570).

1707. Deloitte disregards the possibility that TNG could have sold the Plant to a third party that had its own gas run through the plant. KMG E&P, for example, made an indicative offer of USD 199 million for the LPG Plant in September 2008, based on a mixed comparative value and cost approach – not a DCF analysis. KMG E&P's use of the cost basis to value the LPG Plant contradicts Kazakhstan's argument that the cost basis is an improper valuation method. The 2009 RBS Assessment valued the LPG at USD 86 million (base case) to USD 146 million (high case) and the Tribunal should agree that these are the absolute minimum amounts that the Tribunal should award for the LPG Plant. (CPHB 1 ¶¶ 569 – 572).

1708. Claimants explain that Mr. Chagnoux was not a credible witness. His explanation that he was dishonest in his bid of USD 100 million for the LPG Plant may be

attributed to hurt feelings that Claimants did not initially consider his offer to be good enough to move to Phase 2 of the sale process. On cross, he admitted to not being present at a March 2009 meeting about which he provided testimony. It also appeared that he and Total were interested in currying favor with Kazakhstan. (CPHB 1 ¶¶ 390 – 391).

1709. Respondent's allegations about delays in the construction of the LPG Plant are based on a draft business plan that indicated a target start date of October 2007. The planned launch, however, was Q2 2009. Even if there were a delay, however, it would not shorten the usable life of the plant. (CPHB 1 ¶¶ 577 – 578).

1710. In response to Respondent's allegation that the LPG Plant was speculative from the beginning, Claimants explain that "*Using the valuation metrics that Mr. Broscaru described in his witness statement, Deloitte attempts to create a cash flows and a valuation model that it concludes had a value of US $108.2 million. Deloitte, however, makes a fundamental error in its calculation. Mr. Broscaru stated that TNG expected the LPG Plant to generate US $1 billion in revenue and US $500 million in profit over 10 years. Deloitte, however, spreads those cash flows over 20 years, effectively cutting them in half. FTI has corrected Deloitte's error, and concludes that an accurate 'simplified model' results in a positive NPV of US $92 million."* (CPHB 1 ¶ 579, partially quoted).

1711. The RBS valuation was based on (1) the 2009 reserve report prepared by Miller Lents; (2) detailed legal due diligence by Squire Sanders; (3) detailed financial, tax, and environmental due diligence by PWC; (4) discussions with management of KPM and TNG; and (5) "*valuation discussions with KMG EP*." It was created as an independent valuation for the purpose of a potential transaction, not litigation. It concluded that, on 1 October 2009, the combined enterprise value of Tolkyn, Borankol, and the LPG Plant was USD 612 million in the Default-Base scenario, to USD 760 in the Special-Base scenario which assumed higher gas prices. This represents an alternative valuation which should establish a minimum value for these assets, if the Tribunal rejects the 14 October 2008 valuation date. The Tribunal should, however, draw the inference that it understates the value of these assets. (CPHB 1 ¶¶ 583 – 585).

2. Arguments by Respondent

1712. The LPG Plant is a failed project. Claimants have failed to prove either claim for USD 245 million or USD 408 million for the LPG Plant and they have failed to provide a salvage valuation for the LPG Plant. (R-III ¶¶ 163 – 164). Claimants initially intended to only invest USD 20 million into the project, but as alleged in its first post-hearing brief, expended USD 179 million – 800% of the anticipated amount. They expected it to be fully operational by the third quarter of 2007 but – almost two years after this projected operation date – the project remained unfinished, and Claimants abandoned it. Its value is zero. (R-III ¶¶ 139 – 140; R-I ¶ 53.3; RPHB 1 ¶¶ 812, 894; RPHB 2 ¶¶ 652, 657).

1713. It is unclear whether Claimants maintain their demand for lost opportunity to make a success of the LPG Plant. The termination of the construction of the LPG Plant, however, cannot be associated with any actions by the Republic. Mr. Broscaru received orders to stop construction due to TNG's cash constraints. Mr. Broscaru's

allegation that non-Kazakh workers were unable to renew their work permits in November/December 2008 (which is implausible and is denied) was first adopted in Claimants' First Post-Hearing Brief. Mr. Broscaru provided no substantiation of the claim that the work permits issue affected construction, nor was there a statement of what work could not be done since workers were unavailable. (RPHB 2 ¶¶ 688 – 697, 105 – 111).

1714. Claimants suggested that the Republic interfered by causing TNG's liquidity position to deteriorate, but this is incorrect – those developments related to the Credit Suisse loan and, as confirmed by the PwC Due Diligence Report, were outside of the Republic's influence. Similarly, since there was no harassment campaign, Claimants' assertion that the harassment campaigned made their decision to suspend construction be appropriate is empty. In testimony, it became obvious that either Anatolie Stati or Mr. Broscaru lied about the decision to "*postpone*" or to abandon the LPG Plant project. (RPHB 1 ¶ 115; RPBH 2 ¶¶ 108 - 109).

1715. At the Hearing on Quantum and in the Third Report, GCA explained the steps and costs that would be necessary to commission the LPG Plant, would amount to approximately USD 100 million, USD 32 million of which due to Claimants' "*mothballing*" the equipment. Claimants have not provided a credible cost estimate, and the Hearing on Quantum demonstrated that Ryder Scott had no expertise on capital expenditure. FTI, on the other hand, could not justify their assumption that USD 24.1 million would be necessary – FTI relied completely on information provided by TNG. In particular, FTI relied on the "*Tristan Oil Interim Financial Report For the Nine Months Ended September 30, 2008*", a document that was drafted in November 2008 but discusses the forward looking costs until June 2008. FTI errs in its costs assumptions:

> *921 FTI's approach becomes totally striking when looking at what happened to FTI's valuation in their second report. In their second report FTI applied a fair market value of the LPG Plant based on the allegation that TNG had not spent a total of USD 208.5 million as alleged in the first report but a total of USD 245 million. Applying the same logic that FTI had applied in their first report, they should have reassessed the costs for the completion of the plant and arrived at costs of USD 232.6 million as envisaged by TNG for the construction of the plant minus the USD 245 million actually spent to construct about 80-90% of the plant.*
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> *922 Therefore, FTI in their second report should not have simply stuck to USD 24.1 million to finalise the construction as they did. Instead, FTI should have assumed that TNG would not need to pay USD 24.1 million to construct but rather TNG should be paid USD 12.4 million to construct the plant. This is obviously bogus, yet apparently good enough for FTI. (RPHB 1 ¶¶ 909 – 922, partially quoted; RPHB 2 ¶¶ 688 - 697).*

1716. Claimants sought to mislead potential investors, as well as the Tribunal, about the economic viability of the LPG Plant. Once Claimants' costs and recovery estimates were proven incorrect, Claimants sought to hide this information from the Tribunal and potential investors. At the Hearing, Mr. Lungu admitted to lying in ¶ 27 of his first witness statement. He also conceded that the construction of the LPG Plant had been a story of constant delay, exceeded budgets, and changing

assumptions about the availability of gas. This is obvious when considering the original business plan, which envisaged costs of USD 105 million – not USD 281 million. It assumed commission in the third quarter of 2007 – not in 2009, as written by Mr. Lungu. Mr. Lungu conceded these points in oral testimony. Claimants' statements that the document was a draft with no value were contradicted by the witness. The vendor due diligence report indicated that there had been no delays in construction of the LPG Plant and that it would be completed on time and within budget. In cross-examination, Mr. Lungu explained this to mean that there was no delay, so long as the plan was adjusted from time to time, so as to become the original plan. (RPHB 1 ¶¶ 813 – 846, 864 – 869; RPHB 2 ¶¶ 657 – 659). In the rebuttal, Claimants did not rebut any of the evidence regarding the failure of the LPG Plant. (RPHB 2 ¶¶ 653, 657 – 659).

1717. Claimants have withheld from the Tribunal that they actually assumed – in the PwC Due Diligence Report, that up to USD 60 million would be needed to complete the LPG Plant. In that Claimants have exceeded the projected costs for the LPG Plant by 250%, the estimate of USD 20 – 60 million could be adjusted to USD 40 - 150 million, which is in line with GCA's estimate. (RPHB 1 ¶¶ 925 – 928). Their assumption of costs of USD 60 million, the amount applied by RBS, given TNG's history of exceeding estimated costs, makes Respondent's assumption of USD 100 million more likely. Claimants have not provided proof or a position of costs for the completion of the LPG Plant. (RPHB 2 ¶ 688 – 692).

1718. Mr. Lungu tried to hide the LPG Plant cost explosion from the Tribunal and from its own auditors. FTI attempted to explain that the price increase for the LPG Plant could be explained by reference to Kazakh inflation, but this argument is seriously flawed. First, it is inconsistent with FTI's use of the 1.6% US inflation rate to forecast the costs of the LPG Plant construction. It disregards the initial USD 105 million estimate that was provide in the Ascom LPG Business Plan, allegedly prepared by Vitol. FTI disregards the ultimate of USD 281 provided in Mr. Broscaru's witness statement – oddly, because that estimate was provided to Mr. Broscaru by Mr. Lungu. In any event, the PwC Due Diligence Indicates that the USD 281 cost estimate was correct. As a result, FTI assumes a cost increase of 53.5% (from USD 151.5 million to USD 232.6 million) rather than in increase cannot be explained to the inflation development of 67.9% in 2007 and 2008 cited by FTI. (RPHB 2 ¶¶ 453 – 458).

1719. Deloitte has estimated that the unfinished LPG Plant has a negative enterprise value of **USD – 89.9 million**. They arrive at this using the DCF method, which RBS, Deloitte, and bidders in Project Zenith had no problem applying. Deloitte considered projections of future sales revenues and expenses, including the USD 100 million expenditure required to complete the LPG Plant. Deloitte derived the net cash flow over several years as the balance of revenues and expenses projected and arrived at a negative number. This indicates that alternate uses of the LPG Plant need to be considered. (R-III ¶¶ 145 – 147, 152; RPHB 1 ¶ 812; RPHB 2 ¶ 652, 672).

1720. Deloitte GmbH assumed a start-up date of 2011, which is consistent with the RBS valuation. Nevertheless, even taking account the processing of gas from June 2009 – June 2011, the value of the plant would still be negative. FTI's valuation of the

LPG Plant would only be 7% lower if gas production between 14 October 2008 and 21 July 2010 was disregarded. (RPHB 2 ¶¶ 698 – 699).

1721. Deloitte reaches this negative value because the LPG Plant could only be operated for four years, due to TNG's limited supply of gas. After four years, capacity utilization will fall below the minimum level required for technical operation and negative cash flows will be generated. Claimants were aware of this as of 2009 when, although the business plan was created under the assumption of the availability of 40.2 - 62.3 Bcm^3 to run the plan, the Miller Lents Report informed them that they only had 9.5 Bcm^3 – enough for 4 years. Claimants' valuation expert, Mr. Rosen, already conceded that the LPG Plant could not operate economically on the gas from Tolkyn and Borankol, alone. It would only be economically viable if Claimants' assumed gas volumes from the Contract 302 properties and gas from third parties would be available. No effort, however, was undertaken to test the viability of these assumptions or to see whether it would be possible to extract suitable gas from the CAC Pipeline. While KazTurkMunai was mentioned as a company that could deliver gas to the LPG Plant, no information about the amount of gas was provided. Ignoring the fact that the GCOS for Contract 302 was 5% and that they forwent exploring it, Claimants treated it as 100% for the purposes of assuming that it would supply gas to the LPG Plant. As for the so-called geographically proximate gas sources, Claimants and Mr. Broscaru failed to identify any specifically. All that Claimants have is the RBS Report that assumed gas from third parties could be processed in the Plant. (R-III ¶¶ 141 – 142, 146, 148, 165, 173; RPHB 1 ¶ 870 – 882; RPHB 2 ¶ 657, 700 – 705).

1722. Regarding gas from the Contract 302 property, even if Claimants had not foregone the opportunity to explore it, the Deloitte report confirms a maximum GCOS of 5% for the Interoil Reef, which combined with the ECOS, makes it commercially unexploitable. At the Hearing on Quantum, Claimants failed to show how the LPG Plant could be operated economically, but demonstrated why construction was a failure, in that it was supervised by incompetent personnel. Although he made several statements regarding the economic parameters of the project, in cross-examination, it became clear that Mr. Broscaru had no idea about the economics of an LPG Plant. He used numbers, like the alleged value of USD 450 million that he obtained from Mr. Lungu who, obviously, did not want to be scrutinized on these numbers and did not put them in his own statement. He was unable to support his other written statements during cross. He conceded that the Munaibay discovery could only support the plant for 6 months, and that the Tabyl discovery could only support it for three days and a few hours. It was obvious that the reference to Munaibay could not have included the Interoil Reef. Finally, the only possible conclusion that the Tribunal could draw from Mr. Broscaru's testimony that "*[his] action focused only on technical surveillance of the work and the facility*" is that the Tribunal should disregard every detail that does not only concern the technical details of the LPG Plant. Finally, the Tribunal should also note that Claimants' witness statements from Anatolie Stati and Mr. Broscaru regarding the LPG Plant are inconsistent. (RPHB 1 ¶¶ 847 – 863).

1723. The Claimants' witnesses, Mr. Lungu, Mr. Broscaru, and FTI provided incredible testimony regarding the LPG Plant. Mr. Lungu's testimony regarding the LPG Plant misrepresented all basic parameters of that project. Everyone except FTI agreed that Claimants should never have taken the decision to build the LPG Plant.

19 – 20. Mr. Broscaru, in cross examination, could not answer even basic questions about his witness statement entitled "*Design and economic rationale of the LPG Plant"* because he had received all of his information from Mr. Lungu and had simply written that into his statement. Apparently, Claimants sought to insulate Mr. Lungu from cross-examination regarding the financial aspects of the LPG Plant. FTI calculated that the assumed value of the LPG Plant of USD 450 million was overstated by up to USD 443 million. Corrected, and based on the assumptions set out in Mr. Broscaru's witness statement, FTI should have arrived at a negative value for the LPG Plant. (RPHB 2 ¶¶ 19 – 20, 26 – 28).

1724. With respect to the processing of gas volumes from the Borankol and Tolkyn fields, Claimants' valuation scenario concerning the LPG Plant is to determine the book value of the LPG Plant. Yet, Claimants instead apply a "*book value*" which is identical to the "*investment value*" – namely, the total capital invested in the LPG Plant. A hypothetical buyer will not be interested in how much cash was invested in the business, but only in the cash he or she would get out of the business in the future. Further, the "*investment value*" ignores developments after investment, such as inflation, deflation, and currency developments. Scholars have also confirmed that the investment value does not reflect its FMV, even for business valuation experts. Thus, it is not suitable as an indication for FMV in a treaty arbitration, either. (R-III ¶¶ 179 – 186). The investment value (USD 245) is irrelevant and, indeed, the investment value and the FMV are utterly disproportionate to each other. The investment itself was a black hole for Claimants' investments and, in the end, Claimants invested USD 245 million for the unfinished LPG Plant. The LPG Plant would have costs USD 269 – USD 345 million to finish – grossly higher than the USD 105 which they originally estimated. (R-III ¶¶ 174 – 178).

1725. The alleged USD 208.5 "*book value*" of the LPG Plant – defined as the investment value less accumulated depreciation – is, likewise, irrelevant. This method is not used for determining a FMV and scholars agree that it has no relationship to market values or to asset values. Rather, "*book value*" was created for accounting or tax evaluations. The vast majority of arbitral tribunals regard book value as an inappropriate basis for the calculation of compensation. (R-III ¶¶ 143 – 144, 187 – 195). In any event, Claimants failed to demonstrate that the necessary conditions – including a secured gas supply, an established market for LPG products, and a market for remaining dry gas – existed for the book value of the LPG Plant to be a valid proxy for FMV. (R-I ¶¶ 53.16 – 53.17).

1726. Claimants use the book value method because the FMV method leads to a lower compensation. (R-III ¶ 195). With adjustments like the "*impairment test*" or the "*mark-to-market process*", as required by international accounting standards, a book value can be made to reflect the actual FMV. FTI ignored the impairment of the LPG Plant mentioned in the Tristan Oil Annual Report for 2009, which would adjust the book value negatively. (R-III ¶¶ 196 – 199; RPHB 2 ¶ 706).

1727. The RBS valuation report conducted as part of the KMG EP Due Diligence in September 2009 and which Claimants consider to have been prepared by "*world class experts*" proves that Claimants' valuation of the LPG Plant, and other assets, are bogus. The RBS report estimates the value of the LPG Plant to be between USD 47 – 86 million, with a median of 67 million that is dependent on availability

of unsubstantiated third-party gas. This valuation disproves Claimants' exaggerated claims for the LPG Plant. The values that RBS attributed to the LPG Plant, even under the assumption that third party gas would be available, are nowhere near the costs that TNG incurred for constructing the plant, and are even further from FTI's "*prospective valuation*." (RPHB 1 ¶¶ 825 – 828, 986 – 987, 989).

1728. RBS, even when taking third party gas into account, only arrives at a value of negative USD 4 million to USD 67 million for the LPG Plant. This supports Respondent's view that Claimants' decision to build the LPG plant was fatally wrong. Applying RBS values, Claimants invested USD 245 million to create an asset that, in the best case scenario, had a value of only USD 67 million. They lose between USD 245 million and USD 178 million as a result of building the plant. (RPHB 2 ¶¶ 829 – 832).

1729. In the Hearing on Quantum, Mr. Rosen conceded that Claimants were seeking USD 87,077,000 in overcompensation for the FMV of the LPG Plant. Leaving aside his other errors, Mr. Rosen stated that FMV of the LPG Plant should be determined on a cost basis, and was, therefore, worth USD 245 million – not the USD 329 million that Claimants claim. Apparently, Claimants increase their FMV by adding an "*uplift*" for the processing of gas from the Contract No. 302 properties, which they assume will be available. This "*uplift*" factor is, in effect, double counted since it is already taken into consideration in the FMV. Respondent denies that an uplift would have occurred absent delays in construction. Due to the lack of demand for gas at the time, the Tolkyn production was severely curtailed and there would, as a result, have only been a very limited gas supply for the LPG Plant. (RPHB 1 ¶¶ 883 – 891; RPHB 2 ¶¶ 110).

1730. FTI's Mr. Rosen confirmed at the Hearing 2 that he determined the value of the LPG Plant on the cost basis because his assumption (based on Mr. Broscaru's witness statement and the assumption that Contract 302 and third party gas from the CAC Pipeline) that it was a going concern. The LPG Plant, however, was never a going concern – it would have been uncommercial to complete and operate the plant. All of Mr. Rosen's assumptions are unproven. There was no guarantee of gas from the Contract 302 properties. There was no guarantee of gas from the CAC Pipeline. Claimants, finally, have produced no evidence of their parties to supply gas to the LPG Plant. (RPHB 2 ¶¶ 678 – 687).

1731. Also, the cost basis is not an appropriate violation approach because prospective buyers consider the future income potential of an asset. The cost approach is not a suitable way to arrive at a FMV, even if the asset is not yet generating cash flows because it relies on the untenable assumption that the LPG Plant would be profitable. On top of that, the approach is illogical, awarding different damages based on the amount actually spent. Even the KMG EP, in Project Zenith, agreed that for the formation of a binding offer, the DCF method – and not a cost-based approach – would need to be applied. (RPHB 1 ¶¶ 897 – 906; RPHB 2 ¶¶ 672 - 677).

1732. Claimant's' "*prospective valuation*" of the LPG Plant has been tainted by their unrisked valuation of the Contract 302 properties. Thus, even Mr. Rosen's cost basis approach is based on a 2% chance that significant amounts of gas could be

economically produced from the supposed Interoil Reef. Any investor, however, would take the risks and the GCOS into account. (RPHB 1 ¶¶ 892 – 893).

1733. Mr. Broscaru makes the unsubstantiated assertion that the net present value of the LPG Plant would reach USD 450 million. FTI then used this number in their calculation to arrive on a value of USD 7 – 92 million, depending on the run time of the plant. Claimants instructed Mr. Broscaru to refuse to answer questions regarding these assumption. In any event, FTI admits that this is a gross miscalculation of at least USD 358 million, 38 pages later. In any event, even on their own assumptions, TNG should have arrived at a net present value of the LPG Plant of USD 51.2 million, even assuming a 20-year run-time. FTI made this error by understating the discount rate, disregarding administrative costs, and failing to consider tax – not to mention failing to consider the availability of third party gas. FTI desperately tries to assist Claimants by conveniently disregarding documents (Ascom LPG Business Plan) and by applying irrelevant US inflation (thereby driving capital expenditure down and increasing the prospective valuation) rather than Kazakh inflation. (RPHB 2 ¶¶ 661 – 671).

1734. Deloitte identified two additional methodological errors by FTI. These include that FTI used the same discount rate for the "*prospective*" valuation of the LPG Plant as for their other valuations, which was incorrect since FTI applied different tax rates to the LPG Plant. The applicable discount rate was, thus, understated by 1% and the prospective value of the LPG Plant was, therefore, overstated by USD 20.3 million. Costs were also underestimated and this resulted in an overstatement of value by USD 3.3 million. (RPHB 1 ¶ 580).

1735. Claimants' claim for a portion of the "*prospective value*" of the LPG Plant is bound to fail because it neglects even known certainties and risks (like the expiration of Contract. 302). While they based their initial prospective value on the assumption that gas from third parties and Contract 302 would be processed, they now provide the prospective value to compensation for the situation that the Interoil Reef may have been discovered and found to produce appropriate volumes of gas. FTI has adjusted their "*prospective value*" from USD 408 million, to USD 329 million, to USD 308.7. The absurdity of FTI's calculation is obvious when compared to the USD 67 million valuation that RBS arrived at – under the assumption that the LPG Plant would work at full capacity for 20 years. (RPHB 2 ¶¶ 707 – 713).

1736. Regarding the third party assessments of KPM and TNG's value, including the LPG Plant, the representative of KNOC, Total E&P, KMG EP and OMV have confirmed that their bids did not represent FMV. Instead, they were made to gain access to the data room and further investigation would be needed before arriving at FMV. As confirmed by Mr. Suleymenov's testimony at the Hearing on Quantum, their bids were made based on limited information and they were often made for strategic and not valuation driven reasons. (RPHB 1 ¶¶ 974 – 977). At Hearing on Quantum, Mr. Chagnoux explained that his bid on behalf of Total E&P was artificially high because Claimants' investment bank had conditioned access to the data room on higher bids. Mr. Chagnoux confirmed that he believed the LPG Plant to have a negative value. (RPHB 1 ¶¶ 200 – 202; 978 – 979).

1737. The Republic never had any intention of completing construction in the LPG Plant. Preservation work was initiated beginning in March 2009. Costs associated with

this preservation would need to be deducted from the USD 245 million allegedly spent until that time. As to the operation of the LPG Plant, since Claimants abandoned the plant, KMT (which subsequently assumed the trust management responsibilities of KMG NC) has been forced to employ guards to protect the Plant and re-employ minimal staff to avoid social tension. Claimants have given no explanation as to why the application at Exhibit C-583 in any way indicates that KMG is making plans for the future of the LPG Plant. (R-II ¶ 714; C-583 is undated). Turning to the "*List of Investment projects of the Mangistauskoi Region, which are being supervised in 2011…*", the content of that is not attributable to the Respondent as it did not arrange for such a document to be published. At best, it should be considered as mere promotional material. Contrary to Claimants' contention, the Republic is not training experts to run the LPG Plant. (R-III ¶¶ 203 – 207; RPHB 1 ¶¶ 895 – 896).

1738. Another relevant aspect, ignored by Claimants, is the Vitol Joint Venture Agreement. Under that Agreement, Claimants would not have kept 100% of the future profits allegedly arising from the operation of the unfinished LPG Plant. Respondent does not have the specifics of the Vitol Joint Venture, but many aspects were provided through Mr. Lungu's testimony. Respondent puts Claimants to proof that the proceeds they could have earned operating the LPG Plant under the Joint Venture Agreement are more than half of whichever asset value they are claiming. (R-III ¶¶ 208 – 211; RPHB 1 ¶¶ 907 – 908; RPHB 2 ¶ 729).

1739. The Republic denies Claimants' contentions regarding alleged decision by Vitol to retract its investment in the LPG Plant, which in any event would not be attributable to the Republic. (RPHB 2 ¶ 111).

1740. Vitol is also a factor in the costs analysis. Claimants have admitted that of the USD 245 million in damages for investment costs that they demand, at least USD 66 million were contributed by Vitol. TNG's alleged investment costs are, at best, therefore, USD 179 million. (RPHB 2 ¶¶ 279 – 270).

1741. At the most, the Tribunal could award not more than 50% of any of the assumed value to Claimants, if it were to assume liability and if it were to assume a positive value for the LPG Plant. Claimants, however, are not entitled to damages because the unfinished LPG Plant was never taken from Claimants – they abandoned it. The value of the LPG Plant is negative. What Claimants seek is compensation for the loss of the Plant. It is undisputed that Vitol, Ascom, TNG, and Terra Raf entered into a Joint Operating Agreement on 27 June 2006, pursuant to which the bulk of the profit of the LPG Plant would be generated by the Joint Venture Company – not TNG. Ascom would only own 50% of the shares in the company. If they now demand compensation for an alleged treaty breach, at most they can demand 50% of the asset value, since neither TNG nor Ascom would have received more than 50% of the profits of the LPG Plant. Accordingly, depending on how the Tribunal issues its award, whether based on the "*prospective value*", the "*cost basis valuation*", the RBS valuation, that amount would need to be halved. Anything more would be unjust enrichment. Claimants have failed to produce evidence of any "*obligations toward Vitol*" that would change this. (RPHB 2 ¶¶ 656, 714 – 728).

1742. Since the LPG Plant has a negative enterprise value, Claimants are, at best, entitled to the salvage value of its components. Prof. Marboe and the World Bank agree that it is recommended to use "*the salvage value for the valuation of companies which do not have a proven record of profitability*." Likewise, this measure has been used by arbitral tribunals if they consider the business to lack future prospects, due to an expropriation (*Eastman Kodak v. Iran*) or due to social and economic changes in wake of the Iranian Revolution (*Sola Tiles v. Iran*). The tribunal in *Sedco v. IMICO* used the salvage value to determine FMV in wake on an expropriation. *Tavakoli v. Iran* also considered valuation based on the liquidation value. Claimants' expert FTI even acknowledged that salvage value must be used when it stated "*we assume that the plant would not continue to operate under negative cash flow conditions and would be sold to another producer of natural gas*." (R-III ¶¶ 153 – 162; see also R-I ¶¶ 53.18 – 53.20).

3. The Tribunal

1743. First, in addition to an application of the Tribunal's considerations in the chapter on causation above in this Award, the Tribunal has no doubt that Respondent's actions found above to be in breach of the ECT, in particular were a cause for the delay and then discontinuance of Claimants' completion of the LPG Plant.

1744. In fact, President Nazarbayev himself confirmed this in his Instruction of 19 November 2009 (C-23, attached to Blagovest letter). And, this was further confirmed by MEMR in its Report on its inspections of January 2010 (C-599, Minutes of Inspection of TNG, January 25 – February 5, 2010, at 23).

1745. The Tribunal is not persuaded by Respondent's and their experts' conclusion that the LPG Plant is a failed project and must be considered to have a negative value and no damages at all can be claimed by Claimants. If that were so, Respondent would not have been ready to invest further expenses in the completion of the Plant, after Respondent had taken control of the Plant. However, there were obviously plans to complete it. Publicly available information indicates that Respondent was in fact preparing to open the LPG Plant in 2012. In a document entitled "*List of Investment projects of the Mangistauskoi Region, which are being supervised in 2011*," there is a specific reference to the LPG Plant under "*Regional Projects*" The project is identified as having a cost of USD 315 million (47 billion Tenge) and it was expected to start up in the first half of 2012 with a capacity of 7 mcm of gas per day (2nd FTI Report § 7.7 and fns. 138 and 139). Respondent's argument that it cannot be identified with this document is not persuasive. The LPG Plant was also listed on website of Kazakhstan's Embassy in Israel under the caption "*Large Investment Projects in Kazakhstan through 2012*" with the same project costs (FTI 2nd Report § 7.7 and fn140).

1746. Regarding the value of damages caused by Respondent's action, the Tribunal has taken note of the various extensive arguments submitted by the Parties relying on their respective experts' reports. However, the Tribunal considers that it does not have to evaluate these reports and the very different results they reach. In the view of the Tribunal, the relatively best source for the valuation in the period of the valuation date accepted by the Tribunal are the contemporaneous bids that were made for the LPG Plant by third parties after Claimants' efforts to sell the LPG Plant, both before and after October 14, 2008. Prospective purchasers bid on the

Plant, not as scrap but obviously as prospectively operational. This is reflected in the undisputed indicative offers made by interested buyers in 2008, which valued the LPG Plant at USD 150 million on average. In this context, the Tribunal is not persuaded by Respondent's argument that these offers did not reflect the anticipated price bidders were ready to pay, but were only strategic offers to gain access to the data room. In this context, the Tribunal attributes a limited evidentiary value to the testimony of Respondent's witnesses from KNOC and Total E&P, since these foreign companies remain active investors in Kazakhstan and, thus, for understandable reasons, have an interest to maintain a good relationship with the government of that country.

1747. On the other hand, the Tribunal considers it to be of particular relevance that an offer was made for the LPG Plant by state–owned KMG at that time for **USD 199 million**. The Tribunal considers that to be the relatively best source of information for the valuation of the LPG Plant among the various sources of information submitted by the Parties regarding the valuation for the LPG Plant during the relevant period of the valuation date accepted by the Tribunal, the Tribunal.

1748. Therefore, this is the amount of damages the Tribunal accepts in this context.

L.VII. The Parties' Arguments Concerning the Tristan Notes

1. Arguments by Claimants

1749. Claimants explain the Tristan note structure:

> *571. The notes that were issued by Tristan Oil Ltd., […] provided a portion of the capital for construction and operation of the KPM and TNG oil and gas assets […] Tristan issued notes with a face value of US$ 531.1 million, which matured on January 1, 2012. While Tristan is the nominal principal obligor on those notes, Tristan is a special purpose entity that was created solely for the purpose of raising capital through the note issuance to fund KPM and TNG. It has no operating assets with which to repay the notes. The expectation of all parties involved, including the Tristan noteholders, was that KPM and TNG oil and gas operations would provide the funds to repay the principal and interest on the Tristan notes. Consequently, KPM and TNG guaranteed repayment of all obligations under the Tristan notes. (C-II ¶ 571).*

1750. Tristan has an integral relationship to Claimants, TNG, and KPM – and this relationship was recognized in Respondent's Statement of Defense. Any disposition of Claimants' interest in, or assets of, KPM and TNG requires arrangements to satisfy the Tristan note principal and interest held outside of, but guaranteed by, TNG and KPM. This was reflected in indicative offers received in Project Zenith. (C-III ¶¶ 91 – 92, partially quoted; *see also* C-II ¶¶ 572 - 575).

1751. That Claimants are allowed to claim for damages to the noteholders if Claimants are liable to the noteholders for such alleged damages is permissible was conceded by Respondent in its Rejoinder on Quantum. The only issue before the Tribunal is

whether there is a causal link between the State's illegal conduct and the companies' inability to satisfy their debts. (CPHB 1 ¶¶ 602 – 606).

1752. In large part, Respondent's arguments with regard to the Tristan debt rest on the assumption that the Tristan debt is true third-party debt for which Claimants have no liability. This is incorrect, as "*Claimants: (1) have always been obligated to repay the Tristan noteholders from the proceeds of any award; (2) further reinforced that obligation through the Sharing Agreement, and (3) have repeatedly, consistently, and unequivocally undertaken before this Tribunal (and for the avoidance of doubt, hereby commit and undertake yet again) to repay the Tristan noteholders from the proceeds of any award under the procedures set out in the Sharing Agreement*." Ascom and Terra Raf are also liable to repay the Noteholders, pursuant to Section 6 of the Pledge Agreement. (CPHB 1 ¶¶ 617 – 620, partially quoted; CPHB 2 ¶ 321).

1753. Claimants explain that they are responsible for the Tristan debt, which was issued with a fact value of USD 531.1 million and matured on 1 January 2012. Under the note structure, Tristan issued the notes. Tristan is an SPV with no assets that loaned the proceeds of those notes to KPM and TNG. The expectation was that KPM and TNG would repay the notes from their profits. KPM and TNG guaranteed repayment of all obligations under the notes. Ascom and Terra Raf also pledged 100% of their Participation Interests in KPM and TNG (all of their equity in the companies) and the money to be received with respect to those interests as security for the Tristan notes. Contrary to Respondent's reading of the Pledge Agreements, the claims would not be limited to the value of the shares pledged. Section 6(b) of the Pledge Agreements broadly applies to any and all dividend and other payment or distributions of any kind relating to the Participatory Interest, without restriction. This language is broad enough to include the benefit of payments Claimants receive as compensation for Kazakhstan's mistreatment of expropriation of the companies. (CPHB 1 ¶¶ 621 – 625).

1754. Claimants also point out that "*as Squire Sanders noted in its legal due diligence review for KMG E&P, transfer of the participation interests pursuant to the Pledge Agreements is subject to the State's preemptive right under Article 71 of the Subsoil Law. That raises the prospect that Ascom and Terra Raf may be unable to deliver their Participation Interests in KPM and TNG to the noteholders, and instead would receive compensation from Kazakhstan for those shares upon the State's exercise of its preemptive right. It thus stands to reason that a key purpose of the provision in Section 6(b) was to ensure that the noteholders received the benefit of any payments from Kazakhstan in respect of Ascom and Terra Raf's Participation Interests in KPM and TNG. That is exactly what an award in this arbitration would represent, albeit as the result of violations of the ECT rather than through the legitimate exercise of Kazakhstan's preemptive right*." (CPHB 1 ¶ 625).

1755. Claimants reject Respondent's interpretation of the Pledge Agreement as it would require Claimants to press unreasonable, aggressive arguments in an effort to "stiff" creditors to mitigate losses and reduce damages that Respondent must pay. (CPHB 1 ¶ 626).

1756. The Sharing Agreement is only relevant insofar as it confirms Claimants' intention to perform their contractual obligations to the Tristan noteholders – it has no bearing

on the calculation of damages due as of the valuation date. The Pledge Agreements always obligated Ascom and Terra Raf to turn over any proceeds of this arbitration to the Tristan noteholders. The Sharing Agreement simply reorders the respective priorities of the Claimants and the Participating Noteholders so that Claimants will share in any proceeds of this arbitration. On 14 February 2013, the Sharing Agreement was accepted by 99.8% of the noteholders, effectively amending the notes and related security arrangements for all noteholders. The Sharing Agreement did not create or materially alter Claimants' obligations regarding the Tristan debt. Instead, it was a renegotiation of Claimants' existing obligations and not a voluntary assumption of new liability. The suggestion that Claimants voluntarily assume liability to share 70% of any award when they had no obligation to do so is absurd. The Sharing Agreement does not materially reduce Claimants' basic liability under the Tristan debt, either. It is a private matter between Claimants and the noteholders and has no bearing on Kazakhstan at all. (CPHB 1 ¶¶ 626 – 630, 632; CPHB 2 ¶¶ 325 - 327).

1757. The fundamental purpose and effect of the Sharing Agreement is to provide both sides with a clear set of agreed rights and obligations for the event that the award in this arbitration is less than requested by Claimants. In such event, Claimants will share in the award and, if noteholders have recovered at least 70% of the amount outstanding, will receive a total release in 2016. In exchange, the noteholders will ensure that Claimants are incentivized to pursue collection of any award (which may not be in Claimants' interest if Claimants are not to receive proceeds), and also to receive a right to approve any settlement. The Sharing Agreement changes the order of allocation of any award proceeds between Claimants and noteholders, until the noteholders are fully repaid. (CPHB 1 ¶¶ 631, 636).

1758. Claimants explain how, against the background of the Sharing Agreement, awarding equity would unjustly enrich Respondent at Claimants' expense.

> *[…] if the assets of KPM and TNG that Kazakhstan seized had a fair market value of US $1 billion and the outstanding Tristan debt were US $531 million, the value of Claimants' equity in KPM and TNG would be US $469 million. If the Tribunal awarded just the equity value (US $469 million in this example), that entire amount would go to satisfy Ascom and Terra Raf's liability to the Tristan noteholders under Section 6 of the Pledge Agreements (without considering the impact of the Sharing Agreement, which is discussed below). In other words, an award of equity value would in fact give Claimants less than the full value of their equity because some (and perhaps all) of the award would go to satisfy liabilities to third parties that, but for Kazakhstan's violations, would have been satisfied with the profits of KPM and TNG. In contrast, an award of the enterprise value (US $1 billion in this illustrative example) would satisfy Ascom and Terra Raf's liability to the Tristan noteholders, leaving Claimants with the value of their equity interest in KPM and TNG (US $469 million in the example), free and clear of all debts. Thus, an award of enterprise value is the proper measure of compensation to put Claimants in the position they would have occupied but for Kazakhstan's violations.*
>
> *[…] an award of equity value would unjustly enrich Kazakhstan by allowing it to obtain assets unencumbered by liabilities for a fraction of their value. In the same example, for instance, an award of equity value*

would allow Kazakhstan to obtain assets worth US $1 billion while paying only US $469 million to Claimants. Claimants' subsequent payment to the noteholders under the Pledge Agreements would effectively eliminate any claims that the noteholders may have against the assets of KPM and TNG, or against Kazakhstan itself (to the extent that the noteholders have any claims directly against Kazakhstan, which to date they have never asserted). Thus, an award of equity value in this illustrative example would allow Kazakhstan to keep assets worth US $1 billion while paying only US $469 million, and without facing any further liabilities. In contrast, an award of the enterprise value (US $1 billion in this example) would require Kazakhstan to pay the full value of the assets its expropriated, and would not subject Kazakhstan to any further liability (because any claims of the noteholders would be extinguished by Claimants' performance of their obligations under the Pledge Agreements). (CPHB 1 ¶¶ 634 – 635).

2. Arguments by Respondent

1759. The principal on the Tristan notes must be deducted from the asset values calculated by Claimants' expert since, due to the peculiarities of the securing mechanisms, Claimants can practically no longer be liable for and cannot claim the noteholders' alleged damage. Under Claimants' own case, due to the alleged breach of the ECT, Claimants are practically not liable to the noteholders. In any event, Claimants do not have standing to claim the noteholders' alleged damage. Further, the shares must be worthless, due to Respondent's allegedly illegal action. Thus, any claim by noteholders could not create a loss for Claimants. Assuming that there was a breach of the ECT, this would amount to a financial gain, advantageous to Claimants. Thus, it does not matter that Respondent did not assume or perform KPM's and TNG's guarantee obligations, as Claimants allege. (R-III ¶¶ 379 – 383, 389 – 390; RPHB 2 ¶¶ 923, 945).

1760. Even if Claimants were not freed from liability, their claim for recovery of the Tristan note principal would fail. Under the *Chorzów* principles, which the Parties agree apply here and according to which "*compensation must wipe out the effect of the allegedly expropriatory state action*" (looking to the situation that would have existed absent the alleged breach of international law), Respondent is not liable for the Tristan note principal. With or without breach, Tristan Oil would have been liable for the Tristan note principal and Claimants would have been acting as guarantors for the debt. There was no worsening of the situation through the Respondent's allegedly illegal actions. Claimants must have been aware of this, only including a claim for principal in passing in their Reply Memorial on Quantum. (R-III ¶¶ 392 – 393; RPHB 1 ¶ 1068; RPHB 2 ¶¶ 940 – 941).

1761. Under the *Chorzów* principles, compensation is to be achieved according to the FMV of an asset. The FMV takes the asset's debt into account. After all, a willing buyer would never simply pay the enterprise value, since debt infringes on the buyer's ability to realize profits from the purchase. The so-called Sharing Agreement entered into on 17 December 2012 foresees that proceeds from an award in this arbitration will be shared between Claimants and the noteholders in a roughly 30% / 70% split. Claimants effectively admit that the equity and not the enterprise value is the appropriate tool to value the assets when they base their claim on the idea that the Sharing Agreement acts as a security for the debt.

However, they essential argue that, if the debt is not added, the amount awarded would immediately go to the noteholders, leaving nothing for Claimants. Notably, Claimants did not try to gross up their claim by adding the debt that they continue to owe for taxes, which would also be deduced from an award. Investment practice strongly disfavors tax gross-ups, even when those are based the argument that an award in their favor would be subject to higher levels of taxation than the profits they would have been expected to make without interference. (RPHB 1 ¶¶ 1056, 1068 – 1074, 1097 – 1098).

1762. It should also be noted that Claimants do not allege that they are liable for noteholder debt no matter what. Instead, they state that that liability would only come into existence with an award. Then, they attempt to gross up the award by adding this debt to their damages. Claimants were never liable for the debt. It is not the case that Claimants had been supposed to hold the cash flows created by KPM and TNG and would then forward those to noteholders. Instead, repayment would go through Tristan, who is not a Claimant. (RPHB 1 ¶ 1078; RPHB 2 ¶¶ 941 – 942). Section 6 of the Terra Raf and Ascom Pledge Agreements create no liability for those Claimants toward noteholders. It only refers to dividends and distributions and, therefore, excludes payments from a hypothetical award. (RPHB 2 ¶¶ 945 – 948).

1763. The claim for recovery for interest and penalties must also fail. It has not been shown that any Tristan noteholder has brought a claim against Claimants for the note interest, penalties, or principal or that Claimants have paid anything to noteholders. Absent this proven damage, the claim must be dismissed. None of the Claimants remain liable for any of the noteholder debt, not even as a result of the Pledge Agreements. Under Section 6 of Ascom's and Terra Raf's Pledge Agreements, KPM and TNG only pledged to pay shareholders as part of a payout of equity. Payments by third parties (such as a payment of an award), are not dividends or distributions, meaning that, therefore, the noteholders are not entitled to them. (R-III ¶ 394; R-I ¶¶ 57.1 – 57.3; RPHB 1 ¶¶ 1075 - 1076).

1764. In any event, any liability based on the Sharing Agreement is Claimants and not Respondent's. Respondent cannot be held liable for Claimants' unilateral action. (RPHB 1 ¶¶ 1077, 1188).

1765. In response to Claimants' allegation that, if the Tribunal does not award the Tristan rate, it should include interest that has accrued on the Tristan notes since 14 October 2008, Respondent states that this allegation does not hold water. Even without a breach of international law, Tristan Oil would have been liable for the note principal, and for the interest payments. Further, Respondent cannot be liable for interest between 14 October 2008 and 1 July 2010, since Tristan only failed to make interest payments starting on 1 July 2010. Finally, since Claimants have never specified the amount of interest that accrued during the time period, Claimants' claims related to Tristan Note Interest should be rejected in their entirety. (RPHB 2 ¶¶ 1014 – 1018).

1766. Even if the Claimants had suffered damage, a debt gross up is contrary to international law and arbitral practice (as demonstrated in *Impregilo v. Pakistan* and Dr. Stern's dissent in the *Occidental* case, and *PSEG v. Turkey*) and would enable the noteholders to circumvent jurisdictional and substantive hurdles of their

own potential claims. There is no reason to assume that the Parties to the ECT intended that individuals could attach themselves onto another individual's claim to circumvent the ECT's requirements. Like in *Impregilo* where the investor was not permitted to present claims of his joint venture partner, here, too, the Claimants should not be permitted to present this claim on behalf of noteholders. Claimants attempt to vest this Tribunal with jurisdiction to decide on the interpretation of the pledge agreements, even though they have agreed in those pledges that an ICC tribunal will have jurisdiction. Respondent's general offer to arbitrate contained in the ECT does not entail an offer to have matters regarding the interpretation of private contracts be arbitrated as well. In addition, if Claimants are successful, it will have the practical consequence that Claimants serve for the noteholders to realize the noteholders' claim. (RPHB 1 ¶ 1085 – 87; RPHB 2 ¶¶ 934 – 939, 944, 950).

1767. Even if there were such a claim from a noteholder, the Claimants have failed to prove causation, namely that the alleged action of Respondent prevented timely payments to be made on the Tristan notes. Instead, any damages suffered could have been caused by a variety of reasons, including the economic crisis, falling oil prices, poor business decisions, or the Guarantors' debt overload. (R-III ¶¶ 395 – 396; R-II ¶ 723).

3. The Tribunal

1768. The Tribunal recalls its considerations above in this Award in the chapter on the treatment of debts. In particular, it recalls the following conclusions regarding the Tristan Notes:

1769. Regarding the Tristan Notes as the by far largest debt, Respondent expressly agreed in its Rejoinder on Quantum (R-III ¶ 383) that, insofar as Claimants remain responsible for the Tristan debt, enterprise value is the correct measure of damages. While Respondent's statement at the May 2013 hearing may perhaps be understood as changing that position, it did not attempt to reconcile its prior statement and the Tribunal still agrees with Respondent's earlier position.

1770. Based on the information before it, the Tribunal concludes that Ascom and Terra Raf are still liable to repay the noteholders pursuant to Section 6 of the Pledge Agreement. That provision expressly includes in the payments to be made to the pledgeholder "*other payment or distribution of any kind*." The Tribunal sees no reason why this general language should be restricted to payments of KPM and TNG alone as Respondent has argued at the May 2013 hearing (Tr. day 1, pp. 246 and 247). Quite to the contrary, if Claimants, in the present arbitration, would not claim the value of the Tristan debts, they might be held liable for not pursuing the interests of the pledgeholders.

1771. Having again examined the Parties' specific arguments summarized above regarding the Tristan Notes, the Tribunal confirms that these conclusions need not be changed and that no reduction of any damages found is due to the Tristan Notes.

L.VIII. Moral Damages

1. Arguments by Claimants

1772. Respondent has conceded that "*moral damages are permissible*" and that they may be awarded in the following exceptional cases in investment treaty arbitrations, such as where:

> – *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;*
>
> – *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*
>
> – *both cause and effect are grave or substantial. (C-II ¶ 617, quoting from R-I ¶ 55.2).*

1773. The events here, including the prosecution and imprisonment of KPM's in-country manager, were exactly those which would warrant the Tribunal, in its discretion, to award moral damages, **in an amount of at least 10% of the total compensatory damages awarded to Claimants**. (C-III ¶¶ 95 - 97). While it is an exceptional remedy, this is a case where such an award is appropriate:

> *96. There are only a modest number of investment treaty cases on record in which a state's mistreatment of an investor was so severe, intentional, and multi-faceted as Kazakhstan's treatment of Claimants in this dispute. There are even fewer cases on record in which that treatment was admittedly ordered by the Respondent's Head of State and carried out by dozens of state organs and instrumentalities over a period of years. Claimants have demonstrated that the mistreatment they suffered, while exceptional by investment treaty standards, was part of a "playbook" that Kazakhstan's rulers have employed in similar contexts. Claimants have also shown that awards of moral damages are becoming increasingly accepted in investment treaty practice, as demonstrated by the recent award in Desert Line v. Yemen. (C-III ¶ 96).*

1774. Respondent's idea that a moral damages awarded requires a precise repeat of the events at issue in *Desert Line* is nonsense. Rather, Respondent has identified a framework within which moral damages can be awarded, and Respondent's conduct fits that framework. Here, there was an actual, illegal imprisonment and a threat that all of Claimants' general managers would meet the same fate. By July 2010, Respondent had succeeded in driving Claimants' key personnel from Kazakhstan out of fear of imprisonment. It was the stress and anxiety to *Desert Line's* executives and the injury to *Desert Line's* credit, reputation, and prestige that caused that Tribunal to award moral damages. The parallels between that case and this one are striking. The fact that Mr. Cornegruta escaped from the false imprisonment does not absolve Respondent of liability. This Tribunal has discretion in awarding a figure that it finds most appropriate to compensate for the harm suffered by Claimants, and is not limited to the USD 1 million awarded in *Desert Line*. (C-II ¶¶ 619 – 623; C-I ¶¶ 453 – 464; CPHB 1 ¶ 659).

1775. Claimants remind the Tribunal that the claim for moral damage is a claim for Claimants' moral suffering. Claimants suffered through years of Kazakhstan's misconduct. Respondent has not disputed Mr. Cojin's testimony that KPM and

TNG's managers worked in Kazakhstan under threats and harassment, while being targeted, monitored, and followed by the Financial Police, before they were finally forced to flee the country. Kazakhstan has a responsibility to compensate Claimants for the stress, anxiety, mental anguish, and reputational harm that it imposed on them through its intimidation tactics, false criminal accusations, defamation, and the ultimate seizure of its assets. (CPHB 1 ¶¶ 658 – 663). The Tribunal should exercise its discretion to award substantial moral damages to Claimants. (CPHB 2 ¶ 395).

2. Arguments by Respondent

1776. Claimants' claim for moral damages is disingenuous, at best. First, that the Republic's actions with respect to Mr. Cornegruta and the search of KPM's and TNG's premises on 6 May 2009 were legal and proper. This bars any claim for moral damages. The allegation that it was an aggressive and intimidating raid is based only on Mr. Stejar's statements, which lacked credibility and contradicts the testimony of Mr. Rakhimov. Second, Claimants have not suffered any moral harm that would warrant an award for moral damages in the amount claimed. (R-III ¶¶ 499 – 501; RPHB 2 ¶¶ 1025 – 1031).

1777. While the Parties agree that moral damages may be awarded in exceptional circumstances, these do not exist in the present case. The *Lemire* requirements have not been fulfilled. Further, this case is distinguishable from the *Desert Line* case, where armed tribes attacked the investor's premises and the Yemeni military put the premises under siege. The 6 May 2009 search, as demonstrated in unchallenged witness testimony, was conducted by "*unarmed officers [who] took [the] utmost care to carry out the search without creating more disturbance than necessary*." Accordingly, it cannot serve as the basis for a claim of moral damages. (R-III ¶¶ 502 – 507; R-I ¶ 55.2).

1778. An award of moral damages would only benefit Anatolie and Gabriel Stati – neither of whom has suffered any more harm in the present case. The person who allegedly suffered moral harms, Mr. Cornegruta, is apparently not on speaking terms with Anatolie. Stati and has not been involved in this arbitration. Moral damages to Messrs. Stati, as a result of Mr. Cornegruta's imprisonment, have not been proven. (R-III ¶¶ 508 – 513, 1028).

1779. Claimants have since toned down their initial demands for compensation, the previous calculation of which was extraordinary and reminiscent of US-style punitive damages. Claimants are claimed moral damages of at least **USD 272.87 million** (10% of the claimed USD 2,728.2 million). Not only has no investment award for moral damages ever come close to such an amount, there is no case that points to moral damages being calculated as a percentage of the compensatory damages award. Indeed – there is no necessary connection between the tangible and moral harm allegedly suffered (i.e. "*there is no connection between the financial losses following from the assets being taken into trust management and the alleged stress and anxiety supposedly following from the May 2009 search or the imprisonment of Mr. Cornegruta*."). (R-III ¶¶ 514 – 518; R-I ¶¶ 55.2 – 55.3, RPHB 2 ¶ 1031).

1780. Insofar as these damages are disguised punitive damages, there is no basis in international law for such an award, and tribunals have firmly rejected claims for punitive damages in the past. (R-III ¶ 518).

3. The Tribunal

1781. The Parties agree that a claim for moral damages can only be justified in investment treaty cases in very exceptional circumstances.

1782. Therefore, Claimants, having the burden of proof, must meet a very high threshold to show a liability for moral damages.

1783. Indeed, as Claimants concede, there are only a modest number of investment treaty cases on record in which a state's mistreatment of an investor was so severe, intentional, and multi-faceted as Kazakhstan's treatment of Claimants in this dispute. There are even fewer cases on record in which that treatment was admittedly ordered by the Respondent's Head of State and carried out by dozens of state organs and instrumentalities over a period of years.

1784. Obviously, the present case is distinguishable from the *Desert Line* case, where armed tribes attacked the investor's premises and the Yemeni military put the premises under siege. The Tribunal further agrees with Respondent that the *Lemire* requirements have not been fulfilled.

1785. While, above in this Award in the chapter on liability, the Tribunal has identified a timeline of conduct by Respondent that it considers must be viewed together and concluded to be a breach of its ECT obligation to provide FET, the Tribunal did not accept Claimants' characterization that this was a "*playbook*" by Respondent. And even if this were so, this would not by itself mean that moral damages are due.

1786. Without having to go into detail on the general question whether and under which exceptional circumstances awarding moral damages might be justified in investment treaty cases, the Tribunal concludes that Claimants have not fulfilled their burden of proof for facts that would make it necessary to examine that question any further.

L.IX. Tax Claims

1. Arguments by Claimants

1787. Claimants do not address tax issues in their Reply Memorial on Quantum and state that tax assessments are not at issue in the Quantum Hearing. Claimants do not seek to recover any tax payments as damages. They protest the inclusion of the Balco expert report and argue that the tax assessments, which were part of the harassment campaign, were part of the liability phase. Neither the Deloitte report, the Balco report nor the Rahimgaliev witness statement relies on the validity of the tax assessments for valuation calculations. The report and the second Rahimgaliev witness statement are an improper backdoor attempt to get liability issues heard in this quantum hearing. (C. ltr. to Tribunal 10.12.12). Claimants' arguments concerning the validity of the tax assessments are found at C-II ¶¶ 233 – 236.

1788. Respondent's tax claim is part of Respondent's campaign to harass Claimants. Deducting it from amounts owed to Claimants would be contrary to international law. In any event, USD 62 million (USD 81.2 million in CPHB 2) is not the actual amount that Claimants would owe if Kazakhstan's legal argument were correct. Respondent has not presented evidence of the actual amount that the net tax debt would be, even if the legal argument were correct. (CPHB 1 ¶¶ 648 – 649; CPHB 2 ¶ 133).

1789. The USD 62 million tax claim was manufactured and, as Scott Horten and PwC confirm, is part of a well-recognized strategy that Kazakhstan uses to pursue investors who have fallen out of favor with the President. The claim is incorrect on the merits. Claimants were entitled to use the rate contained in Art. 20, and that contained in Art. 23 Tax Law contradicts the clear wording of the Subsoil Use Contracts. Even if Respondent were correct, however, the back taxes owed would be less than USD 62 million, as Prof. Balco agreed, since the issue would not be whether, but when, the drilling expenses could be deducted. Kazakh domestic courts resolved this issue in favor of Claimants, making this issue largely academic. (CPHB 1 ¶¶ 238 – 261).

1790. Procedurally, Respondent has raised this issue as a counterclaim. It has done this belatedly and solely to reduce the compensation owed to Claimants. If the Tribunal nevertheless decides to consider this claim, Kazakhstan bears the burden of proving that the position is correct (that taxes are lawfully owed), as well as the amount of taxes owed. Kazakhstan has proven neither. The corporate income tax dispute is a cash-flow issue that exclusively concerns the timing of deductions for drilling expenses – even if Kazakhstan's arguments were correct, Claimants would likely only owe a small fraction of the sum claimed because KPM and TNG could deduct all or nearly all of the drilling expenses, by today. (CPHB 2 ¶¶ 133 – 134).

2. Arguments by Respondent

1791. In part, Claimants' damages are based on an alleged improper assessment of taxes and duties against them. Tax issues have a significant impact on valuation. Respondent maintains that the assessments were made in accordance with the law and that Respondent is not liable for them. Respondent also applied the appropriate amortization rate. This is supported by Mr. Balco's expert report. (R-III ¶¶ 366 – 373).

1792. Any claim will need to be set off against the amount which Claimants owe Respondent due to their failure to correctly declare their taxable income. (R. ltr. to Tribunal 13.12.12). For KPM from the period 1 January 2005 to 31 December 2007, an additional 3,257,446.00 thousand Tenga was payable. For TNG for the same period, TNG is liable to pay an additional 5,906,027.2 thousand Tenga. (R-III ¶ 368).

1793. In its First Post Hearing Brief, Respondent calculated that KPM and TNG are liable for more than USD 81.2 million in tax debt, including penalties. Claimants admit that corporate back taxes were never paid by KPM or TNG. Claimants' dispute relates to the question of which amortization rate to apply to the companies' exploration expenses for 2005 – 2007. The tax committee applied the rate set out in Art. 23 of the applicable tax law (25%), but Claimants allege that the 100% rate

set out in Art. 20 should have been applied. Squire Sanders and PwC have confirmed that Respondent has applied the correct 25% rate. This was also confirmed in the expert report by Prof. Balco, which was not contested by Claimants. (RPHB 1 ¶¶ 1057 – 1061; RPHB 2 ¶¶ 963 – 965).

1794. Claimants wrongfully focused on the types of activities (own-account construction), rather than the purpose of the activities, which is the focus of the Kazakh Tax Code and the Subsoil Use Agreements. The Tax Code offers different depreciation rates on expenses relating to exploration and extraction, and those related to processing, including own-account construction and acquisition of equipment. This distinction is clear when viewing the grammatical interpretation in the Russian version of Art. 20 and 23 of the Tax Code. The language of the Tax Code and the Subsoil Use Agreements is consistent. None of Claimants' expenses referred to production (processing of new materials). Thus, Prof. Balco concluded that KPM's and TNG's expenditures were for exploration. The applicable tax depreciation rate for exploration under Art. 23 is 25%. (RPHB 2 ¶¶ 966 – 974).

1795. Respondent explained that the Tax Committee's February 2009 assessment did not constitute a reversal of a prior tax assessment, and this was confirmed by Mr. Rahimgaliev in the Hearing on Quantum, as well as in Claimants' own vendor due diligence of August 2008 which sets out the periods and types of taxes for which audits had been conducted. (RPHB 1 ¶¶ 1061 – 1062).

1796. Kazakh courts have confirmed the correctness of the Tax Committee's position. A clear look at the decision of the Supreme Court of 3 November 2010 overruling the decisions of the appellate and cassation courts demonstrates that Claimants' position was not vindicated, but rather was groundless. The Supreme Court's decision was reasoned and based on the proper construction of the relevant legislative position. The Court did not change a previous position, as alleged by Prof. Maggs. The decisions cited by Prof. Maggs (10 June 2008 and 11 February 2009) addressed only the point in time at which a taxpayer may claim an incentive. Neither case concerned whether the 100% depreciation rate could be applied to own-account construction expenditures. (RPHB 2 ¶¶ 975 – 982).

1797. Even if the relevant wells were fixed assets, KPM and TNG would have had to have applied different depreciation rates. Claimants failed to identify which wells were put into operation to either the Tax Committee or to the Kazakh courts. Claimants have also not provided a calculation for the impact of higher deductions in later years. They have the burden to prove these deductions. Accordingly, the amount of at least USD 81.32 million of tax debt, as calculated by PwC, is unchallenged. (RPHB 2 ¶¶ 983 – 987).

3. The Tribunal

1798. The Tribunal recalls its timeline, above in this Award in the chapter on liabilty of Respondent's conduct, through which it found Respondent to be a breach of its ECT obligation for FET. It further recalls its conclusions, above in this Award in the chapter on the relevance of debts, insofar as they deal with tax assessments.

1799. There is no doubt that an investor must pay taxes in the host country, as assessed by law. However, there is also no doubt that these tax assessments may be

abusively made in breach of the ECT. All of the alleged back tax obligations were created by and during Respondent's conduct after October 2008 which this Tribunal found above to be a string of measures in breach of the ECT. Indeed, the tax assessments were a major part of this string of measures. As the disputed tax assessments were all retro-active assessments for back taxes which had not been assessed during the earlier period before October 2008 when relations between Respondent and the Claimants were still normal, Respondent has the burden of proof that these disputed back tax assessments after October 2008 were not part of this breaching conduct.

1800. KPM and TNG prevailed in their court challenges of the tax assessments. The only appellate decision in favour of Respondent was issued after the seizure of the investment in a review process alleged by Claimants to have been conducted without their knowledge or participation. The decision of the Supreme Court of 3 November 2010 overruling the decisions of the appellate and cassation courts does not appear to the Tribunal to show a fair and independent assessment. Rather, the Tribunal tends to agree with Prof. Maggs that the Court changed a previous position compared to previous decisions cited by Prof. Maggs (10 June 2008 and 11 February 2009). This decision of the Supreme Court, in the judgment of the present Tribunal, is not sufficient to fulfill Respondent's burden of proof that the assessment would have been the same without Respondent's breaching conduct.

1801. Therefore, the Tribunal concludes that no deduction for Claimants' tax obligations are to be made from the damages found to be due for the ECT breaches.

L.X. Relevance of Cliffson SPA and Other Factors in Establishing Fair Market Value (FMV)

1. Arguments by Claimants

1802. The best evidence of the value of Claimants' investments as of 21 July 2010 is the actual, then-pending Cliffson transaction – a deal that would have closed, but for Respondent's interference. Claimants ask the Tribunal to contrast the low values that Respondent has assigned to the assets with the terms of the arm's length Cliffson transaction, which was pending at the time of the seizure. Claimants and Cliffson executed a comprehensive SPA on 13 February 2010 for all of Claimants' equity interests in TNG, KPM, and Tristan to Cliffson for USD 267 million, and Cliffson agreed to assume all of those companies' liabilities, totaling more than USD 655 million. This places the entire value of the deal for Claimants' distressed assets at approximately **USD 924 million**. All that stood in the way of this deal was (1) Respondent's waiver of pre-emptive rights and (2) MOG approval. In response to Claimants' applications and document submissions, Respondent initiated a final inspection blitz that led to the expropriation of Claimants' assets on 22 July 2010. (C-III ¶¶ 5 – 7; CPHB 1 ¶¶ 586, 596; CPHB 2 ¶ 371).

1803. The Cliffson transaction remained pending until at least 7 June 2010 when Cliffson sent a letter to the MOG stating that it no longer wished to pursue the transaction. Cliffson did not inform Claimants of this letter, and Claimants only saw this letter when it was produced in this arbitration. (CPHB 1 ¶ 587).

1804. Respondent has argued that Claimants' story regarding the Cliffson negotiations is not credible. Anatolie Stati never stated that the first time Claimants had discussions with the principals was in February 2010. The Cliffson transaction was an arm's length transaction. Discussions began in November 2009 with an Assaubayev company called Grand Petroleum, which had access to the Project Zenith data room. The only unusual aspect to the negotiations with the Assaubayevs was the preliminary MOU that the Aussabayevs executed in November 2009 that included a preliminary price commitment, which was later changed. The MOU shows that the Aussabayevs were insiders who knew the value of the assets that they were purchasing and that they knew that they were purchasing them at a distressed value. (CPHB 1 ¶¶ 588 – 592; CPHB 2 ¶¶ 371 – 373).

1805. The fact that the transaction did not close was a result of Respondent's action. Respondent's representation that Cliffson failed to take steps necessary to close the deal mischaracterizes the evidence. Anatolie Stati's letter of 9 March 2010 is no indication that Cliffson had backed away from its obligations. The letter focused on Cliffson's failure to perform its obligations in the Side Letter agreement to bring a halt to the governmental harassment of KPM and TNG. Cliffson repeatedly told Claimants that they were working on obtaining government approval. The fact that government approval never came is a good indication that the government's harassment campaign was very effective and that Cliffson was unsuccessful in ending it. It is not evidence that it had re-evaluated its decision to purchase. In any event, as FTI explained, absent a reason to believe that Cliffson's re-evaluation of value was the reason that the transaction did not close, the agreed price is a reliable indicator of the value of the non-consummated transaction. (CPHB 1 ¶¶ 593 – 596; CPHB 2 ¶ 373).

1806. Claimants' letter to Cliffson of 15 June 2010 reflects concern that Cliffson backed out of the transaction to because Kazakh authorities were planning to auction KPM's assets to satisfy the criminal penalty. (CPHB 2 ¶ 375).

1807. In previous submissions, Claimants have argued that the bids received in Project Zenith are a fair indication of the FMV of the properties, absent the State's harassment and indirect expropriation measures. (C-I ¶ 73). Regarding Project Zenith, Claimants only argue that the offers received there serve as evidence that the right to export / the future receipt of international export prices was reasonably contemplated in 2008. (C-III ¶ 10). Claimants maintain that Respondent has not shown that the bids received in that project were in any way inaccurate or incomplete. (C-II ¶ 399).

2. Arguments by Respondent

1808. Rather than provide a valuation for the correct date of 21 July 2010, Claimants instead refer to the Cliffson SPA of 13 February 2010 and allege that this SPA reflects a value of USD 924 million for KPM and TNG. (R-III ¶ 397). Respondent's summary is best taken from its own words.

(a) *The Cliffson SPA is no reflection of the fair market value. From its contents and from the little time the parties took to enter into it, the Cliffson SPA appears as a highly atypical agreement that raises doubts as*

to whether there were serious negotiations regarding the value of the companies and as to whether a proper due diligence was conducted. It can hence not be described as an arm's length transaction.

(b) In fact, from documentary evidence and the statements made by Claimants' witnesses at the hearing, it appears that soon after the conclusion of the SPA, Cliffson itself realized that it had agreed to an inappropriately high purchase price. As a result, Cliffson tried to wiggle its way out of the SPA later on.

(c) In any event, the Cliffson SPA does not contain information sufficient in order to allow a proper assessment of its value. (R-III ¶ 398).

1809. Regarding the argument that Cliffson had insufficient time to properly assess KPM's and TNG's value, the evidence shows that not more than 13 days of due diligence and negotiations were conducted before the SPA was concluded, and Cliffson was granted no guarantees or company-specific information. This is atypical for a contract valued at nearly USD 1 billion – in fact, Total E&P and KMG EP needed substantially more time - six months and four months, respectively - to come to their decision. The brevity and vagueness of the SPA also reveals a lack of proper due diligence. For example, major contracts and licenses, pending lawsuits, major debt, and other characteristics of the companies that could be important for their value are either not mentioned at all or are not set out in any detail. This lack of specificity is atypical of a proper M&A transaction. Thus, the Cliffson SPA was not likely an arm's length transaction. Even if the Cliffson deal was a fair market transaction at arm's length, however, the Cliffson SPA does not provide sufficient information for a proper valuation. Any calculation reached by FTI cannot be accepted as the actual value of the Cliffson SPA. (R-III ¶¶ 397 – 405, 412; RPHB 1 ¶¶ 997, 1003). In addition, at the Hearing on Quantum, Claimants introduced a new background to the Cliffson transaction, one that would have it date back to September 2009. This is not credible. (RPHB 2 ¶ 8).

1810. That the Cliffson transaction cannot be seen as an arm's length transaction, conducted on a reasonable information basis is supported by Mr. Lungu's testimony when he stated that Cliffson simply relied on information from the government and looked at KMG EP due diligence documents to assess the potential of the deal, without ever assessing Claimants' data room. The only part of that testimony that Mr. Lungu could know for sure was the proposition that the Assaubayev family did not assess the data room – everything else was speculation or invention. If the Assaubayev family had seen the KMG EP due diligence, they would not have made an offer based on a supposed enterprise value of USD 1.15 billion as alleged at the Hearing on Quantum, or USD 920 million as initially alleged. The Assaubayevs cannot have had access to the KMG EP valuation. (RPHB 1 ¶¶ 1116 – 1020; RPHB 2 ¶¶ 865 – 866).

1811. Cliffson also attempted to hinder the closing of the SPA, concluding that it had agreed to pay more than FMV. Under the SPA, two important closing conditions needed to occur: (1) the Republic had to waive its pre-emptive rights and (2) the MOG had to approve the transfer. Although Cliffson was responsible for making the necessary applications, Claimants made them – and then only 2 months after the SPA was concluded. Cliffson's lack of cooperation was apparent and recognized by Claimants. Cliffson did not provide the information required by the

MOG for approval or by the Republic for the waiver, possibly in breach of section 4.2 of the SPA, as recognized by Anatolie Stati. Cliffson effectively hindered the deal from being closed. (R-III ¶¶ 406 – 411).

1812. Claimants continue to withhold details of the circumstances of the Cliffson deal. At the Hearing on Quantum, both Anatolie Stati and Mr. Lungu were caught in lies regarding when they had made contact with the family behind Cliffson. They revealed strange details about changes in the purchase price that, if true, should have been revealed at an earlier time because they would have supported a higher damages price, supported negative inferences with regard to KMG EP's valuation. The fact that these details were first elaborated in direct testimony shows that Claimants wished to avoid serious cross examination on those matters. Mr. Calancea was also evasive about questions. The story that has been given continues not to add up. In addition to Anatolie Stati and Mr. Lungu contradicting each other, Mr. Lungu's statement also contradicted prior documents on the record. His statement that Claimants were unaware of Cliffson's desire to "*back out*" is contradicted by the evidence and is inconsistent with Claimants' Opening Presentation at the Hearing on Quantum. (RPHB 1 ¶¶ 116, 998 – 1015; RPHB 2 ¶ 865 – 867).

1813. Claimants now argue that the Cliffson transaction actually began in November 2009 with a MOU between Grand Petroleum and Claimants. No documentation has been provided of this, despite the fact that Claimants would have been entitled to submit so much under PO-10. (RPHB 2 ¶ 869).

1814. Respondent has demonstrated that the Republic's authorities cooperated with Claimants in the process of obtaining state consent and the waiver of preemptive rights. Claimants, however, failed to provide sufficient documentation to the authorities – documents which remain outstanding to date. At the Hearing on Quantum, Mr. Lungu's testimony demonstrated Claimants' admission that it was ultimately Cliffson that backed out of the transaction, due to their own financial troubles. This makes their previous arguments about state impediments irrelevant. (RPHB 1 ¶¶ 998 – 1001; RPHB 2 ¶ 870).

1815. Claimants' arguments that are based on Anatolie Stati's letter of 9 March 2010 misstate that evidence. That letter shows that Claimants were accusing Cliffson of not taking the necessary steps for the implementation of the SPA, meaning that Cliffson was backing out of the transaction. It indicated a lack of progress on both the implementation of the SPA and the Side Letter. (RPHB 2 ¶ 871).

1816. Respondent denies that Cliffson was obliged to work back channels to obtain governmental approval for the sale. Not only would such an obligation be unenforceable, there is no documentation of such an obligation. (RPHB 2 ¶ 872).

1817. Finally, Respondent objects to Claimants' suggestion that the Tribunal should exercise its discretion to increase the amount of damages based on the Cliffson SPA. There is no basis in international law for a discretionary increase of damages. (RPHB 2 ¶ 873).

1818. Regarding basing a recovery on an alleged FMV, as Respondent reiterated in the Hearing, the non-binding offers made during the first phase of Project Zenith also

cannot serve as an indication of Claimants' properties' FMV as of October 2008. The representatives of KNOC, Total E&P, KMG EP, and OMV have confirmed that their bids did not represent FMV. Instead, as confirmed by Mr. Chagnoux's, Mr. Seitinger's, and Dr. Kim's testimony, they were made to gain access to the data room and were pushed up by Renaissance Capital. As confirmed by Mr. Suleymenov's testimony at the Hearing on Quantum, their bids were made based on limited information and they were often made for strategic and not valuation driven reasons. Dr. Kim of KNOC and Mr. Seitinger of OMV confirmed at the Hearing on Quantum that their bids were the result of optimistically high gas price assumptions, which were driven by the Renaissance Capital Information Memorandum and its reference to the KazAzot Tripartite Agreement. The Information Memorandum admittedly "*does not purport to be comprehensive*" and "*has not been independently verified*" and is based in part on unaudited financial statement. Thus, it is not a basis to produce a FMV. Even representatives of KNOC, Total E&P, and KMG EP testified that the information was not sufficient to make a FMV decision. In any event, bidders made bids for reasons that had nothing to do with FMV. As Claimants admitted at the Hearing on Quantum, bidders bid for strategic reasons, often after pressure from Renaissance Capital, in order to gain access to the data room. The only bids that somewhat matched the indicative value were those for Tolkyn, but those were inflated by unverified assumptions. In FTI's Additional Expert Report of 25 January 2013, Claimants claim an unrealistic FMV for USD 197 million for Borankol and USD 497 million for Tolkyn. (R-II ¶¶ 447 – 450; RPHB 1 ¶¶ 974 – 986; RPHB 2 ¶¶ 803 – 806).

1819. Indicative offers were also based on the reserves estimates in the 2008 Miller & Lents Report, which were massively overstated as compared to the estimates provided by Ryder Scott and GCA in this arbitration. "*The 2008 Miller & Lents Report provided for 2P reserves of 141.3 mmboe. Even Ryder Scott estimated 2P reserves of only 97.7 mmboe as of their valuation date. Assuming the highly overstated Ryder Scott estimates were correct, the indicative bids would thus still be based on a reserves report which overstated 2P reserves by further 40%. Importantly, the overstatement related primarily to the estimates for valuable liquids production from the Tolkyn field.*" (RPHB 2 ¶ 806).

1820. The offers made based on the Information Memorandum and the vendor due diligence ranged from USD 0.55 billion to USD 1.55 billion. Regarding the individual assets the ranges were as follows:

(a) USD 90 mn and USD 248 mn for Borankol;

(b) USD 367 mn and USD 1.067 bn for Tolkyn; and

(c) USD 70 and USD 280 for the LPG Plant. (R-III ¶ 451).

1821. These ranges show that they do not reflect a FMV. At most, the indicative offers could show that Claimants have overvalued their assets. Other circumstances include Claimants' ramping up of production in 2008, the 2008 spike in oil prices, and the non-conclusion of the Tripartite Agreement. (R-III ¶¶ 455 – 471; RPHB 1 ¶¶ 974 – 975). Claimants rely on favorable bids and ignore circumstances that show that these bids were above FMV, as well as lower bids. (R-III ¶¶ 452 – 454). The bids do not support Claimants' and FTI's valuation suggestions. This has not been addressed by Claimants. (RPHB 2 ¶¶ 807 – 808).

1822. Finally, even though these bids were exaggerated, Claimants' claims in this arbitration exceed what the bidders were offering. This is particularly true for the LPG Plant – the highest bid for that was USD 280 million, and Claimants have increased their estimate of the prospective value of that plant to USD 408.3 million. For the Borankol field, Claimants claim USD 231.5 million, even though the average of the indicative bids was USD 151.8. (R-III ¶¶ 472 – 475).

1823. At the Hearing on Quantum and as explained above, Claimants put forward arguments about alternative valuation methods, including the comparable transactions analysis, the comparable companies' analysis, and the "*implied value based on market value of debt*" methods. Each of these strongly supports Deloitte's and disproves FTI's findings. (RPHB 1 ¶ 1021).

3. The Tribunal

1824. The Tribunal has taken note of the extensive submissions by the Parties on their different views regarding the relevance of the Cliffson SPA and other factors in establishing FMV.

1825. However, the Tribunal's considerations in the Award, above, rely for the valuation of the damages due on factual and legal grounds that are independent from the above issues disputed between the Parties. Therefore, while the Tribunal understands why the Parties have been involved in that dispute, it need not enter into an examination of these issues for its decisions on the claims raised.

L.XI. Credibility of the Parties' Experts

1. Arguments by Claimants

1826. GCA and Deloitte's work is utterly unreliable. GCA's work is largely a "*black box*" - it failed to produce the working papers underlying its conclusions because none exist. Instead, the documents and data that GCA produced were nearly all created by someone else – either Ryder Scott or State institutes. Only 20 megabytes of the 20,810 megabytes of data produced were GCA's own independent work product. The scant original work produced for Contract 302 – the Prospect Risk Assessment and the Crystal Ball documents – are deficient. Respondent's argument that they are more thorough and revealing than Ryder Scott's demonstrate a profound ignorance of the prospect evaluation process, which involves seismic research and interpretation. If GCA had provided the maps upon which they relied, one could give them credit for documentation of the work, but their supporting documentation consisted of a piece of paper with number and no explanation of their origin. (CPHB 2 ¶¶ 330 – 331, 338 – 339).

1827. Ryder Scott produced 6510 megabytes of original, independent work product. (CPHB 2 ¶ 331)

1828. The Deloitte TCF valuation was not tested by cross-examination, and Kazakhstan has explained that there was no reliance on it. Mr. Gruhn testified that the Deloitte GmbH report was completely independently prepared. There are, however, numerous differences between these two valuations, and Deloitte GmbH must explain the bases for these differences, which to date have not been explained.

These include the gas price scenarios, the LPG Plant scrap value, and the value of the Contract 302 properties. Combined, these resulted in a reduction of the total calculation of the damages from USD 229 – 237 million to USD 186 million – a decrease of approximately 20%. Claimants provide the following chart to demonstrate the differences (CPHB 1 ¶¶ 505 – 512):

Differences in NPV Between Deloitte DCF and Deloitte GmbH			
Property	**Deloitte TCF**	**Deloitte GmbH**	**Difference in Dollars**
Tolkyn	US $121 million	US $123.2 million	Increase US $2.2 million
Borankol	US $16 million	US $62.8 million	Increase US $46.8 million
LPG Plant	US $24 to $32 million	US $ (89.1 million)	Decrease US $113.1 to $121.1 million
Munaibay Oil	US $68 million	US $ (297.7 million)	Decrease US $365.7 million
Total NPV	**US $229 to $237 million**	**US $(200.8 million)**	**Decrease US $429.8 to $437.8 million**
Total Deviation in NPV			**US $527.8 to $535.8 million**

2. Arguments by Respondent

1829. Claimants have attempted to argue that the RBS Report fully accounted for the impact of market factors, the effects of the global financial crisis, the effect of a year of additional production in KPM and TNG, the watering in the fields, the effects of additional compression costs according to GCA, and the effect of lower reserves in the Miller Lents report. This is not, however, the difference between the RBS and FTI values. Rather, those values differ in terms of asset value assumptions. None of the factors listed by Claimants' counsel depressed RBS's valuation. Claimants' depiction of the RBS values is devastating not for Respondent, but for Claimants and FTI. (RPHB 2 ¶¶ 825 – 838).

1830. Ryder Scott has proven to be a partisan instrument of Claimants, rather than independent experts. First, they were fully complicit in Claimants' procedural ambush at the Hearing on Quantum, where Claimants introduced a wholly new "*Interoil Reef*" case based on 3D seismic data introduced in Ryder Scott's direct testimony. Ryder Scott failed to put this data on the record for one and a half years

and the late introduction of this data hindered any meaningful cross examination of Ryder Scott. Ryder Scott was fully complicit in that they deliberately concealed their change in the GCOS estimate while the experts were preparing their joint issue list. They signed off on the statement that there was "*general agreement*" on the GCOS for the Contract 302 Area. Then, at the Hearing, they revealed that they had 3D data and then departed from their "*general agreement*" on the GCOS. This is not the behavior of an independent part-appointed expert, but rather proves that Ryder Scott was willing to engage in partisan maneuvers and not to act with the aim of assisting the Tribunal in finding the truth. Second, Ryder Scott demonstrated their willingness to uncritically adopt Claimants' findings as their own. At the hearing, they presented the findings in the "*Project Munaibay 3D*" presentation, prepared by Claimants, as their own findings. This was confirmed by Mr. Nowicki's testimony about drilling depths under cross-examination on 2 May 2013. It was apparent that Ryder Scott had not expected that there would be another expert report concerning the 3D interpretation or that they would be subject to cross-examination on that matter. (RPHB 2 ¶¶433 – 442).

1831. Mr. Nowicki of Ryder Scott was forced to admit to making further incorrect statements. While he stated in his CV that he had "*provided expert witness testimony for various arbitration hearings*", he admitted that the present arbitration was the first in which he gave testimony. He tried to mislead the Tribunal that the 3D structure was merely an update of the earlier 2D interpretation and not a complete disproval of the 2D structure. Ryder Scott also ignored issues that would hurt his clients' position, such as the H2S issue and the faulting in the crest of the "*Interoil Reef*." His statements about the closure of the reef "*in my mind, I know that there has to be more to that reef. It doesn't just end where the data ends*" is contradicted by the documentation and is also telling. This proves his lack of forthrightness and independence. (RPHB 2 ¶¶ 445 – 448).

1832. Ryder Scott makes methodological errors including basing its Interoil Reef estimates on gas columns that are world record beating size, without demonstrating closure and does not take account of faulting. (RPHB 2 ¶ 449).

1833. FTI's analysis is severely flawed:

(a) *FTI incorrectly mixed the nominal and the real terms approach. FTI had to concede this severe and obvious methodological mistake and as a result, had to correct their overall value estimate by a stunning USD 379 million.*

(b) *FTI ignored known and quantified risks in their Contract No. 302 valuation, thus concealing valuable information from the Tribunal and violating good valuation practice. Deloitte GmbH have calculated that if GCoS and ECoS had been applied by FTI, the value of Contract No. 302 would be reduced in the order of 90%. FTI's "prospective valuation" is nothing but an attempt to "anchor" a high value with the Tribunal and it is not aimed at providing any useful expertise.*

(c) *FTI arbitrarily reduced its inflation rate assumptions from one report to another, with the clear intention to inflate asset values.*

(d) *FTI added almost USD 50 million to Claimants' claim by way of arbitrary rounding.*

(e) *FTI arbitrarily reduced its country risk premium, even though KPM's and TNG's financial statements explicitly mentioned country risk. FTI thus minimised their discount rate and overstated values.*

(f) *FTI created a 63.8% overstatement of their estimated market value for the Munaibay oil discovery through a series of severe calculation mistakes.*

(g) *FTI applied the same discount rate for their "prospective valuation" of the LPG Plant as for their other valuations. This is inconsistent as FTI applied different taxes to the LPG Plant.*

(h) *FTI admittedly assumed incorrect administration costs with regard to the Contract 302 Development.*

(i) *FTI underestimated the variable distribution costs for KPM, thus overstating Borankol's value by a further USD 3.3 million. The same mistake occurred in the EMV calculation for Munaibay Oil and in the "prospective valuation" of the Contract 302 Properties.*

(j) *FTI based its gas price assumptions on an unsigned draft contract which they interpreted against its wording. Thus, FTI applied prices that were never agreed upon to Contract No. 302 gas volumes that very likely do not exist.*

(k) *FTI made serious mistakes in their comparable companies and comparable transactions analysis, such as using transactions that closed prior to the financial crisis without adjusting for the effects thereof.*

(l) *FTI conducted an entirely unrecognised, illogical and empirically disproved valuation method for its "Implied Market Value of Debt" analysis. (RPHB 2 ¶ 451; see also ¶¶ 453 - 474).*

1834. Throughout these proceedings, FTI has made corrections in the amount of USD 841 to its value estimates. (RPHB 2 ¶¶ 463 – 464). This is small compared to the USD 530 million in changes that Claimants have stated make the Deloitte GmbH and the Deloitte TCF valuations "*completely unreliable*." (RPHB 2 ¶ 465).

	Statement of Claim (million USD)	Δ	Reply on Quantum (million USD)	Δ	Hearing on Quantum (million USD)	Δ	1st PHB (million USD)
Borankol Field	193	+ 38.5	231.5	- 33.49	197.01		197.013
Tolkyn Field	561	- 52.6	508.4	- 29.47	478.93		478.927
LPG Plant (cost)	208.5	+ 36.5	245		245		245
Contract 302 (prospective)	1,766	- 186	1,580	- 132	1,448	+ 188.9	1,636.9

LPG Plant (prospective)	344	+ 64.3	408.3	- 79.2	329.1		329.1

1835. Deloitte and GCA have provided solid work that remains intact and reliable and should be used by this Tribunal for the purposes of damage calculation. Claimants' and their experts' criticism completely ignore the explanations given and documents provided by GCA and Deloitte GmbH. Ryder Scott criticized GCA's reports, stating that they "*saw nothing in the GCA reports that led them to believe that GCA did independent geological, petrophysical or seismic analysis*" This criticism is undermined by GCA's provision of GCOS sheets, Crystal Ball Sheets, and other supporting documentation. Furthermore, there are no "*wild swings*" in the GCA reports. One need only to look at the appendices to the GCA reports to see that the amendments to the forecasts were minor, excepting the Munaibay Oil estimate. All changes were explained. GCA provides detailed cost estimates (which FTI hid from the Tribunal). Their approach in independently auditing the available data was sufficient for estimating a FMV. (RPHB 2 ¶ 443 – 444; 475 – 484).

1836. Deloitte GmbH's work was of far better quality and was more reliable than FTI's. FTI's criticisms were baseless and could often have been avoided if FTI had not ignored explanations given by Deloitte GmbH. (RPHB 2 ¶¶ 486 – 488).

1837. Regarding the differences between Deloitte GmbH and Deloitte TCF valuations, Deloitte GmbH has explained why they applied different gas pricing assumptions than did Deloitte TCF. As explained, the reason that Deloitte GmbH had not provided a scrap value was because they had not received the working files from Deloitte TCF. Claimants' criticisms regarding the valuation of Munaibay Oil are completely hypocritical. Respondent refuses any allegation of bad faith in submitting the Deloitte TCF valuation. (RPHB 2 ¶¶ 489 – 493).

3. The Tribunal

1838. The Tribunal has taken note of the submissions by the Parties on their different views regarding the professional methods and credibility of the experts who have submitted reports and testified in the hearings of this case.

1839. However, the Tribunal's considerations in the Award above rely, for the valuation of the damages due, on factual and legal grounds that are mostly independent from the conclusions of the Parties' experts. In those few instances where the Tribunal has relied on information or evaluation provided by the Parties' experts, the Tribunal has no hesitation to do so and such reliance is not impacted by the general doubts the Parties have expressed regarding the professional methods and credibility of the experts. Therefore, while the Tribunal understands why the Parties have raised concerns regarding the experts, the Tribunal need not enter into an examination of these issues for its decisions on the claims raised.

L.XII. Interest

1. Arguments by Claimants

1840. An award of interest is appropriate to fully compensate Claimants for the injury caused by Kazakhstan. Claimants request that the Tribunal award pre-award and post-award interest, compounded annually, to the value of each of the separate elements of Claimants' damages claim from 14 October 2008 to the date that Respondent pays the Award in full. Awarding compound interest in investment treaty cases is the standard practice, since that is the norm in commercial financing transactions, making such necessary to fully compensate Claimants for the loss of opportunity to invest the funds. The rate that the Tribunal selects should accord with the general principle of "*full reparation*" for the injuries inflicted by Kazakhstan, as noted in the *LG&E v. Argentina* and the *Funnekotter v. Zimbabwe* decisions. The rate elected should be appropriate to compensate Claimants for the full period of time that they have been deprived of the value of their investments. (C-III ¶¶ 80 - 81, partially quoted; CPHB 1 ¶ 650, CPHB 2 ¶ 390).

1841. Claimants suggest applying, at minimum, a rate akin to Kazakhstan's sovereign debt or borrowing rate to the compensation owed. This would reflect the fact that, in effect, Respondent's taking has forced Claimants to loan Respondent the amount of compensation that Respondent would have paid. At maximum, the rate should be the cost for commercial loans for investments in the Kazakh market during the relevant time period (i.e., 10.5%, as exemplified in the rate for the Tristan notes during the relevant period). Setting such a range is a reasonable application of the *Chorzów* is also consistent with the approaches of other arbitral tribunals, including *Funnekotter*, *Wena Hotels*, and *Impregilo S.p.A.* (C-III ¶¶ 82, 86, 87).

1842. Respondent has conceded that interest may be appropriate and suggested the rate of 6%, based on US Treasury Bills. This approach is inappropriate because it does not reflect the rate that Claimants would have earned by investing the amount due. Claimants are not in the business of investing in US Treasury bills and instead invest in areas of the world, like Iraq and Southern Sudan, which have the potential for enormous returns. The interest should be tailored toward what an investor like Claimants could have earned by investing the funds. In *Sylvania v. Iran*, the Tribunal observed that it could be appropriate to derive an interest rate that would have been common in the investor's own country. Thus, looking to the U.S. Treasury Bill rate is inappropriate, and the rate from a commercial bank in Moldova is more appropriate. While there is a currency component to commercial interest rates, that is not a reason to apply the US Treasury Bill rate. Moldovan commercial banks accept USD, and can apply interest to those deposits, following the "*investment approach*." (CPHB 1 ¶ 655 – 657; CPHB 2 ¶ 394).

1843. Claimants would have maintained the debt and would have paid it off, but for Kazakhstan's conduct. Claimants also incurred debt that they would not have otherwise incurred, absent Kazakhstan's actions. The interest on the Laren loan was 35% until it was paid off in 2011. The Tristan note interest rate is 10.5%. 10.5%, thus, conservatively reflects Claimants' actual borrowing costs. To compensate Claimants' injury, the Tribunal should award interest at the rate of 10.5% on the entire award. Further, if the Tribunal does not award interest at least the 10.5% Tristan note rate, then it should include as a component of the award the interest that has accrued on those notes since 14 October 2008. (C-III ¶¶ 88 – 90; CPHB 1 ¶¶ 650 – 654; CPHB 2 ¶¶ 391 – 393).

2. Arguments by Respondent

1844. Respondent refutes Claimants' range of interest rates arguments, stating that these represent a contradiction to Claimants' reasoning for an award of interest and are contrary to arbitral practice. (R-III ¶¶ 476 – 478).

1845. Claimants have provided no evidence that the Tristan note rate would be an example of typical interest for a commercial loan in Kazakhstan at the time, which Respondent denies. Second, neither the commercial loan rate nor the sovereign debt rate plays any role in the determination of interest rates for an award. (R-III ¶¶ 479 – 480).

1846. Respondent disagrees with Claimants' contentions that the 10.5% interest rate on the Tristan notes is the borrowing cost attributable to Respondent's conduct. Claimants are not liable for any of the noteholder debt and, to the extent that they are based on the Sharing Agreement, the Republic cannot be liable for that unilateral action. There is, therefore, nothing that could justify the 10.5% interest rate. In addition, the interest rate owed pursuant to the Sharing Agreement is the rate that is set by the Tribunal in a potential Award. Thus, at least as of 1 January 2012, 10.5% is not a reflection of Claimants' borrowing costs – the Tribunal is free to determine those costs, freely. (RPHB 1 ¶¶ 1010 – 1013).

1847. The Parties agree that the claim for interest arises from the principle of "*full compensation*." On this premise, the interest calculation must be based on what Claimants could have earned by investing the amounts due under the Award – what the Respondent did or could have done with the money in the meantime is irrelevant. (R-III ¶¶ 484 – 486). Applying the principles established in *Siemens v. Argentina, LG&E v. Argentina, Chevron v. Equator,* and *CSOB v. Slovak Republic*, Respondent states as follows:

> *(a) Claimants have never stated that they wanted and less even that they would have been able to give out to anyone a loan at a rate typical "for commercial loans for investments in the Kazakh market during the relevant time period". Claimants are not a bank operating in Kazakhstan. They do not need to be "fully compensated" with regard to the interest a bank in Kazakhstan could have achieved with a commercial loan.*
>
> *(b) Likewise, there is no reason to assume that Claimants would have invested any sum under a potential damages award into Kazakh state bonds. Given what Claimants themselves claim to have been their experience with the Kazakh government, this seems in fact very unlikely. (R-III ¶¶ 481 – 483, partially quoted).*

1848. Interest rates for typical conservative and risk-adverse investments should be applied. This is confirmed by arbitral practice and is in line with the purpose of "*full compensation*." The use of risky investments as the baseline for a calculation is particularly inappropriate and would force the Tribunal to decrease the return rates of that investment with view to the increased risks. (R-III ¶¶ 487 – 489).

1849. Respondent submits that the low-risk re-investment rate that the Tribunal should use for guidance is the rate for 6 month US Treasury Bills. Since one of the most important factors in determining the interest rate for a debt is the currency of that debt, the rate of the national bank supervising that currency is relevant. Awarding based on typical USD interest rates for a risk-adverse investment would be in line

with other arbitral decisions whose only contact with the USA was that damages were awarded in USD. Further, US Treasury Bills do not yield compound interest. But, using the 6 months rate, it would be appropriate to compound interest semi-annually. The Republic clarified that it has never generally accepted the appropriateness of compound interest. Alternatively, an interbank offering rate based on various large banks would be an appropriate benchmark. The Tribunal should consider averages from multiple institutions or from countries and financial institutions with high credit standing, and should also consider the duration to maturity of the financial instrument. Using these factors, either the 6 month US Treasury Bill rate or the interbank offering rate (i.e. Libor, 6 months) would be appropriate. (R-III ¶¶ 490 – 494; RPHB 2 ¶¶ 1021 – 1024).

1850. Claimants' use of the interest rate offered by a specific Moldovan commercial bank, "*Victoriabank*" is not appropriate, as demonstrated by Deloitte. First, the interest rate offered by one specific commercial bank depends on the credit standing of that bank. Second, the circumstances of that bank have nothing to do with the situation of the present case. Third, FTI's alleged investment approach (A Moldovan Company to hold its money at one single Moldovan Bank) is doubtful, since prudent investors spread their assets. (RPHB 2 ¶¶ 1019 – 1020).

1851. No interest of any kind can be awarded for Claimants' loss of opportunity claim with respect to the Contract 302 properties. This follows from the principle that there may not be double compensation. (R-III ¶¶ 495 – 497). Respondent's argument is best taken from its own words:

> *497. The awarding of damages for loss of opportunity – equal to the awarding of damages for lost profits – is based on the presumption that capital had been invested and that this investment would have created future profits. However, capital invested in a way to create future profits cannot create an additional amount of interest at the same time. Or in other words: the future profits claimed are already the "interest" on the investment. Additional interest is not possible have rejected the application of a commercial or a sovereign debt rate. (R-III ¶ 497).*

3. The Tribunal

1852. The Parties agree that, on damages awarded, interest is due. The Tribunal agrees as well.

1853. As the Tribunal has found above that the correct date for the valuation of damages is 30 April 2009, this is also the date from which interest shall be calculated.

1854. Regarding the rate of interest, the Tribunal agrees with Respondent that according to arbitral practice in comparable cases, the rate of a conservative investment should be used. As Respondent rightly has pointed out (R-III ¶ 493) as the damages will be awarded in US-Dollars, as confirmed by previous arbitral practice, the Tribunal considers that the rates of 6 months US treasury bills over the relevant period are the appropriate rate.

1855. Regarding the question whether compound interest is due, Respondent's comments are not quite consistent. While, in its last submission (RPHB 2 ¶ 1024), Respondent denies that any compound interest should be awarded, the Tribunal

rather agrees with Respondent's comment in its Rejoinder (R-III ¶ 494) that Claimants could be expected to reinvest their interest gains every 6 months and that, therefore, interest has to be compounded semi-annually.

L.XIII. Summary of Tribunal's Conclusions Regarding Quantum

1856. Based on the foregoing and as explained above, the Tribunal has accepted the following quantum of damages to be paid from Respondent to Claimants. First, the Tribunal has found in Claimants' favor for the following amounts:

Section	Title	Amounts
L.IV.	Quantum Related to Borankol and Tolkyn Fields (Combined Asset Value)	**USD 277,800,000.00**
L.V.	Quantum Related to Contract 302 Properties (Claimants' Out of Pocket Investment Expenses)	**USD 31,330,000.00**
L.VI.	Quantum Related to the LPG Plant	**USD 199,000,000.00**
	SUBTOTAL	**USD 508,130,000.00**

1857. The Tribunal has also found that certain debts need to be deducted from this amount:

Section	Title	Amounts
L.III.	Treatment of Debt	
	Reachcom Facility Agreement	**USD 335,624.00**
	Limozen Facility Agreement	**USD 10,049,442.00**
	Reachcom Receivables Purchase Agreement	**USD 59,853.00**
	SUBTOTAL	**USD 10,444,899.00**

1858. Since the only evidence that the Parties have provided regarding these debt amounts is the FTI Consulting Second Expert Report (28 May 2012), that is what the Tribunal uses to define the values of these debts.

1859. Subtracting the subtotal of debts (USD 10,444,899.00) from the subtotal of compensation due (USD 508,130,000.00), the Tribunal concludes that the net amount to be paid by Respondent to Claimants amounts to **USD 497,685,101.00**.

1860. This net amount is to be paid from Respondent to Claimants with interest, defined as the rate of 6 months US Treasury Bills from 30 April 2009 to the date of payment, compounded semi-annually.

1861. In addition to these amounts, the Tribunal decides on the arbitration costs, below.

M. Arbitration Costs

M.I. Arguments by Claimants

1862. Claimants request that the Tribunal award them all costs and expenses associated with this arbitration, including attorneys' fees and expenses, experts' fees and expenses, and fees and expenses of the Tribunal and the SCC, pursuant to Art. 44 of the SCC Arbitration Rules. Article 44 embodies the "*loser pays*" rule, and, for the reasons already set out above, Claimants should prevail and Respondent should pay in this arbitration. (C-III ¶ 98; C Costs ¶¶ 2 – 3; C Costs Reply ¶¶ 2 – 3). Claimants request that the Tribunal award Claimants the entirety of their costs in this arbitration, **USD 17,950,992.87**, plus compound interest on the costs award at a reasonable rate until Respondent pays in full. Claimants further request that the Tribunal deny Respondent's request for costs. (C Costs ¶ 30; C Costs Reply ¶¶ 18 – 19).

1863. The severity of Respondent's misconduct in the events leading to this arbitration also weighs in favor of the Tribunal awarding Claimants the full costs incurred in pursuing an international legal remedy for the injuries suffered. (C Costs ¶¶ 4 – 7; C Costs Reply ¶ 3).

1864. Respondent's gross procedural misconduct greatly increased Claimants' legal fees and expenses and added nearly one year to the procedural calendar. Respondent's violation of PO-2 forced Claimants to prepare the bulk of their Reply submission without the aid of those documents. The late submission of 30,000 pages of materials resulted in significant delay and the quasi-bifurcation of the proceeding. Respondent's withholding of the four critical diligence and valuation reports for thirteen months, in violation of PO-2 and PO-3, exacerbated Claimants' expenses. Respondent held Claimants to prove and respond to positions that Respondent knew to be contradicted by crucial, contemporaneous evidence. In addition, Respondent increased costs by submitting lengthy, confusing, and contradictory written pleadings. Respondent's case materially changed throughout its submissions, requiring Claimants to submit new evidence to disprove it. Absent the untimely submission of the false contention regarding the Interoil Reef, the May 2013 Hearing would not have needed to include expert testimony on that subject. Respondent's misconduct is similar to and indeed worse than the respondent's misconduct in *ADC v. Hungary*, where the tribunal found an award of Claimants' legal expenses was justified. Here, Claimants should not be forced to bear the costs of Respondent's poor planning and its unwillingness/inability to follow the Tribunal's instructions. (C Costs ¶¶ 8 – 21; C Costs Reply ¶¶ 4 – 5).

1865. Claimants incurred **USD 17,950,992.87** in total costs, fees, and expenses in this arbitration. These costs were reasonable in light of the complexity of the case (involving 10 pleadings, 97 witness statements and expert reports, and over 1100 exhibits), its duration, and the harm that Respondent caused to Claimants' investments. The legal fees are in line with market rates and the fees of the experts are tailored to the scope and complexity of the issues addressed. The total costs comprise less than 2% of the quantum claimed. The table, found at C Costs ¶ 23, summarizes Claimants' costs. (C Costs ¶¶ 22 – 27).

CATEGORY	AMOUNT (IN US$)
Legal Fees & Expenses	
• King & Spalding	$ 12,337,787.80
Fees Expenses (including, *inter alia*, hearing expenses, court reporting, and interpreter fees)	$ 887,203.72
• Bulboaca & Asociatii *Fees and Expenses*	$ 396,569.41
Experts' Fees & Expenses	
• FTI	$ 1,514,932.87
• Ryder Scott	$ 877,458.14
• Professor Adnan Amkhan Bayno	$ 174,886.48
• Scott Horton	$ 104,244.00
• Professor Maidan Suleymenov	$ 89,437.00
• Professor Aleksey Malinovskiy	$ 37,226.82
• Professor Peter Maggs	$ 33,731.14
Claimants' Out-of-Pocket Costs and Expenses (including, *inter alia*, client representatives' travel, translation, and other logistical expenses)	
• Translation services	$ 28,429.84
• Travel expenses	$ 39,085.18
• Industry and legal consultant expenses	$ 2,600.00
SCC Payments	$ 1,425,448.95
TOTAL	**$ 17,950,992.87**

1866. Claimants note that the Parties have submitted very similar cost claims, with Claimants claiming USD 17,950,993 and Respondent claiming USD 17,625,116. It should be noted, however, that Claimants have already paid USD 1,425,449 of the SCC's and the Tribunal's advances, and Respondent has only paid USD 42,411. (C Costs Reply 14, stating USD 42,411 in reference to the advances. This is likely a typo, since the advance that Respondent states that it paid amounted to USD 38,991.00 and was reported on the line above the USD 42,411 amount, which was for the Hearing Center). It is clear, therefore, that if the Parties had shared the

costs equally as they were supposed to, Claimants' overall costs claim would be approximately USD 1 million less than Respondent's. Each Party would have paid USD 733,930 in SCC advances, thereby reducing Claimants' claim to USD 17,259,474 and increasing Respondent's claim to USD 18,316,635. This shows not only the reasonableness of Claimants' claim, but also underscores that a significant portion of the costs claimed are directly attributable to Respondent's misconduct. (C Costs ¶¶ 28 – 29; C Costs Reply ¶ 14).

1867. Claimants, contrary to Respondent's argument, have not changed their relief sought. The Statement of Claim was clear that the claim for the Contract 302 properties was one for loss of opportunity. There is authority that the Tribunal may exercise its discretion to fix the amount of damages. This has had no effect on the costs of the proceeding. Second, there was no "*surprise*" introduction of 3D Seismic Data, nor did the production increase the costs of this proceeding. Claimants properly submitted the 3D seismic in order to rebut Respondent's argument made in December 2012 that Claimants had no intention to explore the Interoil Reef. There was no reason to submit the 3D seismic prior to that. Fundamentally, however, this introduction did not increase Respondent's costs – effort to review and analyse the data would have been expended even if the data had been submitted earlier. Importantly, the submission of the 3D seismic had nothing to do with the necessity of the May 2013 Hearing, which occurred because the Parties jointly requested an opportunity for oral closing arguments, in January 2013. The additional costs by addressing the 3D seismic at that hearing were incremental, at best. (C Costs Reply ¶¶ 6 – 9).

1868. Respondent's additional allegations of misconduct are intended only to distract the Tribunal. With regard to the new documents submitted on 20 September 2012 and the Sharing Agreement, those were submitted with the Tribunal's permission. (C Costs Reply ¶¶ 10 – 11).

1869. While Respondent now argues that it would have submitted the KMG EP Due Diligence documents sooner, there is no evidence that KMG considered the documents confidential. In any event, that confidentiality had been waived when it disclosed those to Respondent's counsel and experts. Regarding the so-called "disappearance" of Laura Hardin, that is a non-issue – Ms. Hardin left the employment of FTI in June 2012. The circumstances of her departure were beyond Claimants' knowledge or control. It was immaterial because her partner, Howard Rosen, who was involved in the preparation of all of the damages reports, appeared and gave testimony. In any event, this stands in juxtaposition to Respondent's misconduct regarding the Deloitte TCF report. (C Costs Reply ¶¶ 12 – 13).

1870. Some of the costs claimed by Respondent, including the USD 600,000 for the Deloitte TCF Report, and USD 270,000 for Prof. Olcott, and the USD 60,000 for Neftegazkonsult are related to Respondent's procedural misconduct and are particularly objectionable. Respondent's costs for its quantum and geology experts, Deloitte GmbH and GCA, substantially exceed Claimants' cost submissions for FTI and Ryder Scott, and are particularly excessive when compared to the quality of those reports. (C Costs Reply ¶¶ 15 – 16).

M.II. Arguments by Respondent

1871. Respondent requests the Tribunal to order Claimants to reimburse the Republic for, *inter alia*, the fees and expenses of the experts, consultants, witnesses, and legal counsel. (R-III ¶ 519).

1872. Respondent has incurred **USD 17,625,116.33** in legal fees, expert fees, costs in this arbitration, which it summarizes in the following table (R Costs ¶ 19):

Attorneys fees until 21 June 2013	**USD 11,660,999.61**
Attorneys expenses until 21 June 2013	**USD 446,023.06**
Experts	
Professor Tietje	**USD 43,807.50**
Professor Olcott	**USD 270,000.00**
Professor Didenko	**USD 50,000.00**
Professor Kogamov	**USD 50,000.00**
Professor Ilyassova	**USD 53,875.00**
Professor Balco	**USD 42,646.25**
Deloitte & Touche GmbH	**USD 2,151,775.50**
Deloitte TCF	**USD 600,000.00**
Gaffney Cline & Associates	**USD 1,217,255.67**
Marc Latman (expert for New York securities law)	**USD 13,412.50**
Neftegazkonsult	**USD 60,000.00**
Richard Butler (expert for witness testimony)	**USD 17,158.88**
Professor Zhanaidarov (expert for Kazakh civil law)	**USD 37,418.23**
Hassans International Law Firm (experts for Gibraltar law)	**USD 5,210.70**
Mangat Thapar	**USD 51,703.74**
Paul Rogers (cost expert)	**USD 1,651.44**
Government representatives (travel costs, hotel expenses, allowance)	**USD 102,779.64**
Witnesses (travel costs, hotel expenses, allowance)	**USD 63,678.81**
Translations	**USD 474,180.06**
Courier	**USD 14,807.26**
Copy	**USD 50,134.75**

Costs of the arbitration	
SCC additional advance	**USD 38,991.00**
ICC Hearing Centre	**USD 42,410.66**
Court Reporter	**USD 29,749.02**
Interpretation Costs	**USD 35,447.05**
Total costs	**USD 17,625,116.33**

1873. Claimants have forced Respondent to spend three years defending baseless allegations in four hearings, numerous written submissions, and further correspondence. They have blown this case out of proportion and submitted new and contradictory expert opinions and last minute evidence before each hearing. That they changed their claim from their USD 1.4 billion and then put the valuation "*at the discretion of the Tribunal*" is an additional example of how they blew up their claim. Their initial and deliberate ignorance of the complexity of this case was the cornerstone for delay in these proceedings. (R Costs ¶¶ 1 – 4; R Costs Reply ¶¶ 4 – 5).

1874. Claimants' procedural conduct was far from exemplary. Although the first two FTI reports were co-authored by Laura Hardin, Claimants refused to offer her for cross examination and likely never intended to. (RPHB 2 ¶¶ 1041 – 1050). Claimants' procedural misconduct also caused Respondent to incur significant loss, giving the Respondent the right to demand reimbursement of all costs incurred as a result. In particular, their abuse related to the Munaibay 3D seismic rendered much of Respondent's preparation obsolete and subsequently caused additional costs in excess of **USD 500,000**. Respondent's experts, GCA, were forced to study these by surprise in less than 2 months, rather than 2.5 years. Counsel was forced to recruit and coordinate with new experts and GCA's experts had to come to a second hearing. Claimants attempt to make Respondent responsible for the belated introduction of 3D seismic data, but this was Claimants' doing. Whether intentional or not, the delayed introduction of the 3D seismic data led to significant additional costs and delay, for which Claimants are responsible. (R Costs ¶¶ 5 – 11; R Costs Reply ¶¶ 6 – 7).

1875. Claimants' other procedural misconduct, including the disruptive submission of new documents before hearings and outside of the procedural timetable, their ex-post attempt to justify its position in a "*debt gross-up*", the Request to Compel Production of 2 January 2013, and their baseless objections to expert testimony also led to further additional costs and created mounting time pressure for Respondent. (R Costs ¶ 12; RPHB 2 ¶¶ 1041 *et seq*.).

1876. Claimants' arguments that Respondent should pay their costs, in particular every single accusation of procedural misconduct, are without merit. In addition, Claimants' argument that the Respondent espoused positions that it knew to be untrue is particularly far-fetched. The KMG EP Due Diligence documents support Respondent's position. There are sections in that report where the opinions expressed are different from the Respondent's and its experts' views, but that is merely because the due diligence reports are exactly what they purport to be: the

professional opinion of the authors of those reports. The Respondent was previously barred from submitted the KMG EP Due Diligence documents by KMG EP's refusal to disclose the documents. (R Costs ¶¶ 13 – 18; R Costs Reply ¶¶ 8 – 10).

1877. Claimants' expert, FTI, made numerous baseless allegations, thereby forcing Deloitte to rebut them, since a diligent expert report must address the other side's arguments, no matter how far-fetched. If Claimants consider that their costs and expenses are appropriate, they cannot deny that this holds true for the Respondent's costs and expenses. (R Costs Reply ¶ 11).

M.III. The Tribunal

1878. The relevant provisions regarding the costs of arbitration are provided in Art. 43 and 44 SCC Rules.

1879. Pursuant to Art. 43.2, by its letter of 12 December 2013, the SCC Board has determined the costs of this arbitration, and pursuant to Art. 43.4, these are included in this Award as follows:

Karl-Heinz Böckstiegel	
Fee	EUR 400 000
Per diem	EUR 8 500
Expenses	EUR 11 730,39
Secretary	EUR 60 672,74
David R. Haigh, QC	
Fee	EUR 240 000
Per diem	EUR 12 500
Expenses	EUR 20 857,61
Sergei Lebedev	
Fee	EUR 240 000
Per diem	EUR 12 500
Expenses	EUR 2 710,24
Stockholm Chamber of Commerce	
Administrative fee	EUR 60 000

1880. According to Art. 43.5, "*the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances.*" Further, regarding the costs incurred by a party, Art. 44 provides the Tribunal a similar discretion at the request of a party, to order one party to pay any reasonable costs incurred by another party, including the costs of legal representation, again "*having regard to the outcome of the case and other relevant circumstances.*"

1881. Such requests for the application of both provisions have been made by the Parties in this case and the Tribunal, therefore, has to decide on them.

1882. The Tribunal is aware of a certain practice in investment treaty arbitration that each party bears its own costs and that the parties divide tribunal costs equally. That

practice is not binding on this Tribunal, which prefers the more recent practice in investment arbitration of applying the general principle of "*costs follow the event.*" That approach is the more compelling one in the present case which is governed by the SCC Rules that expressly contemplate the rule of "*costs follow the event*" in Art. 43.5 and 44 by their emphasis on "*the outcome of the case*." This conclusion is supported by both sides' arguments that the unsuccessful side in this arbitration should have to bear the full amount of tribunal costs as well as the other side's costs of legal representation.

1883. Regarding the present case, the Tribunal takes into account that Claimants requested a total relief of more than USD 1 billion plus what they call a discretionary portion in the range of USD 1.5 billion, of which this Award only grants an amount in the range of USD 0.5 billion, i.e. some 20%. On the other hand, Claimants prevail on jurisdiction, liability, causation, and part of quantum, all of which were the major objects of the dispute and made up by far the greatest part of the work of the Parties and of the Tribunal in this procedure.

1884. Therefore, the Tribunal concludes that Respondent shall pay to Claimants 50% of Claimants' costs of legal representation. For the same reasons, the Tribunal concludes that, of the arbitration costs for the SCC and the Tribunal as quoted above, Respondent has to bear ¾ and Claimants ¼.

1885. As both sides come out with very similar total costs of their legal representation, the Tribunal accepts the amounts of costs claimed by both sides as reasonable. Both Parties have included in their cost claims the deposits they paid to the SCC for arbitration costs. According to Claimants, they have paid total deposits of USD 1,425,448.95 to the SCC. According to Respondent, it has paid what it calls an "*SCC additional advance*" of USD 38,991.00, though no other deposit payment is mentioned. During the procedure, the SCC has informed the Tribunal by its letters of 11 October 2010 and 20 June 2012 of some of the deposits paid by the Claimants. The SCC did not inform the Tribunal of any deposit payments made by Respondent. With its decision of 12 December 2013, the SCC did not inform the Tribunal of the total deposits paid by the Parties, but pointed out that it will determine the exact amounts due by each Party in its settlement of accounts with the Parties. The SCC costs decision was denominated in Euro, while the Parties have submitted their costs claims in USD. The total arbitration costs set by the SCC amount to EUR 1,069,470.98, of which ¾ are to be borne by Respondent, according to the Tribunal's above ruling. This amounts to EUR 802,103.24. The Tribunal, therefore, concludes that Respondent shall pay to Claimants ½ of Claimants' full cost claim of USD 17,950,992.87, in an amount of **USD 8,975,496.40.** Obviously, this amount comprises the above awarded 50% of Claimants' costs of legal representation and the USD 712,724.47 portion of the EUR 802,103.24 SCC costs which Respondent shall bear. The remaining accounting of the deposits will have to be done between the SCC and the Parties.

(The Decisions of the Tribunal are placed on a separate page of this Award hereafter.)

N. Decisions

For the Reasons set out above in this Award, the Tribunal hereby decides, declares, and awards as follows:

1. **The Respondent has violated its obligations under the Energy Charter Treaty with respect to the Claimants' investments.**
2. **Subtracting the subtotal of debts (USD 10,444,899.00) from the subtotal of compensation due (USD 508,130,000.00), the Tribunal decides that Respondent shall pay to Claimants a net amount of USD 497,685,101.00.**
3. **This net amount is to be paid from Respondent to Claimants with interest, defined as the rate of 6 months US Treasury Bills from 30 April 2009 to the date of payment, compounded semi-annually.**
4. **Regarding the costs of arbitration, the Tribunal decides:**
   - 4.1. **Of the costs of arbitration as determined by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Respondent shall bear ¾ and Claimants ¼. These arbitration costs will be drawn from the advances paid by the Parties to the SCC.**
   - 4.2. **Further, Respondent shall pay to Claimants 50% of Claimants' costs of legal representation, i.e. an amount of USD 8,975,496.40.**
5. **All other claims are dismissed.**

Place of Arbitration: Stockholm (Sweden)

David R. Haigh QC
(Co-Arbitrator)
Dissenting with regard to Sections I.IV., I.V., and I.XIII of the Award

Prof. Sergei N. Lebedev
(Co-Arbitrator)
Dissenting with regard to Section H.I. of the Award

Prof. Karl-Heinz Böckstiegel
(Chairman of Tribunal)
14.12.2013